



City of Winston-Salem

2019 Disparity Study



CITY OF WINSTON-SALEM, NORTH CAROLINA

2019 DISPARITY STUDY

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CHAPTER I. INTRODUCTION

2019 Disparity Study

City of Winston-Salem, North Carolina



1.1 INTRODUCTION

Winston-Salem, North Carolina is the fifth most populous city in North Carolina, and the third largest urban area in North Carolina. In 2018, the estimated population was 246,328 making it the second largest municipality in the Piedmont Triad region. The Piedmont Triad region is a north-central region of North Carolina that consists of the area within and surrounding the three major parts: Greensboro, Winston-Salem, and High Point with an estimated population of 676,673 who live and work in the region.

CHAPTER SECTIONS



1.1	Introduction
1.2	Study Team
1.3	Overview of Study Approach
1.4	Report Organization
1.5	Glossary of Terms

The procurement practice of the City is to increase procurement opportunities for minority and women business enterprises¹ (M/WBE). In March 2011, City Council adopted a resolution establishing a minimum 10 percent M/WBE goal on formal City construction and repair projects. In January 2018, the City included a 10 percent M/WBE goal for professional and other services. The Office of Business Inclusion and Advancement (BIA), which consists of the Business Development Division, the M/WBE Division, and Reintegration & Youth Development provides the structure and organization for coordinating and collaborating with other City departments as well as reaching out to the minority and women vendor community.

In March 2019, the City retained MGT of America Consulting, LLC (MGT) to conduct a disparity study to determine if there are any disparities between the utilization of minority, or women business enterprises (M/WBEs) compared to the availability of M/WBEs in the marketplace who are ready, willing, and able to perform work. MGT examined the statistical data using the following business categories:

- ◆ Construction Services;
- ◆ Professional Services;
- ◆ Other Services; and
- ◆ Goods and Supplies.

The Study analyzes whether a disparity exists between the number of available M/WBEs providing goods or services in the above business categories (availability) and the number who are actually contracting with the City as a prime contractor or construction subcontractor (utilization).

1.2 STUDY TEAM

The MGT team who conducted the City’s M/WBE Disparity Study is the most experienced and skilled team in the disparity study business. MGT staff has extensive social science research experience and experience in all aspects of disparity research. The experience of our team enables us to navigate the challenges, obstacles, and volatility associated with conducting a thorough Disparity Study, which can derail even the most well-planned and executed study.

¹ “Woman-owned businesses” refers to non-Hispanic white woman owned businesses.

1.2.1 MGT PROJECT TEAM

MGT is a Tampa-based research and management consulting firm. Since 1990, MGT has conducted over 214 disparity and disparity-related studies. The team of experts who dedicated their time, attention, and expertise to this study include:

Dr. Fred Seamon, Executive Vice President/Qualitative Researcher

Dr. Seamon was responsible for ensuring the team had the necessary staff and resources to address the deliverables set forth in the scope of work. Dr. Seamon also conducted policy interviews with City officials and stakeholders. Dr. Seamon has over 30 years of consulting, research, and teaching experience. He has been conducting research related to access and equity since he was a graduate student. Dr. Seamon has been involved in over 100 of MGT's disparity and disparity-related research studies. His disparity study areas of expertise include qualitative research methods, community engagement, and outreach and policy analysis. He has extensive experience analyzing the structure, operations, and processes of public sector organizations and nonprofit agencies and conducting research studies related to access, equity, and disparities in education, business, and human services. His consulting experience also includes workforce development, organizational development, program evaluation, program auditing, and performance management in workforce development, developmental disabilities, and community philanthropy.

Mr. Reggie Smith, Vice President/Project Director

Mr. Smith is the leader of MGT's disparity study business unit and is nationally recognized for managing and directing disparity studies. He has directed over 36 disparity studies since joining MGT and has managed some of the largest disparity studies in the country. He plays a key role in developing, refining, and executing MGT's methodology and quality standards for conducting disparity studies. Mr. Smith is a highly skilled project manager with the knowledge and skills necessary to manage the complexity of a disparity study. In addition to his disparity study experience, Mr. Smith has extensive experience providing consulting, training, and public relations services to private and public sector agencies, particularly in local government. Mr. Smith also specializes in managing and conducting reengineering, operational assessments, organizational and performance reviews, and administrative technology projects for city, county, and state government agencies.

Ms. Vernetta Mitchell, Disparity Services Manager/Project Manager

Ms. Mitchell led the qualitative research effort for this study. She has over 20 years of experience in minority business program development, public and private sector SBE and M/WBE program administration, construction, and government procurement. She has successfully managed dozens of disparity studies since joining MGT and has functional knowledge and expertise in project management, project scheduling, analytical reporting, meeting facilitation, and public relations. Ms. Mitchell's extensive experience in procurement, construction, and program administration has enabled Ms. Mitchell to use her expertise in the development and management of qualitative data collection that has led to more efficient analyses and reporting of business participation.

Mr. Andres Bernal, Senior Consultant/Quantitative Data Manager

Mr. Bernal was responsible for collecting and analyzing City’s contracting and procurement data and serves as the data manager for MGT’s disparity studies. He has extensive experience in the collection and analysis of large complex data and applying various statistical and mathematical computations to reach reliable and valid conclusions that are used to shape disparity study findings and recommendations. Mr. Bernal has a law degree and an impressive background in economic theories, including Microeconomic Theory, Macroeconomic Theory, Econometrics, Urban Economics, Experimental Economics, Human and Labor Resource Economics, and Regression Analysis.

Ms. Kim Stewart, Senior Consultant/Research & Analysis

Ms. Kim Stewart assisted with the preparation and analysis of data for this report. She has over 14 years of experience conducting and managing disparity studies from start to finish and has served as the lead researcher, identifying and preparing data for study evaluation. She has been a lead researcher or project manager on over 40 disparity-related studies and has been a repeat presenter at the American Contract Compliance Association’s (ACCA) National Training Institute on project goal setting, and contract data collection for disparity studies.

MGT SUBCONSULTANTS

Lain Consulting LLC – (MBE)

LaPronda Spann is the Principal and Chief Visionary Architect of Lain Consulting LLC, a Minority Owned and Disadvantaged Business Enterprise located in Charlotte, North Carolina. Established in 2004 and incorporated in 2010, Lain Consulting LLC is an award-winning full-service consulting firm that specializes in diversity certification support services, supplier growth planning, program development and government contracting. For the City’s study, Ms. Spann provided research and input on the community outreach plan and managed the community meetings including the coordination and management of a local court reporter for the meetings.

M&V Consulting and Contracts, LLC – (MBE)

Mr. Michael McKoy, President of M&V Consulting and Contracts, LLC has over 30 years of engineering and transportation experience. He brings experience in all modes of construction, highway, transit, rail, aviation, and ferry. Mr. McKoy served the state of North Carolina working with the North Carolina Department of Transportation as the State Contractor Utilization Engineer from 2005 - 2015. Mr. McKoy currently works in several areas of business development and minority/women business assistance programs. Mr. McKoy conducted in-depth interviews with businesses located in the Winston-Salem Combined Statistical Area and area trade associations and business organizations.

Thompson Consulting and Analytics, LLC – (MBE)

Mr. Ron Thompson, Principal Researcher with Thompson Consulting and Analytics, LLC provides economic impact analysis (employment, personal income, tax, and economic activity), econometric modeling and forecasting, commercial real estate market research, analysis, and site feasibility studies. Mr. Thompson produces economic research studies, industry and competitive analysis, white papers, written reports, and presentation of actionable insights. Mr. Thompson conducted the regression analysis using data provided from the business owner surveys.

Oppenheim Research – Anneliese Oppenheim, President (WBE)

Ms. Anneliese Oppenheim is the CEO of Oppenheim Research and a longtime partner with MGT. Ms. Oppenheim was responsible for conducting the custom census surveys and the business owner telephone surveys for this project. She has over 15 years of experience in the field of survey analysis and opinion research. Her work has included public opinion polling, policy study, program evaluation, and product and advertising research.

1.3 OVERVIEW OF STUDY APPROACH

The City’s study includes procurement activity from July 1, 2013, through June 30, 2018 (FY2014 – FY2018). The objectives of this study were:

- ◆ Determine whether the City, either in the past or currently, engages in discriminatory practices in the solicitation and award of contracts in Construction, Professional Services, Other Services, and Goods & Supplies to M/WBEs.
- ◆ Determine if a legally justified need exists for the continuation of a M/WBE program in accordance with the guidelines set forth by the Supreme Court and relevant subsequent cases.

The Study analyzed contracting opportunities in these procurement categories in order to identify with particularity whether a statistical disparity exists. A statistical disparity demonstrates whether the City is a passive participant in private sector discrimination and/or lingering effects of past discrimination exist that give rise to a compelling governmental interest for City’s M/WBE Programs.

The work plan consisted of, but was not limited to, the following major tasks:

- ◆ Establish data parameters and finalize the work plan.
- ◆ Conduct a legal review.
- ◆ Review City’s policies, procedures, and programs.

RESEARCH QUESTIONS

These research questions are embedded in relevant chapters throughout this report.

1. Is there factual predicate evidence to support a race- and gender-conscious M/WBE program for the City?
2. How does case law inform the research methodology for City’s disparity study?
3. Are there disparities between the availability and utilization of M/WBE primes and subcontractors?
4. If so, what is the cause of the disparity? Is there other evidence that supports and/or explains why there is disparity?
5. Does the City passively engage in private sector discrimination?
6. Are there statistically significant disparities in the utilization of M/WBEs by primes on projects where there are no MWBE goals?
7. Is there qualitative/anecdotal evidence of disparate treatment of M/WBE subcontractors by prime contractors?

- ◆ Determine City’s geographic and product markets.
- ◆ Conduct market area and utilization analyses.
- ◆ Determine the availability of qualified firms.
- ◆ Analyze the availability and utilization of primes or subcontractors in City’s geographic and product markets.
- ◆ Quantify the disparity between availability and utilization for primes and subcontractors.
- ◆ Conduct a survey of business owners.
- ◆ Collect and analyze anecdotal information.
- ◆ Prepare and present draft and final reports for the study.

I.4 REPORT ORGANIZATION

In addition to this introductory chapter, the City’s 2019 Disparity Study report consists of:

CHAPTER 2	LEGAL FRAMEWORK Chapter 2 presents the legal framework and an overview of the controlling legal precedents that impact remedial procurement programs with a particular concentration on the United States Court of Appeals for the Fourth Circuit.
CHAPTER 3	REVIEW OF POLICIES, PROCEDURES, AND PROGRAMS Chapter 3 provides MGT’s analysis of the City’s race- and gender-neutral and race- and gender-conscious policies, procedures, and programs.
CHAPTER 4	MARKET AREA AND UTILIZATION ANALYSES Chapter 4 presents the methodology used to determine City’s relevant market area, and the analyses of vendor utilization by the City for the procurement of Construction, Professional Services, Other Services, and Goods & Supplies procurement.
CHAPTER 5	AVAILABILITY AND DISPARITY ANALYSES Chapter 5 presents the availability of M/WBEs in City’s geographic and product markets and the disparity between the availability and utilization of M/WBEs by the City.
CHAPTER 6	PRIVATE SECTOR ANALYSIS Chapter 6 provides an analysis of the disparities present in the private sector and the effect on M/WBEs. This private sector analysis demonstrates why the City’s race and gender-conscious programs and goals are necessary to ensure it does not become a passive participant in private sector discrimination.

CHAPTER 7	ANECDOTAL ANALYSIS Chapter 7 contains an analysis of anecdotal data collected from the survey of business owners, one-on-one interviews, and public meetings.
CHAPTER 8	FINDINGS, COMMENDATIONS AND RECOMMENDATIONS Chapter 8 provides a summary of the findings, commendations, and recommendations based upon the analyses presented in this study.
APPENDICES	The appendices contain additional analyses and supporting documentation and data.

MGT recommends reading the 2019 Disparity Study in its entirety to understand the basis for the findings and conclusions presented in **Chapter 8, Findings, Commendations and Recommendations**.

1.5 GLOSSARY OF TERMS

This glossary contains definitions of common terms and acronyms used throughout the City’s 2019 Disparity Study. Additional and more detailed definitions can be found in various chapters of the report.

Anecdotal	A personal account of experiences of businesses doing business with or attempting to do business with the City collected through surveys, interviews, and public hearings.
Aspirational Goal	A benchmark percentage of spending by an agency with a particular group over a period of time. The aspirational goal is typically an annual goal.
Anecdotal Database	A compiled list of utilized firms, registered vendors, and certification lists developed from several different sources, including Dun & Bradstreet. This list was used to develop the pool of available firms to participate in the anecdotal activities.
Awards	Awards reflect anticipated dollar amounts a prime contractor or vendor are scheduled to receive upon completion of a contract.
Combined Statistical Area	Combined Statistical Area (CSA) are geographic entities defined by the U.S. Office of Management and Budget (OMB) for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics.
Contract	All types of City agreements, to include direct payments and purchase orders, for the procurement of goods and services.
Custom Census	Custom census involves using Dun & Bradstreet as a source of business availability. A short survey is conducted on a random sample of firms supplied by Dun & Bradstreet, requesting specific information, i.e. ethnic and gender status, willingness to work on City projects.

DBE	An acronym for a Disadvantaged Business Enterprise. A DBE is a for-profit business which is at least 51% owned and controlled by one or more socially or economically disadvantaged individuals, whose personal net worth does not exceed the US Department of Transportation’s current threshold.
Direct Payment	Payment made to prime contractors or vendors without the development of a contract.
Disparity Index/ Disparity Ratio	The ratio of the percentage of utilization and the percentage of availability for a particular demographic group times 100. Disparities were calculated for primes and subcontractors for each of the business categories.
Disparity Study	A study that reviews and analyzes the utilization and availability of disadvantaged, minority- and women-owned businesses in a particular market area to determine if disparity exists in the awarding of contracts to minority and women business enterprises by a public entity.
Expenditures	Expenditures are payments made by City to primes and payments made by primes to subcontractors.
Good Faith Efforts	Documented evidence of the primes’ efforts to meet established project goals to contract with M/WBE firms.
Intermediate Scrutiny	The second level of federal judicial review to determine whether certain governmental policies are constitutional. Less demanding than “strict scrutiny.”
Lowest Responsible, Responsive Bidder	An entity that provides the lowest price, has responded to the needs of the requestor, and has not violated statutory requirements for vendor eligibility.
M/WBE	An acronym for a minority, or woman-owned business enterprise. An MWBE is a business that is at least 51% owned and operated by one or more individuals who are African American, Asian American, Hispanic American, Native American or Nonminority Women.
Master Utilization Database	A database that maintains firms who have conducted business with the City and were paid by the City for goods and services.
MBE	An acronym for a minority-owned business enterprise. An MBE is a business that is at least 51% owned and operated by one or more individuals who are African American, Asian American, Hispanic American, or Native American.
Non-M/WBE	An acronym for firms not identified as minority- or women-owned.
Passive Discrimination	The act of perpetuating discrimination by awarding contracts to firms that discriminate against minority and women-owned firms.

Prima Facie	Evidence which is legally sufficient to establish a fact or a case unless disproved or rebutted.
Prime	The contractor or vendor to whom a purchase order or contract is issued by City.
Private Sector	The for-profit part of the national economy that is not under direct government control.
Procurement Category	The type of service or good provided under a contract awarded. The categories analyzed are Construction, Professional Services, Other Services, and Goods & Supplies.
Project Goals	Goals placed on an individual project or contract, as opposed to aspirational goals placed on overall agency spending.
Public Sector	The non-profit part of the economy that is controlled by the government.
PUMS	An acronym for Public Use Microdata Sample. PUMS contains records for a sample of housing units with information on the characteristics of each unit and each person in it. PUMS files are available from the American Community Survey (ACS) and the Decennial Census.
Purchase Order	A commercial document and first official offer issued by a buyer to a seller, indicating types, quantities, and agreed prices for products or services.
Regression Analysis	A technique for modeling and analyzing several variables when the focus is on the relationship between a dependent variable and one or more independent variables. More specifically, regression analysis helps one understand how the typical value of the dependent variable changes when any one of the independent variables is varied, while the other independent variables are held constant. For the purpose of this study, a multivariate regression analysis was used to examine the influence of an owner's race and gender on gross revenues reported by firms participating in a survey of vendors administered during the study.
Relevant Geographic Market	The geographical area where the firms that have been awarded the majority of the City contract dollars are located.
Sole Source	The contracting or purchasing of goods or services, without bidding, when performance or price competition for a product are not available; when a needed product is available from only one source of supply; or when standardization or compatibility is the overriding consideration
Statistically Significant	The likelihood that a result or relationship is caused by something other than mere random chance. Statistical hypothesis testing is traditionally employed to determine if a result is statistically significant or not. This provides a "p-value" representing the probability that random chance could explain the result. In general, a 5% or lower p-value is considered to be statistically significant.

Strict Scrutiny	The highest level of federal judicial review to determine whether certain governmental policies are constitutional. Applies to race-conscious programs.
Subcontractor	A vendor or contractor providing goods or services to a prime contractor or vendor under contract with City.
Utilization	Examines the expenditures and awards made to primes and subcontractors in the City's geographic market area for each procurement category. The utilization data is presented as the dollars spent or awarded and the percentage of the total dollars by racial, ethnic, and gender classification.
WBE	An acronym for a women-owned business enterprise. A WBE is a business that is at least 51% owned and operated by one or more nonminority women.

CHAPTER 2. LEGAL REVIEW

2019 Disparity Study

City of Winston-Salem, North Carolina



2.1 INTRODUCTION

This chapter provides legal background for the study. The material that follows does not constitute legal advice to the City of Winston-Salem (City) on minority and women business enterprise (M/WBE) programs, affirmative action, or any other matter. Instead, it provides a context for the statistical and anecdotal analysis that appears in subsequent chapters of this report.

The Supreme Court decisions in *Richmond v. Croson Company (Croson)*,² *Adarand v. Peña (Adarand)*,³ and later cases have established and applied the constitutional standards for an affirmative action program. This chapter identifies and discusses those decisions, summarizing how courts evaluate the constitutionality of race-specific and gender-specific programs. Decisions of the Fourth Circuit offer the most directly binding authority; in particular, the recent decision involving the North Carolina Department of Transportation’s (NCDOT) M/WBE program in *H.B. Rowe v. Tippett*.⁴ While the Fourth Circuit has not directly addressed an issue involving MWBE programs since the *Croson* decision, this review considers decisions from other circuits.

By way of a preliminary outline, the courts have determined that an affirmative action program involving governmental procurement of goods or services must meet the following standards:

- ◆ A remedial race-conscious program is subject to strict judicial scrutiny under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.
 - Strict scrutiny has two basic components: a compelling governmental interest in the program and a narrow tailoring of the program to serve or address the government’s compelling interest.
 - To survive the strict scrutiny standard, a remedial race-conscious program must be based on a compelling governmental interest.
 - “Compelling government interest” means the government must prove past or present racial discrimination requiring remedial attention.

CHAPTER SECTIONS



2.1	Introduction
2.2	Standards of Review for Race-Specific and Gender-Specific Programs
2.3	To Withstand Strict Scrutiny, an MBE Program Must Be Based on Thorough Evidence Showing a Compelling Governmental Interest
2.4	Sufficiently Strong Evidence of Significant Statistical Disparities Between Qualified Minorities Available and Minorities Utilized Will Satisfy Strict Scrutiny and Justify a Narrowly Tailored M/WBE Program
2.5	The Governmental Entity or Agency Enacting an M/WBE Program Must Be Shown to Have Actively or Passively Perpetuated the Discrimination
2.6	Anecdotal Evidence of Discrimination in Disparity Studies
2.7	To Withstand Strict Scrutiny, an M/WBE Program Must Be Narrowly Tailored to Remedy Identified Discrimination
2.8	Small Business Procurement Preferences
2.9	Recent Developments
2.10	Conclusions

² *Richmond v. Croson*, 488 U.S. 469 (1989).

³ *Adarand v. Peña*, 515 U.S. 200 (1995).

⁴ *H.B. Rowe v. Tippett*, 2010 WL 2871076 (4th Cir. 2010).

- There must be a specific “strong basis in the evidence” for the compelling governmental interest.
- Statistical evidence is preferred and possibly necessary as a practical matter; anecdotal evidence is permissible and can offer substantial support, but it probably cannot stand on its own.
- Program(s) designed to address the compelling governmental interest must be narrowly tailored to remedy the identified discrimination.
 - “Narrow tailoring” means the remedy must fit the findings.
 - The evidence showing compelling government interest must guide the tailoring very closely.
 - Race-neutral alternatives must be considered first.
 - A lesser standard, intermediate judicial scrutiny, applies to programs that establish gender preferences.
 - To survive the intermediate scrutiny standard, the remedial gender-conscious program must serve important governmental objectives and be substantially related to the achievement of those objectives.
 - The evidence does not need to be as strong and the tailoring does not need to be as specific under the lesser standard.

2.2 STANDARDS OF REVIEW FOR RACE-SPECIFIC AND GENDER-SPECIFIC PROGRAMS

2.2.1 RACE-SPECIFIC PROGRAMS: THE CROSON DECISION

Croson established the framework for testing the validity of programs based on racial discrimination. In 1983, the Richmond City Council (Council) adopted a Minority Business Utilization Plan (the Plan) following a public hearing in which seven citizens testified about historical societal discrimination. In adopting the Plan, the Council also relied on a study indicating that “while the general population of Richmond was 50 percent African American, only 0.67 percent of the city’s prime construction contracts had been awarded to minority businesses in the five-year period from 1978 to 1983.”⁵

The evidence before the Council also established that a variety of state and local contractor associations had little or no minority business membership. The Council relied on statements by a Council member whose opinion was that “the general conduct of the construction industry in this area, the state, and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread.”⁶ There was, however, no direct evidence of race discrimination on the part of the city in its contracting

⁵ Id. at 479-80.

⁶ Id. at 480.

activities, and no evidence that the city's prime contractors had discriminated against minority-owned subcontractors.⁷

The Plan required the city's prime contractors to subcontract at least 30 percent of the dollar amount of each contract to one or more minority-owned business enterprises (MBEs). The Plan did not establish any geographic limits for eligibility. Therefore, an otherwise qualified MBE from anywhere in the United States could benefit from the 30 percent set-aside.

J.A. Croson Company, a non-MBE mechanical plumbing and heating contractor, filed a lawsuit against the city of Richmond alleging that the Plan was unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment. After a considerable record of litigation and appeals, the Fourth Circuit struck down the Richmond Plan and the Supreme Court affirmed this decision.⁸ The Supreme Court determined that strict scrutiny was the appropriate standard of judicial review for MBE programs, which means that a race-conscious program must be based on a compelling governmental interest and be narrowly tailored to achieve its objectives. This standard requires a firm evidentiary basis for concluding that the underutilization of minorities is a product of past discrimination.⁹

2.2.2 GENDER-SPECIFIC PROGRAMS

The Supreme Court has not addressed the specific issue of a gender-based classification in the context of a woman-owned business enterprise (WBE) program. *Croson* was limited to the review of an MBE program. In evaluating gender-based classifications, the Court has used what some call "intermediate scrutiny," a less stringent standard of review than the "strict scrutiny" applied to race-based classifications. Intermediate scrutiny requires that classifying persons on the basis of sex "must carry the burden of showing an exceedingly persuasive justification for the classification."¹⁰

The Fourth Circuit has ruled that the intermediate scrutiny standard is satisfied by "by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."¹¹ The Fourth Circuit in *H.B. Rowe* agreed with other federal circuits that intermediate scrutiny "can rest safely on something less than the 'strong basis in evidence'."¹² This 'something less' can mean that the statute must "present [] sufficient probative evidence in support of its stated rationale for enacting a gender preference, i.e., . . . the evidence [must be] sufficient to show that the preference rests on evidence-informed analysis rather than on stereotypical generalizations."¹³

⁷ *Id.*

⁸ *Id.* at 511.

⁹ *Id.* at 493.

¹⁰ *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981)); see also *United States v. Virginia*, 518 U.S. 515, 531 (1996), *Nguyen v. U.S.*, 533 U.S. 53, 60 (2001). For an earlier Fourth Circuit application of intermediate scrutiny see *Adkins v. Rumsfeld*, 464 F.3d 456, 468 (4th Cir. 2006).

¹¹ *Hogan*, 458 U.S. at 724 (internal quotation marks omitted).

¹² *H.B. Rowe*, at 10 (citing *Engineering Contractors* at 909).

¹³ *Id.* at 10 (citing *Engineering Contractors* at 910, *Concrete Works* at 959).

2.3 TO WITHSTAND STRICT SCRUTINY, AN MBE PROGRAM MUST BE BASED ON THOROUGH EVIDENCE SHOWING A COMPELLING GOVERNMENTAL INTEREST

For government contracting programs, courts have yet to find a compelling governmental interest for affirmative action other than remedying discrimination in the relevant marketplace. In other arenas, diversity has served as a compelling governmental interest for affirmative action. For example, the Ninth Circuit upheld race- based admission standards at an experimental elementary school in order to provide a more real world education experience.¹⁴ More recently, in *Petit v. Chicago*, the Seventh Circuit relied on *Grutter v. Bollinger (Grutter)* in stating that urban police departments had “an even more compelling need for diversity” than universities and upheld the Chicago program “under the *Grutter* standards.”¹⁵ The recent holding that other compelling interests may support affirmative action does not yet appear to have any application to public contracting.¹⁶

Croson identified two necessary factors for establishing racial discrimination sufficiently to demonstrate a compelling governmental interest in establishing an M/WBE program. First, there needs to be identified discrimination in the relevant market.¹⁷ Second, “the governmental actor enacting the set-aside program must have somehow perpetuated the discrimination to be remedied by the program,”¹⁸ either actively or at least passively with “the infusion of tax dollars into a discriminatory industry.”¹⁹

Although the Supreme Court in *Croson* did not specifically define the methodology that should be used to establish the evidentiary basis required by strict scrutiny, the Court did outline governing principles. Lower courts have expanded the Supreme Court’s *Croson* guidelines and have applied or distinguished these principles when asked to decide the constitutionality of state, county, and city programs that seek to enhance opportunities for minorities and women.

2.3.1 POST-ENACTMENT EVIDENCE

The Supreme Court in *Croson* found pre-enactment evidence of discrimination insufficient to justify the program. The defendant in *Croson* did not seek to defend its program based on post-enactment evidence. However, following *Croson*, a number of circuits did defend the use of post-enactment evidence to support the establishment of a local public affirmative action program.²⁰ Some cases required both pre-enactment and post-enactment evidence.²¹

¹⁴ *Hunter v. Regents of University of California*, 190 F.3d 1061 (9th Cir. 1999).

¹⁵ *Petit v. Chicago*, 352 F.3d 1111 (7th Cir. 2003).

¹⁶ *Grutter v. Bollinger*, 539 U.S. 306 (2003). For an argument that other bases could serve as a compelling interest in public contracting, see Michael K. Fridkin, “The Permissibility of Non-Remedial Justifications for Racial Preferences in Public Contracting,” 24 *N. Ill. U. L. Rev.* 509 (Summer 2004).

¹⁷ *Croson*, 488 U.S. at 492, 509-10.

¹⁸ *Coral Construction v. King County*, 941 F.2d 910, 918 (9th Cir. 1991).

¹⁹ *Id.* at 922.

²⁰ See, e.g., *Engineering Contractors v. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Association v. Philadelphia*, 6 F.3d 990, 1009 n. 18 (3rd Cir. 1993); *Concrete Works v. Denver*, 36 F.3d 1513 (10th Cir. 1994).

²¹ See, e.g., *Coral Construction*, 941 F.2d 910, 920.

The Supreme Court case of *Shaw v. Hunt*²² (*Shaw*) raised anew the issue of post-enactment evidence in defending local public sector affirmative action programs. *Shaw* involved the use of racial factors in drawing voting districts in North Carolina. In *Shaw*, the Supreme Court rejected the use of reports providing evidence of discrimination in North Carolina because the reports were not developed before the voting districts were designed. Thus, the critical issue was whether the legislative body believed that discrimination had existed before the districts were drafted.²³ Following the *Shaw* decision, two district courts rejected the use of post-enactment evidence in the evaluation of the constitutionality of local minority business programs.²⁴ A federal circuit court decision, covering the federal small disadvantaged business enterprise program, stated that, “For evidence to be relevant in a strict scrutiny analysis of the constitutionality of a statute, it must be proven to have been before Congress prior to enactment of the racial classification.”²⁵ The issue of post-enactment evidence was not directly addressed in *H.B. Rowe*, although the NCDOT M/WBE program was upheld based on studies conducted after the program was enacted.

2.3.2 RACIAL CLASSIFICATIONS SUBJECT TO STRICT SCRUTINY

In *Scott v. Jackson*, the city argued that its disadvantaged business program was not a racial classification subject to strict scrutiny because (1) it was based upon disadvantage, not race, and (2) it was a goals program and not a quota. The Fifth Circuit disagreed with the claim that the Jackson program was not a racial classification because the city used the federal Section 8(d), which grants a rebuttable presumption of social and economic disadvantage to firms owned by minorities.²⁶ Such a presumption is subject to strict scrutiny. The Fifth Circuit also noted that strict scrutiny applied not simply when race-conscious measures were required, but also when such measures were authorized or encouraged.²⁷ While this issue was not directly addressed in *H.B. Rowe*, the Fourth Circuit did state in an earlier case that with regard to a claim that an employment affirmative action program was not a racial quota, “In the end, appellees cannot escape the reality that these preferences will deny some persons the opportunity to be a state trooper or to advance as a state trooper solely because they belong to a certain race.”²⁸

²² *Shaw v. Hunt*, 517 U.S. 899 (1996).

²³ *Id.* at 910.

²⁴ *AUC v. Baltimore*, 83 F.Supp.2d 613, 620-22 (D.Md. 2000); *West Tenn. ABC v. Memphis City Schools*, 64 F.Supp.2d 714, 718-21 (W.D. Tenn. 1999).

²⁵ *Rothe v. U.S. Dept. of Defense*, 413 F.3d 1327, 1328 (Fed Cir. 2005).

²⁶ *Scott v. City of Jackson*, 199 F.3d 206, 216-17 (5th 1999).

²⁷ *Id.* at 215 (quoting *Bras v. California Public Utilities Commission*, 59 F.3d 869, 875 (9th Cir. 1995)).

²⁸ *Maryland Troopers Assn v. Evans*, 993 F.2d 1072, 1078 (4th Cir. 1993).

2.4 SUFFICIENTLY STRONG EVIDENCE OF SIGNIFICANT STATISTICAL DISPARITIES BETWEEN QUALIFIED MINORITIES AVAILABLE AND MINORITIES UTILIZED WILL SATISFY STRICT SCRUTINY AND JUSTIFY A NARROWLY TAILORED M/WBE PROGRAM

The Supreme Court in *Croson* stated that “where gross statistical disparities can be shown, they alone in a proper case may constitute *prima facie* proof of a pattern or practice of discrimination.”²⁹ But the statistics must go well beyond comparing the rate of minority presence in the general population to the rate of prime construction contracts awarded to MBEs. The Court in *Croson* objected to such a comparison, indicating that the proper statistical evaluation would compare the percentage of qualified MBEs in the relevant market with the percentage of total municipal construction dollars awarded to them.³⁰

The Supreme Court in *Croson* recognized statistical measures of disparity that compared the number of qualified and available M/WBEs with the rate of state construction dollars actually awarded to M/WBEs in order to demonstrate discrimination in a local construction industry.³¹ To meet this more precise requirement, courts, including the Fourth Circuit, have accepted the use of a disparity index.³²

2.4.1 DETERMINING AVAILABILITY

To perform proper disparity analysis, the government must determine “availability”—the number of qualified minority contractors willing and able to perform a particular service for the state and local government. In *Croson*, the Court stated, “Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.”³³

An accurate determination of availability also permits the government to meet the requirement that it “determine the precise scope of the injury it seeks to remedy” by its program.³⁴ Following *Croson*’s statements on availability, lower courts have considered how legislative bodies may determine the precise scope of the injury sought to be remedied by an MBE program. Nevertheless, the federal courts have not provided clear guidance on the best data sources or techniques for measuring M/WBE availability.

Different forms of data used to measure availability give rise to particular controversies. In *H.B. Rowe* subcontractor availability was estimated using NCDOT-approved subcontractors, subcontractor awardees and prime contractors. The plaintiff’s expert argued in the case that subcontractor bidder data should be employed to estimate subcontractor availability rather than a vendor-based approach. The Fourth Circuit

²⁹ *Croson*, 488 U.S. at 501, quoting *Hazelwood School Division v. United States*, 433 U.S. 299, 307-308 (1977).

³⁰ *Id.* at 501.

³¹ *Croson*, 488 U.S. at 503-504.

³² *H.B. Rowe*, at 11. See also, *Engineering Contractors*, 122 F.3d at 914; *Concrete Works IV*, 321 F.3d at 964-69.

³³ *Croson*, 488 U.S. at 509 (emphasis added).

³⁴ *Id.*, 488 U.S. at 498.

in *H.B. Rowe* noted that the available subcontractor bidder data did not change the results of the vendor data.³⁵

Further, Courts have permitted the use of census data to measure availability. Census data has the benefit of being accessible, comprehensive, and objective in measuring availability. In *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, the Third Circuit acknowledged some of the limitations of census data, but nonetheless stated that such data could appropriately be used in disparity studies.³⁶ In that case, the city's consultant calculated a disparity using data showing the total amount of contract dollars awarded by the city, the amount that went to MBEs, and the number of African American construction firms. The consultant combined this data with data from the Census Bureau on the number of construction firms in the Philadelphia Standard Metropolitan Statistical Area.³⁷ Although the Third Circuit declined to rule on the compelling interest prong, the court's discussion of the data sources indicated that it may be inclined to accept such data sources.³⁸

Another potential data source that could be used to determine minority firm availability is the agency's bidder data.³⁹ However, as pointed out in the National Cooperative Highway Research Program's Report 644, the bidder list approach has several drawbacks, including the fact that minority firms are likely to be underrepresented in such lists because of current and past discrimination.⁴⁰ Further, *Croson* does not require the use of bidder data to determine availability.⁴¹ In *Concrete Works IV*, in the context of plaintiff's complaint that the City of Denver had not used such information, the Tenth Circuit rejected the plaintiff's claim that the availability data was unreliable because it was not based on the city's bidder data.⁴² As the court noted, the usefulness of bid information is limited, since some firms that bid may not be qualified or able to undertake agency contracts, whereas other firms that do not bid may be qualified and able to do so.⁴³

2.4.2 RELEVANT MARKET AREA

Another issue in availability analysis is the definition of the relevant market area. Specifically, the question is whether the relevant market area should be defined as the area from which a specific percentage of purchases are made, the area in which a specific percentage of qualified, willing and able contractors may be located, or the area determined by a fixed geopolitical boundary.

The Supreme Court has not yet established how the relevant market area should be defined, and the relevant market was not directly addressed in *H.B. Rowe*. However, the study in *Rowe* defined the relevant

³⁵ *H.B. Rowe*, at 13. In *Concrete Works*, in the context of plaintiffs' complaint that the city of Denver had not used such information, the Tenth Circuit noted that bid information also has its limits. Firms that bid may not be qualified or able, and firms that do not bid may be qualified and able, to undertake agency contracts. *Concrete Works II*, 36 F.3d at 89-90; *Concrete Works IV*, 321 F.3d at 983-84.

³⁶ *Contractors Ass'n of E. Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 605 (3rd Cir. 1996).

³⁷ *Id.*

³⁸ *Id.*

³⁹ George LaNoe, *Who Counts? Determining the Availability of Minority Businesses for Contracting After Croson*, 21 HARV. J. L. AND PUB. POL. 793, 833 (1998).

⁴⁰ Jon Wainright and Colette Holt, *National Cooperative Highway Research Program: Report 644: Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program* (2010).

⁴¹ 488 U.S. at 502.

⁴² 321 F.3d at 983-84.

⁴³ *Id.*

market as the area in which 75 percent of the dollars was spent by the agency with vendors in a particular procurement category.

2.4.3 FIRM QUALIFICATIONS

Another availability consideration is whether M/WBE firms are qualified to perform the required services. In *Croson*, the Supreme Court noted that although gross statistical disparities may demonstrate prima facie proof of discrimination, “when special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.”⁴⁴ The Court, however, did not define the test for determining whether a firm is qualified. In *H.B. Rowe*, the plaintiff’s expert argued that prime contractor assessment of subcontractor qualifications should be used to assess MWBE subcontractor qualification. But the Fourth Circuit noted that there was no data on prime contractor assessment of subcontractor qualifications.⁴⁵

2.4.4 WILLINGNESS

Croson requires that an “available” firm must be not only qualified but also willing to provide the required services. In this context, it can be difficult to determine whether a business is willing. The decision in *H.B. Rowe* did not directly address measures of willingness, but implicitly accepted the vendor-based measures of availability presented in the NCDOT as a measure of willingness.

2.4.5 ABILITY

Another availability consideration is whether the firms being considered are able to perform a particular service. Those who challenge affirmative action often question whether M/WBE firms have the “capacity” to perform particular services. In *Rowe* the court noted that capacity does not have the same force for subcontracts which are relatively small. NCDOT study provided evidence that more than 90 percent of subcontracts were less than \$500,000.⁴⁶ In addition, the study for NCDOT contained a regression analysis indicating that “African American ownership had a significant negative impact on firm revenue unrelated to firm capacity or experience.”⁴⁷

2.4.6 DISPARITY INDEX

In the *Rowe* decision the plaintiff noted that there was not substantial disparity when the percentage of subcontractors were used was compared to their availability. However, the Fourth Circuit noted that “the State pointed to evidence that prime contractors used minority businesses for low value work in order to comply with the Department’s goals.”⁴⁸ Along these lines the Fourth Circuit noted that the average subcontract awarded to nonminority male subcontractors was more than double the size of subcontracts won by MBE subcontractors.⁴⁹

⁴⁴ *Croson*, 488 U.S. at 501, quoting *Hazelwood School District v. United States*, 433 U.S. 299, 308, n.13 (1977).

⁴⁵ *H.B. Rowe*, at 13.

⁴⁶ *Id.* at 14-15.

⁴⁷ *Id.* at 14.

⁴⁸ *Id.* at 13.

⁴⁹ *Id.* at 12.

2.4.7 STATISTICAL SIGNIFICANCE IN DISPARITY STUDIES

While courts have indicated that anecdotal evidence may suffice without statistical evidence, no case without statistical evidence has been given serious consideration by any circuit court. In practical effect, courts require statistical evidence. Further, the statistical evidence needs to be held to appropriate professional standards.⁵⁰ In *H.B. Rowe* the court noted that the NCDOT study focused on disparity ratios lower than 80 percent and conducted t-tests of statistical significance.

2.4.8 NON-GOAL EVIDENCE

Another question that has arisen in the case law is whether evidence of a decline in M/WBE utilization following a change in or termination of an M/WBE program is relevant and persuasive evidence of discrimination. The Fourth Circuit in *H.B. Rowe* found that a 38 percent decline in MWBE utilization following the suspension of the program “surely provides a basis for a fact finder to infer that discrimination played some role in prime contractors’ reduced utilization of these groups during the suspension.”⁵¹ Similarly, the Eighth Circuit in *Sherbrooke Turf Inc. v. Minnesota Department of Transportation* and the Tenth Circuit in *Concrete Works IV* found that such a decline in M/WBE utilization was evidence that prime contractors were not willing to use M/WBEs in the absence of legal requirements.⁵²

2.5 THE GOVERNMENTAL ENTITY OR AGENCY ENACTING AN M/WBE PROGRAM MUST BE SHOWN TO HAVE ACTIVELY OR PASSIVELY PERPETUATED (PARTICIPATED) THE DISCRIMINATION

In *Croson*, the Supreme Court stated, “It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that *public* dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of *private* prejudice.”⁵³ *Croson* provided that the government “can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment.”⁵⁴ The government agency’s active or passive participation in discriminatory practices in the marketplace may show the compelling interest. Defining passive participation, *Croson* stated, “Thus, if the city could show that it had essentially become a “passive participant” in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system.”⁵⁵

In the *H.B. Rowe* case WBEs were over-utilized on NCDOT projects, but evidence was presented of very low MWBE utilization in private sector commercial construction and econometric evidence of disparities in entry into and earnings from self-employment in construction in the Public Use Micro Sample data. The

⁵⁰ *Contractors Association*, 91 F.3d at 599-601.

⁵¹ *H.B. Rowe*, at 15.

⁵² *Concrete Works* at 985; *Sherbrooke Turf*, 345 F.3d 964, 973 (8th Cir. 2003).

⁵³ *Coral Construction*, 941 F.2d at 922 (citing *Croson*, 488 U.S. at 492) (emphasis added).

⁵⁴ See *Croson*; see generally I. Ayres and F. Vars, “When Does Private Discrimination Justify Public Affirmative Action?” 98 *Columbia Law Review* 1577 (1998).

⁵⁵ *Croson*, 488 U.S. at 492.

Fourth Circuit criticized the evidence offered by NCDOT for not having a t-test of statistical significance, for not showing that WBEs sought private sector work, and for less anecdotal evidence of private sector discrimination against WBEs than was shown for minorities. The Fourth Circuit contrasted affidavits produced in the *Concrete Works* case of firms testifying they sought private sector work and could not obtain it. The court also stated that NCDOT didn't establish the overlap between private sector and public sector work in transportation although the court acknowledged that some of the subcontracting was the same in both sectors. There is negligible private sector highway construction. The econometric evidence of self-employment was not addressed. The Fourth Circuit did acknowledge that,

*We do not suggest that the proponent of a gender-conscious program must always tie private discrimination to public action...Rather, we simply hold where, as here, there exists substantial probative evidence of overutilization in the relevant public sector, a state must present something more than generalized private-sector data unsupported by compelling anecdotal evidence to justify a gender-conscious program.*⁵⁶

2.6 ANECDOTAL EVIDENCE OF DISCRIMINATION IN DISPARITY STUDIES

Most disparity studies present anecdotal evidence along with statistical data. The Supreme Court in *Croson* discussed the relevance of anecdotal evidence and explained: “[E]vidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”⁵⁷

In *H.B. Rowe* there was evidence from a telephone survey, interviews and focus groups. The Fourth Circuit favorably cited survey evidence of a good old boys network excluding MBEs from work, double standards in qualifications, primes viewing MBEs as less qualified, dropping MBEs after contract award and the firms changing their behavior when not required to use MBEs. This material was affirmed in interviews and focus groups. The Fourth Circuit also seemed to give some weight to the differences in responses between ethnic/gender groups in regarding the aforementioned barriers. The Fourth Circuit concluded that, “The survey in the 2004 study exposed an informal, racially exclusive network that systematically disadvantaged minority subcontractors.”⁵⁸

The plaintiff argued that this data was not verified. To which the Fourth Circuit responded, “a fact finder could very well conclude that anecdotal evidence need not— and indeed cannot—be verified because it “is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perceptions.”⁵⁹ The Fourth Circuit also commented favorably on the NCDOT study survey oversampling MBEs as long as the sample was random. The Fourth Circuit did state, citing precedent in

⁵⁶ *H.B. Rowe*, at 27.

⁵⁷ *Croson*, 488 U.S. at 509.

⁵⁸ *H.B. Rowe*, at 17.

⁵⁹ *H.B. Rowe*, at 15 (quoting *Concrete Works*, 321 F.3d at 989).

Maryland Troopers, that it was problematic to infer” discrimination from reports of cronyism absent evidence of racial animus.”⁶⁰

In *Engineering Contractors* the County presented testimony from M/WBE program staff, affidavits from 23 M/WBEs and a survey of Black-owned firms. The Eleventh Circuit acknowledged that the “picture painted by the anecdotal evidence [was] not a good one.”⁶¹ However, The Eleventh Circuit had a limited discussion of the requirements for anecdotal evidence because the statistical evidence was weak and the Court noted that “only in the rare case will anecdotal evidence suffice standing alone.”⁶²

Although *Croson* did not expressly consider the form or level of specificity required for anecdotal evidence, the Ninth Circuit has addressed both issues. In *Coral Construction*, the Ninth Circuit addressed the use of anecdotal evidence alone to prove discrimination. Although King County’s anecdotal evidence was extensive, the court noted the absence in the record of any statistical data in support of the program. Additionally, the court stated, “While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”⁶³ The court concluded, by contrast, that “the combination of convincing anecdotal and statistical evidence is potent.”⁶⁴

There is no merit to [the plaintiff’s] argument that witnesses’ accounts must be verified to provide support for Denver’s burden. Anecdotal evidence is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perceptions...Denver was not required to present corroborating evidence and [the plaintiff] was free to present its own witnesses to either refute the incidents described by Denver’s witnesses or to relate their own perceptions on discrimination in the Denver construction industry

Concrete Works IV, 321 F.3d at 989.

Regarding the appropriate form of anecdotal evidence, the Ninth Circuit in *Coral Construction* noted that the record provided by King County was “considerably more extensive than that compiled by the Richmond City Council in *Croson*.”⁶⁵ The King County record contained “affidavits of at least 57 minority or [female] contractors, each of whom complain[ed] in varying degree[s] of specificity about discrimination within the local construction industry.”⁶⁶ The *Coral Construction* court stated that the M/WBE affidavits “reflect[ed] a broad spectrum of the contracting community” and the affidavits “certainly suggest[ed] that ongoing discrimination may be occurring in much of the King County business community.”⁶⁷

In *Associated General Contractors of California v. Coalition for Economic Equity (AGCC II)*, the Ninth Circuit discussed the specificity of anecdotal evidence required by *Croson*.⁶⁸ Seeking a preliminary injunction, the contractors contended that the evidence presented by the city of San Francisco lacked the specificity

⁶⁰ *H.B. Rowe* at 17 (citing *Maryland Troopers*).

⁶¹ *Eng’g Contrs. Ass’n of S. Florida, Inc.*, 122 F.3d at 925.

⁶² *Id.*

⁶³ *Coral Construction*, 941 F.2d at 919 (emphasis added).

⁶⁴ *Id.* See also *AGCC II*, 950 F.2d at 1414-1415.

⁶⁵ *Coral Construction*, 941 F.2d at 917.

⁶⁶ *Id.* at 917-18.

⁶⁷ *Id.*

⁶⁸ *AGCC II*, 950 F.2d at 1414-1415.

required by both an earlier appeal in that case and by *Croson*.⁶⁹ The court held that the City’s findings were based on substantially more evidence than the anecdotes in the two prior cases, and “were clearly based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as significant statistical disparities in the award of contracts.”⁷⁰

The court also ruled that the City was under no burden to identify specific practices or policies that were discriminatory.⁷¹ Reiterating the City’s perspective, the court stated that the City “must simply demonstrate the existence of past discrimination with specificity; there is no requirement that the legislative findings specifically detail each and every instance that the legislative body ha[d] relied upon in support of its decision that affirmative action is necessary.”⁷² Not only have courts found that a municipality does not have to specifically identify all the discriminatory practices impeding M/WBE utilization, but the Tenth Circuit in *Concrete Works IV* also held that anecdotal evidence collected by a municipality does not have to be verified.

2.7 TO WITHSTAND STRICT SCRUTINY, AN M/WBE PROGRAM MUST BE NARROWLY TAILORED TO REMEDY IDENTIFIED DISCRIMINATION

The discussion of compelling interest in the court cases has been extensive, but narrow tailoring may be the more critical issue. Many courts have held that even if a compelling interest for the M/WBE program can be found, the program can still be found to not be narrowly tailored.⁷³ The Fourth Circuit has laid out the following factors in determining whether or not a program was narrowly tailored:

*(1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties.*⁷⁴

In *H.B. Rowe* the Fourth Circuit added to this list “overinclusiveness,” defined as the “tendency to benefit particular minority groups that have not been shown to have suffered invidious discrimination.”⁷⁵

2.7.1 RACE-NEUTRAL ALTERNATIVES

Concerning race-neutral alternatives, the Supreme Court in *Croson* concluded that a governmental entity must demonstrate that it has evaluated the use of race-neutral means to increase minority business

⁶⁹ *Id.* at 1403-1405.

⁷⁰ *Id.* at 1416. This evidence came from 10 public hearings and “numerous written submissions from the public.” *Id.* at 1414.

⁷¹ *Id.* at 1416, n.11.

⁷² *Id.* at 1416.

⁷³ *Contractors Association*, 91 F.3d at 605; *Engineering Contractors*, 122 F.3d at 926-929; *Verdi v. DeKalb County School District*, 135 Fed. Appx 262, 2005 WL 38942 (11th Cir. 2005).

⁷⁴ *H.B. Rowe*, at 18 (quoting *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 344 (4th Cir. 2001))

⁷⁵ *H.B. Rowe*, at 18 (quoting *Alexander*, 95 F.3d at 316).

participation in contracting or purchasing activities. In *H.B. Rowe* the Fourth Circuit noted that NCDOT had a Small Business Enterprise program and had undertaken all the race neutral methods suggested by the DOT DBE program regulations. The Court went on to note that the plaintiff had identified “no viable race-neutral alternatives that North Carolina has *failed* to consider and adopt”⁷⁶ (emphasis in the original). The Court further noted that disparities persisted in spite of NCDOT employment of these race neutral initiatives.

2.7.2 DURATION OF THE REMEDY

With respect to program duration, in *Adarand v. Peña*, the Supreme Court wrote that a program should be “appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate.”⁷⁷ In *H.B. Rowe* the Fourth Circuit stated that “the district court found two facts particularly compelling in establishing that it was narrowly tailored: the statute’s provisions (1) setting a specific expiration date and requiring a new disparity study every 5 years.”... We agree.”⁷⁸ Other appellate courts have noted possible mechanisms for limiting program duration: required termination if goals have been met⁷⁹ and decertification of MBEs who achieve certain levels of success, or mandatory review of MBE certification at regular, relatively brief periods.⁸⁰

2.7.3 RELATIONSHIP OF GOALS TO AVAILABILITY

Narrow tailoring under the *Croson* standard requires that remedial goals be in line with measured availability. Merely setting percentages without a carefully selected basis in statistical studies, as the city of Richmond did in *Croson* itself, has played a strong part in decisions finding other programs unconstitutional.⁸¹

In *H.B. Rowe* the Fourth Circuit found that NCDOT participation goals were related to percentage MBE availability. First, the NCDOT goals were set project by project. Second, there was a report detailing the type of work likely to be subcontracted. Third, the NCDOT goal setting committee checks its database for availability. Finally, Fourth Circuit noted that 10 percent of the NCDOT projects had a zero M/WBE goal.

2.7.4 FLEXIBILITY

In *H.B. Rowe* the Fourth Circuit agreed with the ruling of the federal district court in the case that the NCDOT MWBE program was flexible, stated that,

The Program contemplates a waiver of project-specific goals when prime contractors make good faith efforts to meet those goals... Good faith efforts essentially require only that the prime contractor solicit and consider bids from minorities. The State does not require or expect the prime contractor to accept any bid from an unqualified bidder, or any bid that is not the lowest bid. Moreover, prime contractors can bank any excess

⁷⁶ *H.B. Rowe*, at 18.

⁷⁷ *Adarand*, 515 U.S. at 238 (internal quotations and citations omitted).

⁷⁸ *H.B. Rowe*, at 18 (quoting *H.B. Rowe, Inc.*, 589 F. Supp. 2d at 597).

⁷⁹ *Sherbrooke*, 354 F.3d at 972.

⁸⁰ *Adarand v. Slater*, 228 F.3d at 1179, 1180.

⁸¹ *Contractors Association*, 91 F.3d at 607 (“The district court also found ... that the ... Ordinance offered only one reference point for the percentages selected for the various set-asides -- the percentages of minorities and women in the general population.”). See also *Builders Association of Greater Chicago*, 256 F.3d at 647.

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.

In contrast, the Third Circuit observed in *Contractors Association* that, “As we have explained, the 15 percent participation goal and the system of presumptions, which in practice require non-black contractors to meet the goal on virtually every contract, result in a 15% set-aside for black contractors in the subcontracting market.”⁸²

The Fourth Circuit also noted that,

*The State does not require or expect the prime contractor to accept any bid from an unqualified bidder, or any bid that is not the lowest bid. Moreover, prime contractors can bank any excess minority participation for use against future goals over the following two years.*⁸³

It is worth observing that these features of the NCDOT program are more narrowly tailored than the federal DBE program for federally funded transportation projects.⁸⁴

2.7.5 BURDEN ON THIRD PARTIES

Narrow tailoring also requires minimizing the burden of the program on third parties waivers and good faith compliance are tools that serve this purpose of reducing the burden on third parties.⁸⁵ The plaintiff in *H.B. Rowe* argued that the solicitation requirements were burdensome and that it was forced to subcontract out work that could be self-performed. The Fourth Circuit noted that the solicitation requirements could be met with existing staff and the M/WBE program did not require subcontracting out work that could be self-performed.⁸⁶

2.7.6 OVER-INCLUSION

Finally, narrow tailoring involves limiting the number and type of beneficiaries of the program. As noted above, there has to be evidence of discrimination to justify a group- based remedy, and over-inclusion of uninjured individuals or groups can endanger the entire program. However, the statute in question limited relief “those racial or ethnicity classifications . . . that have been subjected to discrimination in the relevant marketplace and that have been adversely affected in their ability to obtain contracts with the Department.”⁸⁷

⁸² *Contractors Association*, 91 F.3d at 606.

⁸³ *H.B. Rowe*, at 19.

⁸⁴ Compare federal regulation 49 CFR Part 26 Appendix A(2) with North Carolina regulation 19NCAC 02d.1109(7).

⁸⁵ 49 CFR, Section 26, Part 53.

⁸⁶ *H.B. Rowe*, at 20.

⁸⁷ N.C. Gen. Stat. § 136-28.4(c)(2).

2.8 SMALL BUSINESS PROCUREMENT PREFERENCES

Small business procurement preferences have existed since the 1940s. The first small business program had its origins in the Smaller War Plants Corporation (SWPC), established during World War II.⁸⁸ The SWPC was created to channel war contracts to small business. In 1947, Congress passed the Armed Forces Procurement Act, declaring, “It is the policy of Congress that a fair proportion of the purchases and contracts under this chapter be placed with small business concerns.”⁸⁹ Continuing this policy, the 1958 Small Business Act requires that government agencies award a “fair proportion” of procurement contracts to small business concerns.⁹⁰ The regulations are designed to implement this general policy.⁹¹

Section 8(b)(11) of the Small Business Act authorizes the Small Business Administration (SBA) to set aside contracts for placement with small business concerns. The SBA has the power:

*...to make studies and recommendations to the appropriate Federal agencies to insure that a fair proportion of the total purchases and contracts for property and services for the Government be placed with small-business enterprises, to insure that a fair proportion of Government contracts for research and development be placed with small-business concerns, to insure that a fair proportion of the total sales of Government property be made to small-business concerns, and to insure a fair and equitable share materials, supplies, and equipment to small-business concerns.*⁹²

Every acquisition of goods and services anticipated to be between \$2,500 and \$100,000 is set aside exclusively for small business unless the contracting officer has a reasonable expectation of fewer than two bids by small businesses.⁹³

There has been only one constitutional challenge to the long-standing federal SBE programs. In *J.H. Rutter Rex Manufacturing v. United States*,⁹⁴ a federal vendor unsuccessfully challenged the Army’s small business set-aside as in violation of the due process clause of the Fifth Amendment to the U.S. Constitution, as well as the Administrative Procedures Act and the Armed Forces Procurement Act.⁹⁵ The court held that classifying businesses as small was not a “suspect classification” subject to strict scrutiny. Instead, the court ruled:

Since no fundamental rights are implicated, we need only determine whether the contested socioeconomic legislation rationally relates to a legitimate governmental purpose . . . Our previous discussion adequately demonstrates that the procurement statutes and the regulations promulgated there under are rationally related to the sound

⁸⁸ See, generally, Thomas J. Hasty III, “Minority Business Enterprise Development and the Small Business Administration’s 8(a) Program: Past, Present, and (Is There a) Future?” *Military Law Review* 145 (Summer 1994): 1-112.

⁸⁹ 10 U.S.C. § 2301 (1976).

⁹⁰ 15 USC 631(a).

⁹¹ See 32 C.F.R. §§ 1-701.1 to 1-707.7.

⁹² 15 U.S.C. § 637(b)(11).

⁹³ *Federal Acquisition Regulations* 19.502-2.

⁹⁴ 706 F.2d 702 (5th Cir. 1983), cert. denied, 464 U.S. 1008 (1983).

⁹⁵ Administrative Procedures Act, 5 U.S.C. §§ 552(a)(1)(E) (1976) and the “fair proportion” language of the Armed Forces Procurement Act, 10 U.S.C. § 2301 et seq. (1976), and the Small Business Act, 15 U.S.C. §631 et seq. (1976).

*legislative purpose of promoting small businesses in order to contribute to the security and economic health of this Nation.*⁹⁶

A large number of state and local governments have maintained small business preference programs for many years.⁹⁷ No district court cases were found overturning a state and local small business preference program. One reason for the low level of litigation in this area is that there has been no significant organizational opposition to SBE programs. There are no reported cases of litigation against local SBE programs. The legal foundations that have typically sued M/WBE programs have actually promoted SBE procurement preference programs as a race-neutral substitute for M/WBE programs.

There has been one state court case in which an SBE program was struck down as unconstitutional. The Cincinnati SBE program called for maximum practical M/WBE participation and required bidders to use good faith effort requirements to contract with M/WBEs up to government-specified M/WBE availability. Failure to satisfy good faith effort requirements triggered an investigation of efforts to provide opportunities for M/WBE subcontractors. In *Cleveland Construction v. Cincinnati*,⁹⁸ the state court ruled that the Cincinnati SBE program had race and gender preferences and had deprived the plaintiff of constitutionally protected property interest without due process of law. The city acknowledged that it had not offered evidence to satisfy strict scrutiny because it felt that it had been operating a race-neutral program.

2.9 RECENT DEVELOPMENTS

Recent years have brought further challenges to race- and gender-conscious preference programs in the transportation-constructing industry. In the Seventh Circuit, the federal DBE program and the programs of the Illinois Department of Transportation (IDOT) and the Illinois State Toll Highway Authority survived a Fourteenth Amendment equal protection challenge.⁹⁹ A 2015 challenge to the constitutionality of the IDOT DBE was also unsuccessful before the Seventh Circuit.¹⁰⁰ In 2013, the Ninth Circuit dismissed an appeal, on standing grounds, of a ruling adverse to a constitutional challenge to the California Department of Transportation's DBE program, stating that the program would survive strict scrutiny. The Court indicated here that the Caltran's program would survive strict scrutiny by having a strong basis in evidence of discrimination within the California transportation contracting industry; and being narrowly tailored to benefit only those groups that have actually suffered discrimination.¹⁰¹

Within the Fifth Circuit, the Southern District of Texas recently considered a challenge to Houston's M/WBE program in *Kossman Contracting v. City of Houston*.¹⁰² The case addressed an equal-protection challenge to the City of Houston's 2013 Small/Minority Business Enterprise Program for Construction

⁹⁶ *J. H. Rutter Rex Manufacturing*, at 706 F.2d at 730 (emphasis added). See also *Dandridge v. Williams*, 397 U.S. 471 (1970).

⁹⁷ For example, Florida started a small business preference program in 1985 (FL St Sec. 287); Minnesota, in 1979 (Mn Stat 137.31); New Jersey, in 1993 (N.J.S.A 52:32-17).

⁹⁸ *Cleveland Construction v. Cincinnati*, Case No. A0402638 (Ct Comm Pleas, Hamilton County, Ohio 2005).

⁹⁹ *Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932 (7th Cir. 2016).

¹⁰⁰ *Dunnet Bay Constr. Co. v. Borggren*, 799 F.3d 676 (7th Cir. 2015).

¹⁰¹ *Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1190 (9th Cir. 2013).

¹⁰² *Kossman Contr. v. City of Houston*, No. H-14-1203, 2016 U.S. Dist. LEXIS 37708 (S.D. Tex. Feb. 16, 2016), *adopted by Kossman Contr. Co. v. City of Houston*, No. H-14-1203, 2016 U.S. Dist. LEXIS 36758 (S.D. Tex. Mar. 22, 2016).

Contracts. The opinion provides an up-to-date discussion of current constitutional standards, relying primarily on *Croson*, more recent Supreme Court guidance, and Fifth Circuit analysis.

The court conducted an extensive review of the disparity and availability study commissioned by the City of Houston and determined that the study provided strong evidence of ongoing discrimination in construction contracting processes, which justified the remedial program to combat the discrimination. The study's statistical analysis and anecdotal evidence were held to support the disparity findings. The court analyzed five and one-half years of the City's construction contract records.

In upholding the constitutionality of all aspects of the program, except as to goals for one ethnic group for which the evidence did not show discrimination, the court relied on the following Fifth Circuit cases:

- ♦ *Dean v. City of Shreveport*, 438 F.3d 448 (5th Cir. 2006).
- ♦ *Police Ass'n of New Orleans ex rel. Cannatella v. City of New Orleans*, 100 F.3d 1159 (5th Cir. 1996).
- ♦ *Houston Contractors Ass'n v. Metro. Transit Auth. of Harris Cnty.*, 189 F.3d 467 (5th Cir. 1999).
- ♦ *W.H. Scott Constr. Co. v. City of Jackson, Miss.*, 199 F.3d 206 (5th Cir. 1999).
- ♦ *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).

2.10 CONCLUSIONS

As summarized earlier, when governments develop and implement a contracting program that is sensitive to race and gender, they must understand the case law that has developed in the federal courts. These cases establish specific requirements that must be addressed so that such programs can withstand judicial review for constitutionality and prove to be just and fair. Given current trends in the application of the law, local governments must engage in specific fact-finding processes to compile a thorough, accurate, and specific evidentiary foundation to determine whether there is, in fact, discrimination sufficient to justify an affirmative action plan. Further, state and local governments must continue to update this information and revise their programs accordingly.

While the Supreme Court has yet to return to this exact area of law to sort out some of the conflicts, the Fourth Circuit has recently provided some guidance on core standards. Ultimately, MBE and WBE programs can withstand challenges if state and local governments comply with the requirements outlined by the courts.

CHAPTER 3. REVIEW OF POLICIES,
PROCEDURES, AND PROGRAMS

2019 Disparity Study

City of Winston-Salem, North Carolina



3.1 INTRODUCTION

Chapter 3 examines the City of Winston-Salem’s (City) procurement policies and procedures. The review of procurement policies and procedures is important for several reasons—first it is an essential component of a legally supportable disparity study, second the policy review is critical for pinpointing areas for more in-depth study and analysis to determine how policies and practices impact access to procurement opportunities. Finally, the review is important for identifying enhancements to procurement policies and practices that impact department end users and businesses seeking opportunities with the City.

CHAPTER SECTIONS



- 3.1 Introduction
- 3.2 Methodology and Definitions
- 3.3 Procurement Structure and Environment
- 3.4 Procurement Policies and Procedures
- 3.5 Business Diversity and Inclusion
- 3.6 Conclusion

Chapter 3 includes an overview of procurement policies and procedures and examines the routine application of policies and any unintended consequences that limit equal access to procurement opportunities. MGT’s review of policies and procedures is presented in six sections. Section 2 describes the methodology used to conduct the review. The remaining sections summarize procurement policies, procedures, programs, and the structure and environment in which procurement take place. The review and examination of policies in this chapter is intended to provide the foundation for the analysis of utilization and availability in **Chapter 4** and the findings and recommendations in **Chapter 8**.

3.2 METHODOLOGY AND DEFINITIONS

This section summarizes the overall approach and methods undertaken to review the City’s procurement policies. To conduct the review and to prepare this summary, a multi-faceted approach was used, which included collecting and reviewing source documents and materials related to purchasing policies, procedures, and practices. Policies and procedures were also reviewed and discussed with key stakeholders including City staff responsible for procurement and department end users. The discussions with staff were used to help document procurement policies and their impact on department end users and businesses doing business with or seeking to do business with the City. MGT also navigated the City’s website to review information and resources available to businesses seeking procurement opportunities. The policy review was conducted with the complete cooperation of City staff who provided data, information, insights and assistance to MGT throughout the policy review. The review of policies and procedures included the following major steps:

- ◆ Finalizing the scope of the policy review.
- ◆ Collection, review, and summarization of procurement policies and procedures.
- ◆ Collection, review, and summarization of policies, procedures, and other information and data pertaining to efforts to assist businesses seeking opportunities with the City.
- ◆ Interviews with staff to determine how procurement policies have been implemented, including the application of policies, discretionary use of policies, policy exemptions, and the impact of

policies on key users. Interviews and meetings were initially held with City staff in April 2019. As necessary, follow-up contacts were made to obtain additional information.

- ◆ Review of applicable rules, regulations, and federal and state laws governing contracting and procurement.

Finally, MGT collected and reviewed various source documents and information pertinent to the policy review. Major policy related documents and other information collected and reviewed are itemized in **Table 3-1**.

TABLE 3-1. DOCUMENTS REVIEWED DURING THE POLICY AND PROCEDURES REVIEW

INDEX	DESCRIPTION
<i>Procurement Related Documents</i>	
1.	City of Winston-Salem Purchasing Policy and Procedures Manual (Revision March 31, 2017)
2.	City of Winston-Salem Administrative Policy (Purchasing Policy, Effective Date 4/10/18)
3.	City of Winston-Salem Procurement Guidelines (City of Winston-Salem Website)
4.	Contract Approval Checklist
5.	Change Order Memorandum 2019-01-15
6.	Re-Advertisement for Bids
7.	Good Faith Remedial Actions
8.	City of Winston – Salem Minority and Woman-Owned Business Program Plan 2018
9.	Ordinance Amending Chapter 2” Administration” By Creating A New Division 13 Entitled “M/WBE Advisory Committee
10.	Minority/Women Business Enterprise(M/WBE) Program Participation/Special Instructions for Proposals Estimated to Cost More Than \$100,000
11.	Qualification Adjustments for Subsequent Bids
12.	Special Instructions to Bidders Regarding Compliance with the City of Winston-Salem’s and/or City/County Utility Commission’s Minority and Women Business (M/WBE) Program
13.	Community and Business Development Department Division of Minority and Woman-Owned Business Enterprises 2015 Council Update
14.	MWBE Annual Reports 2012-2013 to 2017-2018
15.	Request for Bid Computer Equipment FB 19263
16.	Request for Letters of Interest/Statement of Qualifications for Professional Engineer Services FB 19225
17.	Request for Proposal Cost Allocation Plan Development April 2014
18.	Request for Proposal Electronic Plan Review January 2015
19.	Request for Proposals Citizen Survey Development September 2017
20.	Request for Qualifications Long Creek Park Master Plan October 2017
21.	Request for Proposals Financial Advisory Services November 2017

INDEX	DESCRIPTION
22.	Request for Proposal Disparity Study July 2018
<i>Statutes and Regulations</i>	
23.	<i>North General Statutes Chapter 22, Chapter 143</i> <i>G.S.22C-2 Performance by Subcontractor</i> <i>G.S. 143-128.3 Minority Business Participation Administration</i> <i>G.S. 143-129 Procedure for Letting Public Contracts</i> <i>G.S. 129.9 Alternative Competitive Bidding Methods</i> <i>G.S. 143-129.8 Purchase of Information Technology Goods and Services</i> <i>G.S. 143-132 Minimum Number of Bids for Public Contracts</i> <i>G.S.143-134.1 Payments to Subcontractors</i> <i>G.S.143-135.8 Prequalification</i>
24.	<i>Code of Ordinances Section 2-2</i>
25.	United States Department of Transportation Disadvantaged Business Program, 49 C.F.R. Part 23 and 26
<i>Other Related Documents</i>	
26.	Office of Business Inclusion & Advancement M/WBE Division Key Work Items
27.	Accomplished Tasks/In Progress Implemented After Study Period/Areas of Opportunity April 14,2019
28.	Business Training Program Sponsored by Office of Business Inclusion & Advancement
29.	City of Winston-Salem Annual Financial Reports.

3.2.1 DEFINITIONS

The section which follows include selected definitions extracted from the City’s Purchasing Policy and Procedures Manual.¹⁰³ Documenting and understanding definitions provided proper context for the policies and procedures reviewed by MGT.

Approved as to Form and Legality: Refers to the statement signed by the City Attorney that the document meets all legal requirements.

Certificate of Insurance: A certificate of insurance is a document issued by an insurance company that is used to verify the existence of insurance coverage. The document includes information such as the effective date of the policy, the type of insurance coverage purchased, and the dollar amount of applicable liability.

Contract: Any written agreement that imposes an obligation, monetary or otherwise, on the parties involved. One party agrees to sell, deliver, or provide a service while the other agrees to purchase the goods or service, based on the terms and conditions within the contract.

¹⁰³ City of Winston-Salem Purchasing Policy and Procedures Manual.

Template Contract: The City's form contracts, where the terms and conditions have been pre-approved by the City of Winston-Salem Attorney. Template contracts are posted on the City's intranet site on the Purchasing page.

Deliverable: A unit or increment of work required by the contract, including such items as goods, services, reports, or documents.

Non-appropriation clause: A non-appropriation clause enables the City to terminate a contract or lease agreement at the end of the current appropriation period without further obligation or penalty. This may be done only in cases where the City was unable to obtain funding for future payment obligations on the contract.

Pre-audit Certification: Refers to the statement signed by the Finance Officer ensuring that the contract meets the pre-audit standards and that the funds for the contract are available or have been encumbered. The pre-audit process is required by North Carolina General Statutes Chapter 159.

Purchase Order: Encumbers budgeted funds and is evidence of the City's commitment to pay once goods are received and/or services are rendered. A Purchase Order is a form of contract for the purchase of goods; however, it does not replace a written formal agreement if applicable.

Department: The department initiating the contract/purchase order.

Scope of Service: Provides a detailed description of the services to be rendered under the contract. Services should be detailed, defining what the services/goods are, when and where the services will be rendered, and how much the services/goods will cost.

Service Contracts: A written agreement for work or duties to be performed by an independent entrepreneur, business, company, corporation, or entity, where the process is more important than the product. Examples of services for this type of contract are janitorial, security, lawn care, demolition, etc.

Contract Amendment or Addendum: A document that adds or deletes a portion of the original contract without changing or rewriting the entire contract. Amendments should be used infrequently as generally it is better to have a new contract.

Contract Extension: An agreement used only to extend and/or renew the term of the original contract.

Consulting Contract: An agreement with an independent contractor whose occupation is the rendering of such services. The contractor possesses specialized knowledge, experience, expertise, and professional qualifications to investigate assigned problems or projects, and to provide counsel, review, analysis, or advise.

Professional Service: An agreement with an independent contractor or corporation who possesses specialized knowledge, experience, expertise, and professional qualifications. Examples of these types of services are architectural, engineering, surveying services.

Construction: A written agreement for work to be performed on an existing structure or the new structure being built for the City. Construction contracts can consist of any of the following:

- ◆ General conditions of the contract for construction
- ◆ Agreement between the Owner and the design professional (architect and/or engineer)
- ◆ Agreement between Owner and Contractor

Purchase of Goods Contract: An agreement that specifies that act of buying or acquisition of goods. This type of contract is usually reserved for purchases of goods in the formal range (≥\$90,000). A purchase order for goods is legally a binding contract.

Lease: An agreement conveying use of property for a designated period of time in exchange for rental payment. Leases over one year must be approved by the City Council. Leases of more than ten years must be treated as a sale and are subject to the upset bid process.

Grant: Funds provided by another government or agency with specific terms and conditions defined.

Non-Standard/Vendor Contract: A contract provided by a vendor or contractor. City Attorney approval is required on all non-standard contracts. Certain information technology hardware/software contracts fit in this category.

Inter-local Agreement: An agreement between two governmental entities or agencies. The initiating department must contact the City Attorney prior to initiating this type of contract

Multi-Year Contracts: The City may enter into multi-year or continuing contracts that extend beyond the fiscal year in which the contract is entered. (Note: This is different from a contract that automatically renews (also known as an Evergreen Clause), which is prohibited.) The usual types of multi-year contracts are service agreements or leases. A non-appropriation clause should be included on all contracts.

3.3 PROCUREMENT STRUCTURE AND ENVIRONMENT

The structure and environment in which procurement occurs was important for understanding how procurement policies are operationalized within the City's organization structure shown in **Exhibit 3-1**. The organizational units shown in **Exhibit 3-1** purchase a variety of goods and services for internal use and to provide essential services to citizens. As such, the organization units in **Exhibit 3-1** engage in procurement at varying levels on an ongoing basis. **Exhibit 3-2** shows the organizational structure for the Purchasing Division which is housed in Financial Management Services. The Purchasing Division responsibilities include overseeing all purchasing activities across the City, to maintain and ensure compliance with regulatory guidelines and internal control procedures, to conduct business with the highest level of customer service, ethical standards, fairness, and transparency, while welcoming qualified, responsible, and diverse vendors. The Procurement Division is responsible for obtaining goods and services for the City, Forsyth County, the City/County Utilities Commission, and the Winston-Salem Transit Authority and is staffed with 7 FTEs including the Purchasing Director, one Senior Buyer, two Buyers (one of whom is also Construction Specialist), one Financial Analyst, one Financial Technician, and

one Senior Office Assistant. The City's website includes information on the areas of responsibility of each Purchasing Staff member. For example, in addition to managing the Purchasing Division, the Purchasing Director is responsible for bids for major purchases and construction projects for the city and county. Buyers are responsible for formal and informal bids, which include but are not limited to:

- ◆ Tangible items and services
- ◆ Construction/repair projects
- ◆ Vehicles and construction equipment
- ◆ Term contracts for mowing, maintenance and other essential city and county services

Financial Analyst, Financial Technician and Senior Office Assistant staff have responsibility for a diverse range of procurement tasks including:

- ◆ Disposal of city surplus
- ◆ Processing purchase orders
- ◆ Monthly reports
- ◆ Change orders Contract renewals
- ◆ Processing fuel orders for city vehicles
- ◆ Training purchase card holders in policies, procedures and reporting
- ◆ Audit purchase card expenditures
- ◆ Data management

To be responsive in providing City services, procurement is continuous and ongoing, and the responsibilities carried out by staff are essential to meeting the City's procurement goals. Pursuant to the City's Purchasing Policy and Procedures Manual,¹⁰⁴ the goals of the City's procurement are as follows:

- ◆ To comply with the legal requirements that govern public purchasing and procurement.
- ◆ To assure vendors that impartial and equal treatment is offered to all segments of the vendor community, including small businesses, minority, and women operated enterprises.
- ◆ To professionally administer the search for sources of supplies, the development of new sources, and the selection of suppliers.
- ◆ To promote good and effective vendor relations, cultivated by informed and fair buying practices and strict adherence to ethical standards.
- ◆ To ensure the wise, prudent, and economical use of public money in the best interest of taxpayers.
- ◆ To ensure appropriate public access to contracting information.

To meet the above goals the Purchasing Division provides centralized procurement services in accordance with applicable laws, rules, regulations, and policies. North Carolina General Statutes, City of Winston-Salem Administrative Policy/Purchasing Policy, Purchasing Policy and Procedures Manual and the Code of Ordinances referenced in **Table 3-1** guide and enable the Purchasing Division to procure "what is needed,

¹⁰⁴ City of Winston-Salem Purchasing Policy and Procedures Manual.

when it is needed, at the lowest possible cost.” In exercising its procurement authority and responsibility, the Procurement Division is expected to:

- ◆ Provide fair and equitable treatment of all persons interested in the City’s procurement
- ◆ Maximize purchasing value of public funds
- ◆ Adhere to laws, regulations, processes, and procedures
- ◆ Obtain goods and services in a timely manner to meet department needs

Staff who are responsible for managing and operating the City’s centralized procurement system perform a broad spectrum of activities aligned with established policies and procedures. Through the acquisition of goods and services in accordance with North Carolina General Statutes and City policies and procedures for advertisement, solicitation, and approval staff performs an essential and vital function for the City. Interviews and meetings with staff provided insight into procurement operations and functions and the role of Purchasing Staff and staff in other City departments. Discussions with staff focused primarily on procurement policies, practices, and processes and their impact on user departments and businesses seeking opportunities with the City. Without the staff support and cooperation received by MGT throughout this study, completing the policy review and the other components of this study would have been difficult. MGT’s review concluded that the City’s procurement policies and procedures are routinely applied in purchasing goods and services across the different sourcing methods currently being utilized. Based on discussions with staff, purchasing goods and services is facilitated by the following:

- ◆ Coordination of all phases of the purchasing process from identifying the need to contract award.
- ◆ Coordination, support, and guidance to departments in the procurement of goods and services.
- ◆ Coordination, support, and assistance to businesses seeking procurement opportunities with the City.

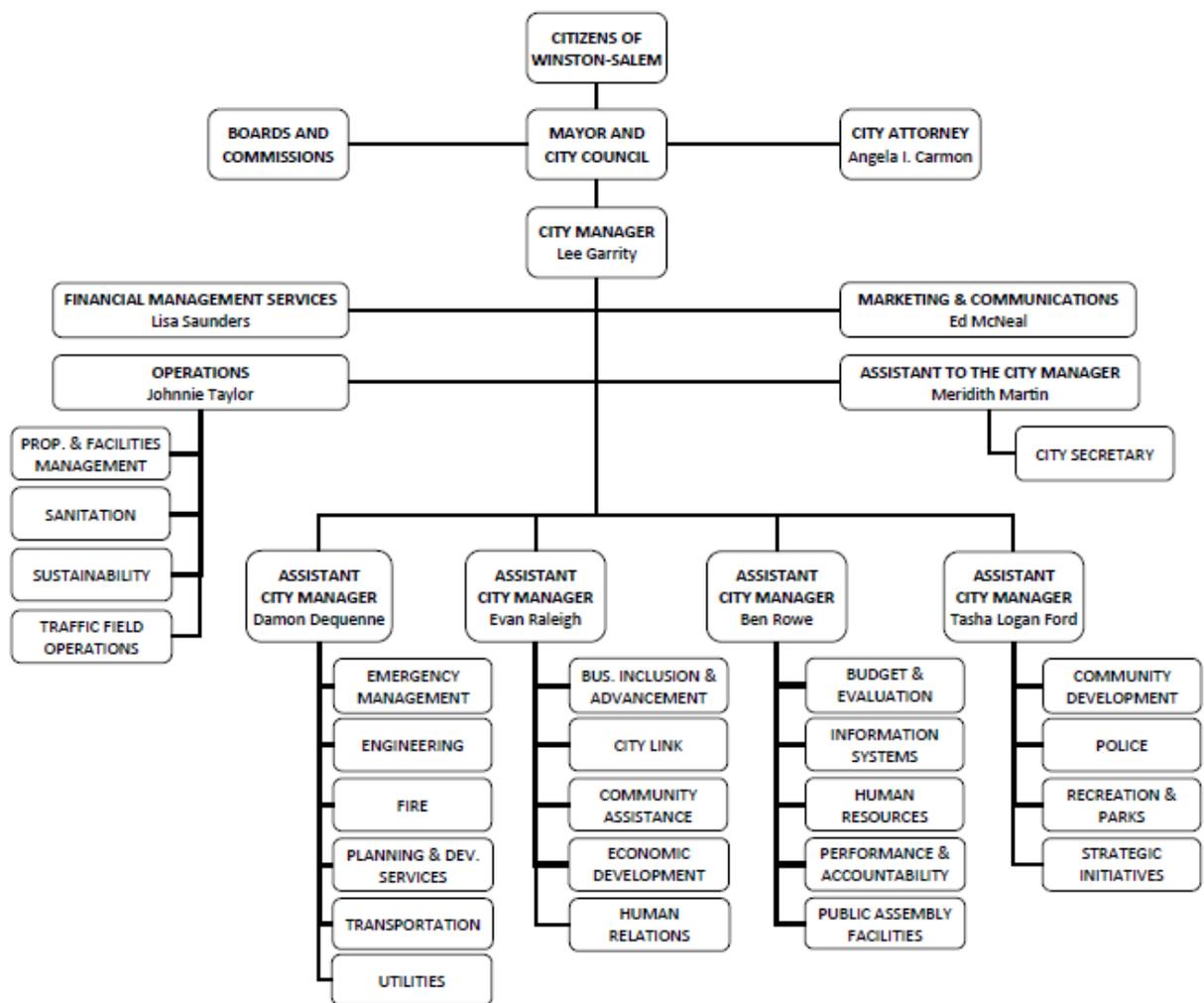
To facilitate M/WBE participation the City’s M/WBE Policy is premised on “providing minorities and women equal opportunity to participate in all aspects of City contracting and purchasing programs.”¹⁰⁵ The Procurement Division works in coordination with Business Inclusion and Advancement (BIA) and the M/WBE Division to facilitate participation of M/WBEs. As discussed in detail later, BIA and the M/WBE Division play a critical role in advancing the City’s goal of increasing the utilization of M/WBEs in City contract and procurement activities. Interviews and meetings with Procurement Division staff, BIA staff, and department staff provided insight into how policies are operationalized to encourage and improve participation of M/WBEs. While it was generally agreed that progress is being made relative to M/WBE participation, some staff indicated that M/WBE availability is lacking in certain areas and over saturated in areas such as landscaping and cement. Some staff also commented it has been difficult to get bids on some projects and there have been instances where no bids have been received from M/WBEs. During the anecdotal research, MGT will solicit input from contractors and subcontractors about reasons for not bidding.

Staff comments also revealed an emphasis on ensuring that policies and procedures are consistently and routinely followed in acquiring goods and services and noted that changes have occurred that give BIA

¹⁰⁵ City of Winston-Salem Minority and Woman-Owned Business Program Plan.

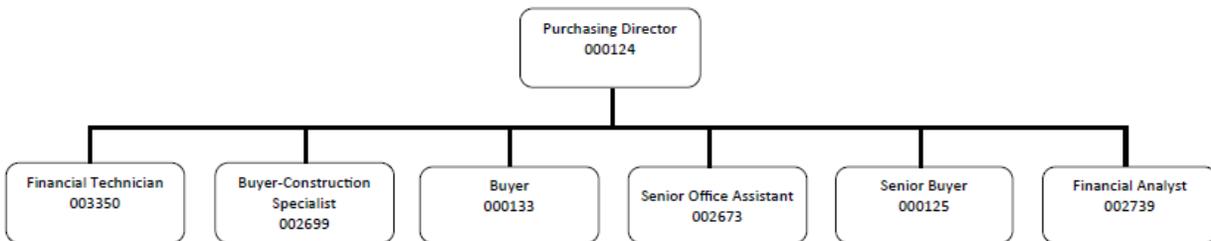
more oversight in strengthening compliance. Overall staff were complimentary about procurement processes and diversity and inclusion efforts. Some staff also noted there may be opportunities to streamline processes to reduce the time between issuing a solicitation and award. Several staff also stated they hope the results of the disparity study provide a “truer” picture of M/WBE availability within the different business categories. In addition to meetings with staff, MGT’s review and navigation of the City’s website was used to better understand what’s available and accessible to businesses interested in doing business with the City. In addition to accessing the different links on the website, MGT completed the online vendor registration and reviewed bid opportunities and other information pertinent to first-time vendors and vendors with prior experience doing business with the City.

EXHIBIT 3-1. CITY OF WINSTON-SALEM ORGANIZATION CHART



Source: City of Winston-Salem.

EXHIBIT 3-2. PURCHASING DIVISION ORGANIZATION CHART



Source: City of Winston-Salem.

3.4 PROCUREMENT POLICIES AND PROCEDURES

3.4.1 OVERVIEW OF PROCUREMENT POLICIES

The overview which follows is narrowly focused on policies, procedures, and practices which have a more direct impact on purchasing goods and services and participation of small and minority businesses in procurement. To evaluate procurement policies MGT reviewed the policy related documents and information listed in **Table 3-1** with a major emphasis on the Purchasing Policy and Procedures Manual, Minority and Woman-Owned Business Program Plan, City of Winston-Salem Administrative Policy/Purchasing Policy and North Carolina General Statutes. Governmental entities in North Carolina must purchase goods and services in accordance with North Carolina General Statutes. For the purpose of the policy review, MGT placed primary emphasis on Chapter 143, Article 8 Public Contracts. In reviewing Chapter 143, MGT focused on the following:

- ◆ NCGS 143-128 Requirements for Certain Building Contracts
- ◆ NCGS 143-128.1 Construction Management at Risk Contracts
- ◆ NCGS 143-128A Design Build Contracts
- ◆ NCGS 143-128C Public-Private Contracts
- ◆ NCGS 128.2 Minority Participation Goals
- ◆ NCGS 143-128.3 Minority Business Participation Administration
- ◆ NCGS -128.4 Historically Underutilized Business Defined, Statewide Uniform Certification
- ◆ NCGS 143-129 Procedure for Letting Public Contracts
- ◆ NCGS 143-129.2 Construction, Design and Operation of Solid Waste Management and Sludging Facilities
- ◆ NCGS 143-129.8 Purchase of Information Technology Goods and Services
- ◆ NCGS 143-129.9 Alternative Competitive Bidding Methods
- ◆ NCGS 143-134.1 Payments to Subcontractors
- ◆ NCGS 143-135.8 Prequalification

The above provisions as well as other sections in North Carolina General Statutes served as the backdrop for the policy review and examining how North Carolina General Statutes are integrated into the City's purchasing policies and procedures and the solicitation documents found in Table 3-3 in the sections which follows. In its review MGT also paid considerable attention to M/WBE requirements/provisions in the North Carolina General Statutes and City policies and procedures since the underlying premise for conducting a disparity study is enhancing procurement opportunities for M/WBEs. As such, how procurement policies are operationalized to facilitate M/WBE participation in procurement was essential to this review. The sections which follow are intended to provide a high-level overview of policies, procedures, and practices. It is not intended to provide a detailed discussion of processes associated with each policy or the "nuts and bolts" of how policies are routinely carried out. Instead MGT's primary focus was on how policies and procedures are being used to facilitate business diversity and inclusion and whether there are barriers and impediments in the policies or how policies are operationalized that adversely impact participation of minority and women vendors.

The review of policy source documents helped shape discussions with staff about how policies are operationalized and how policies impact businesses seeking procurement opportunities. In reviewing these documents MGT also noted whether relevant North Carolina General Statutes and regulations listed in **Table 3-1** are referenced. MGT's experience, has shown that efficient and effective procurement processes are largely dependent upon clearly defined and consistently followed policies for advertisement, solicitation, vendor evaluation/selection, contract negotiation and approval executed and supported by knowledgeable and skilled staff. Based upon MGT's discussions, staff are very knowledgeable about procurement operations and processes and are committed to participation of M/WBEs. From a staff perspective policies and processes are intended to result in the following:

- ◆ Ensure fair and open competition.
- ◆ Provide equitable treatment of vendors seeking procurement opportunities.
- ◆ Maintain a responsive and responsible procurement system.
- ◆ Purchase goods and services in a cost-effective manner.

Overall, MGT's review found that the City has detailed and well-articulated policies and procedures to guide end user departments and businesses seeking procurement opportunities. MGT also found policies and procedures to be user-friendly and resources and information available on the City's website helpful to all businesses seeking procurement opportunities with the City.



Source: Created by MGT, 2019.

Based on discussions with staff MGT created the Purchasing Cycle shown in **Exhibit 3-3**. The intent of **Exhibit 3-3** is to depict major processes or decision points aligned with the City’s purchasing. Overall, the processes and decision points shown in **Exhibit 3-3** are guided by City policies and procedures and North Carolina General Statutes. In reviewing policies and procedures associated with the purchasing cycle in **Exhibit 3-3**, MGT focused on the following:

- ◆ Purchasing Authorization Approvals
- ◆ Solicitation Methods
- ◆ Procurement Exceptions

Table 3-2 shows the purchasing authorization approvals for the City. Reviewing purchasing authorization approvals was important to understanding purchasing limits and thresholds within the City’s centralized purchasing system and pinpointing potential “habit buying.” In many of the previous disparity studies conducted by MGT, “habit buying” and “legacy awards” to exclude rather than include M/WBEs. Pursuant to North Carolina General Statutes, awards in excess of \$100,000 must be approved by Governing Body Action. Purchasing amounts in the \$5,000 to \$50,000 range have the potential to increase opportunities for small and minority and woman-owned businesses. The extent to which these businesses benefit is dependent on “department practices”, particularly in regard to discretionary purchasing. When department staff coordinate and collaborate with BIA and M/WBE Division there is a greater likelihood of increased M/WBE participation. Our experience has shown that when staff have limited or no knowledge of M/WBE vendors and/or do not utilize the M/WBE program or do not connect with inclusion efforts to obtain assistance, M/WBEs may not be consistently considered which could result in habit buying. The extent to which small businesses and M/WBEs are benefiting will be determined by the utilization and availability analysis and the anecdotal analysis.

TABLE 3-2. CITY OF WINSTON-SALEM AUTHORIZATION APPROVALS

From	To	Signature Requirements
\$ 1	\$ 4,999	Requester, secondary review, and department head
5,000	19,999	Requester, department head, assistant city manager*, and city manager
20,000	99,999	Requester, department head, assistant city manager*, and city manager
100,000 or more		Requester, department head, assistant city manager*, city manager, and copy of approved Governing Body Action
Additional Requirement for Sole Source		
\$0 to \$29,999		Requester, department head, assistant city manager*, city manager
\$30,000 or more		Requester, department head, assistant city manager*, city manager, and copy of approved Governing Body Action (per state statute).

*Only for Departments that report directly to an Assistant City Manager

Source: City of Winston-Salem Purchasing Policy and Procedures Manual, March 2017.

3.4.2 SOLICITATION METHODS

Based upon MGT’s review, Chapter 143 and City’s the Purchasing Policy and Procedures Manual (Purchasing Manual) provide ample guidance to carry out procurement processes. The City utilize both formal competitive and informal competitive procurement methods outlined in Section 2-Bidding Process in the Purchasing Policy and Procedures Manual. The Purchasing Division is responsible for determining purchasing methods and ensuring state laws and local policies are consistently followed. Competitive procurement outlined in Section 2 of the Purchasing Manual include the following:

- ◆ Competitive Sealed Bids
- ◆ Request for Bids/Quotations/Invitation for Bids
- ◆ Request for Proposals
- ◆ Competitive Negotiations Process -Invitation to Negotiate (ITN)

In Section 2, MGT also reviewed policies and procedures for the following:

- ◆ Discretionary Spending Under \$20,000
- ◆ Informal Bids
- ◆ Formal Bids
- ◆ Exceptions to formal Bidding Requirements
- ◆ Professional Services
- ◆ Minority/Women’s Business Enterprises(M/WBE) Requirements

According to MGT’s review, the policies and procedures outlined in the City’s Purchasing Manual align with provisions in Chapter 143. As part of its review, MGT felt it was important to also review a small sample of solicitation documents.

Table 3-3 include selected solicitations issued during the study period. Examining solicitations was important because they represent the “starting point” in the purchasing cycle for businesses seeking procurement opportunities with the City. Examining solicitations was also important for determining

alignment between General North Carolina Statutes, City purchasing policies and procedures and solicitation documents.

TABLE 3-3. CITY SOLICITATION DOCUMENTS

Solicitation	Type	Date
Evaluation of Business 40 Surface Street Modification Recommendations	Request for Letters of Interest/ Statement of Qualifications for Professional Engineering Services	September 2014
Cost Allocation Plan Development	Request for Proposals	January 2014
Water Transmission System Improvements Near Thomas Water Treatment Plant and Winston-Salem State University-Contract B	Invitation to Bid	November 2014
Electronic Plan Review	Request for Proposal	January 2015
Long Creek Park Master Plan	Request for Qualifications	October 2017
Citizen Survey Development	Request for Proposals	September 2017
Financial Advisory Services	Request for Proposals	November 2017
Disparity Study	Request for Proposal	July 2018

Source: Created by MGT, 2019.

The solicitations in **Table 3-3** do not include the full range of source selection methods and procedures that can be used to purchase goods and services. For example, the City’s P-Card policy (Purchasing Card Policy allow for small dollar purchases of \$999.99 or less. Also, not included in **Table 3-3** are the exceptions procurement categories shown in **Table 3-4**. As mentioned earlier, there are very explicit policies, procedures and requirements for the full range of solicitation methods utilized by the City for formal and informal competitive and noncompetitive solicitations. In addition, there are very explicit procurement procedures for construction projects and professional services such as A & E in accordance with N.C.G.S 143-129, N.C.G.S 143-129(c), N.C.G.S 133-1.1(a) and N.C.G.S 143-132.

PROCUREMENT EXCEPTIONS

Pursuant to N.C.G.S 143-129(e), Section 2.4.1 in the Purchasing Manual outline exceptions to some or all requirements that apply to formal procurements. Exceptions utilized by the City are shown in **Table 3-4**.

TABLE 3-4. EXCEPTIONS TO FORMAL BIDDING REQUIREMENTS

<p>In accordance with N.C.G.S. 143-129 (e), the following goods and services are exempt from competitive requirements:</p> <p>Exceptions that apply to purchase contracts only:</p> <ul style="list-style-type: none"> ◆ Purchases from other governmental agencies. ◆ Competitive group purchasing. ◆ Purchase of gasoline, diesel fuel, alcohol fuel, motor oil, fuel oil, or natural gas. These purchases are subject to informal bidding requirements G.S. 143-131. ◆ Sole Source requires Board approval when greater than \$30,000 and City Manager approval when \$30,000 or less. ◆ Information technology goods or services purchased through the State Office of Information Technology or under request for proposals. ◆ State Contract purchases. ◆ Purchase of <i>used</i> apparatus, supplies, materials, or equipment. For purposes of this exception, remanufactured, refabricated or demo apparatus, supplies, materials, or equipment is not included in the exception. A demo item is one that is used for demonstration and is sold by the manufacturer or retailer at a discount.

<ul style="list-style-type: none"> ◆ “Piggybacking” or Previously Bid <i>Purchase</i> Contracts (requires governing board approval at a regular meeting upon 10 days public notice). ◆ Purchase of goods and services from nonprofit work centers for the blind and severely disabled. <p>Exceptions that apply to construction or repair contracts only:</p> <ul style="list-style-type: none"> ◆ Change Order Work. ◆ Construction Manager at Risk projects (Qualifications Based Selection is required). ◆ Design-Build Services (Qualifications Based Selection is required). ◆ Public-Private Partnership Construction Services (Qualification Based Selection is required). ◆ Force account work (note: limitations apply). ◆ Projects using unemployment-relief labor paid for in whole or in part with state or federal funds. <p>Exceptions that apply to both construction and purchase contracts:</p> <ul style="list-style-type: none"> ◆ Special emergency involving health and safety of people and/or their property. ◆ Guaranteed energy savings contracts, which are governed by Article 3B of Chapter 143 of the General Statutes. ◆ Solid waste management facilities. <p>Exceptions that apply to service contracts:</p> <ul style="list-style-type: none"> ◆ Services contracts (including demolition).
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Source: City of Winston-Salem Purchasing Policy and Procedures Manual.

As shown in **Table 3-4**, exceptions to formal bidding include a diverse range of goods and services some of which may be provided by small and minority and woman-owned businesses.

3.5 BUSINESS DIVERSITY AND INCLUSION

The major impetus of this disparity study is increasing access to procurement opportunities and increased utilization and availability of minority and women-owned businesses. MGT’s experience has shown that business diversity and inclusion, particularly for small and minority and women-owned businesses is largely dependent upon policies and procedures that are consistently followed, staff who are supportive and sensitive to the inclusion of these businesses, effective compliance monitoring, and effective outreach, information and communication about procurement opportunities. Also important is a dedicated entity such as the Office of Business Inclusion and Advancement with its three Divisions— Business Development, Minority and Woman-Owned Business Enterprises, and Reintegration & Youth Development. As discussed throughout this chapter there are ample policies in place related to M/WBE participation, including Chapter 143 and City ordinances, resolutions and policies. In addition to policies, the structure and resources in place to support M/WBE participation usually dictate success or failure.

3.5.1 MINORITY AND WOMAN-OWNED BUSINESS PLAN

The City’s Minority and Woman-Owned Business Program Plan helps to focus and coordinate the City’s efforts to increase procurement opportunities for M/WBE businesses. Business Inclusion and Advancement (BIA), the Business Development Division, and M/WBE Division provide the structure and organization for coordinating and collaborating with other City departments as well as reaching out to the minority and women vendor community. Externally, as well as internally, the goal is to improve

participation and minimize and/or eliminate barriers to participation. Given this goal, the M/WBE Division is responsible for the following:

- ◆ Monitoring and assessing utilization of M/WBE businesses
- ◆ Advocating and promoting equal opportunity and access to contracting and procurement opportunities
- ◆ Identifying M/WBE businesses and promoting awareness of City contracting opportunities
- ◆ Recommending revisions and changes to policies and/or procedures that are impediments or barriers to participation
- ◆ Creating and implementing programs that provide assistance to M/WBE firms
- ◆ Supporting M/WBE development by providing small business assistance
- ◆ Ensuring employee accountability regarding commitment to the City's procurement guidelines¹⁰⁶

M/WBE POLICY STATEMENT

It is the policy of the City of Winston-Salem to provide minorities and women equal opportunity to participate in all aspects of City Contracting and purchasing programs, including but not limited to, participation in procurement contracts for commodities and services as well as for contracts relating to construction, repair work and/or leasing activities.¹⁰⁷

SCOPE OF THE M/WBE PROGRAM PLAN

The M/WBE Program operate a voluntary goal program that encourages contractors and consultants to utilize M/WBE firms. Whether for construction and repair, professional services or other services, contractors and consultants are expected to adhere to stringent "good faith" efforts and are held accountable if good faith efforts are not demonstrated. In fact, according to the City's "Good Faith Remedial Actions" firms may be removed from the City's bidder's list for up to one year for the first offense and up to three years for a third offense. The City established a minimum 10 percent minority and women goal on construction and repair projects costing \$300,000 or more. A \$100,000 threshold was adopted January 2018 to increase opportunities for M/WBE participation. The State of North Carolina has a 10 percent participation goal on state building projects. (For local governments, the State imposed 10 percent participation goal applies to city projects involving state funds of \$100,000 or more. The M/WBE requirements are imposed on local government contracts (regardless of the funding source) starting at \$300,000 although the formal bidding requirements apply to contracts in the amount \$500,000 or more.). The M/WBE program assist contractors and consultants in conducting efficient good faith efforts. Contractors and consultants are required to document good faith efforts by affidavit as well as a commitment to utilize minority firms. For construction and repair projects prime contractors are required to submit the following M/WBE forms:

- ◆ Affidavit A-Listing of Good Faith Efforts
- ◆ Affidavit B-Intent to Perform Contract with Own Workforce
- ◆ Affidavit C-Portion of Work to be Performed by Minority Firms

¹⁰⁶ City of Winston-Salem Minority and Woman-Owned Business Program Plan.

¹⁰⁷ Ibid.

- ◆ Affidavit D-Good Faith Efforts
- ◆ Affidavit E-Minority Utilization Commitment Form
- ◆ Affidavit F-Minority Documentation for Contract Payments
- ◆ Subcontractor/Supplier Utilization Form
- ◆ Final MWBE Affidavit of Payment
- ◆ MWBE Replacement Request Form

Except for Affidavit C and Affidavit D, professional services and other services, consultants and firms must provide the same documentation. Compared to other M/WBE Programs that have been part of disparity studies conducted by MGT, the City's compliance monitoring is very strong which is not the case in some other programs. Based on MGT's review, unlike many of the entities for which MGT has conducted disparity studies the City has the structure, operations, systems, and tools in place to support business diversity and inclusion in ways that we have not seen in other places. North Carolina General Statutes, City ordinances, resolutions and policies provide a solid foundation for business diversity and inclusion efforts and initiatives.

The current M/WBE Program Plan does not reflect major accomplishments by BIA to significantly impact the effectiveness and impact of the M/WBE Division and advancing the City's goal of increasing the utilization of M/WBEs in City contract and procurement activities. MGT commends BIA for accomplishing the following:

- ◆ Updating City departments on new vendors registered with the City.
- ◆ Creating a bidding and estimating workshop to assist HUB firms interested in working with the City.
- ◆ Creating "Upcoming Purchase Opportunity" to increase M/WBE participation in discretionary procurements.
- ◆ Creating Project Summary Reports to track M/WBE compliance for each formal construction project.
- ◆ Updating the M/WBE Program Policy for the first time in six years.
- ◆ Initiating the creation of the City of Winston-Salem Vendor Listing.
- ◆ Lowering the threshold for M/WBE goal setting to \$100,000 to increase M/WBE subcontracting opportunities.

The above accomplishments, coupled with other accomplishments and initiatives currently in progress, will go a long way toward strengthening oversight, compliance, and assistance and coordination with City departments in an effort to increase MWBE procurement and contracting opportunities.

DOING BUSINESS WITH THE CITY

As previously mentioned, City policies and procedures provide ample policy guidance and direction for City staff engaged in procurement. Equally important is the guidance and direction provided to minority- and women-owned businesses seeking procurement opportunities. In today's environment, two factors that matter the most are the information available on an organization's website and access to staff who can provide assistance and information if needed. Typically, an organization's website is the starting point

for seeking information about procurement opportunities making it an essential and vital tool and information resource. MGT navigated several links on the City's website and concluded very useful information and guidance is provided to potential vendors including information on vendor registration, M/WBE certification, procurement guidelines, bid opportunities, business support resources and information, annual M/WBE reports, staff contact information, and other information about doing business with the City. Overall, the various links provide useful and essential information in a user-friendly format, particularly for individuals who may not be tech savvy.

As alluded to earlier, there are mechanisms in place to support and encourage business development, business diversity, and inclusion. The City's website has robust business links that include downloadable information and resources that support all businesses. Also included is information about the City's purchasing process, how to submit bids, how bids are awarded, insurance requirements, construction projects, and information about the Business Training Program, which is ideally suited for new/start-up businesses and established businesses interested in growth and expansion.

3.6 CONCLUSION

The policy review focused on the City's contracting and procurement policies as a key factor in the City's efforts to increase participation of M/WBEs in procurement opportunities. Based upon MGT's review, the City has detailed policies that govern all aspects of procurement. As mentioned earlier the source documents reviewed by MGT provide ample policy guidance and direction for department end users purchasing goods and services to meet internal needs and to provide essential services to citizens. The City has a well-established M/WBE program, and there are stringent policies and procedures related to M/WBE participation. In addition, initiatives are in place to build business capacity which M/WBEs can take advantage of. Also, detailed and user-friendly information is provided on the City's website about the procurement process and procurement opportunities. Stated previously, compared to other municipalities where MGT has conducted similar studies, current policies are comprehensive and, if consistently applied, enforced and monitored, will achieve desired outcomes.

Ultimately all City departments can play a role in promoting the City as an organization committed to business diversity and inclusion. Advancing participation of M/WBEs will require continuously encouraging M/WBE participation in all City procurement and contracting. Encouraging participation in this context is based on strengthening relationships and outreach with the M/WBE vendor community and supporting City departments related to utilizing M/WBEs. One of the major concerns expressed by some staff was limited availability which sometimes result in M/WBEs not being utilized. The extent to which firms are available or not will be determined by the availability analysis and the anecdotal analysis will help to identify reasons for lack of participation. Our experience has shown that keeping departments informed about opportunities to utilize M/WBEs and educating the vendor community and providing information about contracting and procurement opportunities can have a significant impact if consistently and effectively executed. If executed effectively, M/WBEs who are the beneficiaries are more likely to become advocates and supporters on behalf of the City business diversity and inclusion efforts.

In conducting the policy review, MGT was encouraged by the progress made by BIA in compliance monitoring and initiatives to update and strengthen processes and systems. MGT was equally encouraged

by opportunities for further improvements that have been identified such as establishing departmental M/WBE goals, M/WBE liaisons in departments, increased vendor rotation, and compliance software to help track project status and payments.

CHAPTER 4. MARKET AREA AND
UTILIZATION ANALYSIS

2019 Disparity Study

City of Winston-Salem, North Carolina



4.1 INTRODUCTION

This chapter presents the results of the relevant geographic market area and utilization analyses of firms utilized by the City (City) for procurements between July 1, 2013 through June 30, 2018. The specific procurement categories analyzed were Construction, Professional Services, Other Services, and Goods & Supplies.

CHAPTER SECTIONS



- 4.1 Introduction
- 4.2 Data Collection and Management
- 4.3 Market Area Analysis
- 4.4 Utilization Analysis
- 4.5 Conclusion

4.2 DATA COLLECTION AND MANAGEMENT

MGT staff compiled and reconciled electronic data provided by the City to develop a Master Utilization Database to support the needs of the study. The data for contracts and purchases paid by the City between fiscal years July 1, 2013 through June 30, 2018 were retrieved from the City's Financial Management System (FMS) MGT worked closely with the City to drill down to those expenditures that were competitive in nature¹⁰⁸. MGT employed a "cleaning and parsing" data process which included updating missing elements or data gaps to conduct the study's analyses. Missing elements or data gaps that were addressed included the updating of race, ethnicity, and gender of the vendor, county and state as identified with the address on file in FMS, assigning of North America Industry Classification System (NAICS) codes to each expenditure. MGT also conducted a "local offices" review which identified if firms had an established office in the market area. If so, that address was used, and dollars paid to the firm were included in the market area analysis.

MGT collected vendor registration, and certification lists from the North Carolina Office of Historically Underutilized Businesses (HUB), and North Carolina Department of Transportation (DOT) containing M/WBE designations. MGT then created a comprehensive list by cross referencing multiple governmental websites containing data on the M/WBE status of firms. This list was then used to flag M/WBEs against the expenditure data of the City. The City's FMS system contained some ethnic and gender information for primes which the designations were maintained unless certification records indicated otherwise. If the firms were not located in any of these lists, they were assumed to be non-M/WBE for purposes of the analysis.

In addition, MGT indicated data which should be excluded from the analyses. MGT combined comparable and related data field from the FMS data program to efficiently and accurately update, prepare, review, and analyze the data. To ensure that all available expenditures were included in the analysis, MGT reviewed summaries of expenditures with the City prior to finalizing the relevant geographic market area and utilization analyses.

4.2.1 STUDY PERIOD

MGT analyzed City expenditures between fiscal years July 1, 2013 and June 30, 2018.

¹⁰⁸ Competitive in this context is defined as any transaction that are available to the open market.

4.2.2 PROCUREMENT CATEGORIES AND EXCLUSIONS

MGT analyzed the following procurement categories: Construction, Professional Services, Other Services, and Goods & Supplies. These procurement categories are defined as:

- ◆ Construction: Services provided for the construction, renovation, rehabilitation, repair, alteration, improvement, demolition, water, sewer, and excavation of physical structures, excluding the performance of routine maintenance.
- ◆ Professional Services: Architects, professional engineers, construction management, design-build services, public-private partnership construction.
- ◆ Other Services: Financial services, legal services, janitorial and maintenance services, medical services, educational services, information technology services, other professional services.
- ◆ Goods & Supplies: Purchases of physical items, office goods, miscellaneous building materials, books, equipment, vehicles, computer equipment.

The following types of transactions were excluded from the analysis due to not being considered competitive in nature:

- ◆ Transactions that fell outside of the study period.
- ◆ Transactions associated with firms located outside the U.S.
- ◆ Transactions associated with non-procurement activities, e.g. grants, scholarships, cooperative agreements, etc.
- ◆ Administrative items such as utility payments, medical payments, leases for real estate, or insurance.
- ◆ Salary and fringe benefits, training, parking, or conference fees.
- ◆ Transactions associated with nonprofit organizations, and governmental agencies.

4.3 MARKET AREA ANALYSIS

As prescribed by *Croson* and subsequent cases, a disparity study requires definition of a market area to ensure that a relevant pool of vendors is considered in analyzing the availability and utilization of firms. The relevant geographic market area determined for the City is the Greensboro-Winston-Salem-High Point, NC Combined Statistical Area (CSA). The counties included in the CSA are as follows: Alamance County, Davidson County, Davie County, Forsyth County, Guilford County, Randolph County, Rockingham County, Stokes County, Surry County, and Yadkin County. This relevant geographic market area was determined due to the majority of the City's spend as well as the firms' close proximity to the City.

4.3.1 METHODOLOGY

.Based on *Croson* guidelines, the relevant geographic market area for the City was determined to be the geographic areas from which the majority of its purchases are procured based on the location of the firms. If these boundaries are stretched too far, the universe of vendors becomes diluted with firms with no

interest or history in working with the agency, and thus their demographics and experiences have little relevance to actual contracting activity or policy. On the other hand, a boundary set too narrowly risks the opposite circumstance of excluding a high proportion of firms who have contracted with, or bid for work with, the agency, and thus may also skew the prospective analyses of disparity. These boundaries are determined by counties within close proximity to the City.

The choice of counties as the unit of measurement is based on the following:

- ◆ The courts have accepted counties as a standard geographical unit of analysis in conducting equal employment and disparity analyses.
- ◆ County boundaries are externally determined and, hence, are free from any researcher bias that might result from any arbitrary determinations of boundaries of geographical units of analysis.
- ◆ Census data and other federal and county data are routinely collected and reported using county boundaries.

Overall Market Area¹⁰⁹. To determine the full extent of the market area in which the City utilized firms, MGT determined geographic locations of utilized vendors by their county jurisdictions identified by zip codes. The overall market area presents the total dollars spent for each procurement category included within the scope of the study. Details of the overall market area by procurement category and county can be reviewed in **Appendix A, Overall Market Area Analysis**.

Relevant Geographic Market Area. Once the overall market area was established, the relevant market area was determined by examining geographic areas from which the majority of its purchases are procured. The dollars expended were summarized by county according to the location of each firm. The relevant geographic market area determined established the boundaries in which the utilization, availability, private sector, and anecdotal analyses are conducted.

4.3.2 ANALYSIS AND IDENTIFICATION OF RELEVANT GEOGRAPHIC MARKET AREA

As described in the preceding section, an overall market area was first established to account for all the City’s payments, after which more specific regions were analyzed to arrive at a relevant geographic market area to support the objectives of the study. Detailed information supporting this market area analyses are presented in **Appendix A, Detailed Market Area Analysis** to this report.

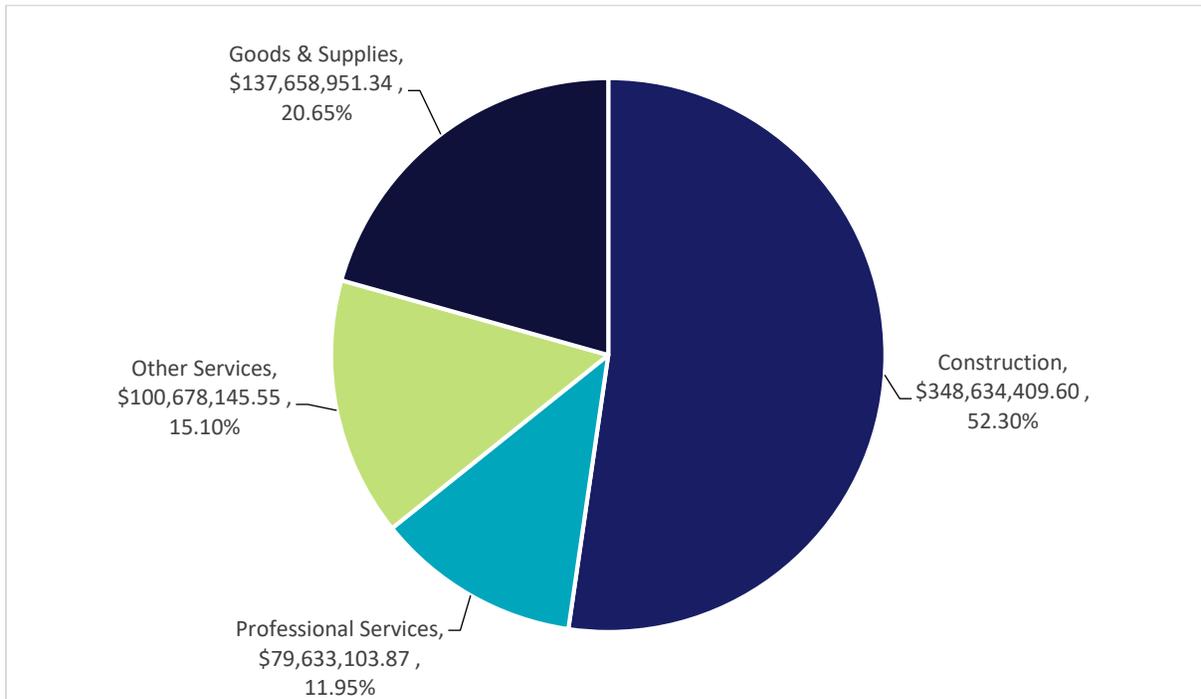
The overall market area analysis is represented in **Figure 4-1** and shows \$666.604 million were paid to firms between fiscal years July 1, 2013 and June 30, 2018.

City of Winston-Salem Relevant Geographic Market Area

- Alamance County, NC
- Davidson County, NC
- Davie County, NC
- Forsyth County, NC
- Guilford County, NC
- Randolph County, NC
- Rockingham County, NC
- Stokes County, NC
- Surry County, NC
- Yadkin County, NC

¹⁰⁹ The overall market area represents the total area within which the city of Winston-Salem expended dollars or utilized firms; thus, the overall market shows the spend with all firms (located inside and outside the relevant market area) with excluded expenditures.

FIGURE 4-1. SUMMARY OF PRIME DOLLARS (PAYMENTS) BY BUSINESS CATEGORY,
OVERALL MARKET AREA ANALYSIS
CITY OF WINSTON-SALEM



Source: MGT developed a Master Utilization Database based on the city of Winston-Salem's FMS system for dollars spent between fiscal years July 1, 2013 and June 30, 2018.

Once MGT completed the analysis of overall spending during the study period, we narrowed the scope to analyze the counties in which the majority of dollars that were expended within the City's procurement activity. It was determined that the region encompassing Alamance County, Davidson County, Davie County, Forsyth County, Guilford County, Randolph County, Rockingham County, Stokes County, Surry County, and Yadkin County will be used as the relevant geographic market area. **Table 4-1** shows that firms located within the relevant geographic market area accounted for 63.53 percent of spend across all procurement categories. When broken down by procurement categories firms located within the established relevant market area also accounted for a majority of the City's spend in their respective categories:

- ◆ 71.88 percent of the dollars awarded in Construction;
- ◆ 71.17 percent of the dollars awarded in Professional Services;
- ◆ 59.89 percent of the dollars awarded in Other Services;
- ◆ 40.61 percent of the dollars awarded in Goods & Supplies.

TABLE 4-1. RELEVANT GEOGRAPHIC MARKET AREA ANALYSIS
DISTRIBUTION OF DOLLARS BY PROCUREMENT CATEGORY,
WINSTON-SALEM'S CSA

CONSTRUCTION	Amount	Percent
<i>Inside Winston-Salem CSA</i>	\$ 250,594,418.35	71.88%
Outside Winston-Salem CSA	\$ 98,039,991.25	28.12%
CONSTRUCTION, TOTAL	\$ 348,634,409.60	100.00%
PROFESSIONAL SERVICES	Amount	Percent
<i>Inside Winston-Salem CSA</i>	\$ 56,675,914.77	71.17%
Outside Winston-Salem CSA	\$ 22,957,189.10	28.83%
PROFESSIONAL SERVICES, TOTAL	\$ 79,633,103.87	100.00%
OTHER SERVICES	Amount	Percent
<i>Inside Winston-Salem CSA</i>	\$ 60,297,108.85	59.89%
Outside Winston-Salem CSA	\$ 40,381,036.70	40.11%
OTHER SERVICES, TOTAL	\$ 100,678,145.55	100.00%
GOODS & SUPPLIES	Amount	Percent
<i>Inside Winston-Salem CSA</i>	\$ 55,904,600.33	40.61%
Outside Winston-Salem CSA	\$ 81,754,351.01	59.39%
GOODS & SUPPLIES, TOTAL	\$ 137,658,951.34	100.00%
ALL BUSINESS CATEGORIES	Amount	Percent
<i>Inside Winston-Salem CSA</i>	\$ 423,472,042.30	63.53%
Outside Winston-Salem CSA	\$ 243,132,568.06	36.47%
ALL BUSINESS CATEGORIES, TOTAL	\$ 666,604,610.36	100.00%

Source: MGT developed a Master Utilization Database based on the city of Winston-Salem's FMS system between fiscal years July 1, 2013 and June 30, 2018.

4.3.3 MARKET AREA CONCLUSIONS

When analyzing the relevant geographic market area, over 63 percent of the expenditures were in the City of Winston-Salem's relevant geographic market area. Analysis of M/WBE utilization, availability, anecdotal, and private sector will be based on firms located in the determined relevant geographic market area. The determination of the relevant geographic market area allows for detailed examinations of contracting activity with local vendors as described in the utilization analysis in the following section.

4.4 UTILIZATION ANALYSIS

4.4.1 PRIME UTILIZATION METHODOLOGY

The utilization analysis presents a summary of payments within the scope of the study and an initial assessment of the effectiveness of initiatives in promoting the inclusion of M/WBEs in the City's contracting and procurement activities.

The prime utilization analysis is based on the defined relevant geographic market area, as described in the preceding sections of this chapter. The payments data included within this analysis encompass dollars paid to primes located within the market area (excluding all subcontracting payments, or “pure primes”). The utilization analysis looks at payments with exclusions removed. This analysis is broken down by the procurement categories of Construction, Professional Services, Other Services, and Goods & Supplies, and encompasses payments between fiscal years July 1, 2013 and June 30, 2018.

4.4.2 SUBCONTRACTOR UTILIZATION METHODOLOGY

The subcontractor utilization analysis is based on data received from the State of North Carolina Historically Underutilized Business State Construction Office (HUBSCO) system for construction contracts. The reporting of construction subcontracting spend is required by the State (need NCGS as footnote) which is why construction subcontract spend was readily available. In January 2018, the City began collecting subcontracting data for professional services or other services purchasing activities. There were not enough data for professional services and other services to analyze subcontracting activities. Therefore, the subcontract analysis is based on construction spend only.

The subcontracting records maintained by the City via HUBSCO do not include data on the non-MWBE subcontractors. For an accurate assessment of utilization and availability, as well as to support project-specific goal setting, it is imperative to collect all of the data – the money spent for *each* subcontractor. If non-MWBE subcontracting spend is not accounted for, there cannot be an accurate representation of data for the geographic and product markets and eliminates the ability to set accurate project specific subcontracting goals.

MGT conducted a prime survey to collect non-M/WBE data for projects reported in HUBSCO. The HUBSCO database contained 87 non-duplicative projects totaling \$225,014,052 within the study period. There were 43 construction prime firms identified. The prime survey solicited information for each contract directly from the construction primes. The City provided a letter requesting primes to provide spending with non-M/WBE for the projects they were awarded in which MGT distributed and monitored responses. MGT contacted all firms via email and phone up to 13 times. MGT was only able to collect complete data for 37% of the dollars in the database totaling \$83,691,791.656 and included 528 subcontracts, both M/WBEs and non-M/WBEs.

The prime survey did not produce the enough data that would allow MGT to develop a comprehensive database of total subcontracts to use for the subcontractor analysis. One major barrier was primes not willing to provide subcontracting data on City contracts.

4.4.3 CLASSIFICATION OF FIRMS

Firms included in the utilization analysis have been assigned business owner classifications according to the definitions provided below.¹¹⁰

- ♦ **M/WBE Firms.** In this study, businesses classified as minority- and women-owned firms (M/WBE) are those which are at least 51 percent owned and controlled by members of one of five groups: African Americans, Asian Americans, Hispanic Americans, Native Americans, or Nonminority

¹¹⁰ Business ownership classification was based on the race, ethnicity, and gender classification of the owner during the study period.

Women. These groups were defined according to the United States (U.S.) Census Bureau as follows:

- **African Americans:** U.S. citizens or lawfully admitted permanent residents having an origin in any of the black racial groups of Africa.
- **Asian Americans:** U.S. citizens or lawfully admitted permanent residents who originate from the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands.
- **Hispanic Americans:** U.S. citizens or lawfully admitted permanent residents of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese cultures or origins regardless of race.
- **Native Americans:** U.S. citizens or lawfully admitted permanent residents who originate from any of the original peoples of North America and who maintain cultural identification through tribal affiliation or community recognition.
- **Nonminority Women:** U.S. citizens or lawfully admitted permanent residents who are non-Hispanic white women. Minority women were included in their respective minority category.
- ♦ **Total Minority Firms.** All minority-owned firms, regardless of gender.
- ♦ **Non-M/WBE Firms.** Firms that were identified as nonminority male or majority-owned were classified as non-M/WBE firms. If there was no indication of business ownership, these firms were also classified as non-M/WBE firms.

4.4.4 PRIME UTILIZATION

Table 4-2 illustrates the prime M/WBE utilization first aggregated by all or total spend and percentage of spend then by each procurement category analyzed during the study period and by business ownership classifications. The prime utilization analysis includes dollars spent and the percentage of dollars spent with firms located in the relevant geographic market area outlined previously in Section 3.1.

In summary, the total prime utilization for M/WBEs amounted to 11.40 percent of total payments within the relevant geographic market area; 2.27 percent for African American firms and 9.13 percent to Nonminority Women firms. Detailed analyses showing the utilization of firms by business ownership classification and year are presented in **Appendix B, Detailed Utilization Analysis**.

M/WBE utilization for specific procurement categories were:

- ♦ **Construction:** M/WBE prime utilization was 8.47 percent. African American firms accounted for 2.64, Nonminority Women firms accounted for 5.82 percent, and Hispanic American utilization was 0.00 percent. There was no spend with Asian American, or Native American firms at the prime level during the study period.
- ♦ **Professional Services:** M/WBE prime utilization was 1.90 percent. African American firms accounted for 1.24 percent, Nonminority Women firms accounted for 0.66 percent, and Hispanic American utilization was 0.00 percent. There was no spend with Asian American, or Native American firms at the prime level during the study period.

- ◆ **Other Services:** M/WBE prime utilization was 36.02 percent. African American firms accounted for 3.63, and Nonminority Women firms accounted for 32.39 percent. There was no spend with Asian American, Hispanic American, or Native American firms at the prime level during the study period.
- ◆ **Goods & Supplies:** M/WBE prime utilization was 7.65 percent. African American firms accounted for 0.19 and Nonminority Women firms accounted for 7.46 percent. There was no spend with Asian American, Hispanic American, or Native American firms at the prime level during the study period.

**TABLE 4-2. PRIME UTILIZATION ANALYSIS
BY BUSINESS OWNERSHIP CLASSIFICATION AND BY PROCUREMENT CATEGORIES
WITHIN THE RELEVANT GEOGRPHIC MARKET AREA**

BUSINESS OWNERSHIP CLASSIFICATION	ALL	Construction	Professional Services	Other Services	Goods & Supplies
African Americans	\$ 9,618,771.79	\$ 6,622,884.94	\$ 700,648.44	\$ 2,188,951.73	\$ 106,286.68
Asian Americans	\$ -	\$ -	\$ -	\$ -	\$ -
Hispanic Americans	\$ 2,400.00	\$ 300.00	\$ 2,100.00	\$ -	\$ -
Native Americans	\$ -	\$ -	\$ -	\$ -	\$ -
TOTAL MINORITY FIRMS	\$ 9,621,171.79	\$ 6,623,184.94	\$ 702,748.44	\$ 2,188,951.73	\$ 106,286.68
Nonminority Women Firms	\$ 38,675,390.88	\$ 14,596,398.83	\$ 375,747.62	\$ 19,532,918.29	\$ 4,170,326.14
TOTAL M/WBE FIRMS	\$ 48,296,562.67	\$ 21,219,583.77	\$ 1,078,496.06	\$ 21,721,870.02	\$ 4,276,612.82
TOTAL Non-M/WBE Firms	\$ 375,175,479.63	\$ 229,374,834.58	\$ 55,597,418.71	\$ 38,575,238.83	\$ 51,627,987.51
TOTAL FIRMS	\$ 423,472,042.30	\$ 250,594,418.35	\$ 56,675,914.77	\$ 60,297,108.85	\$ 55,904,600.33
BUSINESS OWNERSHIP CLASSIFICATION	ALL	Construction	Professional Services	Other Services	Goods & Supplies
African Americans	2.27%	2.64%	1.24%	3.63%	0.19%
Asian Americans	0.00%	0.00%	0.00%	0.00%	0.00%
Hispanic Americans	0.00%	0.00%	0.00%	0.00%	0.00%
Native Americans	0.00%	0.00%	0.00%	0.00%	0.00%
TOTAL MINORITY FIRMS	2.27%	2.64%	1.24%	3.63%	0.19%
Nonminority Women Firms	9.13%	5.82%	0.66%	32.39%	7.46%
TOTAL M/WBE FIRMS	11.40%	8.47%	1.90%	36.02%	7.65%
TOTAL Non-M/WBE Firms	88.60%	91.53%	98.10%	63.98%	92.35%

Source: MGT developed a Master Utilization Database based on the city of Winston-Salem's FMS systems between fiscal years July 1, 2013 and June 30, 2018.

4.4.1 SUBCONTRACTOR UTILIZATION – CONSTRUCTION

As previously discussed, HUBSCO tracks M/WBE vendors in the system. MGT conducted a prime vendor survey to ascertain the entire universe of subcontractors for both M/WBEs and non-M/WBEs but due to low responses from primes accurate data was not readily collected. Therefore, we provided in **Table 4-3** an analysis of subcontracting utilization based on estimated subcontracting. We had the distribution of the subcontract dollars to M/WBE by race, ethnicity and gender classification, but needed to know construction subcontracts granted to non-M/WBEs in order to establish a reasonable basis to determine

the relative proportion of construction subcontract dollars to the corresponding prime construction contracts.

Our experience has shown that construction subcontracting generally represents 20 to 35 percent of the prime construction spending. Census data support the applicability of this rule of thumb for this report. The US Census Bureau, 2012 Economic Census, Construction, Geographic Area Series¹¹¹ shows that the cost of construction work subcontracted out in the state of North Carolina was 35 percent. Assuming that the City’s construction spending pattern is similar to the overall patterns of public and private practices in the State, we concluded that subcontractors received 35 percent of prime dollars. Using the corresponding prime utilization dollars on construction projects for which M/WBE subcontracting data were available, we calculated the estimated overall subcontract dollars on the City’s construction projects to have been \$87.7 million in the market area. We then subtracted M/WBE subcontract dollars from the estimated total subcontract dollars to estimate non-M/WBE subcontract dollars to be \$66.7 million.

Accordingly, **Table 4-3** shows the estimated construction subcontracting utilization dollars and percentages under these assumptions. M/WBE utilization subcontractor for construction amounted to 23.94 percent of total payments within the relevant geographic market area; 4.75 percent for African American firms, 0.23 percent for Asian American firms, 4.56 percent for Hispanic American firms and 14.40 percent to Nonminority Women firms.

**TABLE 4-3. SUBCONTRACTOR UTILIZATION
BY BUSINESS OWNERSHIP CLASSIFICATION
CONSTRUCTION ONLY**

BUSINESS OWNERSHIP CLASSIFICATION	Construction
African Americans	\$4,163,381.24
Asian Americans	\$203,958.36
Hispanic Americans	\$4,000,573.89
Native Americans	\$0.00
TOTAL MINORITY FIRMS	\$8,367,913.49
Nonminority Women Firms	\$12,627,480.35
TOTAL M/WBE FIRMS	\$20,995,393.84
TOTAL Non-M/WBE Firms	\$66,712,652.58
TOTAL FIRMS	\$87,708,046.42
BUSINESS OWNERSHIP CLASSIFICATION	Construction
African Americans	4.75%
Asian Americans	0.23%
Hispanic Americans	4.56%
Native Americans	0.00%
TOTAL MINORITY FIRMS	9.54%
Nonminority Women Firms	14.40%
TOTAL M/WBE FIRMS	23.94%
TOTAL Non-M/WBE Firms	76.06%

¹¹¹ <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk#>. The 2012 data is the most current available data.

4.5 CONCLUSION

The utilization analysis shows that non-M/WBE firms are utilized at substantially higher rates than their M/WBE counterparts. Overall, 88.60 percent of the City's spending went to non-M/WBE firms, while 11.40 percent went to M/WBE firms during the study period. The highest utilization rates among M/WBE firms included Nonminority Women and African American firms, accounting for 9.13 percent and 2.27 percent, respectively, of spending within the relevant geographic market area. Further analyzing the individual procurement categories, Other Services saw the highest utilization of M/WBE firms (36.02 percent), while Professional Services saw the lowest utilization of M/WBE firms (1.90 percent).

Collecting construction subcontractor payment data for non-M/WBEs proved to be a challenge. Therefore, the subcontractor utilization was calculated using estimates supplemented by the U.S. Census Data for Construction in North Carolina. The largest percentage of M/WBE utilization was seen by Nonminority Women at 14.40 percent.

While non-M/WBE utilization is ostensibly quite high compared to M/WBEs throughout the views on utilization that have been presented in this chapter, the proportion of firms willing and able to provide services to the City offer a critical qualifying context in any determination of disparity. Availability and resulting disparity ratios are presented in **Chapter 5, Availability and Disparity Analyses** which follows, to provide more definitive conclusions in this respect.

CHAPTER 5. AVAILABILITY AND
DISPARITY ANALYSIS

2019 Disparity Study

City of Winston-Salem, North Carolina



5.1 INTRODUCTION

This chapter presents the availability and disparity analyses and results. The availability analysis provides an estimate of the M/WBE ownership status of the pool of vendors that are ready, willing, and able to work with the City in its geographic and product marketplaces. The disparity analysis determines whether there is an observed statistically significant difference between the City's utilization of minority and women-owned enterprises (M/WBEs) compared to their respective availability. As with prior chapters, this analysis focuses on expenditures in the procurement categories of Construction, Professional Services, Other Services, and Goods & Supplies between fiscal years July 1, 2013 and June 30, 2018.

CHAPTER SECTIONS



- 5.1 Introduction
- 5.2 Availability Analysis
- 5.3 Disparity Analyses and Significance Testing

5.2 AVAILABILITY ANALYSIS

MGT's approach to estimating the availability of firms ready, willing, and able to perform work for the City of Winston-Salem within its defined geographic and product markets are detailed in this section, followed by a presentation and review of the associated findings.

5.2.1 AVAILABILITY METHODOLOGY

The Supreme Court in *City of Richmond, v. J.A. Croson Co.* indicated the evidence necessary to support a race-conscious public contracting program: Where there is a significant statistical disparity between the number of qualified minority contractors **willing and able** to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.¹¹²

In order to analyze whether a significant statistical disparity exists, MGT must first determine the **availability** of firms of different ownership classifications by determining those that are **willing and able** to perform work within the City's geographic and product markets.

- ◆ In the approach taken to establish availability in this study, **willingness**¹¹³ is established either through (1) a firm's prior utilization by City of Winston-Salem or (2) by direct affirmation from an authoritative party within the organization, as collected via survey.
- ◆ Whether a firm is **able** to perform the work is determined by either (1) their past history of performing work with the City, or (2) their alignment with the narrowly-tailored product markets of goods or services that have been procured by the City, courtesy of their Dun & Bradstreet-assigned industry classification, as well as their physical presence within the geographic market.

It is important to note that we did not filter firms as "able" or not based on any thresholds for capacity for two reasons: (1) the scalable nature of firms, which may reasonably add capacity to handle jobs beyond

¹¹² 488 U.S. 469, 509 (1989).

¹¹³ Willingness is defined as any firm that is interested in working for the City of Winston-Salem.

previous performance, and (2) the inherent concern that discrimination may have influenced the historical or existing scale of operation of the firms within the market.

Post-*Croscon* case law has not prescribed a particular approach to derive vendor availability, which has enabled agencies to use a variety of methods to estimate pools of available vendors that have withstood legal scrutiny. Among varying methods, however, the “custom census” is considered a preferable means of estimation.¹¹⁴ The custom census surveys a representative sample of firms offering the procured goods and services within an organization’s relevant geographic and product markets. The result of the custom census provides estimated M/WBE ownership percentages for the prospective universe of vendors willing and able to work with the focus agency – in this case, City of Winston-Salem.

In its 2010 ‘Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program,’ the National Cooperative Highway Research Program (NCHRP) asserted that “the custom census approach to measuring DBE availability, when properly executed, is superior to the other methods,” because:

- ◆ It assumes the broadest possible view of the prospective universe of vendors.
- ◆ Closely related to the above, it inherently takes an inclusive, or “remedial,” approach to the pool of vendors, including consideration of potentially disenfranchised firms.
 - a. It does so by examining the full market of potential vendors via independent resources or repositories of vendor information. Said differently, it is not shaped or influenced by the focus organization’s or other government organizations’ historical operations or behaviors.
- ◆ It has consistently withstood legal scrutiny and has been upheld “by every court that has reviewed it.”

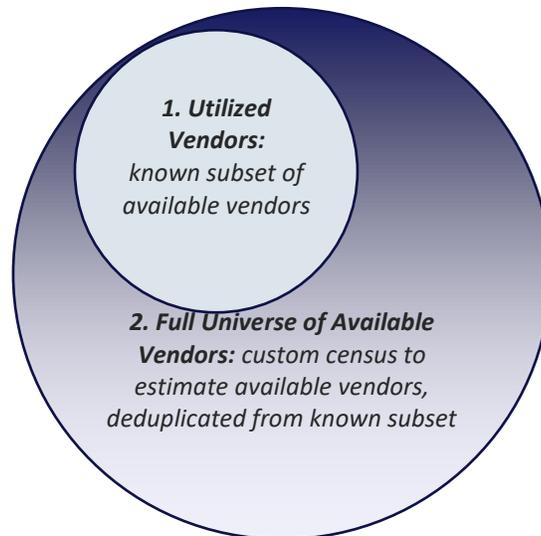
MGT’s data assessment and evaluation of alternative methods for measuring the number of firms willing and able to work with the City confirmed that a custom census approach would provide the most accurate representation of available firms in the relevant market area. In developing the custom census, MGT analyzed a representative sample of firms within the City’s marketplaces for each of the four procurement categories and combined these survey results with accounts of the known universe of vendors who have recently performed work for the City. Thus, MGT’s research and estimation process to determine the numbers of willing and able firms within the market area entailed two prongs:

1. Collecting an inventory of market area firms who have already performed work for the City based on NAICS codes and stratified by the business categories. This product market analysis based on NAICS codes is used to determine which firms will be downloaded from Dun & Bradstreet in order to conduct the custom census. Dun & Bradstreet maintains a comprehensive commercial database of information of firms.
2. Conducting a “custom census” survey of a representative number of firms *that (i) have not done business with the City, but (ii) maintain a physical address within the market area and that (iii) directly affirm interest in working with the City via survey response* .

¹¹⁴ See *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 966 (10th Cir. 2003) (*Concrete Works IV*), cert. denied, 540 U.S. 1027 (2003) (referring to the custom census as “more sophisticated” than earlier studies using census data); *Northern Contracting, Inc. v. Illinois Dep’t of Transp.*, 473 F.3d 715, 723 (7th Cir. 2007) (finding that the custom census “arrive[s] at more accurate numbers than would be possible through use of just the list [of the number of registered and prequalified DBEs under Illinois law].”).

The representative sample was extrapolated to the full universe of firms in the market area within each procurement category, as per Dun & Bradstreet’s current database of firms.

FIGURE 5-1. AVAILABLE VENDOR UNIVERSE



The first set defined above (utilized vendors) was combined with a (deduplicated) extrapolation of the second set to arrive at a comprehensive account of the number of firms available to work for the City, segmented by the procurement categories defined to describe the types of goods or services purchased. The proportions of firms by type of ownership and procurement category estimated in this fashion represent an unadjusted or “base” depiction of availability, purely reflective of the number of businesses in each procurement category.

Industry best-practice recommends application of weights to these availability proportions according to the volume of dollars spent procuring relevant goods or services within each category to enhance the accuracy of these base measures of availability for each procurement category.¹¹⁵ To illustrate:

Consider an entity and single procurement category that spends \$100,000 annually on road painting and has 1,000 firms available to perform this type of service, while it spends \$10,000,000 annually on road paving where it can identify only 10 firms in its market area available to perform this service. If the entity were to use raw numbers to establish availability for both of these services, over 99 percent of its availability measurement (1,000 firms out of 1,010 total) would be driven by the racial/ethnic/gender categories of ownership among road painting firms – none of which would be able to provide services relevant to 99 percent of its spending activity (only \$100,000 of \$10,100,000 total spent relevant to road painting). Instead, the dollars of spending should be used to “weight” the availability measurement so that availability is accurately calibrated to the proportion of dollars spent (in this case, 99 percent of availability driven by the population of road paving vendors).

To establish these weighted availability estimates, MGT first divided each of the four procurement categories into more granular subsectors to establish measurements of availability (percentages of total available firms by M/WBE classifications of ownership) within more homogenous (specific and similar) families of goods or services. These subsectors were established based on the amount of spend within

¹¹⁵ See, for example, U.S. Department of Transportation, Office of Civil Rights, [Tips for Goal-Setting in the Disadvantaged Business Enterprise \(DBE\) Program](#).

each NAICS codes and how they related to each other. Weights were then applied to these percentages according to the proportions of dollars spent in each subsector, before combining the weighted subsectors back into revised representations of availability for the major procurement categories. This approach ensures that availability measurements were reflective of firms available to perform work *in proportion to the categories and respective volumes of dollars actually spent by the City.*

5.2.2 AVAILABILITY ANALYSIS

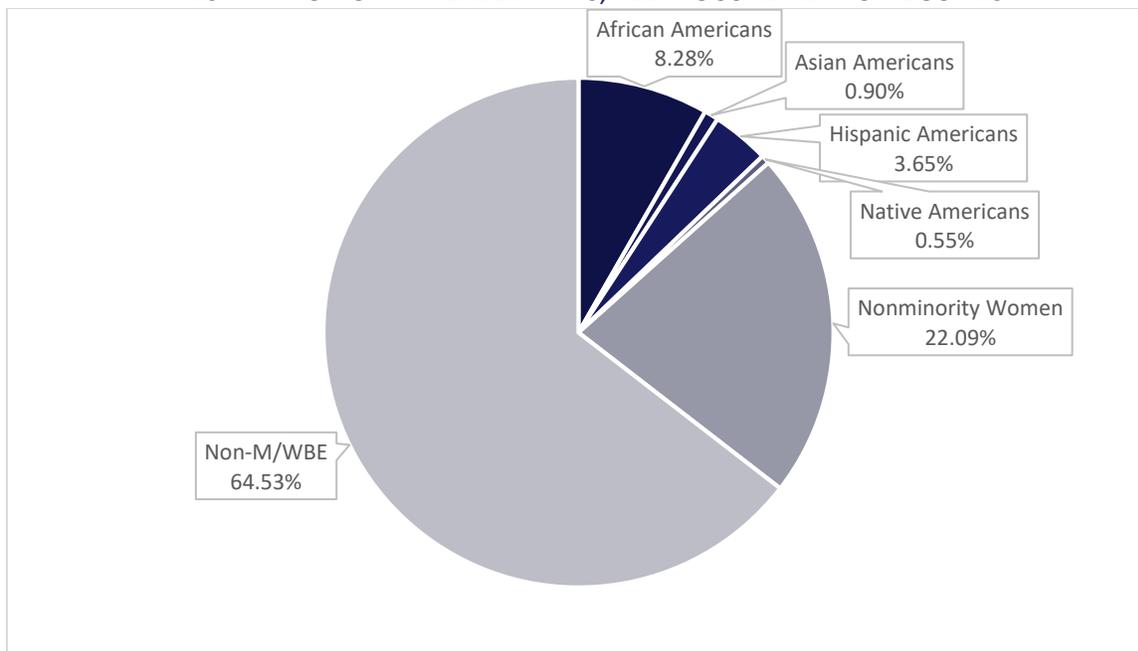
Following the methodology prescribed in section 5.2.1, MGT derived estimates for proportions of available firms for the racial, ethnic, and gender ownership classes and five defined procurement categories. The specific good and service are defined in **Chapter 4, Section 2.2.**

PRIME

Exhibit 5-1 shows the estimated availability of firms by racial, ethnic, and gender ownership across all procurement categories and in the aggregate in the relevant geographic market area. MGT observed the following:

- ◆ African American-owned firms represented 8.28 percent of available vendors;
- ◆ Asian American-owned firms represented 0.90 percent of available vendors;
- ◆ Hispanic American-owned firms represented 3.65 percent of available vendors;
- ◆ Native American-owned firms represented 0.55 percent of available vendors;
- ◆ Nonminority Women firms represented 22.09 percent of available vendors; and
- ◆ M/WBEs represented 35.47 percent of available vendors.
- ◆ Non-M/WBEs represented 64.53 percent of available vendors.

EXHIBIT 5-1.
ESTIMATION OF AVAILABLE FIRMS, ALL PROCUREMENT CATEGORIES



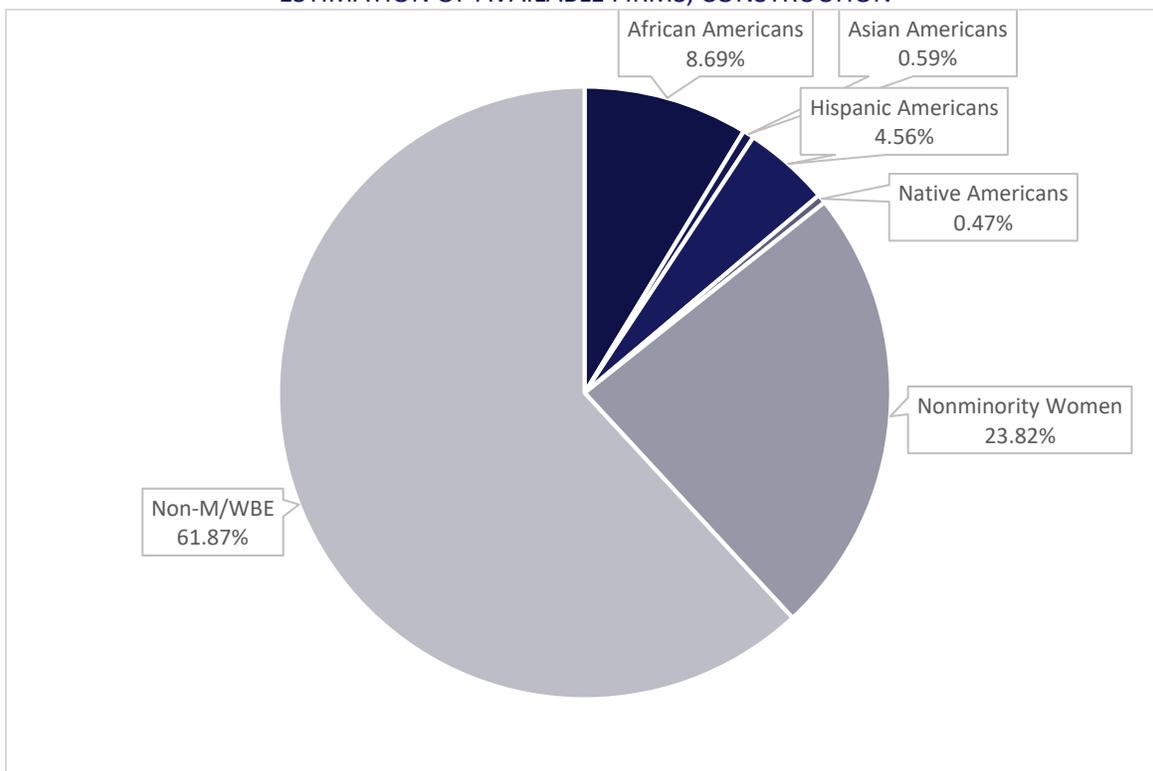
Source: Custom Census Analysis.

Study Period: Fiscal Years July 1, 2013 through June 30, 2018

In the **Construction** category (**Exhibit 5-2**), availability estimates were:

- ♦ African American-owned firms represented 8.69 percent of available vendors;
- ♦ Asian American-owned firms represented 0.59 percent of available vendors;
- ♦ Hispanic American-owned firms represented 4.56 percent of available vendors;
- ♦ Native American-owned firms represented 0.47 percent of available vendors;
- ♦ Nonminority Women firms represented 23.82 percent of available vendors; and
- ♦ Non-M/WBEs represented 61.87 percent of available vendors.

EXHIBIT 5-2.
ESTIMATION OF AVAILABLE FIRMS, CONSTRUCTION



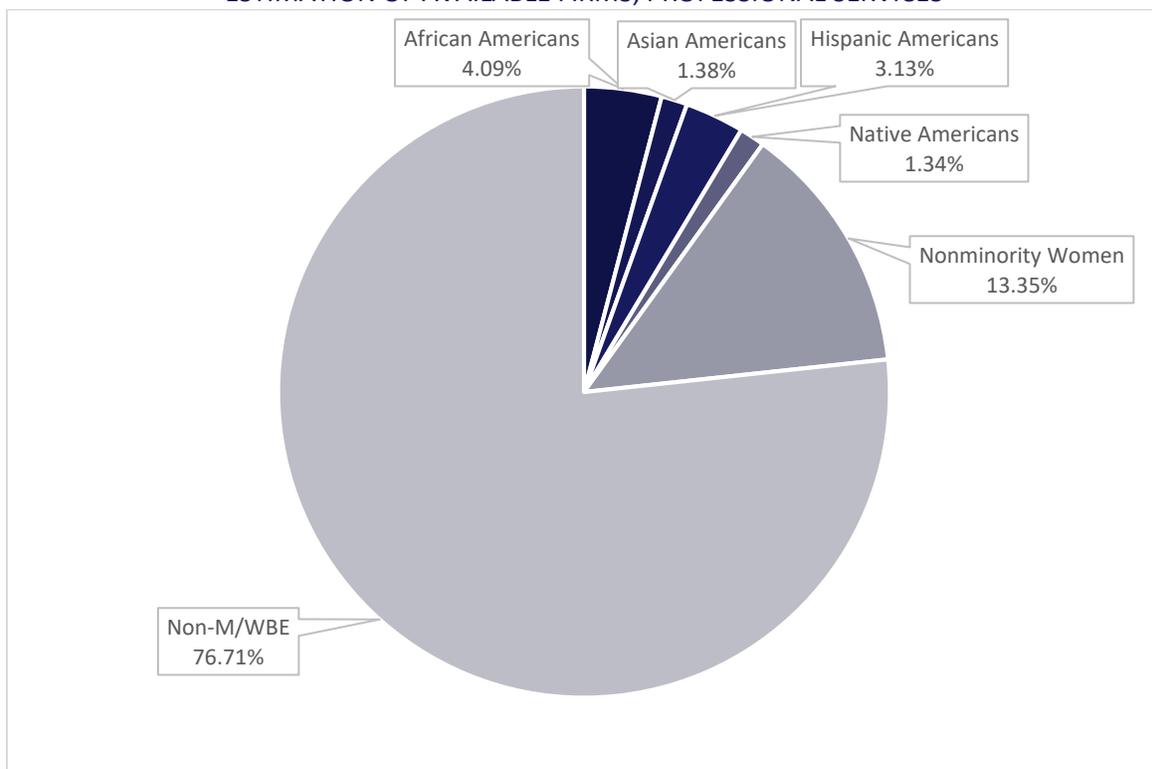
Source: Custom Census Analysis.

Study Period: Fiscal Years July 1, 2013 through June 30, 2018

In the **Professional Services (Exhibit 5-3)** category, availability estimates were:

- ♦ African American-owned firms represented 4.09 percent of available vendors;
- ♦ Asian American-owned firms represented 1.38 percent of available vendors;
- ♦ Hispanic American-owned firms represented 3.13 percent of available vendors;
- ♦ Native American-owned firms represented 1.34 percent of available vendors;
- ♦ Nonminority Women firms represented 13.35 percent of available vendors; and
- ♦ Non-M/WBEs represented 76.71 percent of available vendors.

EXHIBIT 5-3.
ESTIMATION OF AVAILABLE FIRMS, PROFESSIONAL SERVICES

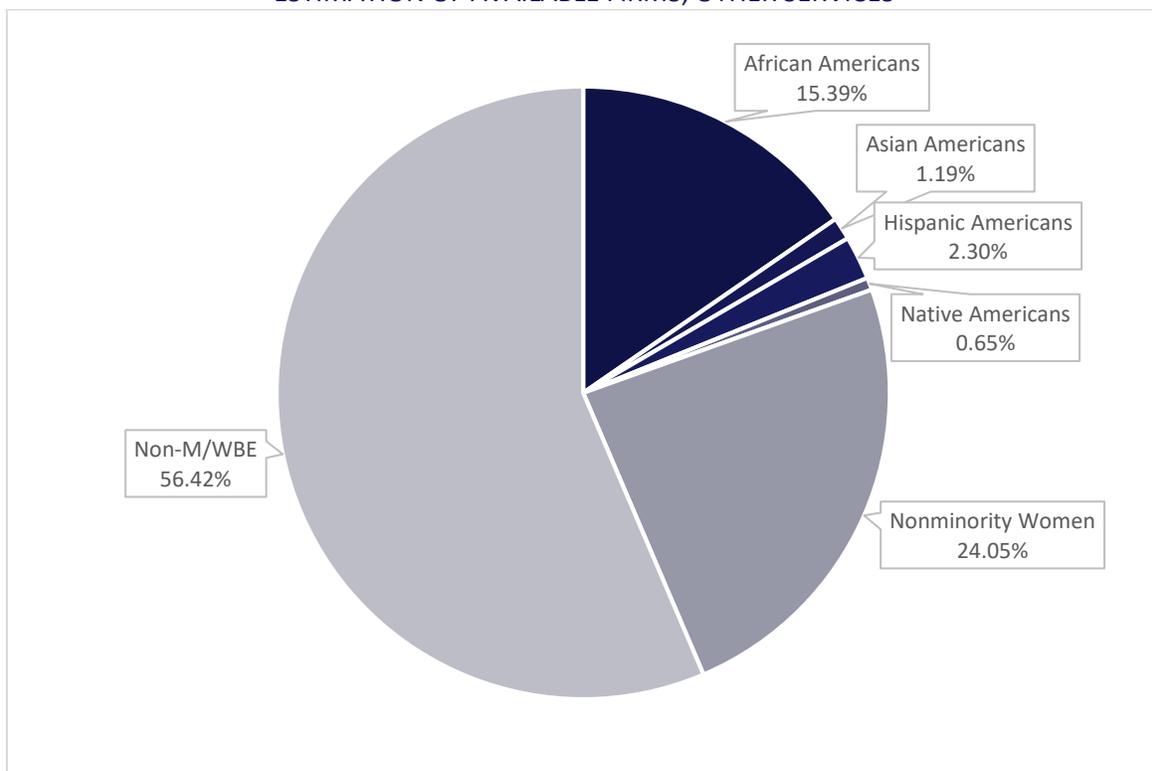


Source: Custom Census Analysis.
Study Period: Fiscal Years July 1, 2013 through June 30, 2018

In the **Other Services (Exhibit 5-4)** category, availability estimates were:

- ♦ African American-owned firms represented 15.39 percent of available vendors;
- ♦ Asian American-owned firms represented 1.19 percent of available vendors;
- ♦ Hispanic American-owned firms represented 2.30 percent of available vendors;
- ♦ Native American-owned firms represented 0.65 percent of available vendors;
- ♦ Nonminority Women firms represented 24.05 percent of available vendors; and
- ♦ Non-M/WBEs represented 56.42 percent of available vendors.

EXHIBIT 5-4.
ESTIMATION OF AVAILABLE FIRMS, OTHER SERVICES

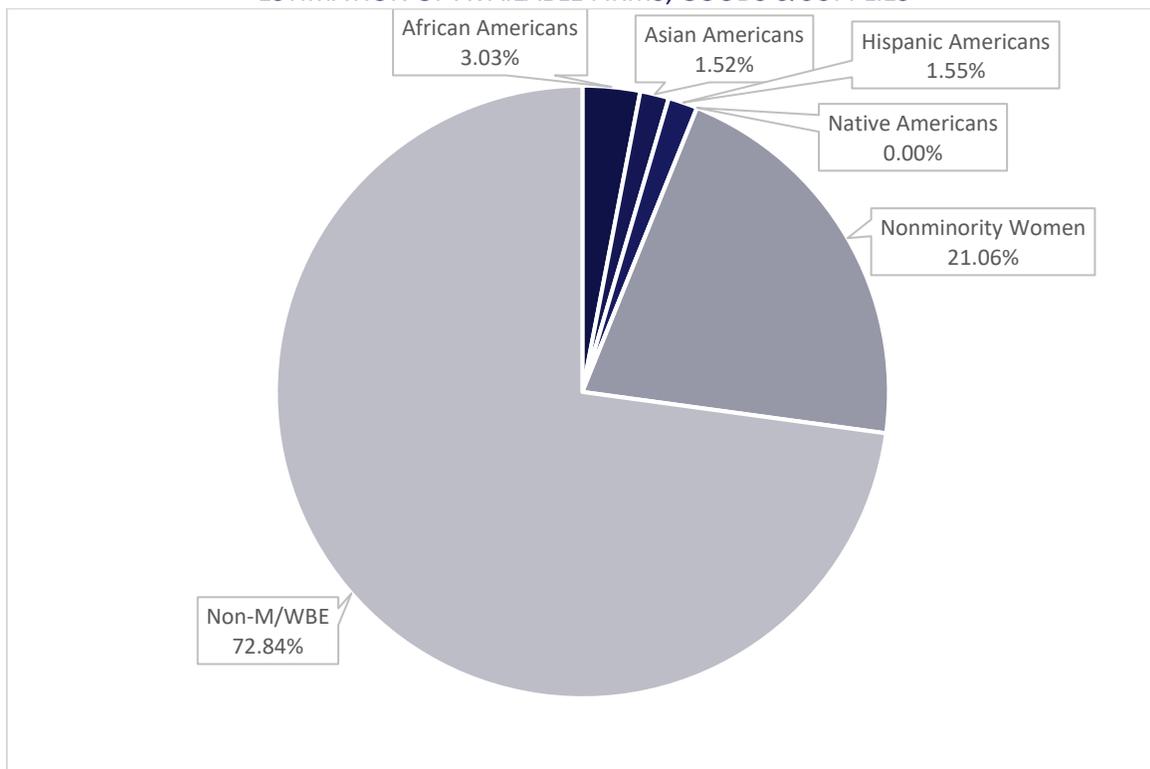


Source: Custom Census Analysis.
Study Period: Fiscal Years July 1, 2013 through June 30, 2018

In the **Goods & Supplies (Exhibit 5-5)** category, availability estimates were:

- ♦ African American-owned firms represented 3.03 percent of available vendors;
- ♦ Asian American-owned firms represented 1.52 percent of available vendors;
- ♦ Hispanic American-owned firms represented 1.55 percent of available vendors;
- ♦ Native American-owned firms represented no available vendors;
- ♦ Nonminority Women firms represented 21.06 percent of available vendors; and
- ♦ Non-M/WBEs represented 72.84 percent of available vendors.

EXHIBIT 5-5.
ESTIMATION OF AVAILABLE FIRMS, GOODS & SUPPLIES



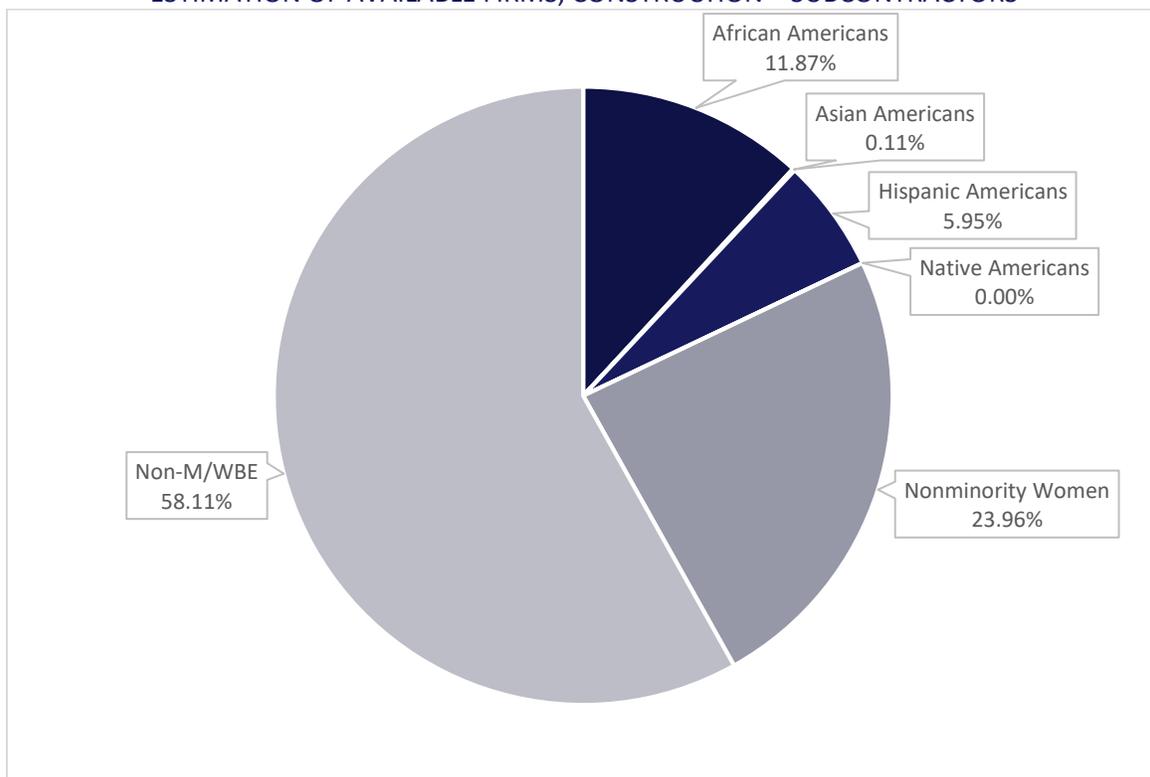
Source: Custom Census Analysis.
Study Period: Fiscal Years July 1, 2013 through June 30, 2018

CONSTRUCTION - SUBCONTRACTORS ONLY

In the **Construction (Subcontractors)** category (**Exhibit 5-6**), availability estimates were:

- ♦ African American-owned firms represented 11.87 percent of available vendors;
- ♦ Asian American-owned firms represented 0.11 percent of available vendors;
- ♦ Hispanic American-owned firms represented 5.95 percent of available vendors;
- ♦ Native American-owned firms represented no available vendors;
- ♦ Nonminority Women firms represented 23.96 percent of available vendors; and
- ♦ Non-M/WBEs represented 58.11 percent of available vendors.

EXHIBIT 5-6.
ESTIMATION OF AVAILABLE FIRMS, CONSTRUCTION – SUBCONTRACTORS



Source: Custom Census Analysis.

Study Period: Fiscal Years July 1, 2013 through June 30, 2018

5.3 DISPARITY METHODOLOGY AND RESULTS

MGT used the City's utilization data (**Chapter 4**) and the availability estimates presented in the previous section (**Section 5.2**) to identify potential disparities in the City's procurement practices. A summary of the approach is provided in **Section 5.3.1** followed by the results of these disparity calculations and associated statistical significance testing in **Section 5.3.2**.

5.3.1 DISPARITY ANALYSIS METHODOLOGY

Once the utilization of prime utilization and construction subcontractor utilization of M/WBE firms has been determined, it must be compared to the available M/WBE firms in the market area. To demonstrate an evidentiary basis for enacting a race-conscious program and to satisfy *Croson's* compelling interest prong, governmental entities must present evidence of underutilization of M/WBEs that would give rise to an inference of discrimination in public contracting.¹¹⁶ If disparity can be shown, a *prima facie* case may be established if the differences between utilization and availability are statistically significant. Appropriate statistical tests must be used to determine if significant differences exist between availability and utilization of M/WBEs. MGT determines disparity by creating a disparity index as well as using statistical significance testing.

DISPARITY INDEX FORMULA

Disparity Index =

$$\%U_{m_1p_1} \div \%A_{m_1p_1} \times 100$$

$U_{m_1p_1}$ = utilization of minorities- and women-owned firms₁ for procurement₁

The disparity index is the ratio of the percentage of utilization and the percentage of availability times 100. The formula for a disparity index is:

Generally, disparity indices of 80 percent or higher—indicating close to full participation—are not considered significant.¹¹⁷ The court referenced the Equal Employment Opportunity Commission's disparate impact guidelines, which establish the 80 percent test

as the threshold for determining a *prima facie* case of discrimination.¹¹⁸ According to the Eleventh Circuit, no circuit that has explicitly endorsed using disparity indices has held that an index of 80 percent or greater is probative of discrimination, but they have held that indices below 80 percent indicate "significant disparities."¹¹⁹

STATISTICAL TESTING. The Supreme Court in *Croson* enforced the utility of statistics, concluding, "If there is a significant statistical disparity between the number of qualified, minority contractors who are willing and able to perform a particular service, and the number of contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." Most federal circuits have supported the use of standard deviation analyses to test the statistical significance of disparity indices. In addition to the disparity index, we will conduct Standard Deviation tests to ascertain the significance of the difference between the availability and utilization. With Standard Deviation analyses, the

t-TEST FORMULA

$$t = \frac{u - a}{\sqrt{\frac{a * (1 - a) * \sum c_i^2}{(\sum c_i)^2}}}$$

t = the t-statistic

u = the ratio of minorities- and women-owned firms' dollars to total dollars

a = the ratio of M/WBE firms to all firms

c_i = the dollar amount.

¹¹⁶ *City of Richmond v. Croson*, at 509.

¹¹⁷ *Engineering Contractors Association of South Florida, Inc.*, 122 F.3d at 914.

¹¹⁸ *Id.* at 914 (citing 29 C.F.R. § 1607.4(D) concerning the disparate impact guidelines and threshold used in employment cases).

¹¹⁹ *Engineering Contractors Association of South Florida, Inc.*, 122 F.3d at 914 (referencing the first appeal in *Contractors Association of Eastern Pennsylvania, Inc.*, 6 F.3d at 1005, crediting disparity index of 4 percent, and *Concrete Works II*, 36 F.3d at 1524, crediting disparity indices ranging from 0 percent to 3.8 percent).

reviewer can determine whether the disparities are substantial or statistically significant, which lends further statistical support to a finding of discrimination.

Disparity calculations are presented by the defined business categories and racial, ethnic, and gender classifications used in earlier phases of the project.

The Relevant Geographic Market Area for the following disparity analyses is defined as firms located in the ten counties of Alamance County, Davidson County, Davie County, Forsyth County, Guilford County, Randolph County, Rockingham County, Stokes County, Surry County, and Yadkin County (**Greensboro-Winston-Salem-High Point CSA**).

To recap, the procurement categories and business ownership classifications are listed below:

INDUSTRY/BUSINESS CATEGORIES

- Construction
- Professional Services
- Other Services
- Goods and Supplies

BUSINESS OWNERSHIP CLASSIFICATIONS

- African American
- Asian American
- Hispanic American
- Native American
- Nonminority Women

5.3.2 DISPARITY ANALYSES AND STATISTICAL SIGNIFICANCE

PRIME

The calculations of disparity ratios and significance testing in each of the procurement categories and ownership classifications by race, ethnicity, and gender are presented in **Tables 5-1** through **5-5**. An analysis of aggregate disparities and statistical significance across all procurement categories in **Table 5-1** reveal:

- ◆ African American-owned firms were underutilized, with a substantial and statistically significant disparity ratio of 27.42;
- ◆ Asian American-owned firms were underutilized, with a substantial and statistically significant disparity ratio of 0.00;
- ◆ Hispanic American-owned firms were underutilized, with a substantial and statistically significant disparity ratio of 0.02;
- ◆ Native American-owned firms were underutilized, with a substantial and statistically significant disparity ratio of 0.00;
- ◆ Nonminority Women firms were underutilized, with a substantial and statistically significant disparity ratio of 41.34; and
- ◆ M/WBEs were underutilized overall, with a substantial and statistically significant disparity ratio of 32.15.

**TABLE 5-1. SUBCONTRACTOR UTILIZATION
DISPARITY RATIO AND SIGNIFICANCE TESTING, ALL PROCUREMENT CATEGORIES**

BUSINESS OWNERSHIP CLASSIFICATION	PERCENT OF DOLLARS	AVAILABLE FIRMS ESTIMATE	DISPARITY INDEX	DISPARATE IMPACT OF UTILIZATION		
		(%)			*	¥¥
African Americans	2.27%	8.28%	27.42	Underutilization	*	¥¥
Asian Americans	0.00%	0.90%	0.00	Underutilization	*	¥¥
Hispanic Americans	0.00%	3.65%	0.02	Underutilization	*	¥¥
Native Americans	0.00%	0.55%	0.00	Underutilization	*	¥¥
TOTAL MINORITY FIRMS	2.27%	13.38%	16.98	Underutilization	*	¥¥
Nonminority Women Firms	9.13%	22.09%	41.34	Underutilization	*	¥¥
TOTAL M/WBE FIRMS	11.40%	35.47%	32.15	Underutilization	*	¥¥
TOTAL NON-M/WBE FIRMS	88.60%	64.53%	137.30	Overutilization		¥¥

* Indicates a substantial level of disparity, which is a disparity index below 80.00.

¥¥ denotes the ratio of utilization to availability is statistically significant at a 0.05 level.

Table 5-2 presents disparity ratios and significance testing for the **Construction** category. Relevant findings include:

- ◆ African American-owned firms were underutilized, with a substantial and statistically significant disparity ratio of 30.40;
- ◆ Asian American-owned firms were underutilized, with a substantial disparity ratio of 0.00. There is not statistical significance due to no Asian American-owned firms being utilized and the low level of available firms;
- ◆ Hispanic American-owned firms were underutilized, with a substantial and statistically significant disparity ratio of 0.00;
- ◆ Native American-owned firms were underutilized, with a substantial disparity ratio of 0.00. There is not statistical significance due to no Native American-owned firms being utilized and the low level of available firms;
- ◆ Nonminority Women firms were underutilized, with a substantial and statistically significant disparity ratio of 24.45;
- ◆ M/WBEs were underutilized with a substantial and statistically significant disparity ratio of 22.21;

TABLE 5-2.
DISPARITY RATIO AND SIGNIFICANCE TESTING, CONSTRUCTION

BUSINESS OWNERSHIP CLASSIFICATION	PERCENT OF DOLLARS	AVAILABLE FIRMS ESTIMATE	DISPARITY INDEX	DISPARATE IMPACT OF UTILIZATION		
		(%)			*	¥¥
African Americans	2.64%	8.69%	30.40	Underutilization	*	¥¥
Asian Americans	0.00%	0.59%	0.00	Underutilization	*	
Hispanic Americans	0.00%	4.56%	0.00	Underutilization	*	¥¥
Native Americans	0.00%	0.47%	0.00	Underutilization	*	
TOTAL MINORITY FIRMS	2.64%	14.31%	18.47	Underutilization	*	¥¥
Nonminority Women Firms	5.82%	23.82%	24.45	Underutilization	*	¥¥
TOTAL M/WBE FIRMS	8.47%	38.13%	22.21	Underutilization	*	¥¥
TOTAL NON-M/WBE FIRMS	91.53%	61.87%	147.94	Overutilization		¥¥

* Indicates a substantial level of disparity, which is a disparity index below 80.00.
 ¥¥ denotes the ratio of utilization to availability is statistically significant at a 0.05 level.

Table 5-3 presents disparity ratios and significance testing for the **Professional Services** category. Relevant findings include:

- ◆ African American-owned firms were underutilized, with a substantial disparity ratio of 30.19. There is not a statistical significance due to only two African American-owned firms being utilized. Due to the low population of African American-owned firms utilized it can't be determined statistically if their underutilization happened by random chance or by some other direct occurrence in the market;
- ◆ Asian American-owned firms were underutilized, with a substantial disparity ratio of 0.00. There is not statistical significance due to no Asian American-owned firms being utilized and the low level of available firms;
- ◆ Hispanic American-owned firms were underutilized, with a substantial and statistically significant disparity ratio of 0.12;
- ◆ Native American-owned firms were underutilized, with a substantial disparity ratio of 0.00. There is not statistical significance due to no Native American-owned firms being utilized and the low level of available firms;
- ◆ Nonminority Women firms were underutilized, with a substantial and statistically significant disparity ratio of 4.96; and
- ◆ M/WBEs were underutilized, with a substantial and statistically significant disparity ratio of 8.17.

TABLE 5-3.
DISPARITY RATIO AND SIGNIFICANCE TESTING, PROFESSIONAL SERVICES

BUSINESS OWNERSHIP CLASSIFICATION	PERCENT OF DOLLARS	AVAILABLE FIRMS ESTIMATE	DISPARITY INDEX	DISPARATE IMPACT OF UTILIZATION		
		(%)				
African Americans	1.24%	4.09%	30.19	Underutilization	*	
Asian Americans	0.00%	1.38%	0.00	Underutilization	*	
Hispanic Americans	0.00%	3.13%	0.12	Underutilization	*	¥¥
Native Americans	0.00%	1.34%	0.00	Underutilization	*	
TOTAL MINORITY FIRMS	1.24%	9.95%	12.47	Underutilization	*	¥¥
Nonminority Women Firms	0.66%	13.35%	4.96	Underutilization	*	¥¥
TOTAL M/WBE FIRMS	1.90%	23.30%	8.17	Underutilization	*	¥¥
TOTAL NON-M/WBE FIRMS	98.10%	76.70%	127.90	Overutilization		¥¥

* Indicates a substantial level of disparity, which is a disparity index below 80.00.

¥¥ denotes the ratio of utilization to availability is statistically significant at a 0.05 level.

Table 5-4 presents disparity ratios and significance testing for the **Other Services** category. Relevant findings include:

- ◆ African American-owned firms were underutilized, with a substantial and statistically significant disparity ratio of 23.59;
- ◆ Asian American-owned firms were underutilized, with a substantial and statistically significant disparity ratio of 0.00;
- ◆ Hispanic American-owned firms were underutilized, with a substantial and statistically significant disparity ratio of 0.00;
- ◆ Native American-owned firms were underutilized, with a substantial disparity ratio of 0.00. There is not statistical significance due to no Native American-owned firms being utilized and the low level of available firms;
- ◆ Nonminority Women firms were overutilized, with a statistically significant disparity ratio of 134.69; and
- ◆ M/WBEs were underutilized, with a statistically significant disparity ratio of 82.67.

TABLE 5-4.
DISPARITY RATIO AND SIGNIFICANCE TESTING, OTHER SERVICES

BUSINESS OWNERSHIP CLASSIFICATION	PERCENT OF DOLLARS	AVAILABLE FIRMS ESTIMATE	DISPARITY INDEX	DISPARATE IMPACT OF UTILIZATION		
		(%)				
African Americans	3.63%	15.39%	23.59	Underutilization	*	¥¥
Asian Americans	0.00%	1.19%	0.00	Underutilization	*	¥¥
Hispanic Americans	0.00%	2.30%	0.00	Underutilization	*	¥¥
Native Americans	0.00%	0.65%	0.00	Underutilization	*	
TOTAL MINORITY FIRMS	3.63%	19.53%	18.59	Underutilization	*	¥¥
Nonminority Women Firms	32.39%	24.05%	134.69	Overutilization		¥¥
TOTAL M/WBE FIRMS	36.02%	43.58%	82.67	Underutilization		¥¥
TOTAL NON-M/WBE FIRMS	63.98%	56.42%	113.39	Overutilization		¥¥

* Indicates a substantial level of disparity, which is a disparity index below 80.00.
 ¥¥ denotes the ratio of utilization to availability is statistically significant at a 0.05 level.

Table 5-5 presents disparity ratios and significance testing for the **Goods & Supplies** category. Relevant findings include:

- ◆ African American-owned firms were underutilized, with a substantial and statistically significant disparity ratio of 6.28;
- ◆ Asian American-owned firms were underutilized, with a substantial and statistically significant disparity ratio of 0.00;
- ◆ Hispanic American-owned firms were underutilized, with a substantial and statistically significant disparity ratio of 0.00;
- ◆ Native American-owned firm’s disparity nor statistical significance could not be calculated. There was no availability and no utilization.
- ◆ Nonminority Women firms were underutilized, with a substantial and statistically significant disparity ratio of 35.42; and
- ◆ M/WBEs were underutilized, with a substantial and statistically significant disparity ratio of 28.17.

TABLE 5-5.
DISPARITY RATIO AND SIGNIFICANCE TESTING, GOODS & SUPPLIES

BUSINESS OWNERSHIP CLASSIFICATION	PERCENT OF DOLLARS	AVAILABLE FIRMS ESTIMATE	DISPARITY INDEX	DISPARATE IMPACT OF UTILIZATION	
		(%)			
African Americans	0.19%	3.03%	6.28	Underutilization	* ¥¥
Asian Americans	0.00%	1.52%	0.00	Underutilization	* ¥¥
Hispanic Americans	0.00%	1.55%	0.00	Underutilization	* ¥¥
Native Americans	0.00%	0.00%	-	Not Applicable	
TOTAL MINORITY FIRMS	0.19%	6.09%	3.12	Underutilization	* ¥¥
Nonminority Women Firms	7.46%	21.06%	35.42	Underutilization	* ¥¥
TOTAL M/WBE FIRMS	7.65%	27.15%	28.17	Underutilization	* ¥¥
TOTAL NON-M/WBE FIRMS	92.35%	72.85%	126.77	Overutilization	¥¥

* Indicates a substantial level of disparity, which is a disparity index below 80.00.
 ¥¥ denotes the ratio of utilization to availability is statistically significant at a 0.05 level.
 Not Applicable utilization or availability so disparity analysis could not be calculated.

CONSTRUCTION - SUB CONTRACTORS ONLY

Table 5-6 presents disparity ratios and significance testing for the **Construction** category. Relevant findings include:

- ◆ African American-owned firms were underutilized, with a substantial and statistically significant disparity ratio of 39.98;
- ◆ Asian American-owned firms were overutilized, with a disparity ratio of 212.30. This overutilization was due to one firm being used during the study period for about \$200,000;
- ◆ Hispanic American-owned firms were underutilized, with a substantial and statistically significant disparity ratio of 76.62;
- ◆ Native American-owned firm's disparity nor statistical significance could not be calculated. There was no availability and no utilization.
- ◆ Nonminority Women firms were underutilized, with a substantial and statistically significant disparity ratio of 60.09; and
- ◆ M/WBEs were underutilized, with a substantial and statistically significant disparity ratio of 57.14.

TABLE 5-6.
DISPARITY RATIO AND SIGNIFICANCE TESTING
CONSTRUCTION SUBCONTRACTING

BUSINESS OWNERSHIP CLASSIFICATION	PERCENT OF DOLLARS	AVAILABLE FIRMS ESTIMATE	DISPARITY INDEX	DISPARATE IMPACT OF UTILIZATION	
		(%)			
African Americans	4.75%	11.87%	39.98	Underutilization	* ¥¥
Asian Americans	0.23%	0.11%	212.30	Overutilization	
Hispanic Americans	4.56%	5.95%	76.62	Underutilization	* ¥¥
Native Americans	0.00%	0.00%	-	Not Applicable	
TOTAL MINORITY FIRMS	9.54%	17.94%	53.20	Underutilization	* ¥¥
Nonminority Women Firms	14.40%	23.96%	60.09	Underutilization	* ¥¥
TOTAL M/WBE FIRMS	23.94%	41.89%	57.14	Underutilization	* ¥¥
TOTAL NON-M/WBE FIRMS	76.06%	58.11%	130.90	Overutilization	¥¥

* Indicates a substantial level of disparity, which is a disparity index below 80.00.

~~¥¥~~ denotes the ratio of utilization to availability is statistically significant at a 0.05 level.

5.3.3 CONCLUSIONS

The calculations of availability and disparity within this chapter and the preceding depiction of utilization presented in **Chapter 4** serve as the foundation for any future development of a race- and gender-based procurement program for the City program. These analyses provide the quantitative legal justification for any future remedies to assist M/WBE enterprises within the market.

As summarized in the table below (**Table 5-7**), disparities between utilization and availability have been observed in all but two instances for specific procurement categories. Disparity and statistical significance are present overall when aggregating all procurement and M/WBE categories included within the scope of the study.

TABLE 5-7.
DISPARITY ANALYSIS SUMMARY

PROCUREMENT CATEGORY	AFRICAN AMERICAN	ASIAN AMERICAN	HISPANIC AMERICAN	NATIVE AMERICAN	NONMINORITY WOMEN	M/WBE Firms
CONSTRUCTION	Disparity	Disparity	Disparity	Disparity	Disparity	Disparity
PROFESSIONAL SERVICES	Disparity	Disparity	Disparity	Disparity	Disparity	Disparity
OTHER SERVICES	Disparity	Disparity	Disparity	Disparity	No Disparity	Disparity
GOODS & SUPPLIES	Disparity	Disparity	Disparity	*	Disparity	Disparity
CONSTRUCTION SUBCONTRACTORS	Disparity	No Disparity	Disparity	*	Disparity	Disparity

Study Period: Fiscal Year July 1, 2013 through June 30, 2018

*No utilization or availability so disparity analysis could not be calculated.

CHAPTER 6. PRIVATE SECTOR
ANALYSIS

2019 Disparity Study

City of Winston-Salem, North Carolina



6.1 INTRODUCTION

The **Legal Framework** presented in **Chapter 2** of this report documented how a government entity must have a record of active or passive discrimination to justify remedies promoted through the institution of a minority- and women-owned business enterprise (M/WBE) program. Courts further require a *compelling-interest analysis* showing a connection between the government or agency and the public or private discrimination that may exist within their jurisdiction. Following documentation of disparities that exist in the public sector in **Chapter 5**, this chapter focuses on an over-arching question¹²⁰:

CHAPTER SECTIONS



- 6.1 Introduction
- 6.2 Private Sector Construction Permits
- 6.3 Private Sector Disparities in SBO Census Data
- 6.4 Analysis of Race, Ethnicity, and Gender Effects on Self-Employment Rates
- 6.5 Conclusion

- ◆ ***Do private sector disparities exist in the private sector which compel the City to continue its M/WBE programs to avoid becoming a passive participant in discrimination?***

Passive discrimination describes a circumstance where a public entity resides in a market with measurably disparate circumstances in the private sector but is failing to take proactive actions to implement remedies within the domain of its control. Substantiating the relevance of an analysis of the private sector:

- ◆ Defining passive participation, the Supreme Court in *Croson* stated, “if the city could show that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system.”¹²¹ This does not mean that the public entity is continuously turning a blind eye to discrimination but rather that the public entity has a compelling interest to mitigate private sector discrimination or risk becoming a passive participant to discrimination.
- ◆ Also stated in *Croson* is that “it is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that *public* dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of *private* prejudice.”¹²²
- ◆ *Croson* further provided that the government “can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment.”¹²³
- ◆ In *Concrete Works IV*, the courts expressly cited as evidence of discrimination that M/WBE contractors used for business with the city of Denver were not used by the same prime contractors for private sector contracts.¹²⁴

¹²⁰ This chapter is a summary of the full private sector findings. The full findings are presented in Appendix C.

¹²¹ *Croson*, 488 U.S. at 492.

¹²² *Coral Construction*, 941 F.2d at 922 (citing *Croson*, 488 U.S. at 492) (emphasis added).

¹²³ See *Croson*; see generally I. Ayres and F. Vars, “When Does Private Discrimination Justify Public Affirmative Action?” 98 *Columbia Law Review* 1577 (1998).

¹²⁴ *Concrete Works IV*, 321 F.3d at 984-85.

- ♦ In *Adarand v. Slater*, the Tenth Circuit favorably cited evidence of capital market discrimination as relevant in establishing the factual predicate for the federal DBE program.¹²⁵ The same court, in *Concrete Works IV*, found that barriers to business formation were relevant insofar as this evidence demonstrated that M/WBEs were “precluded from the outset from competing for public construction contracts.”¹²⁶
- ♦ Also, in *Adarand*, the courts concluded there was a compelling interest for a government Disadvantaged Business Enterprise (DBE) program based primarily on evidence of private sector discrimination.¹²⁷
- ♦ Along related lines, the court also found a regression analysis of census data to be relevant evidence showing barriers to M/WBE formation.¹²⁸
- ♦ A district court upheld the state of North Carolina M/WBE program in road construction based largely on similar private sector evidence supplement by evidence from databases covering private sector commercial construction.¹²⁹

Thus, discriminatory practices in the marketplace may in many circumstances show or serve to support the *compelling interest* required by courts to support an agency’s program to intervene in order to prevent the agency from becoming a *passive participant* to discrimination.

With these decisions supporting investigation into this domain, as part of the development of a comprehensive framework and set of perspectives that have traditionally been used to justify M/WBE programs, this chapter provides an accumulation of evidence for the overarching question of whether or not the City of Winston-Salem, NC (City) has continued compelling interest to maintain its M/WBE programs based on circumstances observed in the private sector. This is investigated using two specific sources of data leveraged to address three specific questions substantiating the over-arching research question regarding disparities in the private sector:

- **City construction permits data**, which are used determine:
 1. *Do disparities exist in utilization of M/WBE firms for commercial private sector construction projects relative to their availability?*
- **2012 Census Survey of Business Owners (SBO) data**, which are used to determine:
 1. *Do marketplace disparities exist in the private sector within the five procurement categories?*
- **2013-2017 Census American Community Survey (ACS) Public Used Microdata Sample (PUMS) data**, which are used to determine:

¹²⁵ *Adarand v. Slater*, 228 F.3d at 1169-70 (10th Cir. 2000).

¹²⁶ *Concrete Works IV*, 321 F.2d at 977. The district court rejected evidence of credit market discrimination as adequate to provide a factual predicate for an M/WBE program. *Concrete Works v. City and County of Denver*, 86 F. Supp. 2d 1042 (D. Colo. 2000) (*Concrete Works I*).

¹²⁷ *Adarand v. Slater*, 228 F.3d 1147 (10th Cir. 2000).

¹²⁸ *Id.* at 977.

¹²⁹ *H.B. Rowe, Inc. v. Tippet*, 589 F.Supp. 2d 587 (ED NC 2008). The court, however, was very brief in discussing what factors in the study accounted for its ruling. The program was subsequently found to be unconstitutional as applied to women. *H.B. Rowe, Inc. v. Tippet*, 615 F.3d 233 (4th Cir. 2010).

1. *Are racial, ethnic, and gender minority groups less likely than nonminority males (non-M/WBEs) to be self-employed?*
2. *Does racial, ethnic, and gender status have an impact on self-employed individuals' earnings?*

In answering these questions, the private sector analysis also supports anecdotal comments offered in **Chapter 6, Anecdotal Analysis**, regarding difficulties M/WBE firms have in securing work on private sector projects.

6.2 PRIVATE SECTOR UTILIZATION ANALYSIS BASED ON CONSTRUCTION PERMITS

To help answer the over-arching research question regarding the existence of disparities in the private sector, as well as the specific question:

1. *Do disparities exist in utilization of M/WBE firms for commercial private sector construction projects relative to their availability?*

Construction permits issued by the City were analyzed. The value in examining permits is that they offer up-to-date records of actual construction activity undertaken in the area. In order to isolate only commercial construction projects as the focus of analysis, public sector and residential permit records, where identified, were excluded. Additionally, to distinguish between primes and subs, MGT assigned general contractors as primes and all others as subs. Since the private sector permits data did not contain the contractor's race, ethnic, or gender information, MGT assigned business ownership classification using various vendor lists obtained from all registration and certification agencies in order to conduct a vendor match procedure. This vendor match procedure allowed MGT to assign business ownership classification to firms presented in the permit data. In order to achieve the greatest number of potential match combinations, in addition to electronically linking the various lists to the permits data, a manual match was also conducted. Firms identified as nonminority male, and firms for which there was no business ownership classification, were considered to be non-M/WBE firms and counted as non-M/WBE firms in the analysis conducted for this Study.

For the procurement category analysis, findings reported in this chapter deal only with private sector construction for permits issued for general construction, mechanical, electrical, and plumbing trades for two reasons: (1) permit data, by its nature, pertains only to construction activities, which is also the category for which data tends to be most extensive and reliable, and (2) courts have historically scrutinized construction activity in a given jurisdiction more than any other procurement category because, in both public and private sector business activity, it tends to be the most financially lucrative in terms of its impact on a local economy.

A total of \$416.404 million in prime and \$197.779 million subcontractor construction permits issued by the City during the study period (July 1, 2013 through June 31, 2018) were analyzed as part of this

investigation. **Table 6-1** shows that 0.07 percent of the prime permits were let to only WBEs. **Table 6-1** also shows that 0.39 percent of the subcontractor permits were let to M/WBEs, with highest M/WBE utilization observed for African American firms (0.15%) followed by Nonminority Female firms (0.24%).

TABLE 6-1.
UTILIZATION ANALYSIS OF FIRMS
COMMERCIAL CONSTRUCTION

BUSINESS OWNERSHIP CLASSIFICATION	PRIME PERMITS	PERCENT OF PRIME PERMITS	SUBCONTRACTOR PERMITS	PERCENT OF SUBCONTRACTOR PERMITS
AFRICAN AMERICAN FIRMS	\$0.00	0.00%	\$304,750.00	0.15%
ASIAN AMERICAN FIRMS	\$0.00	0.00%	\$0.00	0.00%
HISPANIC AMERICAN FIRMS	\$0.00	0.00%	\$0.00	0.00%
NATIVE AMERICAN FIRMS	\$0.00	0.00%	\$0.00	0.00%
TOTAL MINORITY FIRMS	\$0.00	0.00%	\$304,750.00	0.15%
NONMINORITY FEMALE FIRMS	\$282,000.00	0.07%	\$477,319.00	0.24%
TOTAL M/WBE FIRMS	\$282,000.00	0.07%	\$782,069.00	0.39%
TOTAL NON-M/WBE	\$416,122,949.13	99.90%	\$196,997,193.29	99.66%
TOTAL FIRMS	\$416,404,949.13	100.00%	\$197,779,262.29	100.00%

Source: MGT developed a Master Commercial Private Sector Database based on commercial construction permitting data between July 1, 2013 through June 31, 2018.

With this point of reference established, MGT utilized two data sets to compare relative utilization of firms and gauge the scale of any differences. The first of these comparison data sets contained a listing of permits issued to contractors which appeared in both the permits and City public sector construction data, while the second data set contained firms utilized on City public sector construction projects during the study period.

TABLE 6-2.
UTILIZATION ANALYSIS OF FIRMS
COMMERCIAL CONSTRUCTION – PRIME ONLY

BUSINESS OWNERSHIP CLASSIFICATION	PERMITS ISSUED TO CONTRACTORS	PERCENT OF PERMITS	PUBLIC SECTOR UTILIZATION	PERCENT OF CONTRACTS
AFRICAN AMERICAN FIRMS	\$0.00	0.00%	\$6,622,884.94	2.64%
ASIAN AMERICAN FIRMS	\$0.00	0.00%	\$0.00	0.00%
HISPANIC AMERICAN FIRMS	\$0.00	0.00%	\$300.00	0.00%
NATIVE AMERICAN FIRMS	\$0.00	0.00%	\$0.00	0.00%
TOTAL MINORITY FIRMS	\$0.00	0.00%	\$6,623,184.94	2.64%
NONMINORITY FEMALE FIRMS	\$282,000.00	1.64%	\$14,596,398.83	5.82%
TOTAL M/WBE FIRMS	\$282,000.00	1.64%	\$21,219,583.77	8.47%
TOTAL NON-M/WBE FIRMS	\$16,888,320.13	98.36%	\$229,374,834.58	91.53%
TOTAL FIRMS	\$17,170,320.13	100.00%	\$250,594,418.35	100.00%

Source: MGT developed a Master Commercial Private Sector Database based on commercial construction permitting data between July 1, 2013 through June 31, 2018.

TABLE 6-3.
UTILIZATION ANALYSIS OF FIRMS
COMMERCIAL CONSTRUCTION – SUBCONTRACTOR ONLY

BUSINESS OWNERSHIP CLASSIFICATION	PERMITS ISSUED TO SUBCONTRACTORS	PERCENT OF PERMITS	PUBLIC SECTOR UTILIZATION	PERCENT OF CONTRACTS
AFRICAN AMERICAN FIRMS	\$162,000.00	1.31%	\$4,163,381.24	4.75%
ASIAN AMERICAN FIRMS	\$0.00	0.00%	\$203,958.36	0.23%
HISPANIC AMERICAN FIRMS	\$0.00	0.00%	\$4,000,573.89	4.56%
NATIVE AMERICAN FIRMS	\$0.00	0.00%	\$0.00	0.00%
TOTAL MINORITY FIRMS	\$162,000.00	1.31%	\$8,367,913.49	9.54%
NONMINORITY FEMALE FIRMS	\$453,320.00	3.67%	\$12,627,480.35	14.40%
TOTAL M/WBE FIRMS	\$615,320.00	4.98%	\$20,995,393.84	23.94%
TOTAL NON-M/WBE FIRMS	\$11,745,347.00	95.02%	\$66,712,652.58	76.06%
TOTAL FIRMS	\$12,360,667.00	100.00%	\$87,708,046.42	100.00%

Source: MGT developed a Master Commercial Private Sector Database based on commercial construction permitting data between July 1, 2013 through June 31, 2018. Note: Subcontractor utilization is based on the HRC Award data provided by the city of Winston-Salem, and not payments.

The goal of this analysis was to examine public sector and private sector contracting patterns for construction. MGT compared the public sector utilization of firms in City-issued data with private sector utilization of such firms, as reflected in the private commercial permit data, to analyze to what extent utilized contractors which appear in the City data also appear in the permitting data for commercial construction projects.

When the permit results are compared to the City prime utilization results, the city utilizes M/WBEs at higher rates than the commercial sector for both prime contractor and subcontractors. From **Table 6-2**, the City M/WBEs accounted for 8.47 percent of the number of prime construction contracts, while private sector M/WBEs accounted for 1.64 percent of the number of prime construction permits. Specifically, City MBEs accounted for only 2.64 percent of the number of prime construction contracts, while private sector MBEs accounted for 0.00 percent of the number of construction permits; and City WBEs accounted for 5.82 percent of the number of construction contracts, while private sector WBEs accounted for 1.64 percent of the number of construction permits.

When the permit results are compared to the City subcontractor utilization results, the city utilizes M/WBEs at higher rates than the commercial sector for both prime contractor and subcontractors. From **Table 6-3**, the City M/WBEs accounted for 23.94 percent of the number of subcontractor construction contracts, while private sector M/WBEs accounted for 4.98 percent of the number of subcontractor construction permits. Specifically, City MBEs accounted for only 9.54 percent of the number of subcontractor construction contracts, while private sector MBEs accounted for 1.31 percent of the number of construction permits; and City WBEs accounted for 14.40 percent of the number of construction contracts, while WBEs accounted for private sector 3.67 percent of the number of construction permits.

While not definitive in isolation, the data does clearly show a pronounced difference in utilization of M/WBE firms within the private sector versus what we observed for the public sector, where program goals do not facilitate more equitable participation. Combining this perspective with others (such as the public sector disparity ratios presented in **Chapter 5** and vendor survey results and anecdotal evidence to be presented in **Chapter 7**), we see a prevailing theme in a pattern of cumulatively overwhelming evidence that disparities in contracting are fairly pervasive in this market.

6.3 PRIVATE SECTOR DISPARITIES IN SBO CENSUS DATA

To answer the over-arching research question regarding the existence of disparities in the private sector, as well as the specific question (1) of whether these disparities exist in procurement categories relevant to the City's contracting domain, MGT analyzed the U.S. Census Bureau's 2012 Survey of Business Owners (SBO) data¹³⁰ to determine whether disparities exist in the private sector within the four major procurement categories analyzed in this Study.¹³¹ The SBO compiles certain economic and demographic characteristics of businesses and business owners, including data on geography, industry (as defined by NAICS codes), firm receipts or sales, employment numbers, and business ownership classification. The survey has been administered every five years since 1972 as part of the economic census, and the data collected through the SBO is statistically significant.

6.3.1 RESULTS OF ANALYSIS

This private sector analysis presents disparity results based on the following geographic market areas: (1) the state of North Carolina and (2) the Winston-Salem, NC Market Area, which contains the following counties in North Carolina: Alamance, Davidson, Davie, Forsyth, Guilford, Randolph, Rockingham, Stokes, Surry, and Yadkin. These marketplaces were chosen because they are the area's most readily available in the SBO data that allow for similar comparison to the public-sector utilization. The results based on construction in the state of North Carolina are presented first, followed by construction analysis in the Winston-Salem, NC Market Area. For the purpose of this summary, and ease of reading, Construction is the only category presented as it represents a majority of public sector spend by the City. Full results are presented in **Appendix C**.

STATE OF NORTH CAROLINA MARKETPLACE

Table 6-4 shows the measures of private sector disparities based on U.S. Census, 2012 SBO data for the population of available firms in the state of North Carolina by race, ethnicity, and gender for construction).

Based on the analysis of the U.S. Census, 2012 SBO data, overall there remains a significant gap between the market share of M/WBE firms and their share of the state of North Carolina business population, where data were available.

¹³⁰ The 2012 data is the most recent data available from the SBO.

¹³¹ The NAICS codes analyzed were Code 23, Construction; Code 42, Wholesale Trade; Code 54, Professional, Scientific, and Technical Services; Code 56, Administrative and Support and Waste Management and Remediation Services; and Code 81, Other Services (Except Public Administration).

NAICS CODE 23: CONSTRUCTION, STATE MARKETPLACE

Table 6-4 shows the availability, sales, and disparity results for construction. The results were derived from those firms which provide construction or construction-related services based on the NAICS Code 23.

There was a total of 100,710 construction firms (all firms¹³²) in the State of North Carolina in 2012, of which 18.56 percent were owned by minorities and 14.55 percent by nonminority women.

- ◆ African American firms (disparity index of 21.96) were substantially underutilized, accounting for 6.24 percent of all firms and 1.37 percent of sales.
- ◆ Native American firms (disparity index of 20.76) were substantially underutilized, accounting for 2.79 percent of all firms and 0.58 percent of sales.
- ◆ Asian American firms (disparity index of 43.63) were substantially underutilized, accounting for 0.74 percent of all firms and 0.32 percent of sales.
- ◆ Hispanic American firms (disparity index of 29.77) were substantially underutilized, accounting for 8.78 percent of all firms and 2.61 percent of sales.
- ◆ Nonminority women firms (disparity index of 86.35) were underutilized, accounting for 14.55 percent of all firms and 12.56 percent of sales.

There was a total of 21,077 construction employer firms¹³³ in the State of North Carolina in 2012, of which 6.73 percent were owned by minorities and 23.93 percent by nonminority women firms.

- ◆ African American firms (disparity index of 54.21) were substantially underutilized, accounting for 2.30 percent of employer firms and 1.25 percent of sales.
- ◆ Native American firms (disparity index of 44.95) were substantially underutilized, accounting for 0.74 percent of employer firms and 0.33 percent of sales.
- ◆ Data for Asian American firms were withheld; therefore, private sector disparities were not conducted.
- ◆ Hispanic American firms (disparity index of 50.01) were substantially underutilized, accounting for 3.43 percent of employer firms and 1.72 percent of sales.
- ◆ Nonminority women firms (disparity index of 52.26) were substantially underutilized, accounting for 23.93 percent of employer firms and 12.51 percent of sales.

¹³² All firms, a compilation of employer firms and non-employer firms, were examined since non-employer firms can provide services at the subcontractor/subconsultant level, as well hire independent contractors to increase capacity.

¹³³ Employer firms include firms with payroll at any time during 2012.

TABLE 6-4.
PRIVATE SECTOR CENSUS DISPARITIES
NAICS CODE 23, CONSTRUCTION
U.S. CENSUS 2012 SURVEY OF BUSINESS OWNERS,
STATE OF NORTH CAROLINA MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	ALL FIRMS (#)	ALL FIRMS, SALES (\$1,000)	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	100,710	\$41,487,760	21,077	\$37,293,789
African American Firms	6,286	\$568,572	485	\$465,195
Native American Firms ¹	2,814	\$240,657	157	\$124,862
Asian American Firms ²	744	\$133,725	53	S
Hispanic American Firms	8,844	\$1,084,541	723	\$639,749
Nonminority Women Firms ³	14,651	5,211,432	5,044	4,664,042
PERCENTAGE OF MARKETPLACE				
All Firms	100.00%	100.00%	100.00%	100.00%
African American Firms	6.24%	1.37%	2.30%	1.25%
Native American Firms ¹	2.79%	0.58%	0.74%	0.33%
Asian American Firms ²	0.74%	0.32%	0.25%	S
Hispanic American Firms	8.78%	2.61%	3.43%	1.72%
Nonminority Women Firms ³	14.55%	12.56%	23.93%	12.51%
DISPARITY INDEX				
	ALL FIRMS		EMPLOYER FIRMS	
All Firms	100.00		100.00	
African American Firms	21.96		54.21	
Native American Firms ¹	20.76		44.95	
Asian American Firms ²	43.63		S	
Hispanic American Firms	29.77		50.01	
Nonminority Women Firms ³	86.35		52.26	

Source: MGT of America, Inc. conducted private sector disparities marketplace analyses based on U.S. Census Bureau, 2012 Survey of Business Owners (SBO) data.

¹ Native American consists of American Indian- and Alaska Native-owned firms.

² Asian American consists of Asian-owned and Native Hawaiian- and Other Pacific Islander-owned firms.

³ Nonminority Women consists of White Women-owned and White Equally Women-/Male-owned firms.

⁴ S denotes findings were withheld as the estimates did not meet U.S. Census publication standards.

Sales includes total shipments, receipts, revenue, or business done by the firm.

Disparity index is the ratio of the percentage of sales to percentage of available firms multiplied by 100.00. A disparity index below 80.00 indicates a substantial level of disparity.

WINSTON-SALEM, NC MARKET AREA MARKETPLACE¹³⁴

Tables 6-5 show the measures of private sector disparities based on U.S. Census, 2012 SBO data for the population of available firms in the Winston-Salem, NC Market Area marketplace by race, ethnicity, and gender for construction.

Based on the analysis of the U.S. Census, 2012 SBO data, overall there remains a significant gap between the market share of M/WBE firms and their share of the Winston-Salem, NC Market Area marketplace business population, where data was available.

NAICS CODE 23: CONSTRUCTION, WINSTON-SALEM, NC MARKET AREA

Table 6-5 shows the availability, sales, and disparity results for construction (NAICS Code 23). There was a total of 13,885 construction firms (all firms¹³⁵) in the Winston-Salem, NC area marketplace in 2012, of which 16.28 percent were owned by minorities and 17.82 percent by nonminority women.

- ◆ African American firms (disparity index 2.95) were substantially underutilized, accounting for 4.91 percent of all firms and 0.14 percent of sales.
- ◆ Hispanic American firms (disparity index of 0.75) were substantially underutilized, accounting for 10.02 percent of all firms and 0.08 percent of sales.
- ◆ Native American firms (disparity index of 8.53) were substantially underutilized, accounting for 0.96 percent of all firms and 0.08 percent of sales.
- ◆ Nonminority Women firms (disparity index of 32.11) were substantially underutilized, accounting for 17.82 percent of all firms and 5.72 percent of sales.
- ◆ Data for Asian American firms were withheld; therefore, private sector disparities were not conducted.

There was a total of 3,423 construction employer firms¹³⁶ in the Winston-Salem, NC area marketplace in 2012, of which 8.59 percent were owned by minorities and 26.67 percent by nonminority women.

- ◆ Nonminority Women firms (disparity index 8.41) were substantially underutilized, accounting for 26.67 percent of all firms and 2.25 percent of sales.
- ◆ Data for African American, Asian American, Hispanic American, and Native American, firms were withheld; therefore, private sector disparities were not conducted.

¹³⁴ Based on all sectors (NAICS codes 00), there was a total of 131,277 firms (all firms) in the Winston-Salem area marketplace compared to 805,985 for the State of North Carolina marketplace. Therefore, the following results by NAICS code may present data (such as the number of firms, firm sales) lower than the State of North Carolina marketplace.

¹³⁵ All firms include firms with and without payroll at any time during 2012.

¹³⁶ Employer firms include firms with payroll at any time during 2012.

TABLE 6-5.
PRIVATE SECTOR CENSUS DISPARITIES
NAICS CODE 23, CONSTRUCTION
U.S. CENSUS 2012 SURVEY OF BUSINESS OWNERS,
WINSTON-SALEM, NC MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	ALL FIRMS (#)	ALL FIRMS, SALES (\$1,000)	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	13,885	\$5,704,595	3,423	\$5,230,906
African American Firms	682	\$8,271	90	S
Native American Firms ¹	133	\$4,660	1	S
Asian American Firms ²	54	S	2	S
Hispanic American Firms	1,391	\$4,296	201	S
Nonminority Women Firms ³	2,475	326,489	916	117,710
PERCENTAGE OF MARKETPLACE				
All Firms	100.00%	100.00%	100.00%	100.00%
African American Firms	4.91%	0.14%	2.63%	S
Native American Firms ¹	0.96%	0.08%	0.03%	S
Asian American Firms ²	0.39%	S	0.06%	S
Hispanic American Firms	10.02%	0.08%	5.87%	S
Nonminority Women Firms ³	17.82%	5.72%	26.76%	2.25%
DISPARITY INDEX				
		ALL FIRMS		EMPLOYER FIRMS
All Firms		100.00		100.00
African American Firms		2.95		S
Native American Firms ¹		8.53		S
Asian American Firms ²		S		S
Hispanic American Firms		0.75		S
Nonminority Women Firms ³		32.11		8.41

Source: MGT of America, Inc. conducted private sector disparities marketplace analyses based on U.S. Census Bureau, 2012 Survey of Business Owners (SBO) data.

¹ Native American consists of American Indian- and Alaska Native-owned firms.

² Asian American consists of Asian-owned and Native Hawaiian- and Other Pacific Islander-owned firms.

³ Nonminority Women consists of White Women-owned and White Equally Women-/Male-owned firms.

S denotes findings were withheld as the estimates did not meet U.S. Census publication standards.

Sales includes total shipments, receipts, revenue, or business done by the firm.

Disparity index is the ratio of the percentage of sales to percentage of available firms multiplied by 100.00. A disparity index below 80.00 indicates a substantial level of disparity.

6.3.2 SBO CONCLUSION

The SBO analysis shows consistent underutilization of M/WBE firms relative to their availability in the market area, validating the overarching research question of whether these disparities exist for the broader private sector, and is compelling for the City to maintain associated remedies to avoid passive participation in discrimination, irrespective of circumstances in the public sector.

Further, Appendix C displays results of the remaining procurement categories analyzed and showed substantial disparity among defined M/WBE classes where sufficient data were available.

6.4 ANALYSIS OF RACE, ETHNICITY, AND GENDER EFFECTS ON SELF-EMPLOYMENT AND EARNINGS

This section examines further evidence regarding the over-arching research question of whether disparities exist in the private sector and addresses the two more specific questions:

1. *Are racial, ethnic, and gender minority groups less likely than nonminority males (non-M/WBEs) to be self-employed?*
2. *Do racial, ethnic, and gender status have an impact on individuals' earnings?*

This is achieved through an examination of the effects of race, ethnicity, and gender, alongside controls for individual economic and demographic characteristics, on individuals' participation in the private sector as self-employed business operators, as well as the effects of these variables on their earnings. The analysis is targeted to four categories of private sector business activity (Construction, Professional Services, Other Services, and Goods & Supplies) that aligns with the City procurement categories defined for the Study, noting that Professional Services also encompasses Architecture and Engineering.

Adopting the methodology and variables employed by a City of Denver disparity study (see *Concrete Works v. City and County of Denver*¹³⁷), we use Public Use Microdata Samples (PUMS) data derived from the 2013-2017 American Community Survey (ACS), to which we apply appropriate regression statistics to draw conclusions.

6.4.1 THE INFLUENCES OF RACE, ETHNICITY, AND GENDER ON SELF EMPLOYMENT

To answer the first question, MGT used logistic regression to calculate the probability of being self-employed (the dependent variable), independent of other socioeconomic and demographic characteristics known to influence the likelihood self-employment (such as age or educational attainment). This analysis is thus intended to isolate the effects of race, ethnicity, and gender on self-employment rates. In evaluating the data in **Table 6-6**, the inverse of odds-ratios is particularly relevant.

¹³⁷ *Concrete Works v. City and County of Denver*, 321 F.3 950 (10th Cir. 2003).

This analysis examined the statistical effects of these variables on the likelihood of being self-employed in the Winston-Salem, Market Area. From the inverse of this value, we can interpret a likelihood value of its effect on self-employment. The results are interpretable based on the inverse of the “odds ratios”. For example, the “odds ratio” for an African American is 0.399 as seen in the top portion of **Table 6-6**, while the inverse of this is 2.51, as seen in the lower portion of this table. This inverse value means that a nonminority male is 2.51 times more likely to be self-employed than an African American. Comparisons are made to nonminority males as a control group, where the influence of any of the race, ethnicity, or gender variables is considered absent. In this sense, the circumstance of the nonminority male is considered to be a baseline for what might be expected for self-employment rates for this market – with race, ethnicity, or gender variables being tested for their positive or negative influence.

TABLE 6-6.
SELF-EMPLOYMENT ODDS RATIOS AND THEIR INVERSES FOR MINORITY GROUPS RELATIVE TO NONMINORITY MALES AFTER CONTROLLING FOR DEMOGRAPHIC AND ECONOMIC CHARACTERISTICS

BUSINESS OWNERSHIP CLASSIFICATION	ALL INDUSTRIES	CONSTRUCTION	PROFESSIONAL SERVICES	OTHER SERVICES	GOODS & SUPPLIES
ODDS-RATIOS					
African American Firms	0.399	0.401	0.197	0.566	0.463
Hispanic American Firms	0.486	0.481	0.393	0.665	0.230
Asian American Firms	0.816	0.876	0.316	0.987	0.465
Native American Firms	0.677	0.876	0.315	0.735	.987
Nonminority Women Firms	0.456	0.424	0.234	0.543	0.654
INVERSE OF ODDS-RATIOS					
African American Firms	2.506	2.494	5.076	1.767	2.160
Hispanic American Firms	2.058	2.079	2.545	1.504	4.348
Asian American Firms	1.225	1.142	3.165	1.013	2.151
Native American Firms	1.477	1.142	3.175	1.361	1.013
Nonminority Women Firms	2.193	2.358	4.274	1.842	1.529

Source: PUMS data from 2013-2017 American Community Survey (Winston-Salem, NC Market Area) and MGT, calculations using SPSS Statistics software. Note: Shading and **bold** indicates the estimated “odds ratio” for the group was statistically significant at 95% confidence interval¹³⁸. The architecture and engineering business industry was excluded from this analysis because of the insufficient data.

Are racial, ethnic, and gender minority groups less likely than nonminority males (non-M/WBEs) to be self-employed? The findings show that racial, ethnic, and gender minority groups are nearly universally less likely than nonminority males to be self-employed. For example, nonminority males were 5.08 times more likely than African Americans to be self-employed in the Professional Services; and nonminority males were 2.49 times more likely than African Americans to be self-employed in the Construction industry.

With respect to the over-arching research question, these findings again communicate that disparities do exist in the market. Within this circumstance and in response to the specific research question, it is also

¹³⁸ Statistically significant is the likelihood that a relationship between two or more variables is caused by something other than random chance. MGT incorporates the statistical 95% confidence interval. This means that if the same population is sampled on numerous occasions and interval estimates are made on each occasion, the resulting intervals would bracket the true population parameter in approximately 95% of the cases.

evident that racial, ethnic, and gender variables have a statistically significant negative impact on rates of self-employment after other factors are controlled for.

6.4.2 THE INFLUENCES OF RACE, ETHNICITY, AND GENDER ON INDIVIDUAL EARNINGS

To answer the second question, MGT compared minority and female entrepreneurs' earnings to those of nonminority male entrepreneurs in the Winston-Salem, NC Market Area, when the effect of other demographic and economic characteristics was controlled or neutralized.

This analysis examined the statistical effects of these variables on income from self-employment for business owners in Winston-Salem, NC Market Area. As yielded by the linear regression analysis, each number in **Table 6-7** represents a percent change in earnings associated with the introduction of the variable (business ownership classification) in the left-hand column. For example, across all industries, the adjustment factor for an African American is -0.319, meaning that an African American would be predicted to earn 31.90 percent less than a nonminority male, all other variables considered or controlled for.

TABLE 6-7.
EARNINGS ELASTICITIES OF MINORITY GROUPS RELATIVE TO NONMINORITY MALES AFTER CONTROLLING FOR
DEMOGRAPHIC AND ECONOMIC CHARACTERISTICS

BUSINESS OWNERSHIP CLASSIFICATION	ALL INDUSTRIES	CONSTRUCTION	PROFESSIONAL SERVICES	OTHER SERVICES	GOODS & SUPPLIES
African American Firms	-0.319	0.342	-0.479	-0.221	-0.921
Hispanic American Firms	-0.295	-0.421	0.124	-0.214	-0.527
Asian American Firms	-0.103	-0.124	1.021	-0.431	-0.872
Native American Firms	-0.312	-0.232	0.123	-0.202	-0.351
Nonminority Women Firms	-0.323	-0.261	-0.221	-0.41	-0.332

Source: PUMS data from 2013-2017 American Community Survey (Winston-Salem, NC Market Area) and MGT, calculations using SPSS Statistics software. Note: Shading and **bold** indicates the estimated "elasticities" for the group were statistically significant at 95% confidence interval. The architecture and engineering business industry was excluded from this analysis because of insufficient data. In terms of the regression "elasticity" means the percent change resulting by being a member of one of the M/WBE groups.

The findings provide further positive evidence that disparities exist in the private sector of the City's market area, compelling the continuation of remedies in the domain of the government's influence.

The findings also provide affirmative evidence to the more specific questions regarding impacts on earning, demonstrating that self-employed racial, ethnic, and gender minority groups earn less than their nonminority male counterparts, all variables considered.

6.5 CONCLUSIONS

Analysis of the U.S. Census 2012 SBO data and the PUMS 2013-2017 data demonstrate, in response to the over-arching research question driving this analysis, that disparities do exist for M/WBE firms operating in the private sector within the City's market area. Thus, based on guidance offered by the courts into this

domain, the City may have a compelling interest to continue its current M/WBE program to avoid becoming a passive participant to discrimination.

To the more specific research questions:

- ◆ The permits analysis presented a summary of firm utilization by racial, ethnic and gender classification comparing M/WBE utilization for the City private sector construction projects with commercial construction projects from July 1, 2013 through June 31, 2018. According to the findings from commercial construction projects, substantial M/WBE underutilization was evident in the private sector. When compared to findings from the commercial construction projects, M/WBE firms fared better on City projects.
- ◆ Findings from the U.S Census 2012 SBO data indicate that there are substantial disparities for most M/WBE firms across industry sectors resembling the procurement categories identified for this study.
- ◆ Findings from the 2013-2017 PUMS data indicate that:
 - M/WBE firms were significantly less likely than nonminority males to be self-employed.
 - If they were self-employed, M/WBE firms earned significantly less in 2013-2017 than did self-employed nonminority males.

In light of these findings, credence may be given to the proposition established in *Croson*, which suggested a government could be a passive participant in private sector discrimination if it did not act to counter these dynamics at least within the domain of its influence. This evidence stands alongside the disparities observed in public sector contracting to illustrate the substantial inequities that continue to exist in the City's marketplace, underscoring its compelling interest in continuing to pursue remedies to address these extant gaps.

CHAPTER 7. ANECDOTAL ANALYSIS

2019 Disparity Study

City of Winston-Salem, North Carolina



7.1 INTRODUCTION

This chapter examines anecdotal evidence of disparate treatment of M/WBE firms by the City, the City's prime contractors, and the private sector. The collection and analysis of anecdotal data helps explain and provides context for the quantitative data analyses found in **Chapter 4, Market Area and Utilization Analyses** and **Chapter 5, Availability and Disparity Analyses**. In conjunction with the quantitative data, MGT also was able to draw inferences from the anecdotal data as to the prevalence of obstacles perceived as limiting the participation of M/WBEs and other firms in the City's procurement transactions.

CHAPTER SECTIONS



- 7.1 Introduction
- 7.2 Methodology
- 7.3 Demographics
- 7.4 Findings
- 7.5 Suggested Remedies from Anecdotal Participants
- 7.6 Stakeholder Interviews
- 7.7 Conclusions

Unlike conclusions derived from other types of analysis in this report, the conclusions derived from anecdotal analysis do not rely solely on quantitative data. Rather, the analysis in this chapter utilizes qualitative data to describe the context of the examined social, political, and economic environment in which all businesses and other relevant entities applicable to the Study operate. Anecdotal comments in this chapter detail the perceptions and opinions of individuals, and the evidentiary weight of these opinions depends on how much they are corroborated by statements of others and the quantitative data in the report. Collective responses from the multiple data collection activities provided in this chapter are not altered for context but are edited for grammar.

The collective anecdotal activities gathered input from 224 business owners or representatives regarding their perceptions of their experiences working with the City, or on City projects as subcontractors.

7.2 METHODOLOGY

The blueprint for collecting and analyzing anecdotal information for this Study was provided by the U.S. Supreme Court in *City of Richmond v. J.A. Croson*, 488 U.S. 469, 109 S.Ct. 706 (1989) (*Croson*). In that case, the Court held that race-conscious programs must be supported by strong documentation of discrimination, including evidentiary findings that go beyond the demographics of a community. Anecdotal information can bolster the quantitative analyses of contract expenditures to explain whether or not minority business creation, growth, and retention are negatively affected by discrimination. In *Croson*, the Court held that anecdotal accounts of discrimination could help establish a compelling interest for a local government to institute a race-conscious remedy. Moreover, such information can provide a local entity with a firm basis for fashioning a program that is narrowly tailored to remedy identified forms of marketplace discrimination and other barriers to M/WBE participation in contract opportunities. Further discussion regarding the collection of anecdotal data is contained in **Chapter 2, Legal Framework**.

MGT's experience conducting disparity studies has shown that utilizing multiple methods of anecdotal data collection provides more comprehensive information than methodologies using a single-pronged approach. For this reason, MGT used a combination of surveys, community meetings, online comments, and one-on-one interviews with businesses to collect anecdotal information that are analyzed to identify issues and concerns that were common to businesses in the market area. In addition to the anecdotal

data collection from area businesses, MGT conducted interviews and meetings with area trade associations, and business organizations to gather anecdotes on their perceptions on City's procurement process and impact of the M/WBE program to firms. While the collection of these anecdotes is not required by the courts, input from advocacy and professional development organizations give a third-party perspective of M/WBE issues.

7.2.1 OUTREACH

To establish a base for the outreach efforts MGT developed a database of firms that incorporated data sets from the City's vendor list and certification lists collected from government agencies in North Carolina. This database was created to ensure that a broad range of firms in the marketplace were notified about the qualitative data collection activities.

Next, MGT worked with the City to develop a Community Outreach Plan that identify various outreach methods geared to inform and encourage community involvement and engagement for the anecdotal data collection activities. One such method was the creation of a disparity study website that informed the community of the project objectives, work tasks, anecdotal activities, frequently asked questions, and general information about the initiative. The website allowed businesses to submit online comments directly to MGT about their experiences doing business or attempting to do business with the City. Additional outreach methods included:

- ◆ MGT and the City identified area trade associations and business organizations, referred to as stakeholders for purposes of this report, whose insights would be valuable to understanding the dynamics and perceptions of the vendor community. The stakeholders were notified via e-mail blasts, and/or phone calls of anecdotal data collection activities and asked to encourage their members to participate.
- ◆ Use of social media, i.e. Twitter, LinkedIn to encourage engagement.
- ◆ Use of the City's government channel, WSTV 13.
- ◆ Email blasts to the business community to increase awareness and engagement.
- ◆ Printed and digital ads (included in various ethnic media publications) as well as radio ads also increased awareness.

7.2.2 SAMPLING

MGT's sampling methodology for the in-depth interviews was to randomly select firms from the study's master vendor database. Each sample pulled included M/WBE and non-M/WBE firms in each procurement category studied in this report. The survey of vendors responses was collected from the sample pulled from Dun & Bradstreet for the custom census survey.¹³⁹ To avoid contacting business multiple times the database was cross referenced with previous extractions to ensure that firms did not participate in more than one anecdotal activity.

¹³⁹ See Chapter 5, Availability and Disparity Analysis.

7.2.3 SURVEY OF VENDORS

The survey of vendors asked respondents to provide information on business ownership, demographics and structure; work bid or performed as prime contractors with the City; work bid or performed as subcontractors to City prime contractors; whether the respondent firm bid or performed work in the private sector; and any perceived barriers to doing business with the City or its primes that the respondents believed they had experienced during the study period. The survey was administered via telephone to a randomly selected list of firms.

Disparity study survey analyses are commonly plagued by sample size limitations, especially where the size of the minority business population is insufficient to permit a valid and representative sample. This problem is compounded when analyses are stratified further by business category. Insufficient sample size can pose problems for the statistical confidence of the results. MGT attempted to collect data in proportion to the distribution of M/WBEs and non-M/WBEs in the relevant market area. Although MGT's goal is to report data that can satisfy the 95 percent confidence level, this does not mean that data should not be reported because of slightly reduced confidence intervals, especially when extreme due diligence has been exercised in attempting to meet the 95 percent standard. For this reason, our conclusions from the responses received do not reflect a statistical finding for Native American firms in the anecdotal findings. The survey of vendors questionnaire is included in this report as **Appendix D, Custom Census Business Survey Instrument**.

7.2.4 COMMUNITY MEETINGS

Area businesses were invited to attend one of three community meetings. As a precursor to collecting comments, attendees, were provided a presentation outlining the study's objectives, work tasks Following the presentation, attendees who wanted to provide comments did so individually.

The Community Meetings were held as follows:

- ◆ July 8, 2019: The Enterprise Center at S.G Atkins Community Development Center.
- ◆ July 9, 2019: Georgia E. Taylor Neighborhood Center.
- ◆ July 10, 2019: Hanes Hosiery Community Center.

MGT and the City engaged the outreach efforts in section 7.2.1 to invite the business community. Since the community meetings were open to the public, firms that participated in the community meetings may have been randomly selected for other anecdotal activities.

7.2.5 IN-DEPTH INTERVIEWS

The in-depth interviews were one-on-one interviews with business owners or representative to gather information from M/WBE and non-M/WBE firms regarding their primary line of business, ethnicity, gender, education/training background of the owner, business history, size and gross revenues during selected calendar and/or fiscal years, and information about the firms' experiences in attempting to do, and conducting business with the City (both directly as a prime and/or as a subcontractor). The in-depth interviews were structured settings in which an interviewer or facilitator used an interview guide (**Appendix G**) to petition input from participants but provided more latitude for additional information

gathering on issues that are unique to the respondents' experiences than the community meetings. The interviewer made no attempt to prompt or guide responses from the participants, although follow-up questions were asked to obtain further clarification or information as necessary and appropriate. Before the interviews began, each participant attested that their responses were given freely and were true and accurate reflections of their experience with the City or its prime contractors.

7.2.6 STAKEHOLDER OUTREACH

Outreach to stakeholders (trade associations and business organizations) was beneficial to the outreach efforts because their assistance extended communication efforts to inform and engage the business community in anecdotal activities. Stakeholders were asked to disseminate community meetings notices and anecdotal data collection information to their members or constituents. The organizations and associations included in these efforts are identified in **Appendix H, List of Trade Associations and Business Organizations**.

As mentioned, stakeholders were contacted to participate in interviews and meetings to gather their input, perceptions, and experiences on the effectiveness of the M/WBE Program and barriers firms face when contracting or attempts to contract with the City or its primes.

7.2.7 ONLINE COMMENTS

Like the community meetings, the option to provide written comments via the disparity study website expanded anecdotal data collection and allowed firms who were not selected for interviews, surveys, etc. to participate. Comments were accepted until outreach efforts were concluded to ensure that firms were allowed time to submit their comments.

7.3 DEMOGRAPHICS

The demographic characteristics of anecdotal participants by activity type are presented in the sections below.

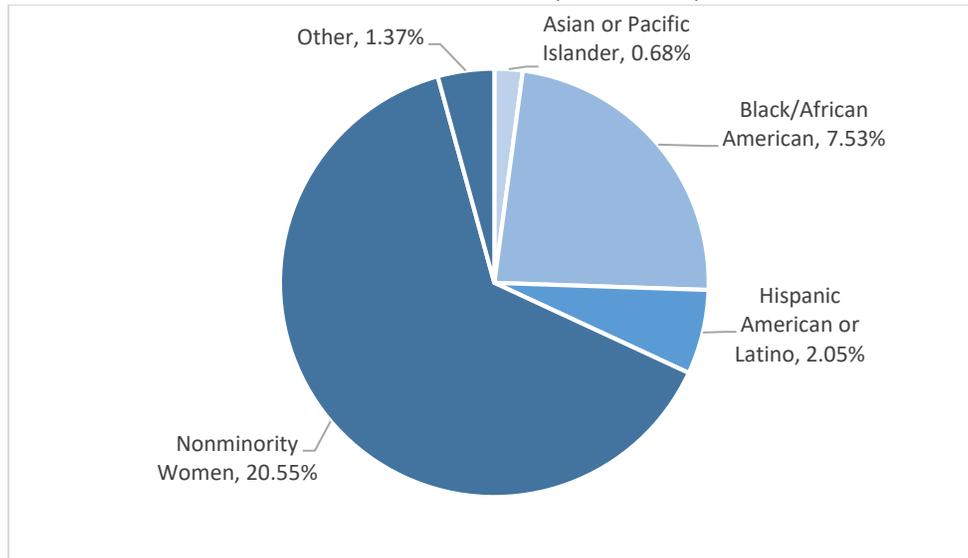
7.3.1 VENDOR SURVEY

Firm owners and representatives that participated in the survey were asked about their experiences doing business or attempting to do business with the City, its prime contractors, and in the private sector during the study period. The demographic composition of the 146 firms that completed surveys who 1) were interested in doing business with the City and 2) have done or attempted to business with the City is outlined in **Tables 7-1 and 7-2** and **Figures 7-1 through 7-4**. The unaltered data with the survey responses were used to conduct a regression analysis that addressed any barriers but for race and gender. A detailed explanation can be found in **Appendix F, Survey Regression Analysis**.

RACE, ETHNICITY, AND GENDER

Figure 7-1 provides the race, ethnicity, and gender of respondents. Respondents that selected "Other" indicated that the firm owner(s) identifies with multiple ethnicities. Nonminority Women were the largest group of respondents to the survey followed by African Americans.

**FIGURE 7-1.
CITY OF WINSTON-SALEM
SURVEY OF VENDORS DEMOGRAPHICS
NUMBER OF RESPONDENTS RACE, ETHNICITY, & GENDER**



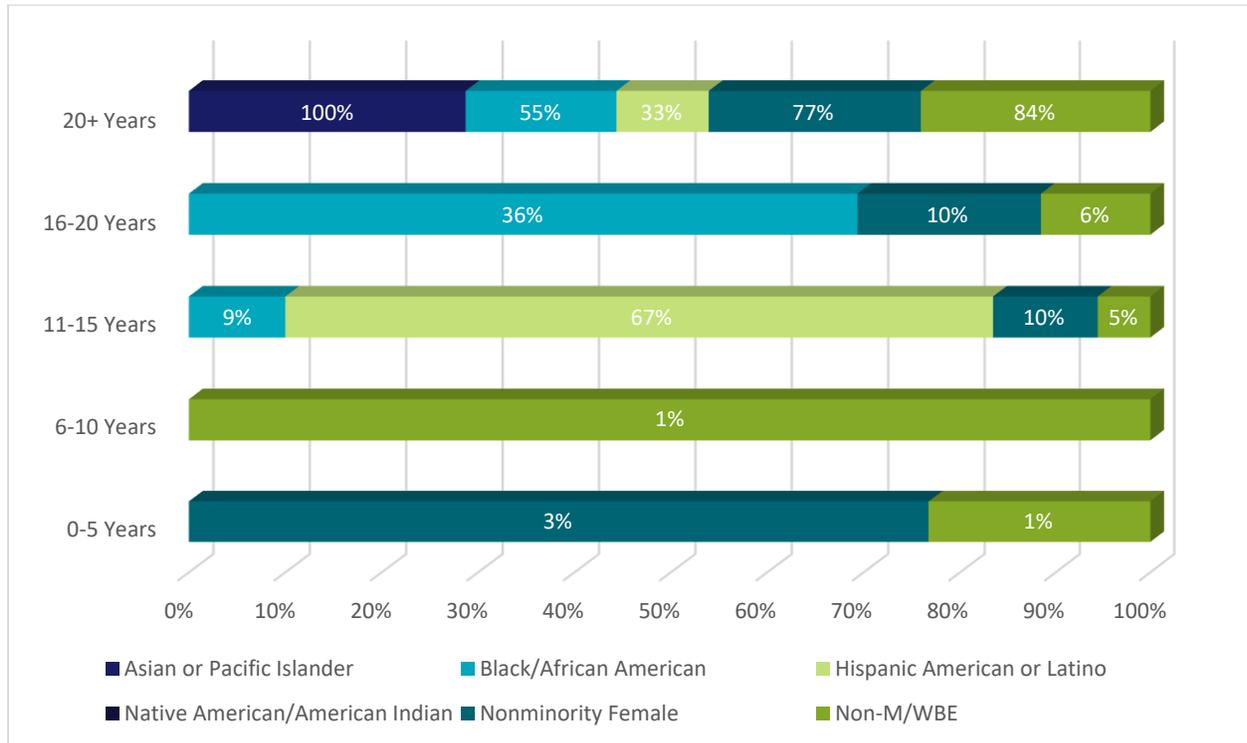
Source: 2019 Vendor Survey

YEARS IN BUSINESS AND REVENUE

A firm’s capability to grow in business can be measured by the number of years they remain in business and their revenue earned over a period of time. The average number of years firms that completed the survey was 20+ years or 78.77 percent of the respondents. Firms also indicated their gross revenue earned for 2018 and the source of that revenue. Revenue earned from City contracts or subcontract were 10 percent or less of their total earnings (29.37% of the M/WBE responses). In the private sector 34.33 percent of the M/WBE firms earned 91-100 percent of their revenue, and 34.48 percent of the firms earn less than 10 percent of their revenue with other governmental agencies.

Figure 7-2 illustrates ranges of years in business grouped by business ownership classification. Survey responses from M/WBEs varied among all ranges. Overall, the average length of time in business for M/WBE respondents was 20 years or more.

FIGURE 7-2.
CITY OF WINSTON-SALEM
SURVEY OF VENDORS DEMOGRAPHICS
NUMBER OF YEARS IN BUSINESS

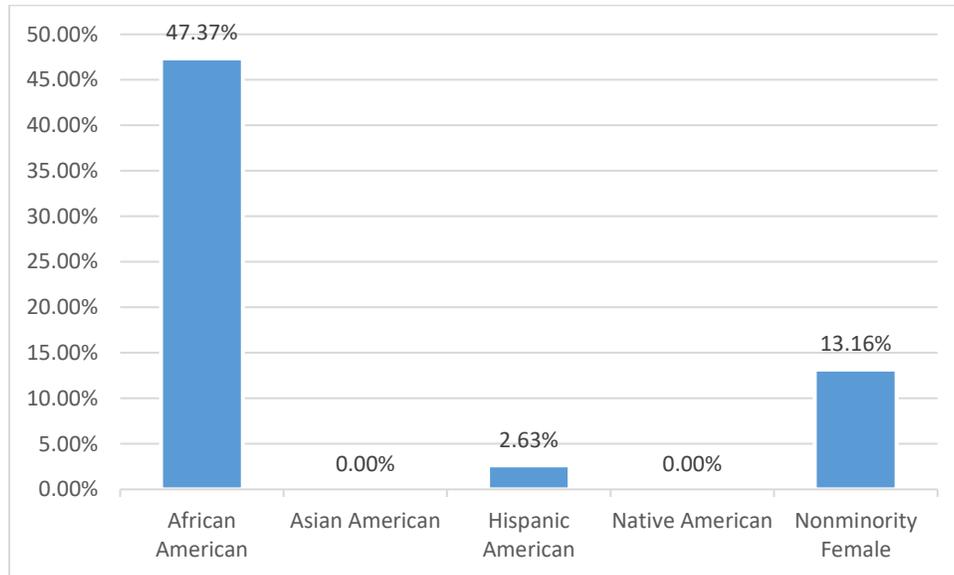


Source: 2019 Vendor Survey

7.3.2 COMMUNITY MEETINGS

MGT and the City hosted three community meetings, and 38 business owners and representatives participated representing varying industries, including construction, engineering, information technology, real estate, educational consulting, and environmental consulting. Official testimonies were received and recorded from 22 attendees. The racial, ethnic and gender compositions of the attendees were as follow in **Figure 7-3**.

FIGURE 7-3.
CITY OF WINSTON-SALEM
COMMUNITY MEETINGS DEMOGRAPHICS

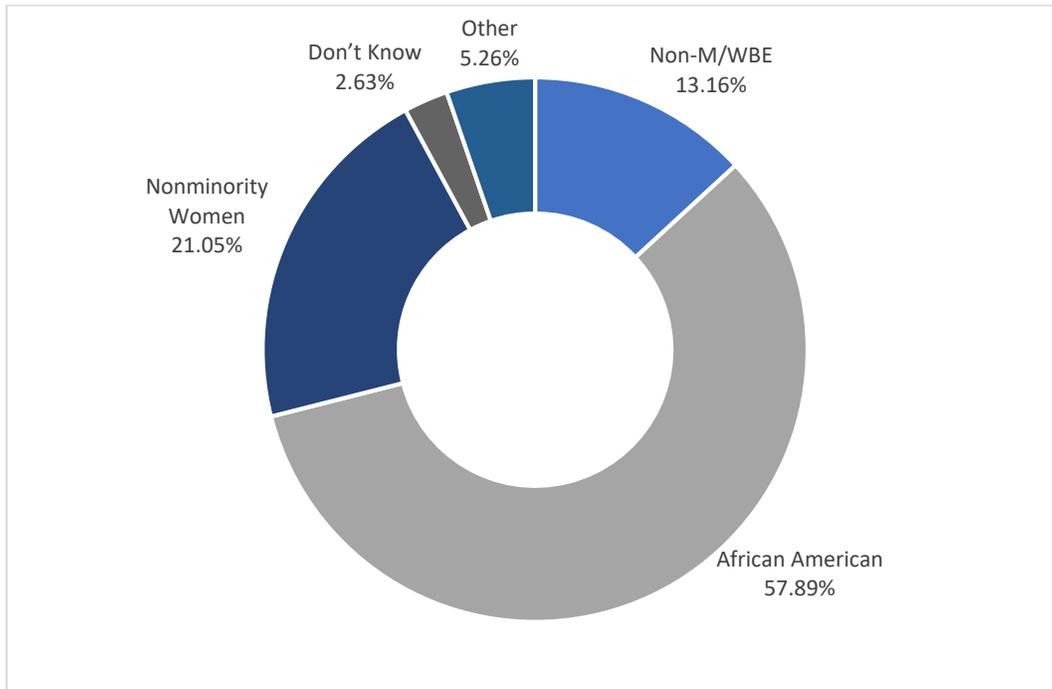


7.3.3 IN-DEPTH FIRM INTERVIEW

The in-depth interviews were conducted with randomly selected firms extracted from the master vendor database and located in the City’s relevant market area.¹⁴⁰ MGT cross referenced the list of firms for the interviews to ensure they were not previously selected for other anecdotal activities. In total, 40 firms were interviewed. The racial and ethnic composition of the firms that completed an interview are illustrated in **Figure 7-4**.

¹⁴⁰ See **Chapter 4, Market Area and Utilization Analyses**.

FIGURE 7-4.
CITY OF WINSTON-SALEM
IN-DEPTH INTERVIEW DEMOGRAPHICS



“Other” indicates that the Firm owner does not associate with one specific ethnicity or race.

7.3.4 ONLINE COMMENTS

The City’s disparity study website provided an opportunity for firms to submit comments on their experience doing business with or attempting to do business with the City, primes contracted with the City, or in the private sector. After executing the communication methods outlined in the Community Outreach Plan, MGT received one online comment.

7.4 FINDINGS

7.4.1 M/WBE PROGRAM ISSUES AND CHALLENGES

Many firms commented the overall structure of contracts and how the M/WBE goals can impact the outcome of M/WBE utilization.

- ♦ A Nonminority Male construction firm owner stated that their firm no longer does business with the City because of the complexity of MWBE requirements in the bid process. *“These requirements make it way too difficult to bid Winston’s work with undue burden on the contractor.”*

- ♦ A Nonminority Male engineering firm owner suggested that smaller size contracts should be targeted for smaller M/WBE engineering firms. This would permit the City to achieve participation and remove the burden of the bidder to meet a goal on small contracts.
- ♦ An African American trade contractor stated that the City should establish a mentor/protégé program to grow minority firms, particularly in areas where there are no minority trade contractors.

7.4.2 PROCUREMENT PROCESS ISSUES AND CHALLENGES

M/WBE firms often seek prime contract opportunities to work directly for the City. Some of the procurement processes such as restrictive language in RFPs, time to prepare and submit bids and proposals are a few of the barriers highlighted by firms. Included below is a sampling of comments on this barrier.

- ♦ An African American owned commercial janitorial company stated: *“The way proposals are written require unnecessary things, require you to show similar jobs if you have no experience”.*
- ♦ A Nonminority Woman marketing company owner stated: *“100 hours into a proposal and City of Winston-Salem decided not to hire anyone – putting a lot of money, happened twice with the city.”*
- ♦ An African American landscaping and general cleaning company owner stated: *“Doesn’t think minority get fair shot, same contractors get same jobs”*
- ♦ A Nonminority Male owner of a professional services company stated: *“Time is limited to keep up with listing/solicitation is challenging.”*
- ♦ An African American goods & supplies company owner stated: *“It’s hard to break into existing relationships sometimes. Suggest put upcoming contracts & bid opportunities in one place like city website.”*
- ♦ A Nonminority Woman professional services firm owner stated: *“Templates they [City] use for request for proposals tend to be for fixed cost goods not professional services with soft cost. Treating a service business like a commodity is not helpful to small business.”*

7.4.3 PAYMENT ISSUES

Cash flow becomes a barrier for M/WBE firms, particularly smaller M/WBE firms because it limits the amount of work they can bid, decreases their ability to hire employees, or retain current employees. Delayed payments for services rendered to the City or to primes were cited by firms as a challenge to doing business with the City. Included below is a sampling of comments on this barrier.

- ♦ An African American other services company owner stated: *“Experiences with getting paid so far have been good; slow payment but it comes.”*
- ♦ An African American other services company owner stated: *“They [City] can pay immediately with a purchasing card but take too long with normal city process.”*

7.4.4 PRIMES CONTRACTING BEHAVIOR

Subcontracting is often the gateway to M/WBE firms growing their business. Primes who unfairly treat, assess, and deal with M/WBE firms impacts the City's program as well as the economic vitality of M/WBEs as they try to grow their business. M/WBE firms expressed their frustration with prime contractors that use M/WBE firms as part of their bid packages, only to limit their participation or payment once the project is won. Others simply want more opportunities to network with prime firms to increase their opportunities for subcontract work. Included below is a sampling of comments on this barrier.

- ♦ An African American construction company owner stated: *"Engineering department hold M/WBEs higher scrutiny for M/WBE's work. City and prime contractor sided against M/WBE."*
- ♦ An African American owned construction services company stated: *"Need to come up with way for subs to actually bid projects – no bid process"*

7.4.5 DISCRIMINATION AND DISPARATE TREATMENT

Evidence of disparate or discriminatory experiences do not need to be verified to be considered because the anecdotal comments are the respondents' perception and individual accounts of their experience. M/WBE participants in the surveys, in-depth interviews, and community meetings were asked if they experienced discriminatory or disparate behavior by the City, its primes, or in the private sector during the study period. **Many of the respondents could not identify a particular instance of discrimination.**

7.5 SUGGESTED REMEDIES FROM ANECDOTAL PARTICIPANTS

While collecting anecdotal data, participants provided their ideas and recommendations for improving the procurement process and M/WBE Program to increase M/WBE participation. A few recurring ideas and/or suggested remedies provided by participants are:

- ♦ Establish M/WBE goals based on the size of the projects.
- ♦ The City should separate architecture and engineering from construction projects to allow smaller architecture and engineering firms to bid as primes.
- ♦ The City should focus on discretionary spending within all City departments.
- ♦ Place a procurement forecast on the City's website and do extensive outreach to teach firms how to locate opportunities.

7.6 STAKEHOLDER INTERVIEWS

MGT also conducted interviews with representatives from 10 area trade associations and business associations regarding the impact of the City's M/WBE program.

Generally, these Stakeholders agree that the M/WBE Program can be beneficial to the growth and development of M/WBE firms. The Stakeholders interviewed provide capacity building, advocacy, and technical and/or business development to their members, many of which are M/WBE firms. The challenges many of the Stakeholders identified included (1) City needs more education to the public on their M/WBE program, 2) breaking out contracts to fit smaller businesses, and 3) more trainings and workshops on how to do business be held.

Many Stakeholders suggested that a partnership with the City in technical assistance and outreach could increase not only the awareness of the M/WBE program but the utilization of M/WBE firms, focus on the long-term development of capacity.

7.7 CONCLUSIONS

Using multi-faceted qualitative data collection methods proved to be successful in gathering perceptions, experiences, and proposed options to enhance the contracting experience from the business community, particularly among M/WBE firms. While the collection of qualitative data for this report was substantial, several of the participants did not identify specific issues or concerns that they had with the City or its primes. In summary, 224 business owners or representatives provided their perceptions of their experiences working with the City, or on City projects as subcontractors. Key findings include the confirmation of barriers to M/WBEs in that the City's procurement process is difficult to maneuver. These findings provide anecdotal evidence of barriers M/WBE firms face that lends credence to the statistical evidence found elsewhere in this report.

CHAPTER 8. FINDINGS,
COMMENDATIONS, AND
RECOMMENDATIONS

2019 Disparity Study

City of Winston-Salem, North Carolina



8.1 INTRODUCTION

The City's 2019 Disparity Study consisted of fact-finding to analyze City procurement trends and practices between July 1, 2013 and June 30, 2018 pertaining to the utilization of minority and women business enterprises, and to evaluate various options for future program development. Within the context of studying the City's procurement practices, the study must be conducted in a manner consistent with disparity study best practices, controlling local legal precedents, and constitutional law in order to properly advise the City about the legal basis for potential remedies, if necessary.

CHAPTER SECTIONS



- 8.1 Introduction
- 8.2 Findings
- 8.3 Commendations and Recommendations
- 8.4 Conclusions
- 8.5 Selected M/WBE and SLBE Practices

The city of Winston-Salem's Disparity Study determined that there are disparities between the number of viable minority- and woman-owned businesses that are ready, willing, and able to perform Construction, Professional Services, Other Services, and Goods and Supplies contracts, and the numbers of these same business types who are actually participating in these same types of contracts with the City. This chapter will summarize the evidence on the central research question: *is there factual predicate evidence for the continuation of a race- and gender-conscious M/WBE program for the City?*

As discussed in **Chapter 2, Legal Framework**, courts have determined that an affirmative action program involving governmental procurement of goods or services is subject to strict judicial scrutiny under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and must be narrowly tailored to remedy the identified discrimination.

MGT's methodology included a review of disparity studies legal framework, a policy and procedures review, analyses of utilization, availability, and statistical disparity, anecdotal research, private sector analyses, and findings, commendations, and recommendations. The results of this study and conclusions drawn are presented in detail in **Chapters 3** through **7** of this report.

8.2 FINDINGS

FINDING A: RELEVANT GEOGRAPHIC MARKET AREA (CHAPTER 4, APPENDIX A)

MGT determined the total spend during the study period in all procurement categories was \$666 million dollars as reflected in **Table 8-1** below. Prime expenditure data was utilized to determine the relevant geographic market area for the study.¹⁴¹ Based on the results of the market area analysis conducted for each business category, the recommended relevant market area contains the city of Winston-Salem in addition to the following: Alamance County, Davidson County, Davie County, Forsyth County, Guilford County, Randolph County, Rockingham County, Stokes County, Surry County, and Yadkin County. Known as the Greensboro-Winston-Salem-High Point, NC Combined Statistical Area (CSA). Findings of the relevant market area establishes the area in which your outreach is conducted and identification of firms to meet program goals. The spending in the relevant geographic market area is represented in **Table 8-1**.

¹⁴¹ Chapter 4, Market Area and Utilization Analyses

TABLE 8-1.
RELEVANT GEOGRAPHIC MARKET AREA ANALYSIS
DISTRIBUTION OF DOLLARS BY PROCUREMENT CATEGORY,
WINSTON-SALEM CSA

CONSTRUCTION	Amount	Percent
<i>Inside Winston-Salem CSA</i>	\$ 250,594,418.35	71.88%
Outside Winston-Salem CSA	\$ 98,039,991.25	28.12%
CONSTRUCTION, TOTAL	\$ 348,634,409.60	100.00%
PROFESSIONAL SERVICES	Amount	Percent
<i>Inside Winston-Salem CSA</i>	\$ 56,675,914.77	71.17%
Outside Winston-Salem CSA	\$ 22,957,189.10	28.83%
PROFESSIONAL SERVICES, TOTAL	\$ 79,633,103.87	100.00%
OTHER SERVICES	Amount	Percent
<i>Inside Winston-Salem CSA</i>	\$ 60,297,108.85	59.89%
Outside Winston-Salem CSA	\$ 40,381,036.70	40.11%
OTHER SERVICES, TOTAL	\$ 100,678,145.55	100.00%
GOODS & SUPPLIES	Amount	Percent
<i>Inside Winston-Salem CSA</i>	\$ 55,904,600.33	40.61%
Outside Winston-Salem CSA	\$ 81,754,351.01	59.39%
GOODS & SUPPLIES, TOTAL	\$ 137,658,951.34	100.00%
ALL BUSINESS CATEGORIES	Amount	Percent
<i>Inside Winston-Salem CSA</i>	\$ 423,472,042.30	63.53%
Outside Winston-Salem CSA	\$ 243,132,568.06	36.47%
ALL BUSINESS CATEGORIES, TOTAL	\$ 666,604,610.36	100.00%

FINDING B: M/WBE PRIME UTILIZATION (CHAPTER 4, APPENDIX B)

In **Table 8-2** the prime utilization analysis shows that non-M/WBE firms are utilized at substantially higher rates than their M/WBE counterparts. The City's spending with non-M/WBE firms totaled 88.60 percent, while only 11.40 percent went to M/WBE firms. The highest utilization rates among M/WBE classifications included Nonminority Women firms accounting for 9.13 percent of dollars spent during the study period at the prime level. Further analyzing the individual procurement categories, Nonminority Women had the greatest utilization in Other Services at 32.39 percent or \$19.5 million followed by African American firms in Other Services at 3.63 percent or \$2.1 million.

TABLE 8-2.
PRIME UTILIZATION ANALYSIS
BY BUSINESS OWNERSHIP CLASSIFICATION AND BY PROCUREMENT CATEGORIES
WITHIN THE RELEVANT GEOGRPHIC MARKET AREA

BUSINESS OWNERSHIP CLASSIFICATION	ALL	Construction	Professional Services	Other Services	Goods & Supplies
African Americans	\$ 9,618,771.79	\$ 6,622,884.94	\$ 700,648.44	\$ 2,188,951.73	\$ 106,286.68
Asian Americans	\$ -	\$ -	\$ -	\$ -	\$ -
Hispanic Americans	\$ 2,400.00	\$ 300.00	\$ 2,100.00	\$ -	\$ -
Native Americans	\$ -	\$ -	\$ -	\$ -	\$ -
TOTAL MINORITY FIRMS	\$ 9,621,171.79	\$ 6,623,184.94	\$ 702,748.44	\$ 2,188,951.73	\$ 106,286.68
Nonminority Women Firms	\$ 38,675,390.88	\$ 14,596,398.83	\$ 375,747.62	\$ 19,532,918.29	\$ 4,170,326.14
TOTAL M/WBE FIRMS	\$ 48,296,562.67	\$ 21,219,583.77	\$ 1,078,496.06	\$ 21,721,870.02	\$ 4,276,612.82
TOTAL Non-M/WBE Firms	\$ 375,175,479.63	\$ 229,374,834.58	\$ 55,597,418.71	\$ 38,575,238.83	\$ 51,627,987.51
TOTAL FIRMS	\$ 423,472,042.30	\$ 250,594,418.35	\$ 56,675,914.77	\$ 60,297,108.85	\$ 55,904,600.33
BUSINESS OWNERSHIP CLASSIFICATION	ALL	Construction	Professional Services	Other Services	Goods & Supplies
African Americans	2.27%	2.64%	1.24%	3.63%	0.19%
Asian Americans	0.00%	0.00%	0.00%	0.00%	0.00%
Hispanic Americans	0.00%	0.00%	0.00%	0.00%	0.00%
Native Americans	0.00%	0.00%	0.00%	0.00%	0.00%
TOTAL MINORITY FIRMS	2.27%	2.64%	1.24%	3.63%	0.19%
Nonminority Women Firms	9.13%	5.82%	0.66%	32.39%	7.46%
TOTAL M/WBE FIRMS	11.40%	8.47%	1.90%	36.02%	7.65%
TOTAL Non-M/WBE Firms	88.60%	91.53%	98.10%	63.98%	92.35%

Source: Chapter 4, Market Area and Utilization Analysis.

FINDING C: CONSTRUCTION SUBCONTRACTING UTILIZATION (CHAPTER 4)

The estimated construction subcontracting utilization dollars and percentages with M/WBEs amounted to 23.94 percent of total payments within the relevant geographic market area; 4.75 percent for African American firms, 0.23 percent for Asian American firms, 4.56 percent for Hispanic American firms and 14.40 percent to Nonminority Women firms.

TABLE 8-3.
SUBCONTRACTOR UTILIZATION
BY BUSINESS OWNERSHIP CLASSIFICATION
CONSTRUCTION ONLY

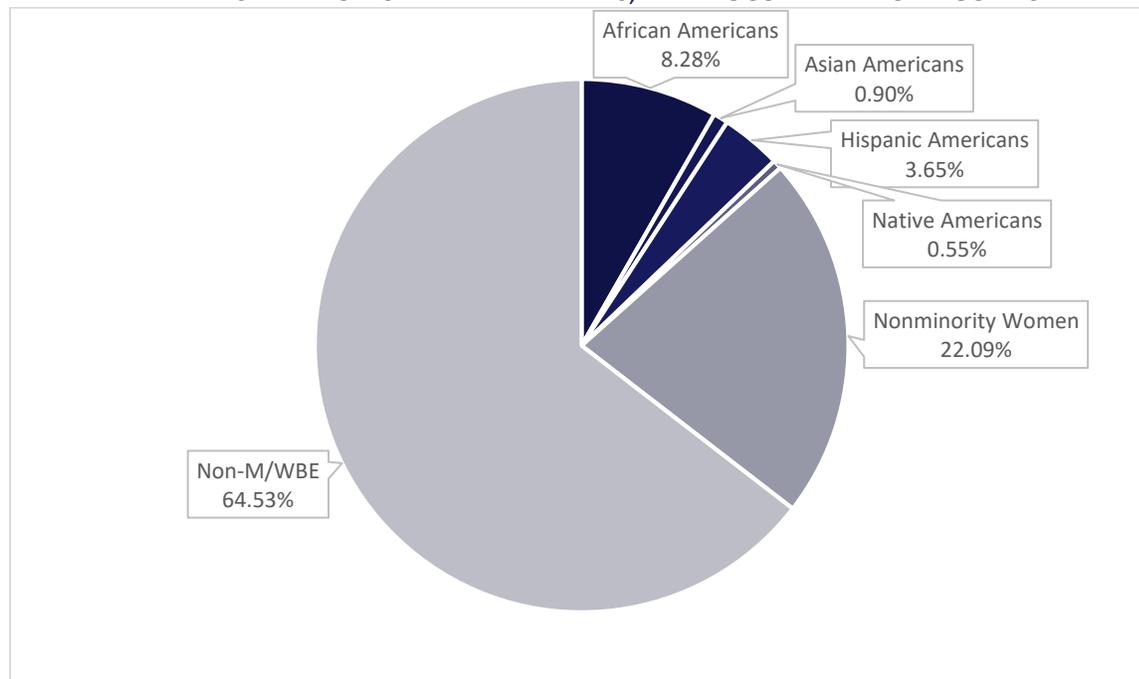
BUSINESS OWNERSHIP CLASSIFICATION	Construction
African Americans	\$4,163,381.24
Asian Americans	\$203,958.36
Hispanic Americans	\$4,000,573.89
Native Americans	\$0.00
TOTAL MINORITY FIRMS	\$8,367,913.49
Nonminority Women Firms	\$12,627,480.35
TOTAL M/WBE FIRMS	\$20,995,393.84
TOTAL Non-M/WBE Firms	\$66,712,652.58
TOTAL FIRMS	\$87,708,046.42
BUSINESS OWNERSHIP CLASSIFICATION	Construction
African Americans	4.75%
Asian Americans	0.23%
Hispanic Americans	4.56%
Native Americans	0.00%
TOTAL MINORITY FIRMS	9.54%
Nonminority Women Firms	14.40%
TOTAL M/WBE FIRMS	23.94%
TOTAL Non-M/WBE Firms	76.06%

FINDING D: AVAILABILITY ESTIMATES (CHAPTER 5)

A reliable estimation of the number of firms *willing* and *able* to provide each of the respective services under the scope of examination is an incumbent element in the determination of disparity. Post-*Croscon* case law has not prescribed a single, approach to deriving firm availability, and agencies have used a variety of means to estimate pools of available vendors that have withstood legal scrutiny.

MGT uses the availability estimates for primes to calculate aspirational goals proposed later in this chapter. Therefore, the availability estimates are illustrated in **Figure 8-1**.

FIGURE 8-1.
ESTIMATION OF AVAILABLE FIRMS, ALL PROCUREMENT CATEGORIES



FINDING E: DISPARITY (CHAPTER 5)

Included in this section are aggregate inputs and calculations of disparity ratios and significance testing for primes by ownership classifications by race, ethnicity, and gender. Detailed disparity analysis for each procurement category are located in **Chapter 5** of this report. Analysis of disparities across all procurement categories combined in **Table 8-4** reveals:

- ◆ African American-owned firms were underutilized, with a substantial and statistically significant disparity ratio of 27.42;
- ◆ Asian American-owned firms were underutilized, with a substantial and statistically significant disparity ratio of 0.00;
- ◆ Hispanic American-owned firms were underutilized, with a substantial and statistically significant disparity ratio of 0.02;
- ◆ Native American-owned firms were underutilized, with a substantial and statistically significant disparity ratio of 0.00;
- ◆ Nonminority Women-owned firms were underutilized, with a substantial and statistically significant disparity ratio of 41.34; and
- ◆ M/WBEs firms were underutilized, with a substantial and statistically significant disparity ratio of 32.15.

TABLE 8-4.
DISPARITY RATIO AND SIGNIFICANCE TESTING, ALL PROCUREMENT CATEGORIES

BUSINESS OWNERSHIP CLASSIFICATION	PERCENT OF DOLLARS	AVAILABLE FIRMS ESTIMATE	DISPARITY INDEX	DISPARATE IMPACT OF UTILIZATION	
		(%)			
African Americans	2.27%	8.28%	27.42	Underutilization	* ¥¥
Asian Americans	0.00%	0.90%	0.00	Underutilization	* ¥¥
Hispanic Americans	0.00%	3.65%	0.02	Underutilization	* ¥¥
Native Americans	0.00%	0.55%	0.00	Underutilization	* ¥¥
TOTAL MINORITY FIRMS	2.27%	13.38%	16.98	Underutilization	* ¥¥
Nonminority Women Firms	9.13%	22.09%	41.34	Underutilization	* ¥¥
TOTAL M/WBE FIRMS	11.40%	35.47%	32.15	Underutilization	* ¥¥
TOTAL NON-M/WBE FIRMS	88.60%	64.53%	137.30	Overutilization	¥¥

Source: MGT developed the Utilization Analysis and Availability Analysis for the study.

Disparity index is the ration of the percentage of dollars to the percentage of available firms multiplied by 100.00.

The index is based on actual percentage value and not the rounded utilization and availability estimates percentage values presented. The disparity indices have been rounded.

¥¥ denotes the ratio of utilization to availability is statistically significant at a 0.05 level.

The totals may not equal the sum of components due to rounding.

FINDING F: DISPARITIES IN COMMERCIAL AND PUBLIC CONSTRUCTION (CHAPTER 6)

The commercial construction permits analysis presented a summary of firm utilization by racial, ethnic and gender classification comparing M/WBE utilization for the City private sector construction projects with commercial construction projects from July 1, 2013 through June 31, 2018. According to the findings from commercial construction projects, substantial M/WBE underutilization was evident in the private sector. When compared to findings from the commercial construction projects, M/WBE firms fared better on City projects.

FINDING G: DISPARITIES IN SELF-EMPLOYMENT AND REVENUE EARNINGS (CHAPTER 6)

Findings from the Public Use Microdata Sample (PUMS) from 2013-2017 data indicate minorities were significantly less likely than nonminority males to be self-employed and, if they were self-employed, they earned significantly less in 2013-2017 than did self-employed nonminority males. When self-employment rates were stratified by race and by business type, trends varied within individual race-by-type cells, but disparities persisted, in general, for all minorities and nonminority women.

FINDING H: ANECDOTAL COMMENTS (CHAPTER 7)

Among the M/WBEs who responded to questions about barriers to doing business, the biggest concern for both primes and subcontractors were identifying opportunities to bid with the City.

8.3 COMMENDATIONS AND RECOMMENDATIONS

Most of the following commendations and recommendations are based on multiple findings and do not necessarily tie to one finding.

COMMENDATION: M/WBE PROGRAM IMPROVEMENTS

In recent years and prior to the conclusion of the disparity study, the City has adopted and implemented processes to increase outreach, business development, and reporting. Items implemented are listed in Table 8-5 below.

TABLE 8-5
IMPLEMENTED PROGRAM PROCESSES

1. Updated City/County bid webpage to include pre-bid date
2. Implemented weekly email of upcoming projects which included category and initiating department
3. Added renewable contract information on City/County bid webpage
4. Created bidding and estimating workshop to assist HUB firms
5. Created good faith effort program to assist contractors, consultants, engineers, etc. in conducting an efficient good faith effort
6. Created “Upcoming Purchase Opportunity” to increase M/WBE participation in departmental discretionary spending less than \$20,000
7. Created Project Summary Reports to track M/WBE prime contractor compliance on formal construction projects estimated to cost \$100,000 or more
8. Emailed pre-bid meeting sign-in sheets to M/WBE firms
9. Updated the M/WBE Program Policy
10. Lowered M/WBE goal setting threshold from projects estimated to cost \$300,000 to projects anticipated to exceed \$100,000
11. Implemented M/WBE Replacement Request Form for formal construction projects
12. Implemented Subcontractor Quote Comparison Form for formal construction projects
13. Initiated the creation of the City Vendor Listing
14. Revised Special Instructions to Bidders
15. Implemented M/WBE Program reminders included with the prime’s Notice of Award
16. Increased accessibility of M/WBE forms, information, policies, etc. via the City’s intranet to staff
17. Established a 10% minimum M/WBE participation goal on all professional and other service contracts
18. Strengthened penalties for contractors that fail to make a good faith effort to meet contractual M/WBE percentages

RECOMMENDATION A: ASPIRATIONAL M/WBE GOALS

Proposed goals are listed in **Table 8-5**. The proposed goals are based on a weighted average of M/WBE utilization and availability. These aspirational goals should not be applied rigidly to every individual City procurement. Instead M/WBE goals should vary from project to project. Aspirational goals should be based on relative M/WBE availability.

TABLE 8-6.
PROPOSED M/WBE GOALS

BUSINESS CATEGORY	ASPIRATIONAL MWBE GOALS
Construction	11.44%
Construction Subs	25.74%
Professional Services	4.04%
Other Services	36.78%
Materials and Supplies	9.60%

RECOMMENDATION B: NARROWLY TAILORED M/WBE PROGRAM

Any new M/WBE Program modifications implemented to address the findings of this report should be narrowly tailored to specifically address identified disparity in accordance with guidance from case law regarding race- and gender-based procurement programs. Developments in court cases involving federal disadvantaged business enterprise (DBE) programs provide important insight into the design of local M/WBE programs. Federal courts found have consistently found DBE regulations in 49 CFR 26 to be narrowly tailored.¹⁴² The federal DBE program has the features in **Table 8-6** that contribute to this characterization as a narrowly tailored remedial procurement preference program. The City should adopt these features in any new M/WBE program.

TABLE 8-6.
NARROWLY TAILORED M/WBE PROGRAM FEATURES

	Narrowly Tailored Goal-setting Features	DBE Regulations
1.	The City should not use M/WBE quotas.	49 CFR 26(43)(a)
2.	The City should use race- or gender-conscious set-asides only in extreme cases.	49 CFR 26(43)(b)
3.	The City should meet the maximum amount of M/WBE goals through race-neutral means.	49 CFR 26(51)(a)

Source: Suggested features in a proposed narrowly tailored M/WBE program based on USDOT 49 CFR 26.

RECOMMENDATION C: SUBCONTRACTOR PROJECT GOALS

The current M/WBE policy has a 10 percent goal for construction, repair and maintenance, other services, and professional services contracts. To ensure all M/WBE firms in the relevant market area have opportunities, project specific subcontracting goals should continue to be established where there is availability for specific scopes of work across all procurement categories, and based on the historical participation of M/WBE on identical or similar projects. Project specific subcontract goals will assist the City in addressing identified disparities found in this report.

RECOMMENDATION D: EXPANDED DATA COLLECTION AND MANAGEMENT

The City should implement data systems and processes to monitor and track progress on key performance measures and establish solid processes to collect and analyze M/WBE utilization data by race, ethnicity, and gender to monitor goal attainment. Data collection should include:

¹⁴² *Adarand v. Slater*, 228 F.3d 1147 (10th Cir. 2000), *Gross Seed. v. State of Nebraska*, 345 F.3d 968 (8th Cir. 2003); cert denied, 158 L.Ed. 2d 729 (2004).

- ◆ Require primes to report subcontractor and supplier utilization (both M/WBE and non-M/WBE). As identified in this report, M/WBE subcontracting data were available for construction only. All subcontracting/supplier utilization should be maintained to analyze and report total M/WBE subcontracting participation.
- ◆ Validate subcontractor utilization using compliance reporting. A contract compliance system should allow subcontractors to verify that they received payment for work performed. This feature will allow more accurate reporting of utilization.
- ◆ Consistently collect bid and proposal responses and identify those that are M/WBE firms. Bid and proposal data will assist the City in monitoring marketplace availability. For example, if data illustrates there are enough M/WBEs in the market presumed to be available to bid but do not bid, the City should contact firms and determine the cause.
- ◆ Data system should connect intuitively with the City's payment data system from the beginning of a contract to its completion.
- ◆ Collect and report spend and percentage of spend by each City department.
- ◆ List of certified M/WBE firms in the established relevant market area. The database of firms located in the relevant market area should be readily available to City departments and potential bidders or proposers.

COMMENDATION AND RECOMMENDATION E: M/WBE OUTREACH FOR INFORMAL PURCHASES

The City should be commended the City's Upcoming Purchase Opportunity Form for all departments making a purchase between \$1,000 (p-card max) - \$19,999.99 (discretionary spend max). include outreach to M/WBE firms for informal contracts and purchases. Departments that have purchasing authority should document and report their outreach efforts to M/WBEs to encourage and solicit bids and quotes. The City should consider mandating the use of the online "Upcoming Purchase Opportunity Form" by City departments for all goods and services estimated to cost between \$1,000 and \$19,999.99. By doing so department staff can coordinate with the M/WBE Division to increase the likelihood of M/WBE participation.

RECOMMENDATION F: RIGHT TO AUDIT LANGUAGE IN CONTRACTS

The City should consider incorporating language in all contracts that primes must maintain subcontract/supplier documentation for M/WBE and non-M/WBE firms for a period of time; usually the time will match the City's record retention policy.

RECOMMENDATION G: ON-CALL SERVICES

The City should consider utilizing a vendor rotation system for on-call contracts to increase the opportunity for M/WBE firms to do business with the city as prime. Implementing a vendor rotation model on contracts of this nature will maintain a diverse pool of available services providers instead of "locking-in" one vendor for a multi-year contract.

RECOMMENDATION H: HISTORICALLY UNDERUTILIZED BUSINESSES (HUB)

The City should define minority and woman-owned enterprises as businesses approved and certified by the Department of Administration's Office for Historically Underutilized Businesses under the Statewide Uniform Certification Program (SWUC). The SWUC program streamlines the certification process by reducing the number of public sector entities by which businesses must apply for certification. By applying this standard, the city promotes economic opportunities for businesses owned and operated by M/WBE's in government contracting and procurement.

RECOMMENDATION I: M/WBE STAFF AND DEPARTMENTAL LIAISONS

The M/WBE Division has a significant role in education, compliance, and advocacy of staff as well as for the M/WBE community. Partnerships with City departments and area trade associations increases the outreach and education, however, there should be enough staff to monitor, track, report, and coordinate all of the efforts and policies of the M/WBE Program. The City should consider increasing the budget of the M/WBE Division to support additional outreach, workshops, marketing materials, professional development, and overall capacity building of M/WBE firms. The City should consider allocating resources to support a staff member whose responsibilities include inspecting the work performed on the site of construction and repair projects. Having an advocate in the field could ensure inspection standards are applied fairly, subcontract agreements are upheld, and verification of scope issues that may arise. This person could also use their knowledge of market conditions in the goal setting process. The Office of Performance and Accountability should conduct a desk audit to determine the purpose and function of staff necessary to meet program's objectives. If necessary, the City should consider hiring an outside consultant to assist with M/WBE functions until new staff are hired.

All City departments can play a role in promoting the City M/WBE utilization. Staff within departments with purchasing authority and seek out bidders for discretionary purchasing should act as a liaison between the department and the M/WBE Division. Liaisons will maintain outreach and bid records and report activity to the M/WBE Division. The liaison will also work with the M/WBE Division to identify available M/WBE firms.

8.4 CONCLUSIONS

The City has implemented various methods to inform, education, and increase M/WE utilization. The City should continue their momentum. MGT found sufficient evidence of disparity and recommends the continuation of a narrowly tailored race- and gender-based procurement program to address identified disparities. Disparity was identified overall in all business ownership categories except for Non-M/WBE firms. This evidence is based on quantitative and qualitative data from public and private sources. Any program efforts must be narrowly tailored to rectify the issues identified in this report.

The City of Winston-Salem has implemented a solid program to increase the utilization of M/WBE firms in the market area. The recommendations of this study provide guidance on policy modifications that will meet the narrowly tailored standard.