



# *Business Market Availability and Disparity Study*

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# CALIFORNIA High-Speed Rail Authority

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**T**he California High-Speed Rail Authority (Authority) is responsible for planning, designing, building and operating the first high-speed rail system in the nation. California's high-speed rail system will connect the mega-regions of the state, contribute to economic development and a cleaner environment, create jobs and preserve agricultural and protected lands. By 2029, the system will run from San Francisco to the Los Angeles basin in under three hours at speeds capable of over 200 miles per hour. The system will eventually extend to Sacramento and San Diego, totaling 800 miles with up to 24 stations. In addition, the Authority is working with state and regional partners to implement a statewide rail modernization program that will invest billions of dollars in urban, commuter, and intercity rail systems to meet the state's 21st century transportation needs.



# *Business Market Availability and Disparity Study*

In response to the Federal Railroad Administration's directive for the California High-Speed Rail Authority (Authority) to conduct an Availability and Disparity Study, the Authority contracted with Mason Tillman & Associates to complete the 2014 Business Market Availability and Disparity Study (Study). The time period of the Study included contracts and subcontracts awarded from July 1, 2006 to June 30, 2013. While the majority of the Study reflects a time period during which the Authority had neither a Small Business Program nor a Small Business participation goal, the Authority has since established a Small Business Program, implemented improvements and undertaken several proactive steps to increase Small Business participation in its contracting activities.

Since taking the steps and implementing the improvements described below, the Authority has awarded 13 professional services contracts and 1 design-build construction contract totaling more than \$1.1 billion—all of which have committed to meet or exceed the Authority's established 30 percent goal. These commitments, as depicted in the chart and table following this Preface, total approximately \$350 million and represent the Authority's continued commitment to enhance high-speed rail contracting opportunities pursuant to the Authority's Small Business Program and Small Business goals.

In 2011, the Authority undertook several preliminary steps to increase Small Business participation in its contracting opportunities. These steps included the following:

- Developed a ListServer to communicate the Board of Directors (Board) meeting agenda, the Board schedule and press releases to the general public and businesses interested in the high-speed rail project.
- Developed, maintained and posted a database of Small Businesses (SB), Disadvantaged Business Enterprises (DBE) and Disabled Veteran Business Enterprises (DVBE) interested in high-speed rail contract opportunities.
- Hosted pre-proposal conferences and industry forums and solicited Expressions of Interest.
- Hosted Public Participation Sessions to obtain comments on the draft SB/DBE Program.
- Enhanced the existing Small Business Policy to ensure DBEs and DVBEs were clearly identified in the policy statement.
- Published a 30 percent Small Business Goal on the first design-build Request for Qualifications solicitation.

In 2012, the Authority continued to improve outreach and expand efforts to increase Small Business participation. Most notably, on August 20, 2012, the Authority Board unanimously adopted the Small and Disadvantaged Business Enterprise Program, which established an overall 30 percent Small Business (SB) participation goal, representative of firms that reflect the diversity of California. This goal includes a 10 percent Disadvantaged Business Enterprise (DBE) goal and a 3 percent Disabled Veteran Business Enterprise (DVBE) goal on federally assisted contracts. Concurrently, Chief Executive Officer Jeff Morales approved Policy Directive #POLI-SB-01 on behalf of the Authority to ensure that Small Businesses,

as defined by Government Code 14837, Military and Veteran Code 999 and 49 Code of Federal Regulation Part 26, are afforded every practicable opportunity to participate in the Authority's contracting program.

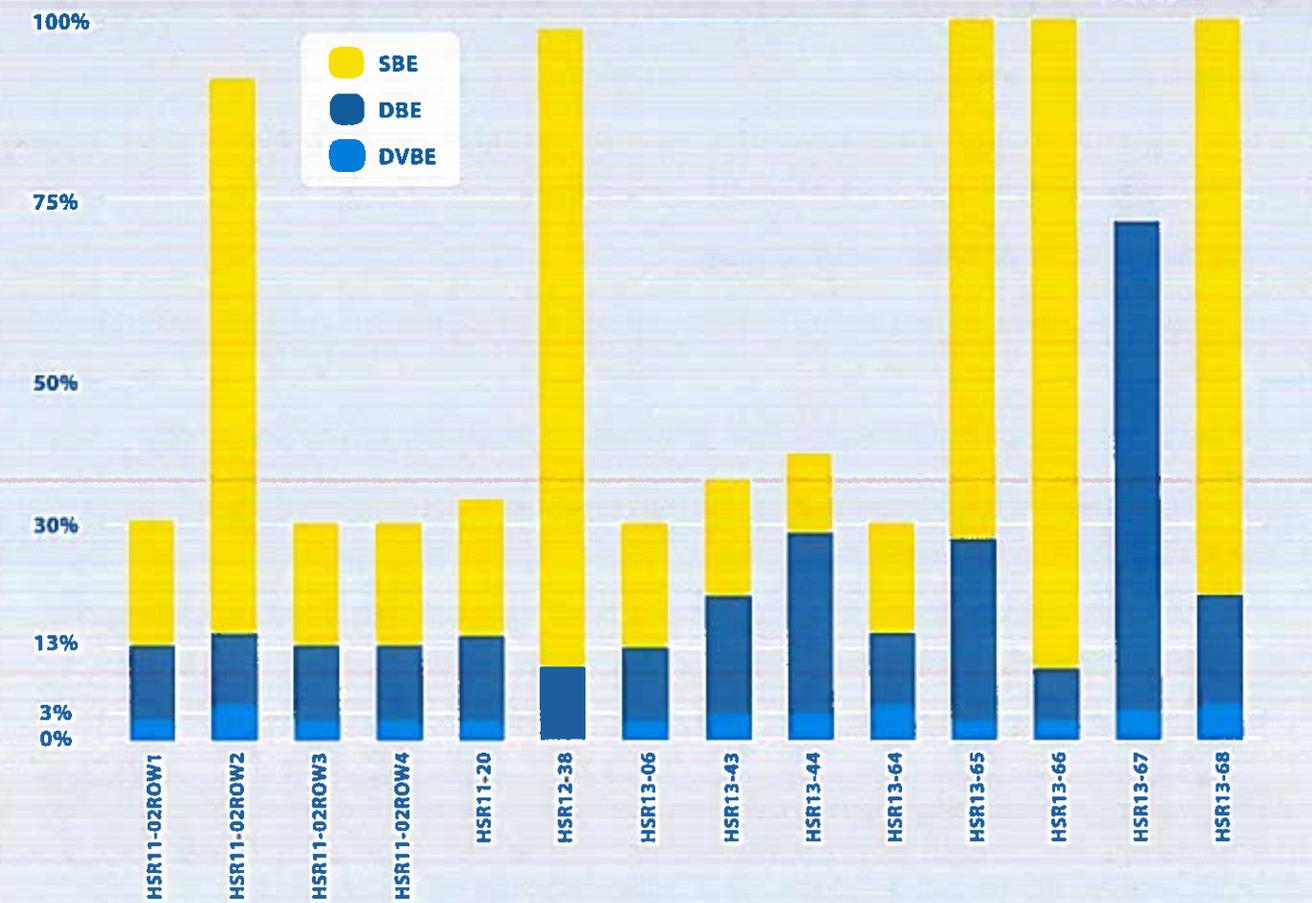
Additionally, the Authority undertook the following tasks in 2012 to increase SB/DBE/DVBE participation:

- Appointed a SB/DBE/DVBE Advocate/Ombudsperson to encourage joint ventures, assist Small Businesses in securing contracts, enhance networking opportunities and address Small Business concerns related to the Authority's contracts.
- Hosted Community Public Participation Meetings that included Small Business information.
- Attended, hosted and or co-sponsored numerous Small Business Outreach events. These events included an Associated Professionals and Contractors (APAC) meeting, Pre-proposal outreach conferences and a "Meet the Primes" event.
- Maintained a ListServer of firms interested in the high-speed rail project to which the Authority disseminated solicitation notices and pre-proposal conference invitations from the Authority and the five (5) Shortlisted design-build teams for Construction Package 1 (CP 1).
- Established the Business Advisory Council (BAC) composed of 25 organizations representing minority, women and non-minority trade and professional services members. Information about the BAC was posted to the Authority's website.
- Posted Post-Award Contract Compliance SB Utilization Reports and the Uniform Report of DBE Awards and Commitments to the Authority's website.
- Established and implemented the Pre-Award SB/DBE/DVBE Responsiveness Determination Procedures.
- Adopted a Title VI Program Policy and Plan, a Limited English Proficiency Policy and Plan and guidance for Environmental Justice to ensure the public is treated with respect without concern for race, gender, color, national origin, language barriers, minority populations or low-income status.
- Established procedures to host debriefing conferences, upon request, with unsuccessful proposers/bidders.
- Incorporated the significance of the Small Business Program Plan into the Authority's 2012 Business Plan.
- Established a Community Benefits Agreement Policy to enhance Small Business employee retention and assist in removing other business capability barriers.

Over the past year and a half, the Authority continued to enhance opportunities for Small Business participation and took additional steps to accomplish this goal. These steps included:

- Posting bid results on its website.
- Hosting 12 no-cost certification workshops that included strategic partners, who assisted SB/DBE/DVBEs with bidding, writing statements as well as obtaining surety bonds and insurance.
- Publishing a quarterly Small Business Newsletter.
- Fostering Small Business participation by unbundling the Right-of-Way Services contract into four (4) feasible contract opportunities.
- Establishing a 30 percent Disadvantaged Worker goal on the high-speed rail construction project.
- Hosting a Small Business Program Kick-off meetings with new Professional Services Consultants and the CP1 design-build Contractor.
- Entering into eight (8) Strategic Partnerships with Small Business resource partners that provide technical assistance and business development services to SB/DBE/DVBEs.
- Establishing a Small Business utilization and recordkeeping mechanism to collect Small Business commitment, utilization and payments through monthly reports that identify contract awards and progress in attaining their respective Small Business goal commitments (Form 103).
- Implementing 10 of the Business Advisory Council recommendations to enhance Small Business participation.
- Establishing a Contract Compliance Division to oversee post-award, Small Business utilization, monitor Prompt Payment and Small Business Performance Plan implementation, and improve Small Business Program Accountability Standards.
- Performing periodic on-site monitoring and contract monitoring to ensure work committed to Small Businesses is actually being performed by the listed Small Businesses.
- Obtaining copies of executed Small Business subcontractor's contracts and/or SBE Purchase Orders (PO) to ensure work commitments are actualized.
- Fostering Small Business participation by unbundling the Right-of-Way Engineering and Surveying Services contract into five (5) feasible contract opportunities.

**SB/DBE/DVBE COMMITMENTS ON CONTRACTS AWARDED SINCE AUGUST 2012**



Prepared 5/30/2014

Contract*	Company	Scope	Contract Amount
HSR11-02ROW1	Bender Rosenthal, Inc.	Right of Way Services	\$8,500,000
HSR11-02ROW2	Continental Acquisition Services, Inc.	Right of Way Services	\$8,500,000
HSR11-02ROW3	Universal Field Services, Inc.	Right of Way Services	\$8,500,000
HSR11-02ROW4	Beacon Integrated Professional Resources, Inc.	Right of Way Services	\$8,500,000
HSR11-20	Wong + Harris, JV	Project and Construction Management – CP1	\$34,208,888.87
HSR12-38	Mason Tillman Associates, LTD	Business Market Availability and Disparity Study	\$223,763.59
HSR13-06	Tutor Perini/Zachry/Parsons, JV	Construction Package 1	\$969,988,000
HSR13-43	CH2M Hill, Inc.	Regional Consultant: Los Angeles to San Diego	\$2,000,000
HSR13-44	TY Lin International	Regional Consultant: Bakersfield to Palmdale	\$46,100,000
HSR13-64	Mark Thomas & Company	ROW Engineering & Surveying	\$3,200,000
HSR13-65	Hernandez, Kroone & Associates	ROW Engineering & Surveying	\$3,200,000
HSR13-66	Quad Knopf, Inc.	ROW Engineering & Surveying	\$3,200,000
HSR13-67	Chaudhary & Associates, Inc.	ROW Engineering & Surveying	\$3,200,000
HSR13-68	O'Dell Engineering	ROW Engineering & Surveying	\$3,200,000

\*Chart and table refer to the thirteen (13) professional services contracts and one (1) design-build construction contract awarded since August 2012.



# California High-Speed Rail Authority

## **Business Market Availability and Disparity Study**

Final Report

MASON TILLMAN  
ASSOCIATES, LTD

May 2014

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# **Table of Contents**

<b>EXECUTIVE SUMMARY</b> .....	1
<b>I. STUDY OVERVIEW</b> .....	1
A. STUDY TEAM.....	1
B. STUDY PURPOSE.....	1
C. STUDY PERIOD AND INDUSTRIES .....	2
D. ETHNIC AND GENDER GROUPS STUDIED .....	2
E. PRIME CONTRACT DATA .....	3
F. SUBCONTRACTOR DATA .....	4
G. CONTRACT THRESHOLDS .....	4
<b>II. METHODOLOGY</b> .....	5
A. LEGAL FRAMEWORK.....	5
B. STRUCTURE OF THE REPORT .....	6
<b>III. NOTABLE FINDINGS</b> .....	7
A. UTILIZATION ANALYSIS.....	7
B. MARKET AREA ANALYSIS .....	10
C. AVAILABILITY ANALYSIS .....	11
D. CONTRACT SIZE ANALYSIS.....	12
<b>IV. ANALYSIS OF STATISTICALLY SIGNIFICANT UNDERUTILIZATION</b> .....	13
A. DISPARITY FINDINGS .....	14
<b>V. ANECDOTAL FINDINGS</b> .....	16
A. SUMMARY OF IN-DEPTH INTERVIEWS .....	16
<b>VI. RECOMMENDATIONS</b> .....	17
A. ADMINISTRATIVE STRATEGIES .....	17



B. SUPPORTIVE SERVICES STRATEGIES.....	17
C. PROCUREMENT STRATEGIES.....	18
D. SMALL AND DISADVANTAGED BUSINESS ENTERPRISE PROGRAM ADMINISTRATION .....	18
E. DBE AND SBE PROGRAM TRACKING AND MONITORING STRATEGIES.....	18
F. CONTRACTING STRATEGIES FOR DESIGN-BUILD PROJECTS.....	18
G. WEBSITE ENHANCEMENT STRATEGIES.....	19

## ***List of Tables***

TABLE 1: BUSINESS ETHNIC AND GENDER GROUPS .....	2
TABLE 2: PRIME CONTRACTOR UTILIZATION SUMMARY .....	8
TABLE 3: CERTIFIED BUSINESS PRIME CONTRACTOR UTILIZATION BY THRESHOLD .....	9
TABLE 4: PRIME CONTRACTOR UTILIZATION SUMMARY .....	9
TABLE 5: SUBCONTRACT UTILIZATION SUMMARY .....	9
TABLE 6: CERTIFIED BUSINESS SUBCONTRACTOR UTILIZATION BY THRESHOLD .....	10
TABLE 7: MARKET AREA ANALYSIS.....	11
TABLE 8: PRIME AND SUBCONTRACTOR CONTRACTOR AVAILABILITY ANALYSIS .....	11
TABLE 9: PRIME CONTRACTS SIZE ANALYSIS .....	12
TABLE 10: SUBCONTRACTS SIZE ANALYSIS .....	13
TABLE 11: PRIME CONTRACT DISPARITY SUMMARY .....	14
TABLE 12: SUBCONTRACT DISPARITY SUMMARY .....	15



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# ***EXECUTIVE SUMMARY***

## ***I. STUDY OVERVIEW***

### ***A. Study Team***

Mason Tillman Associates, Ltd., (Mason Tillman) a public policy consulting firm based in Oakland, California, performed the 2014 Business Market Availability and Disparity Study (Study) for the California High-Speed Rail Authority (Authority). Diversified Contract Management Group, Urban Strategic Solutions, Katherine Padilla & Associates, Inc., and Sullivan International, Inc. assisted Mason Tillman in the performance of the Study. The consultants performed data collection, surveying services and assisted in the planning and facilitation of the Public Participation Meetings.

Robert Padilla, Small Business Advocate and Kendall Darr, Esq, Legal Counsel managed the Study. Mr. Padilla facilitated Mason Tillman's access to the contract and procurement data needed to perform the Study.

### ***B. Study Purpose***

The purpose of the Disparity Study was to determine whether or not there was statistically significant underutilization in the award of the Authority's prime contracts and subcontracts to Disadvantaged Business Enterprises (DBEs) and businesses owned by minorities and women (M/WBEs) in the market area during the study period. The Study also analyzed the utilization of Disabled Veteran Business Enterprises (DVBES) and Small Businesses (SBEs), although underutilization of these businesses was not subject to a test of statistical significance. Under a fair and equitable system of awarding contracts, the proportion of contract dollars awarded to M/WBEs and DBEs, hereafter M/WBEs, should be relatively close to the corresponding proportion of available M/WBEs<sup>1</sup> in the relevant market area. If the available M/WBE prime contractors or subcontractors are underutilized, a statistical test is conducted to calculate the probability of observing the empirical disparity ratio or any event which is less probable.



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<sup>1</sup> Availability is defined as the number of ready, willing and able firms. The methodology for determining willing and able firms is detailed in Chapter 4.

### **C. Study Period and Industries**

Prime contracts and subcontracts awarded from July 1, 2006 to June 30, 2013 constituted the universe of contracts studied. Only professional services contracts, including architecture and engineering were awarded during this timeframe. Prime contracts the Authority awarded included construction management, landscape architecture, surveying, mapping, legal, accountants, technical, information technology, research, planning, and consultant services.

### **D. Ethnic and Gender Groups Studied**

Consistent with 49 CFR Section 26.5, the analysis of disparity was disaggregated into nine ethnic and gender groups. The nine groups are listed in Table 1.

**Table 1: Business Ethnic and Gender Groups**

<b>Ethnicity and Gender Category</b>	<b>Definition</b>
African American Businesses	Businesses owned by male and female African Americans
Asian-Pacific American Businesses	Businesses owned by male and female Asian-Pacific Americans
Subcontinent Asian American Businesses	Businesses owned by male and female Subcontinent Asian Americans
Hispanic American Businesses	Businesses owned by male and female Hispanic Americans
Native American Businesses	Businesses owned by male and female Native Americans
Minority-owned Business Enterprises	Businesses owned by African American, Asian-Pacific American, Subcontinent Asian American, Hispanic American, and Native American males and females
Minority and Women-owned Business Enterprises	Businesses owned by Minority Males, Minority Females, and Caucasian Females
Non-Minority Female-owned Business Enterprises	Businesses owned by Caucasian Females



Ethnicity and Gender Category	Definition
Non-Minority Male-owned Business Enterprises	Businesses owned by Caucasian Males, and businesses that could not be identified as Minority or Female-owned

**E. Prime Contract Data**

The data for the prime contractor utilization analysis includes contract awards and amendments compiled by the Authority’s Office of Contracts and Procurement, proposal budget amounts collected from bids and proposals on file with the Authority, and amendments provided by the Authority’s prime contractors. The Authority also provided limited information on amendments to the original awards. However, the majority of the contract amendment amounts were secured directly from the prime contractors.

Payment data provided by the Authority was not adequate for the analysis. The payment data the Authority compiled was limited to payments made in the 2012-2013 fiscal year on 16 prime contracts. Since the Authority could not provide payment data for the contracts awarded during the entire study period, the prime utilization analysis was based on the original award amounts and amendments to the original awards. Contracts the Authority provided included not-for-profits, government agencies, educational institutions, and utilities. These contracts were marked for exclusion and were not included in the analysis.

Each contract was classified by industry based mainly on the contract title and the contractor’s name. A few contracts did have a description of the services provided. The contract description information was also used to identify industry.

After the industry classifications of were assigned as either professional, architecture, or engineering services, the ethnicity and gender of each prime contractor were verified. The ethnicity and gender information the Authority maintained for prime contractors was incomplete. Since ethnicity and gender information is central to the validity of the prime contractor utilization analysis, Mason Tillman conducted research to reconstruct the ethnicity and gender for each prime contractor. The prime contractors’ names were cross-referenced with certification lists, chambers of commerce lists, and trade organization membership directories. The prime contractors’ websites were also reviewed for the business owners’ ethnicity and gender. Prime contractors whose ethnicity and gender could not be verified through published sources were surveyed. Once the ethnicity and gender research was completed and the contract records were cleaned, the utilization analysis was performed. For purposes of the analysis, businesses that were employee-owned or publicly traded were also classified as non-minority male. Therefore Non-Minority Male-owned Business Enterprises is inclusive of these additional forms of business ownership.



## **F. Subcontractor Data**

The Authority did not maintain comprehensive records of the subcontracts awarded by its prime contractors. Therefore, most of the award, payment, and demographic data on subcontracts awarded by the prime contractors had to be reconstructed. A number of steps were undertaken to compile the subcontract records. An initial research effort was made to retrieve hardcopy subcontract records from the Authority's archived files. Contract files and proposals housed in the Authority's file room were reviewed for documents containing subcontractor information. Bid documents, invoices, and close-out reports found in some of the stored files contained subcontractor names, award amounts, payment information, and contact data. The relevant documents were scanned and the information was entered into Mason Tillman's relational database.

The Authority anticipated that the contract files would contain complete records of all prime contractors and their subcontractors. However, the research effort undertaken in the Authority's contract files and proposals yielded only limited information. Since the stored files were not complete, additional research was undertaken.

The prime contractors were surveyed in an effort to reconstruct their subcontract records. Each of the Authority's prime contractors was contacted to request the subcontractors' name, contact information, initial awards and amendments, and total payment amounts. To verify subcontractor awards, payments, and participation on each prime contract, up to three attempts were made to contact prime contractors and subcontractors by telephone. Once contacted, the prime contractors and subcontractors had the option of verifying data by telephone, email, facsimile, or mail. If the subcontractor could not be contacted, the data collected from prime contractor or the Authority's project files were used in the utilization analysis. A total of 193 subcontractor records were compiled from the various sources and used in the subcontractor utilization analysis.

## **G. Contract Thresholds**

Professional Services prime contracts were analyzed at five dollar levels. One level included all contracts regardless of award amount. A second level included all contracts \$14,000,000 and under. The third level included all contracts \$3,500,000 and under. The latter two levels were designated because under California Government Code (GC) and the California Code of Regulations (CCR)<sup>2</sup>, the thresholds define a Small Business Enterprise and Microbusiness, respectively. The fourth and fifth levels, under \$250,000 and under \$50,000, are the informal thresholds defined in the California Department of General Services (DGS) procurement standards. DGS stipulates that contracts valued from \$5000.01 to \$249,999.99 can be awarded to a certified Small or Disabled Veteran-owned Business, provided that the department has received at least two responsive bids. As set forth in the California Public Contract Code (PCC), contracts under \$50,000 can

<sup>2</sup> GC § 14837 (d)(1)-(2), 2 CCR 1896 12(a)-(b) <http://www.dgs.ca.gov/pd/programs/osds/sheligibilitybenefits.aspx>. Last accessed March 17, 2014.



be awarded without a competitive bid process or advertising, regardless of business certification status.<sup>3</sup>

## **II. METHODOLOGY**

### **A. Legal Framework**

The *City of Richmond v. J.A. Croson Co.*<sup>4</sup> (*Croson*) and related case law provided the legal framework for conducting the Disparity Study. Specifically, two United States decisions, *Croson* and *Adarand v. Peña*<sup>5</sup> (*Adarand*), raised the standard by which federal courts review both local and federal government minority business enterprise and disadvantaged business enterprise contracting programs.

The City of Richmond, Virginia (City) adopted a Minority Business Utilization Plan (Plan) which required prime contractors awarded a City construction contract to meet a subcontract goal of at least 30 percent. The goal required 30 percent participation of minority businesses. The factual predicate for the plan included a statistical study demonstrating that 50 percent of the City's population was African American and the utilization of African Americans on the City's prime construction contracts was 0.67 percent. The plaintiff, J.A. Croson, Inc., was denied a waiver of the goal and challenged the City's Plan under 42 U.S.C. 1983, and argued that it was unconstitutional under the Fourteenth Amendment's Equal Protection Clause. The court announced the longstanding legal precedent that programs employing racial classification would be subject to "strict scrutiny," the highest legal standard. Government agencies such as the Authority, as set forth in *Croson*, may adopt race-conscious programs only as a remedy for identified statistical findings of discrimination and the remedy must impose a minimal burden upon unprotected classes. *Croson* ruled that an inference of discrimination can be made *prima facie* if the disparity is statistically significant. For this study, this analysis was applied to M/WBEs by ethnicity and gender within the one industry.

*Adarand*, which the United States Supreme Court decided in 1995, directly challenged the USDOT's Disadvantaged Business Enterprise (DBE) Program as set forth in statute and regulations. The Court found a compelling interest for the USDOT DBE Program but ruled, after applying the *Croson* "strict scrutiny" standard, that the DBE Program was not narrowly tailored. In response, the USDOT amended its regulations in 1999 to include goals which can be met by race-neutral and race-specific means.

<sup>1</sup> GC §§ 11256, 14616, 14838.5 (a)-(b), PCC 10335.5 (c)(6), 10340 (b)(6) [http://www.documents.dgs.ca.gov/pd/poliproc/v2Chapt04\\_10\\_0730.doc](http://www.documents.dgs.ca.gov/pd/poliproc/v2Chapt04_10_0730.doc). Last accessed March 17, 2014.

<sup>4</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)

<sup>5</sup> *Adarand Constructors, Inc. v. Federico Pena*, 115 S.Ct. 2097 (1995).



Following *Adarand*, there were several circuit court cases which challenged the constitutionality of the USDOT DBE regulations.<sup>6</sup> Until the 2005 Ninth Circuit Court of Appeals decision in *Western States Paving Co. v. State of Washington Dept. of Transportation*<sup>7</sup> (*Western States*), the challenges had been unsuccessful. However, *Western States* found that the State of Washington's DBE Program was facially constitutional, but determined the State's application of the regulations was invalid because it was not narrowly tailored to a finding of statistically significant underutilization of the respective minority groups.

The following critical components were performed for the Authority's Disparity Study.

**Disparity Study:  
Critical Components**

1. Legal Framework
2. Utilization Analysis
3. Market Area Analysis
4. Availability Analysis
5. Disparity Analysis
6. Anecdotal Analysis
7. Recommendations

A legal review (Regulatory Framework Analysis) was the **first step** in the disparity study. Case law sets the standard for the methodology employed in a disparity study. **Step two** was to collect utilization records and determine the extent to which Authority used M/WBEs to secure its needed professional services. Utilization records were also used to determine the geographical area in which companies that received the Authority's prime contracts were located. In **step three**, the Authority's market area was identified. Once the market area was defined, the **fourth step**, the availability analysis, identified businesses willing and able to provide professional services needed by the Authority. In the **fifth step**, a disparity analysis was performed to determine whether there was a statistically significant

underutilization of M/WBEs. In **step six**, the anecdotal analysis, the Authority-specific experiences of business owners in the State of California were collected. In **step seven**, the statistical and anecdotal analyses were reviewed and recommendations were written to enhance the Authority's efforts in contracting with M/WBEs in the State.

**B. Structure of the Report**

The Disparity Study findings are presented in ten chapters. The contents of each chapter are briefly described below

:  
**Overview of the Disparity Study Report**

<sup>6</sup> *Sherbrooke Turf Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 969-73 (8<sup>th</sup> Cir 2003), *Gross Seed Co. v. Nebraska Department of Roads*, 345 F.3d 964 (8<sup>th</sup> Cir 2003), *Western States Paving Co. v. State of Washington Dept. of Transportation*, 407 F. 3d 983 (9th Cir 2005), *Northern Contracting Inc v. Illinois Department of Transportation*, 473 F.3d 715 (2007).

<sup>7</sup> *Western States*, 407 F. 3d 983 (9th Cir 2005)



- *Chapter 1: Regulatory Framework Analysis* presents the case law applicable to business affirmative action programs and the methodology based on those cases required for the Study
- *Chapter 2: Prime Contractor Utilization Analysis* presents the distribution of prime contracts by ethnicity, and gender
- *Chapter 3: Subcontractor Utilization Analysis* presents the distribution of subcontracts by ethnicity, and gender
- *Chapter 4: Market Area Analysis* presents the legal basis for geographical market area determination and defines Authority's market area
- *Chapter 5: Prime Contractor and Subcontractor Availability Analysis* presents the distribution of available businesses in the Authority's market area
- *Chapter 6: Anecdotal Analysis* presents the business owner's experiences of barriers and exemplary practices encountered in contracting or attempting to contract with Authority
- *Chapter 7: Prime Contractor Disparity Analysis* presents prime contractor utilization as compared to prime contractor availability by ethnicity and gender, and evaluates the statistical significance of any underutilization
- *Chapter 8: Subcontractor Disparity Analysis* presents subcontractor utilization as compared to subcontractor availability by ethnicity and gender, and evaluates the statistical significance of any underutilization
- *Chapter 10: Recommendations* presents race and gender-neutral remedies to enhance the Authority's Small and Disadvantaged Business Enterprise Program and its contracting with M/WBEs, DVBES and SBEs.

*Appendix A: Business Market Availability and Capacity Analysis*

### **III. NOTABLE FINDINGS**

#### **A. Utilization Analysis**

The objective of the utilization analyses is to determine the level of M/WBE utilization as prime and subcontractors. This Study documents the Authority's utilization of M/WBE, DVBE and SBE prime and subcontractors by ethnicity and gender for the study period July 1, 2006 to June 30, 2013.

##### **1. Prime Contractor Utilization Analysis**



The Authority issued 74 contracts during the study period. The contract awards during the study period totaled \$1,020,574,634. Table 2 below summarizes the prime contractor utilization analysis by the percent of prime contract dollars awarded to each ethnic and gender group.

**Table 2: Prime Contractor Utilization Summary**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
<b>All Prime Contracts</b>				
African American	0	0.00%	\$0	0.00%
Asian-Pacific Americans	0	0.00%	\$0	0.00%
Subcontinent Asian Americans	0	0.00%	\$0	0.00%
Hispanic Americans	2	2.70%	\$110,000	0.01%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	5	6.76%	\$25,510,230	2.50%
Non-Minority Males	67	90.54%	\$994,954,404	97.49%
<b>Prime Contracts Under \$14,000,000</b>				
African American	0	0.00%	\$0	0.00%
Asian-Pacific Americans	0	0.00%	\$0	0.00%
Subcontinent Asian Americans	0	0.00%	\$0	0.00%
Hispanic Americans	2	3.17%	\$110,000	0.13%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	5	7.94%	\$25,510,230	29.70%
Non-Minority Males	56	88.89%	\$60,266,211	70.17%
<b>Prime Contracts Under \$3,500,000</b>				
African American	0	0.00%	\$0	0.00%
Asian-Pacific Americans	0	0.00%	\$0	0.00%
Subcontinent Asian Americans	0	0.00%	\$0	0.00%
Hispanic Americans	2	3.70%	\$110,000	0.55%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	2	3.70%	\$10,230	0.05%
Non-Minority Males	50	92.59%	\$20,016,211	99.40%
<b>Prime Contracts Under \$250,000</b>				
African American	0	0.00%	\$0	0.00%
Asian-Pacific Americans	0	0.00%	\$0	0.00%
Subcontinent Asian Americans	0	0.00%	\$0	0.00%
Hispanic Americans	2	4.76%	\$110,000	2.33%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	2	4.76%	\$10,230	0.22%
Non-Minority Males	38	90.48%	\$4,607,670	97.46%
<b>Prime Contracts Under \$50,000</b>				
African American	0	0.00%	\$0	0.00%
Asian-Pacific Americans	0	0.00%	\$0	0.00%



Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Subcontinent Asian Americans	0	0.00%	\$0	0.00%
Hispanic Americans	1	5.56%	\$10,000	1.99%
Native Americans	0	0.00%	\$0	0.00%
Caucasian Females	2	11.11%	\$10,230	2.03%
Non-Minority Males	15	83.33%	\$483,105	95.98%

**Table 3: Certified Business Prime Contractor Utilization by Threshold**

The Authority's Small and Disadvantaged Business Enterprise Program established in August 2012<sup>8</sup> set an overall 30 percent SBE participation goal, which includes a 10 percent goal for DBEs and a 3 percent goal for DVBEs. No contracting goal was in place before the enactment of the Small and Disadvantaged Business Enterprise Program in August 2012. Table 4 details the Authority's use of SB/MBE/WBE/DBE/DVBE prime contractors as certified by CUCP and DGS.

**Table 4: Prime Contractor Utilization Summary**

Prime Contract Threshold	Number of Contracts Awarded to Certified Firms	Total Dollars Awarded to Certified Firms	Percent of Total Dollars Awarded	Number of Contracts Awarded to Non-Certified Firms	Total Dollars Awarded to Non-Certified Firms	Percent of Total Dollars Awarded
\$1 - \$49,999	2	\$33,400	0.003%	16	\$469,935	0.046%
\$50,000 - \$249,999	14	\$3,188,365	0.312%	10	\$1,036,200	0.102%
\$250,000 - \$3,499,999	1	\$406,041	0.040%	11	\$15,002,500	1.470%
\$3,500,000 - \$14,000,000	2	\$17,000,000	1.666%	7	\$48,750,000	4.777%
Greater than \$14,000,000	0	\$0	0.000%	11	\$934,688,193	91.585%
<b>Total</b>	<b>19</b>	<b>\$20,627,806</b>	<b>2.021%</b>	<b>55</b>	<b>\$999,946,828</b>	<b>97.979%</b>

## 2. Subcontractor Utilization Analysis

A total of 193 subcontracts were analyzed, which totaled \$125,631,181.97 dollars expended during the study period. Table 5 summarizes the subcontractor utilization by the percent of subcontract dollars expended with each ethnic and gender group.

**Table 5: Subcontract Utilization Summary**



<sup>8</sup> California High-Speed Rail Authority Revised Small and Disadvantaged Business Enterprise Program [http://www.hsr.ca.gov/docs/programs/small\\_business/Small%20and%20Disadvantaged%20Business%20Enterprise%20Program.pdf](http://www.hsr.ca.gov/docs/programs/small_business/Small%20and%20Disadvantaged%20Business%20Enterprise%20Program.pdf) [Last accessed March 17, 2014]

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
<b>All Subcontracts</b>				
African American	3	1.55%	\$ 693,321.80	0.55%
Asian-Pacific Americans	9	4.66%	\$ 2,046,754.13	1.63%
Subcontinent Asian Americans	6	3.11%	\$ 1,551,690.22	1.24%
Hispanic Americans	7	3.63%	\$ 2,717,111.89	2.16%
Native Americans	0	0.00%	\$ -	0.00%
Caucasian Females	20	10.36%	\$ 12,332,525.29	9.82%
Non-Minority Males	148	76.68%	\$106,289,778.64	84.60%
<b>Subcontracts Awarded from July 1, 2012 to June 30, 2013</b>				
African American	1	10.00%	\$ 7,936.88	3.92%
Asian-Pacific Americans	0	0.00%	\$ -	0.00%
Subcontinent Asian Americans	0	0.00%	\$ -	0.00%
Hispanic Americans	0	0.00%	\$ -	0.00%
Native Americans	0	0.00%	\$ -	0.00%
Caucasian Females	0	0.00%	\$ -	0.00%
Non-Minority Males	9	90.00%	\$ 94,711.68	96.08%

Table 6 details the Authority's prime contractors' use of SB/MBE/WBE/DBE/DVBE subcontractors certified by CUCP and DGS.

**Table 6: Certified Business Subcontractor Utilization by Threshold**

Subcontract Threshold	Number of Subcontracts Awarded to SBEs	Total Dollars Expended with SBEs	Percentage of Total Award Dollars	Number of Subcontracts Awarded to Non-SBEs	Total Dollars Expended with Non-SBEs	Percentage of Total Award Dollars
\$1 – \$49,999	14	\$362,280	0.29%	61	\$832,869	0.66%
\$50,000 – \$249,999	14	\$1,736,388	1.38%	41	\$4,665,461	3.71%
\$250,000 - \$3,499,999	21	\$18,677,431	14.87%	33	\$28,203,411	22.45%
\$3,500,000 - \$13,999,999	3	\$18,722,686	14.90%	5	\$32,490,179	25.86%
\$14,000,000 and More	1	\$19,940,477	15.87%	0	\$0	0.00%
<b>Total</b>	<b>53</b>	<b>\$59,439,261</b>	<b>47.31%</b>	<b>140</b>	<b>\$66,191,921</b>	<b>52.69%</b>

## **B. Market Area Analysis**

*Croson* was explicit in saying that the local construction market was the appropriate geographical framework within which to perform statistical comparisons of business availability and business utilization.<sup>9</sup> The identification of the local market area is particularly important because it is the geographic area within which the available businesses are enumerated. Although *Croson* and its progeny do not provide a bright line

<sup>9</sup> *Croson*, 488 U.S. at 497 (1989)



rule for the delineation of the local market area, taken collectively, the case law supports a definition of market area as within the geographic area where the jurisdiction spends a majority of its dollars.

During the study period the Authority awarded 74 professional services prime contracts valued at \$1,020,574,634. The Authority awarded 85.14 percent of these contracts and 98.24 percent of dollars to businesses located in the State of California. Given the distribution of the awarded contracts and the applicable case law, the State of California was defined as the market area. The analysis of contracts has been limited to an examination of contracts awarded to available market area businesses in California. Table 7 summarizes the market area analysis.

**Table 7: Market Area Analysis**

Market Area	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
<b>Professional Services (Including Architecture and Engineering)</b>				
Market Area	\$1,002,609,084	63	98.24%	85.14%
Outside Market Area	\$17,965,550	11	1.76%	14.86%
<b>Total</b>	<b>\$1,020,574,634</b>	<b>74</b>	<b>100.00%</b>	<b>100.00%</b>

### **C. Availability Analysis**

When considering sources for determining the number of willing and able M/WBEs and non-M/WBEs in the market area, the selection must be based on whether two aspects about the population in question can be gauged from the sources. One consideration is a business' interest in doing business with the jurisdiction, as implied by the term "willing," and the other is its ability or capacity to provide a service or good, as implied by the term "able." A list of available professional service M/WBEs and non-M/WBEs was compiled. The distribution of the available businesses is presented in Table 8.

**Table 8: Prime and Subcontractor Contractor Availability Analysis**

Ethnicity	Prime Contractors	Subcontractors
African American	7.13%	7.02%
Asian-Pacific Americans	9.96%	9.83%
Subcontinent Asian Americans	2.38%	2.39%
Hispanic Americans	8.04%	7.94%
Native Americans	0.67%	0.66%
Caucasian Females	16.26%	16.16%
Non-Minority Males	55.57%	56.01%



## D. Contract Size Analysis

For the size analysis, the Authority's prime contracts and subcontracts were grouped into 12 dollar ranges.<sup>10</sup> Each industry was analyzed to determine the number and percent of contracts within each of the nine size categories. The size distribution of contracts awarded to Non-M/WBEs was then compared to the size distribution of contracts awarded to Non-Minority Females, Minority Females, and Minority Males.

Table 9 which presents the size distribution of prime contracts awarded within the 12 dollar ranges, illustrates that 13.51 percent of the Authority's prime contracts were less than \$25,000; 24.32 percent were less than \$50,000; 28.38 percent were less than \$100,000; 56.76 percent were less than \$250,000; 58.11 percent were less than \$500,000; 62.16 percent were less than \$575,000; 62.16 percent were less than \$650,000; 64.86 percent were less than \$1,000,000; 72.97 percent were less than \$3,500,000; 85.14 percent were less than \$14,000,000; 87.84 percent were less than \$38,000,000 and 12.16 percent of the Authority's prime contracts were \$38,000,000 or more.

**Table 9: Prime Contracts Size Analysis**

Size	Non-Minority				Minority				Total	
	Females		Males		Females		Males		Freq	Percent
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent		
\$1 - \$25,000	2	2.70%	7	9.46%	1	1.35%	0		10	13.51%
\$25,001 - \$49,999	0	0.00%	8	10.81%	0	0.00%	0		8	10.81%
\$50,000 - \$99,999	0	0.00%	3	4.05%	0	0.00%	0		3	4.05%
\$100,000 - \$249,999	0	0.00%	20	27.03%	1	1.35%	0		21	28.38%
\$250,000 - \$499,999	0	0.00%	1	1.35%	0	0.00%	0		1	1.35%
\$500,000 - \$574,999	0	0.00%	3	4.05%	0	0.00%	0		3	4.05%
\$575,000 - \$649,999	0	0.00%	0	0.00%	0	0.00%	0		0	0.00%
\$650,000 - \$999,999	0	0.00%	2	2.70%	0	0.00%	0		2	2.70%
\$1,000,000 - \$3,499,999	0	0.00%	6	8.11%	0	0.00%	0		6	8.11%
\$3,500,000 - \$13,999,999	3	4.05%	6	8.11%	0	0.00%	0		9	12.16%
\$14,000,000 - \$37,999,999	0	0.00%	2	2.70%	0	0.00%	0		2	2.70%
\$38,000,000 and More	0	0.00%	9	12.16%	0	0.00%	0		9	12.16%
<b>Total</b>	<b>5</b>	<b>6.76%</b>	<b>67</b>	<b>90.54%</b>	<b>2</b>	<b>2.70%</b>	<b>0</b>	<b>0.00%</b>	<b>74</b>	<b>100.00%</b>

Table 10 which presents the size distribution for subcontracts awarded within the 12 dollar ranges illustrates that 28.5 percent of the Authority's contracts were less than \$25,000; 38.86 percent were less than \$50,000; 55.44 percent were less than \$100,000; 67.36 percent were less than \$250,000; 80.31 percent were less than \$500,000; 82.38 percent were less than \$575,000; 83.94 percent were less than \$650,000; 87.56 percent were less than \$1,000,000; 95.34 percent were less than \$3,500,000; 99.48 percent were less than \$14,000,000; 0.52 percent of the Authority's contracts were \$14,000,000 or more.

<sup>10</sup> The nine dollar ranges are \$1 to \$25,000, \$25,001 to \$50,000, \$50,001 to \$100,000, \$100,001 to \$250,000, \$250,001 to \$500,000, \$500,001 to \$750,000, \$750,001 to \$1,000,000, \$1,000,001 to \$3,000,000, and \$3,000,001 and greater.



**Table 10: Subcontracts Size Analysis**

Size	Non-Minority				Minority				Total	
	Females		Males		Females		Males		Freq	Percent
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent		
\$1 - \$25,000	3	1.55%	46	23.83%	4	2.07%	2	1.04%	55	28.50%
\$25,001 - \$49,999	1	0.52%	15	7.77%	1	0.52%	3	1.55%	20	10.36%
\$50,000 - \$99,999	2	1.04%	27	13.99%	0	0.00%	3	1.55%	32	16.58%
\$100,000 - \$249,999	6	3.11%	15	7.77%	0	0.00%	2	1.04%	23	11.92%
\$250,000 - \$499,999	4	2.07%	15	7.77%	2	1.04%	4	2.07%	25	12.95%
\$500,000 - \$574,999	0	0.00%	4	2.07%	0	0.00%	0	0.00%	4	2.07%
\$575,000 - \$649,999	0	0.00%	2	1.04%	0	0.00%	1	0.52%	3	1.55%
\$650,000 - \$999,999	1	0.52%	4	2.07%	0	0.00%	2	1.04%	7	3.63%
\$1,000,000 - \$3,499,999	2	1.04%	12	6.22%	1	0.52%	0	0.00%	15	7.77%
\$3,500,000 - \$13,999,999	1	0.52%	7	3.63%	0	0.00%	0	0.00%	8	4.15%
\$14,000,000 - \$37,999,999	0	0.00%	1	0.52%	0	0.00%	0	0.00%	1	0.52%
\$38,000,000 and More	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
Total	20	10.36%	148	76.68%	8	4.15%	17	8.81%	193	100.00%

#### **IV. ANALYSIS OF STATISTICALLY SIGNIFICANT UNDERUTILIZATION**

The objective of the disparity analysis is to determine the levels which M/WBEs and non-M/WBEs were utilized on the Authority’s prime contracts and subcontracts. Under a fair and equitable system of awarding contracts, the proportion of contract dollars awarded to M/WBEs should be relatively close to the corresponding proportion of available M/WBEs<sup>11</sup> in the relevant market area. If the ratio of utilized M/WBE prime contractors to available M/WBE prime contractors is less than one, a statistical test is conducted to calculate the probability of observing the empirical disparity ratio or any event which is less probable. *Crosby* states that an inference of discrimination can be made *prima facie* if the disparity is statistically significant. Under the *Crosby* model, Non-M/WBEs are not subjected to a statistical test; therefore, underutilization is not analyzed for small and disabled veteran-owned businesses that are owned by Non-Minority Males.

A disparity analysis was performed on all prime contracts and subcontracts awarded from July 1, 2006 to June 30, 2013. Disparity was found at both the prime contract and subcontract levels for several ethnic and gender groups at both dollar thresholds.



<sup>11</sup> Availability is defined as the number of ready, willing, and able firms. The methodology for determining willing and able firms is detailed in Chapter 5.

## **A. Disparity Findings**

### **1. Prime Contracts**

As indicated in Table 11, underutilization was found for all ethnic groups on prime contracts under \$14,000,000. Statistically significant underutilization was found for African Americans, Asian-Pacific Americans, Hispanic Americans, MBEs and M/WBEs. On prime contracts under \$250,000 underutilization was found for all ethnic and gender groups. Statistically significant underutilization was found for African Americans, Asian-Pacific Americans, Hispanic Americans, MBEs and M/WBEs.

**Table 11: Prime Contract Disparity Summary  
July 1, 2006 to June 30, 2013**

Ethnicity/Gender	Professional Services	
	Contracts under \$14,000,000	Contracts under \$250,000
African Americans	Statistically Significant Underutilization	Underutilization
Asian-Pacific Americans	Statistically Significant Underutilization	Statistically Significant Underutilization
Subcontinent Asian Americans	Underutilization	Underutilization
Hispanic Americans	Statistically Significant Underutilization	Underutilization
Native Americans	--	--
Minority-owned Business Enterprises	Statistically Significant Underutilization	Statistically Significant Underutilization
Non-Minority Female-owned Business Enterprises	Overutilization	Statistically Significant Underutilization
Minority and Women-owned Business Enterprises	Statistically Significant Underutilization	Statistically Significant Underutilization



## 2. Subcontracts

As indicated in Table 12, underutilization was found for all ethnic and gender groups on subcontracts. Disparity was found for African Americans, Asian-Pacific Americans, Hispanic Americans, MBEs and M/WBEs.

**Table 12: Subcontract Disparity Summary  
July 1, 2006 to June 30, 2013**

Ethnic/Gender Group	All Subcontracts
African Americans	Statistically Significant Underutilization
Asian-Pacific Americans	Statistically Significant Underutilization
Subcontinent Asian Americans	Underutilization
Hispanic Americans	Statistically Significant Underutilization
Native Americans	—
Minority-owned Business Enterprises	Statistically Significant Underutilization
Non-Minority Female-owned Business Enterprises	Underutilization
Minority and Women-owned Business Enterprises	Statistically Significant Underutilization



## **V. ANECDOTAL FINDINGS**

In addition to requiring a statistical analysis, the United States Supreme Court in *Croson* stated that anecdotal findings, “if supported by appropriate statistical proofs, lend support to a [local entity’s] determination that broader remedial relief [is] justified.” *Croson* authorizes anecdotal inquiries along two lines. The first approach examines barriers attributed to the local entity. Such action is defined as the active participation of the government entity. The second approach examines whether the local entity was essentially a passive participant of exclusion practiced by its prime contractors.

### **A. Summary of In-Depth Interviews**

Public Participation Meetings were held in Oakland, Los Angeles and Fresno, California to collect oral anecdotal testimony from business owners. Business owners were also permitted to submit written comments following each meeting. The Authority only extended an invitation to contractors utilized by the Authority, members of the Business Advisory Council, the State ethnic chambers of commerce. The anecdotal testimony garnered for this Study was therefore too limited and insufficient to draw any inferences about active or passive barriers to contracting with the Authority or in its market area. The anecdotal data collection was required to take place in a public meeting and testimony was restricted to representatives of businesses which had either received or bid on an Authority’s contract significantly limited both the number and quality of the accounts received. Given the constraints imposed on the anecdotal research methodology, no meaningful inferences can be made from the data compiled about market area businesses’ perceptions of contracting with the Authority.. However, excerpts from the few comments received are presented below:

*“Create a scope of work that is appropriate to small and medium-sized companies along with the appropriate financial requirements to deliver on the proposed scope of work.”*

*“Most of the design work for this project has been made available to the very rich and powerful, and the very poor need not apply.”*

*“I know DBE firms [that] have been proposed on contracts but not utilized—with no oversight by the [Authority] to make sure that the prime utilizes the DBE firm that was proposed—especially when the DBE firm’s qualifications were used to the win the contract.”*

*“Borrow some of the practices [from Caltrans]. Promote adding firms after an award, allowing the prime to continue to count towards accomplishing the goals. Locking the goal in one time is awful.”*

*“Please reinforce the DBE and SBE participation [goals].”*



*"I think that developing the oversight through the SB Office, as well as developing goals, has been a huge asset in SB and DBE participation within the [Authority]."*

## **VI. RECOMMENDATIONS**

Although there are findings of statistically significant underutilization of M/WBEs, the Authority cannot implement race-based remedies because Section 31 of the State constitution bars the use of race and gender preferences, except as a condition of federal funding. The Authority is a recipient of United States Department of Transportation (USDOT) funding from the Federal Railroad Administration (FRA). However, the FRA funding is not subject to the goal setting requirements of USDOT DBE regulations 49 CFR Part 26, Subpart C. Consequently, the recommendations are limited to race and gender-neutral remedies that address the administration of the procurement process and the tracking, reporting, and publication of contract opportunities and awards.

Race and gender-neutral recommendations are offered to increase M/WBE, DVBE, SBE and DBE access to the Authority's prime and subcontracts and to track, monitor, report, and verify DBE and SBE prime contractor and subcontractor utilization. The recommended strategies address professional service and design-build contracts. These race and gender-neutral recommendations apply to all ethnic and gender groups. The recommendations are derived from an analysis of the Authority's Small and Disadvantaged Enterprise Program, a review of the Authority's web page, Public Participation Meeting testimonials, and government and corporate best management practices.

### **A. Administrative Strategies**

- Issue Prompt Payment to DBE and SBE Prime Contractors
- Give Five-day Notice of Invoice Disputes
- Institute Payment Verification Program
- Require Fulfillment of DBE and SBE Goals at Bid Opening
- Assess Penalties for Not Achieving the DBE and SBE Contract Goals
- Improve SBE Program Accountability Standards
- Add a Cone of Silence Provision

### **B. Supportive Services Strategies**

- Encourage Joint Ventures
- Assist DBEs and SBEs in Securing Contracting Opportunities
- Enhance Networking Opportunities
- Create a Listserv to Communicate with Interested DBEs and SBEs
- Post Contract Award Notices
- Post Contract Solicitations
- Publish a Newsletter Regularly



- Publish Pre-Proposal Meeting Announcements Timely
- Offer Additional Workshops

**C. Procurement Strategies**

- Revise Insurance Requirements
- Phase-out Retainage Requirements
- Provide Adequate Lead Time When Advertising Solicitations
- Publish Business Processes
- Implement Formal Dispute Resolution Standards
- Provide Debriefing Sessions for Unsuccessful Bidders
- Provide Evaluation Documents

**D. Small and Disadvantaged Business Enterprise Program Administration**

- Develop a Small Business Program Manual and Training Program
- Fully Staff the Office of Small Business
- Expand Business Advisory Council's Functions

**E. DBE and SBE Program Tracking and Monitoring Strategies**

- Implement a Financial Management System
- Use a Unique Identifier of All Contracts Regardless of Procurement Type
- Track the Type of Work Performed
- Implement Uniform Standard for Data Capture
- Utilize a Professional Archiving System
- Conduct Routine Post-Award Contract Compliance Monitoring
- Track and Monitor Pre-Award Subcontractor Commitments
- Improve Oversight of Noncompetitively Bid Contracts

**F. Contracting Strategies for Design-Build Projects**

- Require a DBE and SBE Utilization Plan with the Bid
- Separate Design-Build Construction and Construction Related Goals
- Require DBE and SBE Goal Attainment on Each Task Order
- Track, Verify and Report SBE Utilization Monthly by Task Order
- Assess Penalties for Not Achieving the Project Goal on Each Task Order
- Unbundle Large Procurements into Smaller Contracts
- Reserve Smaller Contracts for Small Businesses
- Use Direct Contracting to Award Small Contracts
- Establish a Direct Purchase Program for Construction Contracts



## **G. Website Enhancement Strategies**

- Post Key Staff Contract Information on the Contact Us Page
- Provide Accessibility for Visually Impaired Individuals
- Provide Option to Enlarge Text
- Provide Text-to-Speech Feature
- Offer Additional Foreign Languages
- Offer Mobile-Optimized Website
- Utilize Social Media Utilities
- Publish Contract Compliance Documents and Purchasing Guidelines
- List All Certified Subcontractors on the Website



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# **Table of Contents**

<b>CHAPTER 1 :</b> .....	1-1
<b>REGULATORY FRAMEWORK ANALYSIS</b> .....	1-1
<b>I. INTRODUCTION</b> .....	1-1
<b>II. GUIDELINES, STANDARDS, AND REQUIREMENTS</b> .....	1-2
A. 49 CFR PART 26, AS AMENDED .....	1-2
B. TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 AND RELATED STATUTES .....	1-4
C. REVISED SMALL AND DISADVANTAGED BUSINESS ENTERPRISE PROGRAM.....	1-4
D. NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM REPORT 644, GUIDELINES FOR CONDUCTING A DISPARITY AND AVAILABILITY STUDY FOR THE FEDERAL DBE PROGRAM .....	1-6
<b>III. CASE LAW</b> .....	1-7
A. CITY OF RICHMOND V. J.A. CROSON CO.....	1-8
B. WESTERN STATES PAVING V. STATE OF WASHINGTON DEPARTMENT OF TRANSPORTATION .....	1-15
C. UNITED STATES DEPARTMENT OF TRANSPORTATION MEMORANDUM .....	1-18
D. ASSOCIATED GENERAL CONTRACTORS V. CALIFORNIA DEPARTMENT OF TRANSPORTATION .....	1-19
E. CALIFORNIA STATE STATUTE .....	1-21
<b>IV. CONCLUSION</b> .....	1-21
<b>CHAPTER 2 :</b> .....	2-1
<b>PRIME CONTRACTOR UTILIZATION ANALYSIS</b> .....	2-1
<b>I. INTRODUCTION</b> .....	2-1
<b>II. PRIME CONTRACT DATA SOURCES</b> .....	2-2
<b>III. PRIME CONTRACTOR UTILIZATION THRESHOLDS</b> .....	2-3
<b>IV. PRIME CONTRACTOR UTILIZATION</b> .....	2-4
A. PROFESSIONAL SERVICES PRIME CONTRACTORS .....	2-4
B. HIGHLY USED PROFESSIONAL SERVICES PRIME CONTRACTORS.....	2-4
C. UTILIZATION OF CERTIFIED SMALL BUSINESS ENTERPRISES .....	2-5
D. UTILIZATION OF CERTIFIED DISABLED VETERAN-OWNED BUSINESS ENTERPRISES .....	2-6
E. UTILIZATION OF CERTIFIED DISADVANTAGED BUSINESS ENTERPRISES .....	2-7



F.	ATTAINMENT OF THE OVERALL SMALL BUSINESS GOAL.....	2-8
G.	ALL PRIME CONTRACTS BY INDUSTRY .....	2-9
H.	PRIME CONTRACTS \$14,000,000 AND UNDER BY INDUSTRY .....	2-11
I.	PRIME CONTRACTS \$3,500,000 AND UNDER BY INDUSTRY .....	2-13
J.	INFORMAL CONTRACTS BY INDUSTRY .....	2-15
V.	SUMMARY .....	2-19

**CHAPTER 3 :..... 3-1**

**SUBCONTRACTOR UTILIZATION ANALYSIS..... 3-1**

I.	INTRODUCTION .....	3-1
II.	SUBCONTRACTOR UTILIZATION DATA SOURCES.....	3-1
III.	SUBCONTRACTOR UTILIZATION .....	3-2
A.	ALL SUBCONTRACTS AWARDED AND DOLLARS EXPENDED FROM JULY 1, 2006 TO JUNE 30, 2013.....	3-2
B.	SUBCONTRACTS AWARDED AND DOLLARS EXPENDED FROM JULY 1, 2012 TO JUNE 30, 2013 .....	3-2
C.	SUBCONTRACTS AWARDED AND DOLLARS EXPENDED TO CERTIFIED SMALL BUSINESSES .....	3-3
D.	PROFESSIONAL SERVICES SUBCONTRACTS AWARDED AND DOLLARS EXPENDED FROM JULY 1, 2006 TO JUNE 30, 2013.....	3-5
E.	PROFESSIONAL SERVICES SUBCONTRACTS EXPENDED FROM JULY 1, 2012 TO JUNE 30, 2013.....	3-7
F.	SUMMARY.....	3-9

**CHAPTER 4 :..... 4-1**

**MARKET AREA ANALYSIS..... 4-1**

I.	MARKET AREA DEFINITION .....	4-1
A.	LEGAL CRITERIA FOR GEOGRAPHIC MARKET AREA .....	4-1
B.	APPLICATION OF THE CROSON STANDARD .....	4-2
II.	MARKET AREA ANALYSIS .....	4-5
A.	DISTRIBUTION OF PROFESSIONAL SERVICES CONTRACTS BY GEOGRAPHIC AREA.....	4-5
B.	SUMMARY OF DISTRIBUTION BY MARKET AREA .....	4-6

**CHAPTER 5 :..... 5-1**

**PRIME AND SUBCONTRACTOR AVAILABILITY ANALYSIS..... 5-1**

I.	INTRODUCTION .....	5-1
II.	PRIME CONTRACTOR AVAILABILITY DATA SOURCES .....	5-2



A.	IDENTIFICATION OF MARKET AREA BUSINESSES .....	5-2
B.	PRIME CONTRACTOR SOURCES .....	5-3
C.	DETERMINATION OF WILLINGNESS .....	5-3
D.	DISTRIBUTION OF WILLING BUSINESSES BY SOURCE.....	5-3
E.	SIZE OF CONTRACTS AWARDED.....	5-4
F.	CAPACITY ASSESSMENT .....	5-5
<b>III.</b>	<b>PRIME CONTRACTOR AVAILABILITY ANALYSIS.....</b>	<b>5-7</b>
A.	PRIME CONTRACTOR AVAILABILITY .....	5-7
<b>IV.</b>	<b>SUBCONTRACTOR AVAILABILITY ANALYSIS .....</b>	<b>5-9</b>
A.	SOURCES OF WILLING AND ABLE SUBCONTRACTORS AND AVAILABILITY .....	5-9
B.	SIZE OF SUBCONTRACTS ANALYZED .....	5-9
C.	SUBCONTRACTOR AVAILABILITY .....	5-11
D.	SUMMARY.....	5-13
 <b>CHAPTER 6 : .....</b>		<b>6-1</b>
<b>ANECDOTAL ANALYSIS.....</b>		<b>6-1</b>
<b>I.</b>	<b>INTRODUCTION .....</b>	<b>6-1</b>
A.	ANECDOTAL EVIDENCE OF ACTIVE AND PASSIVE PARTICIPATION .....	6-2
B.	ANECDOTAL METHODOLOGY .....	6-3
<b>II.</b>	<b>ANECDOTAL EXCERPTS.....</b>	<b>6-4</b>
A.	BONDING AND FINANCING.....	6-4
B.	SMALL AND DISADVANTAGED BUSINESS ENTERPRISE PROGRAM .....	6-4
C.	SMALL AND DISADVANTAGED BUSINESS ENTERPRISE UTILIZATION GOALS .....	6-5
D.	BIDDING ON CONTRACTS .....	6-5
E.	INADEQUATE LEAD TIME FOR BIDDING .....	6-6
F.	BUSINESS CERTIFICATION.....	6-6
G.	INVOICE PAYMENT .....	6-6
H.	CAPACITY BUILDING .....	6-6
<b>III.</b>	<b>SUMMARY OF FINDINGS.....</b>	<b>6-7</b>



<b>CHAPTER 7 :</b> .....	<b>7-1</b>
<b>PRIME CONTRACTOR DISPARITY ANALYSIS</b> .....	<b>7-1</b>
<b>I. INTRODUCTION</b> .....	<b>7-1</b>
<b>II. DISPARITY ANALYSIS</b> .....	<b>7-3</b>
A. DISPARITY ANALYSIS: PRIME CONTRACTS UNDER \$14,000,000 .....	7-4
B. DISPARITY ANALYSIS: PRIME CONTRACTS UNDER \$250,000 .....	7-7
<b>III. DISPARITY ANALYSIS SUMMARY</b> .....	<b>7-10</b>
<b>CHAPTER 8 :</b> .....	<b>8-1</b>
<b>SUBCONTRACTOR DISPARITY ANALYSIS</b> .....	<b>8-1</b>
<b>I. INTRODUCTION</b> .....	<b>8-1</b>
<b>II. DISPARITY ANALYSIS</b> .....	<b>8-1</b>
A. PROFESSIONAL SERVICES SUBCONTRACT AWARDS, JULY 1, 2006 TO JUNE 30, 2013 .....	8-2
B. PROFESSIONAL SERVICES SUBCONTRACT AWARDS, JULY 1, 2012 TO JUNE 30, 2013 .....	8-6
<b>III. SUBCONTRACT DISPARITY SUMMARY</b> .....	<b>8-6</b>
<b>CHAPTER 9</b> .....	<b>9-1</b>
<b>RECOMMENDATIONS</b> .....	<b>9-1</b>
<b>I. INTRODUCTION</b> .....	<b>9-1</b>
<b>II. SUMMARY OF DISPARITY FINDINGS</b> .....	<b>9-1</b>
<b>III. RACE AND GENDER-NEUTRAL RECOMMENDATIONS</b> .....	<b>9-3</b>
A. ADMINISTRATIVE STRATEGIES .....	9-3
B. SUPPORTIVE SERVICES STRATEGIES .....	9-6
C. PROCUREMENT STRATEGIES .....	9-8
D. SMALL AND DISADVANTAGED BUSINESS ENTERPRISE PROGRAM ADMINISTRATION .....	9-11
E. DBE AND SBE PROGRAM TRACKING AND MONITORING STRATEGIES .....	9-12
F. CONTRACTING STRATEGIES FOR DESIGN-BUILD PROJECTS .....	9-14
G. WEBSITE ENHANCEMENT STRATEGIES .....	9-18
<b>CHAPTER 10</b> .....	<b>10-1</b>
<b>APPENDIX - BUSINESS MARKET AVAILABILITY AND CAPACITY STUDY</b> .....	<b>10-1</b>
<b>I. INTRODUCTION</b> .....	<b>10-1</b>



A. STUDY BACKGROUND AND PURPOSE .....	10-1
B. DEFINITIONS .....	10-3
<b>II. METHODOLOGY .....</b>	<b>10-6</b>
A. CAPACITY ASSESSMENT .....	10-9
<b>III. STUDY FINDINGS .....</b>	<b>10-10</b>
A. DATA LIMITATIONS .....	10-10
B. SUMMARY OF CALIFORNIA BUSINESSES AVAILABILITY .....	10-11
C. SUMMARY OF CALIFORNIA CERTIFIED BUSINESS AVAILABILITY .....	10-13
D. SUMMARY OF CALIFORNIA NON-CERTIFIED BUSINESS AVAILABILITY .....	10-17
E. CAPACITY ANALYSIS .....	10-21
<b>IV. CONCLUSION .....</b>	<b>10-26</b>
 <b>CALIFORNIA HIGH-SPEED RAIL BUSINESS INFORMATION SURVEY .....</b>	 <b>10-27</b>
 <b>ADDITIONAL TABLE .....</b>	 <b>10-28</b>

## ***List of Tables***

TABLE 1.01: S/DBE PROGRAM COMPONENTS .....	1-5
TABLE 2.01: BUSINESS ETHNIC AND GENDER GROUPS .....	2-1
TABLE 2.02: CONTRACT ANALYSIS THRESHOLDS FOR CALIFORNIA HIGH-SPEED RAIL AUTHORITY .....	2-3
TABLE 2.03: TOTAL PRIME CONTRACTS AND DOLLARS AWARDED: PROFESSIONAL SERVICES, JULY 1, 2006 TO JUNE 30, 2013.....	2-4
TABLE 2.04: PROFESSIONAL SERVICES PRIME CONTRACTS .....	2-4
TABLE 2.05: PROFESSIONAL SERVICES PRIME CONTRACTS BY NUMBER OF VENDORS.....	2-5
TABLE 2.06: SBE UTILIZATION BY THRESHOLD .....	2-5
TABLE 2.07: DVBE UTILIZATION BY THRESHOLD.....	2-6
TABLE 2.08: DBE UTILIZATION BY THRESHOLD.....	2-7
TABLE 2.09: CERTIFIED BUSINESS UTILIZATION BY THRESHOLD .....	2-8
TABLE 2.10: PROFESSIONAL SERVICES PRIME CONTRACTOR UTILIZATION: ALL CONTRACTS, JULY 1, 2006 TO JUNE 30, 2013.....	2-10



TABLE 2.11: PROFESSIONAL SERVICES PRIME CONTRACTOR UTILIZATION: CONTRACTS \$14,000,000 AND UNDER, JULY 1, 2006 TO JUNE 30, 2013 .....	2-12
TABLE 2.12: PROFESSIONAL SERVICES PRIME CONTRACTOR UTILIZATION: CONTRACTS \$3,500,000 AND UNDER, JULY 1, 2006 TO JUNE 30, 2013 .....	2-14
TABLE 2.13: PROFESSIONAL SERVICES PRIME CONTRACTOR UTILIZATION: CONTRACTS UNDER \$250,000, JULY 1, 2006 TO JUNE 30, 2013 .....	2-16
TABLE 2.14: PROFESSIONAL SERVICES PRIME CONTRACTOR UTILIZATION: CONTRACTS UNDER \$50,000, JULY 1, 2006 TO JUNE 30, 2013 .....	2-18
TABLE 3.01: TOTAL SUBCONTRACTS AWARDED AND DOLLARS EXPENDED .....	3-2
TABLE 3.02: TOTAL SUBCONTRACTS AWARDED AND DOLLARS EXPENDED .....	3-3
TABLE 3.03: SBE SUBCONTRACTOR UTILIZATION BY THRESHOLD .....	3-3
TABLE 3.04: SBE UTILIZATION BY THRESHOLD, JULY 1, 2012 TO JUNE 30, 2013 .....	3-4
TABLE 3.05: PROFESSIONAL SERVICES SUBCONTRACTOR UTILIZATION, JULY 1, 2006 TO JUNE 30, 2013 ..	3-6
TABLE 3.06: PROFESSIONAL SERVICES SUBCONTRACTOR UTILIZATION, JULY 1, 2012 TO JUNE 30, 2013 ..	3-8
TABLE 4.01: DISTRIBUTION OF PROFESSIONAL SERVICES CONTRACTS AWARDED .....	4-5
TABLE 4.02: DISTRIBUTION OF PROFESSIONAL SERVICES CONTRACTS WITHIN THE MARKET AREA.....	4-6
TABLE 5.01: PRIME CONTRACTOR AVAILABILITY DATA SOURCES.....	5-3
TABLE 5.02: DISTRIBUTION OF PRIME CONTRACTOR AVAILABILITY DATA SOURCES .....	5-3
TABLE 5.03: PROFESSIONAL SERVICES PRIME CONTRACTS BY SIZE JULY 1, 2006 TO JUNE 30, 2013.....	5-5
TABLE 5.04: LARGEST CONTRACT THAT CAN BE PERFORMED BY ETHNICITY AND GENDER .....	5-6
TABLE 5.05: AVAILABLE PROFESSIONAL SERVICES PRIME CONTRACTORS .....	5-8
TABLE 5.06: PROFESSIONAL SERVICES SUBCONTRACTS BY SIZE JULY 1, 2006 TO JUNE 30, 2013 .....	5-10
TABLE 5.07: AVAILABLE PROFESSIONAL SERVICES SUBCONTRACTORS .....	5-12
TABLE 7.01: STATISTICAL OUTCOME DESCRIPTIONS .....	7-3
TABLE 7.02: DISPARITY ANALYSIS: PROFESSIONAL SERVICES PRIME CONTRACTS UNDER \$14,000,000 JULY 1, 2006 TO JUNE 30, 2013 .....	7-5
TABLE 7.03: DISPARITY ANALYSIS - PROFESSIONAL SERVICES PRIME CONTRACTS UNDER \$250,000 JULY 1, 2006 TO JUNE 30, 2013.....	7-8
TABLE 7.04: DISPARITY SUMMARY: PROFESSIONAL SERVICES PRIME CONTRACTS.....	7-10
TABLE 8.01: STATISTICAL OUTCOME DESCRIPTIONS .....	8-2
TABLE 8.02: DISPARITY ANALYSIS: PROFESSIONAL SERVICES SUBCONTRACTS .....	8-4
TABLE 8.03: DISPARITY ANALYSIS: PROFESSIONAL SERVICES SUBCONTRACTS .....	8-6



TABLE 8.04: SUMMARY OF SUBCONTRACT DISPARITY FINDINGS .....	8-7
TABLE 9.01: PRIME CONTRACT DISPARITY SUMMARY .....	9-2
TABLE 9.02: SUBCONTRACT DISPARITY SUMMARY .....	9-2
TABLE 01: CALIFORNIA BUSINESS SIZE BY SALES VOLUME .....	10-2
TABLE 02: CALIFORNIA BUSINESS SIZE BY NUMBER OF EMPLOYEES .....	10-2
TABLE 03: BUSINESS AVAILABILITY DATA SOURCES .....	10-7
TABLE 04: SURVEY RESPONSES .....	10-9
TABLE 05: NUMBER OF WILLING BUSINESSES BY STATISTICAL AREA.....	10-11
TABLE 06: TOTAL NUMBER OF WILLING CALIFORNIA BUSINESSES BY INDUSTRY.....	10-12
TABLE 07: TOTAL NUMBER OF WILLING CALIFORNIA BUSINESSES BY ETHNICITY AND GENDER.....	10-13
TABLE 08: NUMBER OF CERTIFIED BUSINESSES BY STATISTICAL AREA .....	10-13
TABLE 09: NUMBER OF CERTIFIED BUSINESSES BY INDUSTRY .....	10-15
TABLE 10: NUMBER OF CERTIFIED BUSINESSES BY STATISTICAL AREA AND BUSINESS CLASSIFICATION	10-15
TABLE 11: TOTAL NUMBER OF NON-CERTIFIED CALIFORNIA.....	10-17
TABLE 12: TOTAL NUMBER OF NON-CERTIFIED BUSINESSES BY INDUSTRY.....	10-19
TABLE 13: TOTAL NUMBER OF NON-CERTIFIED BUSINESSES BY STATISTICAL AREA AND ETHNICITY AND GENDER.....	10-19
TABLE 14: HISTORY OF BID/QUALIFICATION SUBMISSION BY ETHNICITY AND GENDER .....	10-21
TABLE 15: BUSINESS LEGAL STRUCTURE BY ETHNICITY AND GENDER .....	10-22
TABLE 16: LENGTH OF BUSINESS OPERATION BY ETHNICITY AND GENDER .....	10-22
TABLE 17: NUMBER OF EMPLOYEES BY ETHNICITY AND GENDER.....	10-23
TABLE 18: INDUSTRY CLASSIFICATIONS BY ETHNICITY AND GENDER.....	10-23
TABLE 19: LARGEST CONTRACT THAT CAN BE PERFORMED BY ETHNICITY AND GENDER .....	10-24
TABLE 20: LARGEST CONTRACT BID BY ETHNICITY AND GENDER .....	10-24
TABLE 21: GROSS RECEIPTS LOWER THAN \$14 MILLION BY ETHNICITY AND GENDER .....	10-25
TABLE 22: GROSS RECEIPTS LESS THAN \$3.5 MILLION BY ETHNICITY AND GENDER .....	10-25
TABLE 23: COMPARISON OF BUSINESS SURVEY RESULTS.....	10-26
TABLE 24: RELEVANT NAICS CODES.....	10-28



# **List of Charts**

**CHART 7.01: DISPARITY ANALYSIS: PROFESSIONAL SERVICES PRIME CONTRACTS UNDER \$14,000,000 JULY 1, 2006 TO JUNE 30, 2013 ..... 7-6**

**CHART 7.02: DISPARITY ANALYSIS: PROFESSIONAL SERVICES PRIME CONTRACTS UNDER \$250,000 JULY 1, 2006 TO JUNE 30, 2013 ..... 7-9**



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# **CHAPTER 1 :**

## **REGULATORY ANALYSIS                      FRAMEWORK**

### **I. INTRODUCTION**

This chapter presents the Regulatory Framework for the Availability and Disparity Study. The scope of the Study is set forth in the Federal Railroad Administration (FRA) Grant/Cooperative Agreement with the California High-Speed Rail Authority (Authority). Applicable State of California statutes, federal regulations, and federal case law constitute the legal standard.

The Authority adopted its Small and Disadvantaged Business Enterprise Program (S/DBE Program) on August 20, 2012. The Program has been designed to implement the requirements in the FRA Grant/Cooperative Agreement. The requirements include offering maximum practicable opportunities for DBEs and small businesses, including veteran-owned small businesses and service-disabled veteran-owned small businesses, to participate on the Authority's projects. The FRA Grant/Cooperative Agreement also requires that best practices, consistent with the equal opportunity laws delineated in 49 CFR Part 26 and Title VI of the Civil Rights Act of 1964, be implemented in order to ensure adequate small business participation. The Program defines the policies and procedures necessary to fulfill the non-discrimination requirements pertaining to race, color, or national origin as set forth in the FRA Grant/Cooperative Agreement.

Among the best practices set forth in the FRA Grant/Cooperative Agreement is a requirement that the Authority perform an Availability and Disparity Study following the methodology outlined in the National Cooperative Highway Research Program (NCHRP) Report 644, "Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program and NCHRP Synthesis 416." The NCHRP Report recognizes the significant legal requirements that the Authority, as a California recipient of United States Department of Transportation (USDOT) funds, must comply with in order to apply contracting goals on its prime contracts. The FRA Grant/Cooperative Agreement also states that in the absence of goals, the Authority must provide a written explanation and an alternative program to ensure small business participation.<sup>1</sup> The FRA approval of the alternative small business program is pending.

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<sup>1</sup> FRA Grant/Cooperative Agreement p 31.



This Regulatory Framework Analysis is based on a review of the relevant case law, statutes, memoranda, and the Authority's S/DBE Program Plan. In addition, three sources set forth in the Authority's FRA Grant/Cooperative Agreement were analyzed. These sources were as follows:

- U.S. Department of Transportation's Title 49, Subtitle A, Part 26—Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs (49 CFR Part 26);
- Title VI of the Civil Rights Act of 1964 and related statutes; and
- National Cooperative Highway Research Program Report 644, Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program.

## **II. GUIDELINES, STANDARDS, AND REQUIREMENTS**

### **A. 49 CFR Part 26, as Amended**

The pertinent sections of the DBE regulations that set forth best practices required of a United States Department of Transportation (USDOT) grantee are delineated below:

- Approve DBE Policy Statement (Authority 49 CFR Part 26.23):** A signed and dated policy statement that describes the DBE program, its objectives, and responsibilities for its execution must be established. The statement must be circulated internally within the agency, as well as to the DBEs and non-DBEs which perform work on the agency's USDOT-assisted contracts.
- Retain DBE Liaison Officer (Authority 49 CFR Part 26.25):** A DBE liaison officer who is responsible for having direct, independent contact with the Chief Executive Officer must be established to implement all aspects of the DBE program, including ensuring that adequate staff is available to perform the duties of the program.
- Use DBE Financial Institutions (Authority 49 CFR Part 26.27):** Financial institutions owned and operated by socially and economically disadvantaged individuals must be sought out so that prime contractors are encouraged to work with such financial institutions.
- Maintain DBE Directory (Authority 49 CFR Part 26.31):** A DBE directory must be maintained.
- Promote Business Development Programs (Authority 49 CFR Part 26.35):** A business development program must be implemented if directed by



- USDOT which describes the rationale for the program, and informs interested persons how to obtain information about the program element.
- vi. **Implement Certification Process (Authority 49 CFR Part 26.61-26.73):** A certification process must be implemented, consistent with Part 26.61-26.73.
  - vii. **Set Overall Goals (Authority 49 CFR Part 26.45):** Overall goals for DBE participation must be set at three-year intervals, pursuant to the two-step process set forth in Part 26.45. The projected portion of the overall goal which will be achieved by race-neutral means must also be determined.
  - viii. **Set Transit Vehicle Manufacturers Goals (Authority 49 CFR Part 26.49):** As a condition of being authorized to bid or propose on USDOT-assisted transit vehicle procurements, each transit vehicle manufacturer (TVM) is required to certify that it has complied with TVM requirements.
  - ix. **Set Contract Goals (Authority 49 CFR Part 26.51[d-g]):** Contract-specific goals must be established to meet any portion of the overall goal that is not projected to be met through race-neutral means.
  - x. **Implement Monitoring and Enforcement Mechanisms (Authority 49 CFR Part 26.37):** Monitoring and enforcement mechanisms to be implemented include:
    - a. Bring any false, fraudulent, or dishonest conduct in connection with the program to the attention of the USDOT.
    - b. Provide a monitoring and enforcement mechanism to verify that work committed to DBEs at the time of the contract award is actually performed by the DBEs.
    - c. Keep a running tally of actual payments to DBE firms for work committed to them at the time of the contract award.
  - xi. **Monitor Prime Contractor Payments to DBEs (Authority 49 CFR Part 26.109):** Prime contractors are required to cooperate fully and provide the USDOT with any information requested in compliance reviews, certification reviews, investigations, or other matters. Accordingly, prime contractor may be requested to provide records and documents of payments to DBEs for three years following the performance of the contract. This reporting requirement also extends to any certified DBE subcontractor.
  - xii. **Count DBE Participation (Authority 49 CFR Part 26.55):** DBE participation is counted toward overall contracting goals. Only the value of commercially useful work actually performed by the DBE can count toward the goals. In counting subcontractor participation, the amount counted toward goals must have been paid to the subcontractor.



- xiii. **Establish Good Faith Efforts Procedures (Authority 49 CFR Part 26.53):** Good Faith Efforts must be implemented and reviewed in order to ensure that they are consistent with Part 26.53.
- xiv. **Maintain Records of DBEs (Authority 49 CFR Part 26.11):** A bidders list must be created and maintained, and must include information about DBE and non-DBE contractors and subcontractors who seek to work on federally assisted contracts, including firm name, firm address, firm's status as a DBE or non-DBE, age of the firm, and annual gross receipts of the firm.

***B. Title VI of the Civil Rights Act of 1964 and Related Statutes***

Title VI, a provision of the Civil Rights Act of 1964, was implemented with 34 CFR Part 100, prohibits discrimination on the basis of race, color, or national origin in government programs involving federal financial assistance. As a recipient of USDOT funds, the Authority must comply with the provisions of Title VI on all contracts. Pursuant to 34 CFR Part 100, the Authority is required to enact a non-discrimination policy to prevent discrimination on the grounds of race, color, or national origin in any program or activity receiving federal financial assistance.

Pursuant to Title VI, Part 26.7(a) of the DBE regulations, federal recipients

[m]ust never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract...on the basis of race, color, sex, or national origin.<sup>2</sup>

DBE programs

[m]ust not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin.<sup>3</sup>

***C. Revised Small and Disadvantaged Business Enterprise Program***

In compliance with the provisions of the FRA Grant/Cooperative Agreement, the Authority approved a Small and Disadvantaged Business Enterprise Program on August 2, 2012. The table below outlines the components of the Authority's Small and Disadvantaged Business Enterprise Program. The program incorporates best practices from the DBE regulations as required by the FRA Grant/Cooperative Agreement. To



<sup>2</sup> 49 CFR Part 26 7(b)

<sup>3</sup> *Ibid*

provide a frame of reference for analyzing the Small and Disadvantaged Business Enterprise Program, its components are compared to the best practices set forth in the DBE regulations as referenced in the FRA Grant/Cooperative Agreement.

**Table 1.01: Small and Disadvantaged Business Enterprise Program Components**

DBE PROGRAM REQUIREMENT	AUTHORITY'S PROGRAM PROVISION
Approve DBE Policy Statement	The Authority has an approved DBE policy statement.
Retain DBE Liaison Officer and Adequate Staff	A full-time SB Liaison Officer (SBLO), designated by the Authority's CEO, administers the Small and Disadvantaged Business Program. The SBLO is to ensure compliance with Executive Order S-02-06 and 49 CFR Part 26.25.
Use DBE Financial Institutions	This requirement has not been addressed in the Small and Disadvantaged Business Program.
Maintain DBE Directory	The Authority maintains a DBE Directory pursuant to the California Unified Certification Program.
Implement Certification Process	The Program relies upon the California Unified Certification Program and the California Department of General Services Certification Programs.
Set Overall Goals	A 30-percent Race-Neutral Small Business Participation Goal has been set. This goal is comprised of a ten-percent DBE goal and a three-percent DVBE goal. The two-step methodology was not used to set the goal.
Set Transit Vehicle Manufacturer Goals	This requirement has not been addressed in the Small and Disadvantaged Business Program.
Set Contract Goals	This requirement has not been addressed in the Small and Disadvantaged Business Program.
Report Fraud	The Program directs contractors to use the USDOT's hotline to report fraud.
Monitor DBE Work Performance	The Program requires contract compliance and monitoring from the SBLO, with the assistance of the Program Management Team.
Tally Actual DBE Payments	The Program uses SB Utilization Report Form 103 to monitor DBE payments.
Monitor Prime Contractor Payments to DBEs	The Program requires prime contractors to submit a monthly SB Utilization Report Form 103.
Count DBE Participation	The Program counts DBE utilization when the business is certified through the California Unified Certification Program, and is performing a commercially useful function.



DBE PROGRAM REQUIREMENT	AUTHORITY'S PROGRAM PROVISION
Establish Good Faith Efforts Procedures	The Program lists both pre- and post-award GFEs.
Maintain Records of DBE Bidders List	The Program maintains a Business Registry containing businesses which have expressed an interest in, have bid, or have quoted on the Authority's contracting opportunities.

***D. National Cooperative Highway Research Program Report 644, Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program***

The National Cooperative Highway Research Program (NCHRP) Report 644, "Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program," is cited in the FRA Grant/Cooperative Agreement as the standard for performing the required Availability and Disparity Study. Pages 12 and 13 of the NCHRP Report recommend that the following components be included in a Disparity Study when it is to serve as the factual predicate for DBE contracting goals within the federal DBE program:<sup>4</sup>

- A legal review including *Croson*<sup>5</sup> and its progeny;
- An empirical assessment of the appropriate geographic market relevant to an agency's contracting activity;
- An empirical assessment of the appropriate product markets relevant to an agency's contracting activity;
- An estimate of the fraction of businesses within the agency's geographic and product markets that are owned by DBEs;
- An estimate of the percentage of all prime contract and subcontract dollars earned by DBEs;
- A statistical comparison of public sector utilization to availability;
- Econometric analyses of DBEs' success relative to that of non-DBEs in the market area surrounding the agency in question, while holding nondiscriminatory factors constant;



<sup>4</sup> National Cooperative Highway Research Program (NCHRP) Report 644, "Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program" 12-13 (2010)

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

- Econometric analysis of DBEs' access to capital and credit, relative to that of non-DBEs, while holding balance sheet and creditworthiness information constant;
- Qualitative evidence from DBEs and non-DBEs concerning experiences doing business or attempting to do business in the relevant marketplace, including experiences of institutionalized discrimination and/or individual disparate treatment, gathered through surveys, personal interviews, and/or public hearing;
- Qualitative and/or quantitative analysis of the effectiveness of race-neutral measures to address low DBE participation in public contracting; and
- Review of existing policies and procedures related to DBE participation, with recommendations for changes/revisions designed to improve the effectiveness of the program and to increase legal compliance.

### **III. CASE LAW**

As discussed in the NCHRP Report, the case law pertaining to public contracting affirmative action programs sets forth the legal framework and methodology to be used in performing a constitutionally sound availability and disparity study. Two United States Supreme Court decisions, *City of Richmond v. J.A. Croson Co. (Croson)*<sup>6</sup>, and *Adarand v. Peña (Adarand)*<sup>7</sup> and their progeny, are the cases which have established the legal framework for affirmative action contracting programs. These federal cases define the legal framework for a constitutionally sound race-based contracting program, and the standards for the application of race-based goals, in compliance with the USDOT DBE regulations.

*Croson*, decided in 1989, addressed locally funded contracting programs and established an evidentiary standard for a constitutionally sound race-based program. Post-*Croson*, this standard was applied to federally funded DBE programs. The Court ruled in *Croson* that programs employing racial classifications would be subject to "strict scrutiny," the highest legal standard.<sup>8</sup> Broad notions of equity or general allegations of historical and societal discrimination against minorities fail to meet the requirements of strict scrutiny. Local governments, as set forth in *Croson*, may adopt race-conscious programs only as a remedy for identified statistical findings of discrimination. The remedy must impose a minimal burden upon unprotected classes.

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<sup>6</sup> 488 U.S. at 469

<sup>7</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995)

<sup>8</sup> 488 U.S. at 493



*Adarand*, decided in 1995, directly challenged the USDOT's Disadvantaged Business Enterprise regulations. The Court found a compelling interest for the DBE Program but ruled, after applying the *Croson* "strict scrutiny" standard, that the DBE Program was not narrowly tailored.<sup>9</sup> In response to this decision, the USDOT amended the DBE regulations in 1999 to include goals that can be met by race-neutral and race-specific means.

Following *Adarand*, several circuit court cases challenged the constitutionality of the DBE regulations.<sup>10</sup> Until the 2005 Ninth Circuit Court of Appeals decision in *Western States Paving Co. v. State of Washington Dept. of Transportation (Western States)*<sup>11</sup>, these challenges had been unsuccessful. However, *Western States* found that the State of Washington's DBE Program was facially constitutional, but determined that the State's application of the regulations was not constitutional. The court decided that a finding of disparity was necessary for each ethnic and gender group included in the DBE race-conscious goal.

## **A. City of Richmond v. J.A. Croson Co.**

- **The *Croson* Standard of Review**

The standard of review represents the measure by which a court evaluates whether a particular legal claim meets a certain statute, rule, or precedent. In *Croson*, the United States Supreme Court set the standard of review for determining when a race-conscious contracting program meets constitutional muster. The Supreme Court affirmed in *Croson* that, pursuant to the 14<sup>th</sup> Amendment, the proper standard of review for state and local MBE programs, which are necessarily race-based, is strict scrutiny.<sup>12</sup> Specifically, the government must show that the classification is narrowly tailored to achieve a compelling state interest.<sup>13</sup> The Court recognized that a state or local entity may take action in the form of an MBE program to rectify the effects of *identified, systemic racial discrimination* within its jurisdiction.<sup>14</sup> Justice O'Connor, speaking for the majority, articulated various methods of demonstrating discrimination, setting forth guidelines for crafting MBE programs so that they are "narrowly tailored" to address systemic racial discrimination.<sup>15</sup>

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<sup>9</sup> 515 U.S. at 222

<sup>10</sup> *Sherbrooke Turf, Inc. v. Minn. Dep't of Transp.*, 345 F.3d 964, 969-73 (8th Cir. 2003); *Gross Seed Co. v. Neb. Dep't of Rds.*, 2002 U.S. Dist. LEXIS 27125 (D. Neb. May 6, 2002); *Western States Paving Co. v. State of Wash. Dep't of Transp.*, 407 F.3d 983 (9th Cir. 2005); *Northern Contracting, Inc. v. Ill. Dep't of Transp.*, 473 F.3d 715 (7th Cir. 2007)

<sup>11</sup> 407 F.3d at 1002-1003

<sup>12</sup> *Croson*, 488 U.S. at 493-95.

<sup>13</sup> *Id.* at 484-86.

<sup>14</sup> *Id.* at 509.

<sup>15</sup> *Id.* at 501-502. Cases involving education and employment frequently refer to the principal concepts applicable to the use of race in government contracting: compelling interest and narrowly tailored remedies. The Supreme Court in *Croson* and subsequent cases provides fairly detailed guidance on how those concepts are to be treated in contracting. In education and employment, the concepts are not explicated to nearly the same extent. Therefore, references in those cases to "compelling governmental interest" and "narrow



- **Croson Evidentiary Framework**

Government entities considering race in public contracting programs must construct a strong evidentiary framework to stave off legal challenges, and to ensure that the adopted MBE program complies with the requirements of the Equal Protection Clause of the U.S. Constitution. The framework must comply with the stringent requirements of the strict scrutiny standard. Accordingly, there must be a strong basis in evidence, and the race-conscious remedy must be “narrowly tailored,” as set forth in *Croson*. A summary of the appropriate types of evidence to satisfy the first element of the *Croson* standard follows.

- **Active and Passive Participation**

*Croson* requires that the local entity seeking to adopt an MBE program must have perpetuated the discrimination to be remedied by the program.<sup>16</sup> However, the local entity need not be an active perpetrator of such discrimination, as reflected in the prime contracts awarded. Passive participation, through the awards made by the prime contractors, will satisfy this part of the Court’s strict scrutiny review.<sup>17</sup>

- **Systemic Discriminatory Exclusion**

*Croson* clearly established that an entity enacting a business affirmative action program must demonstrate identified systemic discriminatory exclusion on the basis of race or any other illegitimate criteria (arguably gender).<sup>18</sup> Thus, it is essential to demonstrate a pattern and practice of such discriminatory exclusion in the relevant market area.<sup>19</sup> Using appropriate evidence of the entity’s active or passive participation in the discrimination, the showing of discriminatory exclusion must cover each racial group to which a remedy

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tailoring,” for purposes of contracting, are essentially generic and of little value in determining the appropriate methodology for disparity studies.

<sup>16</sup> *Croson*, 488 U.S. at 548.

<sup>17</sup> *Id.* at 509.

<sup>18</sup> *Id.*, see also, *Monterey Mech. v. Wilson*, 125 F.3d 702 (9th Cir. 1997). The Fifth Circuit Court in *W.H. Scott Construction Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999), found that the City’s MBE program was unconstitutional for construction contracts because minority participation goals were arbitrarily set and not based on any objective data. Moreover, the Court noted that had the City implemented the recommendations from the disparity study it commissioned, the MBE program may have withstood judicial scrutiny (the City was not satisfied with the study and chose not to adopt its conclusions). *Id.* at 210. “Had the City adopted particularized findings of discrimination within its various agencies and set participation goals for each accordingly, our outcome today might be different. Absent such evidence in the City’s construction industry, however, the City lacks the factual predicates required under the Equal Protection Clause to support the Department’s 15% DBE participation goal.” *Id.* at 218.

In 1996, Houston Metro had adopted a study done for the City of Houston in which the statistics were limited to aggregate figures that showed income disparity between groups, without making any connection between those statistics and the City’s contracting policies. The disadvantages cited, which M/WBEs faced in contracting with the City, also applied to small businesses. Under *Croson*, that would have pointed to race-neutral remedies. The additional data on which Houston Metro relied were even less availing. Its own expert contended that the ratio of lawsuits involving private discrimination to total lawsuits and ratio of unskilled African Americans’ wages to unskilled Caucasians’ wages established that the correlation with low rates of African American self-employment was due to discrimination. Even assuming that nexus, there is nothing in *Croson* that accepts a low number of MBE business formations as a basis for a race-conscious remedy.

<sup>19</sup> *Croson*, 488 U.S. at 509.



would apply.<sup>20</sup> Mere statistics or broad assertions of purely societal discrimination will not suffice to support a race or gender-conscious program.

*Croson* enumerates several ways an entity may establish the requisite factual predicate. First, a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by an entity—or by the entity’s prime contractors—may support an inference of discriminatory exclusion.<sup>21</sup> In other words, when the relevant statistical pool is used, a showing of gross statistical disparity alone “may constitute *prima facie* proof of a pattern or practice of discrimination.”<sup>22</sup>

The *Croson* Court made clear that both prime contract and subcontract data were relevant. The Court observed that “[w]ithout any information on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city’s construction expenditures.”<sup>23</sup> Subcontracting data is also an important means by which to assess suggested future remedial actions. Since the decision makers are different for awarding prime contracts and subcontracts, the remedies for discrimination identified at a prime contractor versus subcontractor level may also be different.

Second, “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”<sup>24</sup> Thus, if an entity has statistical evidence that non-minority contractors are systematically excluding minority businesses from subcontracting opportunities, it may act to end the discriminatory exclusion.<sup>25</sup> Once an inference of discriminatory exclusion arises, the entity may act to dismantle the closed business system.

In *Coral Construction*, the Ninth Circuit Court of Appeals further elaborated upon the type of evidence needed to establish the factual predicate that justifies a race-conscious remedy. The court held that both statistical and anecdotal evidence should be relied upon in establishing systemic discriminatory exclusion in the relevant marketplace as the factual predicate for an MBE program.<sup>26</sup> The court explained that statistical evidence

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<sup>20</sup> *Id.* at 506. As the Court said in *Croson*, “[t]he random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city’s purpose was not in fact to remedy past discrimination.” See, *N. Shore Concrete & Assoc. v. City of N.Y.*, 1998 U.S. Dist. LEXIS 6785 (E.D.N.Y. Apr. 12, 1998), which rejected the inclusion of Native Americans and Alaskan Natives in the City’s program, citing *Croson*.

<sup>21</sup> *Croson*, 488 U.S. at 509.

<sup>22</sup> *Id.* at 501 (citing *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-308 (1977)).

<sup>23</sup> *Id.* at 502-503.

<sup>24</sup> *Id.* at 509.

<sup>25</sup> *Id.*

<sup>26</sup> *Coral Construction Co. v. King Cnty.*, 941 F.2d 910, 919 (9th Cir. 1991).



alone often does not account for the complex factors and motivations guiding contracting decisions, many of which may be entirely race-neutral.<sup>27</sup>

Likewise, anecdotal evidence alone is unlikely to establish a systemic pattern of discrimination.<sup>28</sup> Nonetheless, anecdotal evidence remains important because the individuals who testify about their personal experiences bring “the cold numbers convincingly to life.”<sup>29</sup>

- **Anecdotal Evidence**

In *Croson*, Justice O’Connor opined that “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”<sup>30</sup>

Anecdotal evidence should be gathered to determine how minority contractors are systematically being excluded from contracting opportunities in the relevant market area. Remedial measures fall along a sliding scale determined by their intrusiveness on non-targeted groups. At one end of the spectrum are race-neutral measures and policies, such as outreach to the M/WBE community, which are accessible to all segments of the business community regardless of race. They are not intrusive and, in fact, require no evidence of discrimination before implementation. Conversely, race-conscious measures, such as set-asides, fall at the other end of the spectrum, and require a larger amount of evidence.<sup>31</sup>

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

*Philadelphia* makes clear that 14 anecdotal accounts will not suffice.<sup>32</sup> While the matter is not free of countervailing considerations, 57 accounts, many of which appeared to be of the type referenced above, were insufficient to justify the program in *Coral*

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* (quoting *Int’l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977)).

<sup>30</sup> *Croson*, 488 U.S. at 509. The Court specifically cited *Teamsters*, 431 U.S. at 338.

<sup>31</sup> *Cf. Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1417-18 (in finding that an ordinance providing for bid preferences was narrowly tailored, the Ninth Circuit stated that the program encompassed the required flexibility and further stated that “the burdens of the bid preferences on those not entitled to them appear relatively light and well distributed . . . In addition, in contrast to remedial measures struck down in other cases, those bidding have no settled expectation of receiving a contract”).

<sup>32</sup> *Contractors Ass’n of Eastern Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3rd Cir. 1993), on remand, 893 F.Supp. 419 (E.D. Pa. 1995), *aff’d*, 91 F.3d 586 (3rd Cir. 1996).



*Construction*.<sup>33</sup> The number of anecdotal accounts relied upon by the district court in approving Denver's M/WBE program in *Concrete Works I* is unclear, but by one count the number might have exceeded 139.<sup>34</sup> It is, of course, a matter of speculation as to how many of these accounts were indispensable to the court's approval of the Denver M/WBE program.

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

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- **Geographic Market**

*Croson* did not speak directly as to how the geographic market is to be determined. In *Coral Construction*, the Court of Appeals held that "[a]n MBE program must limit its geographical scope to the boundaries of the enacting jurisdiction."<sup>35</sup> Conversely, in *Concrete Works I*, the Tenth Circuit Court of Appeals specifically approved the Denver MSA as the appropriate market area, since 80 percent of the construction contracts were awarded there.<sup>36</sup>

Read together, these cases support a definition of market area that is reasonable rather than dictated by a specific formula. *Croson* and its progeny did not provide a bright line rule for local market area, of which determination should be fact-based. An entity may limit consideration of evidence of discrimination within its own jurisdiction.<sup>37</sup> Extra-jurisdictional evidence may be permitted when it is reasonably related to where the jurisdiction contracts.<sup>38</sup>

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<sup>33</sup> 941 F.2d at 917.

<sup>34</sup> See *Concrete Works of Colo. v. City & Cnty. of Denver*, 823 F.Supp. 821, 833-34 (D. Colo. 1993), rev'd on other grounds, 36 F.3d 1513 (10th Cir. 1994). The Denver City Council enacted its M/WBE ordinance in 1990. The program was based on the results of public hearings held in 1983 and 1988 at which numerous people testified (approximately 21 people and at least 49 people, respectively), and on a disparity study performed in 1990. The disparity study consultant examined all this preexisting data, presumably including the anecdotal accounts from the 1983 and 1988 public hearings, as well as the results of its own interviews of 38 M/WBEs in the construction and design industries and representatives from 31 other firms, in preparing its recommendations. *Id.* Thus, short of analyzing the record in the case, it is not possible to determine a minimum number of accounts because it is not possible to ascertain the number of consultant interviews and anecdotal accounts that are recycled statements or statements from the same people. Assuming no overlap in accounts, however, and also assuming that the disparity study relied on prior interviews in addition to its own, the number of M/WBEs interviewed in this case could be as high as 139, and, depending on the number of new people heard by the Denver Department of Public Works in March 1988 (see *id.* at 833), the number might have been even greater.

<sup>35</sup> *Coral Construction*, 941 F.2d at 925.

<sup>36</sup> *Concrete Works*, 823 F.Supp. at 835-36.

<sup>37</sup> *Cone Corporation v. Hillsborough Cnty.*, 908 F.2d 908 (11th Cir. 1990); *Associated Gen. Contractors*, 950 F.2d at 1401.

<sup>38</sup> There is a related question of which firms can participate in a remedial program. In *Coral Construction*, the Court held that the definition of "minority business" used in King County's MBE program was overinclusive. 941 F.2d at 925. The Court reasoned that the definition was overbroad because it included businesses other than those who were discriminated against in the King County business community. *Id.* The program would have allowed, for instance, participation by MBEs that had no prior contact with the County. *Id.* Hence, location within the geographic area is not enough. *Id.* An MBE had to have shown that it previously sought business, or is currently doing business, in the market area. *Id.*



- **Current versus Historical Evidence**

In assessing the existence of identified discrimination through demonstration of a disparity between MBE utilization and availability, it may be important to examine disparity data both before and after the enactment of the current MBE program. This will be referred to as “pre-program” versus “post-program” data.

*Croson* requires that an MBE program be “narrowly tailored” to remedy current evidence of discrimination.<sup>39</sup> Thus, goals must be set according to the evidence of disparity found. For example, if there is a current disparity between the percentage of an entity’s utilization of Hispanic construction contractors and the availability of Hispanic construction contractors in that entity’s marketplace, then that entity can set a goal to bridge that disparity.

- **Statistical Evidence**

To determine whether statistical evidence is adequate to give rise to an inference of discrimination, courts have looked to the “disparity index,” which consists of the percentage of minority or women contractor participation in local contracts divided by the percentage of minority or women contractor availability or composition in the population of available firms in the local market area.<sup>40</sup> Disparity indices have been found highly probative evidence of discrimination where they ensure that the “relevant statistical pool” of minority or women contractors is being considered.

- **Consideration of Race-Neutral Options**

A remedial program must address the source of the disadvantage faced by MBEs. If it is found that race discrimination places MBEs at a competitive disadvantage, an MBE program may seek to counteract the situation by providing MBEs with a counterbalancing advantage.<sup>41</sup>

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<sup>39</sup> See *Croson*, 488 U.S. at 509-10.

<sup>40</sup> *Eng’g Contractors Ass’n of S. Fla. v. Metro. Dade Cnty.*, 943 F. Supp. 1546 (S.D. Fla. 1996), *aff’d*, 122 F.3d 895 (11th Cir. 1997). Although the disparity index is a common category of statistical evidence considered, other types of statistical evidence have been taken into account. In addition to looking at Dade County’s contracting and subcontracting statistics, the district court considered marketplace data statistics (which looked at the relationship between the race, ethnicity, and gender of surveyed firm owners and the reported sales and receipts of those firms), the County’s Wainwright study (which compared construction business ownership rates of M/WBEs to those of non-M/WBEs and analyzed disparities in personal income between M/WBE and non-M/WBE business owners), and the County’s Brimmer Study (which focused only on African American-owned construction firms and looked at whether disparities existed when the sales and receipts of African American-owned construction firms in Dade County were compared with the sales and receipts of all Dade County construction firms).

The court affirmed the judgment that declared appellant’s affirmative action plan for awarding county construction contracts unconstitutional and enjoined the plan’s operation because there was no statistical evidence of past discrimination, and appellant failed to consider race and ethnic-neutral alternatives to the plan.

<sup>41</sup> *Cf. Associated Gen. Contractors*, 950 F.2d at 1417-18.



However, a MBE program cannot stand if the sole barrier to minority or woman-owned business participation is a barrier that is faced by all new businesses, regardless of ownership.<sup>42</sup> If the evidence demonstrates that the sole barrier to MBE participation is that MBEs disproportionately lack capital or cannot meet bonding requirements, then only a race-neutral program of financing for all small firms would be justified.<sup>43</sup> In other words, if the barriers to minority participation are race-neutral, then the program must be race-neutral or contain race-neutral aspects.

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

The Supreme Court has recently explained that although “narrow tailoring does not require exhaustion of every conceivable race-neutral alternative” it “does require serious, good faith consideration of workable race-neutral alternatives that will achieve...diversity[.]” *Grutter*, 123 S.Ct, at 2344, 2345. The County has failed to show the necessity for the relief it has chosen, and the efficacy of alternative remedies has not been sufficiently explored.<sup>44</sup>

If the barriers appear race-related but are not systemic, then the remedy should be aimed at the specific arena in which exclusion or disparate impact has been found. If the evidence shows that in addition to capital and bonding requirements, which are race-neutral, MBEs also face race discrimination in the awarding of contracts, then a race-conscious program will stand, so long as it also includes race-neutral measures to address the capital and bonding barriers.<sup>45</sup>

The Ninth Circuit Court of Appeals in *Coral Construction* ruled that there is no requirement that an entity exhaust every possible race-neutral alternative.<sup>46</sup> Instead, an entity must make a serious, good-faith consideration of race-neutral measures in enacting an MBE program. Thus, in assessing MBE utilization it is imperative to examine barriers to MBE participation that go beyond “small business problems.” The impact on the distribution of contract programs that have been implemented to improve MBE utilization should also be measured.<sup>47</sup>

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<sup>42</sup> *Croson*, 488 U.S. at 508.

<sup>43</sup> *Id.* at 507.

<sup>44</sup> *Hershell Gill Consulting Eng'rs, Inc. v. Miami-Dade Cnty.*, 333 F.Supp. 2d 1305, 1330 (S.D. Fla. 2004).

<sup>45</sup> *Id.* (upholding MBE program where it operated in conjunction with race-neutral measures aimed at assisting all small businesses).

<sup>46</sup> *Coral Construction*, 941 F.2d at 923.

<sup>47</sup> *Eng'g Contractors Ass'n of S. Fla.*, 122 F.3d at 927. At the same time, the Eleventh Circuit's caveat in *Dade County* should be kept in mind: “Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications that a government may use to treat race-based problems. Instead, it is the strongest of medicines, with many potentially harmful side-effects, and must be reserved to those severe cases that are highly resistant to conventional treatment.” For additional guidance, see, *supra*, the discussion of narrow tailoring in *Concrete Works, Adarand, Builders Ass'n of Greater Chicago v. Cnty. of Cook*, 256 F.3d 642 (7th Cir. 2001), and *Builders Ass'n of Greater Chi. v. City of Chicago*, 298 F. Supp. 2d 725 (N.D. Ill. 2003).



## **B. *Western States Paving v. State of Washington Department of Transportation***

*Western States Paving v. State of Washington Department of Transportation* (*Western States*), decided in 2005 by the Ninth Circuit, subjected the State of Washington's Department of Transportation DBE Program to a two-pronged analysis.<sup>48</sup> One aspect of the analysis determined whether the USDOT DBE legislation was facially constitutional, and the other assessed whether the State of Washington's application of the DBE regulations was valid.<sup>49</sup> This decision changed the legal landscape for DBE program goal setting in California and in the other states in the Ninth Circuit.

In 1999, responding to the Supreme Court's decision in *Adarand*, which applied the strict scrutiny standard to federal programs, the USDOT revised the DBE regulations to make the DBE program consistent with the "narrow tailoring" requirement of *Adarand*.<sup>50</sup> The revised provisions applied only to USDOT airport, transit, and highway financial assistance programs. Effective February 28, 2011, the USDOT again amended the DBE regulations. According to the 2011 amendment, recipients were required to incorporate a Small Business Enterprise component in their DBE Program by February 28, 2012.

Since 1999, there have been four challenges to the amended DBE regulations. Each challenged DBE program used the factual predicate set forth in the amended DBE regulations to establish race-based goals. Two circuit courts, the Seventh and the Eighth, decided the DBE programs based on the amended DBE regulations were constitutional. The Ninth Circuit, which includes California, did not. The Ninth Circuit was the first circuit to apply the *Croson* strict scrutiny standard to the DBE regulations.

The State of Washington's Department of Transportation DBE Program was subjected by the court in *Western States* to a two-pronged analysis: 1) whether the USDOT DBE legislation was facially constitutional and 2) whether the State of Washington's application of the DBE regulations was valid.<sup>51</sup> *Western States* applied *Croson* evidentiary standards to the DBE goal-setting process in the Ninth Circuit.

- **Facial Constitutional Challenge**

In *Western States*, the plaintiff sought a declaratory judgment, arguing that the 1998 Transportation Equity Act for the 21<sup>st</sup> Century's (TEA-21) preference program was in violation of the equal protection provision under the Fifth and Fourteenth Amendments of the U.S. Constitution. The TEA-21 DBE Program on its face, and as applied by the State of Washington, was claimed to be unconstitutional.<sup>52</sup> In addressing *Western States*' facial

<sup>48</sup> *Western States*, 407 F.3d at 988-995.

<sup>49</sup> *Western States*, 407 F.3d at 988-995.

<sup>50</sup> *Adarand*, 515 U.S. at 227.

<sup>51</sup> *Western States*, 407 F.3d at 988-995.

<sup>52</sup> *Id.* at 987.



challenge, the Court interpreted the issue as to whether the United States had met its burden of demonstrating that the federal statute and regulations satisfied the exacting requirements of strict scrutiny.

The federal government, according to *Croson*, has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry.<sup>53</sup> Thus, the Court evaluated the evidence that Congress considered in enacting the DBE statute to ensure it had a “strong basis in evidence for its conclusion that remedial action was necessary.”<sup>54</sup> The Court concluded that a substantial body of statistical and anecdotal evidence was considered by Congress at the time the law was enacted. Therefore, the Court found that Congress had a strong basis in evidence for concluding that at least in some parts of the country there was discrimination within the transportation contracting industry that hindered minorities’ ability to compete for federally funded contracts.<sup>55</sup>

Next, the Court considered whether the DBE regulations’ racial classification was narrowly tailored as represented in the State of Washington’s DBE goals. Citing *Croson*, *Western States* decided that a minority preference program must establish utilization goals that bear a close relationship to minority firms’ availability in a particular market in order to be narrowly tailored.<sup>56</sup> The Court referenced *Sherbrooke*,<sup>57</sup> noting that the Eighth Circuit had held that the DBE programs of the Minnesota and Nebraska Departments of Transportation had independently satisfied the narrow tailoring requirement of strict scrutiny by relying upon two disparity studies.

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

MnDOT implemented good faith efforts to encourage prime contractors to meet the DBE goal. The availability of DBEs and the extent of subcontracting opportunities for each project were considered when setting the race-conscious portion of the overall DBE goal. The Eighth Circuit agreed with the district court that MnDOT’s revised DBE Program served a compelling government interest and was narrowly tailored on its face, and as applied in Minnesota.<sup>58</sup>

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<sup>53</sup> *Croson*, 488 U.S. at 492.

<sup>54</sup> *Croson*, 488 U.S. at 500.

<sup>55</sup> *Western States*, 407 F.3d at 993.

<sup>56</sup> *Id.* at 989.

<sup>57</sup> *Sherbrooke*, 345 F.3d at 969-73.

<sup>58</sup> *Id.* at 974.



Similarly, the Nebraska Department of Transportation (NDOT) also set an overall DBE goal pursuant to the DBE regulations for the Nebraska highway construction market. As with Minnesota, the Eighth Circuit found that NDOT's DBE Program was narrowly tailored.<sup>59</sup>

The Ninth Circuit Court notes that the DBE regulations did not establish a mandatory nationwide minority utilization goal in transportation contracting.<sup>60</sup> The Court found that the ten percent DBE utilization goal in the regulation was only "aspirational," and that the regulation provides that each state must establish a DBE utilization goal based upon the proportion of ready, willing, and able DBEs in its transportation contracting industry.<sup>61</sup> Because the regulations require each state to set minority utilization goals that reflect the contractor availability in its own labor market, the Court found the DBE regulations to be narrowly tailored to remedy the effects of race and gender-based discrimination within the transportation contracting industry.<sup>62</sup> The Court ultimately held that it was satisfied that TEA-21's DBE program was narrowly tailored to remedy the effects of race and gender-based discrimination within the transportation contracting industry; thus, *Western States*' facial challenge failed.<sup>63</sup>

- **Application of the Narrowly Tailored Standard in Overall Goal Setting**

The second prong of the Court's analysis considered whether the utilization goals established by the State of Washington "as applied" were unconstitutional, because there was no evidence of discrimination within the State's transportation industry. The State contended that its implementation of the DBE Program was constitutional, because it comported with the federal statute and regulations. The State also posited that since the proportion of DBEs in the state was 11.17 percent and the percentage of contracting funds awarded to them on race-neutral contracts was only nine percent, discrimination was demonstrated.<sup>64</sup> The Court disagreed with the rationale. It found that this oversimplified statistical evidence is entitled to little weight, because it does not account for factors that may affect the relative capacity of DBEs to undertake contracting work.<sup>65</sup>

The Ninth Circuit opined that the only other circuit to consider an applied challenge to the federal DBE program was the Eighth Circuit in *Sherbrooke*.<sup>66</sup> In discussing the Eighth Circuit's opinion in *Sherbrook*, the Ninth Circuit reasoned that both Minnesota

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<sup>59</sup> *Gross Seed*, 2002 U S Dist LEXIS 27125 at \* 18.

<sup>60</sup> *Western States*, 407 F 3d at 994.

<sup>61</sup> *Id.* at 989.

<sup>62</sup> *Id.* at 994-95.

<sup>63</sup> *Id.* at 1002-1003.

<sup>64</sup> *Id.* at 1000-1001.

<sup>65</sup> *Id.* at 999-1000.

<sup>66</sup> *Id.* at 996.



and Nebraska had hired outside consulting firms to conduct statistical analyses of the availability and capacity of DBEs in their local market.<sup>67</sup> Accordingly, *Western States* concluded that the Eighth Circuit had relied upon the statistical evidence in the studies to hold that the State's DBE program was narrowly tailored and satisfied strict scrutiny.<sup>68</sup> Citing *Croson*, the Court opined that recipients of federal funds could not use race-conscious methods to meet their DBE goals without a finding of discrimination.<sup>69</sup> The Ninth Circuit also concluded that in order to satisfy the narrowly tailored requirement, even when discrimination is present, the State may only implement a remedial race-conscious program to include those minority groups which have actually suffered discrimination.<sup>70</sup> The Ninth Circuit found insufficient evidence to suggest that minorities currently or previously suffered discrimination in the Washington transportation contracting industry.<sup>71</sup>

Furthermore, the Court found that the State of Washington failed to provide evidence of discrimination within its own contracting market, and thus failed to meet its burden of demonstrating that its DBE program was narrowly tailored to further Congress's compelling remedial interest.<sup>72</sup>

The Court concluded that the District Court erred when it upheld the State's DBE program simply because the State complied with the federal program's requirement.<sup>73</sup> Washington's DBE program was categorized as an "unconstitutional windfall to minority contractors solely on the basis of their race or gender."<sup>74</sup>

To conclude, *Western States* found that Washington's DBE program met the first prong of the test and was held facially constitutional, but it did not pass the second prong because the State's application of the DBE regulations was not narrowly tailored to a finding of statistically significant underutilization of the respective minority groups. Therefore, the State's application of the DBE regulations was deemed unconstitutional.

### ***C. United States Department of Transportation Memorandum***

In response to the *Western States* decision, the USDOT issued its *USDOT Guidance Memorandum* in 2005, setting forth its recommendation for adhering to the Ninth Circuit's requirement to formulate narrowly tailored DBE goals. USDOT recommended

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<sup>67</sup> *Id.* at 996-97.

<sup>68</sup> *Id.*

<sup>69</sup> *Western States*, 407 F.3d at 1002-1003.

<sup>70</sup> *Id.* at 998.

<sup>71</sup> *Id.* at 1002-1003.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 997.

<sup>74</sup> *Id.* at 997-98.



to its recipients in the Ninth Circuit that a disparity study be performed to comport with the evidentiary standards set forth in *Croson*, and required by *Western States*.<sup>75</sup>

#### ***D. Associated General Contractors v. California Department of Transportation***

*Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation (AGC I)*, filed in 2011 in the Eastern District of California, cited civil rights violations in the application of the California Department of Transportation's (Caltrans) 2009 DBE Program.<sup>76</sup> The plaintiff charged that the Equal Protection Clause of the Fourteenth Amendment, the federal DBE program regulations, and the U.S. Constitution generally require that the Caltrans DBE Program be predicated on evidence showing intentional discrimination.<sup>77</sup> The remedial scheme regarding various groups based on Caltrans' statistical evidence, the plaintiff argued, violated the nondiscrimination mandate of Title VI of the 1964 Civil Rights Act.<sup>78</sup> Additionally, the plaintiff argued that Caltrans, as a federal grantee, did not demonstrate that it would lose its federal funds if it did not implement the 2009 DBE program.<sup>79</sup>

Specifically, the plaintiff challenged Caltrans' application of the "Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users" enacted by Congress in 2005.<sup>80</sup> The Act requires that a minimum of ten percent of federal dollars be expended with disadvantaged business enterprises (DBEs).<sup>81</sup>

The plaintiff sought an injunction against Caltrans' DBE program, declaring the program unconstitutional.<sup>82</sup> The plaintiff asserted that Caltrans must identify intentional acts of discrimination, and that failing to identify specific acts of intentional discrimination renders its program unconstitutional.<sup>83</sup> The program was also attacked on the ground that some of the categories included in the DBE goal did not include sufficient specific statistical evidence pertaining to minority women.<sup>84</sup> The statistical evidence in the disparity study found disparities for minorities, but the findings were not broken down by gender.<sup>85</sup>

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<sup>75</sup> We note that the USDOT regulations, as demanded in 1992, recommend the use of a disparity study, among other availability sources, for setting the DBE goals.

<sup>76</sup> *Associated Gen. Contractors of America v. Cal. Dep't of Transp. (AGC I)*, Hr'g Tr. 11-58 2 (March 23, 2011).

<sup>77</sup> *Id.* at Hr'g Tr. 46 4-7.

<sup>78</sup> *Associated Gen. Contractors of America v. Cal. Dep't of Transp. (AGC II)*, 713 F.3d 1187, 1193 (9th Cir. 2013).

<sup>79</sup> *AGC I*, Hr'g Tr. 10 3-16.

<sup>80</sup> *Id.* at Hr'g Tr. 40 23.

<sup>81</sup> *Id.* at Hr'g Tr. 41 1-5.

<sup>82</sup> *Id.* at Hr'g Tr. 42 19-22.

<sup>83</sup> *Id.* at Hr'g Tr. 46 4-12.

<sup>84</sup> *Id.* at Hr'g Tr. 46 12-18.

<sup>85</sup> *Id.* at Hr'g Tr. 46 18-21.



To rebut the plaintiff's claim, Caltrans argued that its program met the requirements set forth in *Western States*' two-pronged test for narrow tailoring.<sup>86</sup> The two prongs were: the presence or absence of discrimination in the State's transportation contracting industry, and the narrowly tailored remedy limited to minority groups that actually had suffered discrimination.<sup>87</sup>

The court compared the probative evidence presented in *Western States* and *AGC I*. It was determined in *Western States* that there was insufficient evidence of discrimination within the Department's own contracting market.<sup>88</sup> Thus, the State of Washington failed to meet its burden of demonstrating that its DBE program was narrowly tailored to further Congress's compelling remedial interest.<sup>89</sup> In *Western States*, the proportion of DBE firms in the State was compared with the percentage of contracts awarded to DBEs on race-neutral contracts to calculate a disparity.<sup>90</sup> This methodology was found by the Appellate Court to be oversimplified.<sup>91</sup>

In contrast, the evidence Caltrans proffered was characterized by the District Court as extensive statistical and anecdotal evidence of discrimination in the California contracting industry.<sup>92</sup> On March 23, 2011, the District Court in *AGC I* granted summary judgment in favor of Caltrans.<sup>93</sup> The Court found that Caltrans met the standard set forth in *Croson* by identifying discrimination with "specificity," and by showing a pattern of "deliberate exclusion."<sup>94</sup> The plaintiff appealed the District Court's decision to the Ninth Circuit Court of Appeal in *AGC II*. On April 16, 2013 Judge Jerome Harris delivered the opinion for the Ninth Circuit, dismissed the plaintiff's appeal, and upheld Caltrans' DBE Program ruling that it survived the strict scrutiny standard.<sup>95</sup> Judge Harris opined that Caltrans presented sufficient evidence of discrimination in the California transportation contracting industry, and that the DBE Program was narrowly tailored to remedy the identified discrimination.<sup>96</sup>

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<sup>86</sup> *Id.* at Hr'g Tr. 47.3-17.

<sup>87</sup> *AGC I*, Hr'g Tr. 47.3-17.

<sup>88</sup> *Id.* at Hr'g Tr. 54.8-21.

<sup>89</sup> *Id.* at Hr'g Tr. 54.8-22.

<sup>90</sup> *Id.* at Hr'g Tr. 55.3-5.

<sup>91</sup> *Id.* at Hr'g Tr. 55.5-9.

<sup>92</sup> *Id.* at Hr'g Tr. 55.10-56.15.

<sup>93</sup> *Id.* at Hr'g Tr. 56.16.

<sup>94</sup> *Croson*, 488 U.S. at 504, 509.

<sup>95</sup> *AGC II*, 713 F.3d at 1200.

<sup>96</sup> *Id.*



## **E. California State Statute**

California Constitution Section 31 is a constitutional amendment that precludes the use of preferences in the award of public contracts. The amendment allows for the affirmative action requirements of a federal grant. Section 31 states that “if any parts are found to be in conflict with federal law or the U.S. Constitution, the section shall be implemented to the maximum extent that federal law and the U.S. Constitution permit.”

The question of the appropriate application of the DBE program by a USDOT grantee in California was reviewed by the Ninth Circuit in *AGC II* and the court determined that *Caltrans* was required to comply with the DBE regulations.<sup>97</sup> The federal court, however, has yet to rule on whether Section 31 of the California Constitution conflicts with the Equal Protection Clause of the Fourteenth Amendment.<sup>98</sup>

## **IV. CONCLUSION**

The federal laws the Authority must adhere to in order to institute a constitutionally sound race-conscious contracting program as indicated by the FRA Grant/Cooperative Agreement were assessed. The Grant/Cooperative Agreement also references the NCHRP report which states the necessity for USDOT recipients in the Ninth Circuit to gather evidence of discrimination as part of developing an availability and disparity study in accordance with the case law.<sup>99</sup> The NCHRP report further states that all state departments of transportation in the Ninth Circuit have opted to collect such evidence by performing disparity studies.<sup>100</sup> *Croson* is the legal standard presented in the NCHRP report, and is the applicable legal standard for the Authority’s Utilization and Disparity Study.

When the Supreme Court decided *Croson*, it changed the legal standard for the implementation of race-conscious locally funded contracting programs; *Adarand* applied the *Croson* standard to the DBE regulations. The Ninth Circuit, in *Western States*, applied the strict scrutiny standard to the formulation of goals required by the DBE regulations. Thereafter, USDOT directed its recipients in the Ninth Circuit to perform a disparity study to narrowly tailor its DBE goals. In 2013, the Ninth Circuit Court found in the *AGC II* decision that the Caltrans’ race and gender-conscious DBE program was constitutional.<sup>101</sup> The plaintiff initially claimed that the Caltrans DBE program violated the State constitution.<sup>102</sup> Section 31 of the California constitution prohibits any preference

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<sup>97</sup> *ACG II*, 713 F 3d at 1200

<sup>98</sup> *Id.* at 1193

<sup>99</sup> JON WAINWRIGHT & COLETTE HOLT, NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM (NCHRP) REPORT 644 GUIDELINES FOR CONDUCTING A DISPARITY AND AVAILABILITY STUDY FOR THE FEDERAL DBE PROGRAM AND NCHRP SYNTHESIS 416 14 (NCHRP 2010).

<sup>100</sup> *Id.*

<sup>101</sup> *ACG II*, 713 F 3d at 1190, 1200

<sup>102</sup> *Id.* at 1193



based on race, sex, color, ethnicity, or national origin.<sup>103</sup> However, Section 31 allows recipients of federal funds to implement race-based measures in order to maintain eligibility for any federal funds.<sup>104</sup> In *ACG II*, the court noted that the plaintiff's challenge to the race-based goal provisions of the Caltrans DBE program had been dropped.<sup>105</sup> Thus, the application of race-based DBE goals in California has not been found unconstitutional.



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<sup>103</sup> CAL CONSTITUTION art. 1, § 31(a)

<sup>104</sup> See CAL CONSTITUTION art. 1, § 31(e)

<sup>105</sup> *ACG II*, 713 F 3d at 1193

# **CHAPTER 2 :**

## **PRIME CONTRACTOR UTILIZATION ANALYSIS**

### **I. INTRODUCTION**

This chapter presents the analysis of the prime contract awards provided by the California High-Speed Rail Authority (Authority). The 74 contracts were awarded to prime contractors during the study period, which was July 1, 2006 to June 30, 2013. In accordance with Mason Tillman's contract, the prime contractor utilization analysis was limited to professional services, design-build, and construction contracts awarded during the study period. However, during the seven-year study period, the Authority only awarded contracts for professional services, including architecture and engineering. In addition to architecture and engineering services, professional services includes construction management, landscape architecture, surveying, mapping, legal, accountants, technical, research planning, and consultant services.

The award data in the Disparity Study (Study) is disaggregated into nine groups, including the six ethnic and gender groups set forth in the United States Department of Transportation (USDOT) Disadvantaged Business Enterprise (DBE) regulations 49 CFR Part 26. The nine groups are listed in Table 2.01.

**Table 2.01: Business Ethnic and Gender Groups**

<b>Ethnicity and Gender Category</b>	<b>Definition</b>
African American Businesses	Businesses owned by male and female African Americans
Asian-Pacific American Businesses	Businesses owned by male and female Asian-Pacific Americans
Subcontinent Asian American Businesses	Businesses owned by male and female Subcontinent Asian Americans
Hispanic American Businesses	Businesses owned by male and female Hispanic Americans



Ethnicity and Gender Category	Definition
Native American Businesses	Businesses owned by male and female Native Americans
Minority-owned Business Enterprises	Businesses owned by African American, Asian-Pacific American, Subcontinent Asian American, Hispanic American, and Native American males and females
Minority and Women-owned Business Enterprises	Businesses owned by Minority Males, Minority Females, and Caucasian Females
Non-Minority Female-owned Business Enterprises	Businesses owned by Caucasian Females
Non-Minority Male-owned Business Enterprises	Businesses owned by Caucasian Males, and businesses that could not be identified as Minority or Female-owned

## **II. PRIME CONTRACT DATA SOURCES**

The data for the prime contractor utilization analysis includes contract awards and amendments compiled by the Authority’s Office of Contracts and Procurement, proposal budget amounts collected from bids and proposals on file with the Authority, and amendments provided by the Authority’s prime contractors. Authority sources also provided limited information on amendments to the original awards. However, the majority of the contract amendment amounts were secured directly from the prime contractors.

Payment data provided by the Authority was not adequate for the analysis. The payment data the Authority compiled was limited to payments made in the 2012-2013 fiscal year on 16 prime contracts. Since the Authority could not provide payment data for the contracts awarded during the entire study period, the prime utilization analysis was based on the original award amounts and the amendments to the original awards. Contracts the Authority provided included not-for-profits, government agencies, educational institutions, and utilities. These contracts were marked for exclusion and were not included in the analysis.

Each contract was classified by industry based mainly on the contract title and the contractor’s name. A few contracts did have a description of the services provided. This information was also used to identify industry.

After the industry classifications of each contract were assigned as either professional, architecture, or engineering services, the ethnicity and gender of each prime contractor were verified. The ethnicity and gender information the Authority maintained for prime



contractors was incomplete. Since ethnicity and gender information is central to the validity of the prime contractor utilization analysis, Mason Tillman conducted research to reconstruct the ethnicity and gender for each prime contractor. The prime contractors' names were cross-referenced with certification lists, chambers of commerce lists, and trade organization membership directories. The prime contractors' websites were also reviewed for the ethnicity and gender of the business owners. Prime contractors whose ethnicity and gender could not be verified through published sources were surveyed. Once the ethnicity and gender research was completed and the contract records were cleaned, the utilization analysis was performed. For purposes of the analysis, businesses that were employee-owned or publicly traded were classified as non-minority male. Therefore Non-Minority Male-owned Business Enterprises is inclusive of these additional forms of business ownership.

### **III. PRIME CONTRACTOR UTILIZATION THRESHOLDS**

Professional Services contracts were analyzed at the five dollar levels depicted in Table 2.02. One level included all contracts regardless of award amount. A second level included all contracts \$14,000,000 and under. The third level included all contracts \$3,500,000 and under. The latter two levels were designated because under California Government Code (GC) and the California Code of Regulations (CCR)<sup>106</sup>, the thresholds define a Small Business Enterprise and Microbusiness, respectively. The fourth and fifth levels, under \$250,000 and under \$50,000, are the informal thresholds defined in the California Department of General Services (DGS) procurement standards. DGS stipulates that contracts valued from \$5000.01 to \$249,999.99 can be awarded to a certified Small or Disabled Veteran-owned Business, provided that the department has received at least two responsive bids. As set forth in the California Public Contract Code (PCC), contracts under \$50,000 can be awarded without a competitive bid process or advertising, regardless of business certification status.<sup>107</sup>

**Table 2.02: Contract Analysis Thresholds for California High-Speed Rail Authority**

Contract Analysis Threshold	Threshold Amount
All Contracts	None
Informal Thresholds	Under \$50,000 Under \$250,000

<sup>106</sup> GC § 14837 (d)(1)-(2), 2 CCR 1896.12(a)-(b) <http://www.dgs.ca.gov/pd/programs/osds/sbeliabilitybenefits.aspx>. Last accessed March 17, 2014.

<sup>107</sup> GC §§ 11256, 14616, 14838.5 (a)-(b), PCC 10335.5 (e)(6), 10340 (b)(6). [http://www.documents.dgs.ca.gov/pd/polinproc/v2Chapt04\\_10\\_0730.doc](http://www.documents.dgs.ca.gov/pd/polinproc/v2Chapt04_10_0730.doc). Last accessed March 17, 2014.



Contract Analysis Threshold	Threshold Amount
Small Business Threshold	\$14,000,000
Microbusiness Threshold	\$3,500,000

#### **IV. PRIME CONTRACTOR UTILIZATION**

##### **A. Professional Services Prime Contractors**

As depicted in Table 2.03, the Authority issued 74 Professional Services prime contracts during the July 1, 2006 to June 30, 2013 study period. The awards made by the Authority during the study period totaled \$1,020,574,634.

**Table 2.03: Total Prime Contracts and Dollars Awarded:  
Professional Services, July 1, 2006 to June 30, 2013**

Industry	Total Number of Contracts	Total Dollars Awarded
Professional Services	74	\$1,020,574,634

##### **B. Highly Used Professional Services Prime Contractors**

As depicted in Table 2.04, the 74 Professional Services prime contracts were received by 49 unique vendors.

**Table 2.04: Professional Services Prime Contracts**

Total Prime Contracts	74
Total Utilized Vendors	49
Total Expenditures	\$1,020,574,634



An analysis was performed to determine the number of vendors that received at least 70 percent of the Professional Services prime contract dollars. Table 2.05 below presents the distribution of the Authority's Professional Services prime contract dollars by the number of vendors. Five of the 49 vendors, which were non-minority males, publicly-traded, and employee-owned received \$777,479,304 or 76 percent of the Professional Services prime

contract dollars. The findings illustrate that a small group of non-minority male prime contractors received the majority of the Professional Services prime contract dollars awarded by the Authority. The contracts received by these five businesses ranged from \$55,000,000 to \$295,000,000.

**Table 2.05: Professional Services Prime Contracts by Number of Vendors**

Vendors	Total Dollars Awarded	Percent of Dollars Awarded <sup>108</sup>	Number of Contracts Awarded	Percent of Contracts Awarded
5 Highly Used Vendors	\$777,479,304	76%	7	9.46%
<b>49 Total Vendors</b>	<b>\$1,020,823,384</b>	<b>100%</b>	<b>74</b>	<b>100.00%</b>

### ***C. Utilization of Certified Small Business Enterprises***

Table 2.06 details the Authority's use of DGS certified Small Business Enterprises (SBEs) on small and large contracts. As shown, the Authority awarded one contract under \$50,000 to an SBE and 17 contracts under \$50,000 to non-SBEs. No competitive bidding is required at this level. The Authority awarded 14 contracts valued from \$50,000 to \$249,999 to SBEs and 10 to non-SBEs. In addition, the Authority awarded two contracts over \$3,500,000 to SBEs which demonstrates that SBEs have the capacity to perform both small and large contracts, whether competitively bid or not. SBEs received none of the contracts valued \$14,000,000 and greater.

**Table 2.06: SBE Utilization by Threshold**

Contract Threshold	Number of Contracts Awarded to SBEs	Total Dollars Awarded to SBEs	Number of Contracts Awarded to Non-SBEs	Total Dollars Awarded to Non-SBEs
\$1 - \$49,999.99	1	\$10,000	17	\$493,335
\$50,000 - \$249,999	14	\$3,188,365	10	\$1,036,200
\$250,000 - \$3,499,999	1	\$406,041	11	\$15,002,500
\$3,500,000 - \$14,000,000	2	\$17,000,000	7	\$48,750,000
Greater than \$14,000,000	0	\$0	11	\$934,688,193

<sup>108</sup> Percentages are rounded to the nearest whole number



**D. Utilization of Certified Disabled Veteran-Owned Business Enterprises**

Table 2.07 details the Authority's use of DGS certified Disabled Veteran-owned Business Enterprises (DVBEs) on small and large contracts. As shown, the Authority awarded no contracts under \$50,000 to DVBEs and 18 contracts under \$50,000 to non-DVBEs. The Authority also awarded 13 contracts under \$250,000 to one DVBE firm. Contracts less than \$250,000 can be awarded without a competitive bid process utilizing the SB/DVBE option. One competitively bid contract, valued at \$406,041, was also awarded to a DVBE. DVBEs received no contracts \$3,500,000 and greater.

**Table 2.07: DVBE Utilization by Threshold**

Contract Threshold	Number of Contracts Awarded to DVBEs	Total Dollars Awarded to DVBEs	Number of Contracts Awarded to Non-DVBEs	Total Dollars Awarded to Non-DVBEs
\$1 - \$49,999	0	\$0	18	\$503,335
\$50,000 - \$249,999	13	\$3,088,365	11	\$1,136,200
\$250,000 - \$3,499,999	1	\$406,041	11	\$15,002,500
\$3,500,000 - \$14,000,000	0	\$0	9	\$65,750,000
Greater than \$14,000,000	0	\$0	11	\$934,688,193



### **E. Utilization of Certified Disadvantaged Business Enterprises**

Table 2.08 details the Authority's use of California Unified Certification Program (CUCP) certified Disadvantaged Business Enterprises (DBEs). As shown, the Authority awarded no contracts under \$50,000 to DBEs and 18 contracts under \$50,000 to non-DBEs. The Authority also awarded one contract under \$250,000 to a DBE firm. Contracts less than \$250,000 can be awarded without a competitive bid process utilizing the SB/DVBE<sup>109</sup> option. Two contracts, valued at \$8,500,000 each were also awarded to DBEs. DBEs received no contracts \$14,000,000 and greater.

**Table 2.08: DBE Utilization by Threshold**

Contract Threshold	Number of Contracts Awarded to DBEs	Total Dollars Awarded to DBEs	Number of Contracts Awarded to Non-DBEs	Total Dollars Awarded to Non-DBEs
\$1 - \$49,999	0	\$0	18	\$503,335
\$50,000 - \$249,999	1	\$100,000	23	\$4,124,565
\$250,000 - \$3,499,999	0	\$0	12	\$15,408,541
\$3,500,000 - \$14,000,000	2	\$17,000,000	7	\$48,750,000
Greater than \$14,000,000	0	\$0	11	\$934,688,193



## **F. Attainment of the Overall Small Business Goal**

The Authority's Small and Disadvantaged Business Enterprise Program established in August 2012<sup>110</sup> set an overall 30 percent goal. No contracting goal was in place before the enactment of the Small and Disadvantaged Business Enterprise Program in August 2012. The Small and Disadvantaged Business Enterprise Program, as approved, allows for the participation of businesses owned by socially and economically disadvantaged individuals, which includes certified Minority-owned Business Enterprises (MBEs), and Women-owned Business Enterprises (WBEs), as well as, SBEs, and DVBEs, and federally certified DBEs and 8(a) firms to count toward the overall 30 percent small business utilization goal. Table 2.09 details the Authority's use of SB/MBE/WBE/DBE/DVBEs as certified by CUCP and DGS. As shown, the Authority awarded two contracts under \$50,000 to certified firms and 16 contracts under \$50,000 to non-certified firms. The Authority also awarded 14 contracts under \$250,000 to certified firms and 10 to non-certified firms. Contracts less than \$250,000 can be awarded without a competitive bid process utilizing the SB/DVBE option<sup>111</sup>. Two contracts from \$250,000 to \$3,500,000 were awarded to certified firms and 11 to non-certified firms. Certified firms received no contracts \$14,000,000 and greater. Overall, certified firms received less than three percent of the dollars awarded during the study period.

**Table 2.09: Certified Business Utilization by Threshold**

Contract Threshold	Number of Contracts Awarded to Certified Firms	Total Dollars Awarded to Certified Firms	Percent of Total Dollars Awarded	Number of Contracts Awarded to Non-Certified Firms	Total Dollars Awarded to Non-Certified Firms	Percent of Total Dollars Awarded
\$1 - \$49,999	2	\$33,400	0.003%	16	\$469,935	0.046%
\$50,000 - \$249,999	14	\$3,188,365	0.312%	10	\$1,036,200	0.102%
\$250,000 - \$3,499,999	1	\$406,041	0.040%	11	\$15,002,500	1.470%
\$3,500,000 - \$14,000,000	2	\$17,000,000	1.666%	7	\$48,750,000	4.777%
Greater than \$14,000,000	0	\$0	0.000%	11	\$934,688,193	91.585%
Total	19	\$20,627,806	2.021%	55	\$999,946,828	97.979%



<sup>110</sup> California High-Speed Rail Authority Revised Small and Disadvantaged Business Enterprise Program [http://www.hsr.ca.gov/docs/programs/small\\_business/Small%20and%20Disadvantaged%20Business%20Enterprise%20Program.pdf](http://www.hsr.ca.gov/docs/programs/small_business/Small%20and%20Disadvantaged%20Business%20Enterprise%20Program.pdf) Last accessed March 17, 2014.

<sup>111</sup> Benefits of the SB/DVBE Option to Increase SB/DVBE Participation <http://www.documents.dgs.ca.gov/pdf/smallbus/SBDVBEoption.pdf> Last accessed April 2, 2014.

## **G. All Prime Contracts by Industry**

### **1. Professional Services Prime Contractor Utilization: All Contracts**

Table 2.10 summarizes all prime contract dollars awarded by the Authority on Professional Services prime contracts. Minority-owned Business Enterprises received 0.01 percent of the Professional Services prime contract dollars; Non-Minority Female-owned Business Enterprises received 2.5 percent; and Non-Minority Male-owned Business Enterprises received 97.49 percent of the Professional Services prime contract dollars.

*African Americans* received none of the Professional Services contracts during the study period.

*Asian-Pacific Americans* received none of the Professional Services contracts during the study period.

*Subcontinent Asian Americans* received none of the Professional Services contracts during the study period.

*Hispanic Americans* received two or 2.7 percent of the Professional Services contracts during the study period, representing \$110,000 or 0.01 percent of the contract dollars.

*Native Americans* received none of the Professional Services contracts during the study period.

*Minority-owned Business Enterprises* received two or 2.7 percent of the Professional Services contracts during the study period, representing \$110,000 or 0.01 percent of the contract dollars.

*Non-Minority Female-owned Business Enterprises* received five or 6.76 percent of the Professional Services contracts during the study period, representing \$25,510,230 or 2.5 percent of the contract dollars.

*Minority and Women-owned Business Enterprises* received seven or 9.46 percent of the Professional Services contracts during the study period, representing \$25,620,230 or 2.51 percent of the contract dollars.

*Non-Minority Male-owned Business Enterprises* received 67 or 90.54 percent of the Professional Services contracts during the study period, representing \$994,954,404 or 97.49 percent of the contract dollars.



**Table 2.10: Professional Services Prime Contractor Utilization:  
All Contracts, July 1, 2006 to June 30, 2013**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	0	0.00%	\$0	0.00%
Asian-Pacific Americans	0	0.00%	\$0	0.00%
Subcontinent Asian Americans	0	0.00%	\$0	0.00%
Hispanic Americans	2	2.70%	\$110,000	0.01%
Native Americans	0	0.00%	\$0	0.00%
Non-Minority Females	5	6.76%	\$25,510,230	2.50%
Non-Minority Males	67	90.54%	\$994,954,404	97.49%
<b>TOTAL</b>	<b>74</b>	<b>100.00%</b>	<b>\$1,020,574,634</b>	<b>100.00%</b>
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	0	0.00%	\$0	0.00%
African American Males	0	0.00%	\$0	0.00%
Asian-Pacific American Females	0	0.00%	\$0	0.00%
Asian-Pacific American Males	0	0.00%	\$0	0.00%
Subcontinent Asian American Females	0	0.00%	\$0	0.00%
Subcontinent Asian American Males	0	0.00%	\$0	0.00%
Hispanic American Females	2	2.70%	\$110,000	0.01%
Hispanic American Males	0	0.00%	\$0	0.00%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Non-Minority Females	5	6.76%	\$25,510,230	2.50%
Non-Minority Males	67	90.54%	\$994,954,404	97.49%
<b>TOTAL</b>	<b>74</b>	<b>100.00%</b>	<b>\$1,020,574,634</b>	<b>100.00%</b>
Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	2	2.70%	\$110,000	0.01%
Minority Males	0	0.00%	\$0	0.00%
Non-Minority Females	5	6.76%	\$25,510,230	2.50%
Non-Minority Males	67	90.54%	\$994,954,404	97.49%
<b>TOTAL</b>	<b>74</b>	<b>100.00%</b>	<b>\$1,020,574,634</b>	<b>100.00%</b>
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	2	2.70%	\$110,000	0.01%
Women Business Enterprises	5	6.76%	\$25,510,230	2.50%
<b>Minority and Women Business Enterprises</b>	<b>7</b>	<b>9.46%</b>	<b>\$25,620,230</b>	<b>2.51%</b>
Non-Minority Male Business Enterprises	67	90.54%	\$994,954,404	97.49%
<b>TOTAL</b>	<b>74</b>	<b>100.00%</b>	<b>\$1,020,574,634</b>	<b>100.00%</b>



## **H. Prime Contracts \$14,000,000 and Under by Industry**

### **2. Professional Services Prime Contractor Utilization: Contracts \$14,000,000 and under**

Table 2.11 summarizes all contract dollars awarded by the Authority on Professional Services prime contracts \$14,000,000 and under. Minority-owned Business Enterprises received 0.13 percent of the Professional Services prime contract dollars; Non-Minority Female-owned Business Enterprises received 29.70 percent; and Non-Minority Male-owned Business Enterprises received 70.17 percent.

*African Americans* received none of the Professional Services contracts \$14,000,000 and under during the study period.

*Asian-Pacific Americans* received none of the Professional Services contracts \$14,000,000 and under during the study period.

*Subcontinent Asian Americans* received none of the Professional Services contracts \$14,000,000 and under during the study period.

*Hispanic Americans* received two or 3.17 percent of the Professional Services contracts \$14,000,000 and under during the study period, representing \$110,000 or 0.13 percent of the contract dollars.

*Native Americans* received none of the Professional Services contracts \$14,000,000 and under during the study period.

*Minority-owned Business Enterprises* received two or 3.17 percent of the Professional Services contracts \$14,000,000 and under during the study period, representing \$110,000 or 0.13 percent of the contract dollars.

*Non-Minority Female-owned Business Enterprises* received five or 7.94 percent of the Professional Services contracts \$14,000,000 and under during the study period, representing \$25,510,230 or 29.70 percent of the contract dollars.

*Minority and Women-owned Business Enterprises* received seven or 11.11 percent of the Professional Services contracts \$14,000,000 and under during the study period, representing \$25,620,230 or 29.83 percent of the contract dollars.

*Non-Minority Male-owned Business Enterprises* received 56 or 88.89 percent of the Professional Services contracts \$14,000,000 and under during the study period, representing \$60,266,211 or 70.17 percent of the contract dollars.



**Table 2.11: Professional Services Prime Contractor Utilization:  
Contracts \$14,000,000 and under, July 1, 2006 to June 30, 2013**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	0	0.00%	\$0	0.00%
Asian-Pacific Americans	0	0.00%	\$0	0.00%
Subcontinent Asian Americans	0	0.00%	\$0	0.00%
Hispanic Americans	2	3.17%	\$110,000	0.13%
Native Americans	0	0.00%	\$0	0.00%
Non-Minority Females	5	7.94%	\$25,510,230	29.70%
Non-Minority Males	56	88.89%	\$60,266,211	70.17%
<b>TOTAL</b>	<b>63</b>	<b>100.00%</b>	<b>\$85,886,441</b>	<b>100.00%</b>
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	0	0.00%	\$0	0.00%
African American Males	0	0.00%	\$0	0.00%
Asian-Pacific American Females	0	0.00%	\$0	0.00%
Asian-Pacific American Males	0	0.00%	\$0	0.00%
Subcontinent Asian American Females	0	0.00%	\$0	0.00%
Subcontinent Asian American Males	0	0.00%	\$0	0.00%
Hispanic American Females	2	3.17%	\$110,000	0.13%
Hispanic American Males	0	0.00%	\$0	0.00%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Non-Minority Females	5	7.94%	\$25,510,230	29.70%
Non-Minority Males	56	88.89%	\$60,266,211	70.17%
<b>TOTAL</b>	<b>63</b>	<b>100.00%</b>	<b>\$85,886,441</b>	<b>100.00%</b>
Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	2	3.17%	\$110,000	0.13%
Minority Males	0	0.00%	\$0	0.00%
Non-Minority Females	5	7.94%	\$25,510,230	29.70%
Non-Minority Males	56	88.89%	\$60,266,211	70.17%
<b>TOTAL</b>	<b>63</b>	<b>100.00%</b>	<b>\$85,886,441</b>	<b>100.00%</b>
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	2	3.17%	\$110,000	0.13%
Women Business Enterprises	5	7.94%	\$25,510,230	29.70%
<b>Minority and Women Business Enterprises</b>	<b>7</b>	<b>11.11%</b>	<b>\$25,620,230</b>	<b>29.83%</b>
Non-Minority Male Business Enterprises	56	88.89%	\$60,266,211	70.17%
<b>TOTAL</b>	<b>63</b>	<b>100.00%</b>	<b>\$85,886,441</b>	<b>100.00%</b>



## ***I. Prime Contracts \$3,500,000 and Under by Industry***

### **3. Professional Services Prime Contractor Utilization: Contracts \$3,500,000 and Under**

Table 2.12 summarizes all contract dollars awarded by the Authority on Professional Services prime contracts \$3,500,000 and under. Minority-owned Business Enterprises received 0.55 percent of the Professional Services prime contract dollars; Non-Minority Female-owned Business Enterprises received 0.05 percent; and Non-Minority Male-owned Business Enterprises received 99.4 percent.

*African Americans* received none of the Professional Services contracts \$3,500,000 and under during the study period.

*Asian-Pacific Americans* received none of the Professional Services contracts \$3,500,000 and under during the study period.

*Subcontinent Asian Americans* received none of the Professional Services contracts \$3,500,000 and under during the study period.

*Hispanic Americans* received two or 3.70 percent of the Professional Services contracts \$3,500,000 and under during the study period, representing \$110,000 or 0.55 percent of the contract dollars.

*Native Americans* received none of the Professional Services contracts \$3,500,000 and under during the study period.

*Minority-owned Business Enterprises* received two or 3.70 percent of the Professional Services contracts \$3,500,000 and under during the study period, representing \$110,000 or 0.55 percent of the contract dollars.

*Non-Minority Female-owned Business Enterprises* received two or 3.70 percent of the Professional Services contracts \$3,500,000 and under during the study period, representing \$10,230 or 0.05 percent of the contract dollars.

*Minority and Women-owned Business Enterprises* received four or 7.41 percent of the Professional Services contracts \$3,500,000 and under during the study period, representing \$120,230 or 0.6 percent of the contract dollars.

*Non-Minority Male-owned Business Enterprises* received 50 or 92.59 percent of the Professional Services contracts \$3,500,000 and under during the study period, representing \$20,016,211 or 99.4 percent of the contract dollars.



**Table 2.12: Professional Services Prime Contractor Utilization:  
Contracts \$3,500,000 and under, July 1, 2006 to June 30, 2013**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	0	0.00%	\$0	0.00%
Asian-Pacific Americans	0	0.00%	\$0	0.00%
Subcontinent Asian Americans	0	0.00%	\$0	0.00%
Hispanic Americans	2	3.70%	\$110,000	0.55%
Native Americans	0	0.00%	\$0	0.00%
Non-Minority Females	2	3.70%	\$10,230	0.05%
Non-Minority Males	50	92.59%	\$20,016,211	99.40%
<b>TOTAL</b>	<b>54</b>	<b>100.00%</b>	<b>\$20,136,441</b>	<b>100.00%</b>
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	0	0.00%	\$0	0.00%
African American Males	0	0.00%	\$0	0.00%
Asian-Pacific American Females	0	0.00%	\$0	0.00%
Asian-Pacific American Males	0	0.00%	\$0	0.00%
Subcontinent Asian American Females	0	0.00%	\$0	0.00%
Subcontinent Asian American Males	0	0.00%	\$0	0.00%
Hispanic American Females	2	3.70%	\$110,000	0.55%
Hispanic American Males	0	0.00%	\$0	0.00%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Non-Minority Females	2	3.70%	\$10,230	0.05%
Non-Minority Males	50	92.59%	\$20,016,211	99.40%
<b>TOTAL</b>	<b>54</b>	<b>100.00%</b>	<b>\$20,136,441</b>	<b>100.00%</b>
Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	2	3.70%	\$110,000	0.55%
Minority Males	0	0.00%	\$0	0.00%
Non-Minority Females	2	3.70%	\$10,230	0.05%
Non-Minority Males	50	92.59%	\$20,016,211	99.40%
<b>TOTAL</b>	<b>54</b>	<b>100.00%</b>	<b>\$20,136,441</b>	<b>100.00%</b>
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	2	3.70%	\$110,000	0.55%
Women Business Enterprises	2	3.70%	\$10,230	0.05%
<b>Minority and Women Business Enterprises</b>	<b>4</b>	<b>7.41%</b>	<b>\$120,230</b>	<b>0.60%</b>
Non-Minority Male Business Enterprises	50	92.59%	\$20,016,211	99.40%
<b>TOTAL</b>	<b>54</b>	<b>100.00%</b>	<b>\$20,136,441</b>	<b>100.00%</b>



## **J. Informal Contracts by Industry**

### **4. Professional Services Prime Contractor Utilization: Contracts under \$250,000**

Table 2.13 summarizes all contract dollars awarded by the Authority on Professional Services prime contracts under \$250,000. Minority-owned Business Enterprises received 2.33 percent of the Professional Services prime contract dollars; Non-Minority Female-owned Business Enterprises received 0.22 percent; and Non-Minority Male-owned Business Enterprises received 97.46 percent.

*African Americans* received none of the Professional Services contracts under \$250,000 during the study period.

*Asian-Pacific Americans* received none of the Professional Services contracts under \$250,000 during the study period.

*Subcontinent Asian Americans* received none of the Professional Services contracts under \$250,000 during the study period.

*Hispanic Americans* received two or 4.76 percent of the Professional Services contracts under \$250,000 during the study period, representing \$110,000 or 2.33 percent of the contract dollars.

*Native Americans* received none of the Professional Services contracts under \$250,000 during the study period.

*Minority-owned Business Enterprises* received 2 or 4.76 percent of the Professional Services contracts under \$250,000 during the study period, representing \$110,000 or 2.33 percent of the contract dollars.

*Non-Minority Female-owned Business Enterprises* received two or 4.76 percent of the Professional Services under \$250,000 during the study period, representing \$10,230 or 0.22 percent of the contract dollars.

*Minority and Women-owned Business Enterprises* received four or 9.52 percent of the Professional Services contracts under \$250,000 during the study period, representing \$120,230 or 2.54 percent of the contract dollars.

*Non-Minority Male-owned Business Enterprises* received 38 or 90.48 percent of the Professional Services contracts under \$250,000 during the study period, representing \$4,607,670 or 97.46 percent of the contract dollars.



**Table 2.13: Professional Services Prime Contractor Utilization:  
Contracts under \$250,000, July 1, 2006 to June 30, 2013**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	0	0.00%	\$0	0.00%
Asian-Pacific Americans	0	0.00%	\$0	0.00%
Subcontinent Asian Americans	0	0.00%	\$0	0.00%
Hispanic Americans	2	4.76%	\$110,000	2.33%
Native Americans	0	0.00%	\$0	0.00%
Non-Minority Females	2	4.76%	\$10,230	0.22%
Non-Minority Males	38	90.48%	\$4,607,670	97.46%
<b>TOTAL</b>	<b>42</b>	<b>100.00%</b>	<b>\$4,727,900</b>	<b>100.00%</b>
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	0	0.00%	\$0	0.00%
African American Males	0	0.00%	\$0	0.00%
Asian-Pacific American Females	0	0.00%	\$0	0.00%
Asian-Pacific American Males	0	0.00%	\$0	0.00%
Subcontinent Asian American Females	0	0.00%	\$0	0.00%
Subcontinent Asian American Males	0	0.00%	\$0	0.00%
Hispanic American Females	2	4.76%	\$110,000	2.33%
Hispanic American Males	0	0.00%	\$0	0.00%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Non-Minority Females	2	4.76%	\$10,230	0.22%
Non-Minority Males	38	90.48%	\$4,607,670	97.46%
<b>TOTAL</b>	<b>42</b>	<b>100.00%</b>	<b>\$4,727,900</b>	<b>100.00%</b>
Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	2	4.76%	\$110,000	2.33%
Minority Males	0	0.00%	\$0	0.00%
Non-Minority Females	2	4.76%	\$10,230	0.22%
Non-Minority Males	38	90.48%	\$4,607,670	97.46%
<b>TOTAL</b>	<b>42</b>	<b>100.00%</b>	<b>\$4,727,900</b>	<b>100.00%</b>
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	2	4.76%	\$110,000	2.33%
Women Business Enterprises	2	4.76%	\$10,230	0.22%
<b>Minority and Women Business Enterprises</b>	<b>4</b>	<b>9.52%</b>	<b>\$120,230</b>	<b>2.54%</b>
Non-Minority Male Business Enterprises	38	90.48%	\$4,607,670	97.46%
<b>TOTAL</b>	<b>42</b>	<b>100.00%</b>	<b>\$4,727,900</b>	<b>100.00%</b>



## 5. Professional Services Prime Contractor Utilization: Contracts under \$50,000

Table 2.14 summarizes all contract dollars awarded by the Authority on Professional Services prime contracts under \$50,000. Minority-owned Business Enterprises received 1.99 percent of the Professional Services prime contract dollars; Non-Minority Female-owned Business Enterprises received 8.79 percent; and Non-Minority Male-owned Business Enterprises received 91.21 percent.

*African Americans* received none of the Professional Services contracts under \$50,000 during the study period.

*Asian-Pacific Americans* received none of the Professional Services contracts under \$50,000 during the study period.

*Subcontinent Asian Americans* received none of the Professional Services contracts under \$50,000 during the study period.

*Hispanic Americans* received one or 5.56 percent of the Professional Services under \$50,000 during the study period, representing \$10,000 or 1.99 percent of the contract dollars.

*Native Americans* received none of the Professional Services contracts under \$50,000 during the study period.

*Minority-owned Business Enterprises* received one or 5.56 percent of the Professional Services under \$50,000 during the study period, representing \$10,000 or 1.99 percent of the contract dollars.

*Non-Minority Female-owned Business Enterprises* received two or 11.11 percent of the Professional Services under \$50,000 during the study period, representing \$10,230 or 2.03 percent of the contract dollars.

*Minority and Women Enterprises* received three or 16.67 percent of the Professional Services under \$50,000 during the study period, representing \$20,230 or 4.02 percent of the contract dollars.

*Non-Minority Male-owned Business Enterprises* received 15 or 83.33 percent of the Professional Services contracts under \$50,000 during the study period, representing \$483,105 or 95.98 percent of the contract dollars.



**Table 2.14: Professional Services Prime Contractor Utilization:  
Contracts under \$50,000, July 1, 2006 to June 30, 2013**

Ethnicity	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African Americans	0	0.00%	\$0	0.00%
Asian-Pacific Americans	0	0.00%	\$0	0.00%
Subcontinent Asian Americans	0	0.00%	\$0	0.00%
Hispanic Americans	1	5.56%	\$10,000	1.99%
Native Americans	0	0.00%	\$0	0.00%
Non-Minority Females	2	11.11%	\$10,230	2.03%
Non-Minority Males	15	83.33%	\$483,105	95.98%
<b>TOTAL</b>	<b>18</b>	<b>100.00%</b>	<b>\$503,335</b>	<b>100.00%</b>
Ethnicity and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
African American Females	0	0.00%	\$0	0.00%
African American Males	0	0.00%	\$0	0.00%
Asian-Pacific American Females	0	0.00%	\$0	0.00%
Asian-Pacific American Males	0	0.00%	\$0	0.00%
Subcontinent Asian American Females	0	0.00%	\$0	0.00%
Subcontinent Asian American Males	0	0.00%	\$0	0.00%
Hispanic American Females	1	5.56%	\$10,000	1.99%
Hispanic American Males	0	0.00%	\$0	0.00%
Native American Females	0	0.00%	\$0	0.00%
Native American Males	0	0.00%	\$0	0.00%
Non-Minority Females	2	11.11%	\$10,230	2.03%
Non-Minority Males	15	83.33%	\$483,105	95.98%
<b>TOTAL</b>	<b>18</b>	<b>100.00%</b>	<b>\$503,335</b>	<b>100.00%</b>
Minority and Gender	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Females	1	5.56%	\$10,000	1.99%
Minority Males	0	0.00%	\$0	0.00%
Non-Minority Females	2	11.11%	\$10,230	2.03%
Non-Minority Males	15	83.33%	\$483,105	95.98%
<b>TOTAL</b>	<b>18</b>	<b>100.00%</b>	<b>\$503,335</b>	<b>100.00%</b>
Minority and Women	Number of Contracts	Percent of Contracts	Amount of Dollars	Percent of Dollars
Minority Business Enterprises	1	5.56%	\$10,000	1.99%
Women Business Enterprises	2	11.11%	\$10,230	2.03%
<b>Minority and Women Business Enterprises</b>	<b>3</b>	<b>16.67%</b>	<b>\$20,230</b>	<b>4.02%</b>
Non-Minority Male Business Enterprises	15	83.33%	\$483,105	95.98%
<b>TOTAL</b>	<b>18</b>	<b>100.00%</b>	<b>\$503,335</b>	<b>100.00%</b>



## **V. SUMMARY**

The Authority's prime contractor utilization analysis examined professional services contracts, including architecture and engineering contracts executed during the study period. The 74 contract awards analyzed totaled \$1,020,574,634.

The utilization analysis was performed separately for informal and formal prime contracts. The analysis of informal contracts included contracts under \$250,000 and under \$50,000. The analysis of formal contracts was conducted for three dollar thresholds: all contracts, contracts \$14,000,000 and under, and contracts \$3,500,000 and under. The findings show that businesses owned by minorities and women received 2.51 percent of the Professional Services contract dollars awarded and Non-Minority-owned Business Enterprises received 97.49 percent of the Professional Services contract dollars awarded.

A separate analysis was conducted for certified MBEs, WBEs, SBEs, DBEs and DVBEs. The analysis of certified business utilization revealed that 2.021 percent of Professional Services contract dollars were awarded to these firms.



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## **CHAPTER 3:**

# **SUBCONTRACTOR UTILIZATION ANALYSIS**

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### **I. INTRODUCTION**

As discussed in *Chapter 2: Prime Contractor Utilization Analysis*, a disparity study as required under *Croscon* documents M/WBEs' contracting history in the market area. In this chapter, subcontracts issued by the Authority's prime contractors during the July 1, 2006 to June 30, 2013 study period were analyzed. The objective of the analysis was to determine the level of M/WBE subcontractor utilization by ethnicity and gender in the professional services industry, including architecture and engineering (professional services).

In order to perform this analysis, the subcontracts the Authority's prime contractors awarded to M/WBE and Non-Minority Male subcontractors during the study period were reconstructed. *Chapter 8: Subcontractor Disparity Analysis* will determine if the utilization of M/WBE subcontractors is at parity with their availability.

### **II. SUBCONTRACTOR UTILIZATION DATA SOURCES**

During the study period the Authority did not maintain comprehensive records of the subcontracts awarded by its prime contractors. Therefore, most of the award, payment, and demographic data on subcontracts awarded by the prime contractors had to be reconstructed. A number of steps were undertaken to compile the subcontract records. An initial research effort was made to retrieve hardcopy subcontract records from the Authority's archived files. Contract files and proposals housed in the Authority's file room were reviewed for documents containing subcontractor information. Bid documents, invoices, and close-out reports found in some of the stored files contained subcontractor names, award amounts, payment information, and contact data. The relevant documents were scanned and the information was entered into Mason Tillman's relational database.

The Authority anticipated that the contract files would contain complete records of all prime contractors and their subcontractors. However, the research effort undertaken in



the Authority's contract files and proposals yielded only limited information. Since the stored files were not complete, additional research was undertaken.

Next, the prime contractors were surveyed in an effort to reconstruct their subcontract records. Each of the Authority's prime contractors was contacted to request the subcontractors' name, contact information, initial awards and amendments, and total payment amounts. To verify subcontractor awards, payments, and participation on each prime contract, up to three attempts were made to contact prime contractors and subcontractors by telephone. Once contacted, the prime contractors and subcontractors had the option of verifying data by telephone, email, facsimile, or mail. If the subcontractor could not be contacted, the data collected from prime contractor or the Authority's project files were used in the utilization analysis. A total of 193 subcontractor records were reconstructed and used in the subcontractor utilization analysis.

An additional analysis of subcontracts awarded and dollars expended to businesses eligible to meet the Authority's Small and Disadvantaged Business Enterprise Program goals was conducted for the fiscal year in which the Program was authorized. The Authority's Small and Disadvantaged Business Enterprise Program was approved in August 2012, and stipulates that 30 percent of dollars should be spent with SBEs at both the prime contractor and subcontractor levels.

### **III. SUBCONTRACTOR UTILIZATION**

#### **A. All Subcontracts Awarded and Dollars Expended from July 1, 2006 to June 30, 2013**

As depicted in Table 3.01 below, 193 subcontracts were analyzed for the July 1, 2006 to June 30, 2013 study period. The professional services subcontract dollars expended during the July 1, 2006 to June 30, 2013 study period totaled \$125,631,181.97.

**Table 3.01: Total Subcontracts Awarded and Dollars Expended from July 1, 2006 to June 30, 2013**

Industry	Total Number of Subcontracts	Total Dollars Expended
Professional Services	193	\$125,631,181.97

#### **B. Subcontracts Awarded and Dollars Expended from July 1, 2012 to June 30, 2013**

The Small and Disadvantaged Business Enterprise Program was enacted in August 2012. Thus, an analysis was undertaken to determine utilization patterns during the fiscal year in which the program went into effect. As depicted in Table 3.02 below, 10 subcontracts were analyzed for the July 1, 2012 to June 30, 2013 time period. The professional



services subcontract dollars expended during the July 1, 2012 to June 30, 2013 time period totaled \$202,648.56.

**Table 3.02: Total Subcontracts Awarded and Dollars Expended from July 1, 2012 to June 30, 2013**

Industry	Total Number of Subcontracts	Total Dollars Expended
Professional Services	10	\$202,648.56

**C. Subcontracts Awarded and Dollars Expended to Certified Small Businesses**

Table 3.03 details the Authority's prime contractors' use of certified Disadvantaged Business Enterprises (DBE), Disabled Veteran Business Enterprises (DVBE), and Small Business Enterprise (SBEs) on small and large contracts awarded during the July 1, 2006 to June 30, 2013 study period. As shown, the Authority's prime contractors made payments valued under \$50,000 on 14 SBE subcontracts and 61 non-SBE subcontracts; payments valued from \$50,000 to \$249,999 were made on 14 SBE subcontracts and 41 non-SBE subcontracts; payments valued from \$250,000 to \$3,499,999 were made on 21 SBE subcontracts and 33 non-SBE subcontracts; payments valued from \$3,500,000 to \$13,999,999 were made on three SBE subcontracts and five non-SBE subcontracts, and payments valued \$14,000,000 and greater were made on one SBE subcontract and no non-SBE subcontracts.

**Table 3.03: SBE Subcontractor Utilization by Threshold July 1, 2006 to June 30, 2013**

Subcontract Threshold	Number of Subcontracts Awarded to SBEs	Total Dollars Expended with SBEs	Percentage of Total Award Dollars	Number of Subcontracts Awarded to Non-SBEs	Total Dollars Expended with Non-SBEs	Percentage of Total Award Dollars
\$1 - \$49,999	14	\$362,280	0.29%	61	\$832,869	0.66%
\$50,000 - \$249,999	14	\$1,736,388	1.38%	41	\$4,665,461	3.71%
\$250,000 - \$3,499,999	21	\$18,677,431	14.87%	33	\$28,203,411	22.45%
\$3,500,000 - \$13,999,999	3	\$18,722,686	14.90%	5	\$32,490,179	25.86%
\$14,000,000 and More	1	\$19,940,477	15.87%	0	\$0	0.00%
Total	53	\$59,439,261	47.31%	140	\$66,191,921	52.69%



Table 3.04 details the Authority prime contractors' use of SBEs on small and large contracts from July 1, 2012 to June 30, 2013. As shown, the Authority's prime contractors made payments valued under \$50,000 on one SBE subcontracts and 8 non-SBE subcontracts.

**Table 3.04: SBE Utilization by Threshold, July 1, 2012 to June 30, 2013**

Subcontract Threshold	Number of Subcontracts Awarded to SBEs	Total Dollars Expended with SBEs	Percentage of Total Award Dollars	Number of Subcontracts Awarded to Non-SBEs	Total Dollars Expended with Non-SBEs	Percentage of Total Award Dollars
\$1 - \$49,999	1	\$7,937	3.92%	8	\$112,284	55.41%
\$50,000 - \$249,999	0	\$0	0.00%	1	\$82,428	40.68%
\$250,000 - \$3,499,999	0	\$0	0.00%	0	\$0	0.00%
\$3,500,000 - \$13,999,999	0	\$0	0.00%	0	\$0	0.00%
\$14,000,000 and More	0	\$0	0.00%	0	\$0	0.00%
Total	1	\$7,937	3.92%	9	\$194,712	96.08%



### ***D. Professional Services Subcontracts Awarded and Dollars Expended from July 1, 2006 to June 30, 2013***

Table 3.05 depicts the professional services subcontracts awarded and dollars expended by the Authority's prime contractors during the study period. MBEs and Small Business Enterprises received 5.58 percent of the professional services subcontract dollars expended; Non-Minority Female-owned Business Enterprises received 9.74 percent; and Non-Minority Male-owned Business Enterprises received 84.67 percent of subcontract dollars expended.

*African American Businesses* received three, or 1.55 percent, of Authority's professional services subcontracts during the study period, representing \$693,321.80, or 0.55 percent of the subcontract dollars expended.

*Asian-Pacific American Businesses* received nine, or 4.66 percent, of Authority's professional services subcontracts during the study period, representing \$2,046,754.13, or 1.63 percent of the subcontract dollars expended.

*Subcontinent Asian American Businesses* received six, or 3.11 percent, of Authority's professional services subcontracts during the study period, representing \$1,551,690.22, or 1.24 percent of the subcontract dollars expended.

*Hispanic American Businesses* received seven, or 3.63 percent, of Authority's professional services subcontracts during the study period, representing \$2,717,111.89, or 2.16 percent of the subcontract dollars expended.

*Native American Businesses* received none of Authority's professional services subcontracts during the study period expended.

*Minority-owned Business Enterprises* received 25, or 12.95 percent, of Authority's professional services subcontracts during the study period, representing \$7,008,878.04, or 5.58 percent of the subcontract dollars expended.

*Non-Minority Female-owned Business Enterprises* received 20, or 10.36 percent, of Authority's professional services subcontracts during the study period, representing \$12,332,525.29, or 9.82 percent of the subcontract dollars expended.

*Minority and Women-owned Business Enterprises* received 44, or 22.32 percent, of Authority's professional services subcontracts during the study period, representing \$19,238,636.33, or 15.4 percent of the subcontract dollars expended.

*Non-Minority Male-owned Business Enterprises* received 148, or 77.08 percent, of Authority's professional services subcontracts during the study period, representing \$106,289,778.64, or 84.60 percent of the subcontract dollars expended.



**Table 3.05: Professional Services Subcontractor Utilization,  
July 1, 2006 to June 30, 2013**

Ethnicity	Number of Subcontracts	Percent of Subcontracts	Amount of Dollars Expended	Percent of Dollars Expended
African Americans	3	1.55%	\$ 693,321.80	0.55%
Asian-Pacific Americans	9	4.66%	\$ 2,046,754.13	1.63%
Subcontinent Asian Americans	6	3.11%	\$ 1,551,690.22	1.24%
Hispanic Americans	7	3.63%	\$ 2,717,111.89	2.16%
Native Americans	0	0.00%	\$ -	0.00%
Non-Minority Females	20	10.36%	\$ 12,332,525.29	9.82%
Non-Minority Males	148	76.68%	\$ 106,289,778.64	84.60%
<b>TOTAL</b>	<b>193</b>	<b>100.00%</b>	<b>\$ 125,631,181.97</b>	<b>100.00%</b>
Ethnicity and Gender	Number of Subcontracts	Percent of Subcontracts	Amount of Dollars Expended	Percent of Dollars Expended
African American Females	1	0.52%	\$ 7,936.88	0.01%
African American Males	2	1.04%	\$ 685,384.92	0.55%
Asian-Pacific American Females	3	1.55%	\$ 815,981.10	0.65%
Asian-Pacific American Males	6	3.11%	\$ 1,230,773.03	0.98%
Subcontinent Asian American Females	0	0.00%	\$ -	0.00%
Subcontinent Asian American Males	6	3.11%	\$ 1,551,690.22	1.24%
Hispanic American Females	4	2.07%	\$ 1,718,214.79	1.37%
Hispanic American Males	3	1.55%	\$ 998,897.10	0.80%
Native American Females	0	0.00%	\$ -	0.00%
Native American Males	0	0.00%	\$ -	0.00%
Non-Minority Females	20	10.36%	\$ 12,332,525.29	9.82%
Non-Minority Males	148	76.68%	\$ 106,289,778.64	84.60%
<b>TOTAL</b>	<b>193</b>	<b>100.00%</b>	<b>\$ 125,631,181.97</b>	<b>100.00%</b>
Minority and Gender	Number of Subcontracts	Percent of Subcontracts	Amount of Dollars Expended	Percent of Dollars Expended
Minority Females	8	4.15%	\$ 2,542,132.77	2.02%
Minority Males	17	8.81%	\$ 4,466,745.27	3.56%
Non-Minority Females	20	10.36%	\$ 12,332,525.29	9.82%
Non-Minority Males	148	76.68%	\$ 106,289,778.64	84.60%
<b>TOTAL</b>	<b>193</b>	<b>100.00%</b>	<b>\$ 125,631,181.97</b>	<b>100.00%</b>
Minority and Women	Number of Subcontracts	Percent of Subcontracts	Amount of Dollars Expended	Percent of Dollars Expended
Minority Business Enterprises	25	12.95%	\$ 7,008,878.04	5.58%
Non-Minority Female Business Enterprises	20	10.36%	\$ 12,332,525.29	9.82%
<b>Minority and Women Business Enterprises</b>	<b>45</b>	<b>23.32%</b>	<b>\$ 19,341,403.33</b>	<b>15.40%</b>
Non-Minority Male Business Enterprises	148	76.68%	\$ 106,289,778.64	84.60%
<b>TOTAL</b>	<b>193</b>	<b>100.00%</b>	<b>\$ 125,631,181.97</b>	<b>100.00%</b>



### ***E. Professional Services Subcontracts Expended from July 1, 2012 to June 30, 2013***

Table 3.06 depicts the professional services subcontracts awarded and dollars expended by the Authority's prime contractors from July 1, 2012 to June 30, 2013. MBEs received 3.92 percent of the professional services subcontract dollars expended; Non-Minority Female-owned Business Enterprises received none; and Non-Minority Male-owned Business Enterprises received 96.08 percent of subcontract dollars expended from July 1, 2012 to June 30, 2013.

*African American Businesses* received one, or 10 percent, of the Authority's professional services subcontracts awarded from July 1, 2012 to June 30, 2013, representing \$7,936.88, or 3.92 percent of the subcontract dollars expended from July 1, 2012 to June 30, 2013.

*Asian-Pacific American Businesses* received none of the Authority's professional services subcontract dollars expended from July 1, 2012 to June 30, 2013.

*Subcontinent Asian American Businesses* received none of the Authority's professional services subcontract dollars expended from July 1, 2012 to June 30, 2013.

*Hispanic American Businesses* received none of the Authority's professional services subcontract dollars expended from July 1, 2012 to June 30, 2013.

*Native American Businesses* received none of the Authority's professional services subcontract dollars expended from July 1, 2012 to June 30, 2013.

*Minority-owned Business Enterprises* received one, or 10 percent, of the Authority's professional services subcontracts awarded from July 1, 2012 to June 30, 2013, representing \$7,936.88, or 3.92 percent of the subcontract dollars expended from July 1, 2012 to June 30, 2013.

*Non-Minority Female-owned Business Enterprises* received none of the Authority's professional services subcontract dollars expended from July 1, 2012 to June 30, 2013.

*Minority and Women-owned Business Enterprises* received one, or 10 percent, of the Authority's professional services subcontracts awarded from July 1, 2012 to June 30, 2013, representing \$7,936.88, or 3.92 percent of the subcontract dollars expended from July 1, 2012 to June 30, 2013.

*Non-Minority Male-owned Business Enterprises* received nine, or 90 percent, of the Authority's professional services subcontracts awarded from July 1, 2012 to June 30, 2013, representing \$194,711.69, or 96.08 percent of the subcontracts expended from July 1, 2012 to June 30, 2013.



**Table 3.06: Professional Services Subcontractor Utilization,  
July 1, 2012 to June 30, 2013**

<b>Ethnicity</b>	<b>Number of Subcontracts</b>	<b>Percent of Subcontracts</b>	<b>Amount of Dollars Expended</b>	<b>Percent of Dollars Expended</b>
African Americans	1	10.00%	\$ 7,936.88	3.92%
Asian-Pacific Americans	0	0.00%	\$ -	0.00%
Subcontinent Asian Americans	0	0.00%	\$ -	0.00%
Hispanic Americans	0	0.00%	\$ -	0.00%
Native Americans	0	0.00%	\$ -	0.00%
Non-Minority Females	0	0.00%	\$ -	0.00%
Non-Minority Males	9	90.00%	\$ 194,711.68	96.08%
<b>TOTAL</b>	<b>10</b>	<b>100.00%</b>	<b>\$ 202,648.56</b>	<b>100.00%</b>
<b>Ethnicity and Gender</b>	<b>Number of Subcontracts</b>	<b>Percent of Subcontracts</b>	<b>Amount of Dollars Expended</b>	<b>Percent of Dollars Expended</b>
African American Females	1	10.00%	\$ 7,936.88	3.92%
African American Males	0	0.00%	\$ -	0.00%
Asian-Pacific American Females	0	0.00%	\$ -	0.00%
Asian-Pacific American Males	0	0.00%	\$ -	0.00%
Subcontinent Asian American Females	0	0.00%	\$ -	0.00%
Subcontinent Asian American Males	0	0.00%	\$ -	0.00%
Hispanic American Females	0	0.00%	\$ -	0.00%
Hispanic American Males	0	0.00%	\$ -	0.00%
Native American Females	0	0.00%	\$ -	0.00%
Native American Males	0	0.00%	\$ -	0.00%
Non-Minority Females	0	0.00%	\$ -	0.00%
Non-Minority Males	9	90.00%	\$ 194,711.68	96.08%
<b>TOTAL</b>	<b>10</b>	<b>100.00%</b>	<b>\$ 202,648.56</b>	<b>100.00%</b>
<b>Minority and Gender</b>	<b>Number of Subcontracts</b>	<b>Percent of Subcontracts</b>	<b>Amount of Dollars Expended</b>	<b>Percent of Dollars Expended</b>
Minority Females	1	10.00%	\$ 7,936.88	3.92%
Minority Males	0	0.00%	\$ -	0.00%
Non-Minority Females	0	0.00%	\$ -	0.00%
Non-Minority Males	9	90.00%	\$ 194,711.68	96.08%
<b>TOTAL</b>	<b>10</b>	<b>100.00%</b>	<b>\$ 202,648.56</b>	<b>100.00%</b>
<b>Minority and Women</b>	<b>Number of Subcontracts</b>	<b>Percent of Subcontracts</b>	<b>Amount of Dollars Expended</b>	<b>Percent of Dollars Expended</b>
Minority Business Enterprises	1	10.00%	\$ 7,936.88	3.92%
Non-Minority Female Business Enterprises	0	0.00%	\$ -	0.00%
Minority and Women Business Enterprises	1	10.00%	\$ 7,936.88	3.92%
Non-Minority Male Business Enterprises	9	90.00%	\$ 194,711.68	96.08%
<b>TOTAL</b>	<b>10</b>	<b>100.00%</b>	<b>\$ 202,648.56</b>	<b>100.00%</b>



## **F. Summary**

A total of 193 professional services subcontracts were analyzed for the July 1, 2006 to June 30, 2013 study period. The subcontractor utilization analysis revealed that MBEs received 5.58 percent of the subcontract dollars expended, and Non-Minority Female-owned Business Enterprises received 9.82 percent of the subcontract dollars expended.

A utilization analysis was also conducted for subcontracts awarded and dollars expended during the fiscal year in which the Small and Disadvantaged Business Enterprise Program goal was enacted. This analysis revealed that one subcontract, valued at \$7,936.88 or 3.92 percent of the subcontract dollars, was expended with an African American firm. The nine remaining subcontracts, valued at \$202,648.56 or 96.08 percent of the subcontract dollars, were expended with Non-Minority Male-owned Business Enterprises.



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# **CHAPTER 4 :**

## **MARKET AREA ANALYSIS**

### **I. MARKET AREA DEFINITION**

#### **A. Legal Criteria for Geographic Market Area**

The Supreme Court's decision in *City of Richmond v. J.A. Croson Co. (Croson)*<sup>112</sup> held that programs established by local governments to set goals for the participation of minority businesses must be supported by evidence of past discrimination in the awarding of their contracts. Prior to the *Croson* decision, local agencies could implement race-conscious programs without developing a detailed public record to document the underutilization of minority business enterprises in the awarding of contracts. They instead relied on widely recognized societal patterns of discrimination.<sup>113</sup>

*Croson* established that a local government could not rely solely upon discrimination as the basis for a race-conscious program. A local government was instead required to identify discrimination within its own contracting jurisdiction.<sup>114</sup> In *Croson*, the Court found the City of Richmond's Minority Business Enterprise (MBE) construction program to be unconstitutional because there was insufficient evidence of discrimination in the local construction market.

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

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<sup>112</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>113</sup> *United Steelworkers v. Weber*, 433 U.S. 193, 198, n. 1 (1979).

<sup>114</sup> *Croson*, 488 U.S. at 497 (1989).



## **B. Application of the Croson Standard**

While *Croson* emphasized the importance of the local market area, it provided little assistance in defining its parameters. However, it is informative to review the Court's definition of the City of Richmond's market area. In discussing the geographic parameters of the constitutional violation that was investigated, the Court interchangeably used the terms "relevant market," "Richmond construction industry,"<sup>115</sup> and "city's construction industry."<sup>116</sup> These terms were thus used to define the proper scope for examining the existence of discrimination within the City. This interchangeable use of terms lends support to a definition of market area that coincides with the boundaries of a contracting jurisdiction.

An analysis of the cases following *Croson* reveals a pattern that provides additional guidance for defining the market area. The body of cases examining *reasonable* market area definition is *fact-based* rather than dictated by a specific formula.<sup>117</sup> In *Cone Corporation v. Hillsborough County*,<sup>118</sup> the Eleventh Circuit Court of Appeals considered a study which used minority contractors located in the County as the measure of available firms in support of Florida's Hillsborough County MBE Program. The Program was found to be constitutional under the compelling governmental interest element of the strict scrutiny standard.

Hillsborough County's MBE Program was based on statistics indicating that specific discrimination existed in the awarding of construction contracts by the County, not in the construction industry in general. Hillsborough County had extracted data from within its own jurisdictional boundaries, and assessed the percentage of minority businesses available in Hillsborough County. The Court stated that the study was properly conducted within the "local construction industry."<sup>119</sup>

Similarly, in *Associated General Contractors v. Coalition for Economic Equity (AGCCII)*,<sup>120</sup> the Ninth Circuit Court of Appeals found the City and County of San Francisco's MBE Program to have the factual predicate necessary to meet strict scrutiny. The San Francisco MBE Program was supported by a study that assessed the number of available MBE contractors within the City and County of San Francisco. The Court found it appropriate to use the City and County as the relevant market area within which to conduct a disparity study.<sup>121</sup>

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<sup>115</sup> *Id.* at 500

<sup>116</sup> *Id.* at 470

<sup>117</sup> See, e.g., *Concrete Works of Colorado v. City of Denver, Colorado*, 36 F.3d 1513, 1528 (10th Cir. 1994).

<sup>118</sup> *Cone Corporation v. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990).

<sup>119</sup> *Id.* at 915

<sup>120</sup> *Associated General Contractors of California v. Coalition for Economic Equity and City and County of San Francisco*, 950 F.2d 1401 (9th Cir. 1991).

<sup>121</sup> *Id.* at 1415



In *Coral Construction v. King County*, the Ninth Circuit Court of Appeals held that “a set-aside program is valid only if actual, identifiable discrimination has occurred within the local industry affected by the program.”<sup>122</sup> In support of its MBE Program, King County offered studies compiled by other jurisdictions, including entities completely within the County or coterminous with the boundaries of the County as well as a separate jurisdiction completely outside of the County. The plaintiffs contended that *Croson* required King County to compile its own data, and cited *Croson* as prohibiting data sharing.

The Court found that data sharing could potentially lead to the improper use of societal discrimination data as the factual basis for a local MBE program, and that innocent third parties could be unnecessarily burdened if an MBE program were based on outside data. However, the Court also found that the data from entities within the County and from coterminous jurisdictions was relevant to discrimination in the County. They also found that the data posed no risk of unfairly burdening innocent third parties.

The Court concluded that data gathered by a neighboring county could not be used to support King County’s MBE Program. The Court noted:

It is vital that a race-conscious program align itself as closely to the scope of the problem legitimately sought to be rectified by the governmental entity. To prevent overbreadth, the enacting jurisdiction should limit its factual inquiry to the presence of discrimination within its own boundaries.”<sup>123</sup> However, the Court did note that the “world of contracting does not conform itself neatly to jurisdictional boundaries.”<sup>124</sup>

There have been cases where courts have approved a definition of market area that extends beyond a jurisdiction’s geographic boundaries. In *Concrete Works v. City and County of Denver (Concrete Works)*,<sup>125</sup> the Tenth Circuit Court of Appeals directly addressed the issue of whether extra-jurisdictional evidence of discrimination can be used to determine the “local market area” for a disparity study. In *Concrete Works*, the defendant relied on evidence of discrimination in the six-county Denver Metropolitan Statistical Area (MSA) to support its MBE program. Plaintiffs argued that the federal constitution prohibited consideration of evidence beyond jurisdictional boundaries. The Court of Appeals disagreed.

Critical to the Court’s acceptance of the Denver MSA as the relevant local market was the finding that more than 80 percent of construction and design contracts awarded by Denver were awarded to contractors within the Denver MSA. Another consideration was that Denver’s analysis was based on U.S. Census data, which was available for the

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<sup>122</sup> *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), cert. denied, 112 S.Ct. 875 (1992).

<sup>123</sup> *Id.* at 917.

<sup>124</sup> *Id.*

<sup>125</sup> *Concrete Works*, 36 F.3d 1513, 1528 (10th Cir. 1994).



Denver MSA but not for the City itself. There was no undue burden placed on nonculpable parties, as Denver had conducted a majority of its construction contracts within the area defined as the local market. Citing *AGCCII*,<sup>126</sup> the Court noted “that any plan that extends race-conscious remedies beyond territorial boundaries must be based on very specific findings that actions that the city has taken in the past have visited racial discrimination on such individuals.”<sup>127</sup>

Similarly, New York State conducted a disparity study in which the geographic market consisted of New York State and eight counties in northern New Jersey. The geographic market was defined as the area encompassing the location of businesses which received more than 90 percent of the dollar value of all contracts awarded by the agency.<sup>128</sup>

*Croson* determined that the statistical analysis should focus on the number of qualified minority business owners in the government’s marketplace.<sup>129</sup> The text of *Croson* itself suggests that the geographical boundaries of the government entity comprise an appropriate market area, and other courts have agreed with this finding.

It therefore follows that an entity may limit consideration of evidence of discrimination to occurrences within its own jurisdiction, and extra-jurisdictional evidence may only be used if there is specific evidence to support such boundaries.



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<sup>126</sup> *AGCCII*, 950 F.2d 1401 (9th Cir. 1991).

<sup>127</sup> *Concrete Works*, 36 F.3d at 1528 (10th Cir. 1994).

<sup>128</sup> *Opportunity Denied! New York State's Study*, 26 *Urban Lawyer* No. 3, Summer 1994.

<sup>129</sup> *Croson*, 488 U.S. at 501 (1989).

## II. MARKET AREA ANALYSIS

Although *Croson* and its progeny do not provide a bright line rule for the delineation of the local market area, the case law supports a definition of market area as the geographical boundaries of the government entity when taken collectively. Therefore, it is within the State of California where evidence of discrimination is considered.

### A. Distribution of Professional Services Contracts by Geographic Area

The Authority awarded 74 professional services contracts valued at \$1,020,574,634 during the study period. Businesses located in the market area received 85.14 percent of professional services contracts and 98.24 percent of the dollars. The distribution of the professional services contracts awarded and dollars received by all businesses within and outside of the services market area is depicted below in Table 4.01.

Table 4.01: Distribution of Professional Services Contracts Awarded

Geographic Area	Total Dollars	Number of Contracts	Percent of Dollars	Percent of Contracts
California	\$1,002,609,084	63	98.24%	85.14%
Virginia	\$8,500,000	1	0.83%	1.33%
Oregon	\$5,000,000	1	0.49%	1.33%
Maryland	\$4,000,000	1	0.39%	1.33%
District of Columbia	\$100,000	1	0.01%	1.33%
Pennsylvania	\$100,000	1	0.01%	1.33%
Japan	\$60,000	1	0.01%	1.33%
Colorado	\$59,750	1	0.01%	1.33%
Illinois	\$49,600	1	0.00%	1.33%
Switzerland	\$39,200	1	0.00%	1.33%
Tennessee	\$30,000	1	0.00%	1.33%
China	\$27,000	1	0.00%	1.33%
<b>Total:</b>	<b>\$1,020,574,634</b>	<b>74</b>	<b>100.00%</b>	<b>100.00%</b>



## **B. Summary of Distribution by Market Area**

Table 4.02 summarizes the number of professional services contracts the Authority awarded and the dollars spent in the market area, which is the State of California, and outside the market area during the study period.

**Table 4.02: Distribution of Professional Services Contracts within the Market Area**

Market Area	Total Dollars	Number of Contracts	Percent of Dollars	Percent of Contracts
Professional Services (Including Architecture and Engineering)				
Market Area	\$1,002,609,084	63	98.24%	85.14%
Outside Market Area	\$17,965,550	11	1.76%	14.86%
<b>TOTAL</b>	<b>\$1,020,574,634</b>	<b>74</b>	<b>100.00%</b>	<b>100.00%</b>



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## **CHAPTER 5 :**

# **PRIME AND SUBCONTRACTOR AVAILABILITY ANALYSIS**

### **I. INTRODUCTION**

Availability, according to *Croson*, is defined as the number of businesses in the jurisdiction's market area that are willing and able to provide the services the jurisdiction procures.<sup>130</sup> Therefore, to determine availability, the ready, willing, and able businesses within a jurisdiction's market area must be enumerated. The California High-Speed Rail Authority's (Authority) market area is the State of California as determined in *Chapter 4: Market Area Analysis*.

The United States Department of Transportation (USDOT), in its *Tips for Goal Setting Memorandum* has defined the potential pool of available businesses as certified Disadvantaged Business Enterprises (DBEs) and businesses owned by minority groups that are presumed to be socially disadvantaged. These groups are African Americans, Asian-Pacific Americans, Asian Subcontinent Americans, Hispanic Americans, Hispanic Americans and women. Therefore, DBEs for the purpose of an availability and disparity study funded in whole or part by USDOT includes Unified Certification Program DBE-certified businesses, and businesses owned by socially and economically disadvantaged groups. Hereafter, the groups delineated by 49 CFR Part 26 Section 26.5 will be referred to collectively as "Minority and Women-owned Business Enterprises (M/WBEs)."<sup>131</sup>

When considering sources for identifying willing and able M/WBEs and non-M/WBEs the selection must be based on whether two aspects about the target population can be gauged from the sources. One consideration is a business's interest in contracting with the jurisdiction, as implied by the term "willing," and the other is its ability or capacity to provide service or goods, as implied by the term "able."

California businesses enumerated in this availability analysis include M/WBEs and non-M/WBEs that provide the professional services, including architecture and engineering that the Authority procured during the July 1, 2006 to June 30, 2013 study period. To

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<sup>130</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

<sup>131</sup> While Federal Railway Administration (FRA) grantees are not subject to the provisions of 49 CFR Part 26, the requirement to use the ethnic and gender designations as set forth in the regulations are stipulated in Exhibit A of Mason Tillman and the Authority's standard agreement.



determine the appropriate business types, the contracts awarded during the study period were classified by North American Industry Classification System (NAICS) code and contractor availability sources were queried to identify businesses within the selected codes.

Separate availability analyses were conducted for prime contractors and subcontractors. A distribution of the available prime contractors and subcontractors willing and able to perform the Authority's contracts is presented in this chapter by ethnicity and gender.

## **II. PRIME CONTRACTOR AVAILABILITY DATA SOURCES**

### **A. Identification of Market Area Businesses**

Four sources were used to identify businesses in the market area that provide the professional services that the Authority procured during the study period. The first source was the Authority's utilized businesses, the second was the lists compiled from responses the Authority received to the Request for Expressions of Interest and outreach events, the third was state and federal government certification directories, and the fourth were metropolitan chambers of commerce and professional and trade association membership directories.

The four sources were ranked in order to be appended to the availability database. The highest rank was assigned to the Authority's utilized prime contractors and subcontractors. Government certification lists were ranked and appended secondarily, responses to Request for Expressions of Interest and outreach events were ranked and appended third and chambers of commerce and business trade association membership lists were ranked and appended last. From the fourth source, only businesses that affirmed their willingness to contract with the Authority were included in the enumeration of availability. Utilized prime contractors and subcontractors, businesses that were listed with the Authority, and certified businesses were presumed to be available.

The ethnicity and gender status of the enumerated businesses was determined by querying the federal and state certification directories, reviewing company websites, and administering a survey. The certification status of the enumerated businesses was then determined by reviewing state and federal certification databases.



## **B. Prime Contractor Sources**

Table 5.01 lists the sources from which the list of available businesses was compiled.

**Table 5.03: Prime Contractor Availability Data Sources**

Source Type	Number of Directories Secured
California High-Speed Rail Authority Records	10
Government Certification Directories	49
Business Association Membership Directories	10
Chambers of Commerce Membership Directories	27
OneSource™ Business Information Reports <sup>132</sup>	4
Other Government Directories	10
<b>TOTAL</b>	<b>110</b>

## **C. Determination of Willingness**

The California High-Speed Rail Business Information Survey (Survey) was designed to collect information about the willingness and capacity of the California businesses in the relevant NAICS codes. Willingness was determined through a series of survey questions regarding the business's interest in working with the Authority, and its history of bidding on the high-speed rail project as either a prime contractor or subcontractor.

The Survey was administered electronically and by telephone to businesses gleaned from the four sources. The businesses that did not complete the online survey and businesses without email addresses were included in the telephone survey. Businesses that did not complete the Survey after receiving three telephone calls, and those with a disconnected or wrong telephone number, were excluded from the sample analyzed. Only the businesses that affirmed their willingness to contract with the Authority were counted in the enumeration of available businesses.

## **D. Distribution of Willing Businesses by Source**

Table 5.04 depicts the distribution of willing prime contractors by source. As noted, 70.58 percent of the businesses on the unique list of available prime contractors were obtained from the Authority's records and government certification lists. Companies identified through the chamber of commerce directories, business association membership directories, and the willingness survey represent 29.42 percent of the available prime contractors.

**Table 5.04: Distribution of Prime Contractor Availability Data Sources**

<sup>132</sup> OneSource™ is a service that provides global business listings with comprehensive information about the businesses, including contact information, NAICS codes, credit rating, year established, ownership type, annual sales, number of employees and market value.



Sources	M/WBEs Percentage	Non-M/WBEs Percentage	Source Percentage
Prime Contractor Utilization	0.26%	0.92%	0.64%
Requests for Expressions of Interest	6.84%	9.47%	8.33%
Certification Lists	64.21%	59.62%	61.62%
Subtotal	71.32%	70.01%	70.58%
Willingness Survey	28.68%	29.99%	29.42%
Subtotal	28.68%	29.99%	29.42%
Grand Total*	100.00%	100.00%	100.00%

\*The percentages may not total 100 percent due to rounding

### ***E. Size of Contracts Awarded***

In *Associated General Contractors of America v. City of Columbus* and *Engineering Contractors Ass'n. of South Florida v. Metropolitan Dade City*, the courts were concerned with the capacity of the enumerated businesses to bid on large, competitively bid contracts. It should be noted, however, that the focus in both cases was on the bidder's size and ability to perform on large, competitively bid construction contracts.<sup>133</sup> Thus these cases are informative although not the legal standard for professional services.

In order to gauge the capacity required to perform the professional service contracts awarded during the study period, the awarded prime contracts were analyzed to determine their size. For the size analysis, the Authority's contracts were grouped into 12 dollar ranges.<sup>134</sup> The size distribution of contracts awarded to Non-Minority Males was then compared to the size distribution of contracts awarded to Non-Minority Females, Minority Females, and Minority Males.

Table 5.03, which presents the size distribution for contracts awarded within the 12 dollar ranges, illustrates that 13.51 percent of the Authority's contracts were less than \$25,000; 24.32 percent were less than \$50,000; 28.38 percent were less than \$100,000; 56.76 percent were less than \$250,000; 58.11 percent were less than \$500,000; 62.16 percent were less than \$575,000; 62.16 percent were less than \$650,000; 64.86 percent were less than \$1,000,000; 72.97 percent were less than \$3,500,000; 85.14 percent were less than \$14,000,000; 87.84 percent were less than \$38,000,000 and 12.16 percent of the Authority's contracts were \$38,000,000 or more.

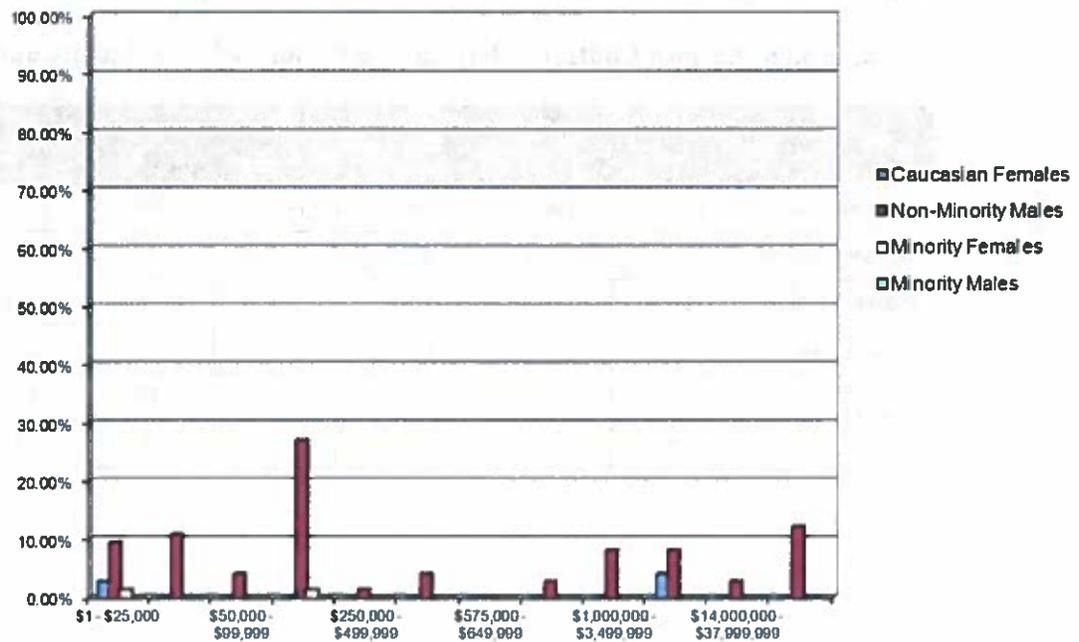
<sup>133</sup> *Associated General Contractors of America v. City of Columbus*, 936 F. Supp. 1363 (S.D. Ohio Eastern Division, decided August 26, 1996), and *Engineering Contractors Ass'n. of South Florida v. Metropolitan Dade City*, 943 F. Supp. 1546 (S.D. Fla. 1996), aff'd 122 F.3d 895 (11th Cir. 1997). Writ of certiorari denied *Metropolitan Dade Participating Agencies v. Engineering Contrs. Ass'n.*, 523 U.S. 1004, 140 L. Ed. 2d 317, 118 S. Ct. 1186, (1998); related proceeding at *Hershell Gill Consulting Eng'rs, Inc. v. Miami-Dade Participating Agencies*, 2004 U.S. Dist. LEXIS 17197 (S.D. Fla., Aug. 24, 2004). Decision was vacated by the 6<sup>th</sup> Circuit Court of Appeals.

<sup>134</sup> The twelve dollar ranges are \$1 to \$25,000, \$25,001 to \$49,999, \$50,000 to \$99,999, \$100,000 to \$249,999, \$250,000 to \$499,999, \$500,000 to \$574,999, \$575,000 to \$649,000, \$650,000 to \$999,999, \$1,000,000 to \$3,499,999, \$3,500,000 to \$13,999,999, \$14,000,000 to \$37,999,999 and \$38,000,000 and greater.



**Table 5.05: Professional Services Prime Contracts by Size  
July 1, 2006 to June 30, 2013**

Size	Non-Minority				Minority				Total	
	Females		Males		Females		Males		Freq	Percent
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent		
\$1 - \$25,000	2	2.70%	7	9.46%	1	1.35%	0		10	13.51%
\$25,001 - \$49,999	0	0.00%	8	10.81%	0	0.00%	0		8	10.81%
\$50,000 - \$99,999	0	0.00%	3	4.05%	0	0.00%	0		3	4.05%
\$100,000 - \$249,999	0	0.00%	20	27.03%	1	1.35%	0		21	28.38%
\$250,000 - \$499,999	0	0.00%	1	1.35%	0	0.00%	0		1	1.35%
\$500,000 - \$574,999	0	0.00%	3	4.05%	0	0.00%	0		3	4.05%
\$575,000 - \$649,999	0	0.00%	0	0.00%	0	0.00%	0		0	0.00%
\$650,000 - \$999,999	0	0.00%	2	2.70%	0	0.00%	0		2	2.70%
\$1,000,000 - \$3,499,999	0	0.00%	6	8.11%	0	0.00%	0		6	8.11%
\$3,500,000 - \$13,999,999	3	4.05%	6	8.11%	0	0.00%	0		9	12.16%
\$14,000,000 - \$37,999,999	0	0.00%	2	2.70%	0	0.00%	0		2	2.70%
\$38,000,000 and More	0	0.00%	9	12.16%	0	0.00%	0		9	12.16%
<b>Total</b>	<b>5</b>	<b>6.76%</b>	<b>67</b>	<b>90.54%</b>	<b>2</b>	<b>2.70%</b>	<b>0</b>	<b>0.00%</b>	<b>74</b>	<b>100.00%</b>



**Capacity Assessment**

There is little case law offering guidance on how to determine if a business is *qualified or able*, and no clear methods on how to obtain meaningful measures of whether or not a business is ready. A firm's revenue, business size, number of employees, bonding levels, and bidding history are factors which were used as indicators of capacity. These were measured through the Survey and considered in terms of the size of the awarded contracts. As noted in Table 6.03 above, 58.11 percent of the awarded prime contracts were under \$500,000.



The Survey included questions to gauge the business's capacity to contract with the Authority as a prime contractor or subcontractor. The survey questions also inquired about the age of the business, number of employees, largest contract award, the largest contract bid, and average annual business revenue. Revenue, like the other economic factors surveyed, is a measure of the value of contracts that a firm received; although not necessarily indicative of the level of contracts a business can perform. With regard to number of employees, in the presence of contracting opportunities, businesses have the elasticity to expand their capacity to perform larger contracts through subcontracting, joint ventures, and employee development.

As depicted in Table 5.04, the majority of businesses surveyed had the ability to perform contracts larger than \$3 million, as self-reported in the Survey. Significant differences were found ( $p=.005$ ) among the ethnic and gender groups. Subcontinent Asian American businesses show a greater ability to perform contracts larger than \$3 million than the other groups surveyed. This, coupled with the fact that the majority of the Authority's contracts were small, illustrates that the available businesses have the requisite capacity to perform the professional services contracts awarded during the study period.

**Table 5.06: Largest Contract That Can Be Performed by Ethnicity and Gender**

	African American	Asian American	Subcontinent Asian American	Hispanic American	Native American	Non-Minority Women	Non-Minority Men
Under \$100,000	17.45%	8.96%	5.88%	14.54%	7.14%	12.33%	11.37%
\$100,000 - \$499,999	28.73%	24.88%	20.59%	19.30%	16.67%	26.84%	20.77%
\$500,000 - \$999,999	12.00%	12.94%	13.24%	15.04%	16.67%	14.31%	16.19%
\$1 - \$3 Million	16.36%	23.88%	16.18%	24.56%	21.43%	20.87%	22.74%
More than \$3 Million	25.45%	29.35%	44.12%	26.57%	38.10%	25.65%	28.92%
<b>Total</b>	<b>275</b>	<b>201</b>	<b>68</b>	<b>399</b>	<b>42</b>	<b>503</b>	<b>809</b>

$\chi^2=45.931$ ,  $df=24$ ,  $p=.005$



These various measures of a business's capacity, when considered in light of the size of the awarded contracts, document the ability of most willing business to perform the majority of the awarded prime contracts.

### **III. PRIME CONTRACTOR AVAILABILITY ANALYSIS**

The prime contractor availability findings for the Authority's market area are as follows:

#### **A. Prime Contractor Availability**

The distribution of available professional services prime contractor is summarized in Table 5.05 below. The ethnic and gender groups are defined in *Chapter 2: Prime Contractor Utilization Analysis*.

*African Americans* account for 7.13 percent of professional services prime contractors in the market area.

*Asian-Pacific Americans* account for 9.96 percent of professional services prime contractors in the market area.

*Subcontinent Asian Americans* account for 2.38 percent of professional services prime contractors in the market area.

*Hispanic Americans* account for 8.04 percent of professional services prime contractors in the market area.

*Native Americans* account for 0.67 percent of professional services prime contractors in the market area.

*Minority-owned Business Enterprises* account for 28.17 percent of professional services prime contractors in the market area.

*Non-Minority Female-owned Business Enterprises* account for 16.26 percent of professional services prime contractors in the market area.

*Minority and Women-owned Business Enterprises* account for 44.43 percent of professional services subcontractors in the in the market area.

*Non-Minority Male-owned Business Enterprises* account for 55.57 percent of professional services prime contractors in the market area.



**Table 5.07: Available Professional Services Prime Contractors**

<b>Ethnicity</b>	<b>Percent of Businesses</b>
African Americans	7.13%
Asian-Pacific Americans	9.96%
Subcontinent Asian Americans	2.38%
Hispanic Americans	8.04%
Native Americans	0.67%
Caucasian Females	16.26%
Non-Minority Males	55.57%
<b>TOTAL</b>	<b>100.00%</b>
<b>Ethnicity and Gender</b>	<b>Percent of Businesses</b>
African American Females	3.39%
African American Males	3.74%
Asian-Pacific American Females	3.31%
Asian-Pacific American Males	6.64%
Subcontinent Asian American Females	0.65%
Subcontinent Asian American Males	1.74%
Hispanic American Females	2.91%
Hispanic American Males	5.13%
Native American Females	0.22%
Native American Males	0.44%
Caucasian Females	16.26%
Caucasian Males	55.57%
<b>TOTAL</b>	<b>100.00%</b>
<b>Minority and Gender</b>	<b>Percent of Businesses</b>
Minority Females	10.48%
Minority Males	17.69%
Caucasian Females	16.26%
Non-Minority Males	55.57%
<b>TOTAL</b>	<b>100.00%</b>
<b>Minority and Females</b>	<b>Percent of Businesses</b>
Minority Business Enterprises	28.17%
Women Business Enterprises	16.26%
<b>Minority and Women Business Enterprises</b>	<b>44.43%</b>
Non-Minority Male Business Enterprises	55.57%
<b>TOTAL</b>	<b>100.00%</b>



## **IV. SUBCONTRACTOR AVAILABILITY ANALYSIS**

### **A. Sources of Willing and Able Subcontractors and Availability**

All available prime contractors were included in the calculation of subcontractor availability. In addition, subcontractors utilized by the Authority's prime contractors were added to the availability database to create the subcontractor availability. Utilized subcontractors did not need to be surveyed for willingness or capacity. These businesses were presumed to be willing because they were previously utilized on an Authority prime contract.

### **B. Size of Subcontracts Analyzed**

The Authority's professional services subcontracts were analyzed to determine the size of awarded contracts, and therefore, the capacity required to perform the services. The Authority's subcontracts were analyzed for the July 1, 2006 to June 30, 2013 study period.

The Authority's subcontracts were grouped into 12 dollar ranges.<sup>135</sup> Each award was grouped by award amount within one of the 12 size categories. The size distribution of subcontracts awarded to Non-Minority Males was then compared to the size distribution of contracts awarded to Non-Minority Females, Minority Females, and Minority Males.

The subcontract size distribution, as presented in Table 6.06, illustrates that nearly a third of the Authority's subcontracts awarded during the July 1, 2006 to June 30, 2013 study period were under \$25,000 and more than half were under \$100,000. This distribution also illustrates the limited capacity needed to perform the majority of the Authority's subcontracts.

#### **1. Authority Subcontract Size Analysis: July 1, 2006 to June 30, 2013**

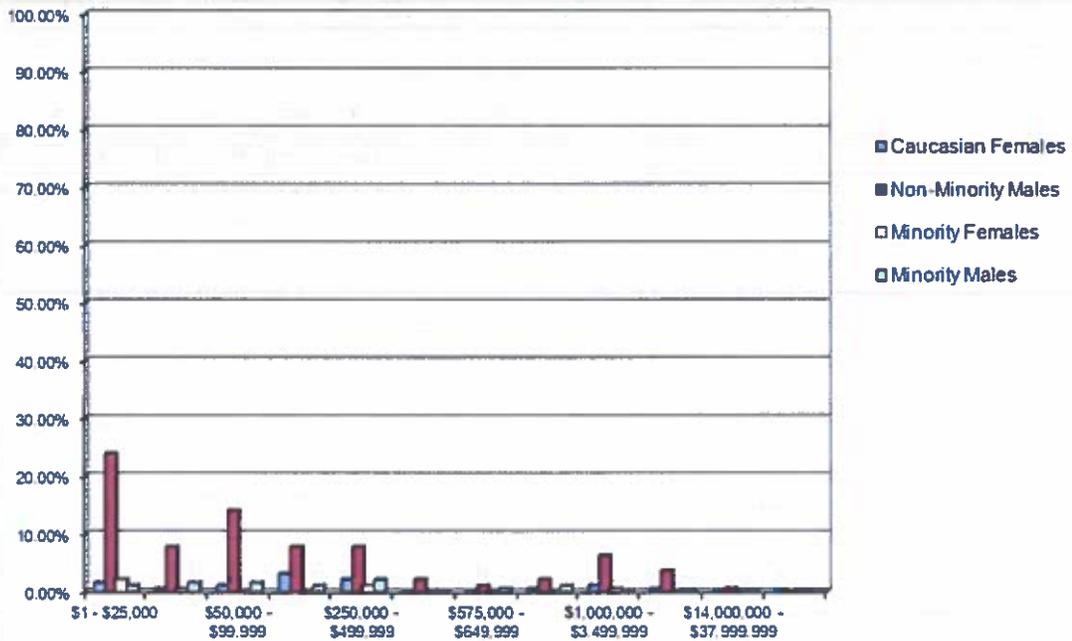
Table 5.07 illustrates that 28.5 percent of the Authority's contracts were less than \$25,000; 38.86 percent were less than \$50,000; 55.44 percent were less than \$100,000; 67.36 percent were less than \$250,000; 80.31 percent were less than \$500,000; 82.38 percent were less than \$575,000; 83.94 percent were less than \$650,000; 87.56 percent were less than \$1,000,000; 95.34 percent were less than \$3,500,000; 99.48 percent were less than \$14,000,000; 0.52 percent of the Authority's contracts were \$14,000,000 or more.



<sup>135</sup> The twelve dollar ranges are \$1 to \$25,000; \$25,001 to \$49,999; \$50,000 to \$99,999; \$100,000 to \$249,999; \$250,000 to \$499,999; \$500,000 to \$574,999; \$575,000 to \$649,000; \$650,000 to \$999,999; \$1,000,000 to \$3,499,999; \$3,500,000 to \$13,999,999; \$14,000,000 to \$37,999,999 and \$38,000,000 and greater.

**Table 5.08: Professional Services Subcontracts by Size  
July 1, 2006 to June 30, 2013**

Size	Non-Minority				Minority				Total	
	Females		Males		Females		Males		Freq	Percent
	Freq	Percent	Freq	Percent	Freq	Percent	Freq	Percent		
\$1 - \$25,000	3	1.55%	46	23.83%	4	2.07%	2	1.04%	55	28.50%
\$25,001 - \$49,999	1	0.52%	15	7.77%	1	0.52%	3	1.55%	20	10.36%
\$50,000 - \$99,999	2	1.04%	27	13.99%	0	0.00%	3	1.55%	32	16.58%
\$100,000 - \$249,999	6	3.11%	15	7.77%	0	0.00%	2	1.04%	23	11.92%
\$250,000 - \$499,999	4	2.07%	15	7.77%	2	1.04%	4	2.07%	25	12.95%
\$500,000 - \$574,999	0	0.00%	4	2.07%	0	0.00%	0	0.00%	4	2.07%
\$575,000 - \$649,999	0	0.00%	2	1.04%	0	0.00%	1	0.52%	3	1.55%
\$650,000 - \$999,999	1	0.52%	4	2.07%	0	0.00%	2	1.04%	7	3.63%
\$1,000,000 - \$3,499,999	2	1.04%	12	6.22%	1	0.52%	0	0.00%	15	7.77%
\$3,500,000 - \$13,999,999	1	0.52%	7	3.63%	0	0.00%	0	0.00%	8	4.15%
\$14,000,000 - \$37,999,999	0	0.00%	1	0.52%	0	0.00%	0	0.00%	1	0.52%
\$38,000,000 and More	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
<b>Total</b>	<b>20</b>	<b>10.36%</b>	<b>148</b>	<b>76.68%</b>	<b>8</b>	<b>4.15%</b>	<b>17</b>	<b>8.81%</b>	<b>193</b>	<b>100.00%</b>



### **C. Subcontractor Availability**

The distribution of available Professional Services subcontractors is summarized in Table 5.09.

*African Americans* account for 7.02 percent of professional services subcontractors in the in the market area.

*Asian-Pacific Americans* account for 9.83 percent of professional services subcontractors in the in the market area.

*Subcontinent Asian Americans* account for 2.39 percent of professional services subcontractors in the in the market area.

*Hispanic Americans* account for 7.94 percent of professional services subcontractors in the in the market area.

*Native Americans* account for 0.66 percent of professional services subcontractors in the in the market area.

*Minority-owned Business Enterprises* account for 27.84 percent of professional services subcontractors in the in the market area.

*Non-Minority Female-owned Business Enterprises* account for 16.16 of professional services subcontractors in the in the market area.

*Minority and Women-owned Business Enterprises* account for 43.99 percent of professional services subcontractors in the in the market area.

*Non-Minority Male-owned Business Enterprises* account for 56.01 percent of professional services subcontractors in the in the market area.



**Table 5.09: Available Professional Services Subcontractors**

Group	Percent of Businesses
African Americans	7.02%
Asian-Pacific Americans	9.83%
Subcontinent Asian Americans	2.39%
Hispanic Americans	7.94%
Native Americans	0.66%
Non-Minority Females	16.16%
Non-Minority Males	56.01%
<b>TOTAL</b>	<b>100.00%</b>
Ethnicity and Gender	Percent of Businesses
African American Females	3.34%
African American Males	3.68%
Asian-Pacific American Females	3.26%
Asian-Pacific American Males	6.57%
Subcontinent Asian American Females	0.64%
Subcontinent Asian American Males	1.75%
Hispanic American Females	2.87%
Hispanic American Males	5.07%
Native American Females	0.22%
Native American Males	0.44%
Non-Minority Females	16.16%
Non-Minority Males	56.01%
<b>TOTAL</b>	<b>100.00%</b>
Minority and Gender	Percent of Businesses
Minority Females	10.33%
Minority Males	17.51%
Non-Minority Females	16.16%
Non-Minority Males	56.01%
<b>TOTAL</b>	<b>100.00%</b>
Minority and Females	Percent of Businesses
Minority Business Enterprises	27.84%
Non-Minority Female Business Enterprises	16.16%
<b>Minority and Women Business Enterprises</b>	<b>43.99%</b>
Non-Minority Male Business Enterprises	56.01%
<b>TOTAL</b>	<b>100.00%</b>



#### ***D. Summary***

The enumeration of available businesses included both willingness and capacity determinations. Separate availability analyses were performed for prime contractors and subcontractors. In determining subcontractor availability, the available prime contractors were presumed to be willing to subcontract. Therefore, the subcontractor availability was a combination of the available prime contractors and the unique utilized subcontractors.

M/WBEs represent 44.43 percent of available prime contractors, whereas M/WBEs represent 43.99 percent of available subcontractors. The availability analysis indicates that there were a significant number of M/WBEs in the State of California with the interest and capacity to perform the Authority's contracts.



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# **CHAPTER 6 :**

## **ANECDOTAL ANALYSIS**

### **I. INTRODUCTION**

The importance of anecdotal testimony in determining evidence of discrimination in a disparity study was established in the landmark case of *City of Richmond v. J.A. Croson Co. (Croson)*.<sup>136</sup> The United States Supreme Court, in its 1989 *Croson*<sup>137</sup> decision, specified the use of anecdotal testimony as a means to determine whether remedial race-specific relief may be justified in a particular market area. *Croson* stated that “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proofs, lend support to a [local entity’s] determination that broader remedial relief [is] justified.”<sup>138</sup>

Anecdotal testimony of individual discriminatory acts can, when paired with statistical data, document the routine practices by which minority and woman-owned business enterprises (M/WBEs) are excluded from business opportunities within a given agency and market area. The statistical data can quantify the results of discriminatory practices, while anecdotal testimony provides the human context within which the numbers can be understood. Anecdotal testimony from business owners can provide information on barriers they believe exist within the market area. The anecdotal testimony for the Authority’s Business Market Availability and Disparity Study (Study) was derived from oral and written accounts of 19 businesses which were consultants or bidders on an Authority contract. The collection of the testimony was undertaken in three Public Participation Meetings, held in three cities within the State, Oakland, Los Angeles and Fresno.



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<sup>136</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. at 509 (1989).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

## **A. Anecdotal Evidence of Active and Passive Participation**

*Croson* authorizes anecdotal inquiries along two lines. The first approach investigates active government discrimination or formal acts of exclusion which are undertaken by representatives of the governmental entity. The purpose of this examination is to determine whether the government has committed acts that bar minority and woman business owners from contracting opportunities.

The second line of inquiry examines the government's passive support of exclusionary practices which occur in the market area into which government funds are infused. Passive exclusion results from government officials knowingly using public monies to contract with companies that discriminate against M/WBEs, or that fail to take positive steps to prevent discrimination by contractors who receive public funds.<sup>139</sup>

Anecdotal accounts of passive discrimination delve mainly into the activities of private sector entities. The Tenth Circuit Court of Appeals has cautioned that anecdotal accounts of discrimination are entitled to less evidentiary weight when the accounts concern more private than government-sponsored activities.<sup>140</sup> Nonetheless, when paired with appropriate statistical data, anecdotal evidence of either active or passive forms of discrimination can support the imposition of a race or gender-conscious remedial program. Anecdotal evidence, in combination with statistical data which is not sufficiently compelling to support a race or gender-conscious program, is not without utility in the *Croson* framework. As *Croson* points out, jurisdictions have at their disposal "a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races."<sup>141</sup> Anecdotal accounts can paint a finely detailed portrait of the practices and procedures that govern the award of public contracts in the relevant market area. These narratives can identify specific generic practices which can be implemented, improved, or eliminated in order to increase contracting opportunities for available businesses. The method of anecdotal data collection is a critical factor in determining the quality and quantity of the accounts

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<sup>139</sup> *Croson*, 488 U.S. at 491-93, 509.

<sup>140</sup> *Concrete Works of Colorado v. City and County of Denver*, 36 F.3d at 1530 (10th Cir. 1994): "while a fact finder should accord less weight to personal accounts of discrimination that reflect isolated incidents, anecdotal evidence of a municipality's institutional practices carry more weight due to the systemic impact that such institutional practices have on market conditions."

<sup>141</sup> *Croson*, 488 U.S. at 509.



## **B. Anecdotal Methodology**

The anecdotal data collection method routinely used, in compliance with *Croson*, is to gather testimony through oral history interviews. This process is defined by the *American Heritage Dictionary* as “historical information obtained in tape-recorded interviews with individuals having firsthand knowledge.” The in-depth interviews are conducted in a manner to preserve the anonymity of the interviewees in order to encourage candid responses.

Anonymity is important when using an in-depth interview technique with business owners to collect their perceptions of doing business with the government. According to an interviewee, anonymity affords the researcher the opportunity to garner eyewitness accounts to assess the effects of contracting practices on minority and woman-owned business enterprises, and the conditions under which these practices occur, without the business owner having concerns about reprisals.

Allowing interviewees to describe the barriers they have experienced in conducting business provides an understanding of how the conditions occur, who creates them, and their effect on business development. Thus, the information obtained can offer vital insights for race and gender-neutral program enhancements. The audio recordings of the in-depth anecdotal interviews are transcribed and analyzed, utilizing qualitative data analysis techniques.

The anecdotal data collection process for this Study was limited by the Authority to the collection of anecdotal accounts in three Public Participation Meetings and in writing. Representatives of the Authority’s prime contractors, their subcontractors and other bidders for an Authority contract were the only persons permitted to speak at the Public Participation Meetings. The speakers were directed by the Authority’s facilitator to limit their comments to experiences regarding a direct engagement with the Authority, either as a utilized firm or bidder. Speakers were also instructed to limit their oral comments to less than four minutes. The brevity of the oral testimony was further affected by the fact that the Authority’s forum for the anecdotal data collection did not afford the business representatives anonymity. Anonymity is especially important when an agency solicits vendor comments on its business practices.

As directed by the Authority, the invitations to the public meetings were limited to business owners who had previously attended an Authority industry forum, certification workshop, pre-bid conference, or those owners who had submitted a letter of interest in response to the Authority’s solicitation for Requests for Expressions of Interest (RFEI). A meeting notice was also sent to the chairs of the California Black Chamber of Commerce, California Asian Chamber of Commerce, and the California Hispanic Chamber of Commerce. Fifty-one business representatives attended the three Public Participation Meetings. Five attendees offered oral testimony, and 14 offered written comments.

At the request of the Authority the oral accounts were not electronically recorded. Mason Tillman’s staff took notes of the oral remarks. The oral testimony and the written



comments were coded. Both the oral testimony, which averaged less than four minutes each speaker and the written statements were too limited to perform any meaningful analysis of patterns or practices regarding the Authority's contracting process the excerpts are informative. Excerpts from the comments are presented below.

## **II. ANECDOTAL EXCERPTS**

### **A. Bonding and Financing**

"Create a scope of work that is appropriate to small and medium-sized companies along with the appropriate financial requirements to deliver on the proposed scope of work."

"There are a number of barriers that prevent DBEs from participating in federal transportation contracting, including bonding requirements which are too high."

"It has been my experience that insurance costs required by the contract under the flow-down provisions are prohibitive for DBEs and SBs. Why can't the prime cover the project and waive [the insurance] for the lower tiers?"

### **B. Small and Disadvantaged Business Enterprise Program**

"I know DBE firms [that] have been proposed on contracts but not utilized—with no oversight by the [Authority] to make sure that the prime utilizes the DBE firm that was proposed—especially when the DBE firm's qualifications were used to win the contract."

"Borrow some of the practices [from Caltrans]. Promote adding firms after an award, allowing the prime to continue to count towards accomplishing the goals. Locking the goal in one time is awful."

"Carefully consider who will receive the majority of the funds available for this project, so that those same funds can flow through local communities and end up in the State (not off-shored), thus directly and indirectly benefiting our local economies."

"Since the larger firms want to speak to the small [businesses] that are larger, the micro [businesses] like my firm and some of my colleagues are left out in the cold. I would suggest a program that focuses more on mentoring. The larger firms basically take [micro businesses] under their wings and help them to grow."

"As a compliance rule, make [prime contractors publish] on the Internet a list of all [subcontractors] used for each project [to fulfill] the required 30 percent goal for small businesses."



### **C. Small and Disadvantaged Business Enterprise Utilization Goals**

“Please reinforce the DBE and SBE participation [goals].”

“For long-term contract, the DBE policy should be amended to increase goals or inclusion of group, thus allowing [the Authority] to show more achievement and to increase the pie slice for DBEs.”

“Goals that exclude ethnic/gender groups [are ill-advised] because they end up locking some [ethnic] groups out.”

“It has been my experience that if an awarding agency does not establish DBE or SB goal on contracts, primes will not utilize DBEs. If participation is not monitored on contracts where DBEs are proposed, many [DBEs] will not be utilized.”

“I’m very glad that the Authority has implemented the 30-10-3 goals.”

“The Authority should monitor the actual accomplishments of its [primes]. Being able to see the actual accomplishments of [small business] participation makes a big difference.”

“I think that developing the oversight through the SB Office, as well as developing goals, has been a huge asset in SB and DBE participation within the [Authority].”

### **D. Bidding on Contracts**

“Identify prime contracts that small/minority contractors can complete.”

“One of the things that I have heard from larger primes/larger firms is that they would rather have one firm with 20 people than 20 little firms with one [person].”

“Very hard to get in [as a subcontractor] when the five [shortlisted] firms are so secretive.”

“Only large, powerful corporations have the opportunity or influence to get engineering projects. Large firms get all of the work, share very little with medium-sized firms, and nothing with very small firms.”

“Most of the design work for this project has been made available to the very rich and powerful, and the very poor need not apply.”

“[Companies] with generations of railroad dynasty conceivably control large portions of this project, but long-time California residents will have to compete in a global market to secure portions of this project—if they are lucky.”

“Unbundle contracts; create real and obtainable project goals and objectives.”



“I [have seen] in a variety of situations, a “hit-and-miss” situation [where] contractors bid contracts, but then [the DBEs] were not utilized by the primes. We see that on other projects, not necessarily with High-Speed Rail.”

***E. Inadequate Lead Time for Bidding***

“[Provide] adequate notice and easy-to-access detailed bid specifications.”

***F. Business Certification***

“I know a number of potential DBEs that will not participate because the DBE certification process is too cumbersome and takes too long.”

***G. Invoice Payment***

“One matter that continues to be an issue with the Authority is prompt payment.”

***H. Capacity Building***

“What I have found is if you want to become a right-of-way agent, you have to have experience as a right-of-way agent. You can’t get experience if you are not hired, and you won’t be hired without experience. That has been my experience, which has been very, very frustrating.”



### **III. SUMMARY OF FINDINGS**

Public Participation Meetings were held in Oakland, Los Angeles and Fresno, California. Invitations to the public meetings were emailed to business owners who had previously attended an Authority industry forum, certification workshop, pre-bid conference, or business owners who had submitted a letter of interest in response to the Authority's solicitation for RFEIs. A notice was also mailed to the chairs of the California Black Chamber of Commerce, California Asian Chamber of Commerce, and the California Hispanic Chamber of Commerce. Anecdotal evidence was collected from a total of 19 persons, five provided oral testimony and 15 provided written comments.

The anecdotal testimony garnered for this Study was too limited to draw any inferences about active or passive barriers to contracting with the Authority or in its market area. The fact that the anecdotal data collection took place in a public meeting and testimony was restricted to representatives of businesses which had either received or bid on an Authority's contract was a significant limitation on both the number and quality of the accounts received. Given the constraints imposed on the anecdotal research methodology, no meaningful inferences can be made from the data compiled about market area businesses' perceptions of contracting with the Authority.



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# **CHAPTER 7:**

## **PRIME CONTRACTOR DISPARITY ANALYSIS**

### **I. INTRODUCTION**

The objective of this chapter is to determine if there was any statistically significant underutilization of available M/WBE prime contractors during the study period. The utilization of Non-Minority Male-owned businesses, including Small and Disabled Veteran Business Enterprises are not subject to a statistical analysis. The utilization of these businesses is detailed in *Chapter 3: Prime Contractor Utilization Analysis*. Where there was a disparity in the use of available M/WBEs from July 1, 2006 to June 30, 2013, the findings were subject to a test for statistical significance.

Under a fair and equitable system of awarding prime contracts, the proportion of prime contract dollars awarded to M/WBEs should be relatively close to the proportion of available M/WBEs<sup>142</sup> in the market area. If the ratio of utilized M/WBE prime contractors to available M/WBE prime contractors is less than one, a statistical test is conducted to calculate the probability of observing the empirical disparity ratio or any event which is less probable. *Crososon* states that an inference of discrimination can be made *prima facie* if the disparity is statistically significant. Under the *Crososon* model, only M/WBEs are subjected to a statistical test.<sup>143</sup> *Crososon* states that an inference of discrimination can be made *prima facie* if the disparity is statistically significant. Non-Minority Male-owned Business Enterprises are not subject to a statistical test.; therefore, underutilization is not analyzed for small and disabled veteran-owned businesses that are owned by Non-Minority Males.

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

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<sup>142</sup> Availability is defined as the number of ready, willing, and able firms. The methodology for determining willing and able firms is detailed in *Chapter 5: Prime and Subcontractor Availability Analysis*.

<sup>143</sup> When conducting statistical tests, a confidence level must be established as a gauge for the level of certainty that an observed occurrence is not due to chance. It is important to note that a 100 percent confidence level, or a level of absolute certainty, can never be obtained in statistics. A 95 percent confidence level is considered by the statistical standard to be an acceptable level in determining whether an inference of discrimination can be made. Thus, the data analyzed here was done within the 95 percent confidence level.



A disparity ratio of less than 0.80 indicates a relevant degree of disparity. Disparity findings less than one are subject to analysis, which tests statistical significance. To test the significance of a disparity ratio, a P-value must be calculated.<sup>144</sup> The three methods employed to calculate statistical significance include a parametric analysis,<sup>145</sup> a non-parametric analysis,<sup>146</sup> and a simulation analysis.

A parametric analysis is most commonly used when the number of contracts is sufficient and the variation of the contract dollar amounts is not too large. When the variation in contract dollar amounts is large, a disparity may not be detectable using a parametric analysis. Therefore, a non-parametric analysis would be employed to analyze the contracts ranked by dollar amount. Both parametric and non-parametric analyses are effective due to the central limit theorem, which is strongest when the number of contracts is large and the data are not skewed. When there are too few contracts<sup>147</sup> or the contract dollar data are skewed, a simulation analysis is employed. The utility of the simulation analysis is also dependent on the severity of the disparity when there are too few contracts. The simulation analysis utilizes randomization to simulate a distribution for the contracts.<sup>148</sup> By conducting multiple trials in the simulation, the empirical data can be used to test the distribution of contract awards for significance.

For parametric and non-parametric analyses, the P-value takes into account the number of contracts, amount of contract dollars, and variation in contract dollars. If the difference between the actual and expected number of contracts and total contract dollars has a P-value equal to or less than 0.05, the difference is statistically significant.<sup>149</sup> In the simulation analysis, the P-value takes into account a combination of the distribution formulated from the empirical data and the contract dollar amounts or contract rank. If the actual contract dollar amount, or actual contract rank, falls below the fifth percentile of the distribution, it denotes a P-value less than 0.05, which is statistically significant.

The statistical model employs all three methods simultaneously to the underutilization of Minority and Woman-owned Businesses Enterprises by industry. Findings from one of the three methods are reported. If the P-value from any one of the three methods is less than 0.05, the finding is reported in the disparity tables as statistically significant. If the P-value is greater than 0.05, the finding is reported as not statistically significant.

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<sup>144</sup> P-value is a measure of statistical significance

<sup>145</sup> Parametric analysis is a statistical examination based on the actual values of the variable. In this case, the parametric analysis consists of the actual dollar values of the contracts.

<sup>146</sup> Non-parametric analysis is a method to make data more suitable for statistical testing by allowing one variable to be replaced with a new variable that maintains the essential characteristics of the original one. In this case, the contracts are ranked from the smallest to the largest. The dollar value of each contract is replaced with its rank order number.

<sup>147</sup> Note: a relatively small availability population size decreases the reliability of the statistical results, therefore, any availability percentage under one percent cannot be labeled as statistically significant.

<sup>148</sup> The simulation analysis can be conducted using contract dollar amounts or contract rankings.

<sup>149</sup> A statistical test is not performed for Non-Minority Males or when the ratio of utilized to available is greater than one for M/WBEs.



## II. Disparity Analysis

A disparity analysis was performed on the 63 professional services prime contracts that were valued less than \$14,000,000 and awarded from July 1, 2006 to June 30, 2013. As demonstrated in *Chapter 5: Prime and Subcontractor Availability Analysis*, the majority of the Authority's professional services prime contracts were small. A total of 85.14 percent of the 74 total prime contracts awarded during the study period were less than \$14,000,000. And the majority of the prime contracts, 56.76 percent, or 42 contracts were less than \$249,999.99.

The threshold levels for the disparity analysis were set at \$14,000,000 and \$250,000 to ensure that within the pool of willing businesses there was documented capacity to perform the contracts analyzed. The \$14,000,000 threshold was designated because it defines a Small Business Enterprise under California Government Code (GC) and the California Code of Regulations (CCR).<sup>150</sup> A second analysis was performed at the \$250,000 threshold, because the California Department of General Services allows for contracts below \$250,000 to be awarded to a certified Small or Disabled Veteran-owned Business without advertising, provided that the department has received at least two responsive bids.<sup>151</sup>

The outcomes of the statistical analyses are presented in the "P-Value" column of the tables. A description of the statistical outcomes coded in Column Eight of the disparity tables is presented below in Table 0.01.

**Table 0.01: Statistical Outcome Descriptions**

P-Value Outcome	Definition of P-Value Outcome
< .05 *	The underutilization is statistically significant
not significant	<ul style="list-style-type: none"> <li>DBEs: This underutilization is not statistically significant</li> <li>Non-Minority Males: This overutilization is not statistically significant</li> </ul>
----	While this group was underutilized, there were too few available firms to determine statistical significance
**	This study does not test statistically the overutilization of minority or gender groups
< .05 †	The overutilization is statistically significant
***	While this group was underutilized, there were too few subcontracts to determine statistical significance



<sup>150</sup> GC § 14837 (d)(1)-(2); 2 CCR 1896.12(a)-(b) <http://www.dgs.ca.gov/pd/programs/osds/sbeligibility/benefits.aspx>. Last accessed March 17, 2014.

<sup>151</sup> See *Chapter 5: Prime and Subcontractor Availability Analysis* for a discussion of M/WBE capacity

## **A. Disparity Analysis: Prime Contracts Under \$14,000,000**

The disparity analysis of professional services prime contracts under \$14,000,000 is described below and depicted in Table 7.02 and Chart 7.01.

*African American Businesses* represent 7.15 percent of the available professional services businesses and received none of the professional services prime contract dollars under \$14,000,000. This finding represents statistically significant underutilization.

*Asian-Pacific American Businesses* represent 8.91 percent of the available professional services businesses and received none of the professional services prime contract dollars under \$14,000,000. This finding represents statistically significant underutilization.

*Subcontinent Asian American Businesses* represent 2.06 percent of the available professional services businesses and received none of the professional services prime contract dollars under \$14,000,000. This finding is not statistically significant.

*Hispanic American Businesses* represent 8.9 percent of the available professional services businesses and received 0.13 percent of the professional services prime contract dollars under \$14,000,000. This finding represents statistically significant underutilization.

*Native American Businesses* represent 0.78 percent of the available professional services businesses and received none of the professional services prime contract dollars under \$14,000,000. While this group was underutilized, there were too few available firms to determine statistical significance of the underutilization.

*Minority-owned Business Enterprises* represent 27.8 percent of the available professional services businesses and received 0.13 percent of the professional services prime contract dollars under \$14,000,000. This finding represents statistically significant underutilization.

*Non-Minority Female-owned Business Enterprises* represent 15.62 percent of the available professional services businesses and received 29.7 percent of the professional services prime contract dollars under \$14,000,000. This study does not test statistically the overutilization of minorities or females.

*Minority and Women-owned Business Enterprises* represent 43.43 percent of available professional services businesses and received 29.83 percent of the professional services prime contract dollars under \$14,000,000. This finding represents statistically significant underutilization.

*Non-Minority Male-owned Business Enterprises* represent 56.57 percent of the available professional services businesses and received 70.17 percent of the professional services prime contract dollars under \$14,000,000. This finding is not statistically significant.



**Table 0.02: Disparity Analysis: Professional Services Prime Contracts Under \$14,000,000  
July 1, 2006 to June 30, 2013**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$0	0.00%	7.15%	\$6,141,757	\$6,141,757	0.00	<.05*
Asian-Pacific Americans	\$0	0.00%	8.91%	\$7,658,163	-\$7,658,163	0.00	<.05*
Subcontinent Asian Americans	\$0	0.00%	2.06%	\$1,766,807	-\$1,766,807	0.00	not significant
Hispanic Americans	\$110,000	0.13%	8.90%	\$7,642,140	-\$7,532,140	0.01	<.05*
Native Americans	\$0	0.00%	0.78%	\$673,069	-\$673,069	0.00	—
Caucasian Females	\$25,510,230	29.70%	15.62%	\$13,419,318	\$12,090,912	1.90	**
Non-Minority Males	\$60,266,211	70.17%	56.57%	\$48,587,187	\$11,679,024	1.24	not significant
<b>TOTAL</b>	<b>\$85,886,441</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$85,886,441</b>			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$0	0.00%	2.99%	\$2,566,077	-\$2,566,077	0.00	not significant
African American Males	\$0	0.00%	4.16%	\$3,575,680	-\$3,575,680	0.00	not significant
Asian-Pacific American Females	\$0	0.00%	3.02%	\$2,594,121	-\$2,594,121	0.00	not significant
Asian-Pacific American Males	\$0	0.00%	5.89%	\$5,062,042	-\$5,062,042	0.00	<.05*
Subcontinent Asian American Females	\$0	0.00%	0.54%	\$462,735	-\$462,735	0.00	—
Subcontinent Asian American Males	\$0	0.00%	1.52%	\$1,304,072	-\$1,304,072	0.00	not significant
Hispanic American Females	\$110,000	0.13%	2.86%	\$2,453,898	-\$2,343,898	0.04	not significant
Hispanic American Males	\$0	0.00%	6.04%	\$5,188,242	-\$5,188,242	0.00	<.05*
Native American Females	\$0	0.00%	0.24%	\$210,334	-\$210,334	0.00	—
Native American Males	\$0	0.00%	0.54%	\$462,735	-\$462,735	0.00	—
Caucasian Females	\$25,510,230	29.70%	15.62%	\$13,419,318	\$12,090,912	1.90	**
Caucasian Males	\$60,266,211	70.17%	56.57%	\$48,587,187	\$11,679,024	1.24	not significant
<b>TOTAL</b>	<b>\$85,886,441</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$85,886,441</b>			
Minority and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Females	\$110,000	0.13%	9.65%	\$8,287,165	-\$8,177,165	0.01	<.05*
Minority Males	\$0	0.00%	18.16%	\$15,592,771	-\$15,592,771	0.00	<.05*
Caucasian Females	\$25,510,230	29.70%	15.62%	\$13,419,318	\$12,090,912	1.90	**
Non-Minority Males	\$60,266,211	70.17%	56.57%	\$48,587,187	\$11,679,024	1.24	not significant
<b>TOTAL</b>	<b>\$85,886,441</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$85,886,441</b>			
Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Business Enterprises	\$110,000	0.13%	27.80%	\$23,879,936	-\$23,769,936	0.00	<.05*
Women Business Enterprises	\$25,510,230	29.70%	15.62%	\$13,419,318	\$12,090,912	1.90	**
Minority and Women Business Enterprises	\$25,820,230	29.83%	43.43%	\$37,299,254	-\$11,679,024	0.69	<.05*
Non-Minority Male Business Enterprises	\$60,266,211	70.17%	56.57%	\$48,587,187	\$11,679,024	1.24	not significant

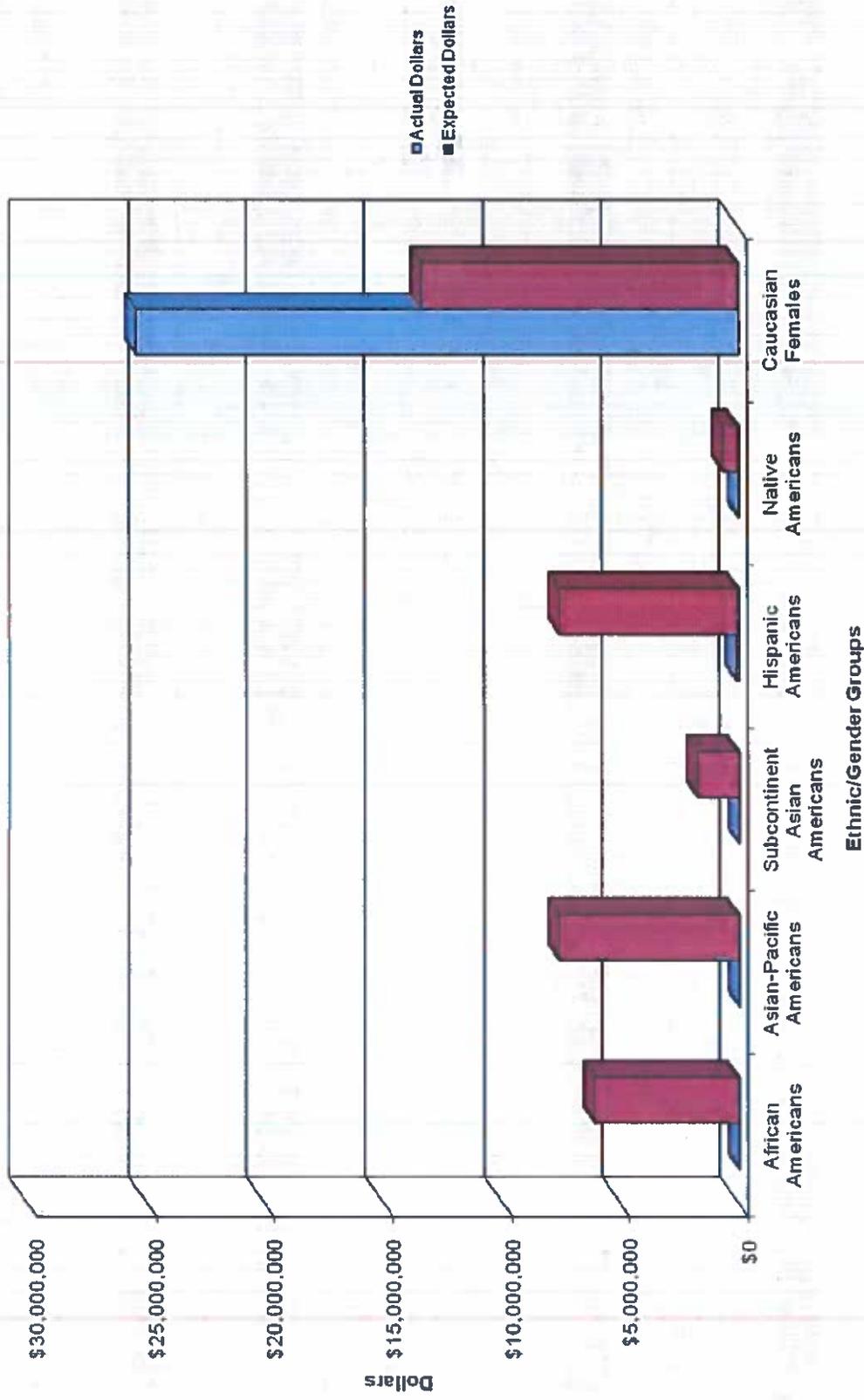
(\*) denotes a statistically significant underutilization.

(†) denotes a statistically significant overutilization.

(\*\*) this study does not test statistically the overutilization of MWBEs or the underutilization of non-minority males.

(—) denotes an underutilized group with too few available firms to test statistical significance.

**Chart 0.01: Disparity Analysis: Professional Services Prime Contracts under \$14,000,000  
July 1, 2006 to June 30, 2013**



## ***B. Disparity Analysis: Prime Contracts Under \$250,000***

The disparity analysis of professional services prime contracts under \$250,000 is described below and depicted in Table 7.03 and Chart 7.02.

*African American Businesses* represent 7.15 percent of the available professional services businesses and received none of the professional services prime contract dollars under \$250,000. This finding is not statistically significant.

*Asian-Pacific American Businesses* represent 8.91 percent of the available professional services businesses and received none of the professional services prime contract dollars under \$250,000. This finding represents statistically significant underutilization.

*Subcontinent Asian American Businesses* represent 2.06 percent of the available professional services businesses and received none of the professional services prime contract dollars under \$250,000. This finding is not statistically significant

*Hispanic American Businesses* represent 8.9 percent of the available professional services businesses and received 2.33 percent of the professional services prime contract dollars under \$250,000. This finding is not statistically significant.

*Native American Businesses* represent 0.78 percent of the available professional services businesses and received none of the professional services prime contract dollars under \$250,000. While this group was underutilized, there were too few available firms to determine statistical significance of the underutilization.

*Minority-owned Business Enterprises* represent 27.8 percent of the available professional services businesses and received 2.33 percent of the professional services prime contract dollars under \$250,000. This finding represents statistically significant underutilization.

*Non-Minority Female-owned Business Enterprises* represent 15.62 percent of the available professional services businesses and received 0.22 percent of the professional services prime contract dollars under \$250,000. This finding represents statistically significant underutilization.

*Minority and Women-owned Business Enterprises* represent 43.43 percent of available professional services businesses and received 2.54 percent of the professional services prime contract dollars under \$250,000. This finding represents statistically significant underutilization.

*Non-Minority Male Business Enterprises* represent 56.57 percent of the available professional services businesses and received 97.46 percent of the professional services prime contract dollars under \$250,000. This finding represents statistically significant overutilization.



**Table 0.03: Disparity Analysis - Professional Services Prime Contracts Under \$250,000  
July 1, 2006 to June 30, 2013**

Ethnicity	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$0	0.00%	7.15%	\$338,093	-\$338,093	0.00	not significant
Asian-Pacific Americans	\$0	0.00%	8.91%	\$421,459	-\$421,459	0.00	<.05*
Subcontinent Asian Americans	\$0	0.00%	2.06%	\$97,260	-\$97,260	0.00	not significant
Hispanic Americans	\$110,000	2.33%	8.90%	\$420,687	-\$310,687	0.26	not significant
Native Americans	\$0	0.00%	0.78%	\$37,051	-\$37,051	0.00	—
Caucasian Females	\$10,230	0.22%	15.62%	\$738,710	-\$728,480	0.01	<.05*
Non-Minority Males	\$4,607,670	97.46%	56.57%	\$2,674,641	\$1,933,029	1.72	<.05†
<b>TOTAL</b>	<b>\$4,727,900</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$4,727,900</b>			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$0	0.00%	2.99%	\$141,258	-\$141,258	0.00	not significant
African American Males	\$0	0.00%	4.16%	\$196,835	-\$196,835	0.00	not significant
Asian-Pacific American Females	\$0	0.00%	3.02%	\$142,802	-\$142,802	0.00	not significant
Asian-Pacific American Males	\$0	0.00%	5.89%	\$278,657	-\$278,657	0.00	not significant
Subcontinent Asian American Females	\$0	0.00%	0.54%	\$25,473	-\$25,473	0.00	—
Subcontinent Asian American Males	\$0	0.00%	1.52%	\$71,787	-\$71,787	0.00	not significant
Hispanic American Females	\$110,000	2.33%	2.86%	\$135,083	-\$25,083	0.81	not significant
Hispanic American Males	\$0	0.00%	6.04%	\$285,604	-\$285,604	0.00	not significant
Native American Females	\$0	0.00%	0.24%	\$11,579	-\$11,579	0.00	—
Native American Males	\$0	0.00%	0.54%	\$25,473	-\$25,473	0.00	—
Caucasian Females	\$10,230	0.22%	15.62%	\$738,710	-\$728,480	0.01	<.05*
Caucasian Males	\$4,607,670	97.46%	56.57%	\$2,674,641	\$1,933,029	1.72	<.05†
<b>TOTAL</b>	<b>\$4,727,900</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$4,727,900</b>			
Minority and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Females	\$110,000	2.33%	9.65%	\$456,194	-\$346,194	0.24	not significant
Minority Males	\$0	0.00%	18.16%	\$858,355	-\$858,355	0.00	<.05*
Caucasian Females	\$10,230	0.22%	15.62%	\$738,710	-\$728,480	0.01	<.05*
Non-Minority Males	\$4,607,670	97.46%	56.57%	\$2,674,641	\$1,933,029	1.72	<.05†
<b>TOTAL</b>	<b>\$4,727,900</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$4,727,900</b>			
Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Business Enterprises	\$110,000	2.33%	27.80%	\$1,314,549	-\$1,204,549	0.08	<.05*
Women Business Enterprises	\$10,230	0.22%	15.62%	\$738,710	-\$728,480	0.01	<.05*
Minority and Women Business Enterprises	\$120,230	2.54%	43.43%	\$2,053,259	-\$1,933,029	0.06	<.05*
Non-Minority Male Business Enterprises	\$4,607,670	97.46%	56.57%	\$2,674,641	\$1,933,029	1.72	<.05†

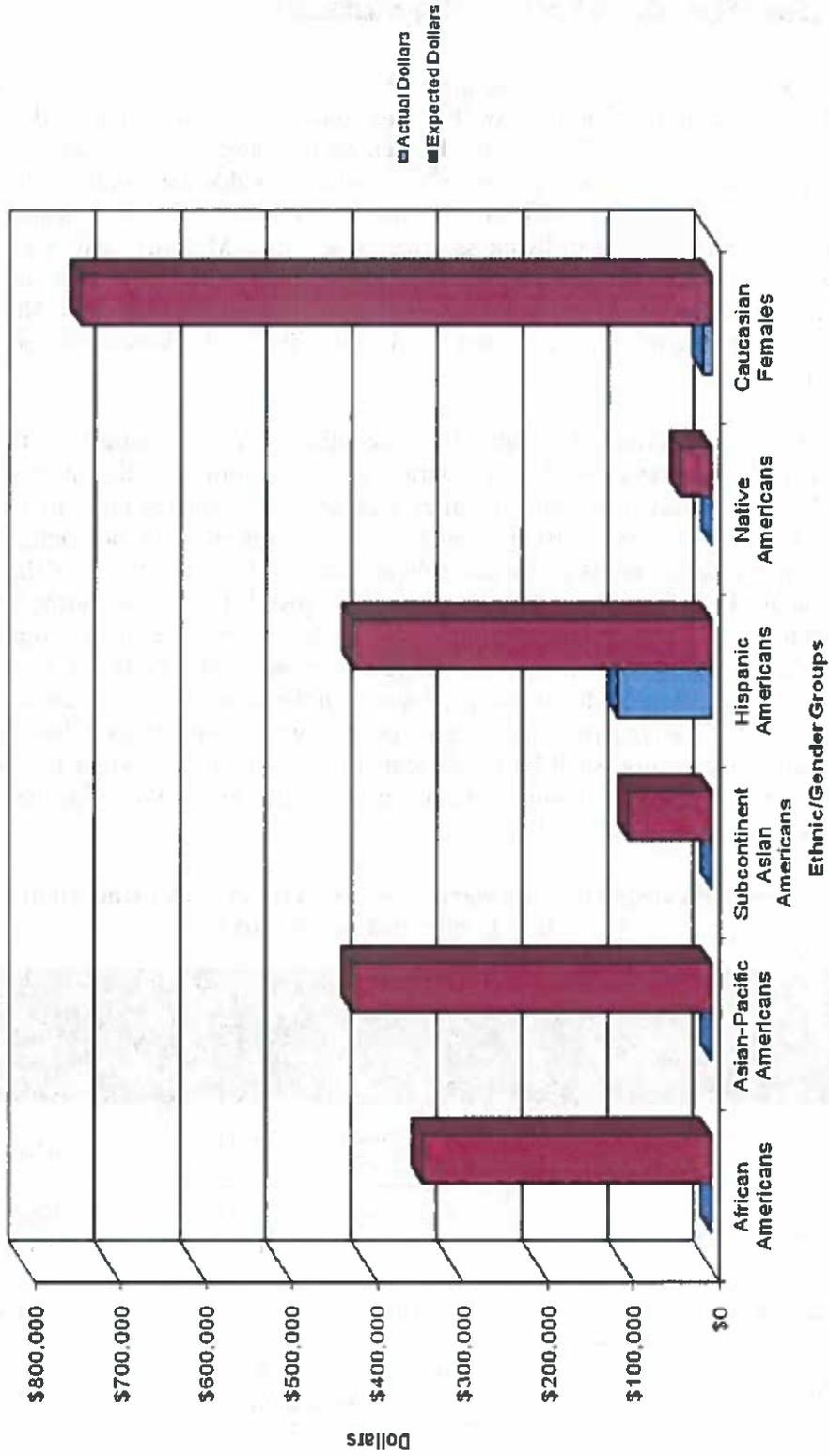
(\*) denotes a statistically significant underutilization.

(†) denotes a statistically significant overutilization.

(\*\*) this study does not test statistically the overutilization of MWBEs or the underutilization of non-minority males.

(—) denotes an underutilized group with too few available firms to test statistical significance.

**Chart 0.02: Disparity Analysis: Professional Services Prime Contracts under \$250,000  
July 1, 2006 to June 30, 2013**



### III. Disparity Analysis Summary

The presumption in *Croson* is that there should be parity between the availability of M/WBEs and the utilization of M/WBEs. This study found that available M/WBEs were underutilized at a statistically significant level. As indicated in Table 0.04, disparity was found at both dollar thresholds. For the 63 contracts under the \$14,000,000 threshold, disparity was found for African Americans, Asian-Pacific Americans, Hispanic Americans, Minority-owned Business Enterprises, and Minority and Woman-owned Business Enterprises. For the 42 contracts under the \$250,000 threshold, disparity was found for Asian-Pacific Americans, Minority-owned Business Enterprises, Non-Minority Female-owned Business Enterprises, and Minority and Women-owned Business Enterprises.

During the study period, the Authority, like other USDOT grantees in the State of California did not have race-based contracting goals. However, the State's Executive Order S-02-06, enacted in 2006, requires that all state agencies meet or exceed a 25 percent small businesses participation goal. The Authority did not apply the small business participation on its prime and subcontracts until the enactment of the Small and Disadvantaged Business Enterprise Program in August 2012. The Authority's Small and Disadvantaged Business Enterprise Program is wholly race-neutral in compliance with California Constitution Section 31 of Article I. Section 31 of Article I is a constitutional amendment that precludes the use of preferences in the award of public contracts. Section 31 states that "if any parts are found to be in conflict with federal law or the U.S. Constitution, the section shall be implemented to the maximum extent that federal law and the U.S. Constitution permit." The amendment, however, allows for the affirmative action requirements of a federal grant.

**Table 0.04: Disparity Summary: Professional Services Prime Contracts  
July 1, 2006 to June 30, 2013**

Ethnicity/Gender	Professional Services	
	Contracts under \$14,000,000	Contracts under \$250,000
African Americans	Statistically Significant Underutilization	Underutilization
Asian-Pacific Americans	Statistically Significant Underutilization	Statistically Significant Underutilization
Subcontinent Asian Americans	Underutilization	Underutilization
Hispanic Americans	Statistically Significant Underutilization	Underutilization



Ethnicity/Gender	Professional Services	
	Contracts under \$14,000,000	Contracts under \$250,000
Native Americans	---	---
Minority-owned Business Enterprises	Statistically Significant Underutilization	Statistically Significant Underutilization
Non-Minority Female-owned Business Enterprises	Overutilization	Statistically Significant Underutilization
Minority and Women-owned Business Enterprises	Statistically Significant Underutilization	Statistically Significant Underutilization



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## **CHAPTER 8 :**

# **SUBCONTRACTOR DISPARITY ANALYSIS**

### **I. INTRODUCTION**

The objective of this chapter is to determine if there was any statistically significant underutilization of available M/WBE subcontractors during the study period. The utilization of Non-Minority Male-owned businesses, including Small and Disabled Veteran Business Enterprises are not subject to a statistical analysis. The utilization of these businesses is detailed in *Chapter 3: Subcontractor Utilization Analysis*. Where there was a disparity in the use of available M/WBEs from July 1, 2006 to June 30, 2013, the findings were subject to a test for statistical significance.

Under a fair and equitable system of awarding subcontracts, the proportion of subcontract dollars awarded to M/WBEs should be relatively close to the proportion of available M/WBEs in the market area. If the ratio of utilized M/WBE subcontractors to available M/WBE subcontractors is less than one, a statistical test is conducted to calculate the probability of observing the empirical disparity ratio or any event which is less probable.<sup>152</sup> *Croson* states that an inference of discrimination can be made *prima facie* if the disparity is statistically significant. Under the *Croson* model, only M/WBEs are subjected to a statistical test. Non-Minority Male-owned Business Enterprises are not subject to a statistical test.; therefore, underutilization is not analyzed for small and disabled veteran-owned businesses that are owned by Non-Minority Males.

A detailed discussion of the statistical procedures for conducting the statistical analysis of disparity is set forth in *Chapter 7: Prime Contractor Disparity Analysis*. These same statistical tests are used to perform the subcontractor disparity analysis.

### **II. DISPARITY ANALYSIS**

As detailed in *Chapter 3: Subcontractor Utilization Analysis*, extensive efforts were undertaken to obtain subcontractor records for the Authority's professional services

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<sup>152</sup> When conducting statistical tests, a confidence level must be established as a gauge for the level of certainty that an observed occurrence is not due to chance. It is important to note that a 100 percent confidence level or a level of absolute certainty can never be obtained in statistics. A 95 percent confidence level is considered by statistical standards to be an acceptable level in determining whether an inference of discrimination can be made. Thus, the data were analyzed within the 95 percent confidence level.



contracts. The disparity analysis was performed on subcontracts issued during the July 1, 2006 to June 30, 2013 study period. A separate analysis of disparity was performed on the subcontracts awarded during the initial year of the Small and Disadvantaged Business Enterprise Program.

The subcontractor disparity findings for the subcontracts awarded during the study period are summarized below in Table 8.02. Also in Table 8.02, the outcomes of the statistical analyses are presented in the “P-Value” column. A description of the statistical outcomes presented in the P-value column of the disparity tables is defined in Table 8.01.

**Table 0.05: Statistical Outcome Descriptions**

P-Value Outcome	Definition of P-Value Outcome
< .05 *	The underutilization is statistically significant
not significant	The analysis is not statistically significant
-----	There are too few available firms to test statistical significance
**	The statistical test is not performed for the overutilization of M/WBEs or the underutilization of Non-Minority Males
< .05 †	The overutilization is statistically significant

The findings from the disparity analysis of the subcontracts awarded from July 1, 2012 to June 30, 2013, during the initial year of the Small and Disadvantaged Business Enterprise Program are presented in Table 8.03. Since there were only 10 contracts awarded during the initial year of the Small and Disadvantaged Business Enterprise Program a meaningful statistical analysis could not be performed by ethnicity and gender. The ethnic and gender groups had to be aggregated in order to have sufficient statistical power to test for the statistical significance of the underutilization of M/WBEs.

### ***A. Professional Services Subcontract Awards, July 1, 2006 to June 30, 2013***

The disparity analysis of professional services subcontracts awarded during the July 1, 2006 to June 30, 2013 study period is described below and depicted in Table 8.02.

*African American Businesses* represent 7.02 percent of the available professional services businesses and received 0.55 percent of the dollars for professional services subcontracts. This finding represents a statistically significant underutilization.

*Asian-Pacific American Businesses* represent 9.83 percent of the available professional services businesses and received 1.63 percent of the dollars for professional services subcontracts. This finding represents a statistically significant underutilization.



***Subcontinent Asian American Businesses*** represent 2.39 percent of the available professional services businesses and received 1.24 percent of the dollars for professional services subcontracts. This finding is not statistically significant.

***Hispanic American Businesses*** represent 7.94 percent of the available professional services businesses and received 2.16 percent of the dollars for professional services subcontracts. This finding represents a statistically significant underutilization.

***Native American Businesses*** represent 0.66 percent of the available professional services businesses and received none of the dollars for professional services subcontracts. While this group was underutilized, there were too few available firms to determine the statistical significance of the underutilization.

***Minority-owned Business Enterprises*** represent 27.84 percent of the available professional services businesses and received 5.58 percent of the dollars for professional services subcontracts. This finding represents a statistically significant underutilization.

***Non-Minority-owned Female Business Enterprises*** represent 16.16 percent of the available professional services businesses and received 9.82 percent of the dollars for professional services subcontracts. This finding is not statistically significant.

***Minority and Women-owned Business Enterprises*** represent 43.99 percent of the available professional services businesses and received 15.4 percent of the dollars for professional services subcontracts. This finding represents a statistically significant underutilization.

***Non-Minority Male-owned Business Enterprises*** represent 56.01 percent of the available professional services businesses and received 84.60 percent of the dollars for professional services subcontracts. This finding represents a statistically significant overutilization.



**Table 0.06: Disparity Analysis: Professional Services Subcontracts  
July 1, 2006 to June 30, 2013**

Group	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African Americans	\$693,322	0.55%	7.02%	\$8,823,678	-\$8,130,357	0.08	< .05 *
Asian-Pacific Americans	\$2,046,754	1.63%	9.83%	\$12,348,150	-\$10,301,396	0.17	< .05 *
Subcontinent Asian Americans	\$1,551,690	1.24%	2.39%	\$2,999,551	-\$1,447,860	0.52	not significant
Hispanic Americans	\$2,717,112	2.16%	7.94%	\$9,973,506	-\$7,256,394	0.27	< .05 *
Native Americans	\$0	0.00%	0.66%	\$824,876	-\$824,876	0.00	---
Non-Minority Females	\$12,332,525	9.82%	16.16%	\$20,296,960	-\$7,964,434	0.61	not significant
Non-Minority Males	\$106,289,779	84.60%	56.01%	\$70,364,460	\$35,925,318	1.51	< .05 †
<b>TOTAL</b>	<b>\$125,631,182</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$125,631,182</b>			
Ethnicity and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
African American Females	\$7,937	0.01%	3.34%	\$4,199,371	-\$4,191,434	0.00	< .05 *
African American Males	\$685,385	0.55%	3.68%	\$4,624,307	-\$3,938,922	0.15	not significant
Asian-Pacific American Females	\$815,981	0.65%	3.26%	\$4,099,386	-\$3,283,405	0.20	not significant
Asian-Pacific American Males	\$1,230,773	0.98%	6.57%	\$8,248,764	-\$7,017,991	0.15	< .05 *
Subcontinent Asian American Females	\$0	0.00%	0.64%	\$799,880	-\$799,880	0.00	---
Subcontinent Asian American Males	\$1,551,690	1.24%	1.75%	\$2,199,671	-\$647,980	0.71	not significant
Hispanic American Females	\$1,718,215	1.37%	2.87%	\$3,599,461	-\$1,881,246	0.48	not significant
Hispanic American Males	\$998,897	0.80%	5.07%	\$6,374,045	-\$5,375,148	0.16	< .05 *
Native American Females	\$0	0.00%	0.22%	\$274,959	-\$274,959	0.00	---
Native American Males	\$0	0.00%	0.44%	\$549,918	-\$549,918	0.00	---
Non-Minority Females	\$12,332,525	9.82%	16.16%	\$20,296,960	-\$7,964,434	0.61	not significant
Non-Minority Males	\$106,289,779	84.60%	56.01%	\$70,364,460	\$35,925,318	1.51	< .05 †
<b>TOTAL</b>	<b>\$125,631,182</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$125,631,182</b>			
Minority and Gender	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Females	\$2,542,133	2.02%	10.33%	\$12,973,057	-\$10,430,924	0.20	< .05 *
Minority Males	\$4,466,745	3.56%	17.51%	\$21,996,705	-\$17,529,960	0.20	< .05 *
Non-Minority Females	\$12,332,525	9.82%	16.16%	\$20,296,960	-\$7,964,434	0.61	not significant
Non-Minority Males	\$106,289,779	84.60%	56.01%	\$70,364,460	\$35,925,318	1.51	< .05 †
<b>TOTAL</b>	<b>\$125,631,182</b>	<b>100.00%</b>	<b>100.00%</b>	<b>\$125,631,182</b>			
Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disp. Ratio	P-Value
Minority Business Enterprises	\$7,008,878	5.58%	27.84%	\$34,969,762	-\$27,960,884	0.20	< .05 *
Non-Minority Female Business Enterprises	\$12,332,525	9.82%	16.16%	\$20,296,960	-\$7,964,434	0.61	not significant
Minority and Women Business Enterprises	\$19,341,403	15.40%	43.99%	\$55,266,722	-\$35,925,318	0.35	< .05 *
Non-Minority Male Business Enterprises	\$106,289,779	84.60%	56.01%	\$70,364,460	\$35,925,318	1.51	< .05 †

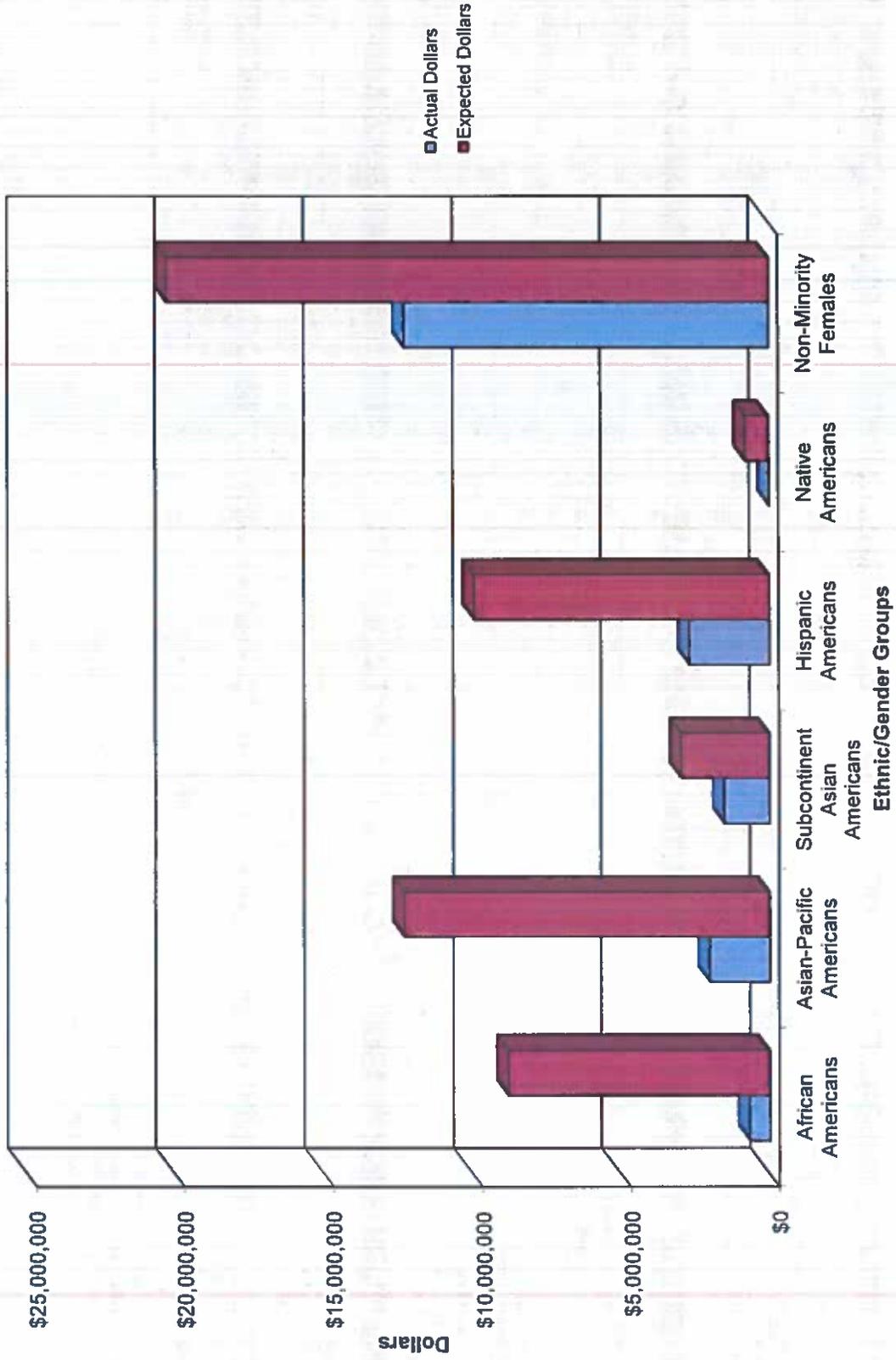
(\*) denotes a statistically significant underutilization

(†) denotes a statistically significant overutilization.

(\*\*) denotes that this study does not test statistically the overutilization of MWBEs or the underutilization of non-minority males.

(---) denotes an underutilized group with too few available firms to test statistical significance.

**Chart 8.01: Disparity Analysis: Professional Services Subcontracts  
July 1, 2006 to June 30, 2013**



**B. Professional Services Subcontract Awards, July 1, 2012 to June 30, 2013**

The disparity analysis of professional services subcontracts awarded during the first year of the Small and Disadvantaged Business Enterprise Program is depicted below in Table 8.03. The ethnic and gender groups are aggregated in order to have sufficient statistical power to test for the statistical significance of the M/WBE underutilization.

*Minority and Women-owned Business Enterprises* represent 43.99 percent of the available professional services businesses and received 3.92 percent of the dollars for professional services subcontracts. This finding represents a statistically significant underutilization.

*Non-Minority Male-owned Business Enterprises* represent 56.01 percent of the available professional services businesses and received 96.08 percent of the dollars for professional services subcontracts. This finding represents a statistically significant overutilization.

**Table 0.07: Disparity Analysis: Professional Services Subcontracts  
July 1, 2012 to June 30, 2013**

Minority and Females	Actual Dollars	Utilization	Availability	Expected Dollars	Dollars Lost	Disparity Ratio	P-Value
Minority and Women Business Enterprises	\$7,937	3.92%	43.99%	\$89,148	-\$81,211	0.09	< .05 *
Non-Minority Male Business Enterprises	\$194,712	96.08%	56.01%	\$113,501	\$81,211	1.72	< .05 †

- ( \* ) denotes a statistically significant underutilization
- ( † ) denotes a statistically significant overutilization.
- ( \*\* ) denotes that this study does not test statistically the overutilization of M/WBEs or the underutilization of non-minority males.
- ( — ) denotes an underutilized group with too few available firms to test statistical significance.

**III. SUBCONTRACT DISPARITY SUMMARY**

As indicated in Table 8.04, disparity was found in the award of subcontracts to African American, Asian-Pacific American, Subcontinent Asian American, Hispanic American, MBEs and M/WBE professional services subcontractors during the July 1, 2006 to June 30, 2013 study period.

During the study period, the Authority, like other USDOT grantees in the State of California did not have race-based contracting goals. However, the State’s Executive Order S-02-06, enacted in 2006, requires that all state agencies meet or exceed a 25 percent small businesses participation goal. The Authority did not apply the small business participation on its prime and subcontracts until the enactment of the Small and Disadvantaged Business Enterprise Program in August 2012. The Authority’s Small and Disadvantaged Business Enterprise Program is wholly race-neutral in compliance with California Constitution Section 31 of Article I. Section 31 of Article I is a constitutional amendment that precludes the use of preferences in the award of public contracts. Section



31 states that “if any parts are found to be in conflict with federal law or the U.S. Constitution, the section shall be implemented to the maximum extent that federal law and the U.S. Constitution permit.” The amendment, however, allows for the affirmative action requirements of a federal grant.

**Table 0.08: Summary of Subcontract Disparity Findings  
July 1, 2006 to June 30, 2013**

Ethnic/Gender Group	July 1, 2006 to June 30, 2013
<b>African Americans</b>	Statistically significant underutilization
<b>Asian-Pacific Americans</b>	Statistically significant underutilization
<b>Subcontinent Asian Americans</b>	Underutilization
<b>Hispanic Americans</b>	Statistically significant underutilization
<b>Native Americans</b>	---
<b>Minority-owned Business Enterprises</b>	Statistically significant underutilization
<b>Non-Minority Female-owned Business Enterprises</b>	Underutilization
<b>Minority and Women-owned Business Enterprises</b>	Statistically significant underutilization



Table 8.05 shows that disparity was also found in the award of subcontracts to Minority and Woman-owned professional services subcontractors during the initial year of the Small and Disadvantaged Business Enterprise Program.

**Table 0.05: Summary of Subcontract Disparity Findings  
July 1, 2012 to June 30, 2013**

Ethnic/Gender Group	July 1, 2012 to June 30, 2013
<b>Minority and Women-owned Business Enterprises</b>	Statistically significant underutilization



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# **CHAPTER 9**

## **RECOMMENDATIONS**

### **I. INTRODUCTION**

The chapter provides race and gender-neutral recommendations to remedy the statistically significant disparity in the utilization of the available Minority and Women-owned Business Enterprises (M/WBEs) at both the prime contract and subcontract levels as documented in this Study. Although there are findings of statistically significant underutilization of M/WBEs, the Authority cannot implement race-based remedies because Section 31 of the State constitution bars the use of race and gender preferences, except as a condition of federal funding. The Authority is a recipient of United States Department of Transportation (USDOT) funding from the Federal Railroad Administration (FRA). However, the FRA funding is not subject to the goal setting requirements of USDOT DBE regulations 49 CFR Part 26, Subpart C. Consequently, the recommendations are limited to race and gender-neutral remedies that address the administration of the procurement process and the tracking, reporting, and publication of contract opportunities and awards.

The recommendations include strategies to remove barriers to M/WBE, Disadvantaged Business Enterprises (DBE), and Disabled Veteran Businesses Enterprises (DVBE) (hereafter collectively referenced as DBE and SBE) access to the Authority's professional services contracts, including design-build contracts. Although there were no design-build contracts awarded during the study period, strategies are recommended to maximize the utilization of DBEs and SBEs on the construction and construction-related services subcontracts awarded under the design-build contracts because of the scope of these anticipated prime contracts.

The Authority's Small and Disadvantaged Business Enterprise Program contains provisions to increase DBE and SBE participation in professional services contracting. However, recommended expansions and improvements to the Program provisions can further remove barriers to DBE and SBE access to the Authority's professional services and design-build contracts.



### **II. SUMMARY OF DISPARITY FINDINGS**

Table 9.01 represents a summary of the disparity findings for professional services prime contracts awarded during the study period. The \$14 million threshold was designated because under California Government Code (GC), this threshold defines a Small

Business Enterprise. The under \$250,000 threshold is the informal threshold defined in the California Department of General Services (DGS) procurement standards. DGS stipulates that contracts valued from \$5000.01 to \$249,999.99 can be awarded to a certified Small or Disabled Veteran-owned Business, provided that the department has received at least two responsive bids.

In the table, *Yes* indicates that statistically significant disparity was found. *No* indicates that statistically significant disparity was not found. Where “----” appears, there was underutilization, but records were insufficient to measure statistical significance of the under utilization.

**Table 9.01: Prime Contract Disparity Summary  
July 1, 2006 to June 30, 2013**

Ethnicity/Gender	Professional Services	
	Contracts under \$14,000,000	Contracts under \$250,000
African Americans	Yes	No
Asian-Pacific Americans	Yes	Yes
Subcontinent Asian Americans	No	No
Hispanic Americans	Yes	No
Native Americans	---	---
Minority-owned Business Enterprises	Yes	Yes
Non-Minority Female-owned Business Enterprises	No	Yes
Minority and Women-owned Business Enterprises	Yes	Yes

Table 9.02 represents a summary of subcontract disparity. In the table, *Yes* indicates that statistically significant disparity was found. *No* indicates that statistically significant disparity was not found. Where “----” appears, there was underutilization, but records were insufficient to determine statistical significance of the underutilization.

**Table 9.02: Subcontract Disparity Summary  
July 1, 2006 to June 30, 2013**

Ethnic/Gender Group	Professional Services
	All Subcontracts
African Americans	Yes
Asian-Pacific Americans	Yes



Ethnic/Gender Group	Professional Services All Subcontracts
Subcontinent Asian Americans	No
Hispanic Americans	Yes
Native Americans	---
Minority-owned Business Enterprises	Yes
Non-Minority Female-owned Business Enterprises	No
Minority and Women-owned Business Enterprises	Yes

### **III. RACE AND GENDER-NEUTRAL RECOMMENDATIONS**

The race and gender-neutral provisions described in the Small and Disadvantaged Business Enterprise Program are included and recommended enhancements are provided below.

#### **A. Administrative Strategies**

##### **1. Issue Prompt Payment to DBE and SBE Prime Contractors**

The Authority's Small and Disadvantaged Business Enterprise Program includes a prompt payment provision for subcontractors. The provision requires that the prime contractor pay a subcontractor within seven days of receipt of payment from the Authority. In addition, retainage must be returned within 10 days of subcontractors' work being completed. However, there is not a provision of prompt payment to DBE and SBE prime contractors. DBE and SBE prime contractors face similar challenges related to cash flow as DBE and SBE subcontractors. Therefore, the Authority should add language in DBE's and SBE's prime contracts to pay the contractor within 15 days of receiving an undisputed invoice.

##### **2. Give Five-day Notice of Invoice Disputes**

Within five (5) days of receiving a disputed invoice, the contractor should receive an Invoice Dispute Notification from the Authority detailing any item in dispute. Undisputed invoice amounts should be paid promptly, and disputed items should be resolved in a timely manner and thereafter paid promptly. The prime contractor should have the same obligation to give notice to the subcontractor within five (5) days of any disputed invoice or item of work on an invoice.



### **3. Institute Payment Verification Program**

In order to monitor compliance with the prompt payment provision, the Authority should verify payments made to DBE and SBE subcontractors and prime contracts. Currently, prime contractors are required to submit Form 103 monthly to verify that subcontractors have been paid. However, this system neither allows integration into the financial system because the form is in hard copy format, nor facilitates verification of payments or lack thereof.

A payment verification program would allow subcontractors to notify the Authority of late payments or non-payments in real time. In addition, each subcontractor listed as paid for the previous billing cycle should be contacted electronically to verify that payment was received. This verification procedure would eliminate reliance on self-reporting by the prime contractors. Given the Authority's growing staff needs, verification by subcontractors could also assist the Authority's project management office monitor compliance.

If a subcontractor reports a discrepancy in the amount actually received from the prime contractor, the discrepancy should be resolved before any additional payments are made to the prime contractor. The simplest resolution would be to have the prime contractor submit to the Authority with each invoice an image of the cancelled check written to the subcontractor to pay for the previous invoice. The payment verification program should be published on the Authority's website, in solicitation documents, and in contract documents. The prime contractors' compliance with the payment verification program should be a mandatory provision of the prime contract.

### **4. Require Fulfillment of DBE and SBE Goals at Bid Opening**

The prime contractor should be required to meet the subcontract goal as a condition of award or document that a good faith effort has been made. If neither the goal, nor the good faith efforts are met the contract should be awarded to the next ranked firm that meets the goal or good faith requirements. This standard would allow greater oversight by the Authority to ensure that the DBE and SBE goals are met on each contract awarded.

### **5. Assess Penalties for Not Achieving the DBE and SBE Contract Goals**

The Authority's Small and Disadvantaged Business Enterprise Program allows for the assessment of monetary penalties for noncompliance with the 30 percent goal. The prime contractor should be required to document the attainment of the approved DBE or SBE goal at the close of the contract. Monetary penalties should be levied on the prime contractor that does not meet the DBE or SBE goal. The penalty, equal the DBE or SBE goal shortfall, could be assessed during the project close-out and withheld from the retainage.



## **6. Improve SBE Program Accountability Standards**

The Authority's accountability structure for compliance with the Small and Disadvantaged Business Enterprise Program is not transparent. It is not clear from the Authority's website, Small and Disadvantaged Business Enterprise Program, or standard contract provisions which office or staff a prime contractor or subcontractor should contact for questions, concerns, complaints, or disputes related to Authority contracts, contracting opportunities, or Small and Disadvantaged Business Enterprise Program standards. This is troublesome in light of the fact that the Authority is understaffed, and that program management and oversight have been largely delegated to a contractor. The 2012 California State Auditor Report raised concerns about the program management contractor falsifying progress reports and inappropriately approving invoices. Seemingly, the report findings indicate the Authority's oversight and accountability is severely compromised.

The Authority should establish a mechanism to ensure that DBEs and SBEs have a means to address contract complaints and disputes to avoid having to use the formal dispute resolution process discussed below. This is particularly important for DBE and SBE subcontractors, especially in payment dispute matters or other routine contract or pre-award matters that might otherwise be elevated for formal dispute resolution. Whenever possible, the Authority should attempt to address concerns of contractors before formal dispute resolution is necessary the formal dispute resolution is discussed below. The office responsible for contractor complaints and disputes should be staffed with qualified, permanent Authority personnel and should have authority to investigate concerns, complaints, and disputes. In addition, more transparent procedures to escalate complaints and disputes from the director-level to executive-level personnel should be formulated, implemented, and publicized widely on the Authority website, in contract documents, newsletters and business meetings.

Any complaint filed by contractors should be written and include at least the following information:

- a. Date submitted;
- b. Contract number;
- c. Contractor's name, address, and telephone number;
- d. Factual allegations contained in the dispute, supported by an affidavit based on the claimant's personal knowledge; and
- e. Documentation of all grounds supporting the contractor's need a timeline for hard-line the matter requested relief.

## **7. Add a Cone of Silence Provision**

The Authority's contracts should include a provision that designates a contact person for each solicitation published. The bidders should only be allowed to communicate with the designated contact person and should not be permitted to influence the bidding process by contacting other Authority personnel or members of the Board of Directors. The



communication between the bidders and the contact person must be material and concern a request or issue about a pending or potential procurement. The communication standards should be published on the Authority website and in all solicitations.

## ***B. Supportive Services Strategies***

The following recommendations should effectively encourage and support DBEs and SBEs to become familiar with the Authority's contracting procedures and gain the required expertise.

### **1. Encourage Joint Ventures**

Joint ventures between SBEs should be encouraged by allowing the SBE joint venture partners to meet the SBE goal if the certified SBE provides a commercially useful function and does not rely on the non-SBE's resources or personnel to fulfill the contract requirements. A joint venture would allow the SBE's to competitively bid on larger contracts as prime contractors.

### **2. Assist DBEs and SBEs in Securing Contracting Opportunities**

The USDOT's Office of Inspector General's 2013 Audit Report found that too few resources are allocated by USDOT recipients to assist DBEs in actually obtaining work. The Report found that recipient's resources are concentrated on certifying DBEs and increasing the number of certified DBEs. Therefore, DBEs' contracting needs are not addressed. Even though the Authority is not a certifying agency, it expends resources to identify businesses eligible for certification businesses. In light of the Audit Report's finding, more resources should be focused on making Authority projects and contracts more accessible to DBEs and SBEs have an increasing number certified.

Early notice of identified contract opportunities should be provided to DBEs and SBEs. Notices of contract opportunities should include complete and current contact information for the project manager. Contract managers should be required to communicate with interested DBEs and SBEs and be accessible within 72 hours of receiving an inquiry from DBEs and SBEs. The Authority should establish a protocol for handling telephone and written inquiries from DBEs and SBEs. The protocol should specify who, when, and how the various inquiries should be handled. Under no circumstances should there be more than 72-hour delay on responding to an inquiry.

### **3. Enhance Networking Opportunities**

The Authority should continue to offer also networking opportunities, such as pre-bid conferences and certification workshops. However, the Authority should make an effort to advertise such opportunities through their weekly email updates, newsletters, trade associations, other agency publications, and the website to target DBEs and SBEs. As discussed above, the Authority should advertise these events well in advance in order to increase attendance.



The Authority should also sponsor marketing forums to allow DBEs and SBEs to deliver technical presentations to the Authority and management staff. The forums should be topical and held on at least a quarterly basis. The Authority held an industry forum for design-build contracts in April of 2014. Additional industry forums on other types of contracts are strongly encouraged. The Authority personnel should notify DBEs and SBEs of the opportunity to make a presentation. Businesses should be required to register on line on a first-come, first-served basis. The outreach material should provide detail sufficient to inform interested businesses of the opportunity to make a presentation at the forum. The forums would allow DBEs and SBEs to become more familiar with procurement and department managers, as well as increase the Authority staff's knowledge of the goods and services offered by DBEs and SBEs.

#### **4. Create a Listserv to Communicate with Interested DBEs and SBEs**

A listserv could target emails to certified DBEs and SBEs that express an interest in the Authority's upcoming contracts and contract forecasts. A listserv can disseminate low cost communications to DBEs and SBEs, virtually ensuring that communications occur on a regular basis and the database can be easily updated to include new DBEs and SBEs.

#### **5. Post Contract Award Notices**

Contract award notices should be posted on the Authority's website and emailed to all bidders. Proof of receipt should be required to confirm that bidders receive timely delivery.

#### **6. Post Contract Solicitations**

Print media is increasingly being replaced by digital media. Accordingly, publishing bidding opportunities in newspapers and trade publications is increasingly ineffective in reaching DBEs and SBEs. Searching for bidding opportunities in print media is time-consuming and tedious. Email or other electronic notifications should also be a standard method of communication. Electronic updates could be posted and emailed weekly or bi-weekly on the same day and at the same time.

#### **7. Publish a Newsletter Regularly**

Newsletters can supplement the weekly email updates and enhance the communication with DBEs and SBEs. The Authority should use a monthly publication as a tool to keep business owners abreast of important announcements. The current monthly newsletter, *Small Business Newsletter*, is only published periodically. The newsletter offers detailed information on upcoming projects, project status, and other Authority announcements. The newsletter should be published on schedule each month and remain on the Authority's website for at least 36 months. As of May 2014, the 2013 newsletters were available on the Authority website for the months of March, April, May/June, July/August, and December. And the only 2014 newsletter was posted for March 2014.



## **8. Publish Pre-Proposal Meeting Announcements Timely**

The Authority announced in the December 2013 issue of the *Small Business Newsletter* a December 13, 2013 deadline for Statements of Qualifications. A similar example of the insufficient notice appeared in the July/August newsletter, when the Authority announced Requests for Qualifications for engineering and surveying services were due on July 16, 2013 and the pre-proposal meeting also would be held in July. In order to inform business owners and to communicate the sincerity of the Authority's interest in having DBEs and SBEs bid and the DBE or SBE goal met, the Authority should announce pre-bid meetings well in advance of the scheduled event.

Business owners should be afforded sufficient notice to encourage maximum attendance of DBEs and SBEs. Events, such as pre-bid meetings, are an important networking tool for DBEs and SBEs, they allow SBEs and DBEs to find potential partners for joint ventures and to meet prime contractors who may use them as subcontractors later on. Since a prime contractor is more likely to use a known subcontractor. Pre-bid meetings can initiate a working relationship between prime contractors and DBE and SBE subcontractors.

## **9. Offer Additional Workshops**

The Authority could expand the scope of its networking events to offer assistance with bidding, plan reading, cost estimation, writing of statements of qualifications, marketing, financial statements, or business management. Bidding workshops could be incorporated as part of the agenda for certification workshops or offered on as separate events.

Management workshops could be a part of a multi-series workshop offered at regular intervals. Workshops that enhance entrepreneurial and management skills can also provide DBEs and SBEs with the knowledge and ability to improve their marketing and presentation when bidding Authority contracts.

## **C. Procurement Strategies**

There are numerous race and gender-neutral remedies that can be applied at various stages in the procurement process to increase DBE and SBE participation in the Authority's contracts.

### **1. Pre-Bid Recommendations**

This section contains recommendations for the Authority to implement prior to advertising a solicitation.



**a. Revise Insurance Requirements**

Insurance requirements should be evaluated to ensure that smaller contracts do not carry a disproportionately high level of coverage. Insurance requirements on small contracts should be eliminated. For all other contracts, the coverage should be set in relation to the actual contract liability. Prohibitive insurance requirements can be a disincentive, and constitute a barrier to DBEs and SBEs, and increase the Authority's costs to procure professional services since the insurance fees are imbedded in the bid.

**b. Phase Out Retainage Requirements**

Retainage, as a percentage of each invoice payment withheld on professional services contracts until the end of the contract, should be re-evaluated. Unlike construction projects, work products are delivered intermittently on many professional service contracts. Therefore, the Authority should impose the retainage policy on a case-by-case basis.

On all projects the subcontractors' retainage should be released on an item-by-item basis as the contractors' work, and/or supplies, are accepted by the Authority. This modification in current policy would reduce the cash flow burden experienced by small prime contractors and subcontractors. Increased cash flow would allow small businesses to build capacity.

**c. Provide Adequate Lead Time When Advertising Solicitations**

In order to maximize DBE and SBE participation, the Authority should ensure that prime contractors have adequate lead time to bid on Authority contracting opportunities. DBEs and SBEs should receive notice of contract opportunities at least four weeks before the bids are due. Some members of the Authority's Business Advisory Council have expressed confusion over proposal due dates. Longer lead time allows businesses sufficient time to address questions and concerns about Authority contracting opportunities. Notice should be disseminated to DBEs and SBEs through the email notifications, newsletters, and networking opportunities.

**d. Publish Business Processes**

The Authority should make the procurement process more transparent by publishing the procurement standards online in a standardized, downloadable, and readable format. Providing an open source for information on the procurement process will engender the public's trust in the procurement process and make procurement decisions more transparent. In addition, businesses would have the information needed to make informed judgments about doing business with the Authority. The time a business must commit to locating information relating to the contracting process should be reduced. It would also be a cost savings to not have staff responding to a myriad of requests from businesses for information about the contracting process. An open source would also maximize staff time, resources, goodwill with the Authority's constituents.



#### **e. Implement Formal Dispute Resolution Standards**

Dispute resolution standards should be established to allow businesses to resolve issues relating to work performance after a contract award. Currently, there is not an Authority officer or office that handles prime contractors or subcontractors' disputes. The Authority should actively manage prime contractor and subcontractor disputes related to Authority contracts. The proposed dispute resolution standards should apply to disputes between prime contractors and the Authority as well as disputes between subcontractors and prime contractors. The dispute resolutions should include provisions for an ombudsperson to handle mediation as needed to achieve timely resolution of the dispute. Mediation should be mandatory in the event a dispute cannot be resolved by the ombudsperson within 10 working days.

The first step in the mediation process would be the submission of a complaint in writing by the aggrieved party to the ombudsperson. The ombudsperson would then aid the parties in resolving the dispute by investigating the claim and making initial contact with the Authority, prime contractor, or subcontractor. If the dispute is not resolved through these means, the ombudsperson will assist the aggrieved party in filing a request for mediation. A dispute would have to be taken to the ombudsperson before proceeding to mediation.

Mediation would be the second step in the resolution process. The mediator contacts both parties involved in the dispute and assists the parties in arriving at an agreed upon resolution. Neither party may involve legal representation during the mediation process. If the parties are not able to reach a mutually agreed upon resolution through mediation, the dispute may proceed to arbitration. A dispute must be taken to mediation before it can proceed to arbitration.

Arbitration is the final step to resolving a dispute. The decision reached by the arbitrator is final and binding. The parties may retain legal representation during the arbitration process.

#### **f. Provide Debriefing Sessions for Unsuccessful Bidders**

Debriefing sessions should be made available to unsuccessful bidders. This option should be published on the Authority's website and included in the Notice of Intent to Award that is sent to unsuccessful bidders.

#### **g. Provide Evaluation Documents**

The evaluators' names and scores should be made available at the time the firm selected for the award is announced. The proposal and the statement of qualifications, and bids should be released upon request at the time the notice of Intent to Award is published. Providing such information upon demand creates greater transparency and allows unsuccessful bidders to improve their bids on future Authority opportunities.



## **D. Small and Disadvantaged Business Enterprise Program Administration**

The following recommendations apply to the Authority's procurement process as a whole and are intended to increase its efficacy and efficiency.

### **1. Develop a Small Business Program Manual and Training Program**

A successful Small and Disadvantaged Business Enterprise Program requires collaboration from all offices and divisions. A *Small Business Program and Training Manual* should be developed to standardize the delivery of the Small Business Program requirements. A manual could ensure that all division managers and their staff have the knowledge and skills to fulfill their duties within the Program. The procedures set forth in the manual should become standard operating procedures for Authority Staff. The *Small Business Program and Training Manual* would also provide staff with clear guidance on its responsibilities to track and report the participation of SBEs and to fulfill other program requirements. Furthermore, a *Small Business Program and Training Manual* should be developed and incorporated in the Authority's new employee orientation.

### **2. Fully Staff the Office of Small Business**

The Authority's Office of Small Business should be staffed with an adequate number of experienced professionals capable of fulfilling the responsibilities to enhance and expand the Small and Disadvantaged Business Enterprise Program. Adequate staffing is necessary to implement and enhance the Small and Disadvantaged Business Enterprise Program objectives. The staff should be augmented to include an ombudsperson who would handle disputes and address the concerns of businesses that contract with the Authority, or which are interested in doing so. The staff should have knowledge about procurement standards, California contracting law, regulations, and affirmative action programs. The personnel should have professional knowledge of the relevant industries. The education levels and professional experience should include business administration and business processes. In order to service the enhanced Small and Disadvantaged Business Enterprise Program, computer and database knowledge should be requisite skills for the staff. All staff should have an expressed interest in increasing the participation of DBEs and SBEs in all facets of the Authority's contracting. The performance for the program staff should include objective measurement of the extent to which the DBE and SBE goal is attained and exceeded.

### **3. Expand Business Advisory Council's Function**

In April 2012, the Authority created a Business Advisory Council (BAC) to advocate for small business owners to have increased access to the Authority's procurement process. The objective of the BAC is to advise and make recommendations to the Authority in the areas of:



- Increasing access to procurement and contracting opportunities for DBEs and SBEs;
- Reviewing initiatives, staff recommendations, and policies that impact small businesses participation; and
- Better informing small business communities of prospective procurement and contract opportunities.

The Authority should increase efforts to implement the stated objective of the BAC and act on recommendations and concerns expressed by BAC members in order to increase DBE and SBE participation. The business members of the BAC are trade organization representatives that are familiar with the barriers DBEs and SBEs encounter in contracting or attempting to contract with the Authority. Greater involvement of the BAC may also improve the effectiveness of the Small and Disadvantaged Business Enterprise program and the Authority's relationship this constituent group.

Additionally, the BAC should hold monthly meetings on a regular basis at a place and time designated by the BAC. Currently, the BAC meets on the third Thursday in "pre-determined months." Meetings seem to occur between one to four months apart. Additionally, special meetings may be called as needed. The BAC's "Operating Guidelines" should also be published and posted on the website in order to increase transparency. Currently, only meeting agendas and minutes are available on the website.

### ***E. DBE and SBE Program Tracking and Monitoring Strategies***

Recommendations are presented as strategies to enhance the Authority's management of the financial and procurement data necessary to ensure accuracy of its utilization reports.

Prime contract and subcontract awards and payments must be monitored to ensure accuracy of the Authority's reports of the DBE and SBE utilization. An assessment of the Authority's data management process revealed the need for an improved system.

#### **1. Implement a Financial Management System**

A financial system to record each prime contract award and all listed subcontractor needs to be implemented. The system should track in each prime contract record the contract name, award amount and date, payment amounts and dates, and vendor contact information. Each of the prime contractor's DBE, SBE, non-DBE, and non-SBE subcontractors should be recorded with its award amount and vendor contact information linked to the prime contract number. The record for each contract should also include the requisition number, date, and initiating department.



The system should have the capability to produce both *ad hoc* and customized reports listing the contract award and payments to the prime contractor and its subcontractors for any time period as specified. All bids and proposals submitted should be captured in the financial system with an electronic copy of the contract.

The Authority's current electronic system for handling contracts does not record the prime contract name, vendor contact information, or payment amount. There is no record of award or payment information for the subcontractors. The archived contracts and proposals are housed in the Authority's file room. There is no inventory of the files or order to their storage. Cabinets which contain files are labeled with adhesive notes. Cardboard boxes containing contract files and binders with proposals are stacked high in the file room.

## **2. Use a Unique Identifier for All Contracts Regardless of Procurement Type**

Each contract should have a unique contract number assigned when the requisition is approved for advertising. The contract number should be used on all modifications to the original contract. The number system for purchase orders should be assigned from the same set of contract numbers, so that prime contracts and task orders can be linked.

## **3. Track Type of Work Performed**

In addition to contract descriptions, the Authority should utilize the North American Industry Classification System (NAICS) commodity codes to describe the specific nature of work performed in each prime contract and subcontract. All Authority contracts at the time the requisition is approved should be assigned an appropriate NAICS code.

## **4. Implement Uniform Standards for Data Capture**

All procurement data should be captured in a uniform standard. During the study period, the Authority used different formats to enter dates, and contract numbers. At times, this information was not captured in the records Mason Tillman received. Uniform standards should be developed for recording all procurement data. It should be mandatory that all data is entered and reported in a uniform standard.

## **5. Utilize a Professional Archiving System**

The Authority should utilize a professional archive system to inventory and store its hardcopy records. A professional archiving system would allow for quicker access and easier reference when reviewing contract files. It could potentially save on the cost to retrieve archived files.

## **6. Conduct Routine Post-Award Contract Compliance Monitoring**

Monthly contract compliance monitoring should be conducted to ensure that the subcontractor participation listed in bids, proposals, and statements of qualification is



achieved for the contract duration. After the contract is awarded, regular compliance monitoring should verify the prime contractor's post award subcontracting levels. Consistent contract compliance monitoring could minimize the hardships experienced by all subcontractors due to unauthorized substitutions and late payments.

The following contract compliance monitoring methods are recommended:

- Track and report subcontractor utilization in an electronic database
- Perform job site visits in order to monitor actual DBE and SBE participation on the Authority contracts
- Conduct on-site certification reviews in order to ensure that only eligible firms are meeting the DBE or SBE goals

#### **7. Track and Monitor Pre-Award Subcontractor Commitments**

The reported subcontract award data should be verified by the listed businesses prior to authorizing a contract award. Currently, prime contractors have to submit monthly form number to track SBE utilization and payments to subcontractors. As an additional monitoring tool, the prime contractor should be required to submit the executed subcontract with each listed DBE and SBE prior to issuing the initial prime invoice payment.

#### **8. Improve Oversight of Noncompetitively Bid Contracts**

The Authority's informal threshold is under \$250,000. One of the Authority's prime contractors received 15 non-competitively bid contracts under \$250,000. These contracts should have been bid competitively in order to ensure that all DBEs and SBEs, had an opportunity to work with the Authority. By implementing a centralized financial and management system and tracking work by NAICS codes, the Authority could improve oversight over informal contracts in order to ensure fair and open competition.

### ***F. Contracting Strategies for Design-Build Projects***

Design-build is a delivery method bundles a significant number of construction items of work and professional services tasks in one contract. The Authority has selected the design-build delivery method to construct the high-speed rail system. In 2013, a short list of five qualified potential bidders was created. Each short listed firm was a joint venture of several firms and a few of the joint venture partners were on more than one team. Each joint venture received two million dollars to prepare a proposal in response to the RFP for Construction Package 1. The Authority's Small and Disadvantaged Business Program's provisions requiring the identification of SBEs after contract awards were applied in this solicitation. The provisions apply to subcontracting, as set forth in the contract.

The scale and scope of the design-build contracts can be so great that a single company cannot assume the risk management or provide the requisite capacity to perform the items



of work. Yet, one design-build contract can put under the control of a single contractor virtually all of an agency's construction and construction-related design contracts. For example, the Authority's Construction Package 1 included design services, which encompassed environmental documentation, hazard logs, as well as design baseline, hydrology and hydraulics, geotechnical, structures, and aesthetic reports, engineering services, construction services, which encompasses safety and security, hazardous material handling, utility work, demolition, roadway construction, trackway, retaining walls, concrete barriers, tunnels, cut sections and walls, bridges, aerial structures, drainage, grounding, and bonding, low voltage systems, lighting, and pumps. Given the scale and scope of these design-build contracts, any procurement program intended to benefit DBEs and SBEs must be carefully crafted to ensure full compliance with the program when awarding design-build contracts.

It is therefore recommended that additional program provisions be instituted to ensure the DBE and SBE goal is met on the five proposed design-build contracts expected to be awarded to build the high-speed rail system. Since the DBE and SBE goals are applied to the design-build contracts after contract award, the policy should be enhanced to include provisions which will provide greater assurance that the Program's 30 percent SBE goal is achieved on each task order.

The Authority projects that there will be four design-build contracts awarded to construct the first four segments of the high speed rail system. The first of the four contracts was awarded August 16, 2013 outside of the study period. The first award was \$985,142,530 to Tutor Perini/Zachry/Parsons (TPZP), a joint venture comprised of three firms. All of the joint venture partners were Non-Minority Male-owned Business Enterprises.

Given the level of subcontracting that will be under the control of the four design-build contractors selected for construction packages 1, 2/3, 4, and 5, specific race and gender-neutral recommendations are provided to maximize the participation of DBEs and SBEs on contracts awarded using the design-build delivery method. The following recommendations will address issues specific to design-build contracting in order to expand on or supplement the race and gender-neutral recommendations in the preceding sections of this Chapter.

### **1. Require a DBE and SBE Utilization Plan with the Bid**

A DBE and SBE Utilization Plan should be a document required to be submitted with the bid. The plan should require the bidder to identify the subcontract opportunities that will satisfy the 30 percent goal and the capacity requirements to perform the required work. Currently, the Authority's Small Business Performance Plan does not require prime contractor to identify the subcontractor or attainment of the goal at the time of bid opening. Prime contractors are only reporting DBE and SBE utilization monthly in Form 103. However, this tracking method does not permit monitoring at the outset of the contract. By requiring disclosure of this critical information from the prime contractor before a contract award, the Authority will be able to exercise greater oversight over DBE and SBE utilization and goal attainment.



## **2. Separate Design-Build Construction and Construction-Related Goals**

In light of the fact that the majority of the Authority's upcoming contracting opportunities will be awarded under the design-build delivery system, there should be separate DBE and SBE goals for construction and architecture and engineering contract work. These goals would need to be tracked and monitored separately.

## **3. Require DBE and SBE Goal Attainment on Each Task Order**

Due to the exorbitant size of the design-build contracts, the Authority should require DBE and SBE goal attainment on each task order. The name of each DBE or SBE subcontractor, the percentage of the assigned work, and the bid amount should be included in the task order submitted to the Authority for approval prior to the commencement of work. This reporting requirement will ensure that the 30 percent SBE utilization goal is met throughout the contract duration.

## **4. Track, Verify, and Report SBE Participation Monthly by Task Order**

DBE and SBE goal attainment should be tracked monthly on each task order in a financial database. Tracking each task order will ensure attainment of the DBE and SBE goal set forth in the DBE and SBE Utilization Plan submitted with the bid and incorporated in the design-build contract.

## **5. Assess Penalties for Not Achieving the Project Goal Set on Each Task Order**

In addition to the penalties assessed for not attaining goals on the entire contract as discussed above, the Authority should also consider assessing penalties for failure to attain the specific DBE and SBE goal approved in each task order.

## **6. Unbundle Large Procurements into Smaller Contracts**

The Authority's Small and Disadvantaged Business Enterprises Program includes selecting and breaking out contract work items into economically feasible units to facilitate DBE and SBE utilization, even when contractors might otherwise prefer to perform the work items with its own forces. Given the geographic market area's ever-increasing small business population, attention to the size of solicitations is simply good business. Unbundling will bring more opportunities within reach of the majority of the local businesses which indirectly fosters competition. The Authority has made efforts to encourage prime contractors to meet DBE and SBE goals by subcontracting after contract award using a number of good faith steps. Therefore, this Program provision should apply to design-build contracts.

Bundling occurs when small purchases are consolidated into one contract, or when goods or services previously purchased individually are grouped together into a single



solicitation. Bundling also occurs when projects that are on separate sites—or on discrete areas of the same site—are included in one solicitation.

The bundling of contracts prevents small firms from bidding on the parts for which they are qualified because the contract includes items of work so large they cannot perform. The review of the scope and scale of the design-build contracts revealed that the subcontracts could be quite large, and therefore, solicitations could be unbundled to allow greater DBE and SBE participation.

Multi-year agreements are additional examples of the type of procurement within which small purchases are combined into one large contract. Small tasks orders issued against a price agreement are customarily for small items of work. Tasks orders issued within a design-build contract using these multi-year agreements are examples of the type of procurement that could be unbundled. The Authority should therefore require that multi-year agreements are reviewed for the opportunities to break the agreements into smaller units of work that could be performed by a DBE or SBE. In determining whether projects should be unbundled, the following criteria should be considered:

- Whether or not the project takes place in more than one location
- Size and complexity of the procurement
- Similarity of the goods and services procured
- Sequencing and delivery of the work
- Public safety issues and convenience
- Procurement division options
- Size of the task orders issued against the procurement

## **7. Reserve Smaller Contracts for Small Businesses**

The Authority should require the design-build contractor to target contracts under \$250,000 to SBEs for construction-related design services, such as surveying and mapping, planning, environmental review, preliminary engineering, testing and commissioning, utilities relocation, drainage improvements, or landscaping. Under Government Code 14838.5, departments may directly solicit certified small businesses for goods, personal services, and IT goods/services between \$5,001 and \$249,999.99. Reserving small contracts in certain areas would allow SBEs to gain experience working on Authority contracts. Prior experience working with an agency increases the contractors' ability to competitively bid on larger contracts in the future. Increased exposure to Authority contracts could potentially allow SBEs to perform into larger contracts.

## **8. Use Direct Contracting to Award Small Contracts**

Direct contracting occurs when separate contracts are awarded for specialty or non-license services which might otherwise be included as an item of work in a construction contract or within the scope of an architecture and engineering contract. Direct



contracting would increase the opportunities for, and build the capacity of small firms by allowing them to work as prime contractors on a greater variety of contracts.

In the construction industry, trucking, demolition, surveying, and landscaping could be awarded as direct contracts and not as items of work in the general construction contract. Design services, which are not required to be performed by a licensed engineer, architect, or registered surveyor, could be awarded as direct contracts. These services include planning, environmental assessments, ecological services, cultural resource services, and testing services.

Under the Government Code, departments may directly solicit certified small businesses for contracts under \$250,000. The Authority should require the design-build contractor to solicit and receive at least two price quotes from certified SBEs. However, a task order should not be approved where this requirement has not been enforced.

#### **9. Establish a Direct Purchase Program for Construction Contracts**

Under a direct purchase program, the contractor includes the cost of construction materials and supplies in the bid. The supplier's name, quantities, and quote are included in the bid. The design-build could issue a purchase order to pay the supplier directly. The supplier would deliver the materials to the job site according to the contractor's schedule.

A direct purchase program would reduce the amount of the contractors' bid subject to a bond. For the purpose of bonding a job, the cost of supplies could be subtracted from the bid price, thereby reducing the amount of the contractor's bond.

This program can be beneficial to the DBE and SBE construction contractors and that may have cash flow challenges in funding their jobs. It would be especially helpful for DBEs and SBEs because the cost of the contract—and in turn the amount that has to be bonded—is reduced by the material costs included in the direct purchase. The cash flow required to pay suppliers in advance of receiving reimbursement for the materials is also eliminated. Additionally, the supplier, knowing that it would receive direct payment from the Authority, could give the small business a more competitive price, thereby reducing the overall bid price.

#### **G. Website Enhancement Strategies**

The Authority's website is well-structured, user-friendly, and contains relevant information for a contractor that can be accessed fairly easily. Each page has related links on the right-hand side where information relevant to a business seeking Authority contracts can be found. The *Doing Business with High-Speed Rail* page appears under the *About Us* dropdown menu and the *Small Business Program* page can be found under the *Programs* dropdown menu.

Links to the *Small Business Certification* page where the *Small Business Certification Guide* link is located are displayed on the quick links on the right hand side when



viewing the *Small Business Program* page. On the quick links section on the *Doing Business with High-Speed Rail* page, a contractor can find current *Bid Opening Results*, *Contracts Currently Out for Bid*, and *eProcurement*. The *eProcurement* link sends a contractor to the California State Contracts Register, the State Contracting and Procurement Registration System, the online Small Business and Disabled Veteran Business Enterprise queries, and the statewide Leveraged Procurement Agreements.

The search function works well, although some sifting through the irrelevant search results is necessary. The well-designed layout is intuitive and allows a contractor to find relevant information with ease. However, there are additional information and features that could enhance the website and provide greater value for business users.

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### **1. Post Key Staff Contact Information on the Contact Us Page**

The Authority's *Contact Us* page lists the complete address, telephone number, and email address for the Authority's headquarters. However, the telephone numbers and email addresses are missing for regional offices and relevant departments, including the Small Business Program office. The *Contact Us* page also is completely devoid of key personnel names and the operating hours for the offices. Although some additional contact information is provided on other pages on the Authority website, complete information for key personnel associated with the Small and Disadvantaged Business Enterprise Program and offices associated with contracting should be included on the *Contact Us* page.

A contractor seeking information on the Small and Disadvantaged Business Enterprise Program will likely go to the *Contact Us* page to find contact information. If that information is not found there, the contractors may not continue the search by exploring other pages. Listing specific contact names can facilitate access for contractors seeking to establish contact with the Authority and, specifically, the Small and Disadvantaged Business Enterprise Program, for clarification on bid items, certification, or other questions.

### **2. Provide Accessibility for Visually Impaired Individuals**

The Authority's commitment to creating a website that is accessible to everyone, including persons with disabilities, is stated on their *Accessibility* page. Disabled contractors can contact the Authority via email if any portion is not accessible due to a disability. However, there are a few improvements that could be made that do not affect the website's appearance or structure and provide immediate access without staff assistance.

### **3. Provide An Option to Enlarge Text**

One simple way to improve accessibility is to provide an option on each page to set the font size from small to medium or large. This feature minimizes barriers for visually impaired individuals.



#### **4. Provide Text-to-Speech Feature**

Each webpage could have a Text-to-Speech feature that reads text on the page out loud. This feature removes additional barriers for visually impaired individuals.

#### **5. Offer Additional Foreign Languages**

English is not the primary language for all users. One method to accommodate English as Second Language (ESL) users is to offer the website in multiple languages. A language selection bar would allow users to choose a preferred language. Upon selecting a language option, the entire website would appear in the alternative language. Offering this option would increase the efficiency and dissemination of information to business users for which English is a second language. The Authority website currently provides a Spanish language version as an option. However, adding more languages could reduce barriers to a wider spectrum of businesses.

#### **6. Offer Mobile-Optimized Website**

Mobile devices are expected by some experts to take over tasks that traditionally have been done on personal computers. Businesses are starting to focus on mobile-first approaches to reach consumers by developing mobile sites first before expanding them to full desktop versions. In order to accommodate the growing number of mobile users, the Authority's website should be mobile-optimized to ensure that all website features function properly on mobile devices, such as smartphones, tablets, and tablet hybrids.

#### **7. Utilize Social Media Utilities**

Social media, such as Facebook™ and Twitter™, can be powerful tools to keep contractors informed about upcoming projects, and new policies and procedures. These tools can be used to provide helpful and pertinent information that is updated regularly. The Authority's website already has five accounts, including Facebook™, Twitter™, YouTube™, Flickr™, and LinkedIn™. However, none of the five accounts contain information for businesses seeking contracts with the Authority. Accounts specifically for Authority contractors could be set up that may be separate from the accounts targeting the general public. The contractor-targeted accounts could provide hints, tips, and Q&As for contractors seeking contracting opportunities.

#### **8. Publish Contract Compliance Documents and Purchasing Guidelines**

Posting contract compliance documents and purchasing guidelines for each industry enhances transparency of the procurement process. Purchasing guidelines, purchasing manuals, or procurement standards also provide contractors with additional details of the Authority contracting process. This is especially important for business owners who are unfamiliar with the Authority's procurement process. This could remove barriers for business owners who have not contracted with the Authority previously. A search of



procurement guidelines using the search function on the Authority website resulted in a few relevant hits showing some guidelines. However, the Authority can create a section on the website where contractors to find these documents in one place with ease. One solution is to create a link to a dedicated webpage with all publicly available Authority procurement documents organized by type of document and industry.

#### **9. List of All Certified Subcontractors on the Website**

A search function to find subcontractors by type of certification, location, industry, and industry classification or NAICS codes is located on California state *eProcurement* website. This search function allows a contractor to find certified subcontractors with the desired certifications, such as small business or microbusiness certifications. However, there are two improvements that the Authority could make. First, no reference of such a list is made on the Authority website. A quick link to this list can greatly simplify the search for certified subcontractors. Second, the search function does not include an option to search for DBEs. The Authority could work with the California Department of General Services to add this certification category to the search or develop its own searchable database and listing.

#### **10. Compile Database of All Contracts Awarded**

The Authority should also create and maintain a database of all the contract awards on professional services, design-build, and goods and services contracts. This database should be made available to the public on the website to ensure transparency. This information is posted on BidSync, but is difficult to reach due to the login requirements, and the information is buried within all the other contracts BidSync handles. The Authority should parse out their contracts and post this information in a database on their website for the public.

#### **11. Publish Links to Ethnic and Trade Organization Partners**

The Authority website could also provide links to state and local ethnic and trade associations that provide assistance to veteran-owned small businesses and service disabled veteran-owned small businesses as well as DBEs, including M/WBEs. These associations often offer networking opportunities, free workshops to get DBE certified, and other kinds of assistance. The Authority already offers a link to the U.S. Department of Commerce Minority Business Development Agency. This feature could be enhanced by adding state and local nonprofits, trade organizations, and state-sponsored supportive



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## **CHAPTER 10**

# **APPENDIX - BUSINESS MARKET AVAILABILITY AND CAPACITY STUDY**

### **I. INTRODUCTION**

#### **A. Study Background and Purpose**

In September 2013, the California High-Speed Rail Authority (Authority) commissioned Mason Tillman Associates, Ltd. (Mason Tillman) to conduct a Business Market Availability and Capacity Study (Study) in conjunction with a Utilization and Disparity Study. The purpose of the Study is to identify and quantify Small Business Enterprises (SBEs), Disadvantaged Business Enterprises (DBEs), Disabled Veteran Business Enterprises (DVBES), and Minority and Woman-owned Business Enterprises (M/WBES) in California. The objective is to enumerate in the target population businesses that are willing and able to perform the contracts the Authority anticipates awarding in the construction and planning of the high-speed rail system. The industries specified in the commissioned are railroad related and similarly related engineering and construction, therefore, industries were simplified to include Construction, Design-Build, and Professional Services (including Architecture and Engineering). The industry classifications identified from the anticipated contracts also included goods and services. Therefore, the target population included businesses in four industries located in the State of California.

This Study was undertaken in a state wherein most businesses are small in terms of number of employees and annual revenue. The Reference USA Business Database™ reports that the majority, 89.78 percent, of the businesses in California have less than \$2.5 million in annual revenue, and 86.57 percent of the State's businesses have fewer than 20 employees.<sup>153</sup>

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<sup>153</sup> The Reference USA Business Database is updated on a rolling basis via public records and telephone verification. The data are compiled via telephone directories, annual reports, business directories, public records from county courthouses, SEC and 10k filings, and Secretary of State data. Each year, one to four phone calls are made to private companies to verify their sales volume, number of employees, and other information.



**Table 03: California Business Size by Sales Volume<sup>154</sup>**

Annual Sales Revenue	Number of Businesses	Percent of Businesses	Cumulative Percent
Less than \$499,999	701,587	66.66%	66.66%
\$500,000 – \$999,999	435,303	15.84%	82.50%
\$1,000,000 - \$2,499,999	247,307	7.28%	89.78%
\$2,500,000 – \$4,999,999	86,674	7.28%	97.06%
\$5,000,000 – \$9,999,999	61,205	1.71%	98.77%
\$10,000,000 – \$19,999,999	34,952	0.92%	99.69%
\$20,000,000 – \$49,999,999	20,201	0.20%	99.89%
\$50,000,000 – \$99,999,999	6,568	0.06%	99.95%
\$100,000,000 – \$499,999,999	4,166	0.05%	100.00%
\$500,000,000 and greater	1,026	<0.001%	100.00%
<b>Total</b>	<b>1,598,989</b>	<b>100.00%</b>	<b>100.00%</b>

**Table 04: California Business Size by Number of Employees<sup>155</sup>**

Number of Employees	Number of Businesses	Percent of Businesses	Cumulative Percent
1 – 4 employees	1,231,983	43.88%	43.88%
5 – 9 employees	292,686	27.22%	71.10%
10 – 19 employees	134,553	15.47%	86.57%
20 – 49 employees	134,553	5.42%	91.99%
50 – 99 employees	31,659	3.83%	95.82%
100 – 249 employees	16,957	2.19%	98.01%
250 – 499 employees	3,642	1.26%	99.27%
500 – 999 employees	1,167	0.41%	99.68%
1,000 – 4,900 employees	837	0.26%	99.94%
5,000 – 9,999 employees	71	0.03%	99.97%
10,000 or more employees	18	0.03%	100.00%
<b>Total</b>	<b>1,848,126</b>	<b>100.00%</b>	<b>100.00%</b>



<sup>154</sup> Reference USA Business Database <http://www.referenceusa.com> Last accessed January 13, 2014

<sup>155</sup> Ibid

## **B. Definitions**

The following definitions apply to this Study:

### **1. Business Classifications**

**Disadvantaged Business Enterprise (DBE)** is defined in the United States Department of Transportation (USDOT) DBE regulations, 49 CFR Part 26.67, as a for-profit business that is at least 51% owned, managed, and controlled by socially and economically disadvantaged individuals. It includes women, African Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and Asian Subcontinent Americans with a personal net worth (PNW) of less than \$1.32 million. A firm must be at least 51 percent owned by a woman, a member of a socially disadvantaged ethnic minority, or another individual regardless of race or gender as determined on a case-by-case basis. A disadvantaged person or persons must have managerial and operational control over all aspects of the business. The source of the capital contribution must be derived from independently owned holdings, without the benefit of a transfer of assets or gift from non-disadvantaged persons. The minority or woman-owned firm must not be inextricably associated or dependent upon a non-disadvantaged firm(s) or individual(s).

**Small Business Enterprise (SBE)** is defined by the California Department of General Services (DGS) by the following size criterion:<sup>156</sup>

- **Small Business.** Annual gross receipts less than \$14,000,000, or fewer than 100 employees;
- **Microbusiness.** Annual gross receipts less than \$3,500,000, or fewer than 25 employees; or
- **Manufacturer.** Fewer than 100 employees.

**Disabled Veteran Business Enterprise (DVBE)** is defined by DGS as a veteran of the United State military, naval or air service who has a service-connected disability of at least 10 percent and resides in California. A DVBE must be at least 51 percent owned, managed, and controlled by one or more disabled veterans.<sup>157</sup>

**Minority and Woman-owned Business Enterprise (M/WBE)** is defined by the United States Small Business Administration (SBA) as a small business concern that is at least 51 percent owned by, or—in the case of a corporation—at least 51 percent of the stock is

<sup>156</sup> California Department of General Services. Small Business Eligibility Requirements. <http://www.dgs.ca.gov/pd/programs/osds/sbeligibilitybenefits.aspx>. Last accessed January 10, 2014.

<sup>157</sup> California Department of General Services. Disabled Veteran Business Enterprise Eligibility Requirements. <http://www.dgs.ca.gov/pd/Programs/OSDS/DVBEEligibilityBenefits.aspx>. Last accessed May 23, 2014.



owned by one or more minority individuals or women. There are six groups defined by SBA<sup>158</sup>:

- ***African American.*** A citizen or resident of the United States who has ancestry from any of the native populations in the continent of Africa that lies south of the Sahara Desert (generally known as Sub-Saharan Africa).
- ***Asian Pacific American.*** A citizen or resident of the United States who has ancestry from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, U.S. Trust Territory of the Pacific Islands, Commonwealth of the Northern Mariana Islands, Laos, and Cambodia.
- ***Hispanic American.*** A citizen or resident of the United States of Latin American ancestry. Hispanic Americans do not include those persons who are descendants of persons from the Iberian Peninsula (i.e. Spain, Portugal; Andorra, and Gibraltar).
- ***Native American.*** A citizen or resident of the United States who has ancestry from indigenous peoples in North America, including American Indians, Eskimos, Aleuts, and Native Hawaiians.
- ***Subcontinent Asian American.*** A citizen or resident of the United States who has ancestry from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal.

## 2. Business Legal Structure

**C Corporation** is a business entity that may have an unlimited number of shareholders, including foreign citizens. C corporations limit the owners' legal and financial liabilities because they are separate entities from their owners. C corporations are taxed at the corporate level, and owners are taxed on the distributed profit and income.

**Limited Liability Company (LLC)** is a business entity where the owners are not personally liable for company debts. An LLC has the ability to share corporate income with shareholders, and it is only taxed on the shareholder level.

**Partnership** is a business entity where ownership is shared between two or more individuals who share management of the business. All owners have responsibility for business debts.



<sup>158</sup> U.S. Small Business Administration Social Disadvantage Eligibility Requirements. <http://www.sba.gov/content/social-disadvantage-eligibility>. Last accessed May 23, 2014

**S Corporation** is a business entity wherein all corporate income is shared directly with shareholders who report income on their individual tax returns. S Corporations are not subject to double taxation; they are only taxed at the shareholder level.

**Sole Proprietorship** is a business entity that is owned and operated by a single individual wherein there is no distinction between the owner and the business. The owner receives all profits and has responsibility for all debts.

### 3. Geographical Groupings<sup>159</sup>

**County** is a political and geographical division of the state used for administrative purposes and assigned governmental authority.

**Statistical Areas** are Office of Management and Budget (OMB) delineations of Metropolitan Statistical Areas (MSA), Metropolitan Divisions, Micropolitan Statistical Areas ( $\mu$ SA), and Combined Statistical Areas (CSA) for statistical purposes. These classifications are intended to provide nationally consistent delineations for collecting, tabulating, and publishing statistics for a set of geographic areas.

- **Metropolitan Statistical Area** has at least one urbanized area of 50,000 or more population, plus adjacent territory that has a high degree of social and economic integration, as measured by commuting ties.
- **Micropolitan Statistical Area** has at least one urban cluster of at least 10,000 but less than 50,000 population, plus adjacent territory that has a high degree of social and economic integration as measured by commuting ties.

### 4. Industry Classification

**NAICS Code** is defined as the North American Industry Classification System. The system is the standard used by federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the United States business economy.

### 5. Research Methodology

**Study Population** refers to the population of businesses within the target population who perform the work or provide the services relevant to the high-speed rail project.

**Study Sample** is the segment within the study population which is actually used to draw conclusions and make inferences.

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<sup>159</sup> Executive Office of the President, Office of Management and Budget, OMB Bulletin No 10-01, February 28, 2013. <http://www.whitehouse.gov/sites/default/files/omb/bulletins/2013/b13-01.pdf> Last accessed January 10, 2014.



**Target Population** is the entire population of businesses domiciled in the State of California in any of the four industries.

## **II. METHODOLOGY**

The target population was comprised of the businesses willing and able to perform the contracts the Authority anticipates awarding in the construction of the high-speed rail system. A number of strategies were used to identify and quantify the study population from within the target population. The first of these strategies required the identification of the industrial classifications that defined the anticipated contracts. Once the contracting opportunities were defined and the industries classified by NAICS codes, California businesses in each of the NAICS codes were identified from multiple sources. The willingness and capacity of the identified businesses to provide services to the Authority was studied.

### **1. Identification of Industry Classifications**

The identification of the NAICS codes defining the industries presented a challenge because the Authority does not maintain a comprehensive list of NAICS codes classifying its contracting opportunities. While there was limited information available regarding the prime contracts the Authority anticipated awarding, there was no compiled information for the anticipated subcontracting opportunities. A number of steps were taken to complete a reasonably comprehensive list of services to be awarded at both the prime and subcontract levels during the construction and planning of the high-speed rail system.

The Authority's engineering and construction management team initially provided a list of NAICS codes reflecting what it considered to be the services anticipated to be awarded by the Authority. This list was augmented with NAICS codes reflecting the subcontracting scope of work as listed in the design-build contract for Construction Package 1 (CP-1). CP-1 is the first of several design-build contracts to be awarded by the Authority. In addition, the NAICS code classifications for the prime and subcontracts awarded by the Authority and its prime contractors from 2006 to 2013 were also added to the dataset. This effort identified Construction, Design-Build, Professional Services, (including Architecture and Engineering), and Goods and Services. In effect, four industries were identified from the NAICS code research.

Once the comprehensive list of NAICS codes was compiled, research was undertaken to identify the Small Businesses, Minority and Woman-owned Businesses Enterprises, Disadvantaged Business Enterprises, and Disabled Veteran Business Enterprises (SB/MBE/WBE/DBE/DVBEs) domiciled in California willing to provide services under the selected NAICS codes.



## 2. Source Collection

The first step in the compilation of a list of willing and able California businesses with the relevant NAICS codes was the identification of organizations that maintained lists of California businesses offering services in any one of the four industries. The most obvious sources were the lists compiled by the Authority, and the certification directories maintained by the State, federal agencies, municipal governments, and private organizations.

The Authority provided lists of the businesses that attended its industry forums, pre-bid conferences, and small business certification workshops. In addition, the Authority provided the list of respondents to a Request for Expressions of Interest which was sent to businesses in March 2011. To augment the Authority sources and those readily available in the public domain, extensive research was undertaken to identify professional associations, trade associations, and chambers of commerce that maintain business directories. A total of 161 relevant sources were identified.

Membership directories that were not publicly available were solicited through written and telephone contact. Through Internet research and telephone solicitations, business listings were secured from 110 of the 161 sources identified. Table 03 presents the types of sources from which lists were obtained.

**Table 05: Business Availability Data Sources**

Source Type	Number of Directories Secured
California High-Speed Rail Authority Records	10
Government Business Certification Directories	49
Business Association Membership Directories	10
Chambers of Commerce Membership Directories	27
OneSource™ Business Information Reports <sup>160</sup>	4
Other Government Directories	10
<b>TOTAL</b>	<b>110</b>

A unique list of businesses was compiled from the 110 sources. Businesses in the appropriate NAICS codes were surveyed to determine their willingness and capacity to contract with the Authority.

## 3. Vendor Identification

The target population was culled from the 110 business listings. The records were cleaned to create a unique database of businesses using a proprietary application. To

<sup>160</sup> OneSource™ is a service that provides global business listings with comprehensive information about the businesses, including contact information, NAICS codes, credit rating, year established, ownership type, annual sales, number of employees and market value



identify duplicate businesses in this dataset, the application compared the different spellings of the company name, as well as similar address and telephone numbers. The unique list was further restricted to the study population which only included businesses with at least one of the relevant NAICS codes. Records that did not contain NAICS codes were queried by description of the services provided and by company name if there was no service description. A study population of 15,183 unique businesses classified in one or more of the relevant NAICS codes was generated. The 15,183 businesses were surveyed to determine both their interest in Authority contracting and their capacity to perform the anticipated contracts.

#### 4. Vendor Survey

The California High-Speed Rail Business Information Survey was created to determine the accurate and complete information about the California businesses in the relevant NAICS codes. The Survey contained two primary areas of inquiry: 1) willingness and 2) capacity. Willingness was determined through a series of questions regarding the business's interest in working with the Authority, and whether the business had previously submitted a bid or statement of qualifications to work on a high-speed rail project as either a prime contractor or subcontractor. To gauge the business's capacity to contract with the Authority as a prime contractor or subcontractor, survey questions inquired about the age of business, number of employees, business revenue, the largest contract awarded, and the largest contract bid.

The Survey was administered to the 15,183 businesses in the study population using a combination of electronic and telephone surveys. A link to the electronic version of the survey was emailed to the 9,452 businesses with an email address in their record. From the email blast, 322 emails bounced, and 546 businesses completed the survey.

The 8,933 businesses that did not complete the online survey (including those whose email bounced) and the 5,731 businesses without email addresses were included in the telephone survey. The responses to each telephone call were recorded directly into a proprietary relational database. The database tracked the time of the call and the status of the response: 1) left a message, 2) refused to participate, 3) left a voicemail, 4) wrong number, and 5) disconnected number. If the respondent requested the survey by email or fax, or if a follow-up call was necessary, that status was also recorded. All businesses that did not respond to the initial telephone call received up to two follow-up calls. Businesses that did not complete the survey after receiving three telephone calls, and those with a disconnected or wrong telephone number, were excluded from the sample analyzed.

Table 04 presents the status of the surveys that were administered electronically and by telephone. The electronic survey received 546 responses. The telephone survey received 4,547 responses. From both sources, 2,438 businesses responded that they were not willing to contract with the Authority and declined to complete the survey, and 2,655 were willing to contract with the Authority and completed the survey. In total, the survey was administered to 5,093 businesses, which is an overall response rate of 33.5 percent.



The California High-Speed Rail Business Information Survey instrument can be found in the Appendix.

**Table 06: Survey Responses**

	Total Survey Recipients	Total Survey Responses	Not Willing to Contract	Willing to Contract
Telephone	15,183 <sup>161</sup>	4,547	2,411	2,136
Electronic	9,452	546	27	519
<b>Total</b>	<b>15,183</b>	<b>5,093</b>	<b>2,438</b>	<b>2,655</b>

## 5. Ethnicity, Gender and Business Certification Status Identification

The ethnicity, gender, and business certification status was available in some government certification records. For all other businesses the certification status was determined from the survey responses. The survey was also used to verify the certification status of the businesses identified from certification records.

### **A. Capacity Assessment**

There is little case law offering guidance on how to determine if a business is *qualified or able*, and no clear methods on how to obtain meaningful measures of capacity. A firm's revenue, business size, number of employees, bonding levels, and bidding history are factors which can be used as indicators of capacity. Revenue is a measure of the value of contracts that a firm received (which is not necessarily indicative of the level of contracting a business can perform). With regard to number of employees, it is fact that in the presence of contracting opportunities, firms have the elasticity to expand their capacity to perform larger contracts through subcontracting, joint ventures, and employee development.

In California, the presence of marketplace discrimination, which can depress a minority and woman-owned firm's revenue, has been widely documented in the public transportation industry. The revenue of a minority or woman-owned business could be restricted even when the business possesses the technical capability to perform contracts of significant size. Recent disparity studies prepared for several California transportation agencies have documented a pattern of systematic discrimination in contracting with minority and woman-owned businesses.<sup>162</sup> Additionally, evidence of marketplace discrimination in California has been documented in the economic patterns reported in

<sup>161</sup> This number includes the companies that did not respond to the email and were subsequently added to the call list.

<sup>162</sup> The California Department of Transportation (Caltrans) availability and disparity study, August 2012. *BBC of America*.

Los Angeles County Metropolitan Transportation Authority (LA Metro) DBE Disparity Study, March 2013. *Mason Tillman Associates, Ltd.*

San Francisco Bay Area Rapid Transit District (BART) Availability and Utilization Study, April 2009. *Mason Tillman Associates, Ltd.*



the United States Census American Community Survey, Public Use Microdata Sample (PUMS).<sup>163</sup>

Despite the challenges of evaluating business capacity, the subject was addressed in the California High-Speed Rail Business Information Survey. There were six questions in the survey intended to assess the vendor's capacity. The responses to these questions were used to profile the respondents' capacity. The specific capacity questions were:

- How long has your business been in operation?
- How many individuals does your business currently employ?
- What is the largest prime or subcontract that your company can perform?
- What is the largest prime or subcontract that your company has bid or proposed?
- Over the past three years, have your average annual gross receipts been more than \$14 million?
- Are your annual gross receipts more than \$3.5 million?

### **III. STUDY FINDINGS**

The surveyed businesses with at least one relevant NAICS code that responded to the electronic or telephone survey are enumerated herein. The analysis is limited to the responses indicating a willingness to provide the services anticipated to be awarded for the construction of the high-speed rail system. A business that was willing to provide goods or services in more than one industry was listed uniquely in each relevant industry. The results from the survey support a number of conclusions about the capacity of SB/MBE/WBE/DBE/DVBEs, and the willingness of these businesses to participate in the Authority's contract opportunities.

#### **A. Data Limitations**

The study sample included all businesses in the study population with either an email address or a telephone number. Businesses with neither would most likely have limited capacity. Therefore, the elimination of this group from the study sample should not have introduced a survey bias. By the same logic, businesses in the study population with wrong numbers in their business listing or disconnected telephone numbers were also likely to lack the ability to perform the Authority's contracts—especially given the extensive effort undertaken in the survey process to correct and update missing and incorrect telephone numbers.

The main limitation to the findings is the fact that the data are self-reported. Because the data are self-reported, respondents may have had recall bias or exaggerated their successes. Another limitation of self-reported data is that respondents tend to leave some



<sup>163</sup> United States Census Bureau American Community Survey PUMS data [http://www.census.gov/acs/www/data/documentation/pums\\_documentation/](http://www.census.gov/acs/www/data/documentation/pums_documentation/) Last accessed March 2013.

items blank. In this analysis, blank responses to questions were not counted towards the total number of responses for the specific question.

## **B. Summary of California Businesses Availability**

Table 05 presents the total number of willing California businesses in the relevant NAICS codes by statistical area. A total of 2,655 unique businesses were willing and able to work with the Authority. Not surprisingly, 90.4 percent of these businesses were concentrated in the State's largest metropolitan areas. Los Angeles-Long Beach-Santa Ana, CA MSA had 992 or 37.36 percent of willing businesses, San Francisco-Oakland-Fremont, CA MSA had 646 or 24.33 percent of willing businesses, Riverside-San Bernardino-Ontario, CA MSA had 234 or 8.81 percent of willing businesses, Sacramento-Arden Arcade-Roseville, CA MSA had 212 or 7.98 percent of willing businesses, San Diego-Carlsbad-San Marcos, CA MSA had 189 or 7.12 percent of willing businesses, Fresno, CA MSA had 72 or 2.71 percent of willing businesses and San Jose-Sunnyvale-Santa Clara, CA MSA had 55 or 2.01 percent willing businesses. The remaining 9.6 percent of willing businesses were dispersed throughout the State.

**Table 07: Number of Willing Businesses by Statistical Area**

Statistical Area	Number of Businesses	Percent of Businesses
Alpine County, CA	0	0.00%
Amador County, CA	1	0.04%
Bakersfield, CA MSA	18	0.68%
Bishop, CA $\mu$ SA	0	0.00%
Calaveras County, CA	3	0.11%
Chico, CA MSA	5	0.19%
Clearlake, CA $\mu$ SA	1	0.04%
Colusa County, CA	1	0.04%
Crescent City, CA $\mu$ SA	0	0.00%
El Centro, CA MSA	1	0.04%
Eureka-Arcata-Fortuna, CA $\mu$ SA	6	0.23%
Fresno, CA MSA	72	2.71%
Glenn County, CA	0	0.00%
Hanford-Corcoran, CA MSA	4	0.15%
Los Angeles-Long Beach-Santa Ana, CA MSA	992	37.36%
Madera, CA MSA	4	0.15%
Mariposa County, CA	0	0.00%
Merced, CA MSA	7	0.26%
Modesto, CA MSA	18	0.68%
Modoc County, CA	0	0.00%
Mono County, CA	0	0.00%
Napa, CA MSA	8	0.30%
Oxnard-Thousand Oaks-Ventura, CA MSA	35	1.32%



Statistical Area	Number of Businesses	Percent of Businesses
Phoenix Lake-Cedar Ridge, CA $\mu$ SA	1	0.04%
Plumas County, CA	1	0.04%
Red Bluff, CA $\mu$ SA	1	0.04%
Redding, CA MSA	14	0.53%
Riverside-San Bernardino-Ontario, CA MSA	234	8.81%
Sacramento-Arden Arcade-Roseville, CA MSA	212	7.98%
Salinas, CA MSA	6	0.23%
San Diego-Carlsbad-San Marcos, CA MSA	189	7.12%
San Francisco-Oakland-Fremont, CA MSA	646	24.33%
San Jose-Sunnyvale-Santa Clara, CA MSA	55	2.07%
San Luis Obispo-Paso Robles, CA MSA	15	0.56%
Santa Barbara-Santa Maria-Goleta, CA MSA	9	0.34%
Santa Cruz-Watsonville, CA MSA	8	0.30%
Santa Rosa-Petaluma, CA MSA	11	0.41%
Sierra County, CA	0	0.00%
Siskiyou County, CA	0	0.00%
Stockton, CA MSA	28	1.05%
Susanville, CA $\mu$ SA	1	0.04%
Trinity County, CA	2	0.08%
Truckee-Grass Valley, CA MSA	3	0.11%
Ukiah, CA $\mu$ SA	5	0.19%
Vallejo-Fairfield, CA MSA	18	0.68%
Visalia-Porterville, CA MSA	12	0.45%
Yuba City, CA MSA	8	0.30%
<b>Total:</b>	<b>2655</b>	<b>100.00%</b>

Table 06 presents the total number of willing California businesses in the relevant NAICS codes by industry. The majority of willing businesses, 1,399 or 52.69 percent, were in the professional services industry (which includes architecture and engineering), 810 or 30.51 percent were construction businesses, 123 or 4.63 percent were design-build businesses, and 323 or 12.17 percent were goods and services businesses.

**Table 08: Total Number of Willing California Businesses by Industry**

Industry	Number of Businesses	Percent of Businesses
Construction	810	30.51%
Design-Build	123	4.63%
Goods and Services	323	12.17%
Professional Services	1399	52.69%
<b>Total:</b>	<b>2655</b>	<b>100.00%</b>

Table 07 presents the total number of willing California businesses in the relevant NAICS codes by ethnicity and gender. The distribution of willing businesses in the study

10-12



sample resembles the ethnic composition of the State. The majority of willing business, 1,021 or 38.46 percent were Non-Minority males, 585 or 22.03 percent were Non-Minority females, 427 or 16.08 percent were Hispanic Americans, 286 or 10.77 percent were African Americans, 221 or 8.32 percent were Asian-Pacific Americans, 80 or 3.01 percent were Subcontinent Asian Americans, and 35 or 1.32 percent were Native Americans.

**Table 09: Total Number of Willing California Businesses by Ethnicity and Gender**

African American	Asian-Pacific American	Subcontinent Asian American	Hispanic American	Native American	Non-Minority Female	Non-Minority Male	Total
286	221	80	427	35	585	1021	2655
10.77%	8.32%	3.01%	16.08%	1.32%	22.03%	38.46%	100.00%

### ***C. Summary of California Certified Business Availability***

Table 08 presents the total number of willing California certified businesses in the relevant NAICS codes by statistical area. There was a total of 1,398 unique certified businesses that were willing to work with the Authority. Not surprisingly, 89.84 percent of these businesses were concentrated in the State's largest metropolitan areas. Los Angeles-Long Beach-Santa Ana, CA MSA had 515 or 36.84 percent of willing businesses, San Francisco-Oakland-Fremont, CA MSA had 314 or 22.46 percent of willing businesses, Riverside-San Bernardino-Ontario, CA MSA had 136 or 9.73 percent of willing businesses, Sacramento-Arden Arcade-Roseville, CA MSA had 121 or 8.66 percent of willing businesses, San Diego-Carlsbad-San Marcos, CA MSA had 114 or 8.15 percent of willing businesses, Fresno, CA MSA had 34 or 2.43 percent of willing businesses and San Jose-Sunnyvale-Santa Clara, CA MSA had 22 or 1.57 percent willing businesses. The remaining 10.16 percent of willing businesses were dispersed throughout the State.

**Table 010: Number of Certified Businesses by Statistical Area**

Statistical Area	Number of Businesses	Percent of Businesses
Alpine County, CA	0	0.00%
Amador County, CA	0	0.00%
Bakersfield, CA MSA	10	0.72%
Bishop, CA $\mu$ SA	0	0.00%
Calaveras County, CA	1	0.07%
Chico, CA MSA	4	0.29%
Clearlake, CA $\mu$ SA	1	0.07%
Colusa County, CA	0	0.00%



Statistical Area	Number of Businesses	Percent of Businesses
Crescent City, CA $\mu$ SA	0	0.00%
El Centro, CA MSA	0	0.00%
Eureka-Arcata-Fortuna, CA $\mu$ SA	4	0.29%
Fresno, CA MSA	34	2.43%
Glenn County, CA	0	0.00%
Hanford-Corcoran, CA MSA	3	0.21%
Los Angeles-Long Beach-Santa Ana, CA MSA	515	36.84%
Madera, CA MSA	1	0.07%
Mariposa County, CA	0	0.00%
Merced, CA MSA	4	0.29%
Modesto, CA MSA	8	0.57%
Modoc County, CA	0	0.00%
Mono County, CA	0	0.00%
Napa, CA MSA	6	0.43%
Oxnard-Thousand Oaks-Ventura, CA MSA	18	1.29%
Phoenix Lake-Cedar Ridge, CA $\mu$ SA	1	0.07%
Plumas County, CA	1	0.07%
Red Bluff, CA $\mu$ SA	1	0.07%
Redding, CA MSA	8	0.57%
Riverside-San Bernardino-Ontario, CA MSA	136	9.73%
Sacramento-Arden Arcade-Roseville, CA MSA	121	8.66%
Salinas, CA MSA	3	0.21%
San Diego-Carlsbad-San Marcos, CA MSA	114	8.15%
San Francisco-Oakland-Fremont, CA MSA	314	22.46%
San Jose-Sunnyvale-Santa Clara, CA MSA	22	1.57%
San Luis Obispo-Paso Robles, CA MSA	8	0.57%
Santa Barbara-Santa Maria-Goleta, CA MSA	4	0.29%
Santa Cruz-Watsonville, CA MSA	6	0.43%
Santa Rosa-Petaluma, CA MSA	5	0.36%
Sierra County, CA	0	0.00%
Siskiyou County, CA	0	0.00%
Stockton, CA MSA	16	1.14%
Susanville, CA $\mu$ SA	1	0.07%
Trinity County, CA	0	0.00%
Truckee-Grass Valley, CA MSA	1	0.07%
Ukiah, CA $\mu$ SA	2	0.14%
Vallejo-Fairfield, CA MSA	12	0.86%
Visalia-Porterville, CA MSA	8	0.57%
Yuba City, CA MSA	5	0.36%



Statistical Area	Number of Businesses	Percent of Businesses
<b>Total:</b>	<b>1398</b>	<b>100.00%</b>

Table 9 presents the total number of willing California certified businesses in the relevant NAICS codes by industry. The majority of willing businesses, 724 or 51.79 percent, were in the professional services industry (which includes architecture and engineering), 442 or 31.62 percent were construction businesses, 70 or 5.01 percent were design-build businesses, and 162 or 11.59 percent were goods and services businesses.

**Table 011: Number of Certified Businesses by Industry**

Industry	Number of Businesses	Percent of Businesses
Construction	442	31.62%
Design-Build	70	5.01%
Goods & Services	162	11.59%
Professional Services	724	51.79%
<b>Total:</b>	<b>1398</b>	<b>100.00%</b>

Table 10 presents the total number of willing California certified businesses in the relevant NAICS codes by statistical area and business classification. There was a total of 1,398 certified businesses willing to contract with the Authority, however each business may hold more than one certification; therefore, there are a total of 2,250 entries in the table below.

**Table 12: Number of Certified Businesses by Statistical Area and Business Classification**

Statistical Area	SB	MBE	WBE	DBE	DVBE	Total
Alpine County, CA	0	0	0	0	0	0
Amador County, CA	0	0	0	0	0	0
Bakersfield, CA MSA	7	5	1	4	3	20
Bishop, CA μSA	0	0	0	0	0	0
Calaveras County, CA	1	0	0	0	1	2
Chico, CA MSA	3	0	2	1	0	6
Clearlake, CA μSA	1	0	0	0	1	2
Colusa County, CA	0	0	0	0	0	0
Crescent City, CA μSA	0	0	0	0	0	0
El Centro, CA MSA	0	0	0	0	0	0
Eureka-Arcata-Fortuna, CA μSA	3	1	4	0	0	8
Fresno, CA MSA	22	11	12	10	6	61



Statistical Area	SB	MBE	WBE	DBE	DVBE	Total
Glenn County, CA	0	0	0	0	0	0
Hanford-Corcoran, CA MSA	1	0	0	1	2	4
Los Angeles-Long Beach-Santa Ana, CA MSA	383	158	142	88	50	821
Madera, CA MSA	1	1	0	0	0	2
Mariposa County, CA	0	0	0	0	0	0
Merced, CA MSA	3	0	1	0	1	5
Modesto, CA MSA	4	3	5	2	0	14
Modoc County, CA	0	0	0	0	0	0
Mono County, CA	0	0	0	0	0	0
Napa, CA MSA	4	1	2	1	2	10
Oxnard-Thousand Oaks-Ventura, CA MSA	14	3	2	4	3	26
Phoenix Lake-Cedar Ridge, CA μSA	1	0	1	0	0	2
Plumas County, CA	0	0	0	0	1	1
Red Bluff, CA μSA	0	0	0	0	0	0
Redding, CA MSA	4	0	3	1	3	11
Riverside-San Bernardino-Ontario, CA MSA	96	44	36	17	22	215
Sacramento-Arden Arcade-Roseville, CA MSA	96	21	27	17	33	194
Salinas, CA MSA	3	0	1	0	0	4
San Diego-Carlsbad-San Marcos, CA MSA	72	32	34	24	38	200
San Francisco-Oakland-Fremont, CA MSA	204	92	112	56	21	485
San Jose-Sunnyvale-Santa Clara, CA MSA	17	8	5	4	4	38
San Luis Obispo-Paso Robles, CA MSA	3	1	4	0	3	11
Santa Barbara-Santa Maria-Goleta, CA MSA	2	2	2	1	0	7
Santa Cruz-Watsonville, CA MSA	4	0	3	2	0	9
Santa Rosa-Petaluma, CA MSA	5	0	2	0	0	7
Sierra County, CA	0	0	0	0	0	0
Siskiyou County, CA	0	0	0	0	0	0
Stockton, CA MSA	11	6	4	7	6	34
Susanville, CA μSA	1	0	0	0	0	1
Trinity County, CA	0	0	0	0	0	0
Truckee-Grass Valley, CA MSA	1	0	0	0	0	1
Ukiah, CA μSA	1	0	0	0	2	3
Vallejo-Fairfield, CA MSA	9	5	2	3	3	22
Visalia-Porterville, CA MSA	5	1	1	1	5	13
Yuba City, CA MSA	4	1	1	1	4	11
<b>Total:</b>	<b>986</b>	<b>396</b>	<b>409</b>	<b>245</b>	<b>214</b>	<b>2250</b>



### **D. Summary of California Non-Certified Business Availability**

Table 11 presents the total number of willing California non-certified businesses in the relevant NAICS codes by statistical area. There was a total of 1,257 unique non-certified businesses that were willing to work with the Authority. Not surprisingly, 91.02 percent of these businesses were concentrated in the State's largest metropolitan areas. Los Angeles-Long Beach-Santa Ana, CA MSA had 477 or 37.95 percent of willing businesses, San Francisco-Oakland-Fremont, CA MSA had 332 or 26.41 percent of willing businesses, Riverside-San Bernardino-Ontario, CA MSA had 98 or 7.80 percent of willing businesses, Sacramento-Arden Arcade-Roseville, CA MSA had 91 or 7.24 percent of willing businesses, San Diego-Carlsbad-San Marcos, CA MSA had 75 or 5.97 percent of willing businesses, Fresno, CA MSA had 38 or 3.02 percent of willing businesses and San Jose-Sunnyvale-Santa Clara, CA MSA had 33 or 2.63 percent willing businesses. The remaining 8.98 percent of willing businesses were dispersed throughout the State.

**Table 13: Total Number of Non-Certified California Businesses by Statistical Area**

Statistical Area	Number of Businesses	Percent of Businesses
Alpine County, CA	0	0.00%
Amador County, CA	1	0.08%
Bakersfield, CA MSA	8	0.64%
Bishop, CA μSA	0	0.00%
Calaveras County, CA	2	0.16%
Chico, CA MSA	1	0.08%
Clearlake, CA μSA	0	0.00%
Colusa County, CA	1	0.08%
Crescent City, CA μSA	0	0.00%
El Centro, CA MSA	1	0.08%
Eureka-Arcata-Fortuna, CA μSA	2	0.16%
Fresno, CA MSA	38	3.02%
Glenn County, CA	0	0.00%
Hanford-Corcoran, CA MSA	1	0.08%
Los Angeles-Long Beach-Santa Ana, CA MSA	477	37.95%
Madera, CA MSA	3	0.24%
Mariposa County, CA	0	0.00%
Merced, CA MSA	3	0.24%
Modesto, CA MSA	10	0.80%
Modoc County, CA	0	0.00%
Mono County, CA	0	0.00%
Napa, CA MSA	2	0.16%



Statistical Area	Number of Businesses	Percent of Businesses
Oxnard-Thousand Oaks-Ventura, CA MSA	17	1.35%
Phoenix Lake-Cedar Ridge, CA $\mu$ SA	0	0.00%
Plumas County, CA	0	0.00%
Red Bluff, CA $\mu$ SA	0	0.00%
Redding, CA MSA	6	0.48%
Riverside-San Bernardino-Ontario, CA MSA	98	7.80%
Sacramento-Arden Arcade-Roseville, CA MSA	91	7.24%
Salinas, CA MSA	3	0.24%
San Diego-Carlsbad-San Marcos, CA MSA	75	5.97%
San Francisco-Oakland-Fremont, CA MSA	332	26.41%
San Jose-Sunnyvale-Santa Clara, CA MSA	33	2.63%
San Luis Obispo-Paso Robles, CA MSA	7	0.56%
Santa Barbara-Santa Maria-Goleta, CA MSA	5	0.40%
Santa Cruz-Watsonville, CA MSA	2	0.16%
Santa Rosa-Petaluma, CA MSA	6	0.48%
Sierra County, CA	0	0.00%
Siskiyou County, CA	0	0.00%
Stockton, CA MSA	12	0.95%
Susanville, CA $\mu$ SA	0	0.00%
Trinity County, CA	2	0.16%
Truckee-Grass Valley, CA MSA	2	0.16%
Ukiah, CA $\mu$ SA	3	0.24%
Vallejo-Fairfield, CA MSA	6	0.48%
Visalia-Porterville, CA MSA	4	0.32%
Yuba City, CA MSA	3	0.24%
<b>Total:</b>	<b>1257</b>	<b>100.00%</b>



Table 12 presents the total number of willing California non-certified businesses in the relevant NAICS codes by industry. The majority of willing businesses, 675 or 53.70 percent, were in the professional services industry (which includes architecture and engineering), 368 or 29.28 percent were construction businesses, 53 or 4.22 percent were design-build businesses, and 161 or 12.81 percent were goods and services businesses.

**Table 14: Total Number of Non-Certified Businesses by Industry**

Industry	Number of Businesses	Percent of Businesses
Construction	368	29.28%
Design-Build	53	4.22%
Goods & Services	161	12.81%
Professional Services	675	53.70%
<b>Total:</b>	<b>1257</b>	<b>100.00%</b>

Table 13 presents the total number of willing California non-certified businesses in the relevant NAICS codes by statistical area, and ethnicity and gender. There were a total of 1,257 non-certified businesses willing to contract with the Authority.

**Table 15: Total Number of Non-Certified Businesses by Statistical Area and Ethnicity and Gender**

Industry	African American	Asian-Pacific American	Subcontinent Asian American	Hispanic American	Native American	Non-Minority Female	Non-Minority Male	Total
Alpine County, CA	0	0	0	0	0	0	0	0
Amador County, CA	0	0	0	1	0	0	0	1
Bakersfield, CA MSA	0	1	0	0	0	2	5	8
Bishop, CA μSA	0	0	0	0	0	0	0	0
Calaveras County, CA	0	0	0	1	0	0	1	2
Chico, CA MSA	0	0	0	0	1	0	0	1
Clearlake, CA μSA	0	0	0	0	0	0	0	0
Colusa County, CA	0	0	0	0	0	0	1	1
Crescent City, CA μSA	0	0	0	0	0	0	0	0
El Centro, CA MSA	0	0	0	1	0	0	0	1
Eureka-Arcata-Fortuna, CA μSA	0	0	0	0	0	0	2	2
Fresno, CA MSA	3	3	1	15	0	5	11	38
Glenn County, CA	0	0	0	0	0	0	0	0
Hanford-Corcoran, CA MSA	0	0	0	1	0	0	0	1
Los Angeles-Long Beach-Santa Ana, CA MSA	57	45	18	68	2	103	184	477
Madera, CA MSA	0	0	0	3	0	0	0	3

Industry	African American	Asian-Pacific American	Subcontinent Asian American	Hispanic American	Native American	Non-Minority Female	Non-Minority Male	Total
Mariposa County, CA	0	0	0	0	0	0	0	0
Merced, CA MSA	0	1	0	0	0	0	2	3
Modesto, CA MSA	2	0	1	4	0	0	3	10
Modoc County, CA	0	0	0	0	0	0	0	0
Mono County, CA	0	0	0	0	0	0	0	0
Napa, CA MSA	0	0	0	0	1	0	1	2
Oxnard-Thousand Oaks-Ventura, CA MSA	0	1	0	3	1	3	9	17
Phoenix Lake-Cedar Ridge, CA μSA	0	0	0	0	0	0	0	0
Plumas County, CA	0	0	0	0	0	0	0	0
Red Bluff, CA μSA	0	0	0	0	0	0	0	0
Redding, CA MSA	0	0	0	0	0	2	4	6
Riverside-San Bernardino-Ontario, CA MSA	11	3	1	20	2	20	41	98
Sacramento-Arden Arcade-Roseville, CA MSA	5	5	5	11	0	18	47	91
Salinas, CA MSA	0	0	0	2	0	0	1	3
San Diego-Carlsbad-San Marcos, CA MSA	12	4	1	14	3	14	27	75
San Francisco-Oakland-Fremont, CA MSA	41	35	14	24	0	68	150	332
San Jose-Sunnyvale-Santa Clara, CA MSA	4	4	0	10	1	8	6	33
San Luis Obispo-Paso Robles, CA MSA	0	0	0	0	0	5	2	7
Santa Barbara-Santa Maria-Goleta, CA MSA	1	0	0	0	0	1	3	5
Santa Cruz-Watsonville, CA MSA	0	0	0	0	0	0	2	2
Santa Rosa-Petaluma, CA MSA	0	0	0	0	0	4	2	6
Sierra County, CA	0	0	0	0	0	0	0	0
Siskiyou County, CA	0	0	0	0	0	0	0	0
Stockton, CA MSA	2	1	0	3	0	6	0	12
Susanville, CA μSA	0	0	0	0	0	0	0	0
Trinity County, CA	0	0	0	0	0	0	2	2
Truckee-Grass Valley, CA MSA	0	2	0	0	0	0	0	2
Ukiah, CA μSA	0	0	0	0	0	0	3	3
Vallejo-Fairfield, CA MSA	1	0	0	3	0	1	1	6
Visalia-Porterville, CA MSA	0	0	0	1	1	0	2	4
Yuba City, CA MSA	0	0	0	0	0	1	2	3
<b>Total:</b>	<b>139</b>	<b>105</b>	<b>41</b>	<b>185</b>	<b>12</b>	<b>261</b>	<b>514</b>	<b>1257</b>

## E. Capacity Analysis

The capacity information is grouped by ethnicity and gender. The ethnic group categories refer to certified and non-certified businesses owned by male and female members of the respective ethnic groups. The following additional designations are used in the tables below:

- *Non-Minority Women* are certified and non-certified businesses that are owned and operated by a female not belonging to any one of the five ethnic groups.
- *Non-Minority Men* are certified and non-certified businesses that are owned and operated by a male not belonging to any one of the five ethnic groups.

Table 14 presents the history of bid/qualification submission to the Authority. A history of bid/qualification submission demonstrates a previous attempt at securing an Authority prime contract or subcontract. As shown, there is little difference between each ethnic groups' history of bidding to the Authority. The overwhelming majority of all businesses have not attempted to work with the Authority either as a prime contractor or subcontractor. Significant differences were found among ethnic and gender groups ( $p=.010$ ). African American, Asian-Pacific American, and Non-Minority Women businesses had lower rates of bid/qualification submission than the other groups surveyed.

**Table 16: History of Bid/Qualification Submission by Ethnicity and Gender**

	African American	Asian-Pacific American	Subcontinent Asian American	Hispanic American	Native American	Non-Minority Women	Non-Minority Men
<b>Yes</b>	7.33%	7.43%	17.14%	11.17%	14.63%	8.75%	10.00%
<b>No</b>	92.67%	92.08%	81.43%	87.59%	85.37%	91.05%	87.93%
<b>Unknown</b>	0.00%	0.50%	1.43%	1.24%	0.00%	0.19%	2.07%
<b>Total</b>	273	202	70	403	41	514	820

$\chi^2=26.1873$ ,  $df=12$ ,  $p=.010$



Table 15 presents the business legal structure. Each business legal structure has unique considerations with regard to policy, organization, and administration. Significant differences were found among ethnic and gender groups ( $p=.000$ ). Of note, is the fact that the majority of African American businesses are sole proprietorships, which is the simplest and most common structure of a start-up business. African American businesses had the highest rates of sole proprietorship and lowest rates S and C corporation than the other groups surveyed.

**Table 17: Business Legal Structure by Ethnicity and Gender**

	African American	Asian-Pacific American	Subcontinent Asian American	Hispanic American	Native American	Non-Minority Women	Non-Minority Men
<b>Sole Proprietorship</b>	47.73%	21.84%	24.29%	22.03%	9.52%	20.94%	19.57%
<b>Partnership</b>	3.58%	3.88%	1.43%	3.47%	0.00%	3.96%	2.29%
<b>S Corporation</b>	22.22%	34.47%	41.43%	35.64%	45.24%	38.49%	39.49%
<b>C Corporation</b>	19.00%	32.52%	27.14%	29.95%	38.10%	28.11%	32.97%
<b>LLC</b>	11.47%	7.28%	5.71%	8.91%	7.14%	8.49%	5.68%
<b>Total</b>	279	206	70	404	42	530	828

$\chi^2=112.849$ ,  $df=24$ ,  $p=.000$

Table 16 presents the length of business operation. New businesses face unique barriers to entry into public contracting which should be less significant for established businesses. Common barriers include access to capital, insurance and bonding, and industry network. Significant differences were found among ethnic and gender groups ( $p=.000$ ). All ethnic and gender groups show higher rates of shorter business operation than Non-Minority Men.

**Table 18: Length of Business Operation by Ethnicity and Gender**

	African American	Asian-Pacific American	Subcontinent Asian American	Hispanic American	Native American	Non-Minority Women	Non-Minority Men
<b>0 – 5 years</b>	26.95%	18.05%	15.71%	19.80%	17.50%	18.71%	14.78%
<b>6 – 10 years</b>	20.92%	21.95%	27.14%	23.47%	40.00%	15.12%	16.31%
<b>11 – 20 years</b>	28.37%	33.17%	31.43%	28.85%	7.50%	26.09%	26.83%
<b>21 – 50 years</b>	22.34%	24.88%	24.29%	27.14%	30.00%	36.86%	37.35%
<b>51 or more years</b>	1.42%	1.95%	1.43%	0.73%	5.00%	3.21%	4.73%
<b>Total</b>	282	205	70	409	40	529	846

$\chi^2=99.478$ ,  $df=24$ ,  $p=.000$

Table 17 presents the size of business by number of employees. Businesses with a greater number of employees are able to conduct larger projects, assume more risks, and expand



the scope of their work compared to businesses with fewer employees. Significant differences were found among ethnic and gender groups ( $p=.000$ ). African American businesses show higher rates of employing fewer individuals than the other groups surveyed. However, it is a common practice for firms to expand their personnel capacity by forging joint ventures and subcontracting relationships with other businesses.

**Table 19: Number of Employees by Ethnicity and Gender**

	African American	Asian-Pacific American	Subcontinent Asian American	Hispanic American	Native American	Non-Minority Women	Non-Minority Men
<b>Less than 5 employees</b>	63.44%	42.65%	36.76%	38.50%	30.23%	42.88%	39.83%
<b>5-10 employees</b>	19.35%	20.59%	22.06%	27.50%	27.91%	24.04%	23.14%
<b>11-20 employees</b>	7.89%	20.59%	11.76%	13.50%	11.63%	14.62%	17.78%
<b>21-50 employees</b>	6.81%	8.33%	23.53%	13.75%	11.63%	14.23%	12.67%
<b>Over 50 employees</b>	2.51%	7.84%	5.88%	6.75%	18.60%	4.23%	6.58%
<b>Total</b>	279	204	68	400	43	520	821

$\chi^2=98.938$ ,  $df=24$ ,  $p=.000$

Table 18 presents the business primary industry. Each industry may have unique elements to consider in assessing capacity. Construction firms have the ability to hire on a project-by-project basis in order to meet higher capacity and human resource demands. A common practice of professional service firms is to subcontract work to expand their capacity. Significant differences were found among ethnic and gender groups ( $p=.000$ ). Hispanic American and Native American businesses had higher rates of owning construction businesses than the other groups surveyed. Asian-Pacific American and Subcontinent Asian American businesses had higher rates of owning professional services businesses than the other groups surveyed.

**Table 20: Industry Classifications by Ethnicity and Gender**

	African American	Asian-Pacific American	Subcontinent Asian American	Hispanic American	Native American	Non-Minority Women	Non-Minority Men
<b>Construction</b>	29.14%	14.36%	18.57%	46.13%	45.24%	23.60%	32.65%
<b>Professional Services</b>	56.47%	72.28%	67.14%	40.65%	35.71%	58.41%	50.73%
<b>Design-Build</b>	3.60%	2.97%	1.43%	3.49%	4.76%	5.03%	4.73%
<b>Goods and Other Services</b>	10.79%	10.40%	12.86%	9.73%	14.29%	12.96%	11.89%
<b>Total</b>	278	202	70	401	42	517	824

$\chi^2=106.176$ ,  $df=18$ ,  $p=.000$

Table 19 presents the largest contract that each business can perform. The majority of businesses, regardless of ethnicity and gender, report the ability to perform contracts larger than \$3 million. Significant differences were found ( $p=.005$ ) among ethnic and



gender groups. Subcontinent Asian American businesses show higher rates of ability to perform contracts more than \$3 million than the other groups surveyed.

**Table 21: Largest Contract That Can Be Performed by Ethnicity and Gender**

	African American	Asian-Pacific American	Subcontinent Asian American	Hispanic American	Native American	Non-Minority Women	Non-Minority Men
Under \$100,000	17.45%	8.96%	5.88%	14.54%	7.14%	12.33%	11.37%
\$100,000 - \$499,999	28.73%	24.88%	20.59%	19.30%	16.67%	26.84%	20.77%
\$500,000 - \$999,999	12.00%	12.94%	13.24%	15.04%	16.67%	14.31%	16.19%
\$1 - \$3 Million	16.36%	23.88%	16.18%	24.56%	21.43%	20.87%	22.74%
More than \$3 Million	25.45%	29.35%	44.12%	26.57%	38.10%	25.65%	28.92%
<b>Total</b>	<b>275</b>	<b>201</b>	<b>68</b>	<b>399</b>	<b>42</b>	<b>503</b>	<b>809</b>

$\chi^2=45.931$ ,  $df=24$ ,  $p=.005$

Table 20 presents the largest size of contract bid or proposed. Significant differences were found among the ethnic and gender groups ( $p=.000$ ). African American businesses show higher rates of bidding on contracts valued at under \$100,000, and from \$100,000 to \$499,999 than the other groups surveyed. Subcontinent Asian American and Native American businesses had higher rates of bidding on contracts valued at more than \$3 million than the other groups surveyed.

**Table 22: Largest Contract Bid by Ethnicity and Gender**

	African American	Asian-Pacific American	Subcontinent Asian American	Hispanic American	Native American	Non-Minority Women	Non-Minority Men
Under \$100,000	25.67%	14.95%	8.33%	17.49%	10.26%	14.73%	13.92%
\$100,000 - \$499,999	29.89%	22.16%	18.33%	20.89%	15.38%	26.76%	21.39%
\$500,000 - \$999,999	7.66%	12.37%	21.67%	15.14%	15.38%	15.77%	15.46%
\$1 - \$3 Million	19.16%	24.23%	13.33%	23.24%	15.38%	20.12%	22.04%
More than \$3 Million	17.62%	26.29%	38.33%	23.24%	43.59%	22.61%	27.19%
<b>Total</b>	<b>261</b>	<b>194</b>	<b>60</b>	<b>383</b>	<b>39</b>	<b>482</b>	<b>776</b>

$\chi^2=68.704$ ,  $df=24$ ,  $p=.000$



Table 21 presents the average annual gross receipts for the previous three years. Per California Department of General Services (DGS) size standards, the small business designation is restricted to businesses with less than \$14 million in gross receipts over the past three years. As illustrated below, there is no significant difference between the groups surveyed.

**Table 23: Gross Receipts Lower than \$14 Million by Ethnicity and Gender**

	African American	Asian-Pacific American	Subcontinent Asian American	Hispanic American	Native American	Non-Minority Women	Non-Minority Men
<b>Yes</b>	95.05%	96.47%	93.33%	93.04%	100.00%	95.10%	94.48%

$\chi^2=2.295$ ,  $p=.891$

Table 22 presents the annual gross receipts. Per DGS size standards, businesses with annual gross receipts under \$3.5 million are designated as microbusinesses. As illustrated below, there is no significant difference between the groups surveyed. However, more African American businesses have gross receipts of less than \$3.5 million than the other groups surveyed.

**Table 24: Gross Receipts Less than \$3.5 Million by Ethnicity and Gender**

	African American	Asian-Pacific American	Subcontinent Asian American	Hispanic American	Native American	Non-Minority Women	Non-Minority Men
<b>Yes</b>	92.16%	77.91%	80.00%	81.41%	84.62%	78.92%	78.89%

$\chi^2=10.408$ ,  $p=.109$



## **IV. CONCLUSION**

The fact that 33.5 percent of businesses in the study population responded to the California High-Speed Rail Business Information Survey indicates that a significant number of California businesses were informed and knowledgeable of the high-speed rail project, and it's anticipated contracting opportunities. These respondents included both those who were willing to work with the Authority and those who declined working with the Authority. This response rate is relatively high for a telephone and Internet survey conducted with no tangible incentive for the respondent.

The capacity profile of the SB/MBE/WBE/DBE/DVBES surveyed is similar to that of all California businesses, as reported in the Reference USA Database.<sup>164</sup> As previously reported, the vast majority of California businesses are small, as determined by revenue and number of employees. Table 23 presents the comparison of business survey results. Reference USA reports that 89.78 percent of businesses have less \$2.5 million in revenue. Moreover, 86.57 percent have fewer than 20 employees. The California High-Speed Rail Business Information Survey had a similar finding with 81.63 percent of businesses having fewer than 20 employees, and 80.77 percent of businesses had annual revenue of less than \$3.5 million.

**Table 25: Comparison of Business Survey Results**

	Reference USA Business Database	High-Speed Rail Business Information Survey
Less than 20 employees	86.57%	81.63%
Annual Revenue	89.78% (less than \$2.5 million)	80.77% (less than \$3.5 million)

The analysis of the business capacity variables, such as largest contract performed, annual revenue and years in business, shows that the SB/MBE/WBE/DBE/DVBES within the state have demonstrated capacity to perform large contracts. Given the profile of businesses in the state willing to work on the high-speed rail project, the Authority has a significant and historic opportunity to foster small business economic growth on one of the nation's largest contemporary public works projects.



<sup>164</sup> Ibid

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# ***CALIFORNIA HIGH-SPEED RAIL BUSINESS INFORMATION SURVEY***



## **ADDITIONAL TABLE**

Table 24 presents the NAICS codes which define the work identified as railroad-related, or similarly related engineering, construction, and professional services.

**Table 26: Relevant NAICS Codes**

<b>NAICS Code</b>	<b>Code Description</b>
<b>21 Mining</b>	
212321	Construction Sand and Gravel Mining
<b>22 Utilities</b>	
221122	Electric Power Distribution
221210	Natural Gas Distribution
221310	Water Supply and Irrigation Systems
<b>23 Construction</b>	
237110	Water and Sewer Line and Related Structures Construction
238390	Other Building Finishing Contractors
238990	All Other Specialty Trade Contractors
236210	Industrial Building Construction
236220	Commercial and Institutional Building Construction
237310	Highway, Street, and Bridge Construction
237990	Other Heavy and Civil Engineering Construction
238110	Poured Concrete Foundation and Structure Contractors
238120	Structural Steel and Precast Concrete Contractors
238130	Framing Contractors
238140	Masonry Contractors
238150	Glass and Glazing Contractors
238160	Roofing Contractors
238170	Siding Contractors
238190	Other Foundation, Structure, and Building Exterior Contractors
238210	Electrical Contractors and Other Wiring Installation Contractors
238220	Plumbing, Heating, and Air-Conditioning Contractors
238310	Drywall and Insulation Contractors
238320	Painting and Wall Covering Contractors
238330	Flooring Contractors
238340	Tile and Terrazzo Contractors
238350	Finish Carpentry Contractors
238910	Site Preparation Contractors



NAICS Code	Code Description
<b>31-33 Manufacturing</b>	
327390	Other Concrete Product Manufacturing
331110	Iron and Steel Mills and Ferroalloy Manufacturing
331491	Nonferrous Metal (except Copper and Aluminum) Rolling, Drawing, and Extruding
332618	Other Fabricated Wire Product Manufacturing
332812	Metal Coating, Engraving (except Jewelry and Silverware), and Allied Services to Manufacturers
333318	Other Commercial and Service Industry Machinery Manufacturing
334512	Automatic Environmental Control Manufacturing for Residential, Commercial, and Appliance Use
334513	Instruments and Related Products Manufacturing for Measuring, Displaying, and Controlling Industrial Process Variables
334519	Other Measuring and Controlling Device Manufacturing
335129	Other Lighting Equipment Manufacturing
335311	Power, Distribution, and Specialty Transformer Manufacturing
324121	Asphalt Paving Mixture and Block Manufacturing
325510	Paint and Coating Manufacturing
326122	Plastics Pipe and Pipe Fitting Manufacturing
327310	Cement Manufacturing
327320	Ready-Mix Concrete Manufacturing
327331	Concrete Block and Brick Manufacturing
327332	Concrete Pipe Manufacturing
331221	Rolled Steel Shape Manufacturing
332111	Iron and Steel Forging
332312	Fabricated Structural Metal Manufacturing
332996	Fabricated Pipe and Pipe Fitting Manufacturing
333120	Construction Machinery Manufacturing
335921	Fiber Optic Cable Manufacturing
336510	Railroad Rolling Stock Manufacturing
339950	Sign Manufacturing
<b>42 Wholesale Trade</b>	
423320	Brick, Stone, and Related Construction Material Merchant Wholesalers
423390	Other Construction Material Merchant Wholesalers
423610	Electrical Apparatus and Equipment, Wiring Supplies, and Related Equipment Merchant Wholesalers
423840	Industrial Supplies Merchant Wholesalers
424950	Paint, Varnish, and Supplies Merchant Wholesalers
<b>44-45 Retail Trade</b>	
444190	Other Building Material Dealers
<b>48-49 Transportation and Warehousing</b>	



NAICS Code	Code Description
484230	Specialized Freight (except Used Goods) Trucking, Long-Distance
<b>51 Information</b>	
512290	Audio Recording of Meetings or Conferences
<b>52 Finance and Insurance</b>	
524126	Direct Property and Casualty Insurance Carriers
524127	Direct Title Insurance Carriers
524128	Other Direct Insurance (except Life, Health, and Medical)
524210	Insurance Agencies and Brokerages
<b>53 Real Estate Rental and Leasing</b>	
532490	Other Commercial and Industrial Machinery and Equipment Rental and Leasing
531210	Offices of Real Estate Agents and Brokers
531320	Offices of Real Estate Appraisers
532412	Construction, Mining, and Forestry Machinery and Equipment Rental and Leasing
532420	Office Machinery and Equipment Rental and Leasing
<b>54 Professional, Scientific, and Technical Services</b>	
541211	Offices of Certified Public Accountants
541511	Custom Computer Programming Services
541513	Computer Facilities Management Services
541611	Administrative Management and General Management Consulting Services
541612	Human Resources Consulting Services
541614	Process, Physical Distribution, and Logistics Consulting Services
541618	Other Management Consulting Services
541720	Research and Development in the Social Sciences and Humanities
541820	Public Relations Agencies
541870	Advertising Material Distribution Services
541890	Other Services Related to Advertising
541930	Translation and Interpretation Services
541990	All Other Professional, Scientific, and Technical Services
541110	Offices of Lawyers
541120	Offices of Notaries
541191	Title Abstract and Settlement Offices
541310	Architectural Services
541320	Landscape Architectural Services
541330	Engineering Services
541340	Drafting Services
541350	Building Inspection Services
541370	Surveying and Mapping (except Geophysical) Services
541380	Testing Laboratories



NAICS Code	Code Description
541860	Direct Mail Advertising
<b>56 Administrative and Support and Waste Management and Remediation Services</b>	
561320	Temporary Help Services
561492	Teleconferencing services
561499	Teleconferencing/Videoconferencing services
561730	Landscaping Services
562211	Hazardous Waste Treatment and Disposal
562212	Solid Waste Landfill
562910	Remediation Services





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