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I. INTRODUCTION

Cuyahoga County, Ohio ("Cuyahoga County" or "County") contracted with EuQuant, Inc. ("EuQuant") (an economic research and data analytics company) to perform an economic and statistical analysis of minority, woman and small business performance in County contracting and procurement. EuQuant sought, through data collection and statistical analysis, to ascertain whether or not the utilization of minority and woman owned businesses ("MWBE"), was consistent with the extent to which they were qualified, willing, and able to engage in County contracting. The study period ranged from FY2009-FY2012 ("Study Period").

In conducting the statistical analysis, EuQuant examined all contracting awards that were made during the Study Period and disaggregated the analysis by prime contracting and subcontracting activity as well as by awards to Small Business Enterprises. In addition, the analysis derived specific outcomes by industry, race, ethnicity and gender. The detailed findings of the economic and statistical analysis are attached as Appendix A.

The County also contracted with Griffin & Strong, P.C. ("GSPC") (a law and public policy consulting firm) to collect and analyze anecdotal data obtained from minority owned, woman owned and small businesses in the County, conduct an economic analysis of the private sector, and produce a final disparity study report ("Study"). GSPC collected anecdotal evidence through telephone surveys, in-depth interviews with business owners, public hearings, focus groups, and emailed comments from interested parties. It also conducted the private sector analysis to determine if the County has been a passive participant in marketplace discrimination. In addition, GSPC conducted interviews with County procurement personnel to assess whether the County has any purchasing policies that present a barrier to minority and woman-owned businesses and whether County procurement personnel understand and consistently administer the procurement policies.

The purpose of this Study was to assist the County in leveling the playing field for minority and woman owned business enterprises by determining whether or not there is compelling evidence sufficient to establish a legal predicate to maintain or create any remedial programs for MWBEs under City of Richmond v. J.A. Croson Company, 488 U.S. 469 (1989). To this end, an important aspect of the Study was to determine whether there exists a statistically significant disparity between the number of MWBEs in the Cuyahoga marketplace that are qualified, willing

and able to do work and the amount of awards made by the County or by prime contractors to the County to such MWBEs.

A. Objective

The principal objectives of this Study were:

- to determine whether or not the County, either in the past or currently (and through direct or indirect actions), has engaged in or provided public dollars in support of discriminatory practices during the solicitation and award of contracts, in the business categories of Professional Services, Construction, Goods & Services, and Suppliers;
- to determine if compelling evidence exists for the County to establish remedial programs for MWBEs in accordance with the guidelines set forth by the U.S. Supreme Court in Croson and relevant subsequent cases; and
- to provide recommendations regarding actions and policies the County might consider as a result of the findings of the Study, including serious consideration of race-neutral program options.

B. Report Organization

This report is organized into the following sections:

Chapter II, which is an overview of the case law history in this area;

Chapter III, which provides a review of the County's purchasing policies and practices;

Chapter IV, which presents the Data Development, Collection and Analysis ("DDCA") conducted by EuQuant as the statistical analysis;

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

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

Chapter VII, which presents the detailed findings of this Study and GSPC's recommendations;

Chapter VIII, which is GSPC's conclusion; and

Chapter IX, which is the Appendices.

C. Study Team

1. EuQuant

- Dr. Thomas D. Boston, CEO, EuQuant
- Linje Boston, Research Director, EuQuant

About EuQuant

EuQuant is an economic consulting and urban planning company whose mission is to empower clients with data-driven solutions for achieving success. EuQuant was founded in 1994 by Dr. Thomas D. Boston, who is a professor of economics at Georgia Institute of Technology. Dr. Boston was assisted by the EuQuant staff, most especially, Linje Boston, who is research director at EuQuant. Linje holds an undergraduate degree in statistics from Carnegie Mellon University and a graduate degree in statistics from the University of Michigan.

2. Griffin & Strong, P.C.

- Rodney K. Strong, Esq., CEO, Griffin & Strong, P.C.
- Dr. Gregory Price, Senior Economist, Morehouse College
- Michele Clark Jenkins, J.D., Senior Director and Project Manager, Griffin & Strong, P.C.
- Imani Strong, Deputy Project Manager, Griffin & Strong, P.C.
- Winston Terrell Group, Anecdotal Interviews
- Oppenheim Research, Inc., Telephone Survey

About Griffin & Strong, P.C.

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

3. Other Members of the Project Team

- **Winston Terrell Group** is a government affairs, public outreach and community relations firm which prides itself on innovative strategies to assist in strategic development for its clients. The firm puts a premium on servicing clients and providing reasonable solutions to problems. Specialty areas include public participation, procurement, representation before government entities, and building relationships with local, state and federal governments. The firm's diverse portfolio includes engineering and architectural firms, public relation firms, non-profits, technology firms, social service providers, municipalities and other interests. The firm conducted all anecdotal interviews for this study.

- **Oppenheim Research, Inc.**, is a Florida-based woman owned, full-service market research firm with over 35 years of experience serving public and private entities. Some of their services include telephone interviews, focus group, and mail survey data. For this project, they conducted the telephone survey.

II. LEGAL ANALYSIS

A. Background and Introduction

The purpose of this disparity study is to evaluate whether a minority or woman business enterprise program is necessary in the County.

Government initiatives which seek to employ "race conscious" remedies to ensure equal opportunity must satisfy the most exacting standards in order to comply with constitutional requirements.[1] These standards and principles of law were applied and closely examined by the U.S. Supreme Court in City of Richmond v. J.A. Croson Company.[2] The Croson decision represents the definitive legal precedent which established "strict scrutiny" as the standard of review by which state and local programs that grant or limit government opportunities based on race are evaluated. The Adarand decision subsequently extended the "strict scrutiny" standard of review to race conscious programs enacted by the Federal Government.

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

The “strict scrutiny” test requires public entities to establish race- or ethnicity-specific programs based upon a compelling governmental interest and that such programs be narrowly

[1] 488 U.S. 469 (1989) Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Johnson v. California, 543 U.S. 499(2005); Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701(2007)

[2] 488 U.S. 469 (1989)

tailored to achieve the governmental interest.[3] The "strict scrutiny" test further requires a "searching judicial inquiry into the justification" for the race-conscious remedy to determine whether the classifications are remedial or "in fact, motivated by the illegitimate notions of racial inferiority or simple racial politics."[4]

It is important to note that the "strict scrutiny" standard of review represents the highest level of judicial scrutiny, and is used to test the legality of all state programs which consider race as a determining factor for the award of benefits or services. Concurrently, states desirous of using gender as a determining factor in the award of benefits or services are subject to the lesser stringent standard of intermediate scrutiny.[5] "State action is presumed to be valid and will be sustained if the classification drawn by the state is rationally related to a legitimate state interest."[6] However, where gender classification is at issue in the Sixth Circuit Court of Appeals, there exists unaltered precedent with respect to equal protection analysis that has not been challenged since the U.S. Supreme Court's pronouncements involving the Virginia Military Institute.

Since Croson, there has been an evolution in the case law in this arena in the Sixth Circuit Court of Appeals and throughout the country. Generally, the decisions have been consistent with the analysis and principles of law set forth in Croson. However, there are anomalies which present judicial modification and expansion of the principles of law in Croson, with regard to the methods used to establish an evidentiary determination of discrimination and the standards required of any resulting remedial programs.

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[3] Croson, 488 U.S. 469; Associated Gen. Contrs. of Ohio, Inc. v. Drabik, 214 F.3d 730 (6th Cir., 2000); Ohio Contractors Ass'n. v. Keip, 713 F.2d 167 (6th Cir. 1983); Michigan Road Builders Assn., Inc. v. Milliken, 834 F.2d 583 (6th Cir. 1987)

[4] Croson, 488U.S. at 493; Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Michigan Road Builders Ass'n., Inc., 834 F.2d 583 (1987)

[5] See Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 273 (1979)

[6] Miami University Wrestling Club v. Miami University, 195 F. Supp.2d 1010, 1013 (S. D. Ohio 2001) (citing Valot v. Southeast Local Sch. Dist, Bd. of Educ., 107 F.3d 1220, 1229(2001); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980) and Michigan Road Builders Ass'n., 834 F.2d at 595

This legal analysis discusses the legal principles outlined by the U.S. Supreme Court, the Sixth Circuit Court of Appeals, and important cases from other circuits in setting forth the specific requirements in the public contracting programs for minority and woman owned businesses.

B. The Croson Decision

In its Croson decision, the U.S. Supreme Court ruled that the City of Richmond's Minority Business Enterprise (hereinafter "MBE") program failed to satisfy both prongs of the "strict scrutiny" standard, which is required for any race-based activities undertaken by governmental entities. The two prongs of the "strict scrutiny" standard require that any race-based activity must be justified by a compelling governmental interest and it must be narrowly tailored to achieve that compelling goal or interest.[7] The City of Richmond failed to show that its minority set-aside program was "necessary" to remedy the effects of discrimination in the marketplace, because it had not demonstrated the necessary discrimination. The Court reasoned that a mere statistical disparity between the overall minority population in the City of Richmond (50 percent African-American) and awards of prime contracts to minority-owned firms (0.67 percent to African-American firms) was an irrelevant statistical comparison and insufficient to raise an inference of discrimination. Regarding the evidence that the City of Richmond provided to support its goal program, the Court emphasized the distinction between "societal discrimination", which it found to be an inappropriate and inadequate basis for social classification, and the type of identified discrimination that can support and define the scope of race-based relief. The Court noted that a generalized assertion that there has been past discrimination in an entire industry provided no guidance to determine the present scope of the injury a race-conscious program sought to remedy. The Court emphasized, "...there was no direct evidence of race discrimination on the part of the City in letting contracts or any evidence that the City's prime contractors had discriminated against minority-owned subcontractors."[8]

In short, the Court concluded there was no prima facie case of a constitutional or statutory violation by anyone in the construction industry. Justice O'Connor did opine, however, that evidence might indicate a proper statistical comparison "where there is a significant statistical

[7] Croson Company, 488 U.S. at 507
[8] Id. at 480

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."[9] In other words, the statistical comparison would be one between the percentage of MBEs in the market that are qualified, willing, and able to perform contracting work (including prime contractors and subcontractors) and the percentage of total City of Richmond contracting dollars awarded to minority-owned firms. The relevant question among lower federal courts has been how to determine this particular comparison.

Additionally, the Court stated that identified anecdotal accounts of past discrimination could provide the basis to establish a compelling interest for local governments to enact race-conscious remedies. However, conclusory claims of discrimination by City of Richmond officials, alone, would not suffice. In addition, the Court held that the City of Richmond's MBE program was not remedial in nature because it provided preferential treatment to minorities such as Eskimos and Aleuts, groups for which there was no evidence of discrimination in the City of Richmond.[10] In order to uphold a race- or ethnicity-based program, there must be a determination that a strong basis in evidence exists to support the conclusion that the remedial use of race is necessary. A strong basis in evidence cannot rest on an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or congressional findings of discrimination in the national economy.[11]

Regarding the second prong of the "strict scrutiny" test, the Court ruled that the City of Richmond's MBE program was not narrowly tailored to redress the effects of discrimination.[12] First, the program extended to a long list of ethnic minorities (e.g., Aleuts) for which the City of Richmond had established no evidence of discrimination. Thus, the scope of the City of Richmond's program was too broad. Second, the Court ruled that the thirty percent (30%) goal for MBE participation in the City of Richmond program was a rigid quota not related to identified

[9] Id. at 509
[10] Id.
[11] Id. At 506
[12] Id.

discrimination. Specifically, the Court criticized the City of Richmond for its lack of inquiry into whether a particular minority business, seeking racial preferences, had suffered from the effects of past discrimination. Third, the Court expressed disappointment that the City of Richmond 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 of Richmond's MBE program contained no sunset provisions for a periodic review process intended to assess the continued need for the program.[13]

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

- Whether there is evidence of discrimination (i.e., statistical disparity, anecdotal evidence, etc.) to support a remedial program for minority owned business;

- Whether the size of the MBE participation goal is flexible and contains waiver provisions for prime contractors who make a "good faith" effort to satisfy MBE utilization goals, but are unsuccessful in finding any qualified, willing and able MBEs;

- Whether there was a reasonable relationship between the numerical goals set and the relevant pool of MBEs capable of performing the work in the marketplace;

- Whether race-neutral alternatives were considered before race-conscious remedies were enacted; and

- Whether the MBE program contains sunset provisions or mechanisms for periodic review to assess the program's continued need.

The Croson Court clearly contemplated that there would be circumstances under which the "strict scrutiny" test could be met by a state, county, municipality or other local governmental entity and that it would be necessary for state and local entities, in certain circumstances, to redress identified discrimination with race-conscious remedies. The Court carefully specified the elements of the analysis to be utilized to determine whether an entity has met the constitutional

[13] Id. at 500

test; however, it only gave clues as to how the necessary analysis would be carried out. That process has been the subject of numerous cases since the Croson decision and are outlined below.

C. Judicial Requirements for Challenges to MWBE Programs

In the legal challenges to MWBE programs, the courts have consistently applied a four-part approach to reviewing and deciding such challenges. First, they have determined the standing requirements for a plaintiff to maintain a suit against an MWBE program. Second, they have established the standard of review of equal protection that governs judicial inquiry. Third, they have decided the evidence that is necessary to prove discrimination. Fourth, they have required a certain burden of production and proof in these cases.

1. Standing

As a result of the Croson decision, courts have entertained numerous legal challenges to MWBE race-conscious programs. In order to be heard by any court, the plaintiff must first satisfy the requirements of "standing." The requirements of standing have their foundation in the case or controversy requirement of Article III of the U.S. Constitution which limits the judiciary's power to hear cases as a last resort to settle controversies. Standing requires that the party plaintiff bringing an action be sufficiently connected to the conduct complained of: "Injury in Fact"; that the conduct of the Defendant in the action brought about the harm complained of: "Causation"; and the decision of the court be capable of redressing the harm done: "Redressability."[14]

Moreover, the courts may dismiss a lawsuit when the plaintiff fails to show some "concrete and particularized" injury that is in fact imminent and which amounts to something more than "conjectural or hypothetical" injury. (Court imposed sanctions based on plaintiffs' complaint which failed to establish "injury in fact.")[15]

[14] Allen v. Wright, 468 U.S. at 752 (1984)

[15] Cone Corp. v. Hillsborough County, 157 F.R.D. 533 (M.D. FL 1994; Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)

Prior to the Adarand decision, the U.S. Supreme Court in Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Florida, et al., modified the traditional standing requirement for contractors challenging local and state government minority preference schemes.[16] The Court relaxed the "injury in fact" requirements by holding that so long as the nonminority contractor can show that it was "able and qualified to bid" on a contract subject to the City of Richmond's ordinance, the "injury in fact" arises from an inability to compete with MWBEs on an equal footing due to the ordinances "discriminatory policy." (Note that in Concrete Works of Colorado v. City and County of Denver, the Plaintiff submitted that the ordinance prevented it from competing on an equal basis[17] and the Plaintiff, in Webster Greenthumb Co. v. Fulton County demonstrated that it was able to bid on contracts and a discriminatory policy prevented it from doing so).[18] Specifically, the U.S. Supreme Court stated:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. And in the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss of a contract. To establish standing, therefore, a party challenging a set-aside program…need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal footing.[19]

The U.S. Supreme Court in Hunt v. Washington State Apple Advertising Comm.,[20] established a three-prong test to determine whether an association has standing to bring a lawsuit on behalf of its members: a court must determine whether "(1) its members would otherwise have

[16] 508 U.S. 656(1993)
[17] Concrete Works of Colorado v. City and County of Denver, 36 F.3d 1513 (1994)
[18] Webster Greenthumb Co. v. Fulton County, 51 F. Supp. 2d 1354 (N.D. Ga 1999)
[19] Northeastern, 508 U. S. at 666; Brunet v. City of Columbus, 1 F.3d 390, 396-97 (6th Cir. 1993)
[20] 432 U.S. 333(1977)

standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of the individual members."[21]

In Adarand, the U.S. Supreme Court continued to find standing in cases in which the challenging party made "an adequate showing that sometime in the relatively near future it will bid on another government contract."[22] That is, if the challenging party is very likely to bid on future contracts, and must compete for such contracts against MBEs, then that contractor has standing to bring a lawsuit.

2. Equal Protection Clause Standards

The second preliminary matter that courts address is the standard of equal protection review that governs their analysis. The Fourteenth Amendment provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws".[23]

(a) Judicial Standards of Review

Courts determine the appropriate standard of equal protection review by examining the protected classes embodied in the statute. The courts apply "strict scrutiny" to review an ordinance's race-based preference scheme and inquire whether the law is narrowly tailored to achieve a compelling governmental interest.[24] Conversely, gender-based classifications are evaluated under the intermediate scrutiny rubric, which provides that the statute must be substantially related to an important governmental objective (Eleventh Circuit Court of Appeals explaining U.S. v. Virginia and the appropriate gender-based affirmative action equal protection

[21] Id. At 343
[22] Adarand, 515 U.S.at 2105
[23] U.S. Const. amend. XIV, § 1
[24] Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998)

analysis).[25] Therefore, race-conscious affirmative action is subject to a higher standard of judicial review than gender-conscious affirmative action, normally. In both a Michigan and an Ohio equal protection law case involving affirmative action, the Sixth Circuit Court of Appeals has employed a "strict scrutiny" test when presented with issues of gender classification. Because such is the precedent of the Sixth Circuit Court of Appeals, and because a number of the Federal Appellate Circuits have examined which standard of review they would employ given the heightened intermediate scrutiny employed in the Sixth Circuit Court of Appeals, we can only conclude that, for now, it is best to subject our analysis of gender based programs to "strict scrutiny."

i. Strict Scrutiny

In order for a local government to enact a constitutionally valid MWBE ordinance which applies to awards of its contracts, it must show a compelling governmental interest. This compelling interest must be proven by particularized findings of discrimination. The "strict scrutiny" test ensures that the means used to address the compelling goal of remedying discrimination "fit" so closely that there is little likelihood that the motive for the racial classification is illegitimate racial prejudice or stereotype.[26] Only after legislative or administrative findings of constitutional or statutory violations, local governments have a compelling interest in remedying discrimination.

The courts have ruled that general societal discrimination is insufficient to justify the use of race-based measures to satisfy a compelling governmental interest.[27] Rather, there must be some showing of prior discrimination by the governmental actor involved, either as an "active" or "passive" participant.[28] Even if the governmental unit did not directly discriminate, it can take

[25] Mississippi Univ. for Women v. Hogan, 458 U.S. 718(1982); Engineering Contractors Ass'n of South Florida, Inc., et al v. Metropolitan Dade County, et al, 122 F.3d 895 (11th Cir. 1997); 518 U.S. 515 (1996)

[26] Croson, 488 U.S. 469(1989); Adarand, 515 U.S. at 235; Hopwood v. State of Texas, 78 F.3d 932, 951 (5th Cir. 1996)

[27] Adarand Constructors, 515 U.S. at 227; Croson, 488 U.S. at 496-97; Miller v. Johnson, 515 U.S. 900, 904 (1995)

[28] 488 U.S. at 498

corrective action. As the Court noted in Tennessee Asphalt v. Farris, "[g]overnmental entities are not restricted to eradicating the effects only of their own discriminatory acts."[29]

The governmental entity must point to specific instances or patterns of identifiable discrimination in the area and in the industry to which the plan applies. A prima facie case of intentional discrimination is deemed sufficient to support a local government's affirmative action plan. However, generalized assertions that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to redress.[30]

Since all racial classifications are viewed as legally suspect, the governing body must show a "strong basis in evidence" of discrimination in order to justify any enactment of race-conscious legislation. Merely stating a "benign" or "remedial" purpose does not constitute a "strong basis in evidence" that the remedial plan is necessary, nor does it establish a prima facie case of discrimination. Thus, the local government must identify the discrimination it seeks to redress and particularized findings of discrimination must also be set forth.[31] Although Croson places the burden on the government to demonstrate a "strong basis in evidence," the Fourteenth Amendment does not require a court to make an ultimate judicial finding of discrimination before the government may take affirmative steps to eradicate discrimination. A particularized showing of discrimination in a marketplace and a determination that a state or local government is a "passive participant" in that marketplace discrimination establishes a compelling governmental interest. The City and County of Denver, Colorado were able to establish a compelling interest by demonstrating they were a passive participant in private discrimination.[32]

In Concrete Works of Colorado, Inc., the Tenth Circuit Court of Appeals reversed the District Court's granting of summary judgment for the City of Denver, which had determined that

[29] Tennessee Asphalt Co. v. Farris, 942 F.2d 969, 974 (6th Cir. 1991)
[30] Croson, 488 U.S. at 498-99; Miller, 515 U.S. at 921
[31] Croson, 488 U.S. at 500-01
[32] Concrete Works of Colorado v. City and County of Denver, 36 F.3d 1513 (1994)

the City of Denver's factual showing of past race and gender discrimination justified its compelling government interest in remedying the discrimination. In reversing, the Tenth Circuit Court of Appeals held that factual issues of dispute existed about the accuracy of the City of Denver's public and private discrimination data, but noted that the City of Denver had shown evidence of discrimination in both the award of public contracts and within the Denver metropolitan statistical area ("MSA"), that was particularized and geographically based. On remand, the City of Denver needed only to come forward with evidence that its ordinance was narrowly tailored, whereupon it became Concrete Works' burden to show that there was no such strong basis.[33]

The Sixth Circuit Court of Appeals signaled in Drabik, that statistical proof of under-utilization would be insufficient in and of itself to supply the justification for the utilization of a non-race-neutral measure in public contracting practices.[34] The Drabik Court did not read the Croson Court as permitting remedial action of a non-race neutral type simply because of statistical findings of underutilization of those minority companies that were in the ready, willing and able to perform a public contracting need category, but rather required that "governments . . . identify discrimination with some specificity before they may use race-conscious relief; explicit findings of a constitutional or statutory violation must be made." (Internal Punctuation omitted).[35] Moreover, the Drabik Court signaled that the government would need to present evidence demonstrating "pervasive, systematic, and obstinate discriminatory conduct" in order to satisfy Croson.[36]

The types of evidence routinely presented to show the existence of a compelling interest include statistical and anecdotal evidence.[37] Where gross statistical disparities exist, they alone may constitute prima facie proof of a pattern or practice of discrimination. Anecdotal evidence, such as testimony from minority contractors, is most useful as a supplement to strong statistical

[33] Id.
[34] Drabik, 214 F.3d at 735
[35] Drabik, 214 F.3d at 735
[36] Drabik, 214 F.3d at 737
[37] Croson, 488 U.S. at 501. See, United Black Firefighters Ass'n. v. City of Akron, 976 F.2d 999, 1009 (6th Cir. 1992); Engineering Contractors, 122 F.3d 895 (11th Cir. 1997); Wessmann v. Gittens, 160 F.3d 790

evidence.[38] Nevertheless, anecdotal evidence is rarely so dominant that it can, by itself, establish discrimination under Croson. The "combination of anecdotal and statistical evidence," however, is viewed by the courts as "potent."[39]

If there is a strong basis in evidence to justify a race-based program, the next step of the "strict scrutiny" test is to determine whether the remedy is "narrowly tailored" to redress the effects of discrimination. If a program is not "narrowly tailored", it will not pass the "strict scrutiny" requirement because it does not further a compelling governmental interest.[40] In the area of college admissions, Ohio courts have relied upon the U.S. Supreme Court's acknowledgement of "maintaining a diverse student body" as a "compelling state interest" for the use of race based programs, and the U.S. Supreme Court's firm stance that certain race conscious remedies will not be considered "narrowly tailored." In Tharp v. Board of Education of the Northwest Local School District, citing Gutter v. Bollinger, the U.S. Supreme Court stated that "racial quotas are impermissible and that race may not be the decisive factor when considering a student's admission." In Croson, the Court set four factors in determining whether a program is "narrowly tailored":

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

Other considerations include the flexibility and duration of the program; that is, whether the program contains a sunset provision or other mechanism for periodic review of its effectiveness. These mechanisms ensure that the program does not last longer than necessary to serve its intended remedial purpose. Furthermore, such mechanisms keep pure the relationship of

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

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

[40] Tharp v. Board of Education of the Northwest Local School District, 2005 U.S. Dist. LEXIS 36572; Grutter v. Bollinger, 539 U.S. 244 (2003)

numerical goals to the relevant labor market, as well as minimize the impact of the relief on the rights of third parties.[41]

ii. Intermediate Scrutiny

In Coral Construction Company v. King County, The Ninth Circuit Court of Appeals applied an intermediate scrutiny standard in reviewing the WBE section of the county's ordinance.[42] The Third Circuit Court of Appeals applied an intermediate level of review in its ruling in Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia.[43] However, the Court opined that it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the standard of discrimination necessary to satisfy the intermediate scrutiny standard; and if so, how much statistical evidence is necessary. Nonetheless, the Court struck down the WBE portion of Philadelphia's programs, finding that the City of Philadelphia had no statistical evidence and insufficient anecdotal evidence regarding woman owned construction firms and gender discrimination.

The Eleventh Circuit Court of Appeals, in Ensley Branch NAACP v. Seibels, addressed the issue in a Title VII action. In this decision, the Eleventh Circuit Court of Appeals rejected the argument that, based on Croson, the U.S. Supreme Court intended "strict scrutiny" to apply to gender-conscious programs challenged under the Equal Protection Clause.[44] Since Ensley, the U.S. Supreme Court decided United States v. Virginia, thereby invalidating Virginia's maintenance of the single sex Virginia Military Institute (VMI).[45] Rather than deciding the constitutionality of the VMI program under intermediate scrutiny, the Court held that "parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."[46] The Court then applied this "exceedingly persuasive

[41] Adarand, 515 U.S. at 238

[42] 941 F.2d 910, (9th Cir. 1991), cert. denied, 502 U.S. 1033, 122 S. Ct. 875 (1992); Miami University Wrestling Club v. Miami University, 195 F.Supp.2d 1010, 1013 (2001)

[43] 6 F.3d 990, (3rd Cir. 1993)

[44] Ensley Branch N.A.A.C.P. v. George Seibels, 31 F.3d 1548, 1579 (11th Cir. (1994))

[45] 518 U.S. 515. (1996)

[46] Virginia, U.S. at 529

justification" standard in invalidating the VMI program. Justice Rehnquist concurred only in the judgment, noting that "the Court . . . introduces an element of uncertainty respecting the appropriate test."[47] Justice Scalia dissented, suggesting that the majority had effectively adopted a "strict scrutiny" standard to judge the constitutionality of classifications that deny individuals opportunity on the basis of sex.[48] The majority however, neither rejected nor affirmed Justice Scalia's analysis.

It is not certain whether the U.S. Supreme Court intended the VMI decision to signal a heightening in scrutiny of gender-based classifications. However, it may be that the VMI case stands as unique because, like key recent U.S. Supreme Court rulings, it involves an institution of higher learning. In the Sixth Circuit Court of Appeals however, "gender based affirmative action plans are subject to "strict scrutiny" when challenged under the Equal Protection Clause."[49] It is noteworthy that both the Brunet and Conlin Courts, in their establishment of "strict scrutiny" as the yardstick to be employed in the Sixth Circuit Court of Appeals, were themselves reviewing employment action cases. Recent Federal District Court cases, as in Engineering Contractors Assn. of South Florida, Inc. v. Metropolitan Dade County, continue to confine their analysis of WBE programs to traditional intermediate scrutiny.[50] In the VMI case, the Court noted, however, that the measure of evidence required for a gender classification is ambiguous. The Eleventh Circuit Court of Appeals agreed with the Third Circuit Court of Appeals' holding that intermediate scrutiny requires that evidence be probative, but added that "probative" must be "sufficient as well." [51]

It is clear that race-conscious affirmative action is subject to a higher standard of judicial review than gender-conscious affirmative action, throughout a majority of appellate circuits. However, in both Michigan and Ohio equal protection law cases involving affirmative action, the Sixth Circuit Court of Appeals has employed a strict scrutiny test when presented with issues of gender classification, while other federal appellate circuits continue to use intermediate scrutiny when reviewing gender based affirmative action programs. This split came about because

[47] Id. at 559
[48] Id. at 571
[49] Brunet v. City of Columbus, 1 F.3d 390, 403-04 6th Cir. (1993); Conlin v. Blanchard, 890 F.2d 811, 816 (6th Cir. 1989)
[50] 122 F.3d 895(11th Cir. 1997); Id. at 907-08
[51] Id. at 895

of the use by the U.S. Supreme Court of the phrase "heightened intermediate scrutiny" when examining gender based affirmative action programs in higher education. Though other appellate circuits have determined that the examination of the U.S. Supreme Court involved no different analysis than is involved in an intermediate scrutiny review, the Sixth Circuit Court of Appeals has not reached this conclusion. Thus we can only conclude that it is best to subject our analysis of gender based programs to strict scrutiny absent a specific controlling contrary decision from the U.S. Supreme Court as to public contracting cases, or an announcement by the Sixth Circuit Court of Appeals of a different standard in public contracting cases than that which has been utilized in school admissions matters involving affirmative action.

(b) Passive Participation

"Strict scrutiny" requires a strong basis in evidence of either active participation by the government in prior discrimination or passive participation by the government in discrimination by local industry.[52] In Dade County, the Court noted again that the measure of evidence required for a gender classification is less clear. The Court agreed with the Third Circuit Court of Appeals' holding that intermediate scrutiny requires that evidence be probative, but here the Court added that probative must be "sufficient as well."[53] The U.S. Supreme Court in Croson opined that municipalities have a compelling interest in ensuring that public funds do not serve to finance private discrimination. Local governments may be able to take remedial action when they possess evidence that their own spending practices exacerbate a pattern of private discrimination.[54]

Subsequent lower court rulings have provided more guidance on passive participation by local governments. In Concrete Works of Colorado Inc. v. The City and County of Denver, the Tenth Circuit Court of Appeals held that it was sufficient for the local government to demonstrate that it engaged in passive participation in discrimination rather than showing that it actively participated in the discrimination.[55] Thus, the desire for a government entity to prevent the

[52] Croson, 488 U.S. at 491-92
[53] Engineering Contractors, 122 F.3d at 895
[54] Croson, 488 U.S. at 502
[55] 36 F. 3d 1513 (10th Cir. 1994)

infusion of public funds into a discriminatory industry is enough to satisfy the requirement. Accordingly, if there is evidence that the County government is infusing public funds into a discriminatory industry, the County has a compelling interest in remedying the effects of such discrimination. However, there must be evidence of exclusion or discriminatory practices by the contractors themselves.

The Court in Concrete Works stated "neither Croson nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality's affirmative action program." Although we do not read Croson as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality's factual predicate for a racial gender conscious program.[56] Other courts continue to struggle with this issue.

In Adarand Construction v. Slater (hereinafter referred to as "Adarand VI"), the Tenth Circuit Court of Appeals addressed the constitutionality of the use in a federal transportation program of a subcontractor compensation clause which employed race-conscious presumptions in favor of minority and disadvantaged business enterprises.[57] In addressing the federal government's evidentiary basis to support its findings of discrimination against minorities in the publicly funded and private construction industry, the Court did not read Croson as requiring that the governmental entity identify the exact linkage between its award of public contracts and private discrimination. The Tenth Circuit Court of Appeals noted that the earlier Concrete Works ruling had not demonstrated the necessary finding of discrimination:

> Unlike Concrete Works, the evidence presented by the government in the present case demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for

[56] Id., at 1529
[57] Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000)

> construction contracts and the channeling of those funds due to private discrimination. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and nonminority subcontracting enterprises, again due to private discrimination, precluding existing minority-owned firms from effectively competing for public construction contracts. The government also presents further evidence in the form of local disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs.[58]

The Federal Government's evidence consisted of numerous congressional investigations, hearings, local disparity studies and anecdotal evidence demonstrating discrimination by prime contractors, unions and financial lenders in the private market place. The Court of Appeals concluded that the government's evidence had demonstrated as a matter of law that there was a strong basis in evidence for taking remedial action to remedy the effects of prior and present discrimination. The Court found that Adarand had not met its burden of proof to refute the government's evidence.[59]

Since the "strict scrutiny" standards and evidentiary benchmarks apply to all public entities and agencies, it follows that the questions regarding passive participation in discrimination are relevant to all governmental units. Moving a step further, since the Federal Government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of public funds, cities share the same interest. The Court in Croson stated that "[i]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."[60]

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[58] Id. (emphasis added); Concrete Works, 36 F.3d at 1529

[59] Adarand, 228 F.3d at 1176

[60] Croson, 488 U.S. at 492 (citing Norwood v. Harrison, 413 U.S. 455 (1973))

3. Evidentiary Requirements

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

(a) Anecdotal Evidence

The majority decision in Croson impliedly endorsed the inclusion of personal accounts of discrimination (noting as a weakness in the City of Richmond's case that the City Council heard "no direct evidence of race conscious discrimination on the part of the City of Richmond in letting contracts or any evidence that the City of Richmond's prime contractors had discriminated against minority-owned subcontractors").[61] However, according to the Croson standard, selective anecdotal evidence about MBE experiences alone would not provide an ample basis in evidence to demonstrate public or private discrimination in a municipality's construction industry.[62] ("Anecdotal evidence is most useful as a supplement to strong statistical evidence . . . ."(Internal citations omitted)). Nonetheless, personal accounts of actual discrimination or the effects of discriminatory practices may complement empirical evidence. In addition, anecdotal evidence of a governmental entity's institutional practices that provoke discriminatory market conditions is particularly probative. Thus, courts have required the inclusion of anecdotal evidence of past or present discrimination.[63] (Weighing Philadelphia's anecdotal evidence); ("[The combination of convincing anecdotal and statistical evidence is potent]"); (supplementing Hillsborough County's

[61] Croson, 488 U.S. at 480

[62] See Concrete Works, 36 F. 3d.1513 (10th Cir. 1994); Middleton et al v. City of Flint, 92 F.3d 396, 405 (6th Cir. 1996)

[63] Contractors Ass'n., 6 F. 3d at 990, 1002-03 (3rd Cir. 1993); Coral Constr. Co. v. King Co., 941 F.2d 910, 919 (9th Cir. 1991)

with testimony from MBEs who filed complaints to the County about prime contractors' discriminatory practices).[64]

In Coral Construction Company v. King County, the Ninth Circuit Court of Appeals concluded that "the combination of convincing anecdotal and statistical evidence" was potent.[65] In a separate case, the Third Circuit Court of Appeals suggested that a combination of empirical and anecdotal evidence was necessary for establishing a prima facie case of discrimination.[66] In addition, the Ninth Circuit Court of Appeals approved the combination of statistical and anecdotal evidence used by the City of San Francisco in enacting its MWBE ordinances.[67]

On the other hand, neither empirical evidence alone nor selected anecdotal evidence alone provides a strong enough basis in evidence to demonstrate public or private discrimination in a municipality's construction industry to meet the Croson standard.[68] For example, in O'Donnell Construction v. District of Columbia, the Court reversed the denial of a preliminary injunction for the plaintiff because the District of Columbia failed to prove a "strong basis in evidence" for its MBE program.[69] The Court held in favor of the plaintiff because much of the evidence the District of Columbia offered in support of its program was anecdotal. The Court opined that "anecdotal evidence is most useful as a supplement to strong statistical evidence--which the Council did not produce in this case."[70]

In Engineering Contractors, the Federal District Court held that, “we have found that kind of evidence [anecdotal] to be helpful in the past, but only when it was combined with and reinforced by sufficiently probative statistical evidence.”[71]

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[64] Cone Corp. v. Hillsborough Co., 908 F.2d 908, 916 (11th Cir. 1990); cert. denied, 498 U.S. 983, 111 S. Ct. 516 (1990); Engineering Contractors, 122 F.3d at 925-26

[65] Coral Constr. Co., 941 F.2d at 919

[66] Contractors Assn. of Eastern Pennsylvania v. City of Philadelphia, 6 F. 3d 990, 1003 (3rd Cir. 1993)

[67] Associated General Contractors of California, Inc. v. Coal. For Economic Equity, et al, 950 F.2d 1401 (9th Cir. 1991), cert. denied, 503 U.S. 985, 112 S. Ct. 1670 (1992)

[68] Concrete Works, 36 F. 3d at 1513

[69] O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992)

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

[71] Engineering Contractors Ass’n, 122 F. 3d at 925

Accordingly, a combination of statistical disparities in the utilization of MWBEs and particularized anecdotal accounts of discrimination are required to satisfy the factual predicate. Thus, any study should include anecdotal evidence of past and present discrimination in order to establish the factual predicate by these guidelines.

(b) Statistical Data

The Court in Croson explained that an inference of discrimination may be made with empirical evidence that demonstrates "a significant statistical disparity between the number of qualified minority contractors . . . and the number of such contractors actually engaged by the locality or the locality's prime contractors."[72] A predicate to governmental action is a demonstration that gross statistical disparities exist between the proportion of MBEs awarded government contracts and the proportion of MBEs in the local industry "willing and able to do the work," in order to justify its use of race conscious contract measures.[73] In order for a governmental entity to adequately assess statistical evidence for purposes of establishing a factual predicate for any race or gender conscious program, there must be evidence identifying minority contractors "willing and able to do the job" and the analysis by such entity must determine, the relevant statistical pool with which to make the appropriate statistical comparisons.[74] Although subsequent lower court decisions have provided considerable guidelines for statistical analyses sufficient for satisfying the Croson factual predicate, the courts have not pronounced any specific way for conducting statistical analyses.

i. Availability

In Contractors Association of Eastern Pennsylvania v. City of Philadelphia, the Third Circuit Court of Appeals stated that available and qualified minority-owned businesses comprise

[72] Croson, 488 U.S. at 509
[73] Ensley Branch, 31 F.3d at 1565
[74] Engineering Contractors Ass'n, 122 F. 3d. at 925 (11th Cir. 1997)

the "relevant statistical pool" for purposes of determining availability.[75] The Court permitted availability to be based on the metropolitan statistical area ("MSA") and local list of the Office of Minority Opportunity. Non-minority or woman owned firm availability was based on U.S. Census data. In Associated General Contractors of America v. City of Columbus, the City's consultants collected data on the number of MWBE firms in the Columbus MSA in order to calculate the percentage of available MWBE firms.[76] This is referred to as the rate of availability. Three sources were considered to determine the number of MWBEs "ready, willing and able" to perform construction work for the City.[77] However, the Court found the City had not undertaken any measures to determine if the MWBEs that were identified were in any way qualified and willing to bid as a prime contractor on city construction projects. Specifically, none of the data showed whether the MWBEs were able to be responsible or provide either a bid bond or performance bond. However, the anecdotal evidence collected demonstrated that only a fraction of MWBEs were capable of meeting the bid bond or performance bond requirements. The Court wrote, "[t]here is no basis in the evidence for an inference that qualified M/FBE firms exist in the same proportions as they do in relation to all construction firms in the market."[78] The Court wondered why the City of Columbus did not simply use the records it already maintains "of all firms which have submitted bids on prime contracts" since it represents "a ready source of information regarding the identity of the firms which are qualified to provide contracting services as prime contractors."[79]

The issue of availability also was examined by the Eleventh Circuit Court of Appeals in Contractors Association of South Florida, Inc., et al v. Metropolitan Dade County, et al. Here, the Court opined that when reliance is made upon statistical disparity, and special qualifications are necessary to undertake a particular task, the relevant statistical pool must include only those minority-owned firms qualified to provide the requested services. Moreover, these minority-owned firms must be qualified, willing and able to provide the requested services. If the statistical

[75] 6 F.3d 990 (3rd Cir. 1993)
[76] 936 F. Supp. 1363 (S. D. Ohio 1996)
[77] Associated General Contractors of America v. City of Columbus, 936 F. Supp. 1363 (1996). (Reversed on related grounds, 172 F.3d 411 (6th Cir. 1999))
[78] Associated General Contractors of Am., 936 F. Supp. at 1389
[79] Id

analysis includes the proper pool of eligible minorities, any resulting disparity, in a proper case, may constitute prima facie proof of a pattern or practice of discrimination.

In an opinion by the Sixth Circuit Court of Appeals in Associated General Contractors v. Drabik, the Court of Appeals ruled that the State of Ohio failed to satisfy the "strict scrutiny" standard to justify the state's minority business enterprise act, by relying on statistical evidence that did not account for which firms were qualified, willing and able to perform on construction contracts. The Court stated that "although Ohio's most compelling statistical evidence compares the percentage of contracts awarded to minorities to the percentage of minority-owned businesses…the problem is that the percentage of minority-owned businesses in Ohio (7% of 1978) did not take into account which were construction firms and those who were qualified, willing and able to perform on state construction contracts."[80] Although this was more data than was submitted in Croson, it was still insufficient under "strict scrutiny", according to the Court.[81]

ii. Utilization

Utilization is a natural corollary of availability, in terms of statistical calculation. In City of Columbus, the City's consultants calculated the percentage of City of Columbus' contracting dollars that were paid to MWBE construction firms.[82] This is referred to as the rate of utilization. From this point, one can determine if a disparity exists and, if so, to what extent.

iii. Disparity Index and Croson

To demonstrate the under-utilization of MWBEs in a particular area, parties can employ a statistical device known as the "disparity index." [83] (Third Circuit Court of Appeals joining the First, Ninth, and Eleventh Circuit Court of Appeals in relying on disparity indices to determine

[80] Drabik, 214 F.3d at 736 (2000)
[81] Id
[82] 936 F. Supp. 1363
[83] Contractors Assn.of Eastern Pennsylvania v. City of Philadelphia., 6 F.3d at 1005

whether a municipality satisfies Croson's evidentiary burden). The disparity index is calculated by dividing the percentage of available MWBE participation in government contracts by the percentage of MWBEs in the relevant population of local firms. A disparity index of one (1) demonstrates full MWBE participation, whereas the closer the index is to zero, the greater the MWBE under-utilization. Some courts multiply the disparity index by 100, thereby creating a scale between 0 and 100, with 100 representing full MWBE utilization.

Courts have used these MWBE disparity indices to apply the "strong basis in evidence" standard in Croson. For instance, the Eleventh Circuit Court of Appeals held that a 0.11 disparity "clearly constitutes a prima facie case of discrimination indicating that the racial classifications in the County plan were necessary" under Cone Corp. v. Hillsborough County.[84] Based on a disparity index of 0.22, the Ninth Circuit Court of Appeals upheld the denial of a preliminary injunction to a challenger of the City of San Francisco's MBE plan based upon an equal protection claim.[85] Accordingly, the Third Circuit Court of Appeals held that a disparity of 0.04 was "probative of discrimination in City contracting in the Philadelphia construction industry."[86]

iv. Standard Deviation

The number calculated via the disparity index is then tested for its validity through the application of a standard deviation analysis. Standard deviation analysis measures the probability that a result is a random deviation from the predicted result (the more standard deviations, the lower the probability the result is a random one). Social scientists consider a finding of two standard deviations significant, meaning that there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor. The Eleventh Circuit Court of Appeals has directed that " 'where the difference between the expected value and the observed number is greater than two or three standard deviations', then the

[84] 908 F.2d at 916

[85] AGC v. Coal. For Economic Equity, 950 F.2d 1401, 1414 (9th Cir. 1991)

[86] Contractors Assn.of Eastern Pennsylvania v. City of Philadelphia, 6 F.3d at 1005

hypothesis that [employees] were hired without regard to race would be suspect (quoting Hazelwood School District et al. v. United States; quoting Castaneda v. Partida). "[87]

v. Statistical Regression Analysis

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

The Webster Court noted that the Court of Appeals in Engineering Contractors affirmed the District Court's conclusion that the disparities offered by Dade County's experts in that case were better explained by firm size than by discrimination.[88] Dade County conducted a regression analysis to control for firm size after calculating disparity indices with regard to the utilization of Black, Hispanic, and woman owned firms in the Dade County market, by comparing the amount of contracts awarded to the amount each group would be expected to receive based on the group's bidding activity and the awardee success rate. Although there were a few unexplained disparities that remained after controlling for firm size, the District Court concluded (and the Court of Appeals affirmed) that there was no strong basis in evidence for discrimination against African American and Hispanic American owned businesses and that the quantitative analysis did not sufficiently demonstrate the existence of discrimination against women owned businesses in the relevant economic sector.[89] Specifically, the Court noted that finding a single unexplained

[87] Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1556 (11th Cir. 1994); 433 U.S. 308; 430 U.S. 482, 497 n.17, 97 S. Ct. 1272, 1281 n.17, (1977)
[88] Webster, 51 F. Supp. 2d at 1365
[89] Engineering Contractors, 122 F.3d at 917

negative disparity against African American owned businesses for the years 1989-1991 for a single category of work was not enough to show discrimination.

The Fourth Circuit Court of Appeals has signaled its agreement with this position. As mentioned in Podberesky, infra, the Court of Appeals determined that the University of Maryland's merit-based scholarship program designed exclusively for Black students was unconstitutional. In its opinion, the three-judge panel rejected UMCP's evidence about its reference pool of high school graduates as overly broad. Additionally, the Court voiced its concerns that the University's "collection of arbitrary figures" failed to account for economic or other explanations for the high attrition rates among African American students at UMCP. "We can say with certainty…that the failure to account for these, and possibly other, nontrivial variables cannot withstand 'strict scrutiny'"…In more practical terms, the reference pool must factor out, to the extent practicable, all nontrivial, non-race based disparities in order to permit an inference that such, if any, racial considerations contributed to the remaining disparity.[90]

(c) Geographic Scope of the Data

The Croson Court observed that because discrimination varies across market areas, state and local governments cannot rely on national statistics of discrimination in the disputed industry to draw conclusions about prevailing market conditions in their respective regions.[91] However, to confine the permissible data to a governmental entity's strict geographical borders would ignore the economic reality that contracts are awarded to firms located in adjacent areas. Thus, courts closely scrutinize pertinent data related to the jurisdictional area of the state or municipality.

Generally, the scope of the statistical analyses pertains to the geographic market area from which the governmental entity makes most of its purchases. In addition, disparities concerning utilization, employment, size, and formation are also relevant in determining discrimination in a

[90] Croson, 488 U.S. at 504
[91] Croson, 488 U.S. at 504

marketplace. It has been deemed appropriate to examine the existence of discrimination against MWBEs even when these areas go beyond the geographical boundaries of the local jurisdictions.[92]

Court decisions have allowed jurisdictions to utilize evidence of discrimination from nearby public entities and from within the relevant private marketplace. Nevertheless, extra-jurisdictional evidence must still pertain to the operation of an industry within geographic boundaries of the jurisdiction. As the Court wrote in Tennessee Asphalt v. Farris, "[s]tates and lesser units of local government are limited to remedying sufficiently identified past and present discrimination within their own spheres of authority."[93]

(d) Post-Enactment Evidence

In Croson, the Court stated that a state or local government "must identify that discrimination . . . with some specificity before they may use race-conscious relief."[94] However, the Court declined to require that all relevant evidence of such discrimination be gathered prior to the enactment of the program. Pre-enactment evidence refers to evidence developed prior to the enactment of an MWBE program by a governmental entity. Such evidence is critical to any affirmative action program because, absent any pre-enactment evidence of discrimination, a state or local government would be unable to satisfy the standards established in Croson. Post-enactment evidence is that which has been developed since the affirmative action program was enacted and therefore was not specifically relied upon as a rationale for the government's race and gender conscious efforts. As such, post-enactment evidence has been another source of controversy in contemporary litigation, though most subsequent rulings have interpreted Croson's evidentiary requirement to include post-enactment evidence. Significantly, crucial exceptions exist in rulings from the federal district courts.

In West Tennessee Chapter of Associated Builders and Contractors v. Board of Education of the Memphis City Schools, the District Court faced the issue of whether "post enactment

[92] Contractors Association of Eastern Pennsylvania v. City of Philadelphia, 91 F.3d 586, 604 (3rd Cir. 1996)
[93] Tennessee Asphalt Co. v. Farris, 942 F.2d 969 974 (6th Cir. 1991)
[94] Croson, 488 U.S. at 504

evidence" was sufficient to establish a strong basis upon which a race conscious program could be supported.[95] The Court opined that although the Court in Croson was not faced with the issue of post enactment evidence, much of the language in the opinion suggested that the Court meant to require the governmental entity to develop the evidence before enacting a plan. Furthermore, when evidence of remedial need was not developed until after the enactment of a race-conscious plan, that evidence provided no insight into the motive of the legislative or administrative body.

The Court concluded that admitting post-enactment evidence was contrary to U.S. Supreme Court precedent as developed in Wygant, Croson, and Shaw. The Court held that post-enactment evidence may not be used to demonstrate that the government's interest in remedying prior discrimination was compelling. It is important to note that this opinion is not representative of the majority of case law on this issue.

Early post-Croson decisions permitted the use of post-enactment evidence to determine whether an MWBE program complies with Croson.[96] In Ensley, the Eleventh Circuit Court of Appeals explicitly held that post-enactment evidence is properly introduced in the record and relied upon by district courts in determining the constitutionality of government race and gender-conscious programs:

> Although Croson requires that a public employer show strong evidence of discrimination when defending an affirmative action plan, the U.S. Supreme Court has never required that, before implementing affirmative action, the employer not have proved that it has discriminated. On the contrary, further finding of discrimination need neither precede nor accompany the adoption of affirmative action.[97]

[95] 64 F. Supp. 2d 714 (W.D. Tenn 1999)

[96] Contractors Ass'n., 6 F. 3d, at 1003-04 (3rd Cir. 1993); Harrison & Burrows Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50, 60 (2d Cir. 1992); Coral Constr., 941 F.2d at 921

[97] Ensley Branch, 31 F.3d at 1565

(e) Remedies-- Narrowly Tailored

Under the Croson framework, any race-conscious plan must be narrowly tailored to ameliorate the effects of past discrimination. Croson's progeny provide significant guidance on how remedies should be narrowly tailored. "Generally, while 'goals' are permissible, unyielding preferential 'quotas' will normally doom an affirmative action plan."[98]

Not unlike other U.S. District Courts and U.S. Courts of Appeal throughout the United States, the Sixth Circuit Court of Appeals has, citing to United States v. Paradise, also recognized four considerations in determining whether a plan is narrowly tailored.[99] They are:

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

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

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

[98] Stefanovic v. University of Tennessee, 1998 U. S. App. LEXIS 1905 (6th Cir. 1998); Tuttle v. Arlington County School Board, 195 F.3d 698 (4th Cir. 1999)

[99] 480 U.S. 149, 171 (1987); Aiken v. City of Memphis, 37 F.3d 1155 6th Cir. (1994); Drabik, 214 F.3d 730 (2000); Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002); Coalition to Defend Affirmative Action v. Granholm, 473 F.3d 237 (6th Cir. 2006); F. Buddie Contracting, Ltd., v. Cuyahoga Community College Dist., 31 F. Supp. 2d 584 (E. Div. Ohio 1998); Ashton v. City of Memphis, 49 F. Supp. 2d 1051 (W. D. Tenn 1999); Peightal , 940 F.2d 1394, 1406 (11th Cir. 1991); Engineering Contractors, 122 F.3d. 895, 927 (citing Ensley Branch, 31 F.3d at 1569)

As a result, the Sixth Circuit Court of Appeals has invalidated race-specific approaches that it found were not narrowly tailored along these lines. Cuyahoga Community College Dist.[100]

MWBE programs must be designed so that the benefits of the programs are targeted specifically toward those firms that faced discrimination in the local marketplace. To withstand a challenge, relief must extend only to those minority groups for which there is evidence of discrimination.[101] Consequently, MWBE firms from outside the local market must show that they have unsuccessfully attempted to do business within the local marketplace in order to benefit from the program.

Croson requires that there not only be a strong basis in evidence for a conclusion that there has been discrimination, but also for a conclusion that the particular remedy is made necessary by the discrimination. In other words, there must be a "fit" between past/present harm and the remedy. The Sixth Circuit Court of Appeals said in Drabik, "outdated evidence does not reflect prior un-remedied or current discrimination," (Internal quotations and citations omitted).[102]

Inherent in the above discussion is the notion that MWBE programs and remedies must maintain flexibility with regard to local conditions in the public and private sectors. Courts have suggested project-by-project goal setting and waiver provisions as means of insuring fairness to all vendors. As an example, the Fourth Circuit Court of Appeals had little problem rejecting the Banneker scholarship program at the University of Maryland because it had no "sunset" provision. "The program thus could remain in force indefinitely based on arbitrary statistics unrelated to constitutionally permissible purposes."[103] Additionally, some courts have indicated that goals need not directly correspond to current availability if there are findings that availability has been adversely affected by past discrimination. Lastly, "review" or "sunset" provisions are

[100] 31 F. Supp. 2d at 588
[101] Drabik, 214 F.3d at 735
[102] Drabik, 214 F.3d at 730
[103] Podberesky, 38 F.3d at 160

necessary components to guarantee that remedies do not out-live their intended remedial purpose.

(f) Burdens of Production and Proof

The Croson Court struck down the City of Richmond's minority set-aside program because the City of Richmond failed to provide an adequate evidentiary showing of past and present discrimination.[104] So did the State of Ohio in Associated Gen. Contrs. of Ohio, Inc. v. Drabik.[105] Since the Fourteenth Amendment only allows race-conscious programs that narrowly seek to remedy particularized discrimination, the Court held that state and local governments "must identify that discrimination . . . with some specificity before they may use race-conscious relief." The Court's rationale for judging the sufficiency of the City of Richmond's factual predicate for affirmative action legislation was whether there existed a "strong basis in evidence for its [government's] conclusion that remedial action was necessary."[106]

Croson places the initial burden of production on the state or local governmental actor to demonstrate a "strong basis in evidence" that its race- and gender-conscious contract program is aimed at remedying identified past or present discrimination. A state or local affirmative action program that responds to discrimination is sustainable against an equal protection challenge so long as it is based upon strong evidence of discrimination. A municipality may establish an inference of discrimination by using empirical evidence that proves a significant statistical disparity between the number of qualified MWBEs, the number of MWBE contractors actually contracted by the government, or by the entity's prime contractors. Furthermore, the quantum of evidence required for the governmental entity must be determined on a case-by-case basis and in the context and breadth of the MWBE program it advanced.[107] If the local government is able to do this, then the burden shifts to the challenging party to rebut the municipality's showing.[108]

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[104] Croson, 488 U.S. at 498-506
[105] 1998 U.S. Dist. LEXIS 22042
[106] Croson, 488 U.S. at 500 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277, 106 S. Ct. 1842, 1849(1986))
[107] Concrete Works, 36 F.3d 1513 (10th Cir. 1994)
[108] Contractors v. Philadelphia, 6 F. 3d at 1007

> Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional.[109]

D. The Latest Developments

1. Associated General Contractors of America, San Diego Chapter v. California DOT[110]

On April 16, 2013, in a case styled, Associated General Contractors of America, San Diego Chapter v. California DOT, the Ninth Circuit Court of Appeals upheld the constitutionality of the California Department of Transportation's (Caltrans) Disadvantaged Business Enterprise (DBE) program. The Caltrans program implements the federal DBE Program. The federal program applies to state and local government recipients of federal funds from the U. S. Department of Transportation (DOT) through the U. S. Federal Aviation Administration (FAA), Federal Transit Administration (FTA), and Federal Highway Administration (FHWA). Caltrans had engaged a consulting firm to conduct a disparity study and, significantly, the Court found the information in the disparity study probative and ruled that Caltrans met the burden of strict scrutiny. The Ninth Circuit Court of Appeals stated in pertinent part:

> Based on review of public records, interviews, assessments as to whether a firm could be considered available, for Caltrans contracts, as well as numerous other adjustments, the firm concluded that minority- and woman owned businesses should be expected to receive 13.5% of contract dollars from Caltrans-administered federally assisted contracts… [The disparity study] accounted for the factors mentioned in Western States Paving. See Western States Paving Co. v. Washington State DOT, Geod Corp. v. NJ Transit Corp., and M.K. Weeden Constr., Inc. v.

[109] Majeske v. City of Chicago, 218 F.3d 820 (7th Cir. 2000); Sherbrooke Turf, Inc. v. Minn. DOT, 345 F.3d 964 (8th Cir. 2003)

[110] 713 F.3d 1187 (9th Cir. 2013)

> Mont. Dep't of Trans., as well as others, adjusting availability data based on capacity to perform work and controlling for previously administered affirmative action programs…The substantial statistical disparities alone would give rise to an inference of discrimination, and certainly Caltrans' statistical evidence combined with anecdotal evidence passes constitutional muster.[111]

This decision is important because it is the most recent validation of the efficacy of a properly conducted disparity study in allowing a governmental actor to survive the constitutional test of "strict scrutiny" when its narrowly tailored programs are challenged.

2. Northern Contracting, Inc. v. State of Illinois, et al.[112]

Northern Contracting ("NCI") filed suit against the Illinois Department of Transportation ("IDOT") claiming that it violated the Constitution in its establishment of a program for awarding contracts to socially disadvantaged small business. The District Court denied NCI's claim, because NCI failed to establish that IDOT did in fact violate the Constitution, and the Seventh Circuit Court of Appeals agreed.

In this case, Illinois used a means other than bidder data to determine relative available market. NCI claimed, among other things, that the Code of Federal Regulations, 49 C.F.R. § 26.45(c) (2), required IDOT to use bidder data, and instead, IDOT used a "custom census" method. Because the use of other resources did not constitute a violation of any regulation leading to an impermissible method of evaluation of availability, together with other failings of a plaintiff in this type of legal action, the Court affirmed the District Court's ruling.

This case signals further acceptance of more than one way to determine availability. It does not evaluate either the cost, or measure the propensity of that pool to yield accurate data as

[111] 407 F.3d 983 (9th Cir. 2005); 746 f.supp.2d 642 (NJ Dist. 2010); 2013 U.S. Dist. LEXIS 126286
[112] 473 F.3d 715 (7th Cir. 2007)

compared to other data pools like those presented as examples in the Code of Federal Regulations. It simply rejects Plaintiff's contention that there is only one way to calculate the number of ready, willing, and able firms.

3. Rothe Dev. Corp. v. Dep't of Def.[113]

In this case, a nonminority woman contractor brought suit against the Department of Defense, because a contract for which it had submitted the lowest bid was in fact awarded to a Socially Disadvantaged minority bidder, because the scheme devised by Congress permitted an SDBE to receive a 10% adjustment in excess of the amount bid against other non-disadvantaged competitors for government contracts. Though the case had been appealed multiple times to the Federal Circuit Court of Appeals, the last appeal brought with it a facial validity challenge from Rothe.

> Although the party challenging a statute bears the ultimate burden of persuading the Court that it is unconstitutional, the government first bears a burden to produce strong evidence supporting the legislature's decision to employ race-conscious action. . . . . "The Court must review the government's evidentiary support to determine whether the legislative body had a 'strong basis in evidence' to believe that remedial action based on race was necessary." (Internal punctuation and citations omitted).[114]

Although Croson places the burden on the government to demonstrate a "strong basis in evidence," the Fourteenth Amendment does not require a court to make an ultimate judicial finding of discrimination before the government may take affirmative steps to eradicate discrimination. However, the courts have said that such prerequisite particularized finding of

[113] 545 F.3d 1023 (Fed. Cir. 2008)
[114] Rothe Dev. Corp., 545 F.3d at 1036

discrimination "need not incriminate itself with a formal finding of discrimination prior to using a race-conscious remedy."[115]

This case is important because it caused the dismantling of the Department of Defenses' DBE program and, if it had had wide-spread precedent or if it had established a trend in the courts, could have had a chilling effect on all federal DBE programs. However, this case has been narrowly interpreted only to apply to this case and no other jurisdictions have followed its outcome.

4. Engineering Contractors Ass'n of South Florida, Inc., et al v. Metropolitan Dade County, et al.[116]

In this case, the Miami Dade Commissioners devised a set-aside program for construction contracts and established participation goals for those businesses which were qualified as either Black Business Enterprises, Hispanic Business Enterprises, or Women Business Enterprises. The Eleventh Circuit Court of Appeals upheld the District Court's holding of the set-aside program as unconstitutional, and addressed in its opinion a question raised by the District Court with respect to gender classifications.

The concern was whether the U.S. Supreme Court created a new standard for review of gender classifications in the "exceedingly persuasive justification" phrase used to analyze single sex university additions to the Virginia Military Institute (VMI). The Eleventh Circuit Court of Appeals held that it did not. In fact the Court stated that it noted the use of the phrase "exceedingly persuasive justification" while . . . [the] U.S. Supreme Court continues to recite "the time-honored intermediate scrutiny standard with approval even as it explains how a district court must evaluate whether the proffered justification for a gender classification is "exceedingly persuasive."[117] The Eleventh Circuit Court of Appeals goes on to say, "Instead of overruling Mississippi University for women, the VMI Court cited that case as "immediately in point" and

[115] Rothe Dev. Corp., 545 F.3d at 1043 (Fed. Cir. 2008) (citing, Dean v. City of Shreveport, 438 F.3d 448, 455 (5th Cir. 2006)

[116] 122 F.3d 895 (11th Cir. 1997)

[117] Id. at 908

the "closest guide" for the VMI decision itself.[118] The U.S. Supreme Court is not in the practice of overruling its own precedents by citing them with approval, and we decline to hold that the Court did so in the VMI case. Unless and until the U.S. Supreme Court tells us otherwise, intermediate scrutiny remains the applicable constitutional standard in gender discrimination cases, and a gender preference may be upheld so long as it is substantially related to an important governmental objective."

This case is important because, if in fact the Eleventh Circuit Court of Appeals is correct in its explanation of the U.S. Supreme Court's decision in the VMI case, then the Sixth Circuit Court of Appeals' continued application of the strict scrutiny standard of review of gender classifications can reasonably be expected to conform to that of the VMI decision, except if a distinction can be drawn between gender classifications in public contracting and school admissions.

5. H.B. Rowe Company, Incorporated v. W. Lyndo Tippett, et. al.[119]

Denied a contract because of its failure to demonstrate good faith efforts to meet participation goals for minority and woman owned subcontractors, H. B. Rowe Company, Incorporated ("Rowe"), a prime contractor, brought an action, asserting that the goals set forth in North Carolina statute, violate the Equal Protection Clause, and sought injunctive relief as well as money damages.[120] The District Court held the challenged statutory scheme constitutional both on its face and as applied. The Fourth Circuit Court of Appeals held that it agreed with the District Court that the State produced a strong basis in evidence justifying the statutory scheme on its face, and as applied to African American and Native American subcontractors, and that the State demonstrated that the scheme was narrowly tailored to serve its compelling interest in remedying discrimination against these racial groups. But the Court did not agree with the District Court that the same was true as applied to other minority groups and woman owned businesses.

[118] United States v. Virginia, 518 U.S. 515, 532 (1996)
[119] 615 F.3d 233 (2010)
[120] N.C. Gen. Stat. § 136-28.4 (1990)

Reviewing the results of the research firm's (that had conducted a disparity study) testing, together with the data concerning the events in subcontractor inclusion during the program's suspension period, the Court was able to see that (1) the State's use of a goals program for inclusion of African-American, Native-American, and nonminority woman owned businesses was supported by a statistically strong basis, and that (2) the newly revised North Carolina statute which called for frequent goal setting was constitutional. The Court noticed prominently that the State's program had been going on since 1983, and had only achieved the inclusion numbers adduced in the 2004 study performed by the commissioned national researcher.[121]

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

> Prime contractors can bank any excess minority participation for use against future goals over the following two years. Given the lenient standard and flexibility of the "good faith" requirement, it comes as little surprise that as of July 2003, only 13 of 878 good faith submissions--including Rowe's--had failed to demonstrate good faith efforts.[122]

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

[121] H. B. Rowe, 615 F.3d 250
[122] H. B. Rowe, 615 F.3d at 253-54

other explanations for apparent disparities. Some other signals were presented by the Appellate Court in Rowe.

The Court also reported that the State did in fact, though it was not challenged on the basis of its having failed to do so, sought out race neutral measures in an attempt to overcome the effects of past and present racial exclusion.[123] And the Court did not disapprove of the State requiring statutorily, that a new disparity study be conducted every five years.[124]

E. Conclusion

In summary, the County can remedy the effects of past racial discrimination in public contracting through race neutral and race conscious programs so long as it can establish, with some specificity, a compelling interest to do so in accordance with the U.S. Supreme Court in Croson, and as reaffirmed and further elaborated in the many subsequent case decisions, including Drabik. To do so, the County must set forth a compelling governmental interest through the use of sound statistical analysis supported by anecdotal findings, and then create a program that is neither over inclusive or under inclusive to achieve those compelling governmental interests, which is referred to in Croson as being "narrowly tailored." With regard to "narrow tailoring", the decisions of the U.S. Court of Appeals for the Sixth Circuit are in line with most of the other appellate circuits of the United States.

However, with regard to the standard of review for gender conscious programs, the Sixth Judicial Circuit applies a more rigorous standard. Whereas, the majority of other U.S. judicial circuits employ a standard of "intermediate scrutiny" in reviewing gender-conscious programs, the Sixth Judicial Circuit has determined, as is evident in cases like Brunet that the higher standard of "strict scrutiny" is to be applied. If the County offers such programs meeting this higher standard in the same manner as it does race-conscious programs, it will certainly satisfy the requirements of the U.S. Court of Appeals for the Sixth Circuit.

[123] H. B. Rowe, 615 F.3d at 252
[124] H. B. Rowe, 615 F.3d at 253

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III. PURCHASING PRACTICES, POLICIES, AND PROCEDURES

A. Introduction

This chapter is an analysis of the purchasing practices, policies, and procedures for Cuyahoga County. This analysis will determine the following:

1. Whether there is any policy that will inherently present a barrier that will more highly impact minority or woman-owned business enterprises' participation in the County's procurement process;
2. Whether County personnel involved in the procurement process understand the County's procurement policies, and particularly the current SBE Program;
3. Whether the practices of County procurement personnel match the County's policies.

A thorough review of internal departmental policies, county ordinances, and informational documents distributed to potential vendors was conducted by the study team of Griffin & Strong, P.C. ("Study Team").

The following County ordinances, rules, and procedures were reviewed for this chapter and are attached to the Study as Appendices E-1, E-2, and E-3:

- County Ethics Policy & Procedures – County Code Title 4 Chapter 407
- Contracts and Purchasing – County Code Title 5 – All Chapters
- Purchasing Policy & Procedures Manual – Ordinance No. O2011-0046

In addition to the written policies, a series of thirteen (13) interviews were conducted with County officials and departmental personnel to ascertain their understanding and perspectives on the policies and practices in place. County personnel interviews were coded and numbered as PPI-1, PPI-2, PPI-3, and so forth.

Interviews were conducted with personnel in the following departments:

- The Office of Procurement and Diversity (OPD)
- The Small Business Enterprise Program Division of OPD
- The Department of Development
- The Department of Public Works—Construction

- The Department of Public Works—Engineering
- The Executive Offices of Cuyahoga County
- The Department of Senior and Adult Services
- The Department of Information Technology
- The Department of Job and Family Services

These interviews reflect how various County employees understand and apply the County's contracting laws, rules, and procedures. Where employee statements are inconsistent with the written policies, GSPC has provided a reference to the actual policy.

The Office of Procurement and Diversity (OPD) acts as a "hub" for purchasing and reviews all bids and contracts, ensuring that they have the correct documents and are funneled through to the appropriate departments and stages in the procurement process. The official procurement process is as follows:

Each department within the County determines a need for a particular commodity or service internally. The various procurement methods are set forth in Section III of the County's Purchasing Policy and Procedure Manual. These include informal competitive bids for purchases of $25,000 or less, formal competitive bidding for purchases over $25,000, Requests for Proposals ("RFP"), and Request for Qualifications ("RFQ") for Professional Design Services and other services where there is a high level of special expertise.[125] The user department provides the specifications, subject to approval by the department head.

The Office of Procurement and Diversity ("OPD") is the monitoring body for all contracts and procedures and ensures that the proposer's documents are in place for eventual approval. This central department conducts occasional trainings which are intended to disseminate information regarding the procurement process. Vendors are notified of contracts out for bid through e-mail

[125] Informal competitive bids use the three (3) quote or informal RFP method; formal competitive bids are by RFP or "lowest and best" price. Other forms of competitive bidding are revenue generating procurements, real estate leasing by RFP, leasing of County properties (revenue generating), and sale of County property by bid.

blasts from the BuySpeed system, on which they may self-register, through advertisements in newspapers and/or other media outlets, and on the County's website. Outreach to Small Business Enterprises (SBE) is conducted through a division of OPD, which also sets the SBE goals on all contracts, generally up to 30%, but contingent upon the available firms in the market. The County has its own certification for SBEs and conducts regular monitoring and verification according to the dictates of the Cuyahoga County Small Business Enterprise ("SBE") Program in section IV of the County's SBE Program Policies and Procedures Manual.

The process for vendor registration is dictated by County code and the requirements may vary depending on the type of registration and the agency that administers that registration process. All qualified potential bidders on any County contract must be registered as vendors with the County, as SBEs if applicable, and complete registration and ethics training through the Inspector General's (IG) office and they are recertified after a prescribed period of time. OPD's role is to ensure that the appropriate measures are taken to obtain bonding and the other necessary certifications, and the department has the authority to reject bids on this basis.

BuySpeed is the purchasing software that has been used by the County for more than fifteen (15) years and allows vendors to self-register in the system. OPD performs an administrative review of a firm's bid/proposal (e.g. bonding and required registration documents) and the user department performs a technical review of the bid/proposal (e.g. compliance with the specifications of the bid). If there is an SBE goal on a project, the SBE Division reviews the bid for compliance prior to acceptance. While the SBE Price Preference, (as outlined in section XII of the County's SBE Program Policies and Procedures Manual), details the impacts of SBE compliance on an award, the recommended vendor must be in compliance with administrative and technical requirements.

B. Vendor Contact and Transparency

Each department in the County has "field buyers" and OPD then manages purchases after the process has been initiated by the department. RFPs, RFQs, and RFBs over $25,000 are

considered formal (requiring competitive bids/proposals), according to County Code Section 501.12, and come through OPD. These requests are then sent out to the "plan holders" or bidders list of registered vendors. "All those people get perfect information," says PPI-4, of the plan holder's list. "We make great efforts in doing that." PPI-4 believes that there is a great deal more transparency now that the old government has been pushed out and those involved in the corruption scandal uprooted. Also, PPI-4 believes that the bid process is now more widely available to potential bidders and "we receive a lot of public records requests."

"Nobody trusts Cuyahoga," PPI-4 says. The source of previous issues, according to this County employee, was that there were change orders issued to add money to large contracts that were not documented well and there was quite a bit that did not go through procurement. When asked if there is increased oversight as a result, PPI-4 responded emphatically, "Oh, yes." The first thing to go, PPI-4 says, was the "Purchasing Manager Discretion" feature, whereby the purchasing manager may click a button and approve purchases.

Now there is "full disclosure" with everything bid out through the online system, BuySpeed, or advertised on the internet. If there is a sole source contract, it is posted for five (5) days and will be put out to bid if even one vendor says that they can provide that service as well. The days of "telephonic orders" on quotes for informal bids under $25,000 are over, PPI-4 asserts. "You could say 'made call, no answer' or you could call the same people every time" (PPI-4). Now, small purchases that require quotes must be posted for at least 24 hours on BuySpeed.

Purchases for professional services[126] are not required to be competitively bid (Code Sec. 501.12 (B) (2)). However, unless a request for an exemption is granted by the Contracts and Purchasing Board[127], and the contract or purchase is $25,000 or more and there is more than one potential source, the contracting agency must bid the work through an RFP or an RFQ.

[126] The County Code states the following work areas as exempt from competitive bid: professional services, such as architectural, legal, medical, veterinary, financial, insurance, information technology, engineering, consulting, surveying, appraisal, brokerage, or construction management services

[127] Since the interviews and data collection for the Study, the County Code has been updated and the Contracts and Purchasing Board has been merged into the Board of Control by Ordinance no. 2015-0006, enacted on April 28, 2015

C. The Tiered Approval System

In general, while there are other impacting factors, all purchases between $500 and $100,000 are approved by the Contracts and Purchasing Board and any contracts between $101,000 and $500,000 are approved by the Board of Control. Contracts over $500,000 are addressed by the County Council, which consists of eleven elected members. A clerk ensures that items coming from the Office of Procurement and Diversity are in accordance with the Contracts and Purchasing section of the County Code and are cost-effective. The Inspector General has responsibility for vetting vendors for fraud when necessary, and primarily provides ethics training and vendor registration. The boards give two opportunities at their meetings for public comment, and GSPC has been made aware of at least 2 appeals/protests at such board meetings. PPI-9 stated that, "Typically, appeals on purchasing go right to OPD or the law department or are handled through the departments." However, the Law Department, while providing legal guidance to OPD or the generating department, is not the body deciding the appeals. Each Board or Council decides the outcome of the appeals. Though all Contracts and Purchasing board meetings are open to the public as well, vendors tend to be present at council meetings.

The new tiered system is a product of the "complete overhaul after the corruption scandal," initiated by the new County Executive (PPI-9). The eleven member County Council previously consisted of three commissioners who made all decisions on purchasing above a certain threshold. The County Executive "wanted more decision makers at the table" (PPI-9). The Contracts and Purchasing Board consists of the County Executive, the Chief of Staff, one member of County Council, the Public Works Director, the OPD Director and the Fiscal Officer. The Board of Control consists of the County Executive, three members of County Council, the Public Works Director, OPD Director and the Fiscal Officer (Code Sec. 205.01, 205.02). Every meeting is open to members of the public and agendas and minutes are posted regularly on the County website. According to PPI-9, there tends to be mainly staff present, members of the media, and occasionally vendors if there is a presentation pertaining to their project.

In addition to this tiered, three-board process, technological purchases must go through yet another step at the Information Technology department. In the last three years, the IT

department has been focused on centralizing the organization and, as a part of this process, the County Council passed an ordinance that requires the IT director to approve all technological purchases in the County. Anything that is over $500 and falls under the category of technology is reviewed by the Technical Advisory Committee (TAC). TAC is more focused on "the tech perspective than the sourcing perspective," meaning that they are focused on ensuring that purchases meet technical standards and are compatible with current systems than examining the purchasing process (PPI-12).

D. NOVUS and BuySpeed

"People like BuySpeed," PPI-4 says. It works "reliably" and produces documents and reports to make purchasing more efficient. Beyond this, vendors can set themselves up on BuySpeed. Previously, they were required to apply and get approved, but now they can "set it up in three minutes." Vendors self-identify by NIGP codes and are notified of every contract out for bid under their specified codes automatically. The department also issues "No-Bid" sheets, questioning vendors about their decision not to bid on certain projects.

However, according to PPI-10, a regular departmental user of the system, there are problems with reliability of BuySpeed. "We're lucky if we can even get into it" because they are located in a remote office and on the State of Ohio's network. It should be noted that BuySpeed is a web-based system and can be accessed anywhere via the Internet. This staff member regularly talks to vendors about enrolling with BuySpeed and instructs them on registering with the Office of the Inspector General. In addition to notifying firms about contracts through BuySpeed, this division pulls from an in-house list. "It would be nice if there was one reliable source for vendor lists," PPI-10 states. It should be noted that BuySpeed is managed by the vendors themselves and is self-identifying, so there is no verification of minority or woman business ownership. On the positive side, they can change/update primary contact information, company address and NIGP codes detailing the goods/services offered, but on the other side, many times, vendors fail to keep their information up to date and thus access to information and notification about business opportunities are hindered/delayed. OPD plans to provide and develop vendor training session and "How to do Business with the County" Guides in the near future. Furthermore, the system

does not allow internal approval. It should be noted that, although this is PPI-10's perception, each department has tailor-made approval paths. Vendors also report difficulty reading and accessing documents through BuySpeed. The current system does not allow departments to share databases, preventing knowledge about firms from being disseminated.

> "There are only two vendors in this area for microfilm equipment. I sat in on a board meeting and listened to another department put in a contract for exactly what I was going to do. If I had seen that before it went in, I could have piggybacked on their contract. If they have to do (the contracting process) twice, vendors have to get another performance bond and it's not fair to them to charge that much" (PPI-7).

The OPD has utilized a system called NOVUS since 2008, which is intended to encourage paperless operation and workflow management. However, PPI-1 says, this program is "limited" and is therefore being expanded to include new features that should "streamline" processes (PPI-1). Documents are scanned and uploaded so that anyone on the control board can see everything a buyer has attached for a particular bid item. "Everything is loaded into NOVUS, but that system doesn't have true workflow built in," PPI-13 states. The new system, which IT is currently building, will, once a contract is approved by the IT director, automatically route to the next individual in the chain of command, then to OPD, the legal department, and risk management. As NOVUS and BuySpeed are "completely separate" systems, the new system will create links that allow them to "talk" to one another (PPI-13). According to PPI-13, there is a "huge problem" with data error, which can be eliminated by automating workflow.

E. Small Businesses in Cuyahoga County

1. The SBE Program

The Director of the Office of Procurement and Diversity also oversees the Small Business Enterprise (SBE) program. The SBE program is detailed in Cuyahoga County Code §503.1. The

program is extensive, including a mentor-protégé program, in-house certification and verification, site visits, award and post-award monitoring, bond assistance, non-compliance sanctions, and a clear explanation of those efforts that constitute "good faith." Prime Contractors are expected to submit a "covenant of non-discrimination" and an "SBE subcontractor participation plan" with bids and proposals, pursuant to Section X of the SBE Program Policies and Procedures Manual. A "good faith effort" in executing this plan is determined by OPD based on records of "correspondence and responses thereto" and copies of advertisements in publications and other media (SBE Program Policies and Procedures Manual §503.1 (XI)).

The SBE Supervisor works directly under the director and has three staff members specific to SBE. The supervisor oversees all work and deals with new applicants to ensure that they understand the program. One staff member is tasked with re-certification of letters A through P and does site visits for 5-year updates. Another employee handles the same for businesses starting with letters Q through Z, and handles subcontractor payments and complaints. The supervisor sends the letters to prime contractors, informing them of the documents required by SBE. The last staff person works mainly on the database, which is "not too user friendly," but is in the process of being revamped (PPI-5). The SBE program only sees those contracts bid over $25,000 (which are considered formal). "We do receive complaints that there needs to be more minorities in the program," PPI-5 says. Still, the SBE supervisor tries to "teach business owners techniques" by instructing them to register as vendors and to obtain the bid holders list and market themselves to primes. There is a "huge" desire in the minority business community for a program specific to minorities, PPI-5 says, and its members come to the supervisor of the SBE program often about that issue. However, it should be noted that minority and woman Business Enterprises (MWBEs) are currently tracked in the County's system. However, there is no current certification of MWBEs so they are self-identified. If an MWBE program is recommended from the Study, it will be necessary to either put a certification process in place or devise a method for accepting certifications from other governmental entities. This is important because any race or gender-conscious program must be "narrowly tailored" to fit the demonstrated remediation which would be to MWBEs only.

"This office is worth it" PPI-5 says when discussing the desire to excel and create a viable minority business program. PPI-5 believes that more resources, including a discrete minority business program, are necessary. The supervisor is "well known" within the business community as an advocate for both minority and small businesses and has urged employees to do as much outreach as possible (PPI-5). In addition, there is an SBE Grievance Board in place for those who would like to appeal companies that have been denied. The Grievance Board consists of five members, including two members of County Council, the Deputy Chiefs of Staff of Development and Justice (or designees), respectively, and the Director of Public Works (or designee). A successful appeal requires an affirmative vote by three members.

"We try to go above and beyond," PPI-5 asserts. If a company reports that a prime has failed to utilize their services, the office tries not to "blackball" the subcontractor in the marketplace and will therefore "discreetly" negotiate with the prime by giving them an opportunity to provide documentation demonstrating that they attempted to use the firm but were unable to do so. PPI-5 states that the idea is to build relationships, not knock them down," and, as a general rule, firms "feel good" about this method. However, there are few provisions for the SBE program administrators to halt the process or upon discovery of fraudulent behaviors. The County Code states that non-compliance is punishable by either "limited suspension, rejection of future proposals, withholding payment, cancellation of contract, or permanent debarment," yet makes it unclear which officials within the County as an entity wield this power.

One of the problems with the efficacy of the SBE program is that buyers "don't really understand" the program. They just "pass information on" rather than dealing with small businesses themselves (PPI-5). The SBE program staff tries to teach buyers about the role of the SBE program, but PPI-5 notes that training might be necessary. "I want all the employees to know what is going on in the SBE Program" (PPI-5). Of those departmental personnel who feel highly familiar with the SBE program, officials in the department of Public Works' construction division state specifically that they spend quite a bit of their time "translating" the realities of small firms to the executives at the County. They assert that the legal language in many of the forms makes work with the County inaccessible. In addition, it is difficult to understand all of the different tiers of registration and the process required prior to bidding or being awarded a contract.

2. Barriers to SBE Engagement

(a) Multiple Separate Registrations

There is often confusion, according to PPI-6 and PPI-7, about registration. "People come in to register with SBE not knowing that they also have to register with BuySpeed and the Inspector General. They have to go through so many layers that they get discouraged" (PPI-6). PPI-6 suggests an integrated registration system, that would automatically take SBE bidders to BuySpeed and then to Inspector General Registration. Linking them would appease vendors who, PPI-7 states, are "angry."

Public Works is responsible for maintenance on all county buildings, sanitary sewers, and the construction and maintenance of roads and bridges. All of the jobs they hire for, PPI-7 says, are "playing in the dirt," where contractors are doing hands-on jobs away from their desks and have less time to focus on administrative matters. PPI-7 says that even though "we are not trying to hold them back and we are out searching for (new SBEs)," the system "makes their lives difficult." "I've been doing purchasing for ten years," PPI-6 inserts, "and we are losing vendors in this process." Information disseminated to applicants from the County's SBE program states the requirements for SBE certification:

> "continuous operation in the category for which it is requesting certification for one year, that majority ownership has at least one year of work experience…that its' annual gross revenues or its total workforce are at or less than the amounts established by the Small Business Administration" (Small Business Enterprise New Program Application, Cuyahoga County).

Beneath this information, the document states explicitly that "anyone and everyone interested in doing business with the County should register as a vendor" and "Vendor registration is different from SBE certification (link)." The link takes users/applicants to the Office of Procurement and Diversity portal for vendor registration, the BuySpeed portal, and the Inspector

General Ethics Training Registration. It is reasonable to assume that some vendors may be confused about the configuration of these multiple registrations. The link on the website should make it clear that BuySpeed registration is not vendor registration and that the registration for Ethics Training is required for the letting of any contracts.

Many small vendors with whom PPI-6 and PPI-7 communicate are still not computerized. PPI-7 describes a father and son-owned body shop as the "ultimate small business." They don't have a computer so they go to the library and call me on the phone and I walk them through the registration process" (PPI-7). It is not allowed for officials to enter the data for the vendors, which these employees of the Department of Public Works believe is an inconvenience and a hindrance. "We try to be proactive about helping out these people and we save money because their overhead is so much lower," PPI-6 asserts. There needs to be increased public awareness, PPI-6 argues, "in layman's terms." Once a vendor is registered with Inspector General, "something should say 'are you an SBE firm?' so that they will know that further registration is necessary" (PPI-6).

(b) Payment Times and Start Dates

"We definitely don't move to pay contractors quickly," says PPI-12, and this can be a deterrent for small firms. PPI-13 states that they would like to hire more local and small firms, but providing incentives is difficult. PPI-12 and PPI-13 state that SBEs gain credit in the RFP process but that the process is "very confusing for them" (PPI-13). Beyond that, the complicated procurement process makes it an uncertain and difficult process, especially for SBEs. "The fact that we have decentralized procurement slows us down" (PPI-12). There is a lack of communication, according to PPI-12, between the department buyers, OPD, and the end users. PPI-12 believes that in-house OPD buyers are unnecessary. "I would prefer to have all the buyers work for procurement" (PPI-12).

Also, PPI-11 notes that the contract is with the prime, who must then contract with the sub and "smaller firms are left waiting." The main complaint heard from SBEs and subcontractors is the timeliness of payment. Because the payment process still involves paper checks rather than

electronic payment it "takes a little while and primes don't pay subs until they are paid," PPI-11 notes. "Small firms can't absorb that money for three months and this can deter someone from wanting to work with us" (PPI-11). "Contracts take way longer to get through now because there's a million people who have to sign off on it. We take four months to tell them now that we're ready to go. We're unreliable," PPI-11 says.

(c) Confusion about SBE Goals

The SBE goal for these purchases can vary and is set by the OPD Director, generally at no more than 30%. A prime contractor must show that they at least attempted to meet the goal. The frequency of waivers of such goals seems to vary from department to department, but is based on a review of relevant firms in the market and funding requirements. When an SBE is a prime, they receive a 20% credit toward their goal but they still must have additional SBE, and PPI-11 says that people are often confused about this requirement. PPI-11 says, "that is a weird one, especially if they want to do all the work themselves, then they have to get 10% more participation." OPD "leaves it to the department" to make the final decision on an RFQ and the committee within the department will score as a group. The SBE goal is "brought up" but it does not disqualify a firm if they have not met it (PPI-11). "As a part of negotiations, we go back and say 'We want you to try to meet this number,'" but there is no penalty in the scores (PPI-11). Until it gets to the "numbers stage" when firms have access to dollar amounts, they are unable to set accurate goals, says PPI-11. Those firms that don't have any SBEs at all and also have not tried to include them "also have bad proposals" and typically will not win, according to PPI-11.

The department receives an online list from SBE and buyers will check about SBE subcontractors. "We just trust them (OPD)" to provide accurate SBE data, PPI-11 says. "Sometimes we get a call from an out of town vendor asking how to find SBEs and we direct them to the website" (PPI-11). However, PPI-11 recalls pulling up a category and "saying 'I know this person is SBE', but if you go to a different category they aren't there" (PPI-11). This inconsistency in the database is "hard" for out of town firms. In addition, "people don't understand the forms," PPI-11 asserts, "especially if they are new to the County." PPI-11 believes that well-meaning firms sometimes miss out on SBE requirements. "We try to look if it's realistic," PPI-11 says. If a firm

attempts to claim that a very small piece of the project will make up their 30% SBE goal, "we ding them points" in evaluation (PPI-11). In practice, during the advertisement period and at pre-bid/pre-proposal meetings, vendors are encouraged to ask questions and seek verifications. If there is an SBE goal, then there is an SBE staffer who presents the SBE requirements and responds to questions regarding the SBE requirements. The bid package also includes sample completed SBE forms.

F. Purchasing Process and Documents

1. Document Management from End-Users' Perspectives

According to PPI-14, a member of a Cuyahoga County user department, the Office of Procurement and Diversity's role is to see if the documents are there, "make sure the i's are dotted and t's crossed," but they "don't look at content" (PPI-14). "It's a cursory review, but it's incredibly long," PPI-14 says. The Job and Family Services Department has one staff member who does "nothing but checks the status of contracts online" with OPD (PPI-14). "The County administration considers our department the gold standard for the County" in terms of the procurement process, PPI-14 states. This County employee attributes this designation to the professional staff in the department who monitor contract documents for accuracy before beginning the procurement process. "Nobody tells us the rationale" behind some of the documents requested, PPI-14 states. When an RFP is issued, there are six copies made and OPD keeps one, but the user department is still required to download it into the system. For instance, PPI-14 continues, each time there is a change to the cover page, anything in the queue has to change "rather than say that this change will be effective going forward" (PPI-14). Most County agencies don't have the staff to do what the Jobs and Family Services Department does, says PPI-14. "We build in time so that we don't miss the start date," PPI-14 says, because their programs are time-sensitive. "Sometimes we talk to prospective vendors and we have to tell them that we've started before we had the allocation due to the long process" (PPI-14).

Officially, OPD is the "face" or conveyor of news regarding new requirements/changes. Whenever possible, it is intended that OPD will implement requirement changes based on a future effective date. However, many times, OPD is informed that changes must be effective immediately. Furthermore, OPD divulges whenever possible and known, the reasoning behind the changes. Also, please note that the RFP and RFQ processes are led by the user departments because they are the technical experts for the item and, thus, negotiate the contracts procured via RFP and RFQ processes. OPD keeps one copy of each proposal submitted for the County record. When the user department submits the eventual negotiated contract for award and approval in NOVUS for approval by the pertinent contracting authority, it is required that the proposal from the recommended vendor also be attached in NOVUS along with other pertinent documents so that the approvers have a complete history of the procurement process for that item. For the formal bids, OPD is similarly required to attach a copy of the bid from the recommended vendor when contracts/POs are submitted for award and approval in NOVUS for approval by the pertinent contracting authority.

The Department of Development also works with federal dollars, though their personnel's attitude toward OPD's role is more favorable, indicating a good working relationship and relative navigability. They work directly with the legal department to draft the language for contracts, though "most of it is boilerplate" (PPI-3). The federal regulations are standardized across the country and based on best practice. Ethics regulation oversight, insurance requirements, and certification are done in purchasing. Development receives a list of firms, but is not a part of the initial approval process. The Law Department ensures that the County requirements are included in all awarded contracts (PPI-2). There is a vendor compliance checklist, which PPI-2 and PPI-3 assert they follow to the letter. "We don't develop policy but follow what we're told by the Law Department and OPD" (PPI-2). When an RFP is issued from Development, the director of the OPD determines if there should be SBE percentages. "We are doing performance measurement to ensure that things move along in a timely way," PPI-2 says of efficiency. "We know how to work it, being in government, we know why these things are in place and we just try to get OPD everything they need to do their job" (PPI-2). "We like consistency. Our work follows federal guidelines and federal policy direction and we would hope that County policy continues to be compatible with that" (PPI-2).

2. Document Management within OPD

Procedurally, for each formal bid/RFP/RFQ, a tab sheet is prepared that documents the required evaluation results for the administrative review, technical review, and, if applicable, the SBE review. The conclusions/findings of these reviews are documented on the bid tabulation sheets. The technical review is done by the user department and typically is the final review. If the user department documents on the tab sheet that the vendor did not meet the technical requirements, the OPD Buyer should communicate with the user department to determine the reason. In tabulating bids for RFPs and RFQs, the user departments score the proposals as detailed in the RFP/RFQ specification packet and the tabulated spreadsheet summarizing the scoring and award recommendation is downloaded into NOVUS. In NOVUS, the pertinent contracting authority will note the Yes/Y for the recommended vendor(s) and NO/N for the others on the RFP and RFQ tab sheet and the contract is awarded accordingly.

PPI-1 states that it receives bids submitted to OPD that have "a lot of discrepancies" and must be rejected. Therefore, PPI-1 has established, as personal practice, the attachment of a bid evaluation sheet and publicizing it to bidders, outlining the requirements that the bidder did not meet in order to answer any questions that may crop up in the future. This is not a requirement, nor is PPI-1's practice of going to the legal department for review of rejected bids, but it is done because this particular employee believes that it is a more efficient process. The bid evaluation sheet is not a requirement for OPD personnel and PPI-1 states that there are many times when purchasing officials just write "no" on bids without officially documenting their reasoning. All RFPs and RFQs include a detailed description of how the proposals are evaluated, the number of points and the criteria for evaluation. Bids have to meet all the requirements listed in the RFB and are selected on a lowest and best basis, where the best is determined based on the criteria described in Sections 501.14 and 501.15 of the Cuyahoga County Code.

PPI-1 says that things "run smoothly to a point." If a department does not provide all the requisite documents, it can take months to complete a contract. The expanded NOVUS system

should help, PPI-1 says, as it will also usher in a new system by which the law department receives everything before OPD reviews it, preventing documents from being passed back and forth multiple times between the two. PPI-1 believes that more departmental accountability is necessary for the efficiency of procurement overall.

"I wish that more departments would take the initiative on the front end to make sure that they have the proper documentation," PPI-1 says, because otherwise, the process "gets held and there's nothing we can do to move the item forward" (PPI-1). If the language is incorrect on an insurance certificate, for instance, OPD must issue a law ticket and refer the documents back to the legal department who must then re-examine the bid package. Still, PPI-1 believes that more internal accountability with state auditors would be beneficial at the departmental level. "We did training sessions and there was always an excuse for why they didn't have the required documents" (PPI-1). According to this County employee, there is not a good working relationship with departments, who are sometimes frustrated with purchasing officials for oversight. The policies are available on the internet and procurement has provided departments with document checklists.

3. Procurement Process Training

The procurement process tends to run "smoothly and quickly" from PPI-10's end. This is a result of the new buyer in the department, who is, apparently, better at following up with staff and providing consistent information. Each OPD Buyer is assigned a slate of user departments. The department assignments are reallocated every 3 years based on projected workload and available staffing. Also, OPD Buyers are available to answer questions from the user department on the procurement and contracting process (including any changes/revisions to procedures).

At a pre-bid conference, this employee recounts a standard procedure of welcoming potential bidders, providing an overview of the program, answering questions, then reviewing the RFP and instructing vendors on how to submit. The County's buyer goes through the bid requirements and SBE goals if applicable. There is always a staff member from the department

present to write what was asked and the answers given so that "if we gave a wrong answer, it's not held against them in bid evaluations." In addition, this employee keeps a notebook to record every conversation with vendors, who are encouraged to call as many times as necessary during the bid process, in order to keep track of answers provided.

Though PPI-10 has developed a system for keeping staff and vendors informed outside of what is explicitly required of the role, this employee believes that more frequent training of buyers and staff is necessary. "The last time was 2011—when you teach someone something one time, it doesn't work. They need reinforcement" (PPI-10). From this staff member's perspective, there is confusion due to the fact that when "OPD will roll out changes, they only send an e-mail to notify us." This is less of a problem for the Senior and Adult Services division, PPI-10 asserts, because "we've got three people and if one is misunderstanding a rule, we will have caught it. But what about these one-person departments?" (PPI-10). PPI-10 did not specify which departments only employ one purchasing professional.

When policies are changed internally, PPI-11 says that OPD will simply "send a memorandum." "Sometimes training would be nice when there's major things that change," PPI-11 says when asked if training would be helpful. "We don't understand why it takes so long with OPD," PPI-11 says, and it is difficult to communicate with consultants because of unpredictability. "I don't have time every single day to call unless the contract is urgent" and without calling, PPI-11 contends, they have "no idea" where the contract is in OPD's process.

The Contracts and Purchasing Procedures (Cuyahoga County Code §501) were approved in the early fall of 2011 and, subsequently, OPD provided training in the fall of 2011 on the new policy. In the summer of 2012, the Contracts and Purchasing Procedures (Cuyahoga County Code §501) were amended and, in December of 2012, OPD provided training on the revisions impacting procurement procedures. The changes impacting the procurement procedures were effective January 1, 2013. Also, at the request of the user departments (typically for new hires), OPD has done and will do department focused trainings. OPD also did a County wide training on procurement and contracting procedures during November of 2014.

Further, County states that while OPD is available for user departments to call regarding the status of their items, for each submitted item, the NOVUS system provides several means of checking the status of an item.

G. Policies Identified as Restrictive to Both Buyers and Vendors

1. Ethics Training

The Office of the Inspector General conducts all ethics investigations pursuant to Title 4 of the Cuyahoga County Code. §407.34 of the Cuyahoga County Code requires all firms, unless exempt, prior to doing business with the County, to undertake ethics training.

PPI-9 states that the Office of the Inspector General also conducts research to ensure that a vendor is "upstanding" and not engaged in "fraud, malpractice, or corruption." However, PPI-13 notes that large companies may be put off by ethics requirements. "Google's not going to take an ethics course" (PPI-13). They "don't want to go through the hassle" of training and "getting a signature is sometimes very difficult" (PPI-13). However, PPI-12 says they are "over the hump" even though the "rollout was painful."

County employees in the Department of Public Works describe the difficulties with attempting to purchase vehicles for the Sheriff's Department due to the County's ethics training and registration process. Once firms have a state certification, they view the County's as "duplicate and repetitious" (PPI-7). "If they had to do that everywhere, in all eighty-five counties, they would be losing money," PPI-7 contends. "We don't recognize the state's authority and no one will register. We can't even get vehicles for the Sheriff's Department!" (PPI-6). In addition, "people who register on one side of the street don't realize that they're not registered on the other side," PPI-6 says of the possibility of sharing registrations and certifications with the City of Cleveland and allowing firms to be exempt from the County's ethics training, if they have already satisfied that requirement with other State and local governments, or alternatively doing refresher courses. Also, for some small firms, the fees for taking the course could be waived. Further, given the distrust of the County that GSPC found, it is important to explain to the business community

at large the confines of the County's investigations so that firms would be more at ease with the process.

2. Insurance and Bonding Requirements

On the subject of bid bonding restrictions, PPI-7 says that the county's processes are too slow to justify the expense to many firms. This employee describes a vehicle purchase for $20,000 requiring a 5% bid bond. The dealership would only stand to make $200 profit, according to PPI-7, and the "bond will be held until three months after the van is delivered and paid for. We have to go to legal when we see obvious errors like that and request permission to lower the bond." It should be noted that the Law Department does not set bonding limits, which are set by the departments, but it does approve them. PPI-6 simply lowers the bonds without going through the whole process, stating "I don't even go to them anymore." "I see great opportunities for small businessperson to make inroads but they are handicapped by the County's many layers of restrictions" (PPI-7).

Insurance requirements are also restrictive, PPI-6 and PPI-7 agree. The doubled dollar amount of insurance coverage means increased costs for the businesses and increased hourly rates for the County. "We have another company," PPI-7 recounts, "an SBE, a family-owned operation, and we gave them a not-to-exceed contract for the year. We call them when we need them. When I informed them that the insurance requirements doubled, they said our hourly rate doubled" (PPI-7). Small businesses are disproportionately affected by the increased insurance bond requirements and the only provision currently made to alleviate this is a provision in the SBE Program (Cuyahoga County Code §503.1(XIX)), enabling the County to "investigate, develop, and implement" a bond assistance program. PPI-6 asserts that if you're not a "multimillion dollar business, it's not worth it." Talking to small companies and telling them that the insurance requirement is a million dollars is "embarrassing" PPI-6 says, "You want to cry for them. They can't do it. They can't afford it." "Each contract is different," PPI-7 says, and the County should account for that. When small businesses add the insurance into their costs, they "can't absorb it, now they're no longer the low bidder" (PPI-7).

The new, heightened insurance and bonding requirements are a "problem," says PPI-13. "Our contract negotiations fail because of them." A firm must ask themselves if it is "worth the cash" to bid (PPI-13). Another County employee, PPI-14, says that small nonprofits "can't do it, it's not cost effective." According to PPI-11, the doubled insurance requirements are a "big fiasco." "Primes have no issue, but subs say they can't meet it," forcing department staff to file a waiver with the law department, who will grant a reduction if they don't believe that it is risky (PPI-11). "We have heard from a lot of people that SBE subs are having trouble," PPI-11 says. For instance, an independent contractor on a specialized bridge project had to run his contract through a bigger firm for whom he worked part time purely due to insurance requirements. "There needs to be some kind of caveat for minimal risk; it should be automatic," to say that you can have lower coverage if you meet certain criteria, PPI-11 believes. "It slows things down when we have to take it to law" (PPI-11). However, according to PPI-15, insurance coverage for one million dollars costs "exactly the same" as insurance coverage for $250,000.

H. Conclusion

While the ethics trainings, certifications, and registrations may be considered necessary aspects of the County's procurement process according to the unique history of the County with regards to purchasing, their monitoring and oversight could be streamlined for a more productive and efficient workflow. Among the suggestions listed herein, more regular trainings within the departments by OPD stands out as a viable first step. It is clear that there is a lack of understanding between OPD and the user departments, who see many of the documents required as non-specific to their needs and at times unnecessary. The new OnBase system will streamline the process so that the Law Department receives documents prior to OPD, which should prevent the back-and-forth that frustrates many user departments. More frequent trainings could eliminate some of the lingering confusion, allowing OPD staff to take suggestions from the departments as well as explaining the purpose behind some of the documentation and processes required.

It is important for any examination of policy to take into account the reality that uniform policies at times impact businesses disproportionately. For instance, the County's documented

issues with processing payments promptly may place a greater burden on a smaller firm with less revenue to cover their losses while their payments are being processed. Officials within the County have stated that the main complaint heard from small business owners is the timeliness of payment.

The bonding requirements also seem disproportionately burdensome on SBEs in the County, many of whom find the current requirement too financially difficult to meet. This could be alleviated by a bond assistance program within the County or reduced bond requirements on lower-risk projects and spreading the bond over multiple years for multi-year projects to increase bonding capacity. The perception of many County employees that the heightened insurance bond requirements are a deterrent to small business participation should not be taken lightly. Furthermore, in addressing small business participation and compliance, the SBE program could be bolstered by a more straightforward policy to ensure sanctions for non-compliance. Currently, the Grievance Board can "recommend" sanctions in Cuyahoga County Code §503.1(XV)), but the code is unclear as to which County officials hold the final power over their implementation.

Finally, the lack of databases that "talk to each other" hinders both vendors and buyers. The inability of departments to share databases and borrow information from one another prevents SBEs from receiving automatic referrals to other relevant departments. As stated by one County employee in the Information Technology department, the automation of workflow through connected databases can also help to eliminate data error. As for vendor registration, the BuySpeed website should make it clear in the system that there are more steps required, such as vendor registration with the Inspector General and Ethics Training, before one may be considered eligible for a contract with the County. To that end, the Ethics requirements and multiple registrations are seen by many internal to the County as a hindrance to attracting larger firms who do business in multiple jurisdictions, as well as confusing to smaller firms who are not, according to some, informed adequately about the entire process and are afraid of the investigative aspects. A clear step-by-step bid eligibility process for vendors laid out either in print format, on the website, or as an addendum to the contract documents would be helpful in ensuring that laymen can understand the steps required of them by the Law Department and the Inspector General.

IV. STATISTICAL ANALYSIS

The statistical analysis for the Study was conducted by EuQuant, Inc. and is attached as Appendix A.

The analysis summarizes all aspects of the statistical data development, collection and analysis and explains findings regarding the availability, utilization and disparity in the use of minority and woman owned businesses that expressed an interest in, or executed, contracts with the County between 2009 and 2012.

V. PRIVATE SECTOR ANALYSIS

A. Introduction

A disparity analysis aids in determining if the government has assisted—at least indirectly—or will continue (if the pattern continues) to assist in perpetuating the discriminatory conduct of private actors by being a passive participant in market processes that are discriminatory in their effects on minority and woman owned business enterprise. Indeed, Justice O'Connor, speaking for the U.S. Supreme Court in Croson, indicated that a state "has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction", and can even "use its spending powers to remedy private discrimination if it identifies that discrimination with the particularity required by the Fourteenth Amendment.[128] GSPC sought to discover whether there is a pervasive pattern of private sector discrimination in the State of Ohio from which it can be inferred that the County has passively assisted in perpetuating the discriminatory conduct of private actors. The data utilized in this analysis came from the US Census Bureau's 2007 Survey of Business Owners Public Use Microdata Sample (SPUMS), which is the most recent.

SPUMS provides the only comprehensive, regularly collected source of information on selected economic and demographic characteristics for businesses and business owners by gender, ethnicity, race, and veteran status in the 50 states, and District of Columbia.[129] The SPUMS universe consists of the population of all nonfarm businesses filing Internal Revenue Service tax forms as individual proprietorships, partnerships, or any type of corporation, and with receipts of $1,000 or more. The SPUMS covers both firms with paid employees and firms with no paid employees.[130] A company or firm in the SPUMS is a business consisting of one or more domestic establishments that the reporting firm specified under its ownership or control. For each business sampled in the SPUMS, business ownership is also demographically defined.

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

[129] SPUMS data are publicly available at http://www.census.gov/econ/sbo/pums.html

[130] The SPUMS data are stratified by state, industry, frame, and whether the company had paid employees in 2007.

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

The private sector analysis in our analysis considers the SPUMS data for the State of Ohio. While the State of Ohio need not constitute the relevant market area for public contracting by the County, SPUMS does not capture data at the County level—the state is the smallest level of geography measured in SPUMS. The value of using SPUMS to evaluate private sector discrimination is that it captures business owner outcomes that can be adversely impacted by discriminatory practice, and the sampling is representative of the universe of firms in the State of Ohio, which enables unbiased statistical estimates of the effects of minority status on business owner outcomes in the State of Ohio—a political jurisdiction that includes the County. In this context, basing the private sector analysis based on the State of Ohio SPUMS data is consistent with the reasoning in Croson that the relevant market for statistical analysis of discrimination is not necessarily confined to specific governmental jurisdictional boundaries, such as cities or counties.[131]

B. Minority and Woman Status as a Barrier to Business Start-up and Expansion Capital in the Ohio Private Sector

In neoclassical economic theory, the output of firms is conditioned on the complementary relationship between capital and other relevant inputs. In the absence of capital, and/or the means to finance capital and the other inputs required to produce goods/services for the market, profit-maximizing firms are constrained from entering a market to produce output. A firm's ability to acquire and finance capital and other necessary inputs therefore is arguably one of the

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

most important determinants of whether it enters a market, and once in the market, whether it can finance additional capital and other inputs to expand the business.[132] A major source of financing for the capital and other inputs for businesses are the private actors in capital markets that provide equity, loans, and venture capital.[133] If business access to private equity, loans and venture capital is adversely affected as of a result minority or woman ownership status, this would be suggestive of, and consistent with discrimination against minority and woman owned businesses in the private sector.

Given the significance of access to financing for capital and other inputs for the emergence and survival of small businesses, our private sector analysis considers the extent to which minority-owned businesses in the State of Ohio face discriminatory barriers in securing such financing. The SPUMS is particularly well-suited to such an inquiry because it captures data that shows whether firms secured various types of financing during their initial start-up, and later during expansion. GSPC's emphasis on exploring barriers to financing is motivated by the research literature on minority-owned businesses, which is dominated by considerations of access to financing, underscoring the importance of discriminatory barriers faced by minority-owned businesses that compromise their formation, operation, and survival.[134] As such, our private sector analysis will inform whether private actors providing business financing in the State of Ohio are engaging in discriminatory practices in a way that is biased against minority and woman owned businesses. Evidence of such a bias would be suggestive of a key private sector barrier faced by minority-owned businesses in the State of Ohio—a barrier to equal opportunity access to

[132] Beck, Thorsten, Asli Demirguç-Kunt, and Vojislav Maksimovic. "Financial and legal constraints to growth: does firm size matter?" *Journal of Finance* 60, no. 1 (2005): 137 - 177

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

[134] Asiedu, Elizabeth, James A. Freeman, and Akwasi Nti-Addae. "Access to credit by small businesses: How relevant are race, ethnicity, and gender?" *American Economic Review* 102, no. 3 (2012): 532 - 537. Blanchard, Lloyd, Bo Zhao, and John Yinger. "Do lenders discriminate against minority and woman entrepreneurs?" *Journal of Urban Economics* 63, no. 2 (2008): 467 - 497, Blanchflower, David G., Phillip B. Levine, and David J. Zimmerman. "Discrimination in the small-business credit market." *Review of Economics and Statistics* 85, no. 4 (2003): 930 - 943, Mijid, Naranchimeg, and Alexandra Bernasek. "Decomposing racial and ethnic differences in small business lending: Evidence of discrimination." *Review of Social Economy* (2013): 1 - 31, and Robb, Alicia M., and Robert W. Fairlie. "Access to financial capital among US businesses: The case of African American firms." *Annals of the American Academy of Political and Social Science* 613, no. 1 (2007): 47 - 72

financing that can constrain the ability of minority-owned businesses to compete on equal terms with other businesses in the market for goods and services.[135]

Lastly, evidence of bias in the market for financing against minority and woman owned businesses in the State of Ohio would lend support to the "but-for justification" for targeted set-asides. Ian Ayres and Frederick Vars, in their consideration of the constitutionality of public affirmative programs posit a scenario in which private suppliers of financing systematically exclude or charge higher prices to minority businesses.[136] If a political jurisdiction awards contracts to the low-cost bidder, this effectively renders the political jurisdiction a passive participant in the private discrimination as minority-owned firms may only have recourse to higher cost financing due to facing discrimination in private sector capital markets, which compromises the competitiveness of their bids. Such a perspective on discrimination suggests that barriers faced by minority-owned firms in private markets for financing can rationalize targeted contracting programs by political jurisdictions, as the counterfactual is that in the absence of such discrimination, they would be able to compete with other firms in bidding for public contracts. Such a rationale for minority set-asides also coheres the finding that, that both the entry and performance of black-owned firms is compromised by their low trust in the capacity and willingness of Federal Government (e.g. courts, regulatory agencies) to mitigate the discrimination they face in the private sector.[137]

C. Statistical and Econometric Framework

Methodologically, our private sector analysis utilizes a binary regression model (BRM) framework—which will permit an assessment of the relationship between a binary/categorical dependent variable such as a business having received of a particular form of business-financing, and independent categorical variables such as race, ethnicity and gender status. The central aim

[135] Bates, Timothy. "Minority business access to mainstream markets." *Journal of Urban Affairs* 23, no. 1 (2001): 41-56

[136] Ayres, Ian, and Fredrick E. Vars. "When does private discrimination justify public affirmative action?" *Columbia Law Review* 98, no. 7 (1998): 1577-1641

[137] Price, Gregory N. "Race, trust in government, and self-employment." *American Economist* 57, no. 2 (2012): 171 - 187

of our private sector analysis with a BRM is to examine how the race/gender/ethnicity status of a business owner in the State of Ohio effects the likelihood and probability of securing particular types of financing in the private sector—relative to white male business owners.[138]

The SPUMS does not provide sampling weights, so our analysis reports estimates from a heteroscedastic probit specification of the BRM, as failing to account for omitted variables driving selection into the SPUMS data could result in biased parameter estimates if based on a homoscedastic specification for the variance of the error term as in standard simple logit and probit specifications of the BRM.[139] A heteroscedastic error specification of the BRM fit to the SPUMS data allows for unbiased estimation of the effects of the covariates on the dependent variable.[140]

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

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

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

D. The Effects of Minority and Woman owned Business Status on Financing Business Start-up and Expansion in Ohio

GSPC identified 22,641 sample firm observations in the State of Ohio from the SPUMS. The data permitted identification of minority-owned firms that were owned by 1.) Asians, 2.) Women, 3.) Hispanics, 4.) Black Americans/African Americans, and 5.) Native Americans (American Indian or Alaskan Native). Approximately 29 percent of the sample firms in Ohio were owned by one of these six minority groups, and to estimate the parameters of our BRM specifications, we use binary variables for each separate minority group category, in addition to one for firm group membership in any of them.[141] To control for unobserved heterogeneity and the bias caused by omitted variables, we allowed the heteroscedasticity in outcomes to be a function of the firm's reported sales revenue.[142]

Heteroscedastic probit BRM parameter estimates are reported in Tables 1 - 18.[143] We report, for each private sector outcome under consideration, a specification that considers all minority-owned firm outcomes relative to nonminority-owned firm outcomes, and a specification that disaggregates minority-owned firm outcomes by race, ethnicity, and gender. The disaggregation permits assessment as to whether or not particular groups within the minority-owned firm classification have different outcomes, suggestive of facing differential discrimination in the market for financing business enterprise in the Ohio private sector. For the sake of brevity, and economy of results presentation, we do not report the estimated coefficients for the specification of heteroscedasticity, however in each instance the specification was significant implying that the presumed form of unobserved heterogeneity in the error term was consistent with the data.

[141] Among the 6,459 minority owned firms the approximate shares owned by each group were 11 percent for Asians, 77 percent for Women, 3 percent for Disabled Veterans, 17 percent for Hispanics, 2 percent for African Americans/African Americans, and 1 percent for Native Americans

[142] The mean value of sales for firms in the sample was approximately $4,333

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

For each specification GSPC reports the estimated coefficient—which measures how minority-owned firm status affects the probability of the outcome under consideration. The standard error of the estimated coefficient along with the absolute value of its t-value, and its statistical significance is also reported. A significant t-value suggests that the estimated coefficient is not due to pure chance, and instead suggests that it is caused by the covariate in question—in this instance minority-owned firm status. As diagnostic measures to assess the adequacy of the estimated specification we report a chi-square test that the covariates jointly have no effect on the dependent variable.[144] A significant chi-square statistic is consistent with rejecting a null hypothesis that the covariates jointly have no effect on the dependent variable under consideration in each specification.

1. Minority-owned Firm Status and Relative Likelihood for Start-up Capital in the Ohio Private Sector

Tables 1-2 report parameter estimates of the effects of minority-owned firm status on the demand, and measured by the need for start-up capital in the Ohio private sector. The parameter estimates reported in Tables 1 - 2 enable insight into the extent to which relative to nonminority-owned firms, minority-owned firms are different with respect to having a need for start-up financing. For the specifications in Tables 1-2, the dependent binary variable is whether or not the firm had "no need" for start-up capital. The statistically significant and negative sign on the aggregate minority-owned firm status indicator in Table 1 suggests that in general, minority-owned firms are less likely, relative to nonminority-owned firms, to have no need for start-up capital. With the exception of firms owned by Disabled Veterans and Native Americans, the results in Table 2 are similar, with the largest effect for woman owned firms. Overall, the parameter estimates in Tables 1-2 suggest that relative to nonminority-owned firms, minority-owned firms are more likely to need start-up financing provided by the private sector in Ohio.

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

Table 1: Heteroscedastic Probit Parameter Estimates: Minority-Owned Business Status and the Relative Likelihood for Start-up Capital in the Ohio Private Sector

	Coefficient	Standard Error	t-Value
Regressand: No Start-up Capital Needed (Binary)			
Regressors:			
Constant	.338	.009	37.55[a]
Minority-owned Business	-.255	.018	14.17[a]
Number of Observations	22641		
χ^2_k	192.22[a]		

Griffin & Strong, P.C. 2015

Notes:

[a] Significant at the .01 level

Table 2: Heteroscedastic Probit Parameter Estimates: Minority-Owned Business Status and the Relative Likelihood for Start-up Capital in the Ohio Private Sector

	Coefficient	Standard Error	t-Value
Regressand: No Start-up Capital Needed (Binary)			
Regressors:			
Constant	.338	.009	37.55[a]
Asian American-Owned Business	-.114	.048	2.37[b]
Woman owned Business	-.262	.020	13.10[a]
Hispanic American-Owned Business	-.223	.038	5.87[a]
African American-Owned Business	-.211	.100	2.11[b]
Native American-Owned Business	-.141	.354	.398
Number of Observations	22641		
χ^2_k	237.01[a]		

Griffin & Strong, P.C. 2015

Notes:

[a] Significant at the .01 level

[b] Significant at the .05 level

2. Minority-owned Firm Status and Bank Loan Start-up Financing

Tables 3-4 report parameter estimates of the effects of minority-owned firm status and financing firm start-up with a bank loan in the Ohio private sector. For the specifications in Tables 3-4, the dependent binary variable is whether or not the firm started-up with a bank loan. The statistically significant and positive sign on the aggregate minority-owned firm status indicator in Table 3 suggests that in general, minority-owned firms are more likely, relative to nonminority-owned firms, to have bank loans as a source of start-up financing. With the exception of firms owned by African Americans, and Native Americans the parameter estimates reported in Table 4 are similar, with Native American-owned firms being relatively less likely to have used bank loans as start-up financing. Overall, the parameter estimates in Tables 3-4 suggest that relative to nonminority-owned firms, minority-owned firms are more likely to have bank loans as a source of start-up financing in the Ohio private sector.

Table 3: Heteroscedastic Probit Parameter Estimates: Minority-Owned Business Status and Bank Loan Start-up Financing in the Ohio Private Sector

	Coefficient	Standard Error	t-Value
Regressand: Start-up Financed by Bank Loan (Binary)			
Regressors:			
Constant	-2.02	.022	91.82 [a]
Minority-owned Business	.203	.037	5.48 [a]
Number of Observations	22641		
χ^2_k	29.98 [a]		

Griffin & Strong, P.C. 2015

Notes:

[a] Significant at the .01 level

[b] Significant at the .05 level

[c] Significant at the .10 level

Table 4: Heteroscedastic Probit Parameter Estimates: Minority-Owned Business Status and Bank Loan Start-up Financing in the Ohio Private Sector

	Coefficient	Standard Error	t-Value
Regressand: Start-up Financed by Bank Loan (Binary)			
Regressors:			
Constant	-2.01	.021	95.71 [a]
Asian American-Owned Business	.109	.096	1.13
Woman owned Business	.128	.041	3.12 [a]
Hispanic American-Owned Business	.137	.074	1.85 [c]
African American-Owned Business	.189	.175	1.08
Native American-Owned Business	-3.03	.067	45.22 [a]
Number of Observations	22641		
χ^2_k	2130.02 [a]		

Griffin & Strong, P.C. 2015

Notes:

[a] Significant at the .01 level

[b] Significant at the .05 level

[c] Significant at the .10 level

3. Minority-owned Firm Status and Government Guaranteed Bank Loan Start-up Financing

Tables 5-6 report parameter estimates of the effects of minority-owned firm status and financing firm start-up with a government guaranteed bank loan in the Ohio private sector. For the specifications in Tables 5 - 6, the dependent binary variable is whether or not the firm started-up with a government guaranteed bank loan. The statistically insignificant sign on the aggregate minority-owned firm status indicator for the parameter estimates reported in Table 5 suggest that in general, minority-owned firms are neither more or less likely, relative to nonminority-owned firms, to have government guaranteed bank loans as a source of start-up financing. The parameter estimates reported in Table 6 suggest that relative to nonminority-owned firms, African American-owned firms are more likely, and Native American-owned firms are less likely to have government guaranteed bank loans as a source of start-up financing.

Table 5: Heteroscedastic Probit Parameter Estimates: Minority-Owned Business Status and Government Guaranteed Bank Loan Start-up Financing in the Ohio Private Sector

	Coefficient	Standard Error	t-Value
Regressand: Start-up Financed by Government Guaranteed			
Bank Loan (Binary)			
Regressors:			
Constant	-2.33	.029	80.34[a]
Minority owned Business	-.051	.057	.895
Number of Observations	22641		
χ^2_k	.790		

Griffin & Strong, P.C. 2015

Notes:

[a] Significant at the .01 level

Table 6: Heteroscedastic Probit Parameter Estimates: Minority-Owned Business Status and Government Guaranteed Bank Loan Start-up Financing in the Ohio Private Sector

	Coefficient	Standard Error	t-Value
Regressand: Start-up Financed by Government Guaranteed			
Bank Loan (Binary)			
Regressors:			
Constant	-2.33	.029	80.34[a]
Asian American-Owned Business	-.187	.177	1.06
Woman owned Business	-.023	.062	.371
Hispanic American-Owned Business	-.173	.1381.25	
African American-Owned Business	.407	.215	1.89[c]
Native American-Owned Business	-2.81	.060	46.83[a]
Number of Observations	226414		
χ^2_k	2197.01[a]		

Griffin & Strong, P.C. 2015

Notes:

[a] Significant at the .01 level

[c] Significant at the .10 level

4. Minority-owned Firm Status and Home Equity Start-up Financing

Tables 7 - 8 report parameter estimates of the effects of minority-owned firm status and financing firm start-up with a home equity loan in the Ohio private sector. For the specifications in Tables 7 - 8, the dependent binary variable is whether or not the firm started-up with a home equity loan. The statistically significant and negative sign on the aggregate minority-owned firm status indicator for the parameter estimates in Table 7 suggest that in general, minority-owned firms are less likely relative to nonminority-owned firms to have home equity loans as a source of start-up financing. The parameter estimates reported in Table 8 suggest that the reduced likelihood of minority-owned firms having home equity loans as a source of start-up financing is driven exclusively by the reduced likelihood of firms owned by women having such financing, as it is only significant and negative in those instances when disaggregated minority-owned firm status is considered. Overall, the parameter estimates reported in Tables 7 - 8 suggest that relative to nonminority-owned firms only woman owned firms are less likely to have home equity loans as a source of start-up financing in the Ohio private sector.

Table 7:Heteroscedastic Probit Parameter Estimates: Minority-Owned Business Status and Home Equity Start-up Financing in the Ohio Private Sector

	Coefficient	Standard Error	t-Value
Regressand: Start-up Financed by Home Equity Loan (Binary)			
Regressors:			
Constant	-1.51	.016	94.37[a]
Minority-owned Business	-.156	.031	5.03[a]
Number of Observations	22641		
χ^2_k	25.42[a]		

Griffin & Strong, P.C. 2015

Notes:

[a] Significant at the .01 level

Table 8: Heteroscedastic Probit Parameter Estimates: Minority-Owned Business Status and Home Equity Start-up Financing in the Ohio Private Sector

	Coefficient	Standard Error	t-Value
Regressand: Start-up Financed by Home Equity			
Loan (Binary)			
Regressors:			
Constant	-1.51	.016	94.37[a]
Asian American-Owned Business	-.005	.077	.065
Woman owned Business	-.173	.035	4.94[a]
Hispanic American-Owned Business	-.107	.067	1.59
African American-Owned Business	-.060	.169	.355
Native American-Owned Business	.565	.431	1.31
Number of Observations	22641		
χ^2_k	34.05[a]		

Griffin & Strong, P.C. 2015

Notes:

[a] Significant at the .01 level

[c] Significant at the .10 level

5. Minority-owned Firm Status and Venture Capital Start-up Financing

Tables 9 - 10 report parameter estimates of the effects of minority-owned firm status and financing firm start-up with venture capital in the Ohio private sector. For the specifications in Tables 9 - 10, the dependent binary variable is whether or not the firm started-up with venture capital. The statistically significant and negative sign on the aggregate minority-owned firm status indicator for the parameter estimates in Table 9 suggest that in general, minority-owned firms are more likely relative to nonminority-owned firms to have venture as a source of start-up financing. The parameter estimates reported in Table 10 suggest that the increased likelihood of minority-owned firms having venture capital as a source of start-up financing is true for all except Asian-owned, African American-owned, and Native American owned firms. Relative to nonminority-owned businesses, Native American-owned firms are less likely to have venture capital as a source of start-up financing.

Table 9: Heteroscedastic Probit Parameter Estimates: Minority-Owned Business Status and Venture Capital Start-up Financing in the Ohio Private Sector

	Coefficient	Standard Error	t-Value
Regressand: Start-up Financed by Ventured Capital (Binary)			
Regressors:			
Constant	-2.01	.022	91.36 [a]
Minority-owned Business	.203	.037	5.49 [a]
Number of Observations	22641		
χ^2_k	29.98 [a]		

Griffin & Strong, P.C. 2015

Notes:

[a] Significant at the .01 level

Table 10: Heteroscedastic Probit Parameter Estimates: Minority-Owned Business Status and Venture Capital Start-up Financing in the Ohio Private Sector

	Coefficient	Standard Error	t-Value
Regressand: Start-up Financed by Venture Capital (Binary)			
Regressors:			
Constant	-2.01	.022	91.36 [a]
Asian American-Owned Business	.109	.096	1.13
Woman owned Business	.128	.041	3.12 [a]
Hispanic American-Owned Business	.137	.074	1.85 [c]
African American-Owned Business	.189	.175	1.08
Native American-Owned Business	-3.03	.067	45.22 [a]
Number of Observations	22641		
χ^2_k	2130.02 [a]		

Griffin & Strong, P.C. 2015

Notes:

[a] Significant at the .01 level

[c] Significant at the .10 level

6. Minority-owned Firm Status and Bank Loan Business Expansion Financing

Tables 11 - 12 report parameter estimates of the effects of minority-owned firm status and bank loan business expansion financing in the Ohio private sector. For the specifications in Tables 11 - 12, the dependent binary variable is whether or not the business financed its expansion with a bank loan. The statistically significant and negative sign on the aggregate minority-owned firm status indicator for the parameter estimates in Table 11 suggest that in general, relative to nonminority-owned firms minority-owned firms are less likely to finance the expansion of their business with a bank loan. The parameter estimates reported in Table 12 suggest that the reduced relative likelihood of minority-owned firms having bank loans as a source of financing the expansion of their business is similar for all minority-owned businesses under consideration except for firms owned by Asians, Disabled Veterans and African Americans, as the indicator coefficient for is negative but insignificant in these instances.

Table 11: Heteroscedastic Probit Parameter Estimates: Minority-Owned Business Status and Bank Loan Expansion in the Ohio Private Sector

	Coefficient	Standard Error	t-Value
Regressand: Expansion Financed by Bank Loan (Binary)			
Regressors:			
Constant	-1.53	.023	66.52 [a]
Minority-owned Business	-.336	.035	9.60 [a]
Number of Observations	22641		
χ^2_k	91.76 [a]		

Griffin & Strong, P.C. 2015

Notes:

[a] Significant at the .01 level

Table 12: Heteroscedastic Probit Parameter Estimates: Minority-Owned Business Status and Bank Loan Expansion Financing in the Ohio Private Sector

	Coefficient	Standard Error	t-Value
Regressand: Expansion Financed by Bank Loan (Binary)			
Regressors:			
Constant	-1.53	.023	66.52 [a]
Asian American-Owned Business	-.047	.086	.546
Woman owned Business	-.347	.039	8.89 [a]
Hispanic American-Owned Business	-.311	.078	3.99 [a]
African American-Owned Business	-.143	.200	.715
Native American-Owned Business	-4.80	.370	12.97 [a]
Number of Observations	22641		
χ^2_k	337.44 [a]		

Griffin & Strong, P.C. 2015

Notes:

[a] Significant at the .01 level

7. Minority-owned Firm Status and Government Guaranteed Bank Loan Business Expansion Financing

Tables 13 - 14 report parameter estimates of the effects of minority-owned firm status and government guaranteed bank loan business expansion financing in the Ohio private sector. For the specifications in Tables 13 - 14, the dependent binary variable was whether or not the business financed its expansion with a government guaranteed bank loan. The statistically significant and negative sign on the aggregate minority-owned firm status indicator for the parameter estimates in Table 13 suggest that in general, relative to nonminority-owned firms, minority-owned firms are less likely to finance the expansion of their business with a government guaranteed bank loan. The parameter estimates reported in Table 14 suggest that relative to nonminority-owned firms, those owned by women and Native Americans have a reduced likelihood of financing the expansion of their business with a government guaranteed bank loan.

Table 13: Heteroscedastic Probit Parameter Estimates: Minority-Owned Business Status and Government Guaranteed Bank Loan Expansion in the Ohio Private Sector

	Coefficient	Standard Error	t-Value
Regressand: Expansion Financed by Government			
Guaranteed Bank Loan (Binary)			
Regressors:			
Constant	-2.31	.063	36.67[a]
Minority-owned Business	-.196	.063	3.11[a]
Number of Observations	22641		
χ^2_k	9.67[a]		

Griffin & Strong, P.C. 2015

Notes:

[a] Significant at the .01 level

Table 14: Heteroscedastic Probit Parameter Estimates: Minority-Owned Business Status and Government Guaranteed Bank Loan Expansion Financing in the Ohio Private Sector

	Coefficient	Standard Error	t-Value
Regressand: Expansion Financed by Government			
Guaranteed Bank Loan (Binary)			
Regressors:			
Constant	-2.31	.029	79.65 [a]
Asian American-Owned Business	-.024	.153	.157
Woman owned Business	-.205	.071	2.89 [b]
Hispanic American-Owned Business	-.171	.146	1.17
African American-Owned Business	-.109	.357	.305
Native American-Owned Business	-2.88	.063	45.71 [a]
Number of Observations	22641		
χ^2_k	2065.93 [a]		

Griffin & Strong, P.C. 2015

Notes:

[a] Significant at the .01 level

[b] Significant at the .05 level

8. Minority-owned Firm Status and Home Equity Loan Business Expansion Financing

Tables 15 - 16 report parameter estimates of the effects of minority-owned firm status and home equity loan business expansion financing in the Ohio private sector. For the specifications in Tables 15 - 16, the dependent binary variable is whether or not the business financed its expansion with a home equity loan. The statistically significant and negative sign on the aggregate minority-owned firm status indicator for the parameter estimates in Table 15 suggest that in general, relative to nonminority-owned firms minority-owned firms are less likely to finance the expansion of their business with a home equity loan. The parameter estimates reported in Table 16 suggests that the reduced likelihood of minority-owned firms utilizing home equity loans as a source of financing the expansion of their businesses is driven by the relative lower likelihood of firms owned by women, Disabled Veterans, and Hispanics.

Table 15: Heteroscedastic Probit Parameter Estimates: Minority-Owned Business Status and Home Equity Loan Financing in the Ohio Private

	Coefficient	Standard Error	t-Value
Regressand: Expansion Financed by Home Equity Loan (Binary)			
Regressors:			
Constant	-1.59	.016	99.37[a]
Minority-owned Business	-.250	.034	7.35[a]
Number of Observations	22641		
χ^2_k	53.42[a]		

Griffin & Strong, P.C. 2015

Notes:

[a] Significant at the .01 level

Table 16: Heteroscedastic Probit Parameter Estimates: Minority-Owned Business Status and Home Equity Loan Expansion Financing in the Ohio Private Sector

	Coefficient	Standard Error	t-Value
Regressand: Expansion Financed by Home Equity			
Loan (Binary)			
Regressors:			
Constant	-1.59	.016	99.37 [a]
Asian American-Owned Business	-.055	.086	.639
Woman owned Business	-.239	.038	6.29 [a]
Hispanic American-Owned Business	-.241	.079	3.05 [a]
African American-Owned Business	.178	.158	1.13
Native American-Owned Business	.959	.396	2.42 [b]
Number of Observations	22641		
χ^2_k	58.83 [a]		

Griffin & Strong, P.C. 2015

Notes:

[a] Significant at the .01 level

[b] Significant at the .05 level

9. Minority-owned Firm Status and Venture Capital Business Expansion Financing

Last but not least, Tables 17 - 18 report parameter estimates of the effects of minority-owned firm status and venture capital business expansion financing in the Ohio private sector. For the specifications in Tables 17 - 18, the dependent binary variable is whether or not the business financed its expansion with venture capital. The statistically significant and negative sign on the aggregate minority-owned firm status indicator for the parameter estimates in Table 17 suggest that in general, relative to nonminority- owned firms minority-owned firms are less likely to finance the expansion of their business with venture capital. The parameter estimates reported in Table 18 suggest that the reduced likelihood of minority-owned firms utilizing venture capital as a source of financing the expansion of their businesses is true for all minority-owned firms except for firms owned by Disabled Veterans, for which the estimated coefficient is positive but statistically insignificant.

Table 17: Heteroscedastic Probit Parameter Estimates: Minority-Owned Business Status and Venture Capital Expansion Financing in the Ohio Private Sector

	Coefficient	Standard Error	t-Value
Regressand: Expansion Financed by Venture Capital			
(Binary)			
Regressors:			
Constant	-2.63	.041	64.15[a]
Minority-owned Business	-.490	.128	3.83[a]
Number of Observations	226414		
χ^2_k	14.69[a]		

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Notes:

[a] Significant at the .01 level

Table 18: Heteroscedastic Probit Parameter Estimates: Minority-Owned Business Status and Venture Capital Expansion Financing in the Ohio Private Sector

	Coefficient	Standard Error	t-Value
Regressand: Expansion Financed by Venture Capital			
(Binary)			
Regressors:			
Constant	-2.63	.041	64.15[a]
Asian American-Owned Business	-3.26	.336	9.70[a]
Woman owned Business	-.494	.154	3.21[a]
Hispanic American-Owned Business	--3.12	.042	74.29[a]
African American-Owned Business	-3.15	.181	17.40[a]
Native American-Owned Business	-3.12	.069	45.22[a]
Number of Observations	22641		
χ^2_k	6165.14[a]		

Griffin & Strong, P.C. 2015

Notes:

[a] Significant at the .01 level

10. Implications for the Existence of Discrimination Against Minority-owned Firms in the Ohio Private Sector

GSPC's private sector analysis of minority-owned businesses in the State of Ohio is motivated by the idea that if business firm access to private equity, loans and venture capital is conditioned on minority ownership status, this would be suggestive of, and consistent with discrimination against minority-owned businesses in the private sector. Discrimination against minority-owned businesses in private sector markets for business financing would result in those businesses having a reduced likelihood, relative to nonminority-owned businesses, of receiving start-up and expansion financing from private sector sources. GSPC's analysis finds that relative to nonminority-owned businesses, minority-owned businesses in the State of Ohio are less likely to have utilized bank loans, home equity and venture capital to finance business start-up and expansion.

The parameter estimates reported in Tables 1 - 18 reveal that the probability and likelihood of minority-owned businesses utilizing start-up and expansion finance capital from the private sector in Ohio is smaller relative to white business owners, as being a minority-owned firm in general reduced the likelihood relative to nonminority-owned firms of receiving financing in 7 of the 9 types of start-up or expansion financing considered. Such relative probabilities and likelihoods are consistent with discriminatory behavior by private lenders against minority-owned businesses in the Ohio private sector which constrains their ability to enter the market, and once in the market, to expand their capabilities. Even when minority status is disaggregated into relevant race/gender/ethnicity/disability status (e.g. Asian, woman, Disabled Veteran, Hispanic, Black, Native American) for each type of financing considered, the results reported in Tables 1 – 18 still show that a majority of the specific minority groups have relative lower likelihood of receiving particular types of start-up and expansion capital relative to nonminority-owned firms.

These findings, while consistent with private sector discrimination against minority-owned firms in Ohio, are not necessarily proof of actual private sector discrimination. While our

analysis considers minority-group based disparities in accessing and using a certain type of business financing, a shortcoming of using disparity in group outcomes to infer discrimination is that statistical/econometric specifications based on disparate group outcomes could omit variables that are unobserved, but important to the group outcomes under consideration.[145] For example, our analysis does not control for a business firm's and/or its principle owners credit history, which is not included in the SPUMS. As such, our parameter estimate could be biased if relative to nonminority-owned firms, minority-owned firms have inferior credit histories, resulting in them being less likely to secure financing from the private sector because they are riskier, and not because they are minority-owned. However, we are confident that our parameter estimates identify the conditional effect of minority status on receiving financing as they are based on an estimator that controls for the heteroscedasticity associated with omitted variables that may also condition the outcome under consideration. Indeed, our heteroscedastic probit estimator controls for unobserved heterogeneity in the form of omitted variables and selection into the SPUMS sample associated with business firm size as measured by sales revenue. That the sign and significance on the minority-owned firm indicators in our parameter estimates correspond to what they would if business financing suppliers discriminated against minority-owned businesses, suggest that our parameter estimates identify the effects of private sector discrimination against minority-owned firms in the private sector of Ohio.

11. Regression Analysis of Public Contracting and Subcontracting Disparities In Cuyahoga County

In this section GSPC considers the relative, public contracting and subcontracting outcomes of business firms owned by nonwhites in the relevant market area for the County. Our analysis utilizes data from business firms that are either willing, able, or have actually contracted/subcontracted with the County, with the aim of determining if the statistical likelihood of successful contracting/subcontracting is conditioned in a statistically significant manner on the race, ethnicity, gender and disability status of business owners. Such an analysis is a useful and important complement to estimating disparity indexes, which assume all things important for success and failure are equal among business firms competing for public contracts, and are based

[145] Pager, Devah, and Hana Shepard. "The sociology of discrimination: Racial discrimination in employment, housing, credit, and consumer markets." *Annual review of sociology* 34 (2008): 181 - 209

on unconditional moments—statistics that do not necessarily inform causality or the source of differences across such statistics. As disparity indexes do not condition on possible confounders of self-employment, and success and failure in public sector contracting/subcontracting by business firms, they are only suggestive of disparate treatment, and their implied likelihood of success/failure could be biased.

Our analysis posits that there are indeed confounders of success and failure in public sector contracting/subcontracting that are sources of heterogeneity among business firms that lead to heterogeneity in success and failure. Failure to condition on sources of heterogeneity in success/failure in public sector contracting/subcontracting can leave simple disparity indexes devoid of substantive policy implications as they could possibly reflect in part or in whole disparate outcomes driven by disparate business firm characteristics that matter fundamentally for success/failure in pubic sector contracting/subcontracting by nonwhite firms. Controlling for confounders that are presumably independent of the race, ethnicity, gender, and disability status of business firm owners, and important for differences in the success/failure rate of business firms competing for public sector contracts/subcontract, if race, ethnicity, gender, or disability status conditions a lower likelihood of success/failure, this would be suggestive of such status causing observed disparities.

Our analysis is based on survey data compiled by GSPC, and constitutes a two-stage cluster sample of firms from the bidder and vendor lists provided by the County. Clusters were constructed on the basis of assigned categories for a business enterprise's primary line of business. The GSPC survey categorized five primary lines of business: Building Construction, Special Trade Contractor, Professional Services, General/Personal Services, and Supplies and Equipment. Given a cost-based constraint of a total sample of 500, a random sample from each cluster was selected, and the cluster share of total observations was used to approximate probability weights for the individual observations of businesses in the cluster.

The GSPC survey was a 103 item questionnaire, that captured data on firm and individual owner characteristics that approximates the content of the SPUMS on which we based our private

sector analysis in an earlier part of this report. The interest in this section is in the extent to which a business firm owner's race, ethnicity, gender and disability status conditions success/failure in the County public contracting and subcontracting opportunities. As such, our use of the data in the GSPC survey is limited to the measured covariates that in our view are best suited for evaluating the extent to which a business firms owner's race, ethnicity and disability status are a possible cause of public contracting disparities.

Table 1 reports a summary on the description, mean and standard deviation of the covariates from the GSPC survey that are relevant to the analysis of this section. The first three listed covariates measure the pubic contracting activities and outcomes of the business firms in the relevant market area for the County since July 2007. Their unconditional variation—given by the standard deviation—in the sample presumably reflects unconditional variation in each business firm's propensity to seek public contracting opportunities and success securing such opportunities. However, the other covariates also have unconditional variation and they measure business firm and owner characteristics that could be important for the observed variation and disparities in seeking and being successful in obtaining public contracting opportunities in the County.

VI. ANECDOTAL EVIDENCE

A. Introduction

The collection and analysis of anecdotal evidence is an aspect of the comprehensive approach Griffin & Strong, P.C. utilizes in conducting disparity studies in compliance with the U.S. Supreme Court's decision in Croson. In Croson, the Court held that, while they cannot stand alone, anecdotal accounts of discrimination may help to establish a compelling interest for a local government to pursue race- and gender-conscious remedies. Moreover, such evidence can provide a local governmental or quasi-governmental entity with a firm basis for fashioning a program that is narrowly tailored to remedy identified forms of marketplace discrimination and other barriers to disadvantaged, minority and women business participation in contract opportunities.

GSPC's methodology for collecting and analyzing qualitative data incorporates multiple methods of information-gathering through a combination of telephone surveys, focus groups, public hearings, and phone interviews, as well as e-mail comments. The evidence gathered through these methods of observation and interaction are used in conjunction with the statistical and econometric research to provide clarity as to the particular causes of any discrimination or disparities found. GSPC's engagement with business owners in the County area was both public and individual, and included:

1. Telephone Survey of Business Owners
2. Anecdotal Interviews
3. Public Hearings
4. Focus Groups

GSPC's anecdotal analysis is intended to "reach behind" the numbers, to enable the firm to draw inferences from the statistical data as to the prevalence and type of obstacles faced by minority, woman-owned, and small businesses in the County's procurements. The focus of the engagement with businesses in the Relevant Market area has been to identify respondents' experiences in conducting business with the County. GSPC solicited participation and responses from community members, and businesses that have done, or attempted to do business with the

County. The personal interview guide used in interviewing businesses included questions designed to establish a business profile for each business. Interviewers gathered information concerning the primary line of business, gender and ethnicity of owner, organizational status, number of employees, year business established, gross revenues, and level of education.

The public hearings drew business owners to speak on the record about their experiences, each taking the floor to address GSPC as well as the members of the County Commission and administration in attendance, and the wider public. Similarly, the focus groups allowed firm owners to discuss their experiences, but also created a collegial and enclosed environment wherein they felt comfortable to dialogue with one another. As will be shown below, the combination of these three methods of collecting the stories, experiences, and histories of business owners in the County area as well as the telephone survey data available for review, create a well-rounded picture of the perception of the County by the business owners whom it serves.

B. Telephone Survey of Business Owners

In May and June of 2014 Oppenheim Research[146] conducted a telephone survey of business owners from the Cuyahoga County, OH Business community. GSPC provided the questions for the survey, and a random stratified list of vendors. The list was taken from the data file provided to GSPC by EuQuant and stratified by the major work categories. The survey resulted in 306 completed surveys.

The telephone survey consisted of 81 substantive questions which asked for various financial and demographic data. Foundational question were first asked and based upon those responses, respondents were led to more detailed questions related to the subject matter. Although, there was no anonymity promised to respondents, only the firm name was documented and the initials given by the person responding to the questionnaire. A sample of the telephone survey is attached as Appendix B.

[146] Oppenheim Research is a woman owned firm that specializes in telephone surveys and has extensive experience in conducting them as part of a disparity study.

C. Findings by Cross-Tabulations

The distribution of firm ownership tabulated from the survey is as follows with the actual cross tabulations from the survey attached as Appendix C:

- Caucasian: 76% (234)
- Black American: 14.7% (45)
- Asian/Pacific Islander: 2.0% (6)
- Hispanic American: 2.3% (7)
- Subcontinent Asian: 1.3% (3)
- Native American 0% (0)
- No Response: 1.0% (3)
- Other: 2.3% (7)

The distribution of firm ownership based upon gender[147] is:

- Male: 65% (199)
- Woman: 33% (101)
- No Response: 2% (6)

The distribution based on response to the question, "Which one of the following is your company's primary line of business?" is as follows:

- Professional Services (General Contractor): 32% (98)
- Construction: 18.3% (56)
- Goods and Services: 23.9% (73)
- Supplier: 25.8% (79)
-

Firms answered various questions concerning the race/ethnicity/gender backgrounds of the owners, owner educational level, and firm financial histories. These questions allow a more nuanced perspective on the survey respondents. The majority of respondents in all race and

[147] Response to telephone survey question which asked, "Is more than 50 percent of your company owned and controlled by a woman or women?"

gender categories either had attended college, were college graduates, or held post graduate degrees, with all Asian Americans and Hispanic Americans falling into these categories and 83% and 86% of Caucasians and Black Americans at this level, respectively (Table 14, Appendix C). 88% of woman owned firms had completed some college, were college graduates, or had obtained a post graduate degree. 22.4% of the 67 woman owned businesses surveyed that reported being certified were also certified as Minority Business Enterprises by a government entity (Table 36.1, Appendix C). Below, we arrange the anecdotal data in contingency tables specifying relationships between row and column variables, and test via Chi-square whether the levels of the row variable are differentially distributed over levels of the column variables. A significant Chi-square test statistic means that any differences in cell frequencies—which measure the race and gender characteristics of anecdotal survey respondents, cannot be explained by chance alone, or are statistically significant.

When asked for information on their firms' gross revenues for the calendar year 2012, Black and Subcontinent Asian American-owned firms had the highest percentages in the "$50,000 or less" category, with a quarter of firms in each group. Caucasian-owned firms' highest percentages were in the $1,000,001-$3,000,000" category, with 20% of their total respondents falling into this group. Woman owned firms had their highest percentage in the $50,000 or less range with 43% of all woman respondents (Table 17, Appendix C).

When asked if their firm had experienced discriminatory behavior from the County at any point since 2009, the vast majority of respondents answered that they had not. In fact, only 7% of Caucasian-owned firms, 13% of Black American-owned firms, 14.3% of Hispanic American-owned firms and no Asian American-owned firm respondents answered in the affirmative (Table 53, Appendix C). However, of those who experienced discrimination from the County, 53.8% stated that it was in the form of action taken against the company by the County rather than in the form of verbal or written statements (Table 56, Appendix C). Only 10% of woman owned firms responded that they had experienced discrimination from the County and 50% of those that responded in the affirmative said that the discrimination was in the form of action taken by the County against their firm (Table 53, Appendix C).

Table 19 below addresses the number of times survey respondents had been denied a commercial bank loan during the Study Period, 78.1% of Caucasian-owned firm respondents answered that they had never been denied, whereas 84% of Black American-owned firm respondents had been denied between 1 and 10 times. 75% of Hispanic American-owned firms had never been denied and no Asian American-owned firm respondents had ever been denied. 66% of woman owned firms reported having never been denied a commercial bank loan.

Table 19 : How many times have you been denied a commercial (business) bank loan between 2009 and 2012?

			Which of the following categories would you consider to be the race or ethnic origin of the owner or controlling party? Would you say:							
	Total	Women	Caucasian	Black American	Asian Pacific	Hispanic American	Native American	Sub-continent Asian	No Response	Other
Un-weighted Base	306	101	234	45	6	7	0	4	3	7
None (Never Denied)	59 65.6%	16 61.5%	50 78.1%	3 15.8%	2 100.0%	3 75.0%	0 0.0%	0 0.0%	0 0.0%	1 100.0%
1-10	26 28.9%	9 34.9%	10 15.6%	16 84.2%	0 0.0%	0 0.0%	0 0.0%	0 0.0%	0 0.0%	0 0.0%
DK/NA	5 5.6%	5 5.6%	4 6.3%	0 0.0%	0 0.0%	1 25.0%	0 0.0%	0 0.0%	0 0.0%	0 0.0%
No Response	216	75	170	26	4	3	0	4	3	6

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In response to the statement that some nonminority prime contractors change their bidding procedures when they are not required to hire minority and woman owned businesses as sub-contractors, only a quarter of Caucasian-owned firm respondents agreed or strongly agreed,

whereas 47% of Black American-owned firms, 50% of Subcontinent Asian American-owned firms and 43% of Hispanic American-owned firms either agreed or strongly agreed with that statement (Table 20 below and Table 52, Appendix C). 28% of woman owned firms across all race and ethnic categories agreed or strongly agreed with this statement. The Chi-square test statistic was significant, suggesting that the responses are statistically significant and different across the race and gender classifications.

Table 20: Please indicate your agreement or disagreement with the following statement: "Some nonminority prime contractors change their bidding procedures when they are not required to hire minority and woman owned businesses as subcontractors".

			Which of the following categories would you consider to be the race or ethnic origin of the owner or controlling party? Would you say:							
	Total	Women	Caucasian	Black American	Asian Pacific	Hispanic American	Native American	Sub-continent Asian	No Response	Other
Un-weighted Base	306	101	234	45	6	7	0	4	3	7
Strongly Agree	33	12	21	8	0	2	0	1	0	1
	10.8%	11.9%	9.0%	17.8%	0.0%	28.6%	0.0%	25.0%	0.0%	14.3%
Agree	60	18	41	13	1	1	0	1	1	2
	19.6%	17.8%	17.5%	28.9%	16.7%	14.3%	0.0%	25.0%	33.3%	28.6%
Neither Agree or Disagree	108	36	87	13	3	2	0	0	1	2
	35.3%	35.6%	37.2%	28.9%	50.0%	28.6%	0.0%	0.0%	33.3%	28.6%
Disagree	52	13	41	4	2	1	0	2	1	1
	17.0%	12.9%	17.5%	8.9%	33.3%	14.3%	0.0%	50.0%	33.3%	14.3%
Strongly Disagree	7	2	6	1	0	0	0	0	0	0
	2.3%	2.0%	2.6%	2.2%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
DK	46	20	38	6	0	1	0	0	0	1
	15.0%	19.8%	16.2%	13.3%	0.0%	14.3%	0.0%	0.0%	0.0%	14.3%

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When asked if they believed that there is an informal network of prime and subcontractors in the County, nearly 20% of Caucasian respondents strongly disagreed, compared to 42% of Black American and 57% of Hispanic American respondents. As can be seen in the table below, another 20% of Caucasian respondents "agreed" with the statement, but not strongly, accompanied by another 20% of Black American respondents (Table 21 below and Table 72, Appendix C). Overall, only 10% of Caucasian respondents who agreed or strongly agreed with this statement agreed that exclusion from this network has kept them from bidding or has interfered with their ability to contract in the public or private sector. 44% of Black American respondents believed that this network had been detrimental to their firms, either agreeing or strongly agreeing with the statement, and 57% of Hispanic American-owned firms felt the same. 44% of woman owned firms across all racial and ethnic categories agreed or strongly agreed that there is an informal network and, while another 22% neither agreed nor disagreed, only 4% strongly disagreed with that statement. (Table 73, Appendix C), The Chi-square test statistic was significant, suggesting that the responses are statistically significant and different across the race and gender classifications.

Table 21: Please indicate your level of agreement or disagreement, on a scale of 1 to 5, where 1 is Strongly Agree and 5 is Strongly Disagree.
There is an informal network of prime and sub-contractors in Cuyahoga County.

			Which of the following categories would you consider to be the race or ethnic origin of the owner or controlling party? Would you say:							
	Total	Women	Caucasian	Black American	Asian Pacific	Hispanic American	Native American	Subcontinent Asian	No Response	Other
Unweighted Base	306	101	234	45	6	7	0	4	3	7
Strongly Agree	71	27	46	19	0	4	0	1	0	1
	23.2%	26.7%	19.7%	42.2%	0.0%	57.1%	0.0%	25.0%	0.0%	14.3%
Agree	63	17	50	9	0	0	0	0	1	3
	20.6%	16.8%	21.4%	20.0%	0.0%	0.0%	0.0%	0.0%	33.3%	42.9%
Neither	78	22	59	12	3	1	0	1	1	1
	25.5%	21.8%	25.2%	26.7%	50.0%	14.3%	0.0%	25.0%	33.3%	14.3%
Disagree	41	17	34	1	2	1	0	0	1	2
	13.4%	16.8%	14.5%	2.2%	33.3%	14.3%	0.0%	0.0%	33.3%	28.6%
Strongly Disagree	17	4	15	0	1	0	0	1	0	0
	5.6%	4.0%	6.4%	0.0%	16.7%	0.0%	0.0%	25.0%	0.0%	0.0%
DK	36	14	30	4	0	1	0	1	0	0
	11.8%	13.9%	12.8%	8.9%	0.0%	14.3%	0.0%	25.0%	0.0%	0.0%

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66% of Black Americans and 42% of Hispanic Americans agreed or strongly agreed that double standards in qualification and performance make it more difficult for minority and/or woman owned, businesses to win bids or contracts, while only 16% of Caucasians agreed or strongly agreed with that statement. 37% of woman owned firms across all ethnicities agreed or strongly agreed that there are double standards in qualification and performance (Table 75, Appendix C). Of Black Americans, 26.7% and 24.4% of respondents strongly agreed or agreed, respectively, with the statement that a prime contractor will sometimes include minority or woman owned businesses to meet a "good faith effort" requirement and then drop them once they win the award. 43% of Hispanic Americans strongly agreed with that statement and 50% of Asian Pacific Americans agreed or strongly agreed. This is compared to the 24% of Caucasian respondents who either agreed or strongly agreed with this statement. 30% of woman owned firms agreed or strongly agreed that primes will occasionally use an MWBE subcontractor to meet the good faith effort requirement and then drop them after winning the award (Table 76, Appendix C). As shown in the table below, 20% of woman owned businesses, 17% of Caucasians, 18% of African Americans, and 29% of Hispanic Americans believe that there is favoritism or disparate treatment in the certification process (Table 22 below and Table 39, Appendix C). The Chi-square test statistic was significant, suggesting that the responses are statistically significant and different across the race and gender classifications.

Table 22: Do you believe that there is favoritism or disparate treatment in the certification process?

	Total		Which of the following categories would you consider to be the race or ethnic origin of the owner or controlling party? Would you say:							
		Women	Caucasian	Black American	Asian Pacific	Hispanic American	Native American	Sub-continent Asian	No Resp-onse	Other
Un-weighted Base	306	101	234	45	6	7	0	4	3	7
Yes	51 16.7%	19 19.0%	39 16.7%	8 17.8%	0 0.0%	2 28.6%	0 0.0%	1 25.0%	0 0.0%	1 14.3%
No	194 63.6%	65 65.0%	144 61.8%	33 73.3%	6 100.0%	3 42.9%	0 0.0%	3 75.0%	2 66.7%	3 42.9%
DK	60 19.7%	16 16.0%	50 21.5%	4 8.9%	0 0.0%	2 28.6%	0 0.0%	0 0.0%	1 33.3%	3 42.9%
No Response	1	1	1	0	0	0	0	0	0	0

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Over 50% of Caucasians and African Americans had worked as a prime with the private sector. 83% of Asian Americans and 28% of Hispanic Americans did the same. Over 75% of Asian Pacific Americans and Subcontinent Asians worked as primes in the private sector (Table 401, Appendix C). However, only 33% of Caucasians and 18% of African American-owned firms worked as primes with the County. Only 14% of Asian-Pacific Americans worked as primes with the County and 25% of Hispanic American respondents (Table 22.1, Appendix C). The percentage difference in participation as primes public sector work for the County versus private sector work was most significant for Asian-Pacific Americans, African Americans, and Caucasians. The Chi-square test statistic was significant, suggesting that the responses are statistically significant and different across the race and gender classifications.

Tables 34.1 to 34.15 in Appendix C ask respondents to determine factors that "may prevent companies from bidding or obtaining work on a project" for the County. Pre-qualification requirements were considered an issue for 22% of African Americans and 29% of Hispanic Americans and 42% of those identifying as "other," whereas only 12% of Caucasians and 14% of woman owned firms believed the same. Performance bond requirements and bid bond requirements had similar percentages for each race and gender group, however the number of Caucasian business owners who viewed bid bonds to be a problem spiked to 15% from 11-12% in the previous categories (Table 34.3 and 34.4, Appendix C). Insurance requirements were seen as an issue primarily by Hispanic Americans with 29%, but only 7% for Caucasian and woman firm owners and 13% of Black Americans, and no percentage in every other category (Table 34.5, Appendix C).

Bid Specifications saw an increase in response in many race/ethnic/gender categories though, notably, no Hispanic American-owned firm agreed that this would be a barrier to working on projects. 24% of woman- owned firms and 27% of African American respondents, however, believed that they were (Table 34.6, Appendix C). The time given to prepare a bid package or quote was seen as a bigger issue amongst African-American business owners at 47%, whereas every other group responded affirmatively in the teens (Table 34.7, Appendix C). Limited knowledge of purchasing practices, policies, and procedures was, again, a bigger issue for African American respondents at 36%, however 16% of Caucasians and Asian Pacific Americans believed the same, along with 18% of woman owned firms (Table 34.8, Appendix C). "Lack of Experience" as a barrier to obtaining work received the lowest percentages, with Caucasian and woman owned firms around 10% and African Americans at 20%. Hispanic Americans and Asian Pacific Americans rated 14% and 17% respectively (Table 34.9, Appendix C). Lack of personnel as a barrier saw similar numbers from African Americans, Caucasians, and woman owned firms as lack of experience, however Hispanic Americans and Asian Americans did not believe at all, or did not know, if lack of personnel was a barrier (Table 34.10, Appendix C). The Chi-square test statistic was significant, suggesting that the responses are statistically significant and different across the race and gender classifications.

In terms of contract size and cost, African Americans responded at 37% and 40% respectively that both were barrier, whereas 14% of Hispanic American firms viewed size as a problem compared to 29% that had an issue with cost. Woman owned firms were on par with both issues at 19% and Caucasians viewed size and cost as barriers at 13% and 15% respectively (Tables 34.11 and 34.12, Appendix C). The selection process was considered a barrier for 43% of Hispanic Americans and 31% of African Americans, as well as over 20% of woman owned businesses (Table 34.14, Appendix C). Competing with large companies was a barrier for 57% of Hispanic and African American-owned business, as well as 33% of Asian Americans, 22% of Caucasians, and 34% of woman owned businesses. The Chi-square test statistic was significant, suggesting that the responses are statistically significant and different across the race and gender classifications. The Chi-square test statistic was significant, suggesting that the responses are statistically significant and different across the race and gender classifications.

When asked if they believe that some nonminority male prime contractors change their bidding procedures when they are not required to hire minority and/or woman owned businesses, 32% of Caucasian respondents neither agreed nor disagreed and 22% either disagreed or strongly disagreed, compared to the nearly 60% of Black American-owned business respondents who either agreed or strongly agreed with that statement, the 50% of Subcontinent Asian Americans and the 43% of Hispanic American-owned businesses who strongly agreed, and the 33% of Asian Pacific American-owned businesses that agreed. 37% of woman owned firms across all race and ethnic categories (Table 23 below and Table 78, Appendix C). The Chi-square test statistic was significant, suggesting that the responses are statistically significant and different across the race and gender classifications.

Table 23: Some nonminority (male) prime contractors change their bidding procedures when they are not required to hire minority and/or woman owned businesses.

			Which of the following categories would you consider to be the race or ethnic origin of the owner or controlling party? Would you say:							
	Total	Women	Caucasian	Black American	Asian Pacific	Hispanic American	Native American	Sub-continent Asian	No Response	Other
Un-weighted Base	306	101	234	45	6	7	0	4	3	7
Strongly Agree	43 14.1%	14 13.9%	25 10.7%	13 28.9%	0 0.0%	3 42.9%	0 0.0%	2 50.0%	0 0.0%	0 0.0%
Agree	73 23.9%	23 22.8%	52 22.2%	13 28.9%	2 33.3%	0 0.0%	0 0.0%	0 0.0%	1 33.3%	5 71.4%
Neither	91 29.7%	31	76 32.5%	7 15.6%	4 66.7%	2 28.6%	0 0.0%	0 0.0%	0 0.0%	2 28.6%
Disagree	45 14.7%	30.7%	40 17.1%	3 6.7%	0 0.0%	1 14.3%	0 0.0%	1 25.0%	0 0.0%	0 0.0%
Strongly Disagree	14 4.6%	14 13.9%	12 5.1%	1 2.2%	0 0.0%	0 0.0%	0 0.0%	1 25.0%	0 0.0%	0 0.0%
DK	40 13.1%	16 15.8%	29 12.4%	8 17.8%	0 0.0%	1 14.3%	0 0.0%	0 0.0%	2 66.7%	0 0.0%

Griffin & Strong, P.C. 2015

The survey also found that over 60% of Black American and Hispanic American business owner-respondents believed that, in general, minority and woman owned businesses are viewed as less competent than nonminority male-owned firms, and only about 25% of Caucasian respondents believed the same. 42% of the 101 woman owned firms surveyed across all racial and ethnic categories agreed or strongly agreed with this statement (Table 77, Appendix C). The

Chi-square test statistic was significant, suggesting that the responses are statistically significant and different across the race and gender classifications.

While Black American and Hispanic American-owned firms tended to believe strongly that discrimination occurred within the County and the private sector, the majority of Caucasian respondents were either less sure or did not agree. Asian Americans (split by the survey into Asian Pacific and Subcontinent Asian) had lower numbers overall in agreement with statements regarding discrimination and informal networks. It is clear from questions regarding private sector work and loan denial rates, however, that Black and Hispanic American business owners are having a harder time in both the private and public marketplace and their perceptions of discrimination in both sectors cannot be discounted.

D. Public Hearings

Three (3) public hearings were held in the County as a part of this study. The first was conducted at Memorial-Nottingham Library, centrally located in the County, on June 18, 2014 at 6pm. Three (3) business owners attended and gave testimony to the members of the County Commission and GSPC's team that were present. The second focus group, located in the Bay Village Library in Bay Village, Ohio, on June 19, 2014, also at 6pm was unattended. There was low turnout for both hearings, although an e-mail blast was sent to 2,849 firms in the area inviting their participation and both hearings were[148] advertised on Griffin & Strong, P.C.'s various social media platforms. It was therefore determined by the study team at Cuyahoga County and GSPC that it would serve the study well to conduct one more public hearing to give the public another chance to participate.

On this occasion, September 15, 2014, in the County Council Chambers, after another e-mail blast was sent, meetings with various community organizations by both GSPC's CEO and

[148] Of those 2,849 firms, 11 unsubscribed to GSPC's e-mails on this study and 1,379 opened the e-mail. The e-mail contained information regarding both hearings. The e-mails sent regarding the focus groups also contained information on the hearings to be conducted on the same day.

County Commissioner Pernel Jones, and a press release issued from the Cuyahoga County Executive's Office, there were approximately thirty persons in attendance and 10 chose to speak on the record. The following will address the salient topics from both attended public hearings, conducted 3 months apart.

Testimony at the final public hearing indicated that majority-owned firms feel that there is an even playing field regardless of race; however, the contention that arose verbally both there and in one of the focus groups between majority firm owners and African American firm owners indicates a racial tension in the marketplace that cannot be ignored.

Each participant was invited by GSPC's Project Executive, Rodney K. Strong, to come to the podium or microphone and give testimony about their experiences contracting with the County, positive or negative, on the record. Each public hearing had a court reporter present and those transcripts are available upon request. The first business owner, Mr. Harvey, came forward to state that he was there as a result of an e-mail from GSPC and has been familiar with the work of the disparity study. He had participated in many public projects with the City of Cleveland, but took issue with the lack of participation on some County projects. He argued that as a result of minorities like himself "not being able to contract legitimately with the County," there is increased economic disparity in minority communities, as their firms would hire minorities as well. He states that because his is a non-union company, he could not participate in several projects. When prompted, he indicated that he thought that the County "should put in a specification that it is not a union job" so that other firms could "share in the economic pie in procuring these contractors, union or non-union".

One Mr. Witherspoon came forward to state that he worked in training, consulting, and promotional work and felt that the County had been "good" about outreach when it came to letting businesses know when there were opportunities to bid. However, he feels that primes should put subcontractors into a "bidding lottery" or have some mechanism for ensuring that different firms have a "chance to create a track record" because "awarding a portion to one sub doesn't open it up to enough people."

Mr. Hoyas, a representative from the Hispanic Contractors Association, noted that the recent Medical Mart project was a "prime example from a Hispanic perspective" of exclusion. He stated that, though they brought "30 Hispanic contractors to the table" and talked about engagement, "a lot of stuff went to the wayside" and there were "unkept promises and issues with the union." Mr. Hoyas stated that there are "major projects that are going on in this town" and named the building companies Kilbain, Turner, and Donnelly as among the prime contractors that fail to focus on "diversity and inclusion." Representatives of Turner Construction were present at the hearing and sent a statement afterward that they felt that the Hispanic American owned business participation on the project had been misrepresented. They provided GSPC with tables showing a breakdown of their workforce participation by race/ethnicity, (which was not relevant to this discussion); and another showing subcontractor dollars awarded to Hispanic firms in the County. It is outside the scope of this study for GSPC to investigate the claims of either Mr. Hoyas or Turner Construction. It should also be noted that Mr. Hoyas also expressed concerns about the lack of a Hispanic outreach consultant on GSPC's disparity study team.

Mr. Spain rose to speak as an official, appointed by the County, to the Metro Hospital Board. He stated that he was on an independent board that had been discussing procurement and disparity and found that the discussion involved contracts with small dollar amounts, whereas the focus should be on bonding issues and "meaningful" contracts. He suggested that the County "try to work smaller contractors in with larger contractors" and said that "we don't expect to get the business so we (minorities) don't even bid on a whole lot." He stated that once firms have developed a track record the can be placed with larger contractors so that they can move up. He also stated the opinion that past technical assistance programs were "much better" than current programs.

Two participants, a Mr. Adams and Mr. Butler, expressed concerns that Cleveland and Cuyahoga County are not as open as other cities. Mr. Adams, the owner of a marketing and public relations firm, stated that there is a "nativist culture" that only engages the "same players" and that the County should adopt new metrics for determining economic indicators of growth of businesses in the community and look at best practices in other cities, including the encouragement of "cross-cultural collaboration." Mr. Butler owns a sustainability consulting firm

in Cleveland and agreed with many of Mr. Adams' statements, stating that "part of the reason that there is a disparity is that there is a capacity issue" and "many minority businesses are lacking in various 20th century matters like cross-cultural competency." Mr. Butler expressed concerns about the literacy of adults in Cleveland and indicated that the issue is two-fold: the lack of an adequately educated populous and, upon education and business ownership, the assumption that minorities can only be subcontractors. He argues that in "other areas of the country" entities "aggregate companies as primes" rather than breaking down contracts for subcontractor involvement. He recommends increased joint-venturing of minority businesses in the County.

Mr. Novak, a representative of a certified SBE woman owned firm in Cleveland came forward to state that his firm has always found the County's process to be "fair and participation goals to be reasonable," that they require "diligence and hard work" to meet, but are "achievable." As a steel erector, his firm has worked as both a prime and as a subcontractor and involves other small and minority business contractors for other portions of the work they do as primes, such as trucking and shipping. Mr. Jordan came back to express his offense at Mr. Novak's statement and to clarify that he is only referring to minority businesses because "anyone can be SBE. "What's your record?" addressing Mr. Novak. He assured those present that "no MBE has erected steel at their (Mr. Novak's firm's) level, I guarantee you," and that "some of the disparities are caused by people who come to talk about what they've done for the County. Mr. Novak rebutted that, as a subcontractor, his firm has to hire union laborers and they have a "successful track record for onsite workforce compliance percentages," both minority and woman workers as well as local workers.

Mr. Fleming rose to speak on the record that his firm had actually bid on a portion of the work for the building in which the hearing was held. He stated that they were going through the process of preparing the bid and then were not contacted, though they contacted the prime on three different occasions. He suggested that the County needs better prime to subcontractor coordination to handle such issues.

Ms. Wilson, a social services provider who had spoken in forum at the previous public hearing came forward to discuss her role as a subcontractor with the "Tapestry" program through the County and her frustration with having waited for referrals that never came. She also gave

testimony that, prior to the meeting, she went to the County website for an RFP with an end date of September 24th that required trainings provided only on September 23rd and October 8th in Boston, MA. She went through the list of Ohio providers and found that only one agency had the training required to apply, which would mean that all other applicants unable to obtain the training would be deemed unresponsive. Ms. Wilson provided GSPC with these documents and her statements were verified. She stated that she is a qualified member of the community who provides much needed culturally adaptive parenting services but is continually excluded through the County's procurement practices.

Following Ms. Wilson, Ms. Jenkins, another county-based social services provider who, also, had previously spoken at the Memorial-Nottingham public hearing, rose to give her statement. She stated that she also went through the County's "Tapestry" program as a subcontractor and completed a rigorous process to ensure compliance and that they were assured work as a result of completion of the program. Because her firm is not funded by grants, County projects were very important to her, besides the fact that she wants to work in her own community. Though she was in good standing, larger agencies continued to receive all the referrals and the few families she was able to serve, she was not paid for her services for over six months and lost her office. She stated that her firm would only like the opportunity to grow but that the County has deemed them, through this program, as being "good professionals with good track records" and they "still use their friends."

E. Focus Groups

There is significant research on discursive models of gathering qualitative data and it is widely accepted that the gathering of a self-selected group of interested persons to interact, verbally and non-verbally, on a particular topic may bring a wealth of significant knowledge to the subject discussed. In describing the interactions of the focus group participants, it is important that the social interactional aspect of the analysis be incorporated. To this end, this section of the anecdotal chapter of the study will address body language, movement, positioning, non-verbal signals, and the byplay of interpersonal interaction that occurred. Each of the firm representatives present were there as a result of GSPC's e-mail campaign to garner participation, which was sent to the full list of e-mail addresses provided by the County and EuQuant.

1. FG1: Memorial-Nottingham Library, 12pm-4pm

The participants in the first focus group at Memorial-Nottingham Library in Cleveland, OH on June 18, 2014, trickled in to sit in a pre-arranged meeting room. The tables and chairs had been turned inward to face one another in a semi-circle, college seminar style. The business owners that participated were all from Cleveland and all residents of Cuyahoga County. Besides the two facilitators from GSPC's team, there were seven participants present. During GSPC's explanation of the purpose of the disparity study and its history, Councilmember Pernel Jones entered the meeting room. Mr. Jones greeted the participants, speaking about the process of securing the disparity study for the County. There were several concerns raised by the participants about the expansion of the local small business program to include firms physically located outside of the County, which Councilmember Jones promised to look into before exiting the focus group.

Then, GSPC's team invited each participant present to introduce themselves, beginning with the man on the facilitator's right in the circle. Participant FG-1-1, an owner of a small construction and renovation firm, recounted experiences with a major construction company with whom he had been in contact, but never heard back from. The participant stated that the City of Cleveland[149] continued to award that company projects, though they did not seem to be responding to minority-owned firms interested in becoming subcontractors.

FG-1-2 works in concrete and construction and heard the CEO of a major company say that he "didn't have to do anything" regarding the utilization of minority-owned firms, but that since the City of Cleveland is 60% minority, his firm would be interested in taking minority bids. The problem, according to this participant, is the difference between public and private dollars. "They can do what they want to do" FG-1-2 states. If the City of Cleveland asked how many minorities they worked with besides those they were contractually or goal-obligated to work with,

[149] GSPC will attempt, insofar as it is possible, to distinguish between the different entities addressed in these meetings and interviews. Many participants discussed issues with the City of Cleveland, Cuyahoga County, as well as other entities in the area including Sewer and Water.

"that will answer everybody's disparity study in the City, the County, and the Sewer district" (FG-1-2).

FG-1-3 teaches parenting and anger management, and states that they are credentialed as a social worker. This participant signed up on the County's website to receive RFPs, but has never filled one out. The reasons were forthcoming as the discussion progressed. FG-1-4 participates in real estate rehabilitation, both commercial and residential. This participant has been a contractor in Cleveland for eight years, "but I make no money here;" FG-1-4 states that the firm tends to contract in other cities. "If you do any work (in the City) you better go through those companies," referring to two major demolition companies and a large real estate company.

FG-1-5, a veteran County contractor, notes that, though the she has always had contract with the County, "It has its issues." Similarly, FG-1-6 used to do a lot of business with the County, but now without a program, "we haven't gotten anything." He states that, when people look at dollars spent, they look to construction and overlook what goes on the supply side. FG-1-7 does electrical and got a job at the Juvenile Justice Center for 1.5 million, which was their first job with the County. "We did a lot of work, and it started off right;" however, the company that was supposed to mentor them sent $8 million worth of "pass-through" with his company. "On paper you look good" FG-1-7 says, since they made promises to teach his firm how to effectively schedule a job from beginning to end and deal with hidden costs. Still, in the end, the "mentor" firm only gave his small business "3% of every dollar" of that 8 million.

This anecdote signaled a pause to the round of introductions, initiating a back-and-forth between the two, more established business owners, and this newcomer to the County. Though it was clear that all parties knew each other, had greeted one another genially with pats on the back and laughter, FG-1-7's story created a telling ripple through the room.

"Why'd you let them use your name?" FG-1-5 asked. "I sued the company that made a copy of my (certification) and they got kicked out for 5 years." FG-1-7 rebuts that "When you're

working for them (majority general/prime contractors), they have you in their grip because they have the ability to hurt you. If they take it away, you're back at zero. They know what you need and how to put enough money out there to keep you going, but you're not making what you should make, with the promise of more. At the end of the day, they racked up thousands of dollars of material in my name." At this, FG-1-5 shook her head, acknowledging the untenable situation the man was describing, and the introductions resumed.

FG-1-8 and FG-1-9, from a midsize office equipment supply firm, introduced themselves and stated that "We don't do that," in reference to the unethical practices FG-1-7 recounted in his anecdote. FG-1-5, already shaking her head negatively as they were speaking asked accusatorily, "Why are you here?" and, upon FG-1-8's response that they were there to "learn" about the procurement process, she turned to the facilitator and stated, bluntly, "They shouldn't be here." The marked tension in the room was broken by the chuckles of a couple of other minority business owners who appeared to agree. However, FG-1-2 stated that it was a good thing to "know the process" and "be educated" because some people "know the process but try not to abide by it." This interaction ceased when Councilmember Jones returned to the room. He addressed a couple of questions and exited again. At that point, the interaction resumed.

It should be noted that FG-1-8 and FG-1-9 were the only two Caucasians, and the only non-African-American participants in the room. The racial tensions in the business community in the greater Cleveland area were spoken aloud in this outburst. It should also be noted that many of the African-American business owners chose to stay well after the departure of FG-1-8 and FG-1-9 at 1pm, continuing the discussion on until 4pm, a full three hours of "internal" dialogue. FG-1-4 would later state that she did not feel that she could "speak freely" while the majority prime contractors were present and FG-1-7 would corroborate the sentiment, stating that "they tell each other everything." It was clearly an "us v. them" situation in which some African-American participants, presumably due to some of the experiences of being blackballed described herein, did not feel that having nonminority prime contractors present would enable them to speak without their words being repeated. Whether or not that was truly the case with FG-1-8 and FG-1-9 specifically, GSPC has no way to discern. What is crucial here is the perception that their presence was symbolic of a silencing business environment to which minorities and small

firms are only allowed cursory entrance and run a constant risk of being summarily excluded. What is examined in this section is the perception that the County's practices have a hand in facilitating, if not fostering, the continuation of that environment.

This group could be described as "self-selective" in that, in order to participate, one must have been on a County list, opted to receive correspondence, clicked through on an e-mail whose subject line held the phrase "disparity study," determined that a) one had enough time to devote to travel and participation or b) that the study itself was important enough for oneself or one's community to merit the sacrifice of time and energy. FG-1-6 stated during the group session that "Everyone in this room is a rebel," after expressing the opinion that he had "never seen so many laid back minorities [than in the County]" (FG-1-6). "You got somebody like [FG-1-7] who will stand up, but if you make too much noise, he has no support from our community at all," FG-1-6 stated. He viewed this apparent decline in activism amongst the minority business community as the end of an era of committed individuals who would "shut [projects] down" such as the former leader of one of the minority activist organizations did. The decision to be a part of the disparity study, to commit one's words and experiences to record (even with the promise of relative anonymity) was seen by FG-1-6 as a rebellious act in the County, one that only the brave, "stand up," individuals would commit. This speaks to the perception of a silencing environment within the business community, where it is believed to require courage to share experiences doing business with prime contractors or with the County.

FG-1-7 began to discuss the issues for minorities with the unions in the County.

> "If I bring in a kid at my church with a strong work ethic, I'm not allowed to bring him in and let him work for me for dollars he will spend in the City, I am forced to get guys in the union that are friends, nephews, brothers, family members. I am a black man whose entire workforce is white. The union blocks these [other, minority] guys from getting in" (FG-1-7).

He states that those in the meeting are the few minorities that made it "out of the barrel," but that "others might not have been able to study because they're hungry." He also asserts that

the union requires a particular test and then will have minority candidates "sweep the floors the entire apprenticeship" and states that the companies some of his friends worked for had them "carrying things and cleaning" rather than learning the trade. FG-1-7 did not go through a union program, but trained at a technical school that has been shut down for 20 years because the school system "got rid of" technical and vocational programs (FG-1-7).

To this, FG-1-2 states that there "has to be a way" to reach out to minority youths and "help them understand what construction is and that it's a good living" because "the union is discriminatory" (FG-1-2). FG-1-4 notes that he obtained $2 million in liability insurance, workers compensation, "everything they told me to carry, I carry" and that he was told "when we get done with the union, we'll see if we have some work for you" (FG-1-4).

FG-1-3, a social worker, stated that there was a man who came to her "on his own" because he was required to take a class, but he had the agency he was "supposed" to go to stapled to his probation documents. In the end, she says that she won but "had to fight probation to get that guy" because her classes worked better for his schedule. She notes that County officials are not supposed to "steer" clients to one place, but they are "threatening parolees to go to certain people" (FG-1-3). When asked how one receives such preferences, FG-1-7 replies that firms get in by knowing "some people at the golf course and at the bar" and says that knowing that this is the way it works is why he likes the "get-togethers that force us to meet and greet" (FG-1-7). However, he says, this is just a County problem. "The City is good, I've personally had good backup from the City. They make sure I get paid" (FG-1-7).

FG-1-2 argues that it starts with the owners making a stipulation for race-conscious goals that "by law" they are unable to do. "What we get as goals, can only be a goal, [it] can't be a mandate" (FG-1-2). They suggest mandatory pre-bid meetings which "eliminates Joe over here bidding a project and never having to meet Hispanic or Black firms." FG-1-5 says "that good faith effort form should be eliminated" to which FG-1-7 replied "and burned." FG-1-2 says that the SBE program at the County does "desk monitoring" but "they're not in the field."

FG-1-3 states that referrals in social services should not be restricted to any one particular firm. She also states that she doesn't get paid promptly. FG-1-2 and FG-1-7 agree that payment is a "huge" issue. "It can put you out of business" (FG-1-2). FG-1-3 also notes that larger firms have grant writers in her field and that she cannot compete. She suggests that the County do an RFP training session. "All the small agencies sit together to try to coordinate, none of us have gotten contracts. Never ever won" (FG-1-3).

FG-1-2 says that "they need to model some things after the City" (of Cleveland) and that the County should start a financial loan program for small businesses with its surplus "of 187 million dollars just sitting there. Contractors like her should be getting paid (FG-1-2). FG-1-7 stated that he applied for a loan with $25,000 in savings and $10,000 that he "didn't want to touch." For a $45,000 loan, the bank "wanted the 25 or wouldn't give it to me" (FG-1-7). The focus group moderator notes that this is over 50% of the loan request, an exorbitant amount, to which FG-1-2 replies that he traveled to Atlanta to find a minority-owned bank to borrow from. "They will tell you they don't loan to small businesses" (FG-1-2).

FG-1-6 says that, when there was a minority business program she was "delivering office supplies all over the City" but "as soon as you stopped telling them they had to do it, I never heard from them" (FG-1-6). FG-1-7 then shares his experience with potentially fraudulent activity on a County project.

> "I was supposed to do work on medical mart, got ready to get people working and after it happened, I called Zenith and Gertz to start and they won't return my phone calls. Where's my purchase order, my contract? I keep getting the run around. Turns out they created a company called Eclipse which came up out the blue and gave them kickbacks. I complained and me complaining knocked me out of the next job, haven't gotten job with Cuyahoga since, someone has committed fraud. They say 'We don't have minority companies anymore, we have SBEs. So now white man can set up company as SBE and take money set aside for minorities (FG-1-7).

When he wrote to complain, FG-1-7 says that he was told that he writes too many letters by a contractor with the County. FG-1-4 commiserates, stating that it is common practice in the County. "I call a lot." FG-1-3 states that she was "told to stop writing letters" by an official within the County. FG-1-4, FG-1-2, and FG-1-7 agree that the current head of the SBE program is "the best, but she's limited" (FG-1-2).

2. FG2: Bay Village Library, 12pm-1:30pm

The second group met at Bay Village Library in Bay Village, Ohio. The demographics of the attendees were markedly different. Though Griffin & Strong, P.C. received five (5) RSVPs for attendance from business owners for this particular focus group, only two attended, both nonminority women. As with the first focus group, the session began with an explanation of disparity studies, and GSPC's role in the process. One attendee noted that it would be interesting to do a comparative study of the pre- and post-corruption scandal in the County market. Both participants, one a technology consultant and the other the owner of a firm specializing in social work indicated that they were unhappy with having to complete the new County ethics training because "it wasn't the small businesses, it was the County employees" engaged in corruption" (FG-2-1). Both woman owned small businesses had contracts with the County, one as prime and the other as a subcontractor.

FG-2-2 states that her contract with the County went well and that she received consistent business as a social services provider; however, payment was "unbearable" and sometimes she would go 5-6 months without payment all due to "one person interfering" whom she felt had developed a personal vendetta against her firm and used withholding of payments to retaliate.

She said that after "20 some years of this, complaints and letters, lawyers, month after month, I run a business there is no business that can exist if they are not paid for 5 months" (FG-2-1). As a result of this issue, this business owner was forced to give up her office space and find other arrangements for her agency. FG-2-1 says that other social services agencies experience something similar and it all stems, in this person's estimation, from one particular person who

works in the Juvenile Court. FG-2-1 believes that conditions have improved under the current administration.

> "Prior to Ed Fitzgerald it was worse. She was the bottom line, that's where this culture of "we don't want to irritate her because we won't get any referrals" comes from. She has gone to all the departments and said refer to other agencies and not us. That bothers me" (FG-2-1).

FG-2-2 states that she recently had an experience with a major national telecommunications firm wherein a $20,000 contract had been signed and they already had $3,000 in billing when her firm was informed that the prime "didn't need us anymore." After contacting the SBE program head, who stated that their "hands were tied," this business owner took matters into her own hands and continued to call the prime contractor, who eventually said that it had been a "misunderstanding" and allowed her firm to complete the agreed upon work. "They submitted a bid and said they were giving us a percentage of the contract" FG-2-2 states, but "if I hadn't done something, nothing would have happened." According to FG-2-2, the SBE program doesn't have the authority they need to properly sanction this kind of activity. In the end, her firm did not receive the full $20,000 because of the suspension of the project.

Both women agreed that the County should adopt mandatory pre-bid sessions. "Why have a pre-bid and it's not mandatory? The big people don't come otherwise and we can't meet the people who are going to bid" (FG-2-2). But, according to FG-2-2, there needs to be more work done on the contract compliance end to ensure that the scope of work is figured out in the beginning and authority should be given to the SBE program to stop the process if the contract is not being adhered to. FG-2-1 states that these firms are "doing 20% to meet the requirement" but are doing it "fraudulently because they have no idea how they are going to use the firm. According to these firms, the "level of scrutiny for the direct service provider does not match the level of scrutiny for people who administer contracts" (FG-2-1).

FG-2-2 recounted "a few bad years" resulting in her inability to obtain bonding, but was unaware of the SBA bonding program or any other options designed for small businesses.

Bonding, she says, is why she has only ever bid as a subcontractor. FG-2-1 feels that two small businesses (referring to both present) "forget the fact that we're women" aren't being treated in a "professional business best practice way" by the County. Corroborating this, FG-2-2 states that "no one follows through" on the processes that are designed to protect small businesses. "You're only going on dollar amount submitted with quote and those numbers are not right" (FG-2-2).

F. E-mail Comments

GSPC received e-mail comments through their County e-mail address, cuyahoga@gspclaw.com, which was maintained by the deputy project manager. During the course of the study GSPC received two statements from firms submitted through this address as well as a statement from the Hispanic Roundtable, a business organization in Cleveland.

EC-1, the owner of a supply company, believes that not being a minority or woman owned business has "precluded" them from competing in the County and claims that they have a local competitor that "put his company in his wife's name in the late 80's" and has been "reaping the benefit of the certification for over 29 years and we have lost countless orders and revenue because of it" (EC-1). This business owner would like to see the expansion of race and gender neutral companies to "help small, new companies get started and grow" (EC-1). Another firm owner states that she has been certified as an FBE for over ten years but has never done any work for the County. She states that since the "cleanup" after the scandal, her firm has participated in bids "as the FBE on a prime vendor's bid" but "never won any work" (EC-2). It should be noted that the County does not currently have a race or gender conscious program.

Though the County does not have an MWBE program or goals, the Hispanic Roundtable especially feels that a goal relevant to the availability of Hispanic owned firms in the area should be set for the County's procurements, particularly those involving construction. The full written statement from the Hispanic Roundtable is attached as Appendix D-1 with supporting articles as Appendices D-2, D-3, and D-4.

G. Anecdotal Interviews

The personal interviews were conducted during the months of June to September, 2014. The one-on-one interviews were conducted with a random sample derived from databases provided by the County Government officials. The Winston/Terrell Group mailed, emailed, telephoned or faxed confirmation letters to all firms that agreed to be interviewed. The interviews were conducted either at the firm owner's office, at a location designated by the firm owner, or over the phone if requested by the firm owner. Interviews ranged in length from 15 to 90 minutes.

Thirty (30) firms were interviewed. Of the 30 representatives interviewed, the ethnic and gender breakdown is as follows:

- 11 African Americans
- 2 Hispanic Americans
- 10 Caucasians
- 1 Native American
- 4 Asian Americans
- 11 woman owned Businesses, across all ethnicities.

It is the belief of the majority of minority-owned firms, African American and Asian Americans, in anecdotal interviews especially that, without an MWBE program or goals, majority-owned firms would not desire to do business with them. African American-owned firms cited many instances of prime contractor fraud and the majority of MBEs listed that they did in fact believe that there was internal favoritism. Though many Asian American-owned firms cited that the County is fair and responsive, very few African American-owned firms believed the same. In fact, their impressions of the County's outreach efforts was similar to the testimonies of the Hispanic Roundtable.

1. Communication

In terms of communication about bid opportunities, few minority-owned firms felt that it was adequate. "I don't see any encouragement," AI-18 states, indicating that he receives information from various small business associations but few from the County directly. In terms of suggested improvements to the County process, he would like to see email announcements about projects being bid. AI-20 believes that signing up on the website does not necessarily mean that you will "get the bid announcement" because "everything is not always online in a timely fashion" (AI-20). This administrative issue is especially impactful because several interviewees mentioned their lack of time due to the size of their firms. AI-20 believes that it would be "really helpful" if the County sent e-mails according to commodity code as some other entities do (AI-20). Another firm owner suggest that the County could be more "clear and concise" about what they are looking for in a bid and "give it to us in a timely manner, and give us some time to respond" (AI-27).

Only one firm came out vehemently in favor of the County's processes with regards to communications.

> "They will specifically reach out and say we have this opportunity, and I assume they do that with others. They will send out an RFP to our firm. They have been more than willing to sit down and review qualifications packages on those things that we would not have gotten as a part of the submission, and they say here's a way to improve and review things. So they have been very helpful for us to be successful." (AI-13)

"I'd like to see some sort of follow-up on some of these projects. The County's building a new headquarters and we did bid on it, and we have heard no response about any of them about what we have submitted. "The County has not been helpful when they have had questions about the procurement process. Respondent stated that most of the assistance that they have been

provided has been through the Minority Business Solutions group, a local group that works with minority contractors. "Well you know, you're not getting the contracts that's one thing. When you bid a project. And, when you're putting together a $800K bid on some of the flooring and painting contracts and don't get a response, it takes time to put those packages together and to not get a response, they were all basically asking for all these bids and once we turned them in, the communication stopped." (AI-29)

2. Informal Networks

With regards to informal networks within the County, half of those interviewed across all demographic groups indicated that they believed that there was an informal network in the County. One firm stated that there is sometimes County/prime contractor collusion in the selection of subcontractors, "they already have their go to people, and they put out a bid to satisfy their paperwork that they've gone to people on the SBE list, but they already have their chosen people" (AI-2). The owner of a County-based management consulting firm stated that "because you are not at the country club where they go," some firm owners do not have "access to decision-makers and they actually take you seriously" (AI-20). AI-20 went on to state that,

> "I'm in leadership Cleveland but I'm not on the same boards or revenue level. It didn't really benefit me as I thought it would. I'm not in the places where they are to keep an ongoing relationship with those who could potentially give me work or make contracts available or give me access." (AI-20)

AI-27 claims that he can "pretty much look and tell whether that I needed even to throw my name in the hat because I'll look at their relationship" and notes that it can be difficult to build new relationships in the County because of this.

3. Race and Gender Discrimination

With regard to overtly discriminatory practices in the County's procurement and/or in the relationships between prime contractors and potential subcontractors, there was much less consensus. Though the minority women interviewed never mentioned their gender, the two Caucasian woman owned businesses interviewed did indicate gender discrimination. "Some feel that it is a man's world. They feel that I shouldn't be there,"AI-14 stated when asked about obstacles to minority and woman owned business participation. AI-12 said that she has never experienced someone in the private sector stating that "I only want to deal with men, or I only want to deal with women," but said that in the public sector "they will spell it out" when looking for a specific gender to participate (AI-12).

As for racial discrimination, 19 of the 30 interviewees indicated that they believed that there is discrimination in the County and a need for MWBE goals. All 19 were either minorities or Caucasian women. 4 of the 6 Caucasian male-owned firms interviewed indicated that they did not believe discrimination existed or that there was a need for MWBE goals. According to AI-9, a Caucasian contractor, "primes will use the best subs no matter what they are" and AI-7, similarly, believes that everyone is on a "very nice, equitable, balanced" playing field (AI-7). On the other hand, AI-9 says that minorities do not do as well within the County because "they are not qualified. Some are, but for the most part there are a lot of issues where they are just not ready or equipped to do the work necessary" (AI-9).

Conversely, minority and woman owned firms state that there is very present discrimination and indicate that they believe the playing field to be in no way level. According to an African-American woman owner of a local staffing firm, speaking directly to AI-9's assertions,

> "They say that they cannot find anyone to do the work that needs to be completed. They say that all the time that's the generic statement. These diverse suppliers do not have the financial capacity, they do not have the expertise." (AI-25)

AI-28, amongst other minority firm owners, believes that the SBE program is not effective without strict provisions to utilize minority firms.

> "I have contacted them. I have voiced complaints. I have sent letters. I basically told them that this was the worst thing that they could have done by allowing this program to go from MBE to SBE and challenge them to show me the numbers to show me how many minorities really got work after they changed the program and I don't think that they can produce it." (AI-28)

Though when asked directly if they believed that there was "reverse discrimination" within the County (meaning that there was an exclusionary preference for groups commonly considered disadvantaged), Caucasian firm owners stated that they did not believe that such a phenomenon was present, but made many contradictory statements. One firm owner stated that, in the presence of goals, contractors "would go to minority companies first to meet participation requirements" and that he would see companies like his "go get certifications to remain competitive and not lose business to those that are certified" but did not indicate how he would obtain such a certification through a minority business program without fraudulent action (AI-6). Another Caucasian business owner believes that the market is "cut-throat" and that nonminority companies that "come in less" than minority companies are edged out of the market and, in fact, that "the minority company will charge more because they are the minority company, and because the companies have to use them" (AI-11). It should be noted that this statement was not a hypothetical "in the presence of goals" statement, but that the interviewee spoke as though goals were already in place for minorities in the County.

4. Fear of Retaliation

In addition, many minorities fear retaliation for speaking up about discriminatory practices, either externally from prime contractors or within the County. AI-28 says, frankly, that "when you speak up you get blackballed" recalling that he "spoke up" about fraudulent and discriminatory activity on his work with Medical Mart and Cuyahoga County Headquarters as a

subcontractor and "had a guy tell me straight to my face…that I did not get one job for that first phase or second phase and it was because I complained" (AI-28).

AI-27 has never appealed an award contract and feels that a firm that did so "would be blacklisted," saying that the County would say "Here we have a complaining company, and why do we want to do business with someone like that?" (AI-27). As a result, he says, "I just don't fight the fight" (AI-27). The firm states that the County has not been helpful when they've had questions or needed information about the procurement process. "If you ask the tough questions, they look at you as a troublemaker" (AI-27). This business owner did note that the County staff are, however, "courteous and polite" but "there's never any results" (AI-27).

5. Outreach and Utilization

Though the staff in the SBE program received praise, generally, it was mentioned multiple times that the program is lacking in outreach, monitoring, and authority to regulate misconduct.

> "The certification people are wonderful. They are very nice people. They do their outreach as they can, but they are not the ones doing the procurement; they are not the ones who start doing the project from the beginning." (AI-5)

One Hispanic American-owned firm stated that it's a "doughnut and coffee show" that firms will not get much out of because "the deal has already been cut" (AI-4). Another firm owner, an African-American in professional services, stated that County outreach is "a dog and pony show" and that "nothing comes out of it that give us things, and once it's done… the same companies and fronts get the jobs" (AI-21).

AI-5 also believes that, in general, the County is not reaching out to the Hispanic community as they should be. Several interviewees indicated that they felt that the County's SBE program is skewed toward African-American participation. One Lebanese American firm owner stated that he would not qualify as an MBE because he is "not from anywhere from the African continent" (AI-1). A Caucasian small business owner stated that, when he went to the County to

get certified as an SBE, he was told that he "was the first white guy" to do so. That was his first experience with the County and he "can't imagine them saying that to a black person or a Puerto Rican person or anybody" that he believed that it explained why his firm never received communication or information from the County: "because I'm not a minority" (AI-8). A Hispanic American firm owner stated that,

> "The same people get taken care of over and over and when you think about it in a community that is predominantly minority African-American males that get taken care of more than the percentages of other ethnic groups in Cleveland, it's a reality we accept it" (AI-4).

6. SBE Program Regulation

AI-4 says that the first thing that "those out-of-town contractors" do when they are awarded contracts is "look for a front company; a minority or woman business enterprise that is a front to do a pass-through" and that this is a very frustrating situation for legitimate businesses because "you cannot live on that 2 to 3%" of a contract that is given in a pass-through agreement (AI-4). In suggesting improvements to the SBE program, AI-21 stated that he would like to see them "check into front companies" and look at those that want to be certified as small businesses "with greater scrutiny," noting that "when a Black company comes into the County they'll be scrutinized more than what a White company that has a front….It seems like you can't get a job in Cleveland unless you get a white guy to be your partner" (AI-21). This statement is supported by another firm owner, who says that

> "I know in this game, as long as I've been in this work, in order for you to graduate to the next level you have to basically sign on with a big money Caucasian person who plays 49% owner in order for you to actually grow your business" (AI-3).

Though her firm is in professional services and she has no personal experience with prime fraud, AI-20 states that she is familiar with the issues with prime contractors in the County through conversations with some of her clients in the construction industry, "they're not paying their subs properly or taking a long time to pay them just all kinds of horror stories" (AI-20). According to AI-28, the fault in the SBE program is that "there is no teeth in the law….no enforcement of the rules" (AI-28).

7. Small Business Advancement

Bonding requirements and firm size were considered to be an impediment by one-third of those interviewed. AI-19, a construction contractor, states that bonding is "very difficult" to get and that the County's requirement that firms provide performance bonds excludes minority, woman, and small businesses. AI-28 also states that "the ability to get bonding" is "what keeps you from bidding now" (AI-28). He expresses displeasure with the lack of effort on the County's part to help firms build bonding capacity. For small businesses, AI-16 would prefer it if the County attempted to "identify and maybe isolate certain projects for small businesses" and feels that it would go a long way toward helping smaller firms move from being subcontractors to bidding as primes (AI-16). According to AI-17, because small firms are competition for prime firms, they are consistently edged out in subcontracting and, therefore, the County "should project a better percentage of contract specifically for minorities as a prime. The goal of the SBE program is for companies to grow and graduate and if they don't get help, you don't give them a chance, then they will stay small" (AI-17).

H. Conclusion

While the majority of people appreciate the concept of an SBE program (even those that believe that there should be an MWBE program in addition or in its stead), the general perception is that the program is not given enough monitoring, enforcement, or sanctioning power. When complaints are filed, there is a feeling that they go nowhere, that the SBE program does not have the power to properly chastise prime contractors for their behavior toward subcontractors, or to stop work on projects should abuses become an issue. Though the SBE program and its head are

viewed favorably overall, it was mentioned several times that the program should have more "teeth" to it.

In General, Caucasian American Males view the County procurement process as fair. Presented with the possibility of MWBE goals, some interviewed felt that it was a form of "reverse discrimination." The new County Council system and County Executive are viewed as fair and responsive especially in light of the fraud and transparency issues in the previous administration.

MWBEs by and large view the County's procurement as still operating under a "good old boy" system that is difficult to penetrate. There is a pervasive feeling that the use and requirement of unions on many projects prohibits minority participation due to accusations of discrimination within the union ranks. In addition to this, there is significant opinion, especially amongst minority participants, that firms who speak up about prime contractor misconduct or issues with County procurement will be retaliated against or "blackballed."

In anecdotal interviews and focus groups, several instances were recounted in which small and minority-owned businesses were offered work, and signed contracts with prime firms, and then were given only a portion of the work allotted or paid a small sum to do no work at all. Across the board, in every demographic group, business owners cited the County's bonding requirements as prohibitive and indicated that small firms take the brunt of contract sizing. Recommendations that the County break out contracts and consider not only taking the lowest bidder, but adopting a more inclusive process, especially on construction contracts, was heard repeatedly.

In several forums, especially through stakeholder meetings, public testimony, and statement submittals, it became clear that many Hispanic American contractors feel that their needs have been considered secondary to those of African-American owned businesses in the County's outreach efforts. It was clear that racial tensions were high in the County in every forum, and many of the comments made in anecdotal interviews spoke to the combustible nature of these interactions.

In both focus groups and in some of the anecdotal interviews, it was indicated that mandatory pre-bid conferences and joint venturing between minority, woman, and small firms can be effective in helping new businesses build relationships and helping more established businesses to move from sub- to prime contracting. In fact, the growth and financial health of businesses was a major focus of much of the anecdotal evidence collected, including concerns regarding bonding requirements and the suggestion by some that the County itself provide bonding assistance.

VII. FINDINGS AND RECOMMENDATIONS

A. Introduction

The County contracted with EuQuant, Inc. ("EuQuant") (an economic research and data analytics company) to perform an economical and statistical analysis of minority, woman and small business performance in Cuyahoga County. The County also contracted with Griffin & Strong, P.C. ("GSPC") (a law and public policy consulting firm) to collect and analyze anecdotal data of minority, woman and small businesses in the County, conduct the private sector analysis, and examine the County's purchasing policies, practices, and procedures. The purpose of this Disparity Study is to determine whether a minority or woman business enterprise program is necessary in the County.

B. Summary of Findings

EuQuant's economic and statistical analysis is attached as Appendix A to this report as "Data Development, Collection and Analysis Report ("DDCA") and reflects, in summary, that there is substantial underutilization of minorities and women in both prime and subcontracting. While the statistical analysis found minority and women SBE subcontractors were utilized more equitably than they were as prime contractors, only a very small portion of total contracting was awarded through the SBE subcontracting program. Specifically, awards to all SBE subcontractors (not just minority SBEs) totaled only $9.8 million, which represented an extremely small percentage of all prime contracts awarded by Cuyahoga (which was $641.1 million). Therefore, subcontract awards to SBEs represented only 1.5% of the value of all prime contracts. Combining subcontracting and prime contracting awards, minorities received $9.3 million - a value equal to just 1.4% of all awards made by the county. In comparison, minorities represented 42.9% availability of all SBE subcontractors and 4.8% of all prime contractors. Furthermore, based on an examination of Cuyahoga County contracts by categories, 22.8% of contracts were for amounts between $100,000 and $500,000 while 17.3% were for amounts greater than $500,000. Comparing this to the revenue of minority-owned firms, the study found that 16.6% of minority-

owned firms had annual revenues between $100,000 to $500,000, while 17.6% had annual revenues greater than $500,000. This suggests that minority firms had sufficient revenue capacity to have executed a higher percentage of awards had they received them.

There are also findings included in this study which show significant disparities in the utilization of minority and woman owned businesses on private sector construction projects. Further, according to GSPC's Private Sector Analysis, this study observed disparities in self-employment earnings by race and gender, even when controlling for demographic and economic variables. Commercial lending discrimination was also specifically identified in the study as an area of concern in the Cuyahoga County, Ohio marketplace.

These findings of disparities are fully supported by the anecdotal evidence collected by GSPC and also reveal a deep distrust by the minority business community in doing business with the County.

The qualitative and quantitative evidence, both individually and together, consistently demonstrate substantial disparities and inequities in the level of participation by minority and woman owned businesses in the County's procurement process, as well as in its marketplace. By testing these disparities with regression analyses there is an obvious inference of discrimination. Further, it is concluded that, despite the County's efforts, through its small business program, without the County's active engagement to ensure that opportunities are open to all, this inference of discrimination will continue in the County.

C. Findings from EuQuant's Statistical Analysis

FINDING 1 – Relevant Market.

The County's relevant market area is defined as Greater Cleveland Metropolitan Area. Greater Cleveland includes the following counties: Cuyahoga, Geauga, Lake, Lorain and Medina. Greater Cleveland is a smaller geographic region than is the Cleveland – Akron – Canton Combined Statistical Area. The latter area includes eight (8) counties and 3.5 million residents. Cleveland MSA has 2.1 million residents. The research results found that 80.1% of available firms had establishments located in the County, and 10.0% had establishments within Greater Cleveland outside of the County.

FINDING 2 – Prime Disparities.

EuQuant determined that the simple disparity index for minority and woman owned firms prime contracting activity as a total of all procurement categories (Professional Services, Construction, Goods & Supplies, and Suppliers) provide a strong inference of discrimination. The outcome of the standard deviation analysis replicated the results of the simple disparity index (with the exclusion of industries that had no standard deviation observations)

A simple disparity index is measured by dividing the utilization percentage by the availability percentage. If the resulting value is .80 or less, EuQuant determined that provides an inference of discrimination. Each of following individual minority groups and women for each procurement category had simple disparity indices of .80 or less in prime contracting:

Table 24: Simple Disparity Indices Indicate a Strong Inference of Discrimination

Minority Groups and Women in Prime Contracting

Professional Services	Construction	Goods & Services	Suppliers
African Americans	African Americans	African Americans	African Americans
Hispanic Americans	Hispanic Americans	Hispanic Americans	Hispanic Americans
Asian Americans	Asian Americans		Asian Americans
Native Americans	Native Americans	Native Americans	Native Americans
Women	Women		Women

Griffin & Strong, P.C. 2014

FINDING 3 – Subcontractor Disparities.

Likewise, in subcontracting, EuQuant determined that the simple disparity index for minority and woman owned firms in subcontracting as a total of all procurement categories (Professional Services, Construction, Goods & Supplies, and Suppliers) provide a strong inference of discrimination. However, the outcome of the standard deviation analysis did not yield the same

result. Standard deviation is -.854 for minorities and -1.16 for women. It is also important to note that in some industry categories there were an insufficient number of awards to minorities and women. As such the standard deviation analysis could not achieve a reasonable level of confidence.

Each of the following individual minority groups and women for each procurement category had simple disparity indices of .80 or less in subcontracting, determined by EuQuant to provide a strong inference of discrimination:

Table 25: Simple Disparity Indices Indicate a Strong Inference of Discrimination
Minority Groups and Women in Subcontracting

Professional Services	Construction	Goods & Services	Suppliers
	African American	African Americans	African Americans
Hispanic Americans		Hispanic Americans	
Asian Americans	Asian Americans	Asian Americans	Asian Americans
Native Americans	Native Americans	Native Americans	Native Americans
	Women		

Griffin & Strong, P.C. 2014

FINDING 4 – Combined Prime and Subcontractor Disparities

A combined prime and subcontractor utilization allows for a clearer picture of how many County dollars went to primes and subcontractors. This is particularly important when a woman or minority group may be overutilized as a subcontractor and underutilized as a prime. It may still be warranted to include that group in a remedial program because the overall dollars awarded represent a significant underutilization.

Each of following individual minority groups for each procurement category had simple disparity indices of .80 or less in the combined areas of prime contracting and subcontracting, determined by EuQuant to provide a strong inference of discrimination:

Table 26: Simple Disparity Indices Indicate a Strong Inference of Discrimination

Minorities and Women in Combined Prime and Subcontracting

Professional Services	Construction	Goods & Services	Suppliers
African Americans	African American	African Americans	African Americans
Hispanic Americans	Hispanic Americans	Hispanic Americans	
Asian Americans	Asian Americans	Asian Americans	Asian Americans
Native Americans	Native Americans	Native Americans	Native Americans
Women	Women		Women

Griffin & Strong, P.C. 2014

From the table above, only woman owned businesses were consistently overutilized as both primes and subcontractors in Goods and Services. Hispanic American-owned firms were over utilized as subcontractors, but had zero utilization as prime. The net result was underutilization, but it was not statistically significant underutilization.

FINDING 5 –Capacity.

The findings do not suggest the statistically significant disparities in prime contracting for minorities and women are the result of insufficient capacity.

FINDING 6-Regression Analysis of Disparity.

The results indicated that, controlling for other factors, firms owned by Women experienced 42% lower revenue than did firms owned by men, and the results were statistically significant. Firms owned by blacks experienced revenues that were 98% lower in comparison to firms owned by whites and those results were also statistically significant.

D. Summary of GSPC's Qualitative Evidence

FINDING 7-Private Market Analysis of Discrimination.

Access to Capital: GSPC's private sector analysis of minority-owned businesses in the State of Ohio is motivated by the idea that if business firm access to private equity, loans and venture capital is conditioned on minority ownership status, this would be suggestive of, and consistent with discrimination against minority-owned businesses in the private sector. Discrimination against minority-owned businesses in private sector markets for business financing would result in those businesses having a reduced likelihood, relative to nonminority-owned businesses, of receiving start-up and expansion financing from private sector sources. GSPC's analysis finds that relative to nonminority-owned businesses, minority-owned businesses in the State of Ohio are less likely to have utilized bank loans, home equity and venture capital to finance business start-up and expansion.

Finding 8 - Anecdotal Evidence

It was perceived that:

- The SBE Program is a good concept but is weak in enforcement power, monitoring, and there are no real sanctions for those that do not comply. In addition, SBE's are always up against large primes so it is difficult for them to win bids and sometimes contracts are just too large for SBEs to bid on.

- Majority firms do not see a need for a MWBE program while minority firms believe that the good old boys network, unions, and discriminatory business practices keep them from getting work from primes.

- There is still a distrust of the procurement process by most MWBE firms and therefore some do not even bother to bid. Many times complaints are ignored. It is also felt that if complaints are made there will be retaliation.

- Primes do not make good on their offers to small and minority-owned businesses for subcontractor work.

- In every demographic group, business owners cited the County's bonding requirements as prohibitive.
- Misunderstanding that the County itself was awarding union only contracts.
- Hispanic American contractors feel that they are secondary to African American-owned businesses in the County's outreach efforts.
- The County should assist MWBE's to get more contracts with primes by doing more outreach and creating more opportunities for MWBEs to interact with potential primes.

Finding 9 -Purchasing Practices, Policies, and Procedures

GSPC's interviews with County personnel indicate that the County has undergone a huge transformation and moved in a positive direction of trying to re-establish the community's trust in the procurement process by creating more transparency. One aspect of these changes is the tiered approval system.

At the same time, there are some areas of the procurement process that are not clear to all personnel. This may be because of numerous changes over the last four years in the process and procedures and perhaps because of some reported issues with BuySpeed.

The County's current SBE Program is an extensive program that includes a mentor-protégé program, in-house certification and verification, site visits, award and post-award monitoring, bond assistance, non-compliance sanctions, and a clear explanation of those efforts that constitute "good faith". As the statistical analysis demonstrates, the SBE Program has not been successful in ameliorating significant disparities between the availability and utilization of minority and women owned businesses which are likely caused by race and gender status. Analysis of the County's existing SBE program as well as general purchasing policies show that certain policies may be barriers that have more impact on minority and women owned businesses than small businesses in general. Findings in the anecdotal evidence and private sector analysis support this. Those areas may be:

- Issues of delayed payments
- Outreach to assist firms in becoming registered in Buyspeed and the Inspector General and not just as an SBE
- Education on the purposes and aims of the Office of the Inspector General, particularly the investigative aspects
- Perception of uniform bonding requirements
- High bonds and long hold periods
- Confusion about SBE goals
- Doubled dollar amount of insurance coverage

E. Study Recommendations

Recommendation 1: Commercial Antidiscrimination Policy

The County already has a commercial antidiscrimination policy which is contained and confirmed in every procurement package, but it is important to emphasize continuation of that policy. Some courts have noted that putting in place antidiscrimination rules is an important component of race-neutral alternatives.[150] Nationally, most agencies, like the County, have adopted requirements to ensure that their procurement process is not discriminatory.

Recommendation 2: Continuation of Small Business Program

The County has tried a race neutral program in the form of the SBE program detailed in the current County Code, Chapter 503[151], yet the statistically significant disparities, likely caused by race and gender[152] have not attained the parity that they were put in place to help achieve. The County should continue its Small Business Enterprise Program, but may consider modifying the program to respond to reviews of the program that it has "no teeth" by adding additional features so that the program has increased monitoring, enforcement and sanctioning power.

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

[151] The current SBE Program is applied to a relatively small number of contracts because certain funding sources may not permit its application. However, it is applied to every contract that permits its application.

[152] See the regression analysis above for more details on the determination of the causation of disparity

Recommendation 3: Small Business Set Aside

The County should respond to the minimal number of MWBE prime contractor awards and the problem of contract sizing, as well as the issue of SBE's difficulties in bidding against large companies, by creating small business set asides. This means that certain contracts could only be bid by certified small businesses.

Recommendation 4: MWBE Aspirational Goals

The SBE program has not been successful in remedying the inference of discrimination. The County could respond to the statistically significant underutilization of minority and woman owned businesses as prime and subcontractors by establishing a new MWBE economic inclusion program ("EIP"). This is not a fix goal program, but instead sets aspirational goals based upon availability. This could be administered with the SBE program by setting overlapping goals so a business could satisfy both the SBE and MWBE goals.

The new EIP could set MWBE subcontractor goals in the work categories and by ethnicities where statistically significant MWBE underutilization occurs. The goals should be set at a percentage that is in-line with the availability percentages for each MWBE group. Goals would be considered aspirational, in that firms that do not meet the goal would, in addition to attesting that they used good faith efforts to attain the goal, be subject to further inquiry as to why the goal was not met, but not be automatically deemed unresponsive. The same goals could remain in place until the next disparity study is done in 5 years; however the program itself must have a "sunset date" in accordance with Croson. It is recommended that the County establish a 5 year sunset date.

The EIP program may be structured to set an overall MWBE goal, rather than setting a goal for each ethnicity (provided that the ethnic group is a statistically underutilized group) this would allow the County not to apply the goal on contracts where MWBE's may not be available in certain industries. It is recommended that an overall goal be set for each major work category (e.g. construction, professional services, goods & services, and suppliers). Goals may be set for each contract or may be set on an annualized average. The latter is more difficult to assess and monitor. Since this is not a fixed goal program, it requires a more hands-on approach from procurement and contract compliance staff.

Recommendation 5: Multiple Classifications

In tracking attainment of goals, it is recommended that, although a firm will continue to be classified in one primary category, an MBE or WBE firm that also qualifies as an SBE can take advantage of the County's SBE Program and can be counted as satisfying goals in as many categories as that firm would otherwise qualify**.**

Recommendation 6: Local EIP Program

The County should consider making the EIP program a local Greater Cleveland Area program in order to obtain maximum benefit to local MWBE firms. Prince George's County, Maryland has a model program called "Jobs First," that establishes a progressive means to benefit firms that operate in the County and support the tax base. See link at http://www.princegeorgescountymd.gov/sites/SupplierDevelopment/Services/Jobs-First-Act/Pages/default.aspx

Recommendation 7: Certification

A new EIP program will require the establishment of a certification process for MWBE status in addition to SBE certification. Certification should be by each race/ethnicity/gender category in order to facilitate tracking availability and utilization in the future. The certification administration includes certification, contract administration, and monitoring.

Recommendation 8: Alternatives to Reducing Contract Size

If contract size cannot be reduced to match MWBE capacity, the County 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 newsletters and increasing

outreach for projects where such collaboration may be effective. In addition, incentives could be provided in the form of additional points given in a bid where multiple MWBEs are participating and/or small businesses that bid together may be able to combine their balance sheets in making a bid.

The County may also cautiously encourage joint ventures between MWBEs and nonminority-owned firms on large-scale projects. For example, the City of Atlanta encourages establishment of joint ventures on large projects over $10 million,[153] 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 County must examine these joint ventures carefully.

Recommendation 9: Mandatory Pre-Bid Conference

The County should respond to the issue of SBEs and MWBEs having difficulties in interacting with prime contractors by requiring mandatory pre-bid conferences that will allow potential prime contractors and subcontractors to interact. Further, the County should initiate additional events and opportunities for subcontractors and primes to interact.

Recommendation 10: MWBE Outreach

The County should respond to the continuing difficulties that the MWBE business community has in obtaining contracts by conducting more extensive outreach such as

- The County should work to provide more forecasts of business opportunities to MWBE vendors.
- The County should partner with federal procurement efforts to market to MWBE firms in the region.
- The County can feature MWBEs and SBEs in employee and procurement newsletters to promote firm awareness.
- The County should assist in marketing and promoting MWBEs wherever possible to the private sector community.

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

Recommendation 11: Private Sector Initiatives

The County should require all bidders to describe their diversity program and list the MWBEs with which they do business. The County should also consider private sector initiatives, as is done by a number of entities such as the City of Tampa, FL; Atlanta, GA; and Saint Paul, MN, such as including MWBE goals in their economic development contracts and measuring MWBE participation on private sector projects performed by County prime contractors.

Recommendation 12: Performance Bonds

The County should respond to the perceived burden of performance bonds on SBE and MWBE firms by breaking performance bonds into "phases". This would keep firms from having to get such large bonds all at once. It is recommended that the County interplay with the federal SBA bonding program which will provide relief to small businesses. Another mechanism is to raise the threshold of when performance bonds are necessary to a dollar amount to be determined by the County. The County might also consider discouraging primes from requiring performance bonds from subcontractors for jobs that are less than a dollar amount to be determined by the County Executive, as part of its administrative function. The County could also undertake to entertain waivers for performance bonds. Firms could prequalify for such a waiver.

Recommendation 13: Union Contracts

Despite a recurring perception to the contrary in the anecdotal evidence collected by GSPC, the County has no union requirements related to procurement, except on a few occasions when they have required PLA's (Project Labor Agreements).[154] PLAs relate only to the particular project and are not a condition for awarding a project either as a prime or a subcontractor. In other words, they do not require the awardee to be a union signatory, but to agree to certain union pay, workforce and other requirements on the awarded project.

However, based on anecdotal reports received by GSPC, there are still aspects of union relationships that should be closely monitored by the County

[154] The County is a signatory to Collective Bargaining Agreements that govern workforce.

- There are prime contractors that will not use subcontractors that are not union signatories, even though this is not a union requirement. This may be used as an excuse to keep using a closed circle of subcontractors that may exclude MWBEs as well as new entrants.
- There may be some clear advantages to becoming a union signatory, however, it is difficult for small businesses to absorb the cost of performing exclusively under union contracts. The County should monitor any perceived pressure to become a union signatory and assist those small businesses, including MWBE's that would like to be unionized to do so.
- Even a PLA may be unduly burdensome on MWBE firms because they may not be able to work with their normal labor crews and access to minority and woman workforce may be limited. The County should do what it can to assure that there are nondiscriminatory practices in obtaining union membership.

With third party union agreements, again, those are workforce related and are not required by the collective bargaining agreements to be a condition of subcontractor awards, although PLAs may be required.

Recommendation 14: Listing of Subcontractors

The County should require all contractors to submit a list of all subcontractors not only proposed to be utilized, but all subcontractors that were contacted in preparation of their bid package. The list of potential subcontractors should include, among other information, the proposed service, and bid amount. The listing of subcontractors would reduce the possibility of bid shopping. It would also assist the County during the submission review process, goal-setting process, and goal attainment review, and help avoid administrative issues of handling noncompliance after contract award.

Recommendation 15: Staffing and Program Monitoring

There should be an increase in the training and resources of the County to ensure the necessary resources to operate the SBE and MWBE program, train the internal customers and to track the data necessary to report on accomplishment. Specifically, this staff would perform outreach, respond to public inquiries about the program, 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.

The County should also develop the means to measure the effectiveness of its efforts. Possible measures include evaluating the following:

- growth in the number of MWBEs winning their first award from the County
- growth in percentage of MWBE utilization by the County
- growth in MWBE prime contracting
- growth in MWBE subcontracting to prime contractors
- number of firms that receive bonding
- percentage of MWBE utilization for contracts not subject to competitive bidding requirements
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Recommendation 16: Access to Capital

The County should develop a comprehensive program to ensure equal access to capital and should convene private sector lenders for the purpose of evaluating the current performance of lenders with regard to MWBE lending and proposing coordinated efforts to increase lending to small and minority-owned businesses. In addition, the County should coordinate with the SBA to assist MWBE borrowers.

Recommendation 17: Oversight Committee

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

VIII. CONCLUSION

Closing Statement

The County has had a difficult history but is making genuine efforts to gain back the trust of its business community. Although the current level of both prime and subcontractor MWBE utilization is minimal, the County is enthusiastic about making real changes to its procurement process in awards to both small businesses and MWBEs. The programs recommended by the Study Team are narrowly tailored to the findings of EuQuant's statistical data and echoed by the anecdotal evidence collected by GSPC.

We urge the Cuyahoga County business community to join with the County to make these important changes and to help make them work.

Griffin & Strong, P.C.

EuQuant, Inc.

October, 2015

IX. APPENDICES