CITY OF MEMPHIS, TENNESSEE
COMPREHENSIVE DISPARITY STUDY

I. Introduction

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

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

The study also addresses and recommends solutions for the concerns expressed by the U.S. Supreme Court in City of Richmond v. J.A. Croson, 488 U.S. 469 with regard to procurement programs for Minority and Woman owned firms. Governmental entities, such as the City, have authorized disparity studies in response to City of Richmond v. J.A. Croson Co.[1] and the cases which followed, to determine whether there has been a compelling interest for remedial procurement programs, based upon ethnicity, race, and gender.

The City adopted its current MWBE program in 1995 as a result of the findings in the 1994 Disparity Study, conducted by D.J. Miller & Associates. The Memphis City Council adopted two primary findings to support establishment of

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

the MWBE Program under the Memphis City Code §2-325: first, that construction, professional services and supply firms owned by MWBEs in the Memphis MSA were disproportionately under-utilized in City of Memphis contracts and in the Memphis private marketplace; and secondly, that the City of Memphis had been a direct and passive participant in the system of discrimination present in the private marketplace. As such, the City Council found that the City had a compelling interest in remedying the present and past effects of discrimination against African American and women business owners. Additionally, the City Council stated in the ordinance that its affirmative duty to remedy the effects of the past and present discrimination also extended to the development of initiatives which encouraged the development of local small businesses.

II. Measurable Accomplishments under the City of Memphis Minority and Women Business Enterprise Procurement Program

Since the enactment of the City of Memphis Minority and Women Business Enterprise Procurement Program[2] there has been a significant increase in the participation of Woman owned, Minority owned and small businesses in the City's procurement activities.

The data showed increases in the absolute and relative value of MWBE utilization since the 1994 Memphis Disparity Study, as indicated by the following:

- MWBE Construction prime contracting utilization increased from $5.3 million out of $85.4 million total dollars spent during the 1994 Study Period, which represents 6.2% participation, to $18.3 million in MWBE participation out of $190.5 million total

[2] Enacted in February, 1996

dollars spent, which represents 9.6% of total construction dollars spent during the current Study Period. Therefore, MWBE participation increased 3.4% in the current Study Period over the totals in the 1994 Study Period.

- MWBE Professional services including A/E utilization grew from $202,609 during the 1994 Study Period, to $10.3 million, or 3.86% of the total during the current Study Period.

- MWBE Other Services and Goods/Supplies utilization grew in percentage terms from about 5.85% in the 1994 Study Period to 9.2 % during the current Study Period.

In addition, The City has also accomplished the following:

- Improved utilization of MWBEs during the course of the Study Period
- Consistently set and met aspiration goals;
- Established a strong local business program;
- Provided outstanding management and technical assistance to MWBEs
- Collaborated with existing financial assistance providers to assist MWBEs in strengthening their contracting power;
- Provided MWBE outreach workshops and seminars;
- Issued contracts in smaller dollar amounts, thus expanding the opportunity for small businesses

III. Understanding the Legal Basis for a Study

Disparity studies like this one are a product of court decisions and rely on scientific processes and analyses in economics and statistics which continue to be modified by developing requirements from the courts.

After the civil rights movement of the 1960's and the general recognition that racial discrimination had been a barrier to both the existence and success of Minority businesses, the federal government created remedial programs in an attempt to level the playing field. The first major federal legislation of this type was the Public Works Employment Act, enacted in 1977. The Public Works Employment Act sought to address the lack of Minority participation in federally funded construction contracts by setting aside, to the extent feasible, ten percent (10%) of those contracts for Minority businesses. Minority firms could, in some instances, be awarded contracts even though they were not the lowest bidder.

Soon after enactment, this law was tested by a court challenge which was ultimately decided by the United States Supreme Court in Fullilove v. Kluznick, 448 U.S. 448 (1980). In Fullilove several associations of construction contractors and subcontractors complained that the Act was unconstitutional under the Equal Protection Clause and that it violated the Civil Rights Act of 1964.[3] The Supreme Court held that the set aside program in the Public Works Employment Act of 1977 was constitutional based upon Congress' Spending Powers under Article I of the Constitution and that Congress does not have to act in a "color-blind" fashion when it seeks to remedy the effects of prior discrimination.

After this ruling by the Supreme Court, many governmental entities elected to enact their own remedial legislation, using the federal model, in order to secure

[3] The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution states that no state shall "deny to any person within its jurisdiction the equal protection of the laws" and Title VI of the Civil Rights Act of 1964 states, "No person in the United States shall, on ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

a level playing field and ensure that public contracting opportunities were equally available to minorities and then later, to women.

One such governmental entity was the City of Richmond, Virginia. However, in 1989 the Supreme Court struck down Richmond's attempts to remedy discrimination against Minority contractors in Croson.[4] Croson and the cases which followed, in particular, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S.Ct. 2097 (1995), made clear that courts must apply strict judicial scrutiny to "race conscious" remedies for discrimination.

Croson states that the strict scrutiny test allows a public entity to establish a race-conscious program only if 1) there is a "compelling governmental interest" upon which the program is based and 2) the program is narrowly tailored to achieve that governmental interest. The strict scrutiny test further requires a "searching judicial inquiry into the justification for such race-based measures" to determine whether the classifications are remedial or "in fact, motivated by the illegitimate notions of racial inferiority or simple racial politics".[5]

In the Croson decision, the Supreme Court ruled that the City of Richmond's Minority Business Enterprise (hereinafter "MBE") program failed to satisfy the two prongs of the strict scrutiny standard:[6] First, the City failed to show that its Minority set-aside program was "necessary" to remedy the effects of past discrimination in the marketplace. Strict scrutiny requires a strong basis in evidence of either active participation by the government in prior discrimination or passive participation by the government in discrimination by the local industry.[7]

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[4] All references to statements made in the Croson decision refer to Justice O'Connor delivering the opinion of the Court unless otherwise noted.
[5] 488 U.S. at 493

[6] Id. at 469, 507.
[7] Croson, 488 U.S. at 491-92, 109 S.Ct. at 537-38.

The Court in Croson questioned whether the City of Richmond had actually proven relevant past discrimination. The Court reasoned that a mere statistical disparity between the overall Minority population in Richmond (50 percent African-American) and awards of prime contracts to Minority owned firms (0.67 percent to African-American firms) was an irrelevant statistical comparison and insufficient to raise an inference of discrimination. The Court noted that a generalized assertion that there has been past discrimination in an entire industry provided no guidance to determine the present scope of the injury a race-conscious program seeks to remedy. The Court also made clear, however, that: "Where there is a significant statistical disparity between the number of qualified Minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise".[8] In other words, the statistical comparison must be one between the percentage of MBEs in the market qualified to do contracting work (including prime contractors and subcontractors) and the percentage of total dollars that the City of Richmond awarded to Minority firms.

It is this reasoning by the courts that is the foundation of the statistical analysis contained in the present Study. Additionally, the Court stated that identified anecdotal accounts of past discrimination also could provide the basis to establish a compelling interest for local governments to enact race-conscious remedies.

Regarding the second prong of the strict scrutiny test, the Court ruled that Richmond's MBE program was not narrowly tailored to redress the effects of discrimination. First, the program extended to a list of ethnic minorities (e.g. Aleuts) for which the Court held that the City had established no evidence of discrimination. Thus, the Court found that the scope of the City's program was too broad. Second, the Court ruled that the thirty percent (30%) goal for MBE

[8] Id. at 509.

participation in the Richmond program was a rigid quota not related to any identified discrimination. Third, the Court expressed disappointment that the City failed to consider race-neutral alternatives to remedy the under-representation of minorities in contract awards. Finally, the Court highlighted the fact that the City's MBE program contained no sunset provisions for a periodic review process intended to assess the continued need for the program.[9]

This Study is designed to assist the City of Memphis, Tennessee in determining whether there is a constitutional basis for the City to utilize race/gender/ethnicity classification in order to correct the present effect of past discrimination.

IV. Scope of This Study

The purpose of this Study is to examine any existing disparity between the availability of Minority owned and Woman owned businesses for participation in the City of Memphis, Tennessee's procurement process and in their actual utilization by the City over the Study Period. In addition, because the City has an interest in ensuring that it is not indirectly assisting firms that discriminate based on race or gender and that it is not a passive participant in any discrimination in the private market place, this Study also contains a private sector review. The central question to be answered by the private sector report is: How are Minority owned and Woman owned firms utilized in the private sector in the absence of race and gender based numeric goals? If it is determined that such firms are underutilized in the private sector, then the next questions are whether the underutilization is the likely result of discrimination and to what extent, if any, has the City of Memphis, Tennessee been a passive participant in identified private sector discrimination.

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[9] Id. at 500.

This Study contains a full analysis of the statistical data collected from the City of Memphis, Tennessee relative to the availability and utilization of Minority and Woman owned businesses, and a discussion of the levels of disparity for the City's prime contractors and subcontractors, and the private sector from July 1, 2002 through June 30, 2007. In addition, the study includes a detailed overview of U. S. Supreme Court and Sixth Circuit case law; analysis of anecdotal data collected from personal interviews and telephone surveys; and a review of the City's purchasing policies, practices, and procedures.

GSPC has been careful to remain cognizant of the foundational case law of Croson and its progeny in this evolving area of jurisprudence. GSPC has utilized methodologies intended to be acceptable to the courts in the Sixth Circuit to support any resultant program.

As outlined in the detailed legal overview, the courts have indicated that for a race-based or gender-based preference program to be maintained or created there must be a clear evidentiary foundation established. Generally, this evidence must be relied upon as part of the implementation of the jurisdiction's decision-making process related to the race-conscious program in order for it to be relevant in any subsequent legal action.

V. Availability, Utilization, and Disparity Findings

After a comprehensive review of the quantitative and qualitative data the Griffin & Strong, P.C. study team made the following findings:

A. STATISTICAL ANALYSIS FINDINGS

FINDING 1: Overall MWBE Utilization

Throughout the Study Period, the City spent $54.1 million with MWBEs within the relevant market across all procurement categories at the prime level. Payments to WBEs represented $4.98 million or .68% of total City spending of $735.1 million for the Study Period.

FINDING 2: Relevant Market

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

- Construction – Memphis, TN MSA;
- Professional Services (A/E) – Memphis, TN MSA
- Other Professional Services – United States
- Other Services – State of Tennessee
- Goods/Supplies – United States

FINDING 3: City MWBE Prime Utilization and Availability

The dollar value of MWBE prime utilization during the Study Period in the relevant market by the City is shown below:

- 49 MWBEs received $18.3 million in Construction contract dollars on City projects, which represent 9.59 % of the total dollars spent by the City on Construction.

- 19 MWBEs received $2.7 million in prime A/E dollars which represent 11.7 % of total A/E dollars spent by the City on A/E.

- 62 MWBEs received $7.6 million in Other Professional Services dollars, which represent 3.1 % total dollars spent by the City on Other Professional Services.

- 243 MWBEs received $15.0 million in Other Services dollars, which represent 14.62 % of dollars spent by the City on Other Services.

- 212 MWBEs received $10.5 million in Goods/Supplies dollars, which present 6.0 % of total dollars spent by the City on Goods/Supplies.

FINDING 4: MWBE MSA Prime Availability within the Relevant Market

Table 1

Business Category	African American %	Asian American %	Hispanic American %	Native American %	White Female %	MWBE Firms %
Construction	15.17%	0.29%	0.00%	0.00%	3.18%	18.64%
Professional Services – A&E	18.49%	0.84%	2.52%	0.00%	6.72%	28.57%
Other Professional Services	12.03%	0.47%	0.12%	0.00%	1.52%	14.14%
Other Services	22.90%	0.11%	0.22%	0.04%	2.13%	25.39%
Goods/Supplies	12.20%	0.15%	0.00%	0.05%	1.45%	13.85%

Source: Master Vendor Database

FINDING 5: Disparity in MWBE Prime Utilization

MWBEs were under-utilized across all procurement categories during the Study Period. However, the under-utilization of the following MWBE groups was determined to be significant enough to suggest the presence of discrimination:

- Construction Prime Contractors: African American, Asian American, and White Female-owned firms;
- A/E: African American, Asian American, Hispanic American, and White Female-owned firms;
- Other Professional Services: African American, Asian American, Hispanic American, and White Female-owned firms;
- Other Services: African American, Asian American, Hispanic American, Native American, and White Female-owned firms;

- Goods/Supplies:African American, Asian American, Native American, and White Female-owned firms.

It is also significant that Non-Minority Male-owned firms were over-utilized in all procurement categories during the Study Period.

FINDING 6: Comparison with 1994 Disparity Study

The data showed increases in the absolute and relative value of MWBE utilization since the 1994 Memphis Disparity Study, as indicated by the following:

- MWBE Construction prime contracting utilization increased from $5.3 million out of $85.4 million total dollars spent during the 1994 Study Period, which represents 6.2% participation, to $18.3 million in MWBE participation out of $190.5 million total dollars spent, which represents 9.6% of total construction dollars spent during the current Study Period. Therefore, MWBE participation increased 3.4% in the current Study Period over the totals in the 1994 Study Period.

- MWBE Professional services including A/E utilization grew from $202,609 during the 1994 Study Period, to $10.3 million, or 3.86% of the total during the current Study Period.

- MWBE Other Services and Goods/Supplies utilization grew in percentage terms from about 5.85% in the 1994 Study Period to 9.2 % during the current Study Period.

FINDING 7: MWBE Construction Subcontractor Utilization and Disparity Analyses

As Table 35 indicates, African American-owned firms have significant over-utilization as construction subcontractors, and Hispanic American, Asian American,

and White Females were statistically significantly under-utilized as construction subcontractors.

FINDING 8: Subcontractor Anecdotal Perceptions

Major concerns in anecdotal testimony regarding experience as a subcontractor were changes in bidding procedures when they are not required to hire MWBEs and inadequate good faith efforts by prime contractors. Of the MWBEs who responded to our telephone questions about experiences as a subcontractor, key issues noted were as follows:

- a group of payment issues: payment delayed (36%), untimely release of retainage (22%), and not paid per contract (20%).
- double standards in qualifications and performance (56% of MWBE respondents);
- never served as subcontractor in the private sector (64% of MWBE respondents).

FINDING 9: Project Goal Setting for MWBE Subcontractor Utilization

The City's MWBE Ordinance speaks to establishing annual overall MWBE participation goals which shall be used as benchmarks for evaluating the performance of the program. The City's ordinance describes the methodology establishing annual overall goals however it does not specifically address how to establish project specific goals nor to establishing separate goals for primes and subs.

B. Findings for Private Sector Analysis

FINDING 10: Disparities in Self-Employment and Revenue Earnings

In general, findings from the U.S Bureau of the Census Public Use Micro Sample (PUMS) 2000 data indicate that there were disparities in entry into and

earnings from self-employment by women and minorities after controlling for education, age, wealth, and other variables. When self-employment rates were stratified by race and by business type, trends varied within individual race-by-type cells, but disparities persisted, in general, for African Americans, Asian Americans, Hispanic Americans, and Non-minority women. When group self-employment rates were submitted to analysis of disparity due to minority status, findings supported the conclusion that disparities for these four groups (of adequate sample size to permit interpretation) were likely the result of some customer discrimination; that is, an unwillingness on the part of some sectors of the private marketplace to do business with firms owned by women and minorities.

FINDING 11: Regression Analysis

Self-employment findings were supported by analyses of the telephone survey of vendors. After adjusting for impact of non-MWBE factors, such as number of employees, age of company, owner's experience, and owner's education level, the analyses showed that MWBE firms had significantly lower 2007 revenues than similar Non-minority Male firms. The consistency of the lower 2007 revenues of MWBE firms for the all-industries analyses and for African Americans and White Females among the different industry grouping analyses, further strengthens the evidence that the disparities are due, at least in part, to the race and/or gender status of the firms.

FINDING 12: Private Sector Utilization in the Memphis Construction Industry

The utilization of MWBE firms on private commercial construction in the City of Memphis in comparison with MWBE utilization by the public sector and Reed Construction Data for prime contractors is shown in Table 62. MWBE utilization was substantially higher for the public sector than for the private

marketplace. Moreover, the public sector used many more MWBEs, particularly in proportion to its spending, than did the private sector commercial construction market.

TABLE 2
CITY OF MEMPHIS
COMPARISON OF PUBLIC AND PRIVATE SECTOR
PRIME CONTRACTOR UTILIZATION

	African American (%)	Asian American (%)	Hispanic American (%)	Native American (%)	White Female (%)	Minority & White Female (%)	Non-Minority Male (%)
Public Construction Prime Contractors (City of Memphis Actual Payments)	8.35	0	0	0	1.24	9.59	90.41
Private Construction Prime Contractors (Building Permits)	0.16	0	0	0	0.08	0.25	99.75
Private Construction Prime Contractors (Reed Construction Data)	3.56	1.68	0	0	0.99	6.23	93.77

Source: Griffin & Strong, P.C. (2008)
Source: City of Memphis Building Permits, Reed Construction Data, Utilization Analysis.

FINDING 13: Disparities in Loan Denials

An econometric analysis of small business lending in the region containing Memphis from the National Survey of Small Business Finance (NSSBF) found evidence of disparities in loan denial rates for African Americans and White Females after controlling for variables representing firm assets and creditworthiness, raising an inference of discrimination in lending.

FINDING 14: Disparities in Interest Rates

Data from the NSSBF showed that when a loan is approved the interest rates charged to MWBEs were all higher than that of Non-minority Males with the exception of Asian Americans, with Hispanic American having the highest rate charged of 20.9 %.

C. Anecdotal Findings

FINDING 15: Anecdotal Evidence

The following presents findings based on the review presented in Chapter VI.

1. Perceptions of Discrimination

About six percent of the 326 MWBE respondents reported discrimination in the survey. There were not a large number of specific incidents of discrimination by the City reported in either the anecdotal testimony or survey responses. The primary concern regarding discrimination in the anecdotal testimony was the impediments to opportunity resulting from informal networks and discrimination in the private sector.

Nineteen percent of the participating firms indicated that they had experienced discrimination in their business dealings with the private sector. Whereas seven percent indicated they had experienced discrimination from the City.

Also the telephone survey respondents that perceived major procurement barriers tended to be 12, 14 and 15% Non-minority Males and 23, 24 and 29% White Females. The responses to other perceived barriers by ethnicity can be found in the crosstabs included in the Appendix H.

2. Barriers to Doing Work with the City

Major concerns in anecdotal testimony regarding barriers to work with the City were the advantages possessed by large and incumbent vendors, an informal network and the selection process. Of the MWBEs who responded to our telephone questions about barriers to doing business, key issues noted were as follows:

- financing (17% of MWBE respondents);
- limited knowledge of purchasing/contracting policies and procedures (14% of MWBE respondents);
- bid and performance bond requirements (16% of MWBE respondents);
- time allotted to prepare bids and quotes (12% of MWBE respondents);
- expenses associated with bid preparation (11% of MWBE respondents);
- prequalification requirements (11% of MWBE respondents);
- insurance (11% of MWBE respondents); and
- bid specifications (11% of MWBE respondents).

FINDING 16: Limited Information

There were anecdotal reports of inadequate pre-bid information on projects. One of the key concerns reported in the survey was the availability and accessibility of information about pending projects (25% of 337 MWBE respondents).

FINDING 17: Disparity Analysis

Although the City has improved MWBE prime participation since the 1994 Disparity Study, there still remains significant disparity between the utilization and availability of MWBEs. The subcontractor analysis indicates that MWBEs have done well. This portion of the analysis indicates that the current subcontracting program has been successful during the Study Period; although that assessment must be tempered somewhat by the data limitations which were previously noted. Yet even in this area, based on the qualitative evidence in the anecdotal chapter and the quantitative private sector evidence, an inference of discriminatory exclusion from private sector construction can be drawn. Detailed statistical evidence also supports the claim that customer discrimination against MWBEs persists even after controlling for both individual and firm characteristics. This combined evidence suggests that absent affirmative measures the City would be a passive participant in a pattern of exclusion of MWBEs.

D. Procurement Findings

FINDING 18: Vendor Lists

Currently, Purchasing (which reports to the Assistant Director of Finance) maintains an updated list of vendors, suppliers and contractors in Oracle Purchasing Software. There are no specified written guidelines concerning how vendors are placed on individual buyer lists. There is no written policy for soliciting MWBEs for small purchases.

FINDING 19: Department Purchase Orders

For purchases of goods and services under $2,500 department managers may make purchasing decisions. For purchase over $2,500 but less than $25,000 Purchasing solicits three verbal or written quotes and process the order with the lowest bidder. The department purchasing policies thus vary in their support for utilizing MWBE firms.

FINDING 20: Post-Bid Information

A number of MWBEs complained about lack of information on projects, in particular, a lack of understanding as to why they are not securing opportunities with the City when their bids or proposals for City business have been rejected.

FINDING 21: Contract Compliance Program Staffing

The Contract Compliance Office is comprised of two staff members. Their focus is goal setting, compilation of the annual MWBE performance report. However the Contract Compliance does not monitor project nor are there consequences for Primes who do not report the information they are suppose to report.

FINDING 22: Program Awareness

City personnel revealed that the Departments are aware of the existence of the MWBE program and their responsibility to report accomplishments once a year, but felt detached from their responsibility to implement and grow the program. The departments see the responsibility for carrying forward this program resting in Contract Compliance or Purchasing. Most division personnel did not know the annual goal established for the year, nor could they explain why project goals were or were not established for certain projects. Many division managers responded that they would be told by Purchasing or Contract Compliance when an MWBE goal was necessary and did not articulate knowledge of the existence of goal setting committees.

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

FINDING 23: Antidiscrimination Rules

The City does not have a formal commercial nondiscrimination component in its MWBE program.

FINDING 24: MWBE Program Data

At present, prime contractors are not required to list all subcontractors and the value of their subcontracts, including MWBE firms, in their bid submissions. The City is still behind with regard to tracking MWBE spending. In particular, the City still does not have a good source of subcontractor utilization and availability data. There is no central filing system within the Construction/Architect/Engineering Division – project managers keep their own project files.

FINDING 25: Data Management

- Oracle system does not track vendor by vendor id number and does not tie commodity codes to vendor
- Contract and subcontract data is not electronic
- No tracking of subcontractor payments
- There is a breakdown of reporting construction/architect/engineering contract and payment information to the Compliance office

FINDING 26: Management and Technical Services

The City provides management and technical services to small and MWBE firms secured primarily through a partnership with the Renaissance Business Center. The center provides management and technical assistance programs through classes and workshops covering many facets of business operations.

FINDING 27: Access to Capital, Bonding, and Insurance

The City does not maintain a financial assistance or bonding program. It has partnered with local financial assistance programs in the Memphis MSA.

FINDING 28: Payment Policy

The City does not have in place a policy to address prompt payment. Therefore there may be inconsistencies in how vendors are paid and in what time frame.

FINDING 29: MWBE Certification

To be certified for the City's MWBE program the owner must be a minority person as "those persons, citizens of the United States and lawfully admitted resident aliens, who are African American (persons whose origins are in one of the Black regional groups of Africa)."[10] The definition for women includes non-minority females and the minority or woman owned business enterprise must be located within the Memphis MSA. At present the City contracts with the Mid-South Minority Business Council (MMBC) to make certification decisions of MWBE-owned business status. In this capacity MMBC is the arbiter of who is approved as an MWBE without right of veto by the City.

The City has taken steps towards establishing its own LBE certification process, certification list, and size standards for certification. However at the time of this study this program has not been implemented.

FINDING 30: MWBE Web Site

The City includes the following information on its Web site: vendor registration, MWBE certification information, answers to questions about RFPs.

[10] Memphis City Code section 2-325(c) Definitions

FINDING 31: Performance Measures

At present, the City provides limited tracking of MWBE certification and MWBE utilization. It is therefore difficult to measure the results of increased outreach or the attainment of goals. It is recommended that, along with the institution of goals, there be put in place a system for tracking the attainment of those goals, as well as incentives for procurement personnel that are responsible for reaching the desired goals.

E. Recommendations for Prime Contracting

RECOMMENDATION 1: Annual Aspirational MWBE Goals

This study provides evidence to support the establishment of a moderate program to promote MWBE utilization in the MSA. This conclusion is based primarily on disparities in current MWBE utilization, substantial disparities in the private marketplace, evidence of discrimination in business formation and revenue earned from self-employment, and some anecdotal evidence of discrimination. The City should tailor its minority participation programs to remedy each of these specific disparities.

The City should be commended for its efforts to establish flexible annual aspirational goals rooted in its own estimates of MWBE availability. Table 63 provides guidance on setting initial annual goals for an MWBE program. These MWBE goals by business category are annual goals, not rigidly set project goals. Goals were set at 80% of the availability determined by this study in each business category for each race/gender/ethnicity category.

TABLE 3

Recommended Race And Gender- Specific Annual Aspirational Goals for Prime Contracting for Each Business Category by Race/Ethnic/Gender Classification Memphis MSA

Business Category	% of	% of	Availabilit
Construction Prime			
African Americans	8.35%	15.17%	12.14%
Asian Americans	0.00%	0.29%	0.23%
Hispanic Americans	0.00%	0.00%	0.00%
Native Americans	0.00%	0.00%	0.00%
White Females	1.24%	3.18%	2.54%
A/E Prime			
African Americans	10.61%	18.49%	14.49%
Asian Americans	0.00%	0.84%	0.67%
Hispanic Americans	0.00%	2.52%	2.01%
Native Americans	0.00%	0.00%	0.00%
White Females	1.08%	6.72%	5.38%
Goods/Supplies			
African Americans	4.88%	12.20%	9.76%
Asian Americans	0.00%	0.15%	0.12%
Hispanic Americans	0.00%	0.00%	0.00%
Native Americans	0.01%	0.05%	0.04%
White Females	1.13%	1.45%	1.16%
Other Services			
African Americans	14.31%	22.90%	18.33%
Asian Americans	0.00%	0.11%	0.09%
Hispanic Americans	0.00%	0.22%	0.18%
Native Americans	0.00%	0.04%	0.03%
White Females	0.31%	2.13%	1.70%
Other Professional			
African Americans	3.09%	12.03%	9.62%
Asian Americans	0.00%	0.47%	0.38%
Hispanic Americans	0.00%	0.12%	0.10%
Native Americans	0.00%	0.00%	0.00%
White Females	0.03%	1.52%	1.22%

Source: Griffin and Strong P.C. (2008) and Master Vendor File

To establish a benchmark for goal setting, goals should be based on relative MWBE availability. MWBE goals based on vendor availability are

reasonable, if not conservative. MWBE vendor-based aspirational goals range from .00 % to 18.33 %.[11]

The primary means for achieving these aspirational goals should be outreach and adjustments in City procurement policy.

COMMENDATION and RECOMMENDATION 2: MWBE and SBE Outreach

The City should be commended for providing MWBE outreach workshops and seminars. There are several vehicles by which City outreach efforts can be strengthened. For example, the data shows zero availability for Hispanic owned Construction firms in the Memphis MSA, however Census Data reports 1,083 Hispanic owned Construction firms in the State of Tennessee. This means that there are likely a number of Hispanic-owned Construction firms that could be doing business with the City of Memphis but they are not getting certified. It is recommended that the City undertake a program to indentify those Hispanic-owned firms that are ready, willing, and able to work for the City and assist them in obtaining certification.

- The City should work with Building and Construction Department on providing more forecasts of business opportunities to MWBE vendors.
- The City should partner with federal procurement efforts to market to MWBE firms in the region. If there are firms already certified with the City, the City could assist those firms in growing their capacity by exposing those firms to federal assistance programs and other resources of the federal government, particularly those of the Minority Business Development Agency.

[11] The MWBE aspirational goal is 80 % of availability. These aspirational goals are set below estimated MWBE availability. The 80 % is derived from the concept that if MWBE utilization is less than 80 % then disparity is substantial. This conservative adjustment reflects a concern that the program errs on the side of narrow tailoring. In principle, goals can be slightly above estimated MWBE availability.

- City agencies can feature MWBEs and SBEs in employee newsletters to promote firm awareness.

- The effectiveness of MWBE and SBE outreach can be improved by classifying businesses into three categories:

  - Category A: Firms that are new to government contracting. These firms should be directed to the Procurement Technical Assistance Center (PTAC), the Small Business Development Centers (SBDC), and the Minority Business Development Center (MBDC). The Contract Compliance Office should not duplicate PTAC, SBDC, or MBDC services.

  - Category B: Firms that are familiar with government contracting in general but not with the particular agency. These firms should be handled via an enhanced Web site that answers routine questions and quarterly group seminars.

  - Category C: Firms that already have government contracts and are looking for more specific assistance. Some agencies allow for new businesses to have 15-minute presentations of corporate capabilities to program managers. The City can also provide unsuccessful bidders with feedback and brief MWBEs and SBEs on quality assurance standards.

COMMENDATION AND RECOMMENDATION 3: Contract Sizing

The City should be commended for its efforts on issuing contracts in small dollar amounts, thus expanding the opportunities that small MWBE firms have to do business with the City of Memphis. However additional criteria that can be

utilized and reviewed in determining whether projects can be divided include multiple locations within one project, size and complexity of the procurement, similarity of goods and services procured, and safety. This list is not exhaustive. As recommended in the Office of Management and Budget (OMB) *Contract Bundling Report*, the City should consider limiting the use of contract bundling to those instances where there are considerable and measurable benefits such as decreased time in acquisition, at least 10 % in cost savings, or improved contract terms and conditions.[12]

RECOMMENDATION 4: Promoting MWBE Collaboration

If contract size cannot be reduced to match MWBE capacity, the City should look for instances in which MWBE capacity can be increased to match contract size. MWBE capacity can be increased by encouraging joint ventures among MWBEs. For example, in Oregon the Northeast Urban Trucking Consortium, an organization composed of seven MWBE independent trucking firms with 15 trucks, joined together to win a $2 million trucking contract. MWBE collaboration can be encouraged by citing consortium examples in CCO newsletters and increasing outreach for projects where such collaboration may be effective.

The City may also cautiously encourage joint ventures between MWBEs and non-minority firms on large-scale projects. For example, the City of Atlanta encourages establishment of joint ventures on large projects over $10 million,[13] where economically feasible, to ensure prime contracting opportunities for all businesses, including certified MWBEs. This type of joint venture poses potential illicit "front" risks, and the City must examine these joint ventures carefully.

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[12] Office of Management and Budget, "Contract Bundling—A Strategy for Increasing Federal Contracting Opportunities for Small Business" (October 2002).

[13] City of Atlanta Ordinance Sec. 2-1450 and Sec. 2-1451.

RECOMMENDATION 5: Bidder Rotation

The City should consider a system of bidder rotation, which would include majority and MWBE firms. Some political jurisdictions use bidder rotation schemes to limit habit purchases from majority firms and to ensure that MWBEs have an opportunity to bid along with majority firms. The City already does some rotation of firms in A&E, but it is here being suggested that firms that new firms be invited to bid with each new RFP and that race-neutral preference be given to firms that have not previously done business with the City, in procurement categories where appropriate.

Miami-Dade County, FL uses small purchase orders for the Community Business Enterprise program and rotates on that basis. In addition, Miami-Dade County utilizes an Equitable Distribution Program, whereby a pool of qualified A&E professionals is rotated awards of county miscellaneous A&E services as prime contractors and subcontractors.

Other bidder rotation best practices: Dekalb County, Georgia "Bidder Box"; Port Authority of New York & New Jersey.

RECOMMENDATION 6: Uniform Procedures for Department Solicitation of MWBE and SBE Bids

The City should establish uniform procedures for department solicitation of MWBE bids or quotes. If the City does establish uniform departmental purchasing policies, such procedures should be included.

RECOMMENDATION 7: Debriefings

The City should increase the frequency of debriefing sessions after contract awards are made, particularly for those projects where there is sufficient MWBE

availability to compete for and win contracts but they did not win the bid. Assistance is given to firm to help them determine why they did not win the bid.7

RECOMMENDATION 8: Performance Reviews

The City should require employees with procurement authority to be evaluated on their MWBE and SBE, utilization as part of their performance review. The City should also ensure that all personnel with purchasing power are fully trained concerning the City's MWBE and SBE program and conform with the program requirements when they solicit bids and make purchases.

F. Recommendations for Subcontracting

RECOMMENDATION 9: Narrow Tailoring of MWBE Program

Recent developments in court cases involving federal DBE programs provide important insight regarding the design of local MWBE programs. In January 1999, the United States Department of Transportation (USDOT) published its final DBE rule in Title 49, Code of Federal Regulations, Part 26 (49 CFR 26). In the course of several cases involving the DBE program, the courts found the new DBE regulations to be narrowly tailored.[14] The federal DBE program features listed in Table 64 are important to this characterization of a narrowly tailored remedial procurement preference program. In particular, the DOT DBE regulations provide a variety of measures that put race- and gender-neutral techniques first and then use race- and gender-conscious project goals as a supplemental device when race- and gender-neutral techniques are found inadequate to reduce disparity in DBE (or MWBE) utilization.

[14] *Adarand v. Slater*, 228 F.3d 1147 (10th Cir 2000), *Sherbrooke Sodding v. MDOT* (2001 US Dist Lexis 19565) (November 14, 2001), *Gross Seed v. Nebraska Department of Roads,* Case No. 4:00CV3073 (NB 2002), *Western States Paving v. Washington DOT*, Case No. C00-5204-RBL (WA 2003).

TABLE 4

NARROWLY TAILORED MWBE AND DBE PROGRAM FEATURES

	NARROWLY TAILORED GOAL-SETTING FEATURES	**DBE Regulations**
1.	The City should not use MWBE quotas.	49 CFR 26(43)(a)
2.	The City should use race- or gender-conscious set-asides only in extreme cases.	49 CFR 26(43)(b)
3.	The City should meet the maximum amount of MWBE goals through race-neutral means.	49 CFR 26(51)(a)
4	The City should use MWBE project goals only where race-neutral means are not sufficient.	49 CFR 26(51)(d)
5.	The City should use MWBE project goals only where there are subcontracting possibilities.	49 CFR 26(51)(e)(1)
6.	If the City estimates that it can meet the all MWBE aspirational goals with race-neutral means, then the City should not use MWBE project goals.	49 CFR 26(51)(f)(1)
7.	If it is determined that the City is exceeding its MWBE aspirational goals, then the City should reduce the use of MWBE project goals.	49 CFR 26(51)(f)(2)
8.	If the City exceeds MWBE aspirational goals with race-neutral means for two years, then the City should not set MWBE project goals the next year.	49 CFR 26(51)(f)(3)
9.	Net worth requirements to determine social and economic disadvantage.	49 CFR 26(67)
10.	If the City exceeds MWBE aspirational goals with project goals for two years then the City should reduce use of MWBE project goals the next year.	49 CFR 26(51)(f)(4)
11.	If the City uses MWBE project goals, then the City should award only to firms that made good faith efforts.	49 CFR 26(53)(a)
12.	The City should give bidders an opportunity to cure defects in good faith efforts.	49 CFR 26(53)(d)

The City's MWBE program is already narrowly tailored in a number of aspects, including the rejection of quotas, the absence of race-conscious set-asides, use of good faith efforts, project goals based on individual project review and linked to MWBE availability, and bidder rights to cure good faith efforts. The City should take more steps to further refine its MWBE program along the lines suggested in the DOT DBE regulations—in particular items 3 through 10 in Table 64 above.

RECOMMENDATION 10: Annual Aspirational MWBE Goals for Construction Subcontracting

The City should also establish annual aspirational goals of MWBE subcontracting (separate from prime contractor aspirational goals) (Table 65). Goals should be adjusted each year according to the utilization of MWBEs by business category, gradually reducing race- and/or gender-conscious goals and increasing race- and gender-neutral goals. The ultimate objective is to eliminate the need for a race- and/or gender-based program and to replace it completely with race- and gender-neutral options. Goals were set at 80% of the availability determined by this study for each race/gender/ethnicity category.

TABLE 5

ASPIRATIONAL GOALS FOR CONSTRUCTION SUBCONTRACTING BY RACE/ETHNIC./GENDER CLASSIFICATION

Recommended Race And Gender- Specific Annual Aspirational Goals for Subcontracting by Race/Ethnic/Gender Classification Memphis MSA			
Business Category by MWBE Classification	% of Contract Dollars	% of Available Firms	Availability Index Goal-80.0
Construction Subcontractors			
African Americans	15.62%	15.56%	12.45%
Asian Americans	0.00%	0.28%	0.22%
Hispanic Americans	0.00%	0.00%	0.00%
Native Americans	0.00%	0.14%	0.11%
White Females	1.42%	3.06%	2.45%

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

[1] The percentage of dollars is taken from the sub utilization Table previously shown.

[2] The percentage of available contractors is taken from the availability Table previously shown.

[3] Disparity ratios for construction subcontracting are calculated based on estimates of nonminority subcontracting utilization. For further details see statistical chapter.

COMMENDATION AND RECOMMENDATION 11: Consistency in Goal Setting Methods

Setting project goals separate from the overall aspirational goals serves to further narrowly tailor an agency's MWBE program. Project goals should be set based on the characteristics of the project, the percentage of that type of work that is typically performed by MWBEs, the areas in which MWBEs are known to provide services, and the goals set by the County.

Setting project goals distinct from overall aspirational goals would raise MWBE program costs. Setting project goals would require an additional part-time staff person. Such project goals should also be subject to periodic review by a goal-setting committee.

RECOMMENDATION 12: Mandatory Subcontracting

As a part of some SBE subcontracting programs some agencies impose mandatory subcontracting clauses which would promote SBE utilization and be consistent with industry practices.

City of Columbia, SC. The City of Columbia Subcontracting Program established in 2003 applies to City contract of $200,000 or more. A prime must subcontract a minimum percentage of its bid. The minimums are shown below:

TABLE 6

CITY OF COLUMBIA, S.C MANDATORY SUBCONTRACTING MINIMUMS

Projects	Minimum subcontracting
Parks	**20 %**
Pipelines (water & sewer)	**20%**
Pump Stations	**20%**
Street Improvements	**20%**
Traffic Signals/Street Lighting	**20%**
Building Project by Project	**Not to exceed 49%**
Miscellaneous projects	**20%**

Source: City of Columbia, Subcontracting Outreach Program (March 2003)

Bidders must make affirmative efforts to outreach to Disadvantaged Business Enterprises (DBEs), Disabled Veteran Business Enterprises (DVBEs) and Other Business Enterprises (OBEs) (defined as a business that does not qualify as either a DBE or a DVBE). A bidder will be deemed non-responsive for failure to meet 80 out of 100 points for good faith efforts. Points are granted on a pass/fail basis, i.e., either zero or full points.

San Diego. As part of its Subcontractor Outreach Program (SCOPe) San Diego requires mandatory outreach, mandatory use of subcontractors, and mandatory submission of an outreach document. Whether a contract has mandatory subcontracting is determined by the engineer on the project.

Contra Costa. The Contra Costa County (California) Outreach Program sets mandatory subcontracting minimums on a contract by contract basis. The

Contra Costa Outreach Program requires that MBEs and WBEs be considered by contractors as possible sources of supply and subcontracting opportunities.

RECOMMENDATION 13: Review City of Jacksonville's Program

The City of Jacksonville, FL implemented a hybrid program by establishing a declining schedule of race conscious targets.[15] In the first program year, Jacksonville proposed to meet 70 % of its MWBE goal with race-conscious means, the second year, 50 %, and the third year, 25 %. At the end of the three year period the program is to be evaluated.

The City of Memphis should consider creating and funding many components of the initiatives of the City of Jacksonville, Florida program to include the following:

- Creation of SBE program with MWBE component
- Creation of Bond Enhancement Program
- Creation of Access to Capital Program
- Creation of Accounting Grants
- Creation of Educational Summits
- Semi-monthly payments to MWBEs
- A cap on the number and total dollar value of contracts that may be set-aside per year
- Appropriating the funds necessary to implement all programs

RECOMMENDATION 14: Reciprocal Certification

Memphis should accept the certification decisions of other governmental entities and not require MWBEs and SBEs to submit to a lengthy process. At a

[15] City of Jacksonville, Executive Order No. 04-02

minimum, for firms that are already certified by other governmental entities[16], Memphis should only request the necessary documentation to verify compliance with City of Memphis' policies and procedures and conduct site visits for further verification, if warranted.

RECOMMENDATION 15: Steering Committee

The true success of a SBE and MWBE Program cannot fall on the shoulders of one office in the organization. The Contract Compliance Office alone cannot make this effort successful. The participation of all procurement professionals is needed to reach out to firms to get certified, to encourage inclusion of new firms and not just the firms that they are used to doing business with, and to assist firms in growing their capacity.

This means that there must be accountability and regular reporting on performance, as well as continuing development of program strategies. A key component is to assemble, senior staff members in the organization, who should serve as a steering committee to drive home the importance of full participation, including the City Administrator, Deputy City Administrators, and User Department Heads. A communications strategy should be established to get the message out that the total integration of MWBEs and LSBEs into the procurement process is important enough to implement, track, and report, by department and division heads. The steering committee should be responsible for a quarterly review and the ultimate outcomes.

Recommendations for Race-Neutral Alternatives

COMMENDATION AND RECOMMENDATION 16: SBE Program

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[16] The State of Florida has an MBE Certification program. It has a larger size standard than the Orange County, FL program. (http://osd.dms.state.fl.us/eligibil.htm) Chapter 288, The 2005 Florida Statues and Chapter 38A-20, Florida Administrative Code.

Memphis should be commended for its establishment of a local business program. The City should move forward with setting SBE goals. A strong SBE program is at the center of maintaining a narrowly tailored program to promote MWBE utilization. It is certainly conceivable that a larger portion of City MWBE utilization can be achieved through the City SBE program.

Larger MWBE utilization through the SBE program can be achieved by increasing the scope of contracts placed in the SBE program, applying SBE goals to more contracts, applying a bid incentive to SBE contracts and changing the SBE size standard (discussed below). Further guidance on SBE programs can come from features of the other SBE programs around the United States, including:

- setting SBE goals for contracts (City of Charlotte)[17], (Miami-Dade County, FL[18];
- setting department goals for SBE utilization (City of Charlotte SBE program);
- making SBE utilization part of department performance review (City of Charlotte SBE program);
- rejecting bids for bidder noncompliance with the SBE program (City of Charlotte SBE program); and
- imposing mandatory subcontracting clauses where such clauses would promote SBE and MWBE utilization, and be consistent with

[17] A description of the Charlotte SBE program can be found at www.charmeck.org/Departments/Economic+Development/Small+Business/Home.htm.

[18] 10-33.02 Code of Miami (CSBE); www.co.miami-dade.fl.us/dbd Ordinance 01-103, Administrative Order 3-32 CBE Program)

industry practice (City of San Diego Subcontractor Outreach Program).[19]

RECOMMENDATION 17: Mentor-Protégé Program

Memphis' MWBE program has assisted in developing successful MWBE subcontractors, some of which have graduated to undertaking prime projects. It is recommended that the City consider an MWBE mentor-protégé program where MWBEs serve as mentors for other MWBE subcontractors. Such an approach has been tried with some success in Orlando, FL. The City should consider partnering with organizations such as the Associated General Contractors, local builders association, the Association of Women Contractors, the National Association of Minority Contractors and similar organization in such a program.

RECOMMENDATION 18: HUBZones

Another variant of an SBE program provides incentives for SBEs located in distressed areas. For example, under the 1997 Small Business Reauthorization Act, the federal government started the federal HUBZone program. A HUBZone firm is a small business that is: (1) owned and controlled by U.S. citizens; (2) has at least 35 % of its employees who reside in a HUBZone; and (3) has its principal place of business located in a HUBZone.[20]

The same preferences that can be given to SBEs can be given to HUBZone firms. For example, the City of New York has a HUBZone type program providing subcontracting preferences to small construction firms (with

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[19] San Diego as part of its Subcontractor Outreach Program (SCOPe) has mandatory outreach, mandatory use of subcontractors, and mandatory submission of an outreach document. Whether a contract has subcontracting is determined by the engineer on the project.

[20] 13 C.F.R. 126.200 (1999). The State of California provides a 5 % preference for a business work site located in state enterprise zones and an additional 1-4 % preference (not to exceed $50,000 on goods and services contracts in excess of $100,000) for hiring from within the enterprise zone. (Cal Code Sec 4530 *et seq.*) Minnesota's bid preferences are limited to small businesses operating in high unemployment areas.

less than $2 million in average revenue) that either perform 25 % of their work in economically distressed areas or for which 25 % of their employees are economically disadvantaged individuals.[21]

All HUBZone programs are race neutral, HUBZone programs can serve as a vehicle for encouraging MWBE contract utilization. Nationally, there are 5,357 female and minority HUBZone firms, representing 56.2 % of total HUBZone firms.[22] In the Phoenix MSA there are 46 women and minority HUBZone firms (107 in the State of Arizona), representing 64.8 % of total HUBZone firms in the city.

RECOMMENDATION 19: Two Tier Size Standard

The federal case law and the DOT DBE regulations point to the use of size standards and net worth requirements as one factor in the narrow tailoring of remedial procurement programs.

Size standards for remedial procurement programs face a dilemma. If the size standard is placed too high, large firms crowd out new firms. If the size standard is placed too low, then too many experienced firms lose the advantages of the remedial program. The City should consider adopting a two-tier standard and a net worth requirement for MWBEs and should update its requirements for SBE firms.

Both the State of New Jersey and the federal government use a two-tier size standard. In this scheme there are separate size standards for small businesses and emerging small businesses. For large projects the State of New Jersey carves out portions of the contract for both tiers of small business. Thus,

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[21] New York Administrative Code § 6-108.1. For a description of the New York local business enterprise program see http://www.nyc.gov/html/sbs/html/lbe.html. Miami-Dade has a Community Workforce Program that requires all Capital Construction Projects contractors to hire 10 % of their workforce from Designated Target Areas (which include Empowerment Zones, Community Development block grant Eligible Block Groups, Enterprise Zones and Target Urban Areas) in which the Capital Project is located. (Miami Ordinance 03-237.)

[22] Based on the SBA pro-net database located at http://pro-net.sba.gov/pro-net/search.html.

a single solicitation requires that the prime spend a certain percentage of the contract with small firms and another percentage with emerging small firms. Along related lines the federal government sets aside contracts for bidding only amongst small firms and other contracts may be set aside for bidding only by emerging small firms.

RECOMMENDATION 20: Commercial Antidiscrimination Rules

Some courts have noted that putting in place antidiscrimination rules is an important component of race-neutral alternatives.[23] Nationally, some agencies have adopted requirements to ensure that their procurement is not discriminatory (e.g., Baltimore, MD; Oakland, CA; Cincinnati, OH; Jackson, MS; Dade County, FL; Seattle, WA; Atlanta Public Schools, GA and Charlotte, NC).

Features of an antidiscrimination policy would include:

- submission of a Business Utilization report on MWBE subcontractor utilization
- review of the Business Utilization report for evidence of discrimination;
- a mechanism whereby complaints may be filed against firms that have discriminated in the marketplace;
- due process, in terms of an investigation by agency staff;
- a hearing process before an independent hearing examiner;
- an appeals process to the agency manager and ultimately to a court; and

[23] *Engineering Contractors v. Dade County,* 943 F.Supp. 1546 (SD Fla 1996).

- imposition of sanctions, including:
  - disqualification from bidding with the agency for up to five years;
  - termination of all existing contracts; and
  - referral for prosecution for fraud.

RECOMMENDATION 21: Private Sector Initiatives

Bexar County, TX added SMWBE participation to their county tax incentive policy in 2004. The county currently considers tax abatements of up to 40 % on qualified real property improvement and new personal property investment. A number of entities such as the City of Tampa, FL, Atlanta, GA, Saint Paul, MN have created private sector initiatives such as including MWBE goals in their economic development contracts and measuring MWBE participation on private sector projects performed by City prime contractors.

COMMENDATION AND RECOMMENDATION 22: Outsourcing Management and Technical Services

The City should be commended for its current efforts in providing management and technical assistance through it partnership with the Renaissance Business Center. These efforts could be strengthened by contracting with an outside management and technical assistance provider to provide needed technical services related to business development and performance, particularly in the area of loans and bonding. Such a contract should be structured to include providing incentives to produce results, such as the number of MWBEs being registered as qualified vendors with the City, the

number of MWBEs graduating from subcontract work to prime contracting, and rewarding firms that utilize MWBEs in their private sector business activities.

RECOMMENDATION 23: Surety Assistance and Wrap-Up Insurance

A small business surety assistance program should provide technical assistance to small firms, track subcontractor utilization by ethnicity, coordinate existing financial as well as management and technical assistance resources, and provide for quality surety companies to participate in the bonding program.

The Port Authority of New York and New Jersey uses a Contractor Insurance Program (CIP), a form of wrap-up insurance under which the Port Authority provides various insurance coverages to approved on-site contractors and subcontractors for construction contracts. In particular, the Port Authority buys and pays the premiums on public liability insurance ($25 million per occurrence), builders' risk insurance, and workers' compensation and employers' liability insurance. In general, the CIP can reduce an owner's project costs by an average of 1 to 2 % compared to traditional contractor procured insurance programs. The Port Authority CIP does help alleviate barriers from insurance costs to MWBE participation in Port Authority construction projects.

The City of Atlanta and Fulton County provide surety assistance programs as a part of their OCIP.

G. Organizational Recommendations

RECOMMENDATION 24: MWBE Program Data

It is imperative for the City to closely monitor the utilization of all businesses by race, ethnicity, gender, and business category over time to determine whether an LSBE program has the potential to eliminate race and

gender disparities without applying specific race and gender goals. The City is still behind in some aspects of its tracking of MWBE spending.

The City should require that all contractors maintain data for subcontractors they have employed for a City project. This includes all subcontractors utilized (minority, women, and nonminority) and the total amount paid. These data should be submitted to the City before the prime contractor's final payment for services.

Availability analysis requires a good data source, such as the centralized bidder registration systems for prime vendors and contractors that are becoming increasing common. For future availability analysis, it is equally important to identify not only the number of prime vendors but also the number of subcontractors available and the services provided by all vendors. Because the City does not collect these data, it is limited in the type of availability analysis it can conduct. In order for Memphis to monitor an M/W/SBE program accurately and improve future availability analyses, it should require all contractors to submit a list of all subcontractors contacted in preparation of their bid package. The list of potential subcontractors should include the proposed service and bid amount. The data will allow the City to identify with accuracy the number of actual subcontractors available. These data should be analyzed and reviewed at least annually and the MWBE program adjusted according to review results.

Ideally, the City data management should rest upon Internet-based data tracking. Such a system would assist in the acquisition of subcontracting data, reduce the costs of disparity analysis, facilitate CCO time management of its staff, and shift focus of CCO staff from certification to contract compliance.

RECOMMENDATION 25: Listing of Subcontractors

The City should require all contractors to submit a list of all subcontractors contacted in preparation of their bid package. The list of potential subcontractors should include the proposed service and bid amount. The listing of subcontractors would reduce the possibility of bid shopping. It would also assist the City during the submission review process, goal-setting process, and goal attainment review, and help avoid administrative issues of handling noncompliance after contract award. Some agencies reduce bid shopping with the following requirements:

- prime contractors must report all subcontractors;
- subcontractor bids must remain confidential;
- prime contractors must contract with subcontractors in the same dollar amount upon which the prime bid was based;
- prime contractors must seek written approval of the substitution of subcontractors; and
- each pay request must identify the dollar amount to be paid to subcontractors.

RECOMMENDATION 26: Historically Under-utilized Subcontractors

Memphis should find ways to encourage the award of contracts to qualified MWBEs that have participated in bidding but that have not won any bids and therefore, have not previously done business with the City. The City could provide bonus points or other incentives when a prime utilizes an "untried" business.

COMMENDATION and RECOMMENDATION 27: Access to Capital

The City should be commended for its collaboration with existing financial assistance providers. Other examples of lending assistance programs include linked deposit programs and collateral enhancement programs. Agencies use linked deposit programs to subsidize lower rates for business and housing loans by accepting a lower rate on their deposits with participating financial institutions. Under a collateral enhancement program the City would not loan funds directly to businesses, but instead would place a collateral reserve account at a bank. The business would then be required to secure financing from a lending institution, which could be conditioned on receipt of additional collateral supplied by the collateral enhancement program.

The cities of Phoenix, AZ, Saint Paul, MN are a couple of examples that offer capital program that have established or partnered with local lending assistance programs and CDC lending programs. Such programs should be evaluated for their impact on SMWBE growth, development and utilization.

RECOMMENDATION 28: Prompt Payment

The City should establish a prompt payment policy. One such policy operates at the Orlando Orange County Expressway Authority (OOCEA) in Florida:

- The OOCEA cuts checks every Tuesday.
- The OOCEA has a Quick Pay program that can pay vendors within two weeks.
- The OOCEA also makes mobilization payments for project preparation.

- The OOCEA payment policy allows for joint checks payable to small and MWBE firms and the materials supplier.
- The OOCEA's payment policy provides for no progress payments to the prime contractor until the prime has certified disbursement of a pro rata share of payments to subcontractors.

The State of Minnesota covers subcontractors in their prompt payment statute. Some small vendors still have problems with prompt payment particularly payments by prime contractors to subcontractors. Certain subcontractors that work on an early phase in a project can suffer from retainage withheld on lengthy projects. The prompt payment policy should address this issue. The City should require that retainage be released when the tasks for the subcontractors phase of work is accepted rather than at the end of the project. [24] This policy has been adopted by a number of state departments of transportation and federal DOT grant recipients.

RECOMMENDATION 29: Oversight Committee

It is important that major stakeholders (including representatives of general contractors and MWBE contractors) take part in discussions about the City's MWBE program. Consequently, the City should provide a vehicle for stakeholder input in the review of any reforms of its MWBE program.

In addition, MWBEs are facing challenges in the general marketplace related to capital, private sector bid opportunities, prompt payment, contract compliance, and business operations. There are a number of entities within the

[24] 49 CFR Part 26.29(b)

Memphis MSA that operate an MWDBE program or who suspended their program. These governmental entities should enter into an inter-local agreement and work in concert to ensure increased contract access, contract compliance, and a coordinated effort to ensure the growth and viability of Memphis MWBEs.

RECOMMENDATION 30: Additional Features for MWBE Web site

Other agencies put the following information on their Web site: directory of certified firms in electronic format (City of New York), uniform certification application, MWBE program description, SBE program description, how to do business information, bid tabulations, direct links to on-line purchasing manuals, capacity and experience data on certified firms, bid opportunities, vendor application, information on loan programs, and forecasts of business opportunities for MWBEs.

RECOMMENDATION 31: Performance Reviews

A means of increasing understanding of the ordinance would be to identify means of broader distribution of program requirements. A first step would be revision of the Purchasing Policies and Procedures manual section, Minority and Women Business Enterprise (C-050) to include more details regarding the ordinances provisions.

Secondly, additional internal materials providing the program highlights could be developed and distributed during a training session for supervisors, managers and directors. Most City personnel interviewed indicated it had been a number of years since they had gone through training for the program. Following implementation of the new ordinance would be an ideal time to schedule training.

The City should require employees with procurement authority to be evaluated on their MWBE utilization as part of their performance review. The City

should also ensure that all personnel with purchasing power are fully trained concerning the City's MWBE program and conform with the program requirements when they solicit bids and make purchases.

RECOMMENDATION 32: Staffing and Program Monitoring

Increase staff, training and resources of the Contract Compliance Office to ensure the necessary resources to operate the MWBE program, train the internal customers and to track the data necessary to report on accomplishment. Specifically, this staff would be responsible to perform outreach, respond to public inquiries about the program, set project and overall goals, analyze bid requirements, monitor compliance from current contracts, and perform dispute resolution, collect and report on data related to contract awards and expenditures and to respond to the needs of the internal customers regarding interpretation, assistance and compliance.

RECOMMENDATION 33: Balanced Scorecard

The City should develop additional measures to gauge the effectiveness of its efforts. Jacksonville, Florida has had a balanced scorecard approach.

Possible measures include:

- growth in the number of MWBEs winning their first award from the City;
- growth in percentage of MWBE utilization by the City;
- growth in MWBE prime contracting;
- growth in MWBE subcontracting to prime contractors;

- number of firms that receive bonding;
- number of firms that successfully graduate from the MWBE program;
- number of graduated firms that successfully win City projects;
- percentage of MWBE utilization for contracts not subject to competitive bidding requirements;
- growth in the number of MWBEs utilized by the City;
- number of joint ventures involving MWBEs; and

H. Conclusion

B. Sufficient Basis to Support a Statistical Inference of Discrimination

The City of Memphis, Tennessee has a legal and economic interest in ensuring that MWBEs participate fully in the economic opportunities created by the City's procurement. The City also has a governmental interest in ensuring that MWBE's have equal access to capital on a non-discriminatory basis.

While utilization of Minority and Women owned firms by the City did improve during the five-year period of this study and since the previous study of 1994, both in relative and absolute terms, substantial disparities did remain in some areas. Disparities in firm revenue and in entry into and earnings from self-employment were also evident after controlling for firm characteristics. MWBEs faced higher barriers in the private sector than in City of Memphis procurement.

To bridge the gap between the disparities found in the Study and the fair, open and inclusive procurement process that the City seeks to have, it will be necessary to address the present effects of past discrimination. The current Minority and Women Owned Business Enterprise Procurement Program should continue to be developed to address the Findings of this Study.

Also, If the recommendations of the Study are enacted, the City should achieve a higher degree of remedial success in its procurement processes and enhance its overall economic environment.

Griffin & Strong, P.C.
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