



**Essex County, NJ**  
*2024 M/WBE Disparity Study*

# County of Essex

Disparity Study

MAY 30, 2024



# Table of Contents

<b>ACKNOWLEDGEMENTS</b> .....	<b>1</b>
STUDY TEAM .....	1
GLOSSARY OF TERMS .....	4
<b>1 INTRODUCTION</b> .....	<b>1</b>
1.1 INTRODUCTION.....	1
1.2 BACKGROUND.....	1
1.3 OVERVIEW OF STUDY APPROACH .....	1
1.4 REPORT ORGANIZATION .....	3
<b>2 LEGAL REVIEW</b> .....	<b>5</b>
2.1 INTRODUCTION.....	5
2.2 SCRUTINY STANDARDS FOR RACE- AND GENDER-SPECIFIC PROGRAMS.....	5
2.3 COMPELLING GOVERNMENTAL INTEREST .....	7
2.4 NARROWLY TAILORING.....	15
2.5 CONCLUSIONS.....	20
<b>3 PROCUREMENT AND CONTRACTING POLICIES, PROCEDURES, AND PRACTICES</b> .....	<b>21</b>
3.1 INTRODUCTION.....	21
3.2 METHODOLOGY .....	21
3.3 DEFINITIONS .....	23
3.4 PROCUREMENT STRUCTURE AND ENVIRONMENT.....	26
3.5 BUSINESS INCLUSION.....	40
3.6 CONCLUSIONS.....	41
<b>4 MARKET AREA AND AVAILABILITY ANALYSES</b> .....	<b>43</b>
4.1 INTRODUCTION.....	43
4.2 DATA COLLECTION AND MANAGEMENT .....	43
4.3 MARKET AREA ANALYSIS .....	44
4.4 AVAILABILITY ESTIMATIONS .....	48
<b>5 PRODUCT MARKET, UTILIZATION, AND DISPARITY ANALYSES</b> .....	<b>52</b>
5.1 INTRODUCTION.....	52
5.2 UTILIZATION ANALYSIS .....	54
5.3 DISPARITY ANALYSES AND SIGNIFICANCE TESTING .....	59
5.4 CONCLUSIONS.....	67

<b>6</b>	<b>PRIVATE SECTOR ANALYSIS .....</b>	<b>68</b>
6.1	INTRODUCTION.....	68
6.2	PRIVATE SECTOR DISPARITIES IN SBO CENSUS DATA .....	69
6.3	PRIVATE SECTOR DISPARITIES IN ABS CENSUS DATA .....	81
6.4	ANALYSIS OF RACE, ETHNICITY, AND GENDER EFFECTS ON SELF-EMPLOYMENT AND EARNINGS .....	92
6.5	ACCESS TO CREDIT .....	102
6.6	CONCLUSIONS.....	106
<b>7</b>	<b>QUALITATIVE ANALYSIS .....</b>	<b>107</b>
7.1	INTRODUCTION.....	107
7.2	QUALITATIVE BACKGROUND .....	107
7.3	METHODOLOGY .....	108
7.4	ONLINE AND TELEPHONE BUSINESS SURVEY .....	110
7.5	IN-DEPTH FIRM INTERVIEWS .....	117
7.6	SUGGESTED REMEDIES FROM QUALITATIVE RESPONDENTS .....	121
7.7	PROFESSIONAL ORGANIZATIONS INTERVIEWS.....	122
7.8	CONCLUSIONS.....	122
<b>8</b>	<b>FINDINGS, COMMENDATIONS, AND RECOMMENDATIONS .....</b>	<b>123</b>
8.1	INTRODUCTION.....	123
8.2	FINDINGS.....	124
8.3	ASPIRATIONAL GOALS METHODOLOGY.....	129
8.4	COMMENDATIONS AND RECOMMENDATIONS .....	129
8.5	CONCLUSIONS.....	132

## TABLES

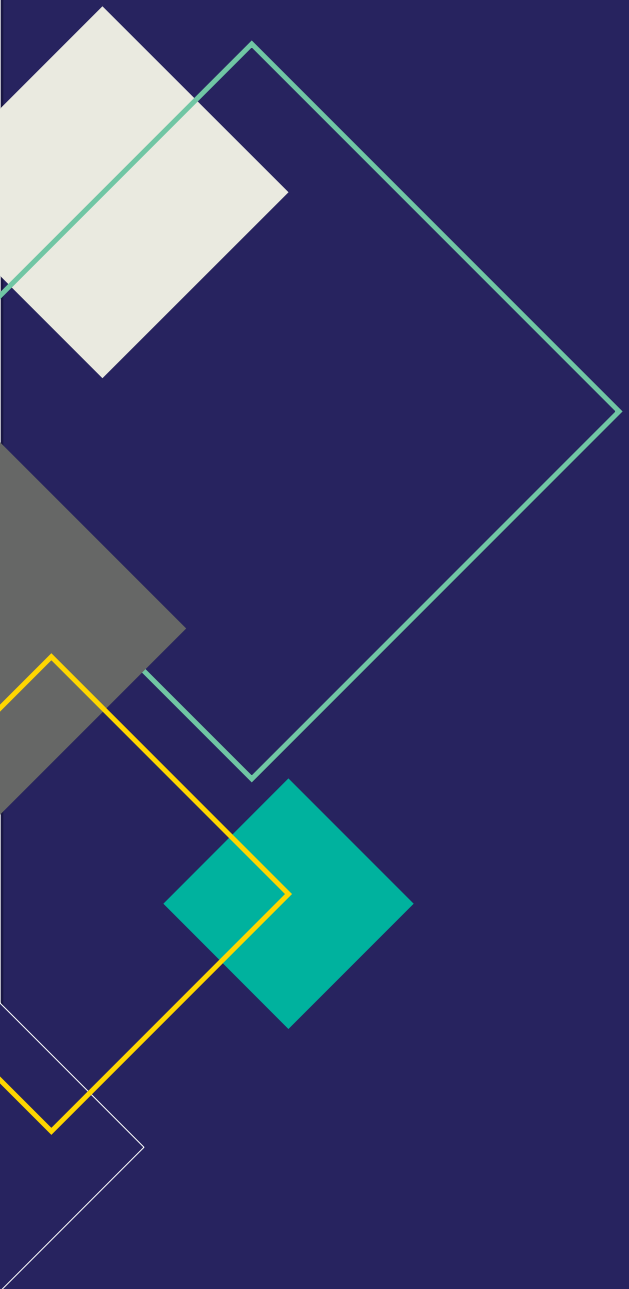
Table 3-1.	Documents Reviewed During Policy And Procedures Review .....	22
Table 4-1.	Market Area Analysis, Contracts Distribution of Dollars by Business Category, County Market Area .....	47
Table 4-2.	Estimation of Available Firms, All Procurement Categories .....	49
Table 4-3.	Estimation of Available Firms, Construction.....	50
Table 4-4.	Estimation of Available Firms, Professional Services.....	50
Table 4-5.	Estimation of Available Firms, Non-Professional Services.....	51
Table 4-6.	Estimation of Available Firms, Goods & Services .....	51
Table 5-1.	Summary of Dollars, Top 5 NAICS Codes, Construction .....	53
Table 5-2.	Summary of Dollars, Top 5 NAICS Codes, Professional Services .....	53
Table 5-3.	Summary of Dollars, Top 5 NAICS Codes, Non-Professional Services.....	53
Table 5-4.	Product Market Distribution of Dollars by NAICS Code Goods & Services .....	54
Table 5-5.	Utilization Analysis by Business Ownership Classification, All Procurement Categories.....	56

Table 5-6 Utilization Analysis by Business Ownership Classification, Construction .....	57
Table 5-7 Utilization Analysis by Business Ownership Classification, professional services .....	57
Table 5-8 Utilization Analysis by Business Ownership Classification, Non-Professional Services .....	58
Table 5-9 Utilization Analysis by Business Ownership Classification, Goods & Services .....	59
Table 5-10. Disparity Indices and Significance Testing, All Procurement Categories .....	62
Table 5-11 Disparity Indices and Significance Testing, Construction .....	63
Table 5-12 Disparity Indices and Significance Testing, Professional Services .....	64
Table 5-13 Disparity Indices and Significance Testing, NON-Professional Services .....	65
Table 5-14 Disparity Indices and Significance Testing, Goods & Services .....	66
Table 5-15. Disparity Analysis Summary.....	67
Table 6-1. Private Sector Census Disparities NAICS Code 23, Construction U.S. Census 2012 Survey of Business Owners, Essex County Marketplace.....	72
Table 6-2. Private Sector Census Disparities NAICS Code 42, Wholesale Trade U.S. Census 2012 Survey of Business Owners, Essex County Marketplace .....	74
Table 6-3. Private Sector Census Disparities NAICS Code 54, Professional, Scientific, and Technical Services U.S. Census 2012 Survey of Business Owners, Essex County Marketplace .....	76
Table 6-4. Private Sector Census Disparities NAICS Code 56, Administrative and Support/Waste Management and Remediation Services U.S. Census 2012 Survey of Business Owners, Essex County Marketplace .....	78
Table 6-5. Private Sector Census Disparities NAICS Code 81, Other Services (Except Public Administration) U.S. Census 2012 Survey of Business Owners, Essex County Marketplace .....	80
Table 6-6. Private Sector Census Disparities NAICS Code 23, Construction U.S. Census 2017 Annual Business Survey, Essex County Marketplace .....	83
Table 6-7. Private Sector Census Disparities NAICS Code 42, Wholesale Trade U.S. Census 2017 Annual Business Survey, Essex County Marketplace .....	85
Table 6-8. Private Sector Census Disparities NAICS Code 54, Professional, Scientific, and Technical Services U.S. Census 2017 Annual Business Survey, Essex County Marketplace .....	87
Table 6-9. Private Sector Census Disparities NAICS Code 56, Administrative and Support/Waste Management and Remediation Services U.S. Census 2017 Annual Business Survey, Essex County Marketplace .....	89
Table 6-10. Private Sector Census Disparities NAICS Code 81, Other Services (Except Public Administration) U.S. Census 2017 Annual Business Survey, Essex County Marketplace .....	91
Table 6-11. Wages Elasticities of Minority Groups Relative to Nonminority Males after Controlling for Demographic and Economic Characteristics .....	95
Table 6-12. Business Earnings Elasticities of Minority Groups Relative to Nonminority Males after Controlling for Demographic and Economic Characteristics .....	97
Table 6-13. Self-Employment Formation Rates.....	98
Table 6-14. Self-Employment Percent Differences Controlling for Demographic and Economic Characteristics .....	100
Table 6-15. Observed and Predicted Self-Employment Rates Essex County Marketplace .....	101
Table 7-1. County of Essex Survey of Vendors Demographics: Proportion of Respondents by M/WBE Class.....	111
Table 7-2. Essex County Discrimination Experiences Identified by Survey Respondents Prime and Subcontract Firms .....	112

Table 7-3. Primes Lack of Solicitation of M/WBE Firms on Projects Without Goals .....	114
Table 7-4. M/WBE Firms Dropped After Project Award.....	115
Table 7-5. Discriminatory Treatment Identified by Primes and SUBCONTRACTORS' PRIVATE PROJECTS.....	116
Table 7-6. Essex County Disparate Treatment Identified by Subcontractors .....	120
Table 8-1. Disparity Studies Comparative Analysis, Essex County.....	123
Table 8-2. Market Area Analysis, Contracts Distribution of Dollars by Business Category, Essex County Market Area .....	125
Table 8-3. Utilization Analysis by Business Ownership Classification, All Procurement Categories.....	126
Table 8-4. Estimation of Available Firms, All Procurement Categories .....	127
Table 8-5. Disparity Indices and Significance Testing, All Procurement Categories .....	127
Table 8-6. M/WBE Aspirational Goals .....	129
Table 8-7. Narrowly Tailored M/WBE Program Features .....	132

## EXHIBITS

Exhibit 3-1. Procurement Linkages .....	27
Exhibit 3-2. Essex County Organization Chart .....	29
Exhibit 3-3. Office of Purchasing Organization Chart .....	30
Exhibit 3-4. Contracting Thresholds .....	32
Exhibit 3-5. Essex County Solicitations .....	33
Exhibit 3-6. Department of Corrections Organization Chart .....	34
Exhibit 3-7. Essex County Hospital Center Organization Chart .....	35
Exhibit 3-8. Department of Parks, Recreation, and Cultural Affairs Organization Chart.....	37
Exhibit 3-9. Department of Public Works Division of Engineering Organization Chart .....	38
Exhibit 3-10. Small Business Development and Affirmative Action Organization Chart .....	40
Exhibit 4-1. Summary of Dollars, Total Contracts (Paid) by Procurement Category, Overall Market Area...46	
Exhibit 7-1. Essex County Survey of Vendors Demographics: Proportion of Respondents by Industry .....	111
Exhibit 7-2. County In-Depth Interview Demographics: M/WBE Classification.....	118

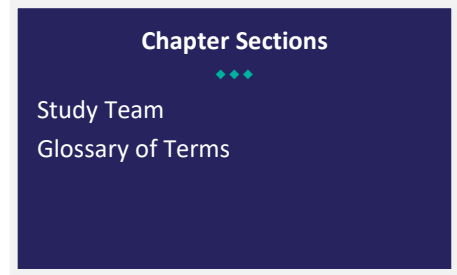


**MGT of America Consulting, LLC**  
4320 West Kennedy Blvd.  
Tampa, Florida 33609

# Acknowledgements

## Study Team

The MGT team who conducted Essex County’s Disparity Study is the most experienced and skilled team in the disparity study business. MGT staff have 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.



Chapter Sections	
Study Team	•••
Glossary of Terms	

## MGT Project Team

MGT is a Tampa, FL-based social impact solutions research and management consulting firm. Since 1990, MGT has conducted over 235 disparity and disparity-related studies. The team of experts who dedicated their time, attention, and expertise to this study include:

### **Mr. Andres Bernal, Vice President**

Mr. Bernal was responsible for developing, refining, and executing MGT’s methodology and quality standards for conducting disparity studies. Mr. Bernal is an expert in quantitative research for diversity, equity, inclusion, and disparity studies with over 15 years of experience. He has been the disparity quantitative research leader on over 10 studies, spearheading collection of data, managing all levels of utilization and availability analyses, managing all levels of the various private sector analyses, and implementing new methodologies that incorporate the latest disparity study legal court cases. He is well-practiced in conducting all aspects of disparity study research and has played a major role collecting, developing, refining, and executing MGT’s methodology and quality standards for MGT’s disparity studies. He has extensive experience in the collection and analysis of large complex data and in 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. Vernetta Mitchell, Project Director/Qualitative Research/Subcontractor Manager**

Ms. Mitchell is an expert in minority business program development and has developed and managed small, minority, and women business programs for local government entities and private sector companies for over 24 years. Ms. Mitchell held the position of Minority or Women Owned Business Enterprise (M/WBE) Program Director for the City of Charlotte, where she redesigned the City’s M/WBE certification, outreach, and goal-setting processes. Ms. Mitchell has participated in more than 50 disparity studies as a team leader or project director. She has extensive experience in project management, project scheduling, analytical reporting, facilitation, and public relations. Ms. Mitchell’s experience in construction procurement, goods and services procurement, and program administration is a critical asset



in qualitative data collection, interpretation of procurement policies and procedures, and program expansion or improvement recommendations.

## **MGT Subconsultants**

### **Market Analytics International (WBE)**

Is a New Jersey-based market research firms that researched and developed the database of professional organizations and conducted in-depth interviews with professional organizations. Market Analytics also conducted qualitative research by interviewing businesses in the relevant market area.

### **Customer Research International, Inc. (MBE)**

Customer Research International (CRI) is a Historically Underutilized Business (HUB), Disadvantaged Business Enterprise (DBE), and Minority Business Enterprise (MBE) certified data collection research firm. CRI will conduct the custom census and vendor surveys for the study.

### **Create A Heart Marketing (MBE)**

Creates fully automated, highly targeted digital marketing campaigns for nonprofits and small businesses. Our campaigns help service-based organizations in every industry increase their market reach, audience engagement and stakeholder support. Create A Heart Marketing designed and maintained the County's disparity study-specific website.

## **Acknowledgements**

We wish to express special appreciation to Mr. Robert Jackson, Ms. Jessica Valle-Rosario, Ms. Tisha Brooks, and Mr. Carl Hunte with Essex County for their leadership, guidance, and assistance in conducting this study.

## Notice

This report, prepared as per the terms of MGT Consulting Group’s engagement with the Essex County, is intended for unified reading and utilization. Any separation or alteration of its sections or pages is strictly prohibited and renders the report invalid. Without prior written consent from MGT, this report cannot be used, reproduced, quoted, or distributed for purposes beyond those specified in the engagement terms. While information from external sources is believed to be reliable, no warranty is provided regarding its accuracy. Predictions in this report are subject to inherent risks and uncertainties, and MGT bears no responsibility for actual outcomes or future events. The opinions expressed herein are valid solely for the stated purpose and as of the report's date, with no obligation to update. All decisions regarding the implementation of advice or recommendations in this report lie with the Essex County. It is exclusively for the Essex County's use, with no third-party beneficiaries, and MGT disclaims liability to any third party for the report's contents or actions taken as a result. Specifically, MGT bears no responsibility to any third party concerning the content of this report or any actions taken, or decisions made based on the results, advice, or recommendations provided herein.

## Glossary of Terms

This glossary contains definitions of common terms and acronyms used throughout the Essex County 2024 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 Essex County collected through surveys, interviews, and focus groups.
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 is 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 Essex County agreements, including 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, and willingness to work on the Essex County projects.
DBE	An acronym for the US Department of Transportation Disadvantaged Business Enterprise business designation. <sup>1</sup>
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-, or women-owned businesses in a particular market area to determine

---

<sup>1</sup> <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/definition-disadvantaged-business-enterprise>

	if disparity exists in the awarding of contracts to minority and women business enterprises by a public entity.
Dun & Bradstreet	Contains a vast database of business data that includes information on companies, industries, and markets.
Expenditures	Expenditures are payments made by the Essex County 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 M/WBE 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 Essex County and were paid by the Essex County 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.
MSA	An acronym for Metropolitan Statistical Area, a geographical region with a relatively high population density at its core and close economic ties throughout the region as defined by the United States Census Bureau.
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 the County of Essex.
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, Non-Professional Services, and Goods and Services
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.
Public Works Contractor Registration (PWCR)	Requires all contractors, subcontractors, or lower tier subcontractors who bid on or engage in the performance of any work for which the payment of prevailing wage is required in the state of New Jersey to register with the Department of Labor and Workforce Development. <sup>2</sup>
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 County of Essex 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.

---

<sup>2</sup> <https://www.nj.gov/labor/wageandhour/registration-permits/register/publicworksregistration.shtml>

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 County of Essex.
Utilization	Examines the expenditures and awards made to primes and subcontractors in the County of Essex 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.

# 1 Introduction

## 1.1 Introduction

The County of Essex, New Jersey (County) commissioned MGT of America Consulting, LLC (MGT) to conduct its first Disparity Study to determine if there are any disparities between the utilization of minority-, or women-owned business enterprises (M/WBEs) compared to the availability of M/WBEs in the Essex County regional marketplace. The overall purpose of the Study is to determine the effects of race, ethnicity, or gender on a businesses' ability to do business in the County – both public and private sectors, acquire capital such as loans and bonding, and win contracts or subcontracts in the marketplace in which the County does business – with a focus on minority-owned and women-owned businesses who conduct business within the region.

Chapter Sections	
***	
1.1	Introduction
1.2	Background
1.3	Overview of Study Approach
1.4	Report Organization

## 1.2 Background

The County of Essex is in northeast New Jersey and is the state's second most populated county with a population of 863,729 according to the 2020 U.S. Census. The County of Essex includes the City of Newark and is part of the New York metropolitan area. The County is home to Rutgers University-Newark, Berkeley College-Newark, and Montclair State University, among other public and private institutions. The County of Essex includes the Newark International Airport and Port Newark and is considered a major national transportation hub. In addition to the aviation and shipping industries, the County of Essex is also home to many large corporate headquarters, including PSE&G, Bell Atlantic, ADP, and Prudential.

MGT began working with the County in the fall of 2021 in the midst of the COVID-19 pandemic. Since that time, MGT and the County have collaborated to identify and gather the most relevant and available data maintained by the County while also diligently encouraging firms in the marketplace to provide accounts of their experience doing business or attempting to do business. The impact of the pandemic on business sustainability can be found in **Appendix I, Impact of Disequilibrium** of this report.

## 1.3 Overview of Study Approach

MGT examined the statistical data using the following business categories:

- ◆ Construction: Services provided for the construction, renovation, rehabilitation, repair, alteration, improvement, demolition, and excavation of physical structures, excluding the performance of routine maintenance.
- ◆ Architecture and Engineering: Professional architectural, engineering, land surveying, planning, environmental, and construction inspection services required for the development and construction of a project.
- ◆ Professional Services: Services that require the provider to possess specialized skills, including the holding of advanced degrees and exercise of independent judgement.

- ◆ Non-Professional Services: Services that do not require the provider to possess specialized skills, including equipment repair, janitorial, auto repair, security, etc.
- ◆ Goods & Services: This category includes all purchases of physical items, including but not limited to equipment and materials, excluding land or a permanent interest in land; or services that do not typically require a provider to have experience in a specialized field or hold an advanced degree.

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 County as a prime contractor or subcontractor (utilization).

The County's study includes procurement activity from July 1, 2016, to June 30, 2021. The objectives of this study were:

- ◆ Determine whether the County, either in the past or currently, engages in discriminatory practices in the solicitation and award of contracts in Construction, Professional Services, Non-Professional Services, and Goods and Services to M/WBEs.
- ◆ Determine if there was evidence of business discrimination toward M/WBEs in the County's market area.
- ◆ Determine if a legally justified need exists for the establishment of a race- and gender-based remedial 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 County 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 the County.

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 the County'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 County?
2. How does case law inform the research methodology for the County'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 County 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?



- ◆ Conduct public engagement meetings.
- ◆ Determine the County’s geographic and product markets.
- ◆ Conduct market area and utilization analyses.
- ◆ Determine the availability of qualified firms.
- ◆ Analyze prime and subcontractor utilization and availability for disparity.
- ◆ Analyze disparities in the private sector.
- ◆ Conduct a survey of business owners.
- ◆ Collect and analyze anecdotal information.
- ◆ Prepare and present draft and final reports for the study.

## 1.4 Report Organization

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

<b>CHAPTER 2</b>	<b>LEGAL REVIEW</b> 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 Second Circuit.
<b>CHAPTER 3</b>	<b>PROCUREMENT AND CONTRACTING POLICIES, PROCEDURES, AND PRACTICES</b> Provides MGT’s analysis of the County’s race- and gender-neutral and race- and gender-conscious policies, procedures, and programs.
<b>CHAPTER 4</b>	<b>MARKET AREA AND AVAILABILITY ANALYSES</b> Details the methodology used to determine the County’s relevant market area, and the analyses of vendor utilization by the County for the procurement of Construction, Professional Services, Non-Professional Services, and Goods and Services procurement.
<b>CHAPTER 5</b>	<b>PRODUCT MARKET, UTILIZATION, AND DISPARITY ANALYSES</b> Presents the availability of M/WBEs in the County’s geographic and product markets and the disparity between the availability and utilization of M/WBEs by the County.
<b>CHAPTER 6</b>	<b>PRIVATE SECTOR ANALYSIS</b> Analyzes and presents the disparities present in the private sector and the effect on M/WBEs. This private sector analysis demonstrates why the County’s race and gender-conscious programs and goals are necessary to ensure it does not become a passive participant in private sector discrimination.
<b>CHAPTER 7</b>	<b>QUALITATIVE ANALYSIS</b> Contains an analysis of qualitative data collected from the survey of business owners, one-on-one interviews with businesses and professional organizations.

<b>CHAPTER 8</b>	<b>FINDINGS, COMMENDATIONS, AND RECOMMENDATIONS</b> Summarizes the utilization, availability, disparity, private sector, and qualitative findings, provide commendations, and suggests recommendations based on the analyses presented in this study.
<b>APPENDICES</b>	The Appendices contain additional analyses and supporting documentation and data.

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

# 2 Legal Review

## 2.1 Introduction

This chapter provides a summary of the state of the law applicable to affirmative action programs of public contracting agencies as the law has been interpreted and evolved in the federal courts. The material that follows does not constitute legal advice to Essex County, NJ (County) on 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. It is the customary MGT chapter for the Third Circuit and the state of New Jersey on this subject matter, reviewed for recent cases at the time of publishing this chapter.

Chapter Sections	
2.1	Introduction
2.2	Scrutiny Standards
2.3	Compelling Governmental Interest
2.4	Narrowly Tailoring
2.5	Conclusions

The Supreme Court decisions in *Richmond v. J. A. Croson Co. (Croson)*,<sup>3</sup> and *Adarand v. Peña (Adarand III)*<sup>4</sup> established and applied the legal framework that governs race- and gender-conscious procurement programs. These cases held that strict scrutiny should be the standard by which race-conscious governmental programs should be reviewed, including federal, state, and local government programs. In particular, the courts held that to survive a constitutional challenge under a strict scrutiny standard, a race-conscious governmental procurement program must be (1) justified by a compelling governmental interest in remedying identified discrimination in the marketplace; and (2) narrowly tailored to remedy that discrimination.

Decisions of the Third Circuit offer the most directly binding authority; in particular, the decisions most on point are *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP I)*<sup>5</sup> and *Contractors Ass'n v. Philadelphia (CAEP II)*<sup>6</sup>. Other circuit court cases outside of the Third Circuit offer persuasive authority where the Third Circuit does not directly address all aspects of a legally defensible M/WBE program. This review also addresses the most pertinent cases outside of the Third Circuit.

## 2.2 Scrutiny Standards for Race- and Gender-Specific Programs

### 2.2.1 Strict Scrutiny - *Richmond v. J. A. Croson Co.* as Applied to State and Local Governments

Justice O'Connor in *Croson* established the framework for testing the validity of race-based programs in state and local governments. In 1983, the Richmond City Council (Council) adopted a Minority Business

<sup>3</sup> *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). It should be noted that as it relates to this analysis, *Croson* refers to the Court's opinion delivered by Justice O'Connor in Parts I, III-B, and IV. Parts II, III-A, and V were plurality opinions delivered by Justice O'Connor.

<sup>4</sup> *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

<sup>5</sup> *Contractors Ass'n of E. Pa. v. City of Phila.*, 6 F.3d 990 (3<sup>rd</sup> Cir. 1993).

<sup>6</sup> *Contractors Ass'n v. Philadelphia* 91 F.3d 586, 605 (3<sup>rd</sup> Cir. 1996).

Utilization Plan (the Plan). In adopting the Plan, the Council relied on information that showed that there was, “no direct evidence of race discrimination on the part of the city” in its contracting activities and no “evidence that the city’s prime contractors had discriminated against minority-owned subcontractors.”<sup>7</sup>

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 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 of the United States Constitution. After a considerable record of litigation and appeals, the Fourth Circuit Court of Appeals struck down the Richmond Plan, and the Supreme Court affirmed this decision.<sup>8</sup> 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.<sup>9</sup>

## 2.2.2 Intermediate Scrutiny

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, as *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 based on sex “must carry the burden of showing an exceedingly persuasive justification for the classification.”<sup>10</sup>

In the intermediate level of scrutiny, some degree of discrimination must be demonstrated in a particular industry before a gender-specific remedy may be instituted in that industry. In *Coral Construction Company v. King County* 941 F.2d 910 (9<sup>th</sup> Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992),<sup>11</sup> the Ninth Circuit Court of Appeals noted that, “The mere recitation of a benign, compensatory purpose will not automatically shield a gender-specific program from constitutional scrutiny.”<sup>12</sup>

Although the United States Supreme Court has not ruled directly on the type of scrutiny it would use for a WBE program, the lower federal courts have applied the “intermediate” scrutiny level of review rather

---

<sup>7</sup> *Croson*, 488 U.S. at 480.

<sup>8</sup> *Id.* at 511.

<sup>9</sup> *Id.* at 488. Third Circuit ruled similarly as *Croson* in *Contractors Ass’n of E. Pa. v. City of Phila.*, 6 F.3d 990 (3<sup>rd</sup> Cir. 1993) and *Contractors Ass’n v. Philadelphia* 91 F.3d 586, 605 (3<sup>rd</sup> Cir. 1996).

<sup>10</sup> *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). See also *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979).

<sup>11</sup> 961 F.2d 910 (9<sup>th</sup> Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992).

<sup>12</sup> *Coral Construction v. King County*, 941 F.2d at 932.

than the strict scrutiny applicable to race-conscious programs.<sup>13</sup> However, the Ninth Circuit has ruled that a gender-based remedial program is subject to intermediate scrutiny “supported by an ‘exceedingly persuasive justification’ and substantially related to the achievement of that underlying objective.”<sup>14</sup> In *Engineering Contractors Assoc. of South Florida v. Metropolitan Dade County*, the Eleventh Circuit Court of Appeals recognized that the U.S. Supreme Court’s decision in *United States v. Virginia*, 518 U.S. 515 (1996) may have “signaled” a heightened level of scrutiny by stating that a governmental agency must demonstrate an “exceedingly persuasive justification” for that action. However, the court concluded that, unless and until the United States Supreme Court indicates otherwise, intermediate scrutiny remains the applicable constitutional standard in gender discrimination cases, and a gender-conscious program may be upheld as long as it is substantially related to an important governmental objective.<sup>15</sup> The Fourth Circuit has ruled that the intermediate scrutiny standard is satisfied “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.”<sup>16</sup> The Fourth Circuit in *Rowe* agreed with other federal circuits that intermediate scrutiny “can rest safely on something less than the ‘strong basis in evidence’.”<sup>17</sup> 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.”<sup>18</sup>

### 2.2.3 Strict Scrutiny Analysis

Although Justice O’Connor in *Croson* did not specifically define the methodology used to establish the evidentiary basis required by strict scrutiny, the Court outlined 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 to enhance opportunities for minorities and women.

## 2.3 Compelling Governmental Interest

*Croson* identified two necessary factors for establishing racial discrimination sufficiently to demonstrate a compelling governmental interest in establishing an MBE program. First, there needs to be identified discrimination in the relevant market.<sup>19</sup> Second, “the governmental actor enacting the set-aside program

<sup>13</sup> See, e.g., *Concrete Works II*, 321 F.3d 950 (10<sup>th</sup> Cir. 2003); *Coral Construction Co. v. King County*, 941 F.2d 910 (9<sup>th</sup> Cir. 1991); *Philadelphia*, 91 F.3d 586 (3<sup>d</sup> Cir. 1996); *Engineering Contractors Association of South Florida, Inc., et. al. v. Metropolitan Dade County, et. al.*, (“*Engineering Contractors*”), 122 F.3d 895 (11<sup>th</sup> Cir. 1997).

<sup>14</sup> *AGC v. California*, 713 F.3d 1187, 1195 (9<sup>th</sup> Cir. 2013). *United States v. Virginia Military Institute*, 518 U.S. 515 (1996); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *Michigan Road Builders Ass’n., Inc. v. Milliken*, 834 F.2d 583, 595 (6<sup>th</sup> Cir. 1987); *Associated General Contractors of California v. City and County of San Francisco*, 813 F.2d 922, 940 (9<sup>th</sup> Cir. 1987).

<sup>15</sup> *Engineering Contractors*, 122 F.3d at 908 (11<sup>th</sup> Cir. 1997).

<sup>16</sup> *Hogan*, 458 U.S. at 724 (internal quotation marks omitted). *H.B. Rowe Co., Inc. v. Tippett*, 615 F.3d 233, 242 (4<sup>th</sup> Cir. 2010).

<sup>17</sup> *Id.*; see also *Concrete Works of Colo. v. City & County of Denver (Concrete IV)*, 321 F.3d 950, 959-60 (10<sup>th</sup> Cir. 2003); *Contractors Ass’n of E. Pa. v. City of Phila.*, 6 F.3d 990, 1010 (3<sup>d</sup> Cir. 1993); *Coral Constr. Co. v. King County*, 941 F.2d 910, 931-32 (9<sup>th</sup> Cir. 1991); *H.B. Rowe Co., Inc. v. Tippett*, 615 F.3d 233, 242 (4<sup>th</sup> Cir. 2010).

<sup>18</sup> *Engineering Contrs. Ass’n v. Metropolitan Dade County*, 122 F.3d 895, 910 (11<sup>th</sup> Cir. 1997); *Concrete Works IV*, 321 F.3d at 959; *H.B. Rowe Co., Inc. v. Tippett*, 615 F.3d 233, 242 (4<sup>th</sup> Cir. 2010).

<sup>19</sup> *Croson*, 488 U.S. at 492, 509-10.

must have somehow perpetuated the discrimination to be remedied by the program,”<sup>20</sup> either actively or at least passively with “the infusion of tax dollars into a discriminatory industry.”<sup>21</sup>

### 2.3.1 Statistical Evidence

The Court in *Croson* indicated 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.<sup>22</sup> In *Croson*, Justice O’Connor 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 to demonstrate discrimination in the local construction industry.<sup>23</sup> To meet this more precise requirement, courts including in the Ninth circuit have accepted the use of a disparity index.<sup>24</sup>

### 2.3.2 Availability

M/WBEs are deemed to be “available” if they are ready, willing, and able to perform. In determining availability of M/WBEs, the approach utilized to assess the universe of available firms should neither be too overinclusive nor underinclusive. The “Custom Census” approach for identifying the pool of available firms has been favorably approved by several courts. In *Northern Contracting, Inc. v. Illinois*, the plaintiff attempted to argue that Illinois Department of Transportation (IDOT) miscalculated the number of DBEs by using a custom census instead of a count of the number of DBEs registered and prequalified by IDOT. The Seventh Circuit upheld the broader custom census count of DBEs, concluding that it reflected an attempt by IDOT to arrive at more accurate numbers than what would be possible through the use of the registered vendors’ list.<sup>25</sup>

Further, the Third Circuit has permitted the use of census data to measure availability. Census data has the benefit of being accessible, comprehensive, and objective in measuring availability. In *CAEP II*, the Third Circuit acknowledged some of the limitations of census data. Nonetheless, it stated that such data could appropriately be used in disparity studies.<sup>26</sup> 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 (MSA).<sup>27</sup> 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.<sup>28</sup>

---

<sup>20</sup> *Coral Const. Co. v. King County*, 941 F.2d 910, 916 (9<sup>th</sup> Cir. 1991).

<sup>21</sup> *Id.* at 922.

<sup>22</sup> *Croson*, 488 U.S. at 501-02.

<sup>23</sup> *Id.* at 503-04.

<sup>24</sup> *AGC v. Caltrans*, 713 F.3d 1187, 1196 (9<sup>th</sup> Cir. 2013). See also, *H.B. Rowe., Inc. v. Tippet*, 615 F.3d 233, 243-44 (4<sup>th</sup> Cir. 2010); *Engineering Contractors*, 122 F.3d at 914; *Concrete Works IV*, 321 F.3d at 962-67.

<sup>25</sup> *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 723 (7<sup>th</sup> Cir. 2007).

<sup>26</sup> *Contractors Ass’n of E. Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 605 (3<sup>rd</sup> Cir. 1996).

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

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

### 2.3.3 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. To be narrowly tailored, a minority preference program must establish utilization goals that bear a close relationship to minority firms' availability in a particular market. In *Croson* for example, one of the constitutional shortcomings that the court identified in the Richmond program was the city's use of the proportion of minorities in the local population to establish the 30 percent quota.<sup>29</sup> The court explained that this numerical goal "rest[ed] upon the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population."<sup>30</sup> The Ninth Circuit Court of Appeals clarified in *Coral Construction* that a DBE (or MBE) program must limit its geographical scope to the boundaries of the enacting jurisdiction.<sup>31</sup>

The Supreme Court has not specifically established how the relevant market area should be defined, but some circuit courts have done so, including the Tenth Circuit in *Concrete Works II*.<sup>32</sup> In that case, a non-M/WBE construction company argued that, under *Croson*, Denver's affirmative action program could only rely on data from within the City and County of Denver—not from the larger six-county Denver MSA. The Tenth Circuit disagreed, holding "[t]he relevant area in which to measure discrimination, then, is the local construction market, but that is not necessarily confined by jurisdictional boundaries."<sup>33</sup> The court further stated that "[i]t is important that the pertinent data closely relate to the jurisdictional area of the municipality whose program we scrutinize, but here Denver's contracting activity, insofar as construction work is concerned, is closely related to the Denver MSA."<sup>34</sup> Because more than 80 percent of Denver Department of Public Works (DPW) construction and design contracts were awarded to firms located within the Denver MSA, the Tenth Circuit held that the appropriate market area was the Denver MSA, not the City and County of Denver alone.<sup>35</sup> Accordingly, data from the Denver MSA was "adequately particularized for strict scrutiny purposes."<sup>36</sup>

### 2.3.4 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 specific services. In *H.B. Rowe, Inc. v. Tippett*, from the Fourth Circuit, the court noted that capacity does not have the same force for relatively small subcontracts. In addition, the study for North Carolina Department of Transportation (NCDOT) contained a regression analysis indicating that "African

<sup>29</sup> *Croson*, 488 U.S. at 729-730.

<sup>30</sup> *Western States Paving*, 407 F.3d at 995.

<sup>31</sup> *Coral Construction*, 941 F.2d at 925.

<sup>32</sup> *Concrete Works of Colorado, Inc. v. City and Cnty. of Denver*, 36 F.3d 1513, 1520 (10<sup>th</sup> Cir. 1994).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

American ownership had a significant negative impact on firm revenue unrelated to firm capacity or experience.”<sup>37</sup>

In *Concrete Works IV*, the court noted that “MWBE construction firms are generally smaller and less experienced because of discrimination....Additionally, we do not read *Croscon* to require disparity studies that measure whether construction firms are able to perform a particular contract.”<sup>38</sup>

### 2.3.5 Disparity Index

In the *Rowe* decision, the plaintiff noted that there was no substantial disparity when the percentage of subcontractors was used compared to their availability. However, the Fourth Circuit stated that “[t]he State pointed to evidence that prime contractors used minority businesses for low-value work in order to comply with the Department’s goals.”<sup>39</sup> 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.<sup>40</sup> The Eleventh Circuit has stated that, “[t]he utility of disparity indices or similar measures to examine the utilization of minorities or women in a particular industry has been recognized by a number of federal circuit courts.”<sup>41</sup>

As in many circuits, the Third Circuit has also ruled in regard to the importance of the Disparity Index as probative evidence indicating discrimination.<sup>42</sup>

### 2.3.6 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.<sup>43</sup> In *Rowe*, the court noted that the NCDOT study focused on disparity ratios lower than 80 percent and conducted t-tests of statistical significance.<sup>44</sup>

The Eleventh Circuit has addressed the role of statistical significance in assessing levels of disparity in public contracting. Generally, disparity indices of 80 percent or higher—indicating close to full participation—are not considered significant.<sup>45</sup> The court referenced the Equal Employment Opportunity Commission’s (EEOC) disparate impact guidelines, which establish the 80 percent test as the threshold for determining a *prima facie* case of discrimination.<sup>46</sup> According to the Eleventh Circuit, no circuit that has

---

<sup>37</sup> *H.B. Rowe Co., Inc. v. Tippett*, 615 F.3d 233, 247 (4<sup>th</sup> Cir. 2010).

<sup>38</sup> *Concrete Works IV*, 321 F.3d 950, 981, 983 (10<sup>th</sup> Cir. 2003).

<sup>39</sup> *H.B. Rowe., Inc. v. Tippett*, 615 F.3d at 243-244.

<sup>40</sup> *Id.* at 245.

<sup>41</sup> *Engineering Contractors Ass’n of South Florida, Inc.*, 122 F.3d at 914.

<sup>42</sup> *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-605 (3<sup>d</sup> Cir. 1996).

<sup>43</sup> *Contractors Ass’n v. City of Philadelphia*, 91 F.3d 586, 603 (3<sup>d</sup> Cir. 1996).

<sup>44</sup> *H.B. Rowe., Inc. v. Tippett*, 615 F.3d at 245.

<sup>45</sup> *Eng’g Contrs. Ass’n of S. Florida, Inc.*, 122 F.3d at 914.

<sup>46</sup> *Id.* at 914, citing 29 C.F.R. § 1607.4D (concerning the disparate impact guidelines and threshold used in employment cases).



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.”<sup>47</sup>

In support of the use of standard deviation analyses to test the statistical significance of disparity indices, the Eleventh Circuit observed that “[s]ocial scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor other than chance.”<sup>48</sup> With standard deviation analyses, the reviewer can determine whether the disparities are substantial or statistically significant, lending further statistical support to a finding of discrimination. On the other hand, if such analyses can account for the apparent disparity, the study will have little if any weight as evidence of discrimination.

Further, the interpretations of the studies must not assume discrimination has caused the disparities, but must account for alternative explanations of the statistical patterns.<sup>49</sup> The Third and Fifth Circuits have also indicated that statistics about prime contracting disparity have little, if any, weight when the eventual M/WBE program offers its remedies solely to subcontractors.<sup>50</sup> In *Engineering Contractors* there was a separate analysis of prime contracting and subcontracting.<sup>51</sup>

### 2.3.7 Burden of Proof

The *Croson* decision imposes the original burden of proof upon the government to demonstrate that a challenged program is supported by documented evidence of past discrimination or current discrimination. The plaintiff then has the burden to prove that the program is unconstitutional through various methods such as the flawed methodology used by the government to show that past or present discrimination exists, the race-neutral reasons for the disparity, or the existence of controverting data.<sup>52</sup>

In *Western States Paving*, the constitutionality of the requirement that contractors use race and gender-based criteria when awarding subcontracts was challenged both “on its face” and “as applied.” A program can be constitutional “on its face” when it is unconstitutional in all circumstances of its application. The court in *Western States Paving* found that the federal DBE regulations and their authorizing statute in Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21) were constitutional, and therefore, the federal DBE program is constitutional “on its face.” For example, as the court held in *Western States Paving*, the U.S. Congress could find that discrimination exists across the country and therefore, there is a compelling need for the program. The court also found that the federal DBE regulations were narrowly tailored for the national contracting industry.

---

<sup>47</sup> *Id* at 914, citing *Contrs. Ass’n of E. 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).

<sup>48</sup> *Eng’g Contrs. Ass’n of S. Florida, Inc.*, 122 F.3d at 914 quoting *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1556 n.16 (11<sup>th</sup> Cir. 1994) (quoting *Waisome v. Port Authority*, 948 F.2d 1370, 1376 (2<sup>nd</sup> Cir. 1991)).

<sup>49</sup> *Eng’g Contrs. Ass’n of S. Florida, Inc.*, 122 F.3d at 922.

<sup>50</sup> *Contrs. Ass’n of E. Pennsylvania, Inc.*, 91 F.3d at 599 (3<sup>rd</sup> Cir.); *W.H. Schott Constr. Co.*, 199 F.3d at 218 (5<sup>th</sup> Cir.)

<sup>51</sup> *Eng’g Contrs. Ass’n of S. Florida, Inc.*, 122 F.3d 895, 920.

<sup>52</sup> *See, e.g., Concrete Works of Colo. v. City & County of Denver*, 321 F.3d 950, 959 (10<sup>th</sup> Cir. 2003), citing *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 277-78 (1986) (“The ultimate burden remains with the [plaintiff] to demonstrate the unconstitutionality of an affirmative-action program”).

On the other hand, a program can be constitutional “on its face” but unconstitutional “as applied” in a particular case. For example, while discrimination exists across the country, it may not exist in the jurisdiction that has the race- and gender-based case.

The Ninth Circuit Court of Appeals in *Western States Paving* held that the state of Washington failed to prove that there was adequate evidence of discrimination within the state’s contracting market and thus failed to meet its burden of demonstrating that its DBE program was narrowly tailored. The Ninth Circuit in the *Western States* established a two-prong test: (1) the agency must establish the presence of discrimination in its own transportation industry, and (2) the affirmative action program must be “limited to those groups that have actually suffered discrimination.”<sup>53</sup> The Court discussed several ways in which the state’s evidence was insufficient:

- ◆ The state had not conducted a valid statistical study to establish the existence of discrimination in the highway contracting industry;
- ◆ The Washington State Department of Transportation’s (WSDOT) calculation of the capacity of DBEs to do work was flawed because it failed to account for the effects of past race-conscious programs on current DBE participation;
- ◆ The disparity between DBE participation on contracts with and without affirmative action components did not provide any evidence of discrimination;
- ◆ A small disparity between the proportion of DBE firms in the state and the percentage of funds awarded to DBEs in race-neutral contracts (2.7% in the case of WSDOT) was entitled to little weight as evidence of discrimination, because it did not account for other factors that may affect the relative capacity of DBEs to undertake contracting work;
- ◆ This small statistical disparity was not enough, standing alone, to demonstrate the existence of discrimination. To demonstrate discrimination, a larger disparity would be required;
- ◆ WSDOT did not present any anecdotal evidence of discrimination; and
- ◆ The affidavits required by 49 CFR 26.67(a), in which DBEs certify that they are socially and economically disadvantaged, did not constitute evidence of the presence of discrimination.

Consequently, the court found the WSDOT DBE program unconstitutional “as applied.”<sup>54</sup>

The *Western States Paving* case noted that, although narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, “it does require serious, good faith consideration of workable race-neutral alternatives.” *Grutter v. Bollinger*, 539 U.S. 306, 339, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003); also see *Adarand III*, 515 U.S. at 237-38 when undertaking narrow tailoring analysis, courts must inquire “whether there was any consideration of the use of race-neutral means to increase minority business participation in government contracting” (internal quotation marks omitted).

TEA-21 DBE regulations place a preference on the use of race-neutral means, including informational and instructional programs targeted toward all small businesses, to achieve a government’s DBE utilization

---

<sup>53</sup> *Western States Paving*, 407 F.3d at 997-99. This two-prong test was re-affirmed in *AGC v. Caltrans*, 713 F.3d 1187, 1196 (9<sup>th</sup> Cir. 2013).

<sup>54</sup> *Id.* at 993 (citing *United States v. Paradise*, 480 U.S. 149 (1987)).

goal. The regulations require a state to “meet the maximum feasible portion of [its] overall goal by using race-neutral means.” 49 C.F.R. § 26.51(a). Only when race-neutral efforts prove inadequate do the regulations authorize a state to resort to race-conscious measures to achieve the remainder of its DBE utilization goal. *Western States Paving* recognized “[w]e, therefore, are dealing here with [regulations] that emphasize the continuing need to employ non-race-conscious methods even as the need for race-conscious remedies is recognized.”<sup>55</sup> However, the Ninth Circuit in the *Western States Paving* and *AGC v. Caltrans* held that states are not required “to independently meet this aspect of narrow tailoring...”<sup>56</sup> That is, states are not required to first actually implement race-neutral programs and evaluate their success prior to implementing race-conscious programs. States must consider race-neutral programs without implementing them.

*Western States Paving* also emphasizes the need for flexibility to show narrow tailoring in the DBE program. The court noted that a quota system is the hallmark of an inflexible affirmative action program. The court quoted *Grutter* stating that “[w]hile [q]uotas impose a fixed number or percentage which must be attained, or which cannot be exceeded, a permissible goal requires only a good-faith effort to come within a range demarcated by the goal itself.”<sup>57</sup> The court recognized that the TEA-21 DBE regulations explicitly prohibit the use of quotas.<sup>58</sup> Moreover, where race-conscious contracting goals are used, prime contractors can meet that goal either by subcontracting the requisite amount of work to DBEs or by demonstrating good faith efforts to do so.<sup>59</sup> A recipient of federal funds, likewise, cannot be penalized by the federal government for failing to attain its DBE utilization goal as long as it undertakes good faith compliance efforts.<sup>60</sup> TEA-21 therefore provides for a flexible system of contracting goals that contrasts sharply with the rigid quotas invalidated in *Croson*.<sup>61</sup>

Additionally, in the Third Circuit the court has held that a challenger to the government’s remedial actions must show credible, particularized evidence of its own that rebuts the government’s showing of a strong basis in evidence for the necessity of the remedial action.<sup>62</sup> *CAEP II* held that the plaintiff challenging the government bears the burden of proof in persuading a court that the government’s remedial actions do not have a compelling interest or that those actions have no strong basis in evidence to conclude that the remedial actions are necessary.<sup>63</sup>

### 2.3.8 Staleness of Data and Time Period of Study

A few cases have addressed the issue of the quantity and currentness of the data required to satisfy strict scrutiny. There is no clear guidance from the district courts about how many years should be studied, although there is cautionary language in cases about relying on small data samples.<sup>64</sup> Concerning the age

<sup>55</sup> *Id.* at 994 (citing *Adarand VII*, 228 F.3d at 1179).

<sup>56</sup> *AGC v. Caltrans*, No. 11-16228, at 23; *Western States Paving*, 407 F.3d at 995, 997-98.

<sup>57</sup> 539 U.S. 306.

<sup>58</sup> 49 C.F.R. § 26.43(a).

<sup>59</sup> *Id.* § 26.53(a).

<sup>60</sup> *Id.* § 26.47(a).

<sup>61</sup> *Grutter v. Bollinger*, 539 U.S. 982 (2003). See also *Sherbrooke Turf, Inc.*, 345 F.3d at 972 (“the [TEA-21] DBE program has substantial flexibility”).

<sup>62</sup> *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598 (3<sup>rd</sup> Cir. 1996).

<sup>63</sup> *Id.* 597.

<sup>64</sup> See, e.g., *Associated Gen. Contrs. of Am. v. City of Columbus*, 936 F.Supp. 1363, 1393 (S.D. Ohio 1996) (*rev’d on other grounds*, 172 F.3d 411).

of data, the court in *Rothe* ruled that the data relied on in the disparity studies was not stale with regard to reenacting a federal program in 2006. While agencies should rely on the most current available data, other circuit courts have “relied on studies containing data more than five years old when conducting compelling interest analyses.”<sup>65</sup>

### 2.3.9 Anecdotal Evidence

Justice O’Connor in *Croson* discussed the relevance of anecdotal evidence, stating: “[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.”<sup>66</sup>

There was evidence from a telephone survey, interviews, and focus groups in *Rowe*. 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 concluded that “[t]he surveys in the 2004 study exposed an informal, racially exclusive network that systematically disadvantaged minority subcontractors.”<sup>67</sup>

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 confirmed because it ‘is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perceptions.”<sup>68</sup> The Fourth Circuit also commented favorably on the NCDOT study survey oversampling MBEs as long as the sample was random.

In *Associated General Contractors of California, Inc. v. Coalition for Economic Equity (AGCC II)*, the Ninth Circuit discussed the specificity of anecdotal evidence required by *Croson*.<sup>69</sup> Seeking a preliminary injunction, the contractors contended that the evidence presented by San Francisco lacked the specificity needed for an earlier appeal in that case and by *Croson*.<sup>70</sup> 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.”<sup>71</sup>

The court also ruled that the City was under no burden to identify every instance of discriminatory practices or policies.<sup>72</sup> 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 instance that the legislative body ha[d] relied upon in support of its decision that affirmative action is necessary.”<sup>73</sup> Not only have courts found that a municipality does

<sup>65</sup> *Rothe Dev. Corp. v. DOD*, 545 F.3d 1023, 1038 (Fed. Cir. 2008) (citing district court discussion of staleness in *W. States Paving Co. v. Wash. State DOT*, 407 F.3d 983 (9<sup>th</sup> Cir. 2005) and *Sherbrooke Turf, Inc. v. Minn. DOT*, 345 F.3d 964 (8<sup>th</sup> Cir. 2003)).

<sup>66</sup> *Croson*, 488 U.S. at 509.

<sup>67</sup> *H.B. Rowe*, 615 F.3d at 251.

<sup>68</sup> *Id.* at 249 (quoting *Concrete Works*, 321 F.3d at 989).

<sup>69</sup> *AGCC II*, 950 F.2d 1401, 1414-15 (9<sup>th</sup> Cir. 1991).

<sup>70</sup> *Id.* At 1415-1416.

<sup>71</sup> *Id.* at 1416. This evidence came from 10 public hearings and “numerous written submissions from the public.” *Id.* at 1414.

<sup>72</sup> *Id.* at 1416 n.11.

<sup>73</sup> *Id.* at 1416.

not have to identify all the discriminatory practices impeding M/WBE utilization specifically, but the Tenth Circuit in *Concrete Works IV* also held that anecdotal evidence collected by a municipality does not have to be verified. “There is no merit to [the plaintiff’s] argument that the 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.”<sup>74</sup>

The Third Circuit in *CAEP I*, found the importance of anecdotal evidence in satisfying strict scrutiny. Although, the court determined that only in exceptional circumstances could anecdotal evidence alone satisfy strict scrutiny, the combination of that evidence with statistical evidence is extremely powerful<sup>75</sup>.

## 2.4 Narrowly Tailoring

The Ninth Circuit in *Western States Paving* agreed with the *Sherbrooke* and *Gross Seed* cases that it is necessary to undertake an as-applied inquiry into whether a government’s DBE program is narrowly tailored. The *Western States Paving* court stated that even when discrimination is present within a state, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination. In *Croson*, for example, one of the rationales upon which the Supreme Court relied to invalidate the city’s quota system was the program’s expansive definition of “[m]inority group members,” which encompassed “[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.”<sup>76</sup> The Court admonished that the random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggested that perhaps the city’s purpose was not in fact to remedy past discrimination.

The Ninth Circuit Court of Appeals noted that it had previously expressed similar concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination. In *Monterey Mechanical Co. v. Wilson*, 125 F.3d at 704, the Ninth Circuit relied upon *Croson* to invalidate a California statute that required prime contractors on public projects to subcontract 15 percent of the work to minority-owned businesses and 5 percent to woman-owned businesses. The statute defined the term “minority” to include Blacks, Hispanics, Native Americans, Pacific-Asians, Asian-Indians, and over two-dozen subgroups.<sup>77</sup> The court concluded that the statute was not narrowly tailored because it provided race-based preferences to “groups highly unlikely to have been discriminated against in the California construction industry.”<sup>78</sup> The overly inclusive designation of benefited minority groups was a “red flag signaling that the statute is not, as the Equal Protection Clause requires, narrowly tailored.”<sup>79</sup> The court also cited *Builders Ass’n of Greater Chicago v. County of Cook*, 256 F.3d 642, 647 (7th Cir.2001), holding that an ordinance that established minimum levels of minority participation in county construction contracts was not narrowly tailored because it afforded preferences

<sup>74</sup> *Concrete Works IV*, 321 F.3d 950, 989 (10<sup>th</sup> Cir. 2003).

<sup>75</sup> *Contractors Ass’n of E. Pa. v. City of Phila.*, 6 F.3d 990, 1002-1003 (3<sup>rd</sup> Cir. 1993).

<sup>76</sup> 488 U.S. at 478, 109 S.Ct. 706 (second alteration in original).

<sup>77</sup> *Id.* at 714, 109 S.Ct. 706.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

to a “laundry list” of minorities, not all of whom had suffered discrimination; *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000), invalidating a state statute that set aside 5 percent of state construction contracts for “Blacks, American Indians, Hispanics, and Orientals” because “[b]y lumping together [these] groups, ... the [program] may well provide preference where there has been no discrimination, and may not provide relief to groups where discrimination might have been proven;” *O’Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C.Cir.1992) “the random inclusion of racial groups for which there is no evidence of past discrimination in the construction industry raises doubts about the remedial nature of [a minority set-aside] program” (internal quotation marks omitted). In contrast, the Caltrans DBE program litigated in *AGC v. Caltrans* had excluded Hispanic-owned firms from race-based preferences based on inadequate factual predicate evidence for the Hispanic ethnic category.<sup>80</sup>

Accordingly, each of the principal minority groups benefiting from the state’s DBE program must have suffered discrimination within the state. If that is not the case, then the DBE program provides minorities who have not encountered discriminatory barriers with an unconstitutional competitive advantage at the expense of both non-minorities and any minority groups that have actually been targeted for discrimination.”

The Third Circuit has laid out the following factors in determining whether 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.*<sup>81</sup>

## 2.4.1 Race-Neutral Alternatives

Concerning race-neutral alternatives, Justice O’Connor in *Croson* concluded that a governmental entity should also evaluate the use of race-neutral means to increase minority business participation in contracting or purchasing activities. In *Rowe*, the Fourth Circuit noted that NCDOT had a Small Business Enterprise (SBE) program and had undertaken all the race-neutral methods suggested by the DOT DBE program regulations. The court pointed out that the plaintiff had identified “no viable race-neutral alternatives that North Carolina has *failed* to consider and adopt”<sup>82</sup> (emphasis in the original). The Court further noted that disparities persisted despite NCDOT employing these race-neutral initiatives.

## 2.4.2 Passive Participation to Discrimination

In *Croson*, Justice O’Connor 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

---

<sup>80</sup> *AGC v. Caltrans*, No. 11-16228, at 4.

<sup>81</sup> *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 605-610 (3d. Cir. 1996) and *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1008-1009 (3d. Cir. 1993).

<sup>82</sup> *H.B. Rowe*, 615 F.3d at 252.

serve to finance the evil of *private* prejudice.”<sup>83</sup> *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.”<sup>84</sup> The government agency’s active or passive participation in discriminatory practices in the marketplace may show a 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.”<sup>85</sup>

Relying on this language in *Croson*, several local agencies have increased their emphasis on evidence of discrimination in the private sector. This strategy has not always succeeded. Evidence of private discrimination presented in litigation was found inadequate in the Philadelphia and Miami-Dade County cases.<sup>86</sup> The Third Circuit stated, in discussing low MBE participation in a local contractors association in the city of Philadelphia, “racial discrimination can justify a race-based remedy only if the City has somehow participated in or supported that discrimination.”<sup>87</sup> Nevertheless, in *Concrete Works IV*, the Tenth Circuit upheld the relevance of data from the private marketplace to establish a factual predicate for M/WBE programs.<sup>88</sup> The courts mainly seek to ensure that M/WBE programs are based on active or passive discrimination findings in the government contracting marketplace and not simply attempts to remedy general societal discrimination<sup>89</sup>.

Courts also seek to find a causal connection between a statistical disparity and actual underlying discrimination. In *Engineering Contractors*, one component of the factual predicate was a study comparing entry rates into the construction business for M/WBEs and non-M/WBEs.<sup>90</sup> The analysis provided statistically significant evidence that minorities and women entered the construction business at rates lower than expected, given their numerical presence in the population and human and financial capital variables. The study argued that those disparities persisting after applying appropriate statistical controls were most likely the result of current and past discrimination. Even so, the Eleventh Circuit criticized this study for reliance on general census data and the lack of particularized evidence of active or passive discrimination by Miami-Dade County, holding that the district court was entitled to find that the evidence did not show compelling justification for a M/WBE program.<sup>91</sup>

The Seventh Circuit has perhaps set a higher bar for connecting private discrimination with government action. In the Cook County case, the trial court extensively considered evidence that prime contractors did not solicit M/WBEs as subcontractors and considered carefully whether this evidence on solicitation served as sufficient evidence of discrimination, or whether instead, it was necessary to provide further evidence that there was discrimination in hiring M/WBE subcontractors.<sup>92</sup> The Seventh Circuit held that this evidence was largely irrelevant.<sup>93</sup> Beyond being anecdotal and partial, evidence that contractors

---

<sup>83</sup> *Coral Cons Co.*, 941 F.2d at 922 (citing *Croson*, 488 U.S. at 492) (emphasis added).

<sup>84</sup> *Croson*, 488 U.S. at 492; see generally Ian Ayres and Fredrick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?* 98 *Colum. L. Rev.* 1577 (1998).

<sup>85</sup> *Croson*, 488 U.S. at 492.

<sup>86</sup> *Contractors Ass’n*, 91 F.3d at 602; *Engineering Contrs. Ass’n v. Metropolitan Dade County*, 122 F.3d 895, 910-11 (11<sup>th</sup> Cir. 1997).

<sup>87</sup> *Contractors Ass’n*, 91 F.3d at 602; see also *Webster v. Fulton County*, 51 F. Supp. 2d 1354 (N.D. Ga. 1999).

<sup>88</sup> *Concrete Works IV*, 321 F.3d at 969.

<sup>89</sup> *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000).

<sup>90</sup> *Engineering Contrs. Ass’n v. Metropolitan Dade County*, 122 F.3d at 921-22.

<sup>91</sup> *Id.* at 922.

<sup>92</sup> *Builders Ass’n of Greater Chicago v. County of Cook*, 123 F. Supp. 2d 1087 (N.D. Ill. 2000).

<sup>93</sup> *Builders Ass’n of Greater Chicago v. County of Cook*, 256 F.3d 642, 645 (7<sup>th</sup> Cir. 2001).

failed to solicit M/WBEs on Cook County contracts was not the same as evidence that M/WBEs were denied the opportunity to bid.<sup>94</sup> Furthermore, such activities on the part of contractors did not necessarily implicate the County as being a passive participant in such discrimination as might exist because there was no evidence the County knew about it.<sup>95</sup>

### 2.4.3 Duration of the Remedy

The Western States Paving Court noted that a narrowly tailored remedial program must also include adequate durational limitations. The Court noted that TEA-21 comports with this requirement because it is subject to periodic reauthorization by Congress. The debates concerning reauthorization ensure that Congress regularly evaluates whether a compelling interest continues to justify TEA-21's minority preference program. Other cases have noted that time limitations are required for DBE/MBE/WBE programs (states may terminate their programs if they meet their annual overall goal through race-neutral means for two consecutive years).<sup>96</sup>

### 2.4.4 Relationship of Goals to Availability

Narrow tailoring under the *Croson* standard requires that remedial goals be in line with measured availability. Setting percentages arbitrarily have played a vital part in finding programs unconstitutional, as evident with what the city of Richmond did in *Croson*. Setting goal percentages need to be based on statistical studies.<sup>97</sup>

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, NCDOT generates a report detailing the type of work likely to be subcontracted. Third, the NCDOT goal-setting committee checks its database for availability. Finally, the Fourth Circuit noted that 10 percent of the NCDOT projects had a zero M/WBE goal.<sup>98</sup>

With regard to goals, the Eleventh Circuit stated that, “we do not agree with the district court that it was ‘irrational’ for the County to set a goal of 19% Hispanic Business Enterprise [HBE] participation when Hispanics make up more than 22% of the relevant contracting pool in every Standard Industrial Classification [SIC] category, and more than 30% for SIC 15. We see nothing impermissible about setting numerical goals at something less than absolute parity. Stated somewhat differently, a local government need not choose between a program that aims at parity and no program at all.”<sup>99</sup>

---

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> See, e.g., *Sherbrooke and Gross Seed*, 345 F.3d 964 (2003).

<sup>97</sup> *Contractors Ass’n v. City of Philadelphia*, 91 F.3d at 607 (“The district court also found significant 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 Ass’n of Greater Chicago*, 256 F.3d at 647.

<sup>98</sup> *H.B. Rowe*, 615 F.3d at 253.

<sup>99</sup> *Eng’g. Contr. of S. Florida, Inc.* 122 F.3d at 927.



## 2.4.5 Flexibility

*Western States Paving* also emphasizes the need for flexibility to show narrow tailoring in the DBE program. The court noted that a quota system is the hallmark of an inflexible affirmative action program. The court quoted *Grutter* stating that “[w]hile [q]uotas impose a fixed number or percentage which must be attained, or which cannot be exceeded, a permissible goal requires only a good-faith effort to come within a range demarcated by the goal itself.”<sup>100</sup> The court recognized that the TEA-21 DBE regulations explicitly prohibit the use of quotas.<sup>101</sup> Moreover, where race-conscious contracting goals are used, prime contractors can meet that goal either by subcontracting the requisite amount of work to DBEs or by demonstrating good faith efforts to do so.<sup>102</sup> A recipient of federal funds, likewise, cannot be penalized by the federal government for failing to attain its DBE utilization goal as long as it undertakes good faith compliance efforts.<sup>103</sup> TEA-21, therefore, provides for a flexible system of contracting goals that contrasts sharply with the rigid quotas invalidated in *Croson*.<sup>104</sup>

## 2.4.6 Burden on Third Parties

Narrow tailoring also requires minimizing the burden of the program on third parties’ waivers. Good faith compliance is a tool that serves the purpose of reducing the burden on third parties.<sup>105</sup> The plaintiff in *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.<sup>106</sup>

## 2.4.7 Over-Inclusion

Finally, narrow tailoring involves limiting the number and type of program beneficiaries. 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. In essence, there must be sufficient statistical evidence of discrimination to include a particular minority group in the remedial program. In *Croson*, the Court noted that “[i]f a 30% set-aside was ‘narrowly tailored’ to compensate [B]lack contractors for past discrimination, one may legitimately ask why they are forced to share this ‘remedial relief’ with an Aleut citizen who moves to Richmond tomorrow? The gross over-inclusiveness of Richmond’s racial preference strongly impugns the city’s claim of remedial motivation”.<sup>107</sup>

Additionally, as noted above in *Rowe*, 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. The statistical evidence that was evaluated by the court to determine if the Statute’s definition of minorities

---

<sup>100</sup> 539 U.S. 306.

<sup>101</sup> 49 C.F.R. § 26.43(a).

<sup>102</sup> *Id.* § 26.53(a).

<sup>103</sup> *Id.* § 26.47(a).

<sup>104</sup> *Grutter v. Bollinger*, 539 U.S. 982 (2003). See also *Sherbrooke Turf, Inc.*, 345 F.3d at 972 (“the [TEA-21] DBE program has substantial flexibility”).

<sup>105</sup> 49 C.F.R. § 26.53.

<sup>106</sup> *H.B. Rowe*, 615 F.3d at 254.

<sup>107</sup> *Croson*, 488 U.S. at 506.

was determined to be overinclusive by including groups for which the 2004 disparity study did not establish sufficient evidence of discrimination. Although, the statute in question limited relief to “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”<sup>108</sup> lumping all minority groups together may provide preference for groups where no discrimination was found.

## 2.5 Conclusions

As summarized earlier, when governments develop and implement a contracting program sensitive to race and gender, they must understand the case law 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 applying 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.

In creating and implementing a race- or gender-conscious contracting program, it is necessary to understand how the courts have interpreted the constitutional requirements. To satisfy strict scrutiny, agencies must provide a compelling interest in a race- or gender-conscious program. While gender-conscious programs are subject to intermediate scrutiny in practice, there has not been a significant difference in the judicial review of race-conscious vs. gender-conscious contracting programs.

The compelling interest begins with showing disparities, if any, between the availability and utilization of firms by demographic category. However, the disparity analysis must be supplemented by factoring in issues such as type of work, as well as firm capacity and interest in pursuing agency contracts. How subcontractors are treated in the absence of goals is also an important part of the factual predicate for a race and gender conscious program. This quantitative analysis must then be supplemented with qualitative evidence from interviews, surveys, and other methods of anecdotal data collection.

If a factual predicate is found for race- and gender conscious efforts, the program still must be narrowly tailored. Critical elements of narrow tailoring include taking race-neutral measures seriously, setting goals near business availability, having mechanisms for flexible program implementation, and avoiding the random inclusion of groups into the program. Working with these criteria the federal courts have consistently ruled that the federal DBE regulations are narrowly tailored.

While the Supreme Court has yet to return to this exact area of law to sort out some of the conflicts, the Third Circuit has 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.

---

<sup>108</sup> N.C. Gen. Stat. § 136-28.4(c)(2).

# 3 Procurement and Contracting Policies, Procedures, and Practices

## 3.1 Introduction

Procurement and contracting are essential functions of Essex County. **Chapter 3** examines policies, procedures, and practices to ensure all interested suppliers can participate in the County’s procurement and contracting. Procurement policies, procedures, and practices have a significant impact on County departments and suppliers attempting to do business or doing business with the County. An important part of a comprehensive disparity study is a review of policies, procedures, and practices. The review is important for several reasons—first it is a key component of a comprehensive legally supportable disparity study. Second, the review is critical for pinpointing opportunities and barriers to participate in the County’s procurement and contracting. Finally, the review is important for documenting efforts to increase participation in procurement and contracting by diverse suppliers.

Chapter Sections	
3.1	Introduction
3.2	Methodology
3.3	Definitions
3.4	Procurement Structure and Environment
3.5	Business Inclusion
3.6	Conclusions

MGT’s review of policies and procedures is presented in six major sections. **Section 3.2** describes the methodology used to conduct the review. The remaining sections summarize procurement policies, procedures, practices, and the structure and environment in which procurement and contracting take place. Our review of policies and procedures in this chapter is intended to provide context for the analysis of utilization and availability as well as study findings and recommendations.

## 3.2 Methodology

This section summarizes MGT’s approach to reviewing the County’s procurement and contracting policies, procedures, and practices. To conduct the review, MGT utilized a methodology refined over the course of more than 225 disparity studies. In examining the routine application and execution of policies and procedures MGT focused on understanding the County’s procurement process and procurement roles and responsibilities. The review included reviewing pertinent source documents and meetings with personnel in the Office of Purchasing, Small Business Development and Affirmative Action (SBDAA), the Department of Corrections, Essex County Hospital Center, Department of Public Works (DPW), and the Department of Parks, Recreation, and Cultural Affairs. Interviews and meetings with County personnel provided valuable insight into procurement roles and responsibilities and the County’s procurement process. The interviews and meetings enabled MGT to better understand the procurement process and the operational impacts on departments and on suppliers seeking to do business or doing business with the County. The policy review was conducted with the cooperation and support of County personnel. At no time did MGT not get the cooperation that was necessary in conducting the policy review. Without the support and cooperation received by MGT, completing the policy review and other components of this study would have been difficult. The policy review included the following major steps:

- ◆ Finalizing the scope and parameters of the policy review.
- ◆ Researching the County’s website to help inform areas of inquiry and to identify information and resources available to County personnel and suppliers seeking to do business or doing business with the County.
- ◆ Collection, review, and summarization of procurement/contracting policies and procedures and resources used by County personnel.
- ◆ Collection and review of supplemental information and data pertinent to the policy review.
- ◆ Interviews/meetings with County personnel to document procurement roles and responsibilities in the County’s procurement process.
- ◆ Review of applicable laws and regulations.
- ◆ Analysis and summarization of data and information gathered throughout the policy review to develop key findings and recommendations.
- ◆ Preparation of the policy review chapter for inclusion in the Essex County 2022 Disparity Study Report.

Policy review meetings with County personnel started in October 2021 and continued until April 2022. COVID restrictions limited in person meetings and all meetings were conducted virtually. As needed follow-up contacts were made to seek clarification and obtain additional information. Finally, MGT reviewed the major source documents and information itemized in **Table 3-1**.

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

INDEX	DESCRIPTION
Procurement Related Documents	
1.	§2-46 Negotiation of Contracts by County Executive, Board Approval Required
2.	§2-50.1 Minority Business Enterprise, Women’s Business Enterprise, Veteran-Owned Business Joint Venture and Set-Aside Program
3.	Cooperative Purchasing: A Guide for Local Officials
4.	Essex County Administrative Code
5.	Essex County Vendor Registration Form
6.	Goods and Services Bid Specifications: A Guide for New Jersey Local Public Agencies-Section A Instructions to Bidders and Statutory Requirements, Section B Supplemental Information to Instructions to Bidders, Section C Standard Bid Document Reference
7.	Limits on Bid Acceptance Dates LFN 2007-4
8.	Local Public Contracting Rules N.J.A.C.
9.	Local Public Contracts Law (LPCL, N.J.S.A. 40A:11)
10.	New Jersey Local Public Contracts Law and Regulation Reference Manual
11.	Prompt Payment of Construction Contracts LFN 2006
12.	Purchasing at 10% Less than the State Cooperative Contract Price LPCL

INDEX	DESCRIPTION
13.	Standard Certification to Accompany Prequalification Regulations
14.	Table of Local Public Contracts Law and Public School Contracts Law - Contracting Thresholds
Other Related Documents	
15.	§2-74 Department of Economic Development, Training and Employment
16.	§2-75 Department of Correction
17.	§2-76 Department of Public Works
18.	Analysis of Essex County Procurement and Contracting, University of Minnesota 2005
19.	Business Registration Certification Update LFN 2004-24
20.	Ordinance 0-2017-00005, Ordinance Adopting the Finding of the Affirmative Action Committee and Establishing A Minority Business Enterprise, Women Business Enterprise, and Veteran Owned Business Set-Aside and Joint Venture Program for the County of Essex
21.	Request for Competitive Contract Proposal-Provide Point of Sale System for Essex County Parks Department, Turtle Back Zoo and South Mountain Recreation Complex
22.	State of New Jersey MBE/WBE Certification Application

### 3.3 Definitions

In reviewing source documents in **Table 3-1**, MGT used the following definitions extracted from the Local Public Contracts Law and Regulation Manual to provide proper context for the review.

- ◆ “Contracting unit” means:
  - (a)Any county; or
  - (b)Any municipality; or
  - (c)Any board, commission, committee, authority or agency, which is not a State board, commission, committee, authority, except as provided pursuant to P.L.2013, c.4, or agency, and which has administrative jurisdiction over any district other than a school district, project, or facility, included or operating in whole or in part, within the territorial boundaries of any county or municipality which exercises functions which are appropriate for the exercise by one or more units of local government, including functions exercised in relation to the administration and oversight of a tourism district located in a municipality in which authorized casino gaming occurs, and which has statutory power to make purchases and enter into contracts awarded by a contracting agent for the provision or performance of goods or services.

The term shall not include a private firm that has entered into a contract with a public entity for the provision of water supply services pursuant to P.L.1995, c.101 (C.58:26-19 et al.).

“Contracting unit” shall not include a private firm or public authority that has entered into a contract with a public entity for the provision of wastewater treatment services pursuant to P.L.1995, c.216(C.58:27-19 et al.).

“Contracting unit” shall not include a duly incorporated nonprofit association that has entered into a contract with the governing body of a city of the first class for the provision of water supply services or wastewater treatment services pursuant to section 2 of P.L.2002, c.47 (C.40A:11-5.1).

“Contracting unit” shall not include a duly incorporated nonprofit entity that has entered into a contract for management and operation services with a municipal hospital authority established pursuant to P.L.2006, c.46 (C.30:9-23.15 et al.).

- ◆ “Governing body” means:
  - (a)The governing body of the county, when the purchase is to be made or the contract or agreement is to be entered into by, or in behalf of, a county; or
  - (b)The governing body of the municipality, when the purchase is to be made or the contract or agreement is to be entered into by, or on behalf of, a municipality; or
  - (c)Any board, commission, committee, authority, or agency of the character described in subsection (1) (c) of this section.
- ◆ “Contracting agent” means the governing body of a contracting unit, or appointed membership of a State authority authorized to enter into a cooperative purchasing agreement pursuant to P.L.2013, c.4, or its authorized designee, which has the power to prepare the advertisements, to advertise for and receive bids and, as permitted by this act, to make awards for the contracting unit in connection with purchases, contracts, or agreements.
- ◆ “Purchase” means a transaction, for a valuable consideration, creating or acquiring an interest in goods, services, and property, except real property or any interest therein.
- ◆ “Professional services” means services rendered or performed by a person authorized by law to practice a recognized profession, whose practice is regulated by law, and the performance of which services requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction or apprenticeship and training. Professional services may also mean services rendered in the provision or performance of goods or services that are original and creative in character in a recognized field of artistic endeavor.
- ◆ “Extraordinary unspecifiable services” means services which are specialized and qualitative in nature requiring expertise, extensive training, and proven reputation in the field of endeavor.
- ◆ “Aggregate” means the sums expended or to be expended for the provision or performance of any goods or services in connection with the same immediate purpose or task, or the furnishing of similar goods or services, during the same contract year through a contract awarded by a contracting agent.
- ◆ “Bid threshold” means the dollar amount set in section 3 of P.L.1971, c.198 (C.40A:11-3), above which a contracting unit shall advertise for and receive sealed bids in accordance with procedures set forth in P.L.1999, c.440 (C.40A:11-4.1 et al.).
- ◆ “Contract” means any agreement, including but not limited to a purchase order or a formal agreement, which is a legally binding relationship enforceable by law, between a vendor who

agrees to provide or perform goods or services and a contracting unit which agrees to compensate a vendor, as defined by and subject to the terms and conditions of the agreement. A contract also may include an arrangement whereby a vendor compensates a contracting unit for the vendor's right to perform a service, such as, but not limited to, operating a concession.

- ◆ "Contract year" means the period of 12 consecutive months following the award of a contract.
- ◆ "Competitive contracting" means the method described in sections 1 through 5 of P.L.1999, c.440 (C.40A:11-4.1 thru 40A:11-4.5) of contracting for specialized goods and services in which formal proposals are solicited from vendors; formal proposals are evaluated by the purchasing agent or counsel or administrator; and the governing body awards a contract to a vendor or vendors from among the formal proposals received.
- ◆ "Goods and services" or "goods or services" means any work, labor, commodities, equipment, materials, or supplies of any tangible or intangible nature, except real property or any interest therein, provided or performed through a contract awarded by a contracting agent, including goods and property subject to N.J.S.12A:2-101 et seq.
- ◆ "Lowest price" means the least possible amount that meets all requirements of the request of a contracting agent.
- ◆ "Lowest responsible bidder or vendor" means the bidder or vendor: (a) whose response to a request for bids offers the lowest price and is responsive; and (b) who is responsible.
- ◆ "Official newspaper" means any newspaper designated by the contracting unit pursuant to R.S.35:1-1 et seq.
- ◆ "Purchase order" means a document issued by the contracting agent authorizing a purchase transaction with a vendor to provide or perform goods or services to the contracting unit, which, when fulfilled in accordance with the terms and conditions of a request of a contracting agent and other provisions and procedures that may be established by the contracting unit, will result in payment by the contracting unit.
- ◆ "Purchasing agent" means the individual duly assigned the authority, responsibility, and accountability for the purchasing activity of the contracting unit, and who has such duties as are defined by an authority appropriate to the form and structure of the contracting unit, and P.L.1971, c.198 (C.40A:11-1 et seq.) who possesses a qualified purchasing agent certificate.
- ◆ "Quotation" means the response to a formal or informal request made by a contracting agent by a vendor for provision or performance of goods or services, when the aggregate cost is less than the bid threshold. Quotations may be in writing or taken verbally if a record is kept by the contracting agent.
- ◆ "Responsible" means able to complete the contract in accordance with its requirements, including but not limited to requirements pertaining to experience, moral integrity, operating capacity, financial capacity, credit, and workforce, equipment, and facilities availability.
- ◆ "Responsive" means conforming in all material respects to the terms and conditions, specifications, legal requirements, and other provisions of the request.

- ◆ “Public works” means building, altering, repairing, improving, or demolishing any public structure or facility constructed or acquired by a contracting unit to house local government functions or provide water, waste disposal, power, transportation, and other public infrastructures.
- ◆ “Concession” means the granting of a license or right to act for or on behalf of the contracting unit, or to provide a service requiring the approval or endorsement of the contracting unit, and which may or may not involve a payment or exchange, or provision of services by or to the contracting unit.
- ◆ “Proprietary” means goods or services of a specialized nature, that may be made or marketed by a person or persons having the exclusive right to make or sell them, when the need for such goods or services has been certified in writing by the governing body of the contracting unit to be necessary for the conduct of its affairs.
- ◆ “Service or services” means the performance of work, or the furnishing of labor, time, or effort, or any combination thereof, not involving or connected to the delivery or ownership of a specified end product or goods or a manufacturing process. Service or services may also include an arrangement in which a vendor compensates the contracting unit for the vendor’s right to operate a concession.

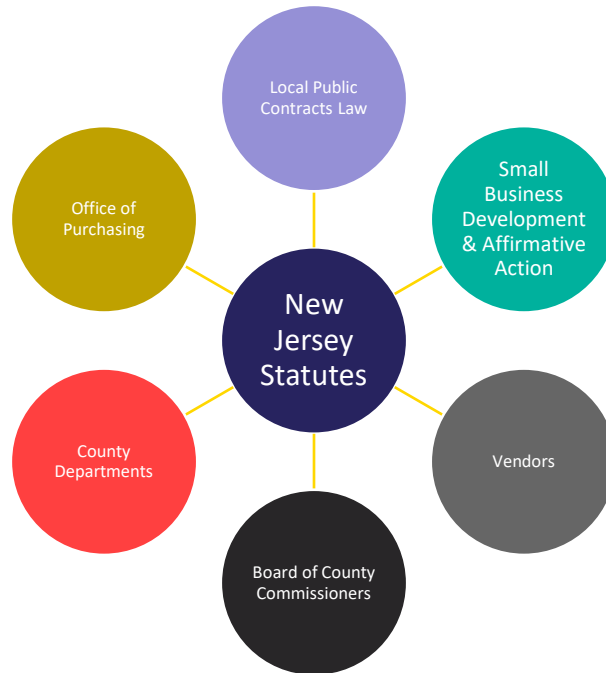
### 3.4 Procurement Structure and Environment

The structure and environment in which procurement and contracting occurs were important for understanding the operational impact of procurement policies on county departments and the impact on suppliers seeking to do business or doing business with the County. The County’s organizational structure was also important for understanding the role of various departments in the procurement process. **Exhibit 3-2** and **Exhibit 3-3** show the organization structure for Essex County and the Office of Procurement. The diagram in **Exhibit 3-1** represents critical linkages in the County’s procurement process.

With an operating budget over \$770 million, procurement and contracting is essential for county operations and service delivery by the entities shown in **Exhibit 3-1**. The entities in **Exhibit 3-1**, including the Board of County Commissioners, Office of Purchasing, SBDAA, departments, and vendors, all play a critical role in the County’s procurement process.



### EXHIBIT 3-1. PROCUREMENT LINKAGES



Source: Created by MGT, 2022.

The Essex County Administrative Code govern relationships and requirements among the entities in **Exhibit 3-1**. Chapter 2, Article I clearly and succinctly states the County’s commitment to nondiscrimination in County Contracts. Specifically, Section C states “The County will not accept bids or proposals from, nor engage in business with, any business firm that discriminates in the solicitation, selection, hiring or treatment of subcontractors, vendors, or suppliers on the basis of race, gender, religion, national origin, ethnicity, sexual orientation, age, disability, or any other form of unlawful discrimination in its solicitation, selection, hiring or treatment of another business.”<sup>109</sup>

Contracts and Purchases (Article VI) outline requirements for contracts and purchases which may be negotiated for approval by the Board of County Commissioners. For the policy review key provisions include the following:

- ◆ §2-47 Bidding Procedures – All purchases which require competitive bids must conform to New Jersey Statutes Annotated (N.J.S.A.) 49 11-20 and Local Public Contract Guidelines and Local Public Contract Regulations.
- ◆ §2-49 Certifications – All responses to request for proposals or other representations of qualifications must be certified true and accurate.
- ◆ §2-50 Awards of Contracts – Competitively bid contracts must be reported quarterly to the Board and must indicate whether vendors are minority vendors.
- ◆ §2-50.1 Minority Business Enterprise, Women’s Business Enterprise, Veteran-Owned Business Joint Venture and Set-Aside Program – Set-Aside is defined as “a contract for goods, equipment,

<sup>109</sup> Essex County Code of Ordinances Chapter 2 Administrative Code.

construction, or services which is designated as a contract for which bids are invited and accepted only from qualified small business enterprises, qualified veteran business enterprises, qualified minority business enterprises or qualified women’s business enterprises”. In §2-50.1 initial goals for Essex County were identified for nonprofessional services, professional services, goods and services, and construction. The initial goals were 15 percent for WBE and MBE, 5 percent Veteran Owned Business [VOB] in all categories except construction. The goals for construction were 20 percent WBE and MBE and 5 percent VOB.<sup>110</sup>

Ideally, procurement systems should be operated in an equitable, cost-effective, and responsive manner to provide goods, supplies, and professional services. Like all counties in the State of New Jersey, Essex County is mandated to follow Local Public Contracts Law (N.J.S.A.40A:11-1 et sec.) and N.J.S.A.19:44A-20.4 et sec. (Pay-to-Play). Essex County utilizes the following major procurement categories:

- ◆ Goods and Services include any work, labor, commodities, equipment, or supplies of any intangible nature except real property.
- ◆ Construction includes building, altering, repairing, improving, or demolishing any public structure or facility constructed or acquired to house local government functions or provide water, waste disposal, power, transportation, and other public infrastructures.
- ◆ Professional Services means services performed by a person authorized by law to practice a recognized profession, whose practice is regulated by law, requiring knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study.
- ◆ Non-Professional Service Services that do not require the provider to possess specialized skills, including equipment repair, janitorial, auto repair, security, etc.

To participate in opportunities with the County all contractors and subcontractors must have a Business Registration Certificate (BRC) and be registered with the State of New Jersey. Vendors seeking opportunities with Essex County may register through the Purchasing Portal. Registration includes specifying products and services that can be provided to Essex County. To participate in the County’s set-aside program, vendors must be a certified or registered Woman-owned, Minority-owned, or Veteran-owned Business Enterprises.

In exercising the authority granted under Local Public Contracts Law, there is a clear expectation to:

- ◆ Obtain goods and services of good quality at fair and reasonable cost.
- ◆ Maximize the purchasing value of public funds.
- ◆ Adhere to statutes, ordinances, regulations, processes, and procedures.
- ◆ Obtain goods and services to meet Essex County’s needs in a timely and equitable manner.

In acquiring goods and services to meet internal and external needs, Essex County personnel perform a broad spectrum of activities aligned with Local Public Contracts Law, ordinances, administrative rules, and regulations that govern procurement and contracting. For this policy review, interviews and meetings with Essex County personnel provided valuable insight into the County’s procurement and contracting.

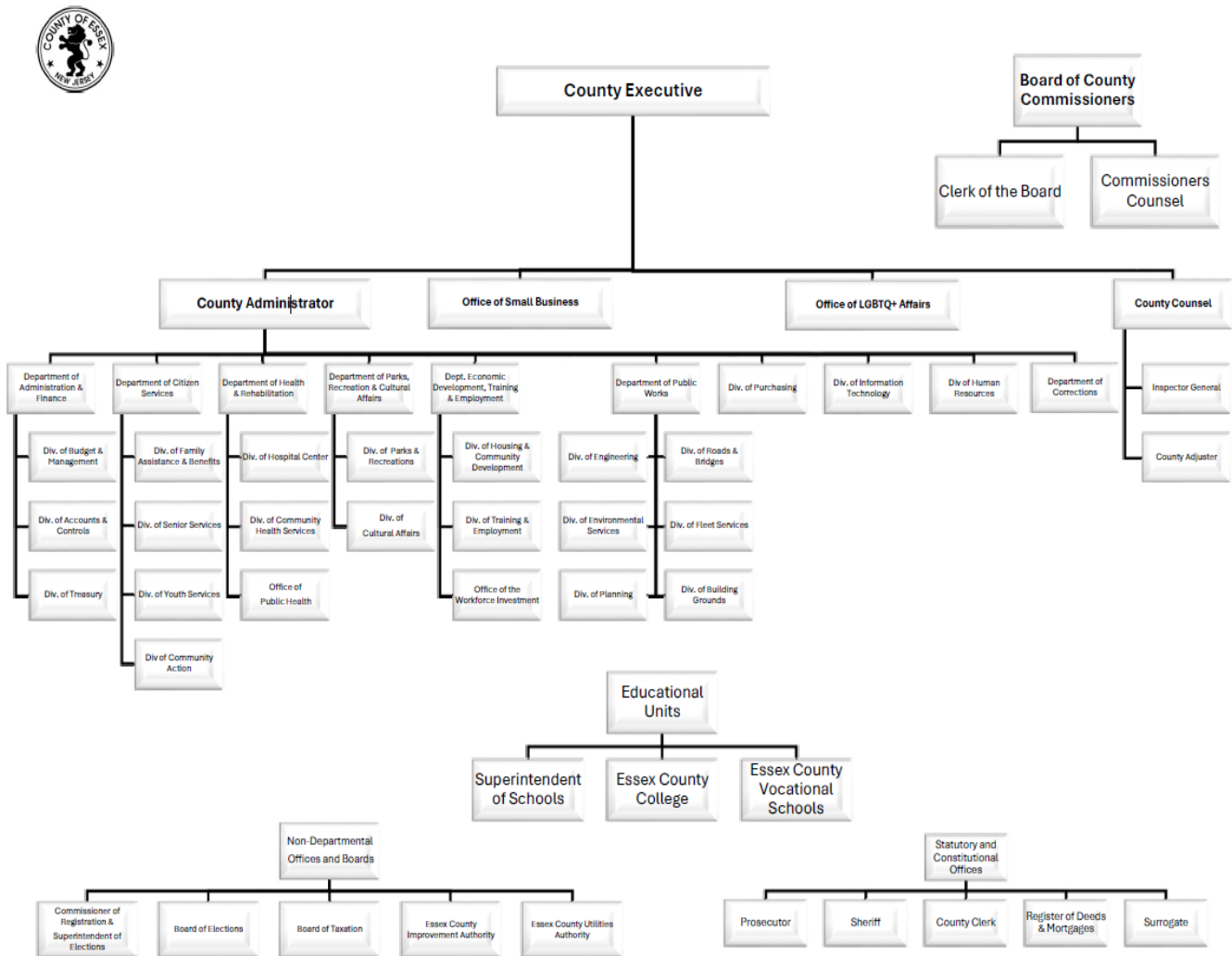
---

<sup>110</sup> Essex County Code of Ordinances Chapter 2 Administrative Code, Article VI. Contracts and Purchases.

Discussions with County personnel focused mainly on procurement and contracting policies and their impact on participation of diverse suppliers.

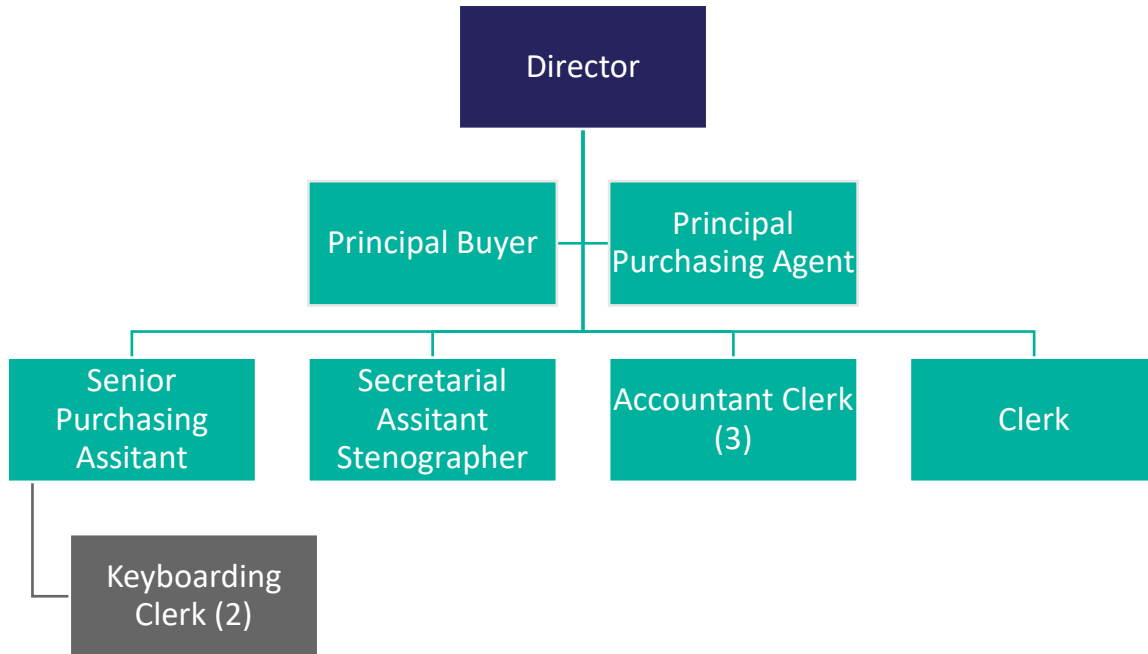
Overall, MGT’s review found County personnel to be knowledgeable about the procurement process and were aware of the County’s emphasis on increasing participation of diverse suppliers. The interviews and meetings also provided insight on the operational impact of procurement policies and practices on county departments. The full impact of policies and practices on suppliers will be determined in conjunction with the anecdotal research component of the study.

EXHIBIT 3-2. ESSEX COUNTY ORGANIZATION CHART



Source: Provided by Essex County.

EXHIBIT 3-3. OFFICE OF PURCHASING ORGANIZATION CHART



Source: Created by MGT based on data from the Essex County Office of Purchasing, 2022.

**Exhibit 3-3** shows the organization structure for the Office of Purchasing which is housed in the Department of Administration and Finance. Pursuant to §2-69, the Office of Purchasing is responsible for establishing, maintaining, and operating a centralized purchasing system for the procurement, storage, and distribution of supplies, materials, equipment, real estate, and insurance required by any and all County departments and budgeted agencies. In addition, the Office is responsible for the collection, sale, and disposal of surplus property and maintaining an inventory and control system for all equipment.<sup>111</sup> As the central purchasing entity, the Office of Purchasing is responsible for purchasing goods and services and obtaining maximum value for each dollar spent. Office of Procurement personnel perform an essential role in the acquisition of goods and services pursuant to Local Public Contracts Law and play a key role throughout the procurement process including pre-solicitation, solicitation, and contract award. Local Public Contracts Law include detailed requirements that the Office of Purchasing must adhere to throughout the procurement process from advertisement to contract award.<sup>112</sup> In carrying out its responsibilities, the Office of Purchasing works closely with county departments throughout the process to ensure compliance pursuant to Local Public Contracts Law, statutes, and ordinances.

### 3.4.1 County Procurement and Contracting

Based on MGT’s experience, an efficient and effective procurement and contracting process is largely dependent on knowledgeable and skilled staff and well executed procurement policies, processes, technologies, and programs. The source documents in **Table 3-1** govern all aspects of the County’s

<sup>111</sup> Essex County Code of Ordinances. Chapter 2. Administrative Code Article IX. Departments §2-69. Department of Administration and Finance.

<sup>112</sup> New jersey Local Public Contracts Law and Regulation Reference Manual.

procurement and contracting. Local Public Contracts Law (LPCL, N.J.S.A.40A:11) and Local Public Contracting Rules (N.J.A.C 5:34) are clearly outlined in the New Jersey Local Public Contracts Law and Reference Manual (Handbook). Part One of the Handbook include Local Public Contracts Law and related statutes, whereas Part Two contain administrative rules related to the Local Public and Public School Contracts Law. Based on MGT's review of the source documents in **Table 3-1**, the County has ample policies and procedures to execute a fair and comprehensive procurement process pursuant to Local Public Contracts Law and relevant statutes and ordinances.

Pursuant to §2-11 The Board of County Commissioners is authorized to organize the administration of the County government including passing ordinances and resolutions necessary for the governance of the County. According to the Administrative Code, the Board of Commissioners also has the authority to issue procurement regulations and the authority to waive requirements for certain procurements or class of procurements.

As mentioned, the Office of Purchasing is the central purchasing entity for the County, except for construction or public works contracts. Public works and design-build contracts are procured by the Departments of Public Works. The Office of Purchasing maintains the Essex County Purchasing Portal where all businesses can register and be informed about all opportunities with Essex County. The Office of Purchasing website includes the following steps for responding to competitive contracts:

- ◆ Provide copy of New Jersey Business Registration Certificate (NJBRC). Businesses cannot bid on an opportunity without being registered with NJBRC.
- ◆ Register with the Purchasing Portal to receive automatic emails based on registered commodity type(s).
- ◆ Download required forms, complete and submit with response.
- ◆ Follow opportunity instructions and due date.<sup>113</sup>

**Exhibit 3-4** shows the public bidding thresholds under Local Public Contracts Law. Guidance and requirements for utilizing the thresholds in **Exhibit 3-4** to obtain the goods and services are found in Public Contracts Law.

---

<sup>113</sup> Office of Purchasing website.

EXHIBIT 3-4. CONTRACTING THRESHOLDS

Public Bidding Thresholds under the Local Public Contracts Law (LPCL) and Public School Contracts Law (PSCL)*		
N.J.S.A. 40A:11-3(a) and (c); 18A:18A-3(a) and (c)	LPCL	PSCL
Bid threshold with a Qualified Purchasing Agent (QPA)**	\$44,000	\$44,000
Quote threshold with a QPA (15% of bid threshold)	\$6,600	\$6,600
Bid threshold without a QPA	\$17,500	\$32,000
Quote threshold without a QPA (15% of bid threshold)	\$2,625	\$4,800

\*Thresholds are effective as of July 1, 2020

\*\*Qualified Purchasing Agent - N.J.S.A. 40A:11-9(b) and N.J.A.C. 5:32-4.

Source: Essex County

To determine the operational impacts of the County’s procurement process, in addition to meeting with personnel in the Office of Purchasing and SBDAA, MGT met with personnel in the Department of Corrections, Essex County Hospital Center, Department of Parks, Recreation, and Cultural Affairs, and DPW. The meetings largely focused on the procurement process and the operational impact on county departments and on suppliers seeking business or doing business with the County. The County posts all bids on the Essex County Purchasing Portal and in the Star Ledger newspaper.

In conjunction with meeting with department personnel, MGT also reviewed a small sample of solicitations shown in **Exhibit 3-5** MGT’s review found the solicitations to be similarly formatted and organized pursuant to applicable laws and regulations referenced in the body of the solicitations and appendices.

Competitive bids above \$17,500 must be advertised pursuant to N.J.S.A. 19:44A-20.4 et sec. Advertisements are placed in the Star-Ledger and the Purchasing Portal. Quotes are solicited for contracts or agreements not subject to public advertising. Professional Services are exempt from bidding and are typically secured through the request for proposal (RFP) process and require Board of County Commissioners approval. Within this context competitive contracting pursuant to 40A:11-4 is awarded by certain criteria in lieu of awarding to the lowest responsible bidder.

EXHIBIT 3-5. ESSEX COUNTY SOLICITATIONS

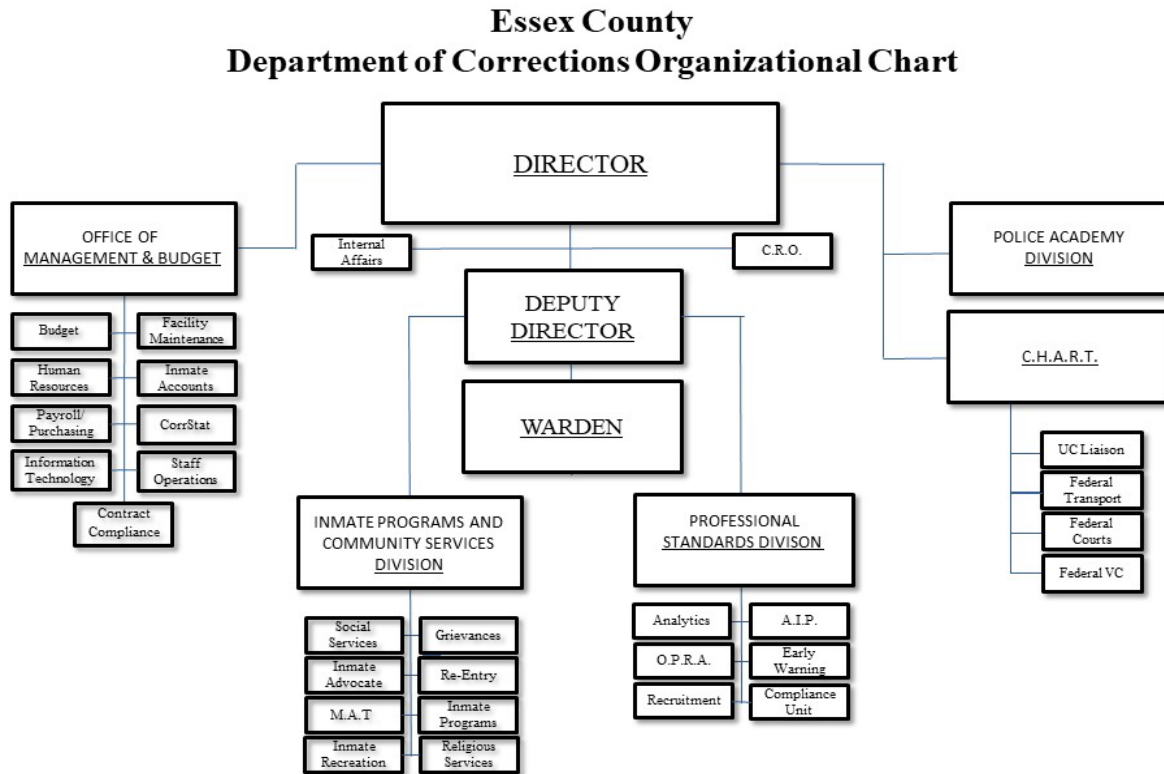
Solicitation	Requesting Agency
RFP 21-292 To Provide Architectural Consulting Services for Essex County Golf Course Renovations	Department of Public Works
Bid 22-018 Furnish and Deliver Golf Course Materials	Department of Parks Recreation and Cultural Affairs
Competitive Contract 22-009 Consultant to Perform Essex County Transportation Plan 2045 Study	Department of Public Works
RFP 22-011 Entertainment Services for 2022 Special Events Calendar	Department of Parks Recreation and Cultural Affairs
Bid 22-019 To Provide Masonry Work	Department of Parks Recreation and Cultural Affairs
Competitive Contract 21-294 Provide the Concession Detention Inmate Tablet Services for Essex County Correctional Facilities	Department of Corrections
Competitive Contract 21-248 To Provide Alternative Incarceration Residential Treatment	Department of Corrections
Competitive Contract 21-221 Joint Commission Regulatory Compliance Consulting Services	The Hospital Center

Source: Essex County

### Department of Corrections

**Exhibit 3-6** shows the organization chart for the Essex County Department of Corrections. Pursuant to 2-75 (Chapter 2 Administrative Code, Article IX), the Department of Corrections is responsible for the County jail and jail annex. The jail houses approximately 465 inmates and is operated by the Essex County Sheriff's Department.

EXHIBIT 3-6. DEPARTMENT OF CORRECTIONS ORGANIZATION CHART



Source: Provided by the Department of Corrections.

According to the County’s website, the mission of the Department of Corrections is:

*To ensure that all persons committed to our County’s correctional institutions are confined with the level of custody necessary to protect the public while providing care, discipline, training, and treatment in preparation for reintegration into the community.*

As shown in **Exhibit 3-6** the Department of Corrections is comprised of several divisions and sub-divisions; some of which operate on a 24-hour basis. The purchasing function in the Department is housed in the Office of the Business Manager.

Based on meetings with Department personnel MGT noted the following:

- ◆ The Department of Corrections is a large and complex organization within the county, and is one of the largest such operations in the country.
- ◆ The Department’s purchasing function includes all goods and services except for construction and construction-related services which are handled by the DPW.
- ◆ Suppliers providing services in secure areas are subject to a background check which has been problematic for some suppliers in the past.

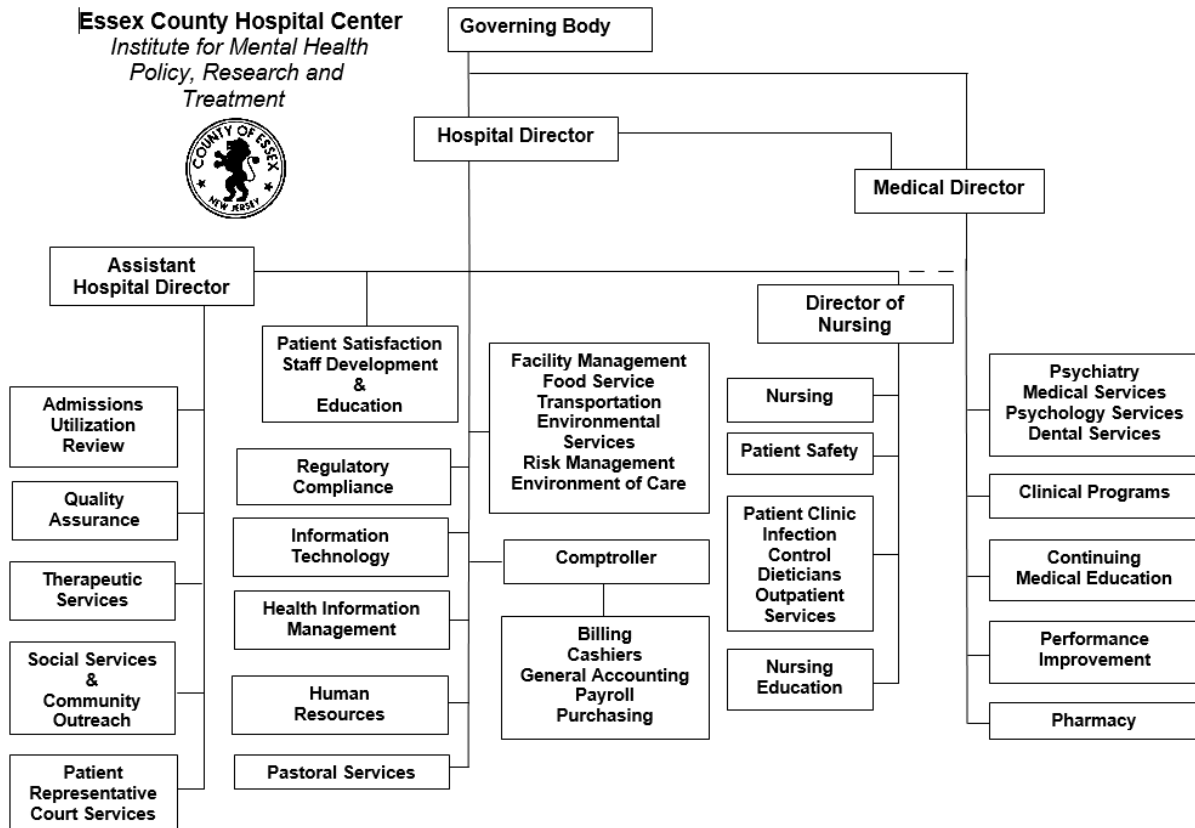


- ◆ The two Department **Exhibit 3-5** solicitations in were similarly organized and formatted and referenced requirements pursuant to Public Contracts Law and relevant statutes and ordinances in the body of the solicitation and the appendices.
- ◆ The Department utilizes the State Contract and Cooperative Purchasing Programs to purchase goods or services to obtain a more economical purchase; it is more convenient and advantageous to the Department in terms of price, quantity, and quality. Eligible vendors must comply with the contract terms and pricing as defined by the state.
- ◆ Throughout the procurement process the Department works closely with the Office of Purchasing and SBDAA.

### Essex County Hospital Center

**Exhibit 3-7** shows the organization chart for Essex County Hospital Center. Pursuant to 2-70 (Chapter 2 Administrative Code, Article IX), the Essex County Hospital Center and other organization entities such as community health facilities and programs constitute a department (Department of Health and Rehabilitation) for the purpose of planning, coordination, and supervision.

EXHIBIT 3-7. ESSEX COUNTY HOSPITAL CENTER ORGANIZATION CHART



04/2019

Source: Provided by the Essex County Hospital Center.

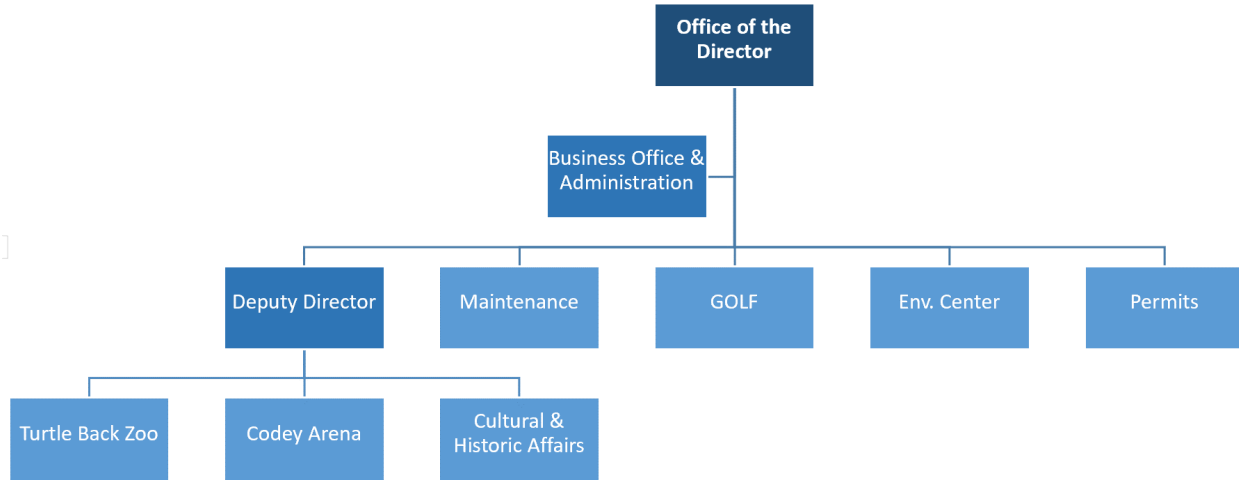
The Hospital Center was established to provide evidenced-based care to promote patient recovery and return to community living. To promote recovery of patients, the Hospital Center provides a variety of behavioral health services. Although not reflected in the organization chart in **Exhibit 3-7**, the director of the Hospital Center also provides leadership of the Division of Community Health Services, which include addiction services and other community-based services and programs.

Based on meetings with Hospital Center personnel MGT noted the following:

- ◆ The Hospital Center and Division of Community Health Services purchase a diverse variety of goods and services required to provide 24-hour residential treatment and community-based services. The Center's purchasing includes all goods and services except for construction which is provided by the DPW.
- ◆ The Center's solicitation in **Exhibit 3-5**, Competitive Contract 21-221 Joint Commission Regulatory Consulting Services, reference Local Public Contracts Law and other statutory requirements in the body of the solicitation and appendices.
- ◆ The Center's maintenance contract is provided through Public Works.
- ◆ In terms of purchasing volume, Community Health Services have the most contracts.
- ◆ The Center actively recruits and utilizes diverse suppliers to meet the Center's needs, and several goods and services contracts have been awarded to minority vendors. There is great sensitivity to the County's commitment to increasing participation of diverse suppliers in the county's contracting.
- ◆ The Housekeeping Sheltered Workshop hires patients to provide services; the majority of these hires are minority patients.
- ◆ The Department utilizes the State Contract and Cooperative Purchasing Programs to purchase goods or services to obtain a more economical purchase; it is more convenient and advantageous to the Department in terms of price, quantity, and quality. Eligible vendors must comply with the contract terms and pricing as defined by the state.

## Department of Parks, Recreation, and Cultural Affairs

EXHIBIT 3-8. DEPARTMENT OF PARKS, RECREATION, AND CULTURAL AFFAIRS ORGANIZATION CHART



Source: Provided by Essex County Department of Parks, Recreation, and Cultural Affairs.

**Exhibit 3-8** shows the organization chart for the Department of Parks, Recreation, and Cultural Affairs. Pursuant to 2-73 (Chapter 2 Administrative Code, Article IX), the Department of Parks, Recreation, and Cultural Affairs is responsible for operating park and recreational facilities and conducting and coordinating cultural affairs. The parks system is comprised of 24 parks and over 7,000 acres of open space which require regular upkeep and maintenance. The Department also operates Turtle Back Zoo, Richard J. Coddey Arena at South Mountain Recreation Complex, the Essex County Environmental Center, and three golf courses. Much of the procurement and contracting by the Department is for the maintenance and upkeep of the parks system. According to staff, the majority of contracts are sent out to bid on a two-year cycle.

Based on meetings with Department of Parks, Recreation, and Cultural Affairs MGT noted the following:

- ◆ The Department of Parks, Recreation, and Cultural Affairs is one of the higher purchasing volume departments in Essex County. The Department’s purchasing includes all goods and services except for construction which is provided by the DPW. DPW’s Division of Engineering is responsible for engineering services for the County’s parks, reservations, and recreation facilities.
- ◆ All of the Department’s solicitations in **Exhibit 3-5** reference Local Public Contracts Law and other statutory requirements in the body of the solicitation and appendices.
- ◆ Procurement cycle time from start to finish can be six months or longer. It was noted that minor errors can often delay the process from start to finish.
- ◆ County issued credit cards would help curtail the practice of personnel using their personal credit cards.
- ◆ There are opportunities to increase participation of minority businesses. Increasing their participation is actively supported by staff. Based on staff comments, ideally the vendor pool should be more reflective of the community.

- ◆ Availability is limited in certain areas of need where only two or three suppliers provide goods, services, or equipment needed by the Department.
- ◆ The Department utilizes the State Contract and Cooperative Purchasing Programs to purchase goods or services to obtain a more economical purchase; it is more convenient and advantageous to the Department in terms of price, quantity, and quality. Eligible vendors must comply with the contract terms and pricing as defined by the state.
- ◆ Slow payment adversely impacts suppliers which is a major reason some suppliers do not bid on county contracts.

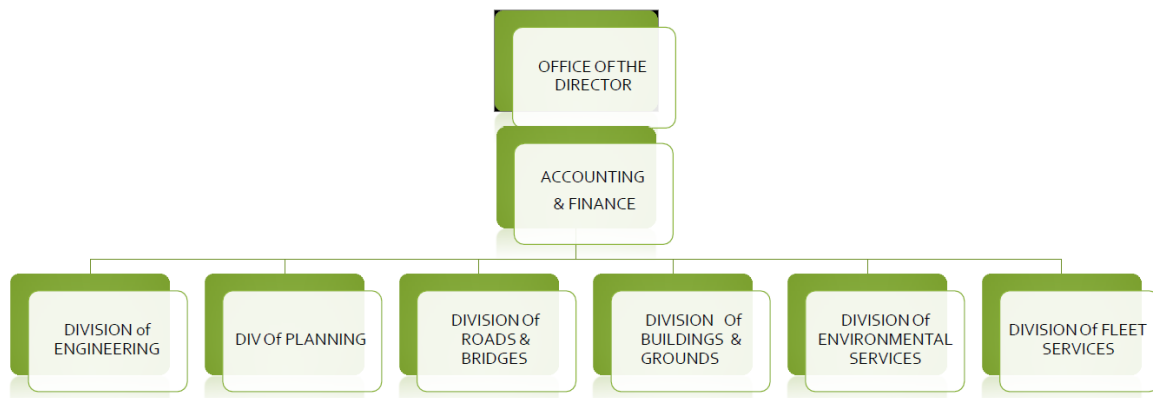
## Department of Public Works

**Exhibit 3-9** shows the organization chart for DPW's Division of Engineering. The Division of Engineering is highlighted because it is the major division in DPW responsible for design, construction, construction inspection, construction management, and bridge inventory and maintenance. Pursuant to 2-76 (Chapter 2 Administrative Code, Article IX), the Department of Public Works consist of six divisions responsible for meeting the County's public work's needs. The divisions within the Department of Public Works include:

- ◆ Division of Engineering
- ◆ Division of Planning
- ◆ Division of Buildings and Grounds
- ◆ Division of Roads and Bridges
- ◆ Division of Fleet Management
- ◆ Division of Environmental Affairs

EXHIBIT 3-9. DEPARTMENT OF PUBLIC WORKS DIVISION OF ENGINEERING ORGANIZATION CHART

# DEPARTMENT OF PUBLIC WORKS



Source: Provided by Essex County Department of Public Works.

The Department's mission is as follows:

*To enhance and sustain a healthy quality of life for every citizen and customer by providing efficient administration, planning, maintenance, construction management and technical engineering of the county's infrastructure.*

In carrying out its mission the services provided by the Department of Public Works include transportation planning, snow and ice removal, pothole repair, tree pruning, roads maintenance and repair, and mosquito control.

DPW must follow the State's administrative code when hiring prime contractors and subcontractors by ensuring they are prequalified prior to bidding and remain eligible as a vendor for 24 months.<sup>114</sup>

Procurement and contracting by the DPW is summarized as follows:

- ◆ DPW provides construction and engineering services for other county departments such as the Department of Parks, Recreation, and Cultural Affairs.
- ◆ DPW has a relatively strong and consistent track record utilizing diverse businesses, particularly the Division of Engineering, which is responsible for design, construction, construction management, and road and bridge maintenance for federally funded and non-federally funded projects.
- ◆ DPW projects that use Federal Highway Administration (FHWA) funding have mandatory DBE goals. Non-federally funded projects do not require mandatory goals. As such the majority of MWBE participation in DPW projects are on non-federally funded projects. All contractors or vendors seeking a public works construction prime contract or subcontract must be classified by Division of Property Management and Construction (DPMC) and obtain a Public Works Contractor Registration (PWC-R) Certificate prior to the bid opening date.
- ◆ Overall prime contractors and subcontractors are utilized primarily on DPW construction related contracts more so than on non- construction projects.
- ◆ There are opportunities to increase utilization of minority and small businesses on DPW contracts. Building stronger relationships with prime contractors whether there are goals or not will pay huge dividends relative increased participation and utilization.
- ◆ The solicitation process from solicitation development to contract award is straightforward and align with what's included in the DPW solicitations in **Exhibit 3-5**.
- ◆ As one of the major departments in Essex County government with a track record for participation of minority and small businesses, DPW is committed to continue looking for ways to increase participation and utilization in all DPW divisions.

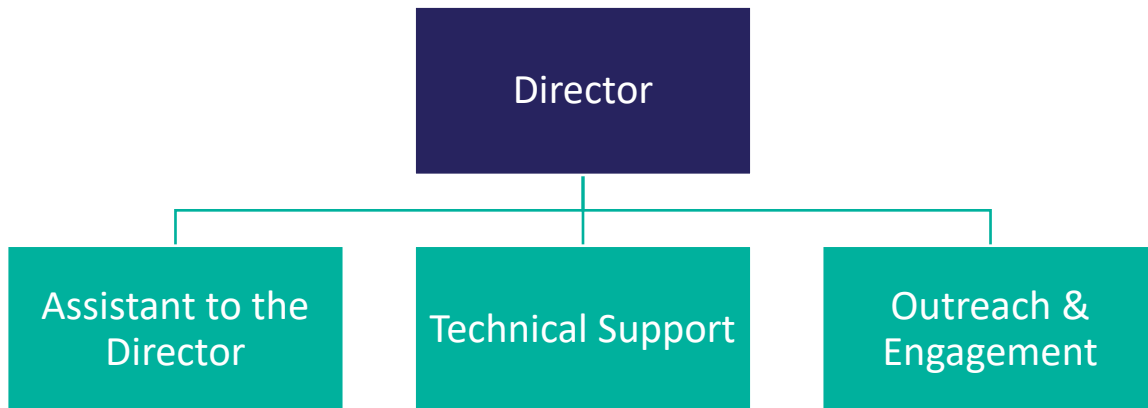
---

<sup>114</sup> N.J. Admin. Code § 17:19-2.1.

### 3.5 Business Inclusion

SBDAA plays an important and essential role in the County’s commitment to equity and inclusion by increasing contracting opportunities for minority and women-owned businesses, small businesses, veteran businesses, and other economically and socially disadvantaged individuals. The organization structure for Small Business Development and Affirmative Action is shown in **Exhibit 3-10**.

EXHIBIT 3-10. SMALL BUSINESS DEVELOPMENT AND AFFIRMATIVE ACTION ORGANIZATION CHART



Source: Created by MGT based on data from the Essex County Minority and Women’s Business Opportunity Office, 2022.

The major impetus for this disparity study is the County’s commitment to greater participation of minority and women-owned firms, veterans, and small businesses. As such it was important to fully understand Small Business Development and Affirmative Action’s role and its efforts to facilitate business diversity by working with the Office of Procurement and other departments throughout the procurement process.

The Office of Small Business Development was created following the 2005 disparity study which recommended policy and program initiatives to address disparities and stimulate participation of minority businesses in procurement and contracting. The mission of the Office of SBDAA is to “position small, women-owned, veteran-owned and minority business enterprises to compete successfully for contracts.” In carrying out its mission, SBDAA is responsible for the following:

- ◆ Collaborating and coordinating with the Office of Purchasing and departments to ensure inclusion opportunities are communicated, monitored, and met.
- ◆ Reaching out to Minority-owned, Woman-owned, Veteran-owned, and Small Business Enterprises
- ◆ Providing technical assistance to help businesses to successfully participate in the County’s procurement process.
- ◆ Developing and sustaining strategic partnerships that benefit Minority-owned, Woman-owned, Veteran-owned, and Small Business Enterprises in building the capacity to compete and participate in the County’s procurement process.

- ◆ Providing information and support.<sup>115</sup>

The County also has established set-aside participation goals per the County's ordinance #0-201700005 – Ordinance Adopting the Findings of the Affirmative Action Committee and Establishing a Minority Business Enterprise, Women Business Enterprise, and Veteran Owned Business Enterprise Set-Aside and Joint Venture Program for the County of Essex. The ordinance sets forth to invite and accept bids only from qualified small, minority, women, and veteran business per N.J.S.A 40a:1-41.

In essence, SBDAA is the County's advocate and catalyst for diverse business growth and sustainability through various workshops and business development opportunities, including the following:

- ◆ Certification/Money Matters Workshop
- ◆ Understanding the RFP Process
- ◆ Meet the Generals
- ◆ Small Business Support & Resources Workshop
- ◆ Access to Capital Workshop
- ◆ Business development and assistance provided by entities such as the New Jersey Economic Development Authority, New Jersey Community Capital, and the African American Chamber of Commerce

Overall, SBDAA's efforts are designed and executed to support diverse businesses competing for business opportunities to provide goods, services, construction, and professional services. Recent changes have been made by SBDAA in the way vendors are notified and targeted for opportunities that will have a significant impact on competing for opportunities. In addition, a key SBDAA strategy is building the county's vendor database with reliable vendors and positioning more vendors for set asides. Coupled with SBDAA's emphasis on getting vendors to bid, win contracts, and establish a track record for doing quality work, these strategies are expected to have a significant impact. To maximize SBDAA's impact it may be helpful to consider the following practices:

- ◆ Collaborative goalsetting and integral SBDAA involvement in all formal solicitations
- ◆ Early and ongoing outreach to engage the vendor community in upcoming solicitations prior to advertisement
- ◆ Targeted outreach for solicitations/matchmaking
- ◆ Partnerships with other jurisdictions/organizations on how to do business with the County and utilize SBDAA resources and assistance
- ◆ World -class compliance systems

## 3.6 Conclusions

The County's commitment to the participation of diverse suppliers in procurement and contracting is embodied in the regulations and policies discussed throughout this chapter. MGT's review concluded there are regulations and policies that govern all aspects of procurement and contracting. However, there

---

<sup>115</sup> SBDAA website.

is no “one size fit all” regarding perceptions and opinions about the County’s procurement process and how county departments and vendors are impacted.

Several key points and observations are particularly noteworthy:

- ◆ Essex County has ample regulations, ordinances, and policies related to the procurement and contracting process. Current policies appropriately guide the end-to-end procurement process across all solicitation types.
- ◆ Based on input from end users there are opportunities to reduce procurement cycle time. Current procurement cycle time “conception to birth” can be 60 days or longer depending upon the solicitation.
- ◆ From an end user perspective there is sensitivity to the participation of minority businesses and small businesses, but the availability of minority businesses and small businesses is limited for certain types of projects.
- ◆ Cooperative purchasing and purchasing off the New Jersey State Contract bypass the County’s procurement process and is viewed as less cumbersome and time consuming, but can also adversely impact utilizing minority businesses.
- ◆ COVID 19 has resulted in adjustments and pivots—some of which may continue post-COVID 19.
- ◆ It was evident that ensuring inclusive and equitable purchasing is taken very seriously as well as is enabling minority- and women-owned businesses to participate in all types of procurement and contracting.
- ◆ Overall staff were very open and forthcoming about progress since the last disparity study, and opportunities to improve and enhance operations, systems, and processes related to procurement and contracting and the utilization of minority businesses.

The policy review underscores the importance of recognizing that increasing participation of woman-owned, minority-owned, veteran-owned, and small businesses must be an organization-wide responsibility and not solely the responsibility of SBDAA. The extent to which the County increases participation will be determined by the results of county-wide efforts and departments working collaboratively to increase participation in County contracts.





# 4 Market Area and Availability Analyses

## 4.1 Introduction

The market area analysis is essential to establishing the universe of available vendors and spending that will be considered in the identification of any disparate treatment of assorted classifications of firms. Availability is a measure of the numbers and proportions of vendors willing and able to work with an agency, while disparity is an observed statistically significant difference between the utilization of minority- and women-owned firms relative to their respective availability.

CHAPTER SECTIONS	
4.1	Introduction
4.2	Data Collection and Management
4.3	Market Area Analysis
4.4	Availability Estimations

This chapter presents the results of the relevant geographic market area and availability estimates analyses of firms willing and able to do business in the market area. The specific procurement categories analyzed were Construction, Professional Services, Non-Professional Services, and Goods and Services.

## 4.2 Data Collection and Management

MGT staff compiled and reconciled electronic data provided by the County to develop a master set of prime and subcontractor contract data into a Master Utilization Database to support the needs of the study. MGT utilized the County’s financial data as the source of prime data and a portion of the subcontractor data that was combined with the subcontractor data collected via a survey of the primes. Based on a common contract ID across both data sets, MGT merged the subcontractor data with the prime data to make up the Master Utilization Database. The analyses for the County’s study had many barriers to producing a detailed quantitative and qualitative analysis. COVID and less than robust subcontractor reporting requirements in New Jersey created extended time in the collection of data. In addition, the study period included two years of data from a legacy system which required a complex migration process. MGT and County worked for a significant time to create a comprehensive prime utilization database. As noted, the State of New Jersey does not require prime contractors to report “audited/verified” subcontractor data. Therefore, MGT requested subcontract data from firms that held contracts with the County during the study period. However, there are efforts by the County to ensure diverse business inclusion do not go unnoticed as it was estimated that \$17 million in DBE spending was not included in the County’s utilization which was required to be reported per FHWA rules. Data collected is included in the total utilization analyses represented in **Section 5.2**.

### 4.2.1 Study Period

The preliminary market area analysis is based on contract transactions for during July 1, 2016, to June 30, 2021.

## 4.2.2 Procurement Categories and Exclusions

MGT analyzed the procurement categories competitively bid by the County, encompassing four sectors: Construction, Professional Services, Non-Professional Services, and Goods and Services. These procurement categories are defined as:

- ◆ Construction: Services provided for the construction, renovation, rehabilitation, repair, alteration, improvement, demolition, and excavation of physical structures, excluding the performance of routine maintenance.
- ◆ Professional Services: Services that require the provider to possess specialized skills, including the holding of advanced degrees and exercise of independent judgement.
- ◆ Non-Professional Services: Services that do not require the provider to possess specialized skills, including equipment repair, janitorial, auto repair, security, etc.
- ◆ Goods & Services: This category includes all purchases of physical items, including but not limited to equipment and materials, excluding land or a permanent interest in land; or services that do not typically require a provider to have experience in a specialized field or hold an advanced degree.

The following types of transactions were excluded from the analysis:

- ◆ Transactions outside of the study period.
- ◆ Transactions associated with non-procurement activities, for example:
  - Administrative items such as utility 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. If these boundaries are stretched too far, the universe of vendors becomes diluted with firms with no interest or history in working with the governmental entity, 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 governmental entity, and thus may also skew the prospective analyses of disparity.

### 4.3.1 Methodology

Based on *Croson* guidelines, the County should include in its relevant market area the geographic areas from which the majority of its purchases are procured. MGT recommends using New Jersey counties located within the New York-Newark-Jersey City, NY-NJ-PA MSA as the geographic unit of measurement by which the relevant market area is established. The choice of counties as the unit of measurement is based on the following: 1) the courts have accepted counties as a standard geographical unit of analysis

in conducting equal employment and disparity analyses; 2) 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; 3) U.S. Census data and other federal and county data are routinely collected and reported using county boundaries. The following presents the methodology used to determine the overall market area and relevant market area.

- ♦ **Overall Market Area.** To determine the full extent of the market area in which the County utilized firms, MGT staff determined geographic locations of utilized vendors by their county jurisdictions. The overall market area presents the total dollars awarded for each procurement category included within the scope of the study. The overall market area results by procurement category are presented in **Section 4.3.3** of this chapter.
- ♦ **Relevant 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. Based on the results of the market area analysis conducted for each business category, the recommended relevant market area are the 12 New Jersey counties within the New York-Newark-Jersey City, NY-NJ-PA MSA.

County Relevant Market Area	
Essex County, NJ	Union County, NJ
Passaic County, NJ	Somerset County, NJ
Bergen County, NJ	Sussex County, NJ
Middlesex County, NJ	Ocean County, NJ
Morris County, NJ	Hudson County, NJ
Monmouth County, NJ	Hunterdon County, NJ

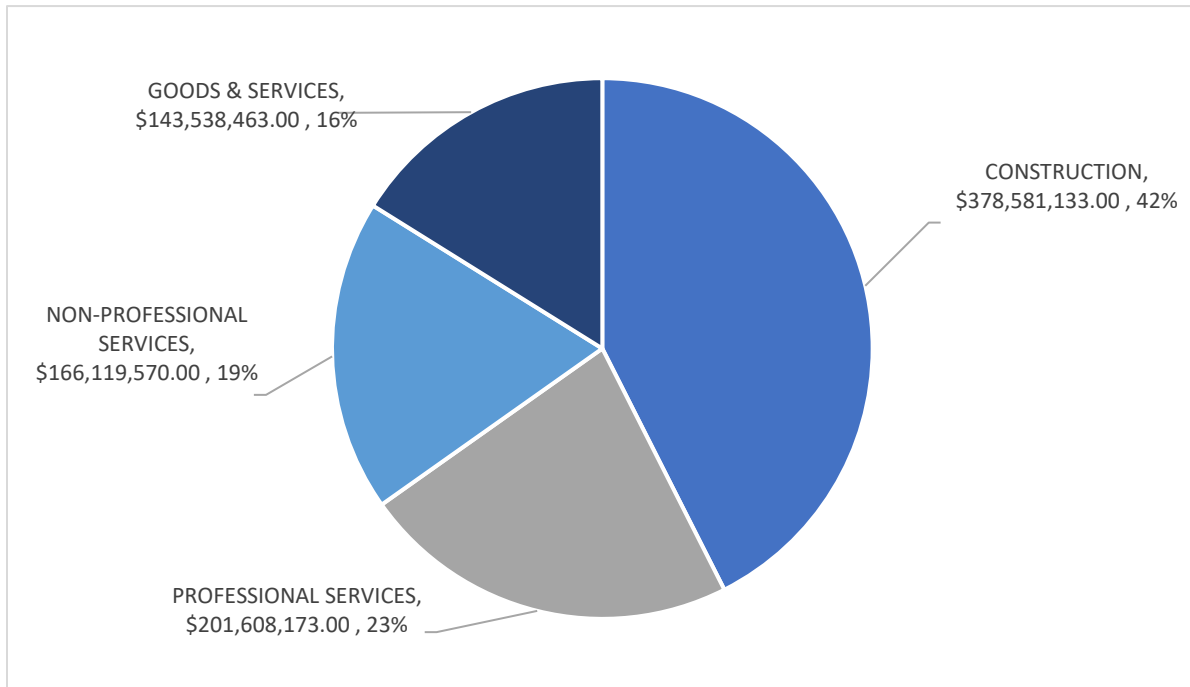
The dollars paid were summarized by county according to the location of each firm and by the services they provided to the County: Construction, Professional Services, Non-Professional Services, and Goods and Services. Corresponding market area analyses showing the dollars awarded by county within each procurement category are presented in **Appendix B, Detailed Market Area Analysis**.

### 4.3.2 Analysis and Identification of Relevant Market Area

As described in the preceding section, an overall market area was first established to account for all relevant County payments, after which more specific regions were analyzed to arrive at a relevant market area to support the goals of the study.

**Figure 4-1** shows \$889,847,339 were paid to firms located within the overall market area between July 1, 2016, to June 30, 2021.

EXHIBIT 4-1. SUMMARY OF DOLLARS, TOTAL CONTRACTS (PAID) BY PROCUREMENT CATEGORY, OVERALL MARKET AREA



Source: MGT developed a Master Prime File based on County's system between July 1, 2016, to June 30, 2021.

Narrowing the geographic scope, **Table 4-1** shows that firms located within the relevant market area accounted for 73.33 percent of spend across all procurement categories. When broken down by procurement categories, firms located within the relevant market area accounted for:

- ◆ 77.68 percent of the dollars awarded in Construction;
- ◆ 56.70 percent of the dollars awarded in Professional Services; and
- ◆ 84.36 percent of the dollars awarded in Non-Professional Services;
- ◆ 72.43 percent of the dollars awarded in Goods & Services.

TABLE 4-1. MARKET AREA ANALYSIS, CONTRACTS DISTRIBUTION OF DOLLARS BY BUSINESS CATEGORY, COUNTY MARKET AREA

<b>CONSTRUCTION</b>	<b>Amount</b>	<b>Percent</b>
<i>Inside MSA</i>	\$294,091,074.00	77.68%
Outside MSA	\$84,490,059.00	22.32%
<b>CONSTRUCTION, TOTAL</b>	<b>\$378,581,133.00</b>	<b>100.00%</b>
<b>PROFESSIONAL SERVICES</b>	<b>Amount</b>	<b>Percent</b>
<i>Inside MSA</i>	\$114,309,623.00	56.70%
Outside MSA	\$87,298,550.00	43.30%
<b>PROFESSIONAL SERVICES, TOTAL</b>	<b>\$201,608,173.00</b>	<b>100.00%</b>
<b>NON-PROFESSIONAL SERVICES</b>	<b>Amount</b>	<b>Percent</b>
<i>Inside MSA</i>	\$140,142,550.00	84.36%
Outside MSA	\$25,977,020.00	15.64%
<b>NON-PROFESSIONAL SERVICES, TOTAL</b>	<b>\$166,119,570.00</b>	<b>100.00%</b>
<b>GOODS &amp; SERVICES</b>	<b>Amount</b>	<b>Percent</b>
<i>Inside MSA</i>	\$103,971,433.00	72.43%
Outside MSA	\$39,567,030.00	27.57%
<b>GOODS &amp; SERVICES, TOTAL</b>	<b>\$143,538,463.00</b>	<b>100.00%</b>
<b>ALL BUSINESS CATEGORIES</b>	<b>Amount</b>	<b>Percent</b>
<i>Inside MSA</i>	\$652,514,680.00	73.33%
Outside MSA	\$237,332,659.00	26.67%
<b>ALL BUSINESS CATEGORIES, TOTAL</b>	<b>\$889,847,339.00</b>	<b>100.00%</b>

Source: MGT developed a Master Utilization Database based on County's financial system between July 1, 2016, to June 30, 2021.

Corresponding market area analyses showing the dollars awarded by county for each procurement category are presented in **Appendix B**.

### 4.3.3 Market Area Conclusions

Based on the market area analysis of the County's procurement activity, it was determined that the 12 New Jersey counties in the New York-Newark-Jersey City, NY-NJ-PA MSA should be used as the market area. This 12-County relevant market area represents a majority of the County's procurement activity, with 73.33 percent of the payments to vendors within this market area. Individually, all of the categories represent a majority of the County's procurement activity within the corresponding categories. Construction having the highest spend in the market area with 77.68 percent of payments; and Professional Services with the smallest at 56.70 percent. The definition of the relevant market area allows for detailed examinations of contracting activity with local vendors. The following section describes the results of this utilization analysis for the County.

## 4.4 Availability Estimations

Included in the sections that follow are descriptions of the approach and methodology used by MGT to estimate availability followed by the results of the data collection and estimation process.

### 4.4.1 Availability Methodology

As noted in **Chapter 2**, the Supreme Court stated in *Croson* that,

*“Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.”*

**Availability** is defined by courts as whether a firm is **willing and able** to work with the agency in question, as a method of constructing the universe of firms that might be considered in that agency’s procurement activities. Due to the statistical limitations of deriving a vendor’s ability, MGT will concentrate on the willingness of the vendors and not adjust availability due to capacity.

- ♦ **Willing** is reasonably presumed via the vendors’ active pursuit of registration to work with any public (government) agency, which drives the scope of identification for the sources of available firms considered.
- ♦ **Able**, or capability to perform work, is more loosely defined due to two obscuring factors: (1) the scalable nature of firms, who may reasonably add capacity to handle jobs beyond previous performance, and (2) the inherent concern that discrimination may have influenced the historic or existing scale of operation of the firms within the market. Therefore, the only confining measure of “ability” used to cull the universe of available vendors is that they have some presence within the defined market area.

Thus, 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 element in the determination of disparity. Post-*Croson* case law has not prescribed a single, particular approach to deriving vendor availability, and agencies have used a variety of means to estimate pools of available vendors that have withstood legal scrutiny; however, among the array of methods utilized, what is known as a “custom census” has received favorable endorsement. A custom census is characterized as a survey of a representative sample of firms offering the procured goods and services within an organization’s relevant market area to determine an estimate of the prospective *universe* of vendors.

MGT’s data assessment and evaluation of alternative methods for measuring the numbers of firms of the types and classifications available to work with the County confirmed that a version of a custom census of firms in the relevant market area would provide the most accurate representation of available firms. The custom census approach used by MGT in this instance required development of representative samples of firms within each of the four procurement categories identified for the study, each of which had to cover the defined 12-county geographic boundaries of the relevant market area.

First, an intensive examination of the County’s procurements was required to define the appropriate characteristics of the universe of prospective vendors, in terms of the types of goods and services offered. County procurements were assigned North American Industry Classification System (NAICS) codes that Dun & Bradstreet uses to classify firms’ primary lines of business. Dun & Bradstreet has a vast database of business data that includes information on companies, industries, and markets. These industry selections were then used to establish weighting criteria to be used in random selections of vendors to be surveyed. Target response thresholds were established for each industry subsector to ensure a 95 percent confidence interval and +/-5 percent margin of error for findings. Second, a survey was designed and administered to sampled firms by telephone and email to (1) determine and/or validate the race, ethnicity, and gender of ownership as well as (2) to elicit these representative firms’ interest in working with the County.

Results of the survey were then extrapolated to the full scale of the applicable universe to arrive at an estimation of available firms by ethnicity/gender classification and procurement category.

#### 4.4.2 Availability Analysis

Following the methodology prescribed in the previous section, MGT derived estimates for proportions of available firms for the racial, ethnic, and gender ownership classes and four defined procurement categories. Corresponding detailed analyses showing the availability of firms by race, ethnicity, and gender are presented in **Appendix C, Detailed Utilization, Availability, and Disparity Analyses**.

**Table 4-2** presents availability estimates spanning across all procurement categories, in aggregate. We observe that:

- ◆ African American firms represented 4.37 percent of available vendors;
- ◆ Asian American firms represented 3.36 percent of available vendors;
- ◆ Hispanic American firms represented 7.41 percent of available vendors;
- ◆ Native American firms represented 0.08 percent of available vendors;
- ◆ MBE firms represented 15.22 percent of available vendors;
- ◆ Nonminority female firms represented 16.53 percent of available vendors; and
- ◆ Non-M/WBE firms represented 68.25 percent of available vendors.

TABLE 4-2. ESTIMATION OF AVAILABLE FIRMS, ALL PROCUREMENT CATEGORIES

BUSINESS OWNERSHIP CLASSIFICATION	% OF AVAILABLE FIRMS
AFRICAN AMERICAN	4.37%
ASIAN AMERICAN	3.36%
HISPANIC AMERICAN	7.41%
NATIVE AMERICAN	0.08%
MBE	15.22%
NONMINORITY FEMALE	16.53%
<b>M/WBE</b>	<b>31.75%</b>
NON-M/WBE	68.25%

Source: Custom Census Analysis.  
Study Period: FY 17-21.

Within the **Construction** category (**Table 4-3**), availability estimates are as follows:

- ♦ African American firms represented 5.90 percent of available vendors;
- ♦ Asian American firms represented 3.68 percent of available vendors;
- ♦ Hispanic American firms represented 9.02 percent of available vendors;
- ♦ Native American firms represented 0.05 percent of available vendors;
- ♦ MBE firms represented 18.65 percent of available vendors;
- ♦ Nonminority female firms represented 15.64 percent of available vendors; and
- ♦ Non-M/WBE firms represented 65.71 percent of available vendors.

TABLE 4-3. ESTIMATION OF AVAILABLE FIRMS, CONSTRUCTION

BUSINESS OWNERSHIP CLASSIFICATION	% OF AVAILABLE FIRMS
AFRICAN AMERICAN	5.90%
ASIAN AMERICAN	3.68%
HISPANIC AMERICAN	9.02%
NATIVE AMERICAN	0.05%
MBE	18.65%
NONMINORITY FEMALE	15.64%
<b>M/WBE</b>	<b>34.29%</b>
NON-M/WBE	65.71%

Source: Custom Census Analysis.  
Study Period: FY 17-21.

In the **Professional Services** category, we observe the following availability proportions (Table 4-4):

- ♦ African American firms represented 3.58 percent of available vendors;
- ♦ Asian American firms represented 4.12 percent of available vendors;
- ♦ Hispanic American firms represented 7.88 percent of available vendors;
- ♦ Native American firms represented 0.27 percent of available vendors;
- ♦ MBE firms represented 15.84 percent of available vendors;
- ♦ Nonminority female firms represented 25.84 percent of available vendors; and
- ♦ Non-M/WBE firms represented 58.31 percent of available vendors.

TABLE 4-4. ESTIMATION OF AVAILABLE FIRMS, PROFESSIONAL SERVICES

BUSINESS OWNERSHIP CLASSIFICATION	% OF AVAILABLE FIRMS
AFRICAN AMERICAN	3.58%
ASIAN AMERICAN	4.12%
HISPANIC AMERICAN	7.88%
NATIVE AMERICAN	0.27%
MBE	15.84%
NONMINORITY FEMALE	25.84%
<b>M/WBE</b>	<b>41.69%</b>
NON-M/WBE	58.31%

Source: Custom Census Analysis.  
Study Period: FY 17-21.



In **Non-Professional Services (Table 4-5)**, availability estimates were as follows:

- ◆ African American firms represented 4.36 percent of available vendors;
- ◆ Asian American firms represented 1.41 percent of available vendors;
- ◆ Hispanic American firms represented 4.28 percent of available vendors;
- ◆ Native American firms represented 0.00 percent of available vendors;
- ◆ MBE firms represented 10.04 percent of available vendors;
- ◆ Nonminority female firms represented 13.22 percent of available vendors; and
- ◆ Non-M/WBE firms represented 76.74 percent of available vendors.

**TABLE 4-5. ESTIMATION OF AVAILABLE FIRMS, NON-PROFESSIONAL SERVICES**

BUSINESS OWNERSHIP CLASSIFICATION	% OF AVAILABLE FIRMS
AFRICAN AMERICAN	4.36%
ASIAN AMERICAN	1.41%
HISPANIC AMERICAN	4.28%
NATIVE AMERICAN	0.00%
MBE	10.04%
NONMINORITY FEMALE	13.22%
<b>M/WBE</b>	<b>23.26%</b>
NON-M/WBE	76.74%

Source: Custom Census Analysis.  
Study Period: FY 17-21.

Finally, in the **Goods & Services (Table 4-6)**, availability estimates consisted of:

- ◆ African American firms represented 1.47 percent of available vendors;
- ◆ Asian American firms represented 3.69 percent of available vendors;
- ◆ Hispanic American firms represented 6.12 percent of available vendors;
- ◆ Native American firms represented 0.00 percent of available vendors;
- ◆ MBE firms represented 11.28 percent of available vendors;
- ◆ Nonminority female firms represented 9.65 percent of available vendors; and
- ◆ Non-M/WBE firms represented 79.07 percent of available vendors.

**TABLE 4-6. ESTIMATION OF AVAILABLE FIRMS, GOODS & SERVICES**

BUSINESS OWNERSHIP CLASSIFICATION	% OF AVAILABLE FIRMS
AFRICAN AMERICAN	1.47%
ASIAN AMERICAN	3.69%
HISPANIC AMERICAN	6.12%
NATIVE AMERICAN	0.00%
MBE	11.28%
NONMINORITY FEMALE	9.65%
<b>M/WBE</b>	<b>20.93%</b>
NON-M/WBE	79.07%

Source: Custom Census Analysis.  
Study Period: FY 17-21.

# 5 Product Market, Utilization, and Disparity Analyses

## 5.1 Introduction

This chapter presents the results of MGT’s analyses regarding **utilization** and **disparity**. Utilization data are central to defining this market area and thus are first presented as a means of identifying the market area for consideration, and then are examined within that market area to assess assorted levels of contracting activity as the first step in the quantitative determination of disparity. Consistent with prior chapters, this analysis focuses on procurements in the categories of Construction, Professional Services, Non-Professional Services, and Goods and Services.

CHAPTER SECTIONS	
5.1	Introduction
5.2	Utilization Analysis
5.3	Disparity Analyses and Significance Testing
5.4	Conclusions

### 5.1.1 Analysis and Identification of Product Market

Based on the major categories and description of work on each contract, MGT assigned NAICS codes to each transaction based on the description of what was purchased for both primes and subcontractors. MGT assigned both NAICS code industry groups (4-digit level) and NAICS code industries (6-digit level). **Table 5-1** through **Table 5-4** show the payments and their associated weights for Construction, Professional Services, Non-Professional Services, and Goods & Services. **Appendix A, Detailed Product Market Analysis** shows the NAICS code industries (6-digit level) for the four procurement categories.

Overall, City procurements occur in **525** NAICS industry groups. In Construction, City procurements occur in **39** NAICS industry groups. In Professional Services, City procurements occur in **102** NAICS industry groups. In Non-Professional Services, City procurements occur in **170** NAICS industry groups. In Goods & Services, City procurements occur in **238** NAICS industry groups.

**Table 5-1** shows that for Construction, the top five NAICS codes make up 34.24 percent (\$304,711,094) of the total utilization and are distributed among the industry groups 236220, 238290, 238110, 236116, and 237310.

TABLE 5-1. SUMMARY OF DOLLARS, TOP 5 NAICS CODES, CONSTRUCTION

NAICS CODE	NAICS DESCRIPTION	AMOUNT	NAICS WEIGHT
236220	Commercial and Institutional Building Construction	\$148,399,970.77	39.20%
238290	Other Building Equipment Contractors	\$66,105,246.19	17.46%
238110	Poured Concrete Foundation and Structure Contractors	\$37,862,482.47	10.00%
236116	New Multifamily Housing Construction (except For-Sale Builders)	\$31,697,616.97	8.37%
237310	Highway, Street, and Bridge Construction	\$20,645,777.19	5.45%

Source: MGT developed a Master Utilization Database based on City's spending between July 1, 2016, to June 30, 2021.

For Professional Services, **Table 5-2**, the top five NAICS codes make up 14.77 percent (\$131,461,586) of the total utilization and are distributed among the industry groups 621498, 621610, 541330, 624190, and 541511.

TABLE 5-2. SUMMARY OF DOLLARS, TOP 5 NAICS CODES, PROFESSIONAL SERVICES

NAICS CODE	NAICS DESCRIPTION	AMOUNT	NAICS WEIGHT
621498	All Other Outpatient Care Centers	\$64,725,936.86	32.10%
621610	Home Health Care Services	\$22,666,501.14	11.24%
541330	Engineering Services	\$16,425,812.97	8.15%
624190	Other Individual and Family Services	\$15,820,813.31	7.85%
541511	Custom Computer Programming Services	\$11,822,521.35	5.86%

Source: MGT developed a Master Utilization Database based on City's spending between July 1, 2016, to June 30, 2021.

For Non-Professional Services, **Table 5-3**, the top five NAICS codes make up 10.41 percent (\$92,602,919) of the total utilization and are distributed among the industry groups 722310, 561730, 485119, 722511, and 485991.

TABLE 5-3 SUMMARY OF DOLLARS, TOP 5 NAICS CODES, NON-PROFESSIONAL SERVICES

NAICS CODE	NAICS DESCRIPTION	AMOUNT	NAICS WEIGHT
722310	Food Service Contractors	\$41,384,295.70	24.91%
561730	Landscaping Services	\$21,477,999.03	12.93%
485119	Other Urban Transit Systems	\$10,559,763.67	6.36%
722511	Full-Service Restaurants	\$9,794,504.45	5.90%

NAICS CODE	NAICS DESCRIPTION	AMOUNT	NAICS WEIGHT
485991	Special Needs Transportation	\$9,386,355.24	5.65%

Source: MGT developed a Master Utilization Database based on City’s spending between July 1, 2016, to June 30, 2021.

For Goods & Services, **Table 5-4**, the top five NAICS codes make up 6.34 percent (\$56,421,119) of the total utilization and are distributed among the industry groups 424120, 423430, 238120, 446110, and 441110.

TABLE 5-4. PRODUCT MARKET DISTRIBUTION OF DOLLARS BY NAICS CODE GOODS & SERVICES

NAICS CODE	NAICS DESCRIPTION	AMOUNT	NAICS WEIGHT
424120	Stationery and Office Supplies Merchant Wholesalers	\$14,545,959.91	10.13%
423430	Computer and Computer Peripheral Equipment and Software Merchant Wholesalers	\$13,137,164.82	9.15%
238120	Structural Steel and Precast Concrete Contractors	\$11,567,666.97	8.06%
446110	Pharmacies and Drug Stores	\$9,239,299.48	6.44%
441110	New Car Dealers	\$7,931,027.58	5.53%

Source: MGT developed a Master Utilization Database based on City’s spending between July 1, 2016, to June 30, 2021.

## 5.2 Utilization Analysis

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 County’s contracting and procurement activities.

The utilization analysis is based on the defined relevant market area, as described in the preceding sections of this chapter. The payments data included within this analysis encompass both (1) total dollars paid to primes located within the market area (excluding all subcontracting payments), and (2) dollars allocated to subcontractors located within the market area, independent of their respective prime contractor location. Analysis of these data is broken down by the procurement categories of Construction, Professional Services, Non-Professional Services, and Goods and Services and encompasses payments between July 1, 2016, to June 30, 2021.

Included in the utilization analysis are cooperative agreement purchases in the total utilization during the study. The County has less flexibility buying from minority and women businesses. During the study period \$50 million was spent with the cooperative agreements and \$17 million was spent with M/WBE firms through cooperative agreements. The County could assist M/WBE firms with guidance and coaching on how they can become associated with cooperative purchases.

## 5.2.1 Classification of Firms

Firms included in the utilization analysis have been assigned to business owner classifications according to the definitions provided below.<sup>116</sup>

- ♦ **M/WBE Firms.** In this study, businesses classified as minority- and women-owned firms (M/WBE) are firms that 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 women. These groups were defined according to the 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 Female:** U.S. citizens or lawfully admitted permanent residents who are non-Hispanic white female. Minority females were included in their respective minority category.

Minority female- and male-owned firms were classified and assigned to their corresponding minority groups. For example, a Hispanic American female- or Hispanic American male-owned firm was assigned to the Hispanic American-owned firm minority group.

- ♦ **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.
- ♦ **MBE Firms.** All minority-owned firms, regardless of gender.
- ♦ **WBE Firms.** All nonminority women-owned firms.

## 5.2.2 Overall Utilization

Table 5-5 shows the M/WBE utilization amounted to 10.54 percent of total awards. Corresponding detailed analyses showing the utilization of firms by business ownership classification are presented in **Appendix C, Detailed Utilization, Availability, and Disparity Analyses.**

---

<sup>116</sup> Business ownership classification was based on the race, ethnicity, and gender classification of the owner during the study period.

TABLE 5-5. UTILIZATION ANALYSIS BY BUSINESS OWNERSHIP CLASSIFICATION,  
ALL PROCUREMENT CATEGORIES

BUSINESS OWNERSHIP CLASSIFICATION	ALL PROCUREMENT CATEGORIES	
	Dollars (\$)	Percent (%)
African Americans	\$2,893,381.00	0.33%
Asian American	\$26,194,607.00	2.94%
Hispanic Americans	\$3,139,187.00	0.35%
Native Americans	\$0.00	0.00%
<b>Total MBE Firms</b>	<b>\$32,227,175.00</b>	<b>3.62%</b>
Nonminority Females	\$61,526,433.00	6.91%
<b>Total M/WBE Firms</b>	<b>\$93,753,615.00</b>	<b>10.54%</b>
Non-M/WBE Firms	\$796,093,721.00	89.46%
<b>TOTAL</b>	<b>\$889,847,339.00</b>	<b>100.00%</b>

Source: MGT developed a Master Utilization Database based on County’s system between July 1, 2016, to June 30, 2021.

### Utilization by Procurement Category

The next series of tables show the summary results of MGT’s utilization analysis of each of the procurement categories.

Beginning with an examination of Construction,

**Table 5-6** shows the utilization of M/WBE firms was 4.16 percent. Otherwise, utilization for specific classifications was:

- ◆ 0.00 percent for African American firms;
- ◆ 1.22 percent for Asian American firms;
- ◆ 0.59 percent for Hispanic American firms;
- ◆ 0.00 percent for Native American firms;
- ◆ 1.81 percent for MBE firms;
- ◆ 2.34 percent for Nonminority female firms; and
- ◆ 95.84 percent for Non-M/WBE firms.

TABLE 5-6 UTILIZATION ANALYSIS BY BUSINESS OWNERSHIP CLASSIFICATION, CONSTRUCTION

BUSINESS OWNERSHIP CLASSIFICATION	CONSTRUCTION	
	Dollars (\$)	Percent (%)
African Americans	\$2,060.00	0.00%
Asian American	\$4,624,999.00	1.22%
Hispanic Americans	\$2,243,374.00	0.59%
Native Americans	\$0.00	0.00%
<b>Total MBE Firms</b>	<b>\$6,870,433.00</b>	<b>1.81%</b>
Nonminority Females	\$8,874,390.00	2.34%
<b>Total M/WBE Firms</b>	<b>\$15,744,823.00</b>	<b>4.16%</b>
Non-M/WBE Firms	\$362,836,310.00	95.84%
<b>TOTAL</b>	<b>\$378,581,133.00</b>	<b>100.00%</b>

Source: MGT developed a Master Prime File based on County's system between July 1, 2016, to June 30, 2021.

Table 5-7 shows the utilization of M/WBE firms was 10.30 percent in Professional Services. Utilization for specific classifications was:

- ◆ 1.35 percent for African American firms;
- ◆ 6.06 percent for Asian American firms;
- ◆ 0.15 percent for Hispanic American firms;
- ◆ 0.00 percent for Native American firms;
- ◆ 7.56 percent for MBE firms;
- ◆ 2.74 percent for Nonminority female firms; and
- ◆ 89.70 percent for Non-M/WBE firms.

TABLE 5-7 UTILIZATION ANALYSIS BY BUSINESS OWNERSHIP CLASSIFICATION, PROFESSIONAL SERVICES

BUSINESS OWNERSHIP CLASSIFICATION	PROFESSIONAL SERVICES	
	Dollars (\$)	Percent (%)
African Americans	\$2,730,829.00	1.35%
Asian American	\$12,214,346.00	6.06%
Hispanic Americans	\$299,755.00	0.15%
Native Americans	\$0.00	0.00%
<b>Total MBE Firms</b>	<b>\$15,244,930.00</b>	<b>7.56%</b>
Nonminority Females	\$5,528,954.00	2.74%
<b>Total M/WBE Firms</b>	<b>\$20,773,884.00</b>	<b>10.30%</b>
Non-M/WBE Firms	\$180,834,289.00	89.70%
<b>TOTAL</b>	<b>\$201,608,173.00</b>	<b>100.00%</b>

Source: MGT developed a Master Prime File based on County's system between July 1, 2016, to June 30, 2021.

Table 5-8 shows the utilization of M/WBE firms was 13.43 percent in Non-Professional Services. Individually, the M/WBE utilization was:

- ◆ 0.09 percent for African American firms;
- ◆ 0.80 percent for Asian American firms;
- ◆ 0.27 percent for Hispanic American firms;
- ◆ 0.00 percent for Native American firms;
- ◆ 1.15 percent for MBE firms;
- ◆ 12.28 percent for Nonminority female firms; and
- ◆ 86.57 percent for Non-M/WBE firms.

TABLE 5-8 UTILIZATION ANALYSIS BY BUSINESS OWNERSHIP CLASSIFICATION, NON-PROFESSIONAL SERVICES

BUSINESS OWNERSHIP CLASSIFICATION	NON-PROFESSIONAL SERVICES	
	Dollars (\$)	Percent (%)
African Americans	\$144,353.00	0.09%
Asian American	\$1,320,712.00	0.80%
Hispanic Americans	\$446,086.00	0.27%
Native Americans	\$0.00	0.00%
<b>Total MBE Firms</b>	<b>\$1,911,151.00</b>	<b>1.15%</b>
Nonminority Females	\$20,398,674.00	12.28%
<b>Total M/WBE Firms</b>	<b>\$22,309,825.00</b>	<b>13.43%</b>
Non-M/WBE Firms	\$143,809,745.00	86.57%
<b>TOTAL</b>	<b>\$166,119,570.00</b>	<b>100.00%</b>

Source: MGT developed a Master Prime File based on County's system between July 1, 2016, to June 30, 2021.

Table 5-9 shows the utilization of M/WBE firms was 24.33 percent in Goods & Services. Individually, the M/WBE utilization was:

- ◆ 0.01 percent for African American firms;
- ◆ 5.60 percent for Asian American firms;
- ◆ 0.10 percent for Hispanic American firms;
- ◆ 0.00 percent for Native American firms;
- ◆ 5.71 percent for MBE firms;
- ◆ 18.62 percent for Nonminority female firms; and
- ◆ 75.67 percent for Non-M/WBE firms.



TABLE 5-9 UTILIZATION ANALYSIS BY BUSINESS OWNERSHIP CLASSIFICATION, GOODS & SERVICES

BUSINESS OWNERSHIP CLASSIFICATION	GOODS & SERVICES	
	Dollars (\$)	Percent (%)
African Americans	\$16,141.00	0.01%
Asian American	\$8,034,553.00	5.60%
Hispanic Americans	\$149,974.00	0.10%
Native Americans	\$0.00	0.00%
<b>Total MBE Firms</b>	<b>\$8,200,668.00</b>	<b>5.71%</b>
Nonminority Females	\$26,724,415.00	18.62%
<b>Total M/WBE Firms</b>	<b>\$34,925,083.00</b>	<b>24.33%</b>
Non-M/WBE Firms	\$108,613,380.00	75.67%
<b>TOTAL</b>	<b>\$143,538,463.00</b>	<b>100.00%</b>

Source: MGT developed a Master Prime File based on County's system between July 1, 2016, to June 30, 2021.

## Utilization Conclusions

The utilization analysis shows that M/WBE firms are utilized at lower rates than their non-M/WBE counterparts. Overall, 10.54 percent of the County awards went to M/WBE firms, while 89.46 percent went to non-M/WBE firms. While M/WBE utilization is low throughout the views on utilization that have been presented in this chapter, the proportion of firms willing and able to provide services to the County are a critical qualifying context in any determinations of disparity. Availability and resulting disparity ratios are presented in **Section 5.3**, which follows, to provide more definitive conclusions in this respect.

## 5.3 Disparity Analyses and Significance Testing

Building on our understanding of the County's vendor utilization (**Section 5.2**) and the availability estimates presented in the previous chapter (**Section 4.4**), we can use this information to identify potential disparities in the County's procurement. A brief 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

Disparity, in this context, is the analysis of the differences between the respective availability of minority- and women-owned firms (as presented in **Chapter 4**) and the utilization of those firms (**Section 5.2**). Thus, MGT calculated disparity indices to examine whether minority- and women-owned firms received a proportional share of dollars based on the respective availability of minority- and women-owned firms located in the study's defined relevant market area (as presented in **Chapter 4**).

MGT's disparity index methodology yields a value that is easily calculable, understandable in its interpretation, and universally comparable such that a disparity in utilization within minority- and women-owned firms can be assessed with reference to the utilization of nonminority- and male-owned firms.

The **disparity index** is a simple proportional calculation that divides utilization rates (percent of dollars awarded to firms by class) by their associated availability (percent of firms available to work, within that same class) and multiplies this value by 100. Thus, a disparity index value of zero (0.00) indicates absolutely no utilization and, therefore, absolute disparity. A disparity index of 100 indicates that utilization is perfectly proportionate to availability, therefore indicating the absence of disparity (that is, all things being equal). Alternately, firms are considered **underutilized** if the disparity indices are less than 100, and **overutilized** if the indices are above 100.

**Disparity Index =**  
 **$\%U_{m,p_i} \div \%A_{m,p_i} \times 100$**

**$U_{m,p_i}$**  = utilization of minorities- and women-owned firms<sub>i</sub> for procurement;

**$A_{m,p_i}$**  = availability of minorities- and women-owned firms<sub>i</sub> for procurement;

Since there is no standardized measurement to evaluate the levels of underutilization or overutilization within a procurement context, MGT’s methodology to measure disparity, if disparity is found, is based on the EEOC’s “80 percent rule.”<sup>117</sup> In the employment discrimination framework, an employment disparity index below 80 indicates a “substantial disparity.” The Supreme Court has accepted the use of the “80 percent rule” in *Connecticut v. Teal* (*Teal*), 457 U.S. 440 (1982).<sup>118</sup> Therefore, following a similar pattern, firms are considered substantially underutilized (substantial disparity) if the disparity indices are 80 or less.

Standard deviation tests or testing for **statistical significance**, in this context, is the analysis to determine the significance of the difference between the utilization of minority- and women-owned firms and the availability of those firms. This analysis can determine whether the disparities are substantial or statistically significant, which lends further statistical support to a finding of discrimination. The following explains MGT’s methodology.

Standard deviation measures the probability that a result is a random deviation from a predicted result, where the greater the number of standard deviations, the lower the probability the result is a random one. The accepted standard used by Courts in disparity testing has been two standard deviations. That is, if there is a result that falls within two standard deviations, then one can assume that the results are nonsignificant, or that no disparity has been confidently established.

**Statistical Significance Testing**

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

t = the t-statistic

u = the ratio of minorities- and women-owned firms’ dollars compared to total dollars  
a = the ratio of M/W/DBE firms to all firms  
c<sub>i</sub> = the dollar amount.

<sup>117</sup> Equal Employment Opportunity Commission, *Uniform Guidelines on Employee Selection Procedures*, Section 4, Part D, “Adverse impact and the ‘four-fifths rule.’”

<sup>118</sup> In *Teal* and other affirmative action cases, the terms “adverse impact,” “disparate impact,” and “discriminatory impact” are used interchangeably to characterize values of 80 and below.

Regarding the use of statistical significance in the disparity study context the National Cooperative Highway Research Program Report 644<sup>119</sup> notes that:

- ♦ “...for statistical disparities to be taken as legally dispositive in the discrimination context, they should be (a) statistically significant and (b) “substantively” significant. Substantive significance is taken to mean, for example, a DBE utilization measure that is less than or equal to 80% of the corresponding DBE availability measure.”
- ♦ “In discrimination cases, the courts have usually required p-values of 5% or less to establish statistical significance in a two-sided case.”

Note that p-values are used to determine whether the differences between two populations feature legitimate differences (that would be sustained if we continued to collect more observations), or if the variation between them is simply a product of normal random variation between observations that would be washed out if we collected more data. A p-value of less than 0.05 suggests it is highly unlikely that the differences between two groups are just driven by chance. The use of the t-test to calculate p-values for disparity indices was approved by the Fourth Circuit in *H.B. Rowe v. Tippet*, 615 F.3d 233, 244-45 (4<sup>th</sup> Cir 2010).

Thus, MGT applies two major tests to determine statistical significance: (1) whether the disparity index is less than or equal to 80 percent of respective M/WBE availability, which is labeled “substantial disparity”, and (2) whether the disparity index passes the t-test determination of statistical significance. In cases where one, or especially both, measures hold true, a remedy is typically deemed to be justifiable by courts, making these results critical outcomes of the subsequent analyses.

### 5.3.2 Disparity Analyses and Statistical Significance Testing

Included in this section are inputs and calculations of disparity indices and significance testing for each of the procurement categories and ownership classifications. Corresponding detailed analyses showing the disparity analysis of firms by race, ethnicity, and gender are presented in **Appendix C**. Analysis of disparities across all procurement categories in **Table 5-10** reveals:

- ♦ African American firms were underutilized with a substantial and statistically significant disparity index of 7.44;
- ♦ Asian American firms were underutilized with a disparity index of 87.66;
- ♦ Hispanic American firms were underutilized with a substantial and statistically significant disparity index of 4.76;
- ♦ Native American firms were underutilized with a disparity index of 0.00;
- ♦ MBE firms were underutilized with a substantial and statistically significant disparity index of 23.80;
- ♦ Nonminority female firms were underutilized with a substantial and statistically significant disparity index of 41.82; and
- ♦ M/WBE firms were underutilized with a substantial and statistically significant disparity index of 33.18.

---

<sup>119</sup> Transportation Research Board of the National Academies, National Cooperative Highway Research Program Report 644, *Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program* (2010), pages 49-50.

TABLE 5-10. DISPARITY INDICES AND SIGNIFICANCE TESTING, ALL PROCUREMENT CATEGORIES

Business Ownership Classification	Utilization	Availability	Disparity Index	Disparity Impact	Statistical Significance	Disparity Conclusion
<b>African Americans</b>	<b>0.33%</b>	<b>4.37%</b>	<b>7.44</b>	<b>Underutilization</b>	<b>***</b>	<b>Disparity</b>
Asian Americans	2.94%	3.36%	87.66	Underutilization		Disparity
<b>Hispanic Americans</b>	<b>0.35%</b>	<b>7.41%</b>	<b>4.76</b>	<b>Underutilization</b>	<b>***</b>	<b>Disparity</b>
Native Americans	0.00%	0.08%	0.00	Underutilization		Disparity
<b>Total MBE Firms</b>	<b>3.62%</b>	<b>15.22%</b>	<b>23.80</b>	<b>Underutilization</b>	<b>***</b>	<b>Disparity</b>
<b>Nonminority Females</b>	<b>6.91%</b>	<b>16.53%</b>	<b>41.82</b>	<b>Underutilization</b>	<b>***</b>	<b>Disparity</b>
<b>Total M/WBE Firms</b>	<b>10.54%</b>	<b>31.75%</b>	<b>33.18</b>	<b>Underutilization</b>	<b>***</b>	<b>Disparity</b>
Non-M/WBE Firms	89.46%	68.25%	131.09	Overutilization	***	No Disparity

Note: Disparity index values may vary slightly from calculations of depicted figures due to rounding of presented levels of utilization and availability.

\* indicates an adverse disparity that is statistically significant at the 15% level or better (85% confidence).

\*\* indicates the disparity is significant at a 10% level or better (90% confidence).

\*\*\* indicates significance at a 5% level or better (95% confidence).

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

The calculation of disparity indices and significance testing for the **Construction** procurement category are depicted in **Table 5-11**.

Relevant findings include:

- ♦ African American firms were underutilized with a disparity index of 0.01;
- ♦ Asian American firms were underutilized with a disparity index of 33.17;
- ♦ Hispanic American firms were underutilized with a disparity index of 6.57;
- ♦ Native American firms were underutilized with a disparity index of 0.00;
- ♦ MBE firms were underutilized with a substantial and statistically significant disparity index of 9.73;
- ♦ Nonminority female firms were underutilized with a substantial and statistically significant disparity index of 14.99; and
- ♦ M/WBE firms were underutilized with a substantial and statistically significant disparity index of 12.13.

TABLE 5-11 DISPARITY INDICES AND SIGNIFICANCE TESTING, CONSTRUCTION

Business Ownership Classification	Utilization	Availability	Disparity Index	Disparity Impact	Statistical Significance	Disparity Conclusion
African Americans	0.00%	5.90%	0.01	Underutilization		Disparity
Asian Americans	1.22%	3.68%	33.17	Underutilization		Disparity
Hispanic Americans	0.59%	9.02%	6.57	Underutilization		Disparity
Native Americans	0.00%	0.05%	0.00	Underutilization		Disparity
<b>Total MBE Firms</b>	<b>1.81%</b>	<b>18.65%</b>	<b>9.73</b>	<b>Underutilization</b>	<b>***</b>	<b>Disparity</b>
<b>Nonminority Females</b>	<b>2.34%</b>	<b>15.64%</b>	<b>14.99</b>	<b>Underutilization</b>	<b>**</b>	<b>Disparity</b>
<b>Total M/WBE Firms</b>	<b>4.16%</b>	<b>34.29%</b>	<b>12.13</b>	<b>Underutilization</b>	<b>***</b>	<b>Disparity</b>
Non-M/WBE Firms	95.84%	65.71%	145.86	Overutilization	***	No Disparity

Note: Disparity index values may vary slightly from calculations of depicted figures due to rounding of presented levels of utilization and availability.

\* indicates an adverse disparity that is statistically significant at the 15% level or better (85% confidence).

\*\* indicates the disparity is significant at a 10% level or better (90% confidence).

\*\*\* indicates significance at a 5% level or better (95% confidence).

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

Disparity indices and significance testing for **Professional Services** appear in **Table 5-12**. Noteworthy observations include:

- ♦ African American firms were underutilized with a substantial and statistically significant disparity index of 37.85;
- ♦ Hispanic American firms were underutilized with a substantial and statistically significant disparity index of 1.89;
- ♦ Native American firms were underutilized with a disparity index of 0.00;
- ♦ MBE firms were underutilized with a substantial and statistically significant disparity index of 47.73;
- ♦ Nonminority female firms were underutilized with a substantial and statistically significant disparity index of 10.61; and
- ♦ M/WBE firms were underutilized with a substantial and statistically significant disparity index of 24.72.

TABLE 5-12 DISPARITY INDICES AND SIGNIFICANCE TESTING, PROFESSIONAL SERVICES

Business Ownership Classification	Utilization	Availability	Disparity Index	Disparity Impact	Statistical Significance	Disparity Conclusion
<b>African Americans</b>	<b>1.35%</b>	<b>3.58%</b>	<b>37.85</b>	<b>Underutilization</b>	<b>***</b>	<b>Disparity</b>
Asian Americans	6.06%	4.12%	147.19	Overutilization	**	No Disparity
<b>Hispanic Americans</b>	<b>0.15%</b>	<b>7.88%</b>	<b>1.89</b>	<b>Underutilization</b>	<b>***</b>	<b>Disparity</b>
Native Americans	0.00%	0.27%	0.00	Underutilization		Disparity
<b>Total MBE Firms</b>	<b>7.56%</b>	<b>15.84%</b>	<b>47.73</b>	<b>Underutilization</b>	<b>***</b>	<b>Disparity</b>
<b>Non-Minority Females</b>	<b>2.74%</b>	<b>25.84%</b>	<b>10.61</b>	<b>Underutilization</b>	<b>***</b>	<b>Disparity</b>
<b>Total M/WBE Firms</b>	<b>10.30%</b>	<b>41.69%</b>	<b>24.72</b>	<b>Underutilization</b>	<b>***</b>	<b>Disparity</b>
Non-M/WBE Firms	89.70%	58.31%	153.82	Overutilization	***	No Disparity

Note: Disparity index values may vary slightly from calculations of depicted figures due to rounding of presented levels of utilization and availability.

\* indicates an adverse disparity that is statistically significant at the 15% level or better (85% confidence).

\*\* indicates the disparity is significant at a 10% level or better (90% confidence).

\*\*\* indicates significance at a 5% level or better (95% confidence).

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

Disparity indices and significance testing for the **Non-Professional Services** sector are presented in **Table 5-13**. Some findings include that:

- ♦ African American firms were underutilized with a substantial and statistically significant disparity index of 2.00;
- ♦ Asian American firms were underutilized with a disparity index of 56.27;
- ♦ Hispanic American firms were underutilized with a substantial and statistically significant disparity index of 6.28;
- ♦ Due to no utilization and availability of Native Americans, proper disparity could not be analyzed;
- ♦ MBE firms were underutilized with a substantial and statistically significant disparity index of 11.45;
- ♦ Nonminority female firms were underutilized with a disparity index of 92.88; and
- ♦ M/WBE firms were underutilized with a substantial and statistically significant disparity index of 57.73.

TABLE 5-13 DISPARITY INDICES AND SIGNIFICANCE TESTING, NON-PROFESSIONAL SERVICES

Business Ownership Classification	Utilization	Availability	Disparity Index	Disparity Impact	Statistical Significance	Disparity Conclusion
<b>African Americans</b>	<b>0.09%</b>	<b>4.36%</b>	<b>2.00</b>	<b>Underutilization</b>	<b>***</b>	<b>Disparity</b>
Asian Americans	0.80%	1.41%	56.27	Underutilization		Disparity
<b>Hispanic Americans</b>	<b>0.27%</b>	<b>4.28%</b>	<b>6.28</b>	<b>Underutilization</b>	<b>***</b>	<b>Disparity</b>
Native Americans	0.00%	0.00%	N/A	N/A		Disparity
<b>Total MBE Firms</b>	<b>1.15%</b>	<b>10.04%</b>	<b>11.45</b>	<b>Underutilization</b>	<b>***</b>	<b>Disparity</b>
Nonminority Females	12.28%	13.22%	92.88	Underutilization		Disparity
<b>Total M/WBE Firms</b>	<b>13.43%</b>	<b>23.26%</b>	<b>57.73</b>	<b>Underutilization</b>	<b>***</b>	<b>Disparity</b>
Non-M/WBE Firms	86.57%	76.74%	112.82	Overutilization	***	No Disparity

Note: Disparity index values may vary slightly from calculations of depicted figures due to rounding of presented levels of utilization and availability.

\* indicates an adverse disparity that is statistically significant at the 15% level or better (85% confidence).

\*\* indicates the disparity is significant at a 10% level or better (90% confidence).

\*\*\* indicates significance at a 5% level or better (95% confidence).

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

Table 5-14 presents disparity indices and significance testing for the **Goods & Services** sector.

- ♦ African American firms were underutilized with a substantial and statistically significant disparity index of 0.77;
- ♦ Hispanic American firms were underutilized with a substantial and statistically significant disparity index of 1.71;
- ♦ Due to no utilization and availability of Native Americans, proper disparity could not be analyzed;
- ♦ MBE firms were underutilized with a substantial and statistically significant disparity index of 50.65;
- ♦ Nonminority female firms were underutilized with a disparity index of 193.02; and
- ♦ M/WBE firms were underutilized with a substantial and statistically significant disparity index of 116.27.

TABLE 5-14 DISPARITY INDICES AND SIGNIFICANCE TESTING, GOODS & SERVICES

Business Ownership Classification	Utilization	Availability	Disparity Index	Disparity Impact	Statistical Significance	Disparity Conclusion
<b>African Americans</b>	<b>0.01%</b>	<b>1.47%</b>	<b>0.77</b>	<b>Underutilization</b>	<b>***</b>	<b>Disparity</b>
Asian Americans	5.60%	3.69%	151.78	Overutilization	**	No Disparity
<b>Hispanic Americans</b>	<b>0.10%</b>	<b>6.12%</b>	<b>1.71</b>	<b>Underutilization</b>	<b>***</b>	<b>Disparity</b>
Native Americans	0.00%	0.00%	N/A	N/A		N/A
<b>Total MBE Firms</b>	<b>5.71%</b>	<b>11.28%</b>	<b>50.65</b>	<b>Underutilization</b>	<b>***</b>	<b>Disparity</b>
Nonminority Females	18.62%	9.65%	193.02	Overutilization	***	No Disparity
Total M/WBE Firms	24.33%	20.93%	116.27	Overutilization	*	No Disparity
<b>Non-M/WBE Firms</b>	<b>75.67%</b>	<b>79.07%</b>	<b>95.69</b>	<b>Underutilization</b>	<b>*</b>	<b>Disparity</b>

Note: Disparity index values may vary slightly from calculations of depicted figures due to rounding of presented levels of utilization and availability.

\* indicates an adverse disparity that is statistically significant at the 15% level or better (85% confidence).

\*\* indicates the disparity is significant at a 10% level or better (90% confidence).

\*\*\* indicates significance at a 5% level or better (95% confidence).

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



## 5.4 Conclusions

The calculations of availability and disparity within this chapter and the preceding depiction of utilization serve as the foundation for the future of the County M/WBE program. These analyses provide the quantitative legal justification for any current or future remedies to assist M/WBE enterprises within the market. As summarized in the table below (**Table 5-15**), disparities between utilization and availability have been observed for most procurement and M/WBE categories included within the scope of the study, both in terms of the order of magnitude (Disparity Indices less than or equal to 80) and statistical significance.

TABLE 5-15. DISPARITY ANALYSIS SUMMARY

Procurement Category	All	CONSTRUCTION	PROFESSIONAL SERVICES	NON-PROFESSIONAL SERVICES	GOODS & SERVICES
African Americans	<b>Disparity***</b>	Disparity	<b>Disparity***</b>	<b>Disparity***</b>	<b>Disparity***</b>
Asian Americans	Disparity	Disparity	No Disparity	Disparity	No Disparity
Hispanic Americans	<b>Disparity***</b>	Disparity	<b>Disparity***</b>	<b>Disparity***</b>	<b>Disparity***</b>
Native Americans	Disparity	Disparity	Disparity	N/A	N/A
<b>Total MBE Firms</b>	<b>Disparity***</b>	<b>Disparity***</b>	<b>Disparity***</b>	<b>Disparity***</b>	<b>Disparity***</b>
Non-Minority Females	<b>Disparity***</b>	<b>Disparity**</b>	<b>Disparity***</b>	Disparity	No Disparity
<b>Total M/WBE Firms</b>	<b>Disparity***</b>	<b>Disparity***</b>	<b>Disparity***</b>	<b>Disparity***</b>	No Disparity

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

**BOLD** indicates substantial statistically significant disparity.

\* indicates an adverse disparity that is statistically significant at the 15% level or better (85% confidence).

\*\* indicates the disparity is significant at a 10% level or better (90% confidence).

\*\*\* indicates significance at a 5% level or better (95% confidence).

# 6 Private Sector Analysis

## 6.1 Introduction

The **Legal Framework** presented in **Appendix A** explains that a government entity must have evidence of active or passive discrimination to permit the institution of a minority- and woman-owned business enterprise (M/WBE) program. Courts 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. This chapter focuses on the overarching question:

- ◆ ***Does evidence of discrimination in the private sector marketplace support Essex County’s continuance of its MBE program to avoid becoming a passive participant in discrimination?***

CHAPTER SECTIONS	
6.1	Introduction
6.2	Private Sector Disparities in SBO Census Data
6.3	Private Sector Disparities in ABS Census Data
6.4	Analysis of Race, Ethnicity, and Gender Effects on Self-Employment and Earnings
6.5	Access to Credit
6.6	Conclusions

*Passive discrimination* describes a circumstance where a public entity resides in a market with measurable discrimination in the public and private sector but fails to take proactive actions to implement remedies. Courts have favorably looked upon private sector analyses as support to determine *compelling interest* in M/WBE programs:

- ◆ Defining passive participation, Justice O’Connor 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.”<sup>120</sup>
- ◆ In *Adarand*, the Tenth Circuit favorably cited evidence of capital market discrimination as relevant in establishing the factual predicate for the federal DBE program.<sup>121</sup>
- ◆ *Concrete Works IV* found that barriers to business formation were relevant insofar as the evidence demonstrated that M/WBEs were “precluded from the outset from competing for public construction contracts.”<sup>122</sup>
- ◆ In *Adarand*, the courts concluded a compelling interest for a government DBE program in part on evidence of private-sector discrimination.<sup>123</sup>
- ◆ Along related lines, a court found regression analysis of census data to be relevant evidence showing barriers to M/WBE formation.<sup>124</sup>

<sup>120</sup> *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1989).

<sup>121</sup> *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1168-70 (10<sup>th</sup> Cir. 2000).

<sup>122</sup> *Concrete Works of Colo. v. City & Cnty. of Denver*, 321 F.3d 950, 977 (10<sup>th</sup> Cir. 2003).

<sup>123</sup> *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000)

<sup>124</sup> *Concrete Works IV*, 321 F.3d 950, 967-69 (10<sup>th</sup> Cir. 2003).

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

These court decisions support an investigation into the existence of discrimination in the private sector to determine whether or not evidence exists warranting M/WBE programs. This chapter provides evidence for the overarching question of whether or not Essex County has a continued compelling interest in maintaining its MBE program based on discriminatory circumstances observed in the private sector. Three sources of data can help to answer the overarching research question regarding disparities in the private sector:

- ◆ **2012 Census Survey of Business Owners (SBO) and 2017 Census Annual Business Survey (ABS) data, which are used to determine:**
  1. *Do marketplace disparities exist in the private sector regarding revenue within similar Essex County procurement categories for firms owned by minorities or females?*
- ◆ **2016-2020 Census American Community Survey (ACS) Public Used Microdata Sample (PUMS) data, which is used to determine whether, even after controlling for a number of relevant factors, there are disparities between minority- and women-owned firms on the one hand, and nonminority, non-women owned firms on the other hand. Among the questions this data allows us to answer are:**
  1. *Does racial, ethnic, and gender status impact individual wages even after controlling for differences among firms?*
  2. *Does racial, ethnic and gender status impact business owner earnings even after controlling for differences among firms?*
  3. *Are racial, ethnic, and gender minority groups less likely than nonminority males (non-M/WBEs) to be self-employed after controlling for differences? If so, does race, ethnicity, or gender have a role in the disparity?*
  4. *If M/WBEs and nonminority male-owned firms shared similar traits and marketplace “conditions” (i.e., similar “rewards” in terms of capital, wages, earning, etc.), what would be the effect on rates of self-employment by race, ethnicity, and gender?*

Notably, the results of this private sector analysis mirror many of the same qualitative and anecdotal results offered in **Chapter 6, Anecdotal Analysis**, regarding discrimination faced by M/WBE firms in attempting to secure work on private sector projects.

## 6.2 Private Sector Disparities in SBO Census Data

To answer the overarching research question regarding the existence of disparities in the private sector, as well as the specific question of whether these disparities exist in procurement categories relevant to the Essex County contracting domain, MGT obtained and analyzed the U.S. Census Bureau’s 2012 SBO data.<sup>125</sup> SBO provides data on economic and demographic characteristics for businesses and business

---

<sup>125</sup> These represent the most recent available data provided through the SBO program and were released in 2016.

owners by geography (such as states and metropolitan areas), categorized by industries defined by NAICS codes, and supporting information, including firm receipts (sales),<sup>126</sup> firm employment size, and business ownership classification. The survey has been administered every five years since 1972 as part of the economic census.

The SBO gathers and reports data on (1) firms with paid employees, including workers on the payroll (employer firms), (2) firms without paid employees, including sole proprietors and partners of unincorporated businesses that do not have any other employees on the payroll (nonemployer firms), as well as (3) in aggregate across employer and nonemployer firms (all). MGT calculated private sector disparity indices to examine whether M/WBE firms in any of these categories received a proportionate share of firm sales based on the availability of M/WBE firms. Disparity indices were reviewed for all firms and employer firms. It should be noted that all of the disparity indices in the SBO tables are statistically significant within a **95 percent** confidence interval.

The following NAICS codes<sup>127</sup> were analyzed because they align with the procurement categories used for Essex County's utilization analysis:

- ◆ NAICS Code 23, Construction
- ◆ NAICS Code 42, Wholesale Trade
- ◆ NAICS Code 54, Professional, Scientific, and Technical Services
- ◆ NAICS Code 56, Administrative and Support and Waste Management and Remediation Services
- ◆ NAICS Code 81, Other Services (Except Public Administration)

## 6.2.1 Results of Analysis

This private sector analysis presents disparity results based on the Essex County geographic marketplace. The Essex County marketplace contains the following counties in the New York-Newark-Jersey City, NY-NJ-PA MSA: Bergen County, NJ; Essex County, NJ; Hudson County, NJ; Hunterdon County, NJ; Middlesex County, NJ; Monmouth County, NJ; Morris County, NJ; Ocean County, NJ; Passaic County, NJ; Somerset County, NJ; Sussex County, NJ; and Union County, NJ.

## 6.2.2 Essex County Marketplace

Table 6-1 through Table 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 Essex County marketplace by race, ethnicity, and gender for construction; wholesale trade; professional, scientific, and technical services; administrative and support and waste management and remediation services; and other services (except public administration).

---

<sup>126</sup> Sales includes total shipments, receipts, revenue, or business done by the firm.

<sup>127</sup> The two-digit NAICS code level was utilized as those codes are the most prevalent level across all the 2012 SBO data.

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 Essex County marketplace business population, where data was available.

### **NAICS Code 23: Construction, Essex County Marketplace**

**Table 6-1** shows the construction availability, sales, and disparity results (NAICS Code 23).

There was a total of 364,025 construction firms (all firms<sup>128</sup>) in the Essex County marketplace in 2012.

- ◆ African American firms (disparity index of 9.90) were substantially underutilized, accounting for 0.67 percent of all firms and .07 percent of sales.
- ◆ American Indian and Alaska Native firms (disparity index of 0.00) were substantially and significantly underutilized, accounting for 0.02 percent of all firms and 0.00 percent of sales.
- ◆ Asian American firms (disparity index of 57.67) were substantially and significantly underutilized, accounting for 0.39 percent of all firms and 0.22 percent of sales.
- ◆ Hispanic American firms (disparity index of 18.58) were substantially and significantly underutilized, accounting for 2.38 percent of all firms and 0.44 percent of sales.
- ◆ Nonminority female firms (disparity index of 84.02) were substantially and significantly underutilized, accounting for 0.96 percent of all firms and 0.81 percent of sales.

There were 98,818 construction employer firms<sup>129</sup> in the Essex County marketplace in 2012.

- ◆ African American firms (disparity index of 0.00) were substantially and significantly underutilized, accounting for 0.14 percent of all firms and 0.00 percent of sales.
- ◆ American Indian and Alaska Native firms (disparity index of 0.00) were substantially and significantly underutilized, accounting for 0.00 percent of all firms and 0.00 percent of sales.
- ◆ Asian American firms (disparity index of 74.93) were substantially and significantly underutilized, accounting for 0.28 percent of all firms and 0.21 percent of sales.
- ◆ Hispanic American firms (disparity index of 31.09) were substantially and significantly underutilized, accounting for 0.87 percent of all firms and 0.27 percent of sales.
- ◆ Native Hawaiian and Pacific Islander firm data did not allow for a proper analysis.
- ◆ Nonminority female firms (disparity index of 66.88) were substantially and significantly underutilized, accounting for 1.25 percent of all firms and 0.84 percent of sales.

---

<sup>128</sup> All firms include firms with and without payroll at any time during 2012.

<sup>129</sup> Employer firms include firms with payroll at any time during 2012.

TABLE 6-1. PRIVATE SECTOR CENSUS DISPARITIES NAICS CODE 23, CONSTRUCTION U.S. CENSUS 2012 SURVEY OF BUSINESS OWNERS, ESSEX COUNTY MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	ALL FIRMS <sup>1</sup> (#)	ALL FIRMS, SALES <sup>2</sup> (\$1,000)	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	364,025	182,230,430	98,818	164,422,555
Nonminority Male	347,895	179,423,214	96,286	162,251,505
African American	2,451	121,419	139	0
American Indian and Alaska Native	90	0	14	0
Asian	1,411	407,321	277	345,344
Hispanic <sup>4</sup>	8,680	807,263	862	445,857
Native Hawaiian and Other Pacific Islander	0	0	0	0
Nonminority Female	3,498	1,471,213	1,240	1,379,849
PERCENTAGE OF MARKETPLACE				
All Firms	100.00%	100.00%	100.00%	100.00%
Nonminority Male	95.57%	98.46%	97.44%	98.68%
African American	0.67%	0.07%	0.14%	0.00%
American Indian and Alaska Native	0.02%	0.00%	0.01%	0.00%
Asian	0.39%	0.22%	0.28%	0.21%
Hispanic <sup>4</sup>	2.38%	0.44%	0.87%	0.27%
Native Hawaiian and Other Pacific Islander	0.00%	0.00%	0.00%	0.00%
Nonminority Female	0.96%	0.81%	1.25%	0.84%
DISPARITY RATIOS <sup>3</sup>				
All Firms		100.00		100.00
Nonminority Male		103.02		101.27
African American		9.90		0.00
American Indian and Alaska Native		0.00		0.00
Asian		57.67		74.93
Hispanic <sup>4</sup>		18.58		31.09
Native Hawaiian and Other Pacific Islander		-		-
Nonminority Female		84.02		66.88

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

<sup>1</sup>Firms include employer and nonemployer firms since nonemployer firms can provide services at the subcontractor/subconsultant level and hire independent contractors to increase capacity. Employer firms include firms with payroll at any time during 2012.

<sup>2</sup>Sales includes total shipments, receipts, revenue, or business done by the firm.

<sup>3</sup>Disparity index is the ratio of the percentage of sales to the percentage of available firms multiplied by 100.00. A disparity index below 80.00 indicates a substantial level of disparity.

<sup>4</sup>Hispanic firms are considered an ethnicity in this Census data and therefore may be double counted in race categories, which leads to percentages equaling greater than 100%.

N/A Denotes that there were no firms or sales for the classification.

Disparity results are statistically significant within a 95 percent confidence interval.

## NAICS Code 42: Wholesale Trade, Essex County Marketplace

**Table 6-2** shows wholesale trade availability, sales, and disparity results (NAICS Code 42).

There was a total of 152,358 wholesale trade firms (all firms) in the Essex County marketplace in 2012.

- ◆ African American firms (disparity index of 1.79) were substantially and significantly underutilized, accounting for 0.32 percent of all firms and 0.01 percent of sales.
- ◆ American Indian and Alaska Native firms (disparity index of 0.0) were substantially and significantly underutilized, accounting for 0.02 percent of all firms and 0.0 percent of sales.
- ◆ Asian American firms (disparity index of 34.58) were substantially and significantly underutilized, accounting for 2.37 percent of all firms and 0.82 percent of sales.
- ◆ Hispanic American firms (disparity index of 6.74) were substantially and significantly underutilized, accounting for 0.87 percent of all firms and 0.06 percent of sales.
- ◆ Native Hawaiian and Pacific Islander marketplace firm data did not allow for a proper analysis.
- ◆ Nonminority female firms (disparity index of 30.40) were substantially and significantly underutilized, accounting for 2.19 percent of all firms and 0.67 percent of sales.

There was a total of 79,019 wholesale trade employer firms in the Essex County marketplace in 2012.

- ◆ African American firms (disparity index of 10.15) were substantially and significantly underutilized, accounting for 0.05 percent of all firms and 0.00 percent of sales.
- ◆ American Indian and Alaska Native marketplace firm data was minimal and therefore did not allow for a proper analysis.
- ◆ Asian American firms (disparity index of 33.17) were substantially and significantly underutilized, accounting for 2.44 percent of all firms and 0.81 percent of sales.
- ◆ Hispanic American firms (disparity index of 12.45) were substantially and significantly underutilized, accounting for 0.45 percent of all firms and 0.06 percent of sales.
- ◆ Native Hawaiian and Pacific Islander marketplace firm data did not allow for a proper analysis.
- ◆ Nonminority female firms (disparity index of 47.29) were substantially and significantly underutilized, accounting for 1.40 percent of all firms and 0.66 percent of sales.

TABLE 6-2. PRIVATE SECTOR CENSUS DISPARITIES NAICS CODE 42, WHOLESALE TRADE U.S. CENSUS 2012 SURVEY OF BUSINESS OWNERS, ESSEX COUNTY MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	ALL FIRMS <sup>1</sup> (#)	ALL FIRMS, SALES <sup>2</sup> (\$1,000)	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	152,358	1,767,361,062	79,019	1,754,669,802
Nonminority Male	143,563	1,739,942,442	75,595	1,727,786,741
African American	489	101,260	37	83,379
American Indian and Alaska Native	29	0	0	0
Asian	3,614	14,496,641	1,926	14,187,559
Hispanic <sup>4</sup>	1,320	1,031,929	353	976,084
Native Hawaiian and Other Pacific Islander	0	0	0	0
Nonminority Female	3,343	11,788,790	1,108	11,636,039
PERCENTAGE OF MARKETPLACE				
All Firms	100.00%	100.00%	100.00%	100.00%
Nonminority Male	94.23%	98.45%	95.67%	98.47%
African American	0.32%	0.01%	0.05%	0.00%
American Indian and Alaska Native	0.02%	0.00%	0.00%	0.00%
Asian	2.37%	0.82%	2.44%	0.81%
Hispanic <sup>4</sup>	0.87%	0.06%	0.45%	0.06%
Native Hawaiian and Other Pacific Islander	0.00%	0.00%	0.00%	0.00%
Nonminority Female	2.19%	0.67%	1.40%	0.66%
DISPARITY RATIOS <sup>3</sup>				
All Firms		100.00		100.00
Nonminority Male		104.48		102.93
African American		1.79		10.15
American Indian and Alaska Native		0.00		-
Asian		34.58		33.17
Hispanic <sup>4</sup>		6.74		12.45
Native Hawaiian and Other Pacific Islander		-		-
Nonminority Female		30.40		47.29

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

<sup>1</sup>Firms include employer and nonemployer firms since nonemployer firms can provide services at the subcontractor/subconsultant level and hire independent contractors to increase capacity. Employer firms include firms with payroll at any time during 2012.

<sup>2</sup>Sales includes total shipments, receipts, revenue, or business done by the firm.

<sup>3</sup>Disparity index is the ratio of the percentage of sales to the percentage of available firms multiplied by 100.00. A disparity index below 80.00 indicates a substantial level of disparity.

<sup>4</sup>Hispanic firms are considered an ethnicity in this Census data and therefore may be double counted in race categories, which leads to percentages equaling greater than 100%.

N/A Denotes that there were no firms or sales for the classification.

Disparity results are statistically significant within a 95 percent confidence interval.



## NAICS Code 54: Professional, Scientific and Technical Services, Essex County Marketplace

Table 6-3 shows the availability, sales, and disparity results for professional, scientific, and technical services (NAICS Code 54).

There was a total of 742,071 professional, scientific, and technical services firms (all firms) in the Essex County marketplace in 2012.

- ◆ African American firms (disparity index of 12.39) were substantially and significantly underutilized, accounting for 0.67 percent of all firms and 0.08 percent of sales.
- ◆ American Indian and Alaska Native firms (disparity index of 3.41) were substantially and significantly underutilized, accounting for 0.04 percent of all firms and 0.00 percent of sales.
- ◆ Asian American firms (disparity index of 87.23) underutilized, accounting for 1.94 percent of all firms and 1.69 percent of sales.
- ◆ Hispanic American firms (disparity index of 22.99) were substantially and significantly underutilized, accounting for 0.78 percent of all firms and 0.18 percent of sales.
- ◆ Native Hawaiian and Pacific Islander firms (disparity index of 0.00) were substantially and significantly underutilized, accounting for 0.00 percent of all firms and 0.0 percent of sales.
- ◆ Nonminority female firms (disparity index of 33.85) were substantially and significantly underutilized, accounting for 3.87 percent of all firms and 1.31 percent of sales.

There was a total of 155,685 professional, scientific, and technical services employer firms in the Essex County marketplace in 2012.

- ◆ African American firms (disparity index of 17.16) were substantially and significantly underutilized, accounting for 0.19 percent of all firms and 0.03 percent of sales.
- ◆ American Indian and Alaska Native firms (disparity index of 0.00) were substantially and significantly underutilized, accounting for 0.01 percent of all firms and 0.0 percent of sales.
- ◆ Asian American firms (disparity index of 63.20) were underutilized, accounting for 2.68 percent of all firms and 1.69 percent of sales.
- ◆ Hispanic American firms (disparity index of 50.50) were substantially and significantly underutilized, accounting for 0.29 percent of all firms and 0.15 percent of sales.
- ◆ Native Hawaiian and Pacific Islander firm data did not allow for a proper analysis.
- ◆ Nonminority female firms (disparity index of 46.66) were substantially and significantly underutilized, accounting for 2.35 percent of all firms and 1.10 percent of sales.

TABLE 6-3. PRIVATE SECTOR CENSUS DISPARITIES NAICS CODE 54, PROFESSIONAL, SCIENTIFIC, AND TECHNICAL SERVICES U.S. CENSUS 2012 SURVEY OF BUSINESS OWNERS, ESSEX COUNTY MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	ALL FIRMS <sup>1</sup> (#)	ALL FIRMS, SALES <sup>2</sup> (\$1,000)	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	742,071	307,358,851	155,685	276,651,129
Nonminority Male	687,877	297,316,787	147,090	268,439,562
Minority	25,483	6,017,253	4,941	5,181,944
African American	4,992	256,079	293	89,331
American Indian and Alaska Native	288	4,072	22	0
Asian	14,406	5,204,988	4,170	4,683,417
Hispanic <sup>4</sup>	5,797	552,114	456	409,196
Native Hawaiian and Other Pacific Islander	0	0	0	0
Nonminority Female	28,711	4,024,811	3,654	3,029,623
PERCENTAGE OF MARKETPLACE				
All Firms	100.00%	100.00%	100.00%	100.00%
Nonminority Male	92.70%	96.73%	94.48%	97.03%
Minority	3.43%	1.96%	3.17%	1.87%
African American	0.67%	0.08%	0.19%	0.03%
American Indian and Alaska Native	0.04%	0.00%	0.01%	0.00%
Asian	1.94%	1.69%	2.68%	1.69%
Hispanic <sup>4</sup>	0.78%	0.18%	0.29%	0.15%
Native Hawaiian and Other Pacific Islander	0.00%	0.00%	0.00%	0.00%
Nonminority Female	3.87%	1.31%	2.35%	1.10%
DISPARITY RATIOS <sup>3</sup>				
All Firms		100.00		100.00
Nonminority Male		104.35		102.70
Minority		57.01		59.02
African American		12.39		17.16
American Indian and Alaska Native		3.41		0.00
Asian		87.23		63.20
Hispanic <sup>4</sup>		22.99		50.50
Native Hawaiian and Other Pacific Islander		-		-
Nonminority Female		33.85		46.66

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

<sup>1</sup>Firms include employer and nonemployer firms since nonemployer firms can provide services at the subcontractor/subconsultant level and hire independent contractors to increase capacity. Employer firms include firms with payroll at any time during 2012.

<sup>2</sup>Sales includes total shipments, receipts, revenue, or business done by the firm.

<sup>3</sup>Disparity index is the ratio of the percentage of sales to the percentage of available firms multiplied by 100.00. A disparity index below 80.00 indicates a substantial level of disparity.

<sup>4</sup>Hispanic firms are considered an ethnicity in this Census data and therefore may be double counted in race categories, which leads to percentages equaling greater than 100%.

Disparity results are statistically significant within a 95 percent confidence interval.

## NAICS Code 56: Administrative and Support and Waste Management and Remediation Services, Essex County Marketplace

Table 6-4 shows the availability, sales, and disparity results for administrative, support, waste management, and remediation services (NAICS Code 56).

There were 293,957 administrative and support and waste management and remediation services firms (all firms) in the Essex County marketplace in 2012.

- ◆ African American firms (disparity index of 13.22) were substantially and significantly underutilized, accounting for 1.11 percent of all firms and 0.15 percent of sales.
- ◆ American Indian and Alaska Native firms (disparity index of 2.64) were substantially and significantly underutilized, accounting for 0.09 percent of all firms and 0.0 percent of sales.
- ◆ Asian American firms (disparity index of 46.46) were substantially and significantly underutilized, accounting for 0.75 percent of all firms and 0.35 percent of sales.
- ◆ Hispanic American firms (disparity index of 15.70) were substantially and significantly underutilized, accounting for 3.33 percent of all firms and 0.52 percent of sales.
- ◆ Native Hawaiian and Pacific Islander firm data did not allow for a proper analysis.
- ◆ Nonminority female firms (disparity index of 29.93) were substantially and significantly underutilized, accounting for 5.50 percent of all firms and 1.65 percent of sales.

There were 63,289 administrative and support and waste management and remediation services employer firms in the Essex County marketplace in 2012.

- ◆ African American firms (disparity index of 40.95) were substantially and significantly underutilized, accounting for 0.27 percent of all firms and 0.11 percent of sales.
- ◆ American Indian and Alaska Native firms (disparity index of 0.00) were substantially and significantly underutilized, accounting for 0.04 percent of all firms and 0.00 percent of sales.
- ◆ Asian American firms (disparity index of 55.77) were substantially and significantly underutilized, accounting for 0.58 percent of all firms and 0.32 percent of sales.
- ◆ Hispanic American firms (disparity index of 23.22) were substantially and significantly underutilized, accounting for 1.08 percent of all firms and 0.25 percent of sales.
- ◆ Native Hawaiian and Pacific Islander marketplace firm data did not allow for a proper analysis.
- ◆ Nonminority female firms (disparity index of 66.65) were substantially and significantly underutilized, accounting for 2.21 percent of all firms and 1.47 percent of sales.

TABLE 6-4. PRIVATE SECTOR CENSUS DISPARITIES NAICS CODE 56, ADMINISTRATIVE AND SUPPORT/WASTE MANAGEMENT AND REMEDIATION SERVICES U.S. CENSUS 2012 SURVEY OF BUSINESS OWNERS, ESSEX COUNTY MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	ALL FIRMS <sup>1</sup> (#)	ALL FIRMS, SALES <sup>2</sup> (\$1,000)	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	293,957	106,892,136	63,289	101,053,923
Nonminority Male	262,255	104,038,735	60,579	98,726,041
African American	3,257	156,624	169	110,488
American Indian and Alaska Native	254	2,439	27	0
Asian	2,211	373,529	367	326,825
Hispanic <sup>4</sup>	9,798	559,526	747	400,603
Native Hawaiian and Other Pacific Islander	0	0	0	0
Nonminority Female	16,182	1,761,283	1,400	1,489,966
PERCENTAGE OF MARKETPLACE				
All Firms	100.00%	100.00%	100.00%	100.00%
Nonminority Male	89.22%	97.33%	95.72%	97.70%
African American	1.11%	0.15%	0.27%	0.11%
American Indian and Alaska Native	0.09%	0.00%	0.04%	0.00%
Asian	0.75%	0.35%	0.58%	0.32%
Hispanic <sup>4</sup>	3.33%	0.52%	1.18%	0.40%
Native Hawaiian and Other Pacific Islander	0.00%	0.00%	0.00%	0.00%
Nonminority Female	5.50%	1.65%	2.21%	1.47%
DISPARITY RATIOS <sup>3</sup>				
All Firms		100.00		100.00
Nonminority Male		109.10		102.07
African American		13.22		40.95
American Indian and Alaska Native		2.64		0.00
Asian		46.46		55.77
Hispanic <sup>4</sup>		15.70		33.59
Native Hawaiian and Other Pacific Islander		-		-
Nonminority Female		29.93		66.65

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

<sup>1</sup>Firms include employer and nonemployer firms since nonemployer firms can provide services at the subcontractor/subconsultant level and hire independent contractors to increase capacity. Employer firms include firms with payroll at any time during 2012.

<sup>2</sup>Sales includes total shipments, receipts, revenue, or business done by the firm.

<sup>3</sup>Disparity index is the ratio of the percentage of sales to the percentage of available firms multiplied by 100.00. A disparity index below 80.00 indicates a substantial level of disparity.

<sup>4</sup>Hispanic firms are considered an ethnicity in this Census data and therefore may be double counted in race categories, which leads to percentages equaling greater than 100%.

N/A Denotes that there were no firms or sales for the classification.

Disparity results are statistically significant within a 95 percent confidence interval.

## NAICS Code 81: Other Services (Except Public Administration), Essex County Marketplace

Table 6-5 shows the availability, sales, and disparity results for NAICS Code other services (except public administration) (NAICS Code 81).

There were a total of 485,792 other services (except public administration) firms (all firms) in the Essex County marketplace in 2012.

- ◆ African American firms (disparity index of 20.57) were substantially and significantly underutilized, accounting for 2.11 percent of all firms and 0.43 percent of sales.
- ◆ American Indian and Alaska Native firms (disparity index of 11.05) were substantially and significantly underutilized, accounting for 0.05 percent of all firms and 0.01 percent of sales.
- ◆ Asian American firms (disparity index of 75.72) were substantially and significantly underutilized, accounting for 1.60 percent of all firms and 1.21 percent of sales.
- ◆ Hispanic American firms (disparity index of 40.23) were substantially and significantly underutilized, accounting for 2.97 percent of all firms and 1.19 percent of sales.
- ◆ Native Hawaiian or Pacific Islander firms (disparity index of 2.16) were substantially and significantly underutilized, accounting for 0.05 percent of all firms and 0.0 percent of sales.
- ◆ Data for nonminority female firms (disparity index of 40.13) were substantially and significantly underutilized, accounting for 5.91 percent of all firms and 2.38 percent of sales.

There were 79,297 other services (except public administration) employer firms in the Essex County marketplace in 2012.

- ◆ African American firms (disparity index of 30.88) were substantially and significantly underutilized, accounting for 0.37 percent of all firms and 0.11 percent of sales.
- ◆ American Indian and Alaska Native firms (disparity index of 0.00) were substantially and significantly underutilized, accounting for 0.02 percent of all firms and 0.00 percent of sales.
- ◆ Asian American firms (disparity index of 40.85) were substantially and significantly underutilized, accounting for 2.66 percent of all firms and 1.09 percent of sales.
- ◆ Hispanic American firms (disparity index of 60.45) were substantially and significantly underutilized, accounting for 1.21 percent of all firms and 0.73 percent of sales.
- ◆ Native Hawaiian or Pacific Islander marketplace firm data did not allow for a proper analysis.
- ◆ Data for nonminority female firms (disparity index of 42.30) were substantially and significantly underutilized, accounting for 3.21 percent of all firms and 1.36 percent of sales.

TABLE 6-5. PRIVATE SECTOR CENSUS DISPARITIES NAICS CODE 81, OTHER SERVICES (EXCEPT PUBLIC ADMINISTRATION) U.S. CENSUS 2012 SURVEY OF BUSINESS OWNERS, ESSEX COUNTY MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	ALL FIRMS <sup>1</sup> (#)	ALL FIRMS, SALES <sup>2</sup> (\$1,000)	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	485,792	47,955,510	79,297	36,097,093
Nonminority Male	424,164	45,447,530	73,367	34,907,343
African American	10,237	207,908	294	41,333
American Indian and Alaska Native	249	2,717	13	0
Asian	7,787	582,065	2,112	392,783
Hispanic <sup>4</sup>	14,423	572,795	963	264,998
Native Hawaiian and Other Pacific Islander	231	493	0	0
Nonminority Female	28,701	1,142,002	2,548	490,636
PERCENTAGE OF MARKETPLACE				
All Firms	100.00%	100.00%	100.00%	100.00%
Nonminority Male	87.31%	94.77%	92.52%	96.70%
African American	2.11%	0.43%	0.37%	0.11%
American Indian and Alaska Native	0.05%	0.01%	0.02%	0.00%
Asian	1.60%	1.21%	2.66%	1.09%
Hispanic <sup>4</sup>	2.97%	1.19%	1.21%	0.73%
Native Hawaiian and Other Pacific Islander	0.05%	0.00%	0.00%	0.00%
Nonminority Female	5.91%	2.38%	3.21%	1.36%
DISPARITY RATIOS <sup>3</sup>				
All Firms		100.00		100.00
Nonminority Male		108.54		104.52
African American		20.57		30.88
American Indian and Alaska Native		11.05		0.00
Asian		75.72		40.85
Hispanic <sup>4</sup>		40.23		60.45
Native Hawaiian and Other Pacific Islander		2.16		-
Nonminority Female		40.31		42.30

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

<sup>1</sup>Firms include employer and nonemployer firms since nonemployer firms can provide services at the subcontractor/subconsultant level and hire independent contractors to increase capacity. Employer firms include firms with payroll at any time during 2012.

<sup>2</sup>Sales includes total shipments, receipts, revenue, or business done by the firm.

<sup>3</sup>Disparity index is the ratio of the percentage of sales to the percentage of available firms multiplied by 100.00. A disparity index below 80.00 indicates a substantial level of disparity.

<sup>4</sup>Hispanic firms are considered an ethnicity in this Census data and therefore may be double counted in race categories, which leads to percentages equaling greater than 100%.

N/A Denotes that there were no firms or sales for the classification.

Disparity results are statistically significant within a 95 percent confidence interval.

### 6.2.3 SBO Conclusion

The SBO analysis shows consistent underutilization of M/WBE firms relative to their availability in the marketplace. The results suggest that disparities exist in the broader private sector in which Essex County conducts business and supports the idea that Essex County should maintain remedies to avoid passive participation in discrimination, irrespective of circumstances in the public sector.

Furthermore, the five procurement categories analyzed showed substantial and statistically significant disparities among defined M/WBE classes where sufficient data were available.

## 6.3 Private Sector Disparities in ABS Census Data

As described above, SBO data is a vital resource in helping to answer the overarching research question regarding the existence of disparities in the private sector and the specific question of whether these disparities exist in procurement categories relevant to the Essex County contracting domain. A limitation with the SBO data is, of course, its age. In 2017, the Census Bureau replaced the SBO data with the American Business Survey (ABS). Essentially this dataset is the same as the SBO with one caveat. ABS data no longer provides information for all firms, only employer firms. This data is still valuable for determining more recent private sector disparities, but it excludes a sector usually dominated by smaller businesses that are the beneficiary of any M/WBE program.

As with the SBO data, ABS gathers and reports data on firms with paid employees, including workers on the payroll (employer firms). MGT calculated private sector disparity indices to examine whether M/WBE firms in any of these categories received a proportionate share of sales based on the availability of M/WBE firms. Disparity indices were reviewed for employer firms. It should be noted that all of the disparity indices in the ABS tables are statistically significant within a **95 percent** confidence interval. The same NAICS codes as the SBO analysis were analyzed for the ABS data and the same marketplace.

### 6.3.1 Results of Analysis

**Table 6-6** through **Table 6-10** show the measures of private sector disparities based on U.S. Census 2017 ABS data for the population of available firms in the Essex County marketplace by race, ethnicity, and gender for construction; wholesale trade; professional, scientific, and technical services; administrative and support and waste management and remediation services; and other services (except public administration).

Based on the analysis of the U.S. Census, 2017 ABS data, overall, there remains a significant gap between the market share of M/WBE firms and their share of the Essex County marketplace business population, where data was available.

## NAICS Code 23: Construction, Essex County Marketplace

**Table 6-6** shows the construction availability, sales, and disparity results (NAICS Code 23).

There were 353,580 construction employer firms<sup>130</sup> in the Essex County marketplace in 2017.

- ◆ African American firms (disparity index of 53.21) were substantially underutilized, accounting for 0.30 percent of all firms and 0.16 percent of sales.
- ◆ American Indian and Alaska firms (disparity index of 22.26) were substantially underutilized, accounting for 0.04 percent of all firms and 0.01 percent of sales.
- ◆ Asian American firms (disparity index of 50.96) were substantially and significantly underutilized, accounting for 0.84 percent of all firms and 0.43 percent of sales.
- ◆ Hispanic American firms (disparity index of 44.91) were substantially and significantly underutilized, accounting for 1.16 percent of all firms and 0.52 percent of sales.
- ◆ Native Hawaiian and Pacific Islander firm data did not allow for a proper analysis.
- ◆ Data for nonminority female firms (disparity index of 95.34) were underutilized, accounting for 1.35 percent of all firms and 1.29 percent of sales.

---

<sup>130</sup> Employer firms include firms with payroll at any time during 2017.



TABLE 6-6. PRIVATE SECTOR CENSUS DISPARITIES NAICS CODE 23, CONSTRUCTION U.S. CENSUS 2017 ANNUAL BUSINESS SURVEY, ESSEX COUNTY MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	353,580	811,566,993
Nonminority Male	340,503	792,000,980
African American	1,059	1,293,303
American Indian and Alaska Native	144	73,573
Asian	2,987	3,494,007
Hispanic <sup>4</sup>	4,097	4,223,115
Native Hawaiian and Other Pacific Islander	0	0
Nonminority Female	4,790	10,482,015
PERCENTAGE OF MARKETPLACE		
All Firms	100.00%	100.00%
Nonminority Male	96.30%	97.59%
African American	0.30%	0.16%
American Indian and Alaska Native	0.04%	0.01%
Asian	0.84%	0.43%
Hispanic <sup>4</sup>	1.16%	0.52%
Native Hawaiian and Other Pacific Islander	0.00%	0.00%
Nonminority Female	1.35%	1.29%
DISPARITY RATIOS <sup>3</sup>		
All Firms		100.00
Nonminority Male		101.34
African American		53.21
American Indian and Alaska Native		22.26
Asian		50.96
Hispanic <sup>4</sup>		44.91
Native Hawaiian and Other Pacific Islander		-
Nonminority Female		95.34

Source: MGT Consulting Group, LLC conducted private sector disparities marketplace analyses based on U.S. Census Bureau, 2017 Annual Business Survey (ABS) data.

<sup>1</sup> Employer firms include firms with payroll at any time during 2017.

<sup>2</sup> Sales includes total shipments, receipts, revenue, or business done by the firm.

<sup>3</sup> 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.

<sup>4</sup> Hispanic firms are considered an ethnicity in this Census data and therefore may be double counted in race categories, which leads to percentages equaling greater than 100%.

N/A Denotes that there were no firms or sales for the classification.

Disparity results are statistically significant within a 95 percent confidence interval.

## NAICS Code 42: Wholesale Trade, Essex County Marketplace

**Table 6-7** shows wholesale trade availability, sales, and disparity results (NAICS Code 42).

There were 225,299 wholesale trade employer firms in the Essex County marketplace in 2017.

- ◆ African American firms (disparity index of 17.46) were substantially and significantly underutilized, accounting for 0.15 percent of all firms and 0.03 percent of sales.
- ◆ American Indian and Alaska Native firm data did not allow for a proper analysis.
- ◆ Asian American firms (disparity index of 47.77) were substantially and significantly underutilized, accounting for 3.25 percent of all firms and 1.55 percent of sales.
- ◆ Hispanic American firms (disparity index of 44.97) were substantially and significantly underutilized, accounting for 0.41 percent of all firms and 0.19 percent of sales.
- ◆ Native Hawaiian and Pacific Islander firm data did not allow for a proper analysis.
- ◆ Nonminority female firms (disparity index of 52.73) were substantially and significantly underutilized, accounting for 2.03 percent of all firms and 1.07 percent of sales.

TABLE 6-7. PRIVATE SECTOR CENSUS DISPARITIES NAICS CODE 42, WHOLESALE TRADE U.S. CENSUS  
2017 ANNUAL BUSINESS SURVEY, ESSEX COUNTY MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	225,299	2,590,755,039
Nonminority Male	212,140	2,517,315,751
African American	330	662,734
American Indian and Alaska Native	0	0
Asian	7,326	40,238,790
Hispanic <sup>4</sup>	929	4,804,271
Native Hawaiian and Other Pacific Islander	0	0
Nonminority Female	4,574	27,733,493
<b>PERCENTAGE OF MARKETPLACE</b>		
All Firms	100.00%	100.00%
Nonminority Male	94.16%	97.17%
African American	0.15%	0.03%
American Indian and Alaska Native	0.00%	0.00%
Asian	3.25%	1.55%
Hispanic <sup>4</sup>	0.41%	0.19%
Native Hawaiian and Other Pacific Islander	0.00%	0.00%
Nonminority Female	2.03%	1.07%
<b>DISPARITY RATIOS<sup>3</sup></b>		
All Firms		100.00
Nonminority Male		103.19
African American		17.46
American Indian and Alaska Native		-
Asian		47.77
Hispanic <sup>4</sup>		44.97
Native Hawaiian and Other Pacific Islander		-
Nonminority Female		52.73

Source: MGT Consulting Group, LLC conducted private sector disparities marketplace analyses based on U.S. Census Bureau, 2017 Annual Business Survey (ABS) data.

<sup>1</sup> Employer firms include firms with payroll at any time during 2017.

<sup>2</sup> Sales includes total shipments, receipts, revenue, or business done by the firm.

<sup>3</sup> Disparity index is the ratio of the percentage of sales to the percentage of available firms multiplied by 100.00. A disparity index below 80.00 indicates a substantial level of disparity.

<sup>4</sup> Hispanic firms are considered an ethnicity in this Census data and therefore may be double counted in race categories, which leads to percentages equaling greater than 100%.

N/A Denotes that there were no firms or sales for the classification.

Disparity results are statistically significant within a 95 percent confidence interval.

## NAICS Code 54: Professional, Scientific, and Technical Services, Essex County Marketplace

**Table 6-8** shows the availability, sales, and disparity results for professional, scientific, and technical services (NAICS Code 54).

There was a total of 470,751 professional, scientific, and technical services employer firms in the Essex County marketplace in 2017.

- ◆ African American firms (disparity index of 25.64) were substantially and significantly underutilized, accounting for 0.34 percent of all firms and 0.09 percent of sales.
- ◆ American Indian and Alaska Native firm data did not allow for a proper analysis.
- ◆ Asian American firms (disparity index of 60.03) were substantially and significantly underutilized, accounting for 1.85 percent of all firms and 1.11 percent of sales.
- ◆ Hispanic American firms (disparity index of 34.43) were substantially and significantly underutilized, accounting for 0.51 percent of all firms and 0.18 percent of sales.
- ◆ Native Hawaiian and Pacific Islander firm data did not allow for a proper analysis.
- ◆ Nonminority female firms (disparity index of 43.25) were substantially and significantly underutilized, accounting for 3.16 percent of all firms and 1.37 percent of sales.

TABLE 6-8. PRIVATE SECTOR CENSUS DISPARITIES NAICS CODE 54, PROFESSIONAL, SCIENTIFIC, AND TECHNICAL SERVICES U.S. CENSUS 2017 ANNUAL BUSINESS SURVEY, ESSEX COUNTY MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	470,751	1,064,512,675
Nonminority Male	443,162	1,035,336,475
African American	1,578	915,026
American Indian and Alaska Native	0	0
Asian	8,707	11,819,050
Hispanic <sup>4</sup>	2,418	1,882,715
Native Hawaiian and Other Pacific Islander	0	0
Nonminority Female	14,886	14,559,409
PERCENTAGE OF MARKETPLACE		
All Firms	100.00%	100.00%
Nonminority Male	94.14%	97.26%
African American	0.34%	0.09%
American Indian and Alaska Native	0.00%	0.00%
Asian	1.85%	1.11%
Hispanic <sup>4</sup>	0.51%	0.18%
Native Hawaiian and Other Pacific Islander	0.00%	0.00%
Nonminority Female	3.16%	1.37%
DISPARITY RATIOS <sup>3</sup>		
All Firms		100.00
Nonminority Male		103.31
African American		25.64
American Indian and Alaska Native		-
Asian		60.03
Hispanic <sup>4</sup>		34.43
Native Hawaiian and Other Pacific Islander		-
Nonminority Female		43.25

Source: MGT Consulting Group, LLC conducted private sector disparities marketplace analyses based on U.S. Census Bureau, 2017 Annual Business Survey (ABS) data.

<sup>1</sup>Employer firms include firms with payroll at any time during 2017.

<sup>2</sup>Sales includes total shipments, receipts, revenue, or business done by the firm.

<sup>3</sup>Disparity index is the ratio of the percentage of sales to the percentage of available firms multiplied by 100.00. A disparity index below 80.00 indicates a substantial level of disparity.

<sup>4</sup>Hispanic firms are considered an ethnicity in this Census data and therefore may be double counted in race categories, which leads to percentages equaling greater than 100%.

N/A Denotes that there were no firms or sales for the classification.

Disparity results are statistically significant within a 95 percent confidence interval.

## NAICS Code 56: Administrative and Support and Waste Management and Remediation Services, Essex County Marketplace

Table 6-9 shows the availability, sales, and disparity results for administrative and support and waste management and remediation services (NAICS Code 56).

There were 188,240 administrative and support and waste management and remediation services employer firms in the Essex County marketplace in 2017.

- ◆ African American firms (disparity index of 50.32) were substantially and significantly underutilized, accounting for 0.45 percent of all firms and 0.23 percent of sales.
- ◆ American Indian and Alaska Native marketplace firm data did not allow for a proper analysis.
- ◆ Asian American firms (disparity index of 94.84 underutilized, accounting for 0.90 percent of all firms and 0.85 percent of sales.
- ◆ Hispanic American firms (disparity index of 50.21 were substantially and significantly underutilized, accounting for 1.46 percent of all firms and 0.73 percent of sales.
- ◆ Native Hawaiian and Pacific Islander marketplace firm data did not allow for a proper analysis.
- ◆ Nonminority female firms (disparity index of 75.78) were substantially and significantly underutilized, accounting for 2.87 percent of all firms and 2.18 percent of sales.

TABLE 6-9. PRIVATE SECTOR CENSUS DISPARITIES NAICS CODE 56, ADMINISTRATIVE AND SUPPORT/WASTE MANAGEMENT AND REMEDIATION SERVICES U.S. CENSUS 2017 ANNUAL BUSINESS SURVEY, ESSEX COUNTY MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	188,240	376,021,448
Nonminority Male	177,545	361,021,822
African American	846	850,397
American Indian and Alaska Native	0	0
Asian	1,690	3,201,740
Hispanic <sup>4</sup>	2,748	2,756,115
Native Hawaiian and Other Pacific Islander	0	0
Nonminority Female	5,411	8,191,374
<b>PERCENTAGE OF MARKETPLACE</b>		
All Firms	100.00%	100.00%
Nonminority Male	94.32%	96.01%
African American	0.45%	0.23%
American Indian and Alaska Native	0.00%	0.00%
Asian	0.90%	0.85%
Hispanic <sup>4</sup>	1.46%	0.73%
Native Hawaiian and Other Pacific Islander	0.00%	0.00%
Nonminority Female	2.87%	2.18%
<b>DISPARITY RATIOS<sup>3</sup></b>		
All Firms		100.00
Nonminority Male		101.79
African American		50.32
American Indian and Alaska Native		-
Asian		94.84
Hispanic <sup>4</sup>		50.21
Native Hawaiian and Other Pacific Islander		-
Nonminority Female		75.78

Source: MGT Consulting Group, LLC conducted private sector disparities marketplace analyses based on U.S. Census Bureau, 2017 Annual Business Survey (ABS) data.

<sup>1</sup> Employer firms include firms with payroll at any time during 2017.

<sup>2</sup> Sales includes total shipments, receipts, revenue, or business done by the firm.

<sup>3</sup> 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.

<sup>4</sup> Hispanic firms are considered an ethnicity in this Census data and therefore may be double counted in race categories, which leads to percentages equaling greater than 100%.

N/A Denotes that there were no firms or sales for the classification.

Disparity results are statistically significant within a 95 percent confidence interval.

## NAICS Code 81: Other Services (Except Public Administration), Essex County Marketplace

Table 6-10 shows the availability, sales, and disparity results for NAICS Code other services (except public administration) (NAICS Code 81).

There were 272,012 other services (except public administration) employer firms in the Essex County marketplace in 2017.

- ◆ African American firms (disparity index of 66.94) were substantially and significantly underutilized, accounting for 0.48 percent of all firms and 0.32 percent of sales.
- ◆ American Indian and Alaska Native marketplace firms (disparity index of 36.39) were substantially and significantly underutilized, accounting for 0.03 percent of all firms and 0.01 percent of sales.
- ◆ Asian American firms (disparity index of 51.22) were substantially and significantly underutilized, accounting for 5.05 percent of all firms and 2.59 percent of sales.
- ◆ Hispanic American firms (disparity index of 67.70) were substantially and significantly underutilized, accounting for 1.33 percent of all firms and 0.90 percent of sales.
- ◆ Native Hawaiian or Pacific Islander marketplace firms (disparity index of 58.91) were substantially and significantly underutilized, accounting for 0.01 percent of all firms and 0.01 percent of sales.
- ◆ Nonminority female firms (disparity index of 58.48) were substantially and significantly underutilized, accounting for 5.02 percent of all firms and 2.93 percent of sales.



TABLE 6-10. PRIVATE SECTOR CENSUS DISPARITIES NAICS CODE 81, OTHER SERVICES (EXCEPT PUBLIC ADMINISTRATION) U.S. CENSUS 2017 ANNUAL BUSINESS SURVEY, ESSEX COUNTY MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	272,012	124,947,816
Nonminority Male	239,600	116,504,842
African American	1,298	399,095
American Indian and Alaska Native	94	15,712
Asian	13,729	3,230,026
Hispanic <sup>4</sup>	3,621	1,126,044
Native Hawaiian and Other Pacific Islander	25	6,765
Nonminority Female	13,645	3,665,332
PERCENTAGE OF MARKETPLACE		
All Firms	100.00%	100.00%
Nonminority Male	88.08%	93.24%
African American	0.48%	0.32%
American Indian and Alaska Native	0.03%	0.01%
Asian	5.05%	2.59%
Hispanic <sup>4</sup>	1.33%	0.90%
Native Hawaiian and Other Pacific Islander	0.01%	0.01%
Nonminority Female	5.02%	2.93%
DISPARITY RATIOS <sup>3</sup>		
All Firms		100.00
Nonminority Male		105.86
African American		66.94
American Indian and Alaska Native		36.39
Asian		51.22
Hispanic <sup>4</sup>		67.70
Native Hawaiian and Other Pacific Islander		58.91
Nonminority Female		58.48

Source: MGT Consulting Group, LLC conducted private sector disparities marketplace analyses based on U.S. Census Bureau, 2017 Annual Business Survey (ABS) data.

<sup>1</sup> Employer firms include firms with payroll at any time during 2017.

<sup>2</sup> Sales includes total shipments, receipts, revenue, or business done by the firm.

<sup>3</sup> Disparity index is the ratio of the percentage of sales to the percentage of available firms multiplied by 100.00. A disparity index below 80.00 indicates a substantial level of disparity.

<sup>4</sup> Hispanic firms are considered an ethnicity in this Census data and therefore may be double counted in race categories, which leads to percentages equaling greater than 100%.

N/A Denotes that there were no firms or sales for the classification.

Disparity results are statistically significant within a 95 percent confidence interval.

### 6.3.2 ABS Conclusion

Like the SBO analysis, the ABS analysis shows consistent underutilization of M/WBE firms relative to their availability in the marketplace. These results provide evidence that disparities exist in the broader private sector, thus supporting the need for Essex County to maintain remedies to avoid passive participation in discrimination, irrespective of circumstances in the public sector.

As with the SBO results, the ABS results for each of the five procurement categories analyzed 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 overarching research question of whether business discrimination exists in the private sector and addresses three more specific questions:

1. *Does racial, ethnic, and gender status impact individual wages even after controlling for differences among firms?*
2. *Does racial, ethnic and gender status impact business owner earnings even after controlling for differences among firms?*
3. *Are racial, ethnic, and gender minority groups less likely than nonminority males (non-M/WBEs) to be self-employed after controlling for differences? If so, does race, ethnicity, or gender have a role in the disparity?*
4. *If minority and female-owned business enterprises (M/WBEs) and nonminority male-owned firms shared similar traits and marketplace “conditions” (i.e., similar “rewards” in terms of capital, wages, earning, etc.), what would be the effect on rates of self-employment by race, ethnicity, and gender?*

Answers to these questions are achieved by examining 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 and the effects of these variables on individuals’ wages and business-owner earnings. Any negative and statistically significant effects by race, ethnicity, and gender found in the model after individual economic and demographic characteristics are controlled for would be consistent with business-related discrimination. The analysis is targeted to five categories of private sector business activity (Construction, Architecture & Engineering, Professional Services, Goods & Services, and all categories combined) that generally align with Essex County procurement categories defined for the study.

Adopting the methodology and variables employed by a City of Denver disparity study (see *Concrete Works v. City and County of Denver*<sup>131</sup>), MGT used PUMS data derived from the 2015-2019 ACS to which MGT applied appropriate regression statistics to draw conclusions. The ACS is an ongoing survey covering the same type of information collected in the decennial census. The ACS is sent to approximately 3.5 million addresses annually, including housing units in all counties within the 50 States and the District of Columbia. The PUMS file from the ACS contains records for a subsample of the full ACS. The data used for the regression analyses are the multi-year estimates combining 2016 through 2020 ACS PUMS records. The combined file contains over six million person-level records. The 2016-2020 ACS PUMS data provides a full range of population and housing information collected in the annual ACS and the decennial census.

---

<sup>131</sup> *Concrete Works of Colo. v. City & Cnty. of Denver*, 321 F.3d 950, 967 (10<sup>th</sup> Cir. 2003).

## 6.4.1 Links to Business Formation and Maintenance

Economics research consistently finds group differences by race, ethnicity, and gender in business formation rates.<sup>132</sup> MGT knows, for instance, that most minorities and females have a lower median age than nonminority males (ACS PUMS, 2016-2020). In general, the likelihood of being self-employed increases with age (ACS PUMS, 2016-2020). An examination of these variables within the context of a disparity study seeks to control for these other important demographic and economic variables in conjunction with race, ethnicity, and gender – since they also influence group rates of business formation. Through the analyses, MGT can determine whether inequities specific to minorities and females are demonstrably present to warrant consideration of public sector remedies. Questions about marketplace dynamics affecting self-employment— or, more specifically, the odds of forming one’s own business and then excelling (i.e., generate earnings growth)— are at the heart of disparity analysis research.

## 6.4.2 Statistical Models and Methods

MGT employed two multivariate regression techniques to answer the research questions identified for this section: (1) logistic regression and (2) linear regression. Logistic regression is an econometric method that allows for analyzing dichotomous dependent variables. The results can then be translated into log-likelihoods that examine how likely one variable is to be true compared to another variable. Linear regression is an econometric method that helps explain the linear relationship between the dependent and independent variables – how substantially and in what direction each independent variable influences the dependent variable. This will help analyze the direct impact of being part of a specific minority or gender group on earnings.

To understand the appropriate application of these regression techniques, it is helpful to explore the variables inherent in these questions in greater detail. There are two general categories of variables employed in the regression techniques: (1) dependent variables and (2) independent variables.

- ◆ Dependent variables are the phenomena to be explained by influences such as age, race, gender, and disability status (i.e., the independent or “explanatory” variables).
- ◆ The first dependent variable is individual wages, a continuous variable with many possible values. A simple linear regression is used to analyze this variable.
- ◆ The second dependent variable is self-employment business earnings, a continuous variable with many possible values. A simple linear regression is used to analyze this variable.
- ◆ The third dependent variable is the probability of self-employment status, which is a binary, categorical variable based on two possible values: 0 (not self-employed) versus 1 (self-employed). Logistic regression is appropriately used to perform an analysis in

---

<sup>132</sup> See Journal of Econometrics, Vol. 61, Issue 1, devoted entirely to the econometrics of labor market discrimination and segregation.

which the dependent variable is binary and categorical. This technique was employed to analyze self-employment.<sup>133</sup>

- ◆ For each analysis, several specifications were conducted. The first specification looked at the impact of race, ethnicity, and gender on individuals from the national level. The second and third specifications examined whether race, ethnicity, and gender significantly impacted individuals in the Essex County market more than at the national level. The results presented in this chapter are specific to the Essex County marketplace. Full specification results can be found in **Appendix D**.

### 6.4.3 The Influences of Race, Ethnicity, and Gender on Individual Wages

To explore whether there are any measurable impacts on wages, MGT compared minority and female nonbusiness owner wages to those of nonminority males in the Essex County marketplace when the effect of other demographic and economic characteristics was controlled. Holding all other personal characteristics constant, if minority and female wage earners cannot achieve comparable wages due to discrimination as their nonminority counterparts, then they are not able to save the necessary capital to start their own businesses. MGT was able to examine the wages of individuals of similar education levels, ages, etc., to permit comparisons more purely by race, ethnicity, and gender.

First, MGT derived a set of independent variables known to predict wages, including:

- ◆ ***Race and Gender:*** African American, Asian American, Hispanic American, Native American, nonminority woman, nonminority males.
- ◆ ***Availability of Capital:*** Homeownership, home value, mortgage rate, unearned income, residual income.
- ◆ ***Marital Status.***
- ◆ ***Ability to Speak English Well.***
- ◆ ***Disability Status:*** From individuals' reports of health-related disabilities.
- ◆ ***Age and Age Squared:*** Squaring the age variable acknowledges the positive, curvilinear relationship between each year of age and earnings.
- ◆ ***Owner's Level of Education.***
- ◆ ***Residing in the Essex County Marketplace.***

MGT used 2016-2020 wages from employment for the dependent variable, as reported in the 5 percent PUMS data.

This analysis examined the statistical effects of these variables on wages for nonbusiness employees in the Essex County marketplace. As the linear regression analysis yielded, each number in **Table 6-11**

---

<sup>133</sup> Logistical regression, or logit, models generate predicted probabilities that are almost identical to those calculated by a probit procedure, used in *Concrete Works v. City and County of Denver* case. Logit, however, has the added advantage of dealing more effectively with observations at the extremes of a distribution. For a complete explanation, see *Interpreting Probability Models* (T.F. Liao, Text 101 in the Sage University series).

represents a percent change in earnings associated with introducing the variable (business ownership classification) in the left-hand column. For example, across all industries, the adjustment factor for an African American is -0.344, meaning that an African American would be predicted to earn 34 percent less than a nonminority male, all other variables considered or controlled for. Complete results of linear regression outputs can be found in **Appendix D**. Specifically:

- ◆ In construction, the negative disparity differences ranged from -11 percent for Native Americans to -45 percent for nonminority females.
- ◆ In architecture & engineering (A&E), the negative disparity differences ranged from -14 percent for Hispanic Americans to -40 percent for nonminority females.
- ◆ In professional services, the negative disparity differences ranged from -27 percent for Asian Americans to -92 percent for Native Americans.
- ◆ In goods & services, the negative disparity differences ranged from -22 percent for Hispanic Americans to -44 percent for nonminority females.

The findings provide further positive evidence that disparities exist in the private sector of Essex County’s marketplace, 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 wages, demonstrating that racial, ethnic, and gender minority groups earn less wages than their nonminority male counterparts, all variables considered.

**TABLE 6-11. WAGES ELASTICITIES OF MINORITY GROUPS RELATIVE TO NONMINORITY MALES AFTER CONTROLLING FOR DEMOGRAPHIC AND ECONOMIC CHARACTERISTICS**

WAGES	TOTAL	CONSTRUCTION	A&E	PROFESSIONAL SERVICES	GOODS & SERVICES
AFRICAN AMERICAN	-34%***	-28%***	-18%***	-41%***	-34%***
ASIAN AMERICAN	-25%***	-22%***	-16%***	-27%***	-34%***
HISPANIC AMERICAN	-32%***	-11%***	-14%***	-43%***	-22%***
NATIVE AMERICAN	-24%***	-15%***	-27%***	-92%***	-25%***
MBE	-29%***	-19%***	-19%***	-51%***	-29%***
NONMINORITY FEMALE	-50%***	-45%***	-40%***	-54%***	-44%***
TOTAL M/WBE	-33%***	-24%***	-23%***	-51%***	-32%***

Source: PUMS data from 2016-2020 American Community Survey (Essex County marketplace) and MGT Consulting Group, LLC, calculations using SPSS Statistics software.

\* indicates a significant adverse disparity at the 15% level or better (85% confidence).

\*\* indicates the disparity is significant at a 10% level or better (90% confidence).

\*\*\* indicates significance at a 5% level or better (95% confidence).

The regression “elasticity” means the percent change resulting from being a member of one of the M/WBE groups.

## 6.4.4 The Influences of Race, Ethnicity, and Gender on Business Owner Earnings

To explore whether there are any measurable impacts on business owner earnings, MGT compared minority and female business owner earnings to those of nonminority males in the Essex County marketplace when the effect of other demographic and economic characteristics was controlled or neutralized. Holding all other personal characteristics constant, if minority and female business owners cannot achieve comparable earnings from their businesses as similarly situated nonminorities because of discrimination, then failure rates for M/WBEs will naturally be higher and M/WBE formation rates will be lower. MGT was able to examine the earnings of business owners of similar education levels, ages, etc., to permit comparisons more purely by race, ethnicity, and gender.

MGT utilized the same model specifications as outlined for wages in this linear regression model. MGT used the dependent variable's 2016-2020 earnings from business owners, as reported in the 5 percent PUMS data.

This analysis examined the statistical effects of the controlled variables on earnings for business owners in the Essex County marketplace. As the linear regression analysis yielded, each number in **Table 6-12** represents a percent change in earnings associated with introducing the variable (business ownership classification) in the left-hand column. For example, across all industries, the adjustment factor for an Asian American is -0.206, meaning that an Asian American would be predicted to earn 21 percent less than a nonminority male, all other variables considered or controlled for. Complete results of linear regression outputs can be found in **Appendix D**. Specifically:

- ◆ In construction, the negative disparity differences ranged from -17 percent for African Americans to -28 percent for nonminority females.
- ◆ In architecture & engineering, the negative disparity differences ranged from 0 percent for Native Americans to -23 percent for Asian Americans.
- ◆ In professional services, the negative disparity differences ranged from -15 percent for Hispanic Americans and Native Americans to -29 percent for nonminority females.
- ◆ In goods & services, the negative disparity differences ranged from -10 percent for Native Americans to -17 percent for Hispanic Americans.

As with individual wages, business owner earnings overall in the Essex County marketplace provide consistent evidence that disparities exist in the private sector, indicating marketplace discrimination against M/WBEs when all other variables are controlled for.

TABLE 6-12. BUSINESS EARNINGS ELASTICITIES OF MINORITY GROUPS RELATIVE TO NONMINORITY MALES AFTER CONTROLLING FOR DEMOGRAPHIC AND ECONOMIC CHARACTERISTICS

BUSINESS EARNINGS	TOTAL	CONSTRUCTION	A&E	PROFESSIONAL SERVICES	GOODS & SERVICES
AFRICAN AMERICAN	-17%***	-17%***	-19%***	-21%***	-14%***
ASIAN AMERICAN	-21%***	-24%***	-23%***	-19%***	-16%***
HISPANIC AMERICAN	-18%***	-19%***	-12%***	-15%***	-17%***
NATIVE AMERICAN	-17%***	-22%***	0%	-29%***	-10%***
MBE	-18%***	-21%***	-13%***	-21%***	-14%***
NONMINORITY FEMALE	-17%***	-28%***	-16%***	-25%***	-15%***
TOTAL M/WBE	-18%***	-22%***	-14%***	-22%***	-14%***

Source: PUMS data from 2016-2020 American Community Survey (Essex County marketplace) and MGT Consulting Group, LLC, calculations using SPSS Statistics software.

\* indicates an adverse disparity that is statistically significant at the 15% level or better (85% confidence).

\*\* indicates the disparity is significant at a 10% level or better (90% confidence).

\*\*\* indicates significance at a 5% level or better (95% confidence).

The regression “elasticity” means the percent change resulting from being a member of one of the M/WBE groups.

## 6.4.5 The Influences of Race, Ethnicity, and Gender on Self-Employment

As noted in the wages and business earnings analyses, discrimination that negatively affects the wages and entrepreneurial earnings of minorities and women will negatively affect the number of businesses formed by these groups as well. MGT used the 2016-2020 U.S. Census ACS 5 percent PUMS data to derive a set of variables known to predict employment status (self-employed/not self-employed). Logistic regression was used to calculate the probability of being self-employed (the dependent variable) based on selected socioeconomic and demographic characteristics with the potential to influence the likelihood of self-employment. The sample for the analysis was limited to labor force participants who met the following criteria:

- ◆ A resident of the Essex County marketplace.
- ◆ Self-employed in construction, architecture & engineering, professional services, or goods and services.
- ◆ Employed full-time (more than 35 hours a week).
- ◆ 18 years of age or older.
- ◆ Employed in the private sector.

Next, MGT derived the following variables<sup>134</sup> hypothesized as predictors of employment status:

- ◆ **Race and Gender:** African American, Asian American, Hispanic American, Native American, nonminority woman, nonminority male.
- ◆ **Availability of Capital:** Homeownership, home value, mortgage rate, unearned income, residual income.
- ◆ **Marital Status.**
- ◆ **Ability to Speak English Well.**
- ◆ **Disability Status:** From individuals’ reports of health-related disabilities.
- ◆ **Age and Age Squared:** Squaring the age variable acknowledges the positive, curvilinear relationship between each year of age and earnings.
- ◆ **Owner’s Level of Education.**
- ◆ **Number of Individuals Over the Age of 65 Living in Household.**
- ◆ **Number of Children Under the Age of 18 Living in Household.**

**Table 6-13** summarizes the business ownership formation rates in the United States and in the Essex County marketplace by race, ethnicity, and gender. Additionally, it compares the differences in formation rates of M/WBEs to non-M/WBEs. As an example, African Americans in the Essex County marketplace have a formation rate of 3.04 percent compared to 9.90 percent for their non-M/WBE counterparts. Thus, the formation rate for African Americans in the Essex County marketplace is 69.3 percent lower than non-M/WBEs  $([3.04 - 9.90]/9.90)$ .

TABLE 6-13. SELF-EMPLOYMENT FORMATION RATES

	US	ESSEX COUNTY	DIFFERENCE FROM NON-M/WBE (ESSEX COUNTY)
<b>TOTALS</b>			
AFRICAN AMERICAN	3.91%	3.04%	-69.33%
ASIAN AMERICAN	6.93%	2.93%	-70.41%
HISPANIC AMERICAN	8.11%	6.90%	-30.35%
NATIVE AMERICAN	7.39%	3.12%	-68.51%
MBE	5.75%	4.65%	-53.03%
WHITE FEMALES	5.48%	3.83%	-61.28%
M/WBE	5.59%	4.25%	-57.08%
NON-M/WBE	13.09%	9.90%	
<b>CONSTRUCTION</b>			
AFRICAN AMERICAN	15.09%	9.85%	-39.51%
ASIAN AMERICAN	16.71%	14.35%	-11.87%
HISPANIC AMERICAN	21.83%	18.09%	11.15%
NATIVE AMERICAN	17.88%	0.00%	-100.00%

<sup>134</sup> The variables used in this analysis were modeled after those incorporated in the same analysis from *Concrete Works v. City and County of Denver*.



	US	ESSEX COUNTY	DIFFERENCE FROM NON-M/WBE (ESSEX COUNTY)
MBE	16.54%	13.63%	-16.27%
WHITE FEMALES	15.46%	11.41%	-29.90%
M/WBE	16.22%	12.94%	-20.50%
NON-M/WBE	22.93%	16.28%	
A&E			
AFRICAN AMERICAN	6.09%	1.43%	-89.44%
ASIAN AMERICAN	9.18%	5.67%	-58.14%
HISPANIC AMERICAN	6.86%	7.41%	-45.36%
NATIVE AMERICAN	8.25%	0.00%	-100.00%
MBE	7.00%	5.54%	-59.12%
WHITE FEMALES	8.40%	9.60%	-29.15%
M/WBE	7.78%	7.24%	-46.57%
NON-M/WBE	13.82%	13.56%	
PROFESSIONAL SERVICES			
AFRICAN AMERICAN	3.40%	3.13%	-66.18%
ASIAN AMERICAN	5.63%	2.03%	-78.07%
HISPANIC AMERICAN	7.44%	5.54%	-40.18%
NATIVE AMERICAN	4.90%	4.43%	-52.15%
MBE	4.74%	3.92%	-57.69%
WHITE FEMALES	5.12%	3.45%	-62.71%
M/WBE	4.99%	3.68%	-60.30%
NON-M/WBE	13.73%	9.26%	
GOODS & SERVICES			
AFRICAN AMERICAN	2.49%	1.70%	-76.85%
ASIAN AMERICAN	4.00%	2.09%	-71.53%
HISPANIC AMERICAN	7.89%	9.29%	26.67%
NATIVE AMERICAN	5.18%	0.00%	-100.00%
MBE	4.04%	4.91%	-33.11%
WHITE FEMALES	5.27%	4.11%	-43.98%
M/WBE	4.72%	4.56%	-37.91%
NON-M/WBE	6.71%	7.34%	

Source: PUMS data from 2016-2020 American Community Survey (Essex County marketplace) and MGT Consulting Group LLC, calculations using SPSS Statistics software.

To test the impact that race, ethnicity, and gender has on the self-employment rates, the logistic regression analysis examined the statistical effects of these variables on being self-employed in the Essex County marketplace. The results in **Table 6-14** indicate the percentage difference between the probability of business ownership for a given race, ethnicity, or gender group compared to similarly situated nonminority males. For example, African Americans in the construction industry have a business formation rate of 51 percent lower than expected in a race-, ethnicity-, and gender-neutral market area. The results in the following tables present rates for the groups after variables such as age and education have been controlled for. Results of logistic regression can be found in **Appendix D**.

TABLE 6-14. SELF-EMPLOYMENT PERCENT DIFFERENCES CONTROLLING FOR DEMOGRAPHIC AND ECONOMIC CHARACTERISTICS

SELF-EMPLOYMENT% CHANGES	TOTAL	CONSTRUCTION	A&E	PROFESSIONAL SERVICES	GOODS & SERVICES
AFRICAN AMERICAN	-52%***	-52%***	-37%***	-41%***	-99%***
ASIAN AMERICAN	-26%***	-46%***	-43%***	-27%***	-31%***
HISPANIC AMERICAN	-56%***	-54%***	-11%***	-43%***	-77%***
NATIVE AMERICAN	-64%***	-62%**	-8%	-92%***	-47%***
MBE	-50%***	-53%***	-25%***	-51%***	-63%***
NONMINORITY FEMALE	-56%***	-36%***	-39%***	-54%***	-34%***
TOTAL M/WBE	-51%***	-50%***	-28%***	-51%***	-57%***

Source: PUMS data from 2016-2020 American Community Survey (Essex County marketplace) and MGT Consulting Group, LLC, calculations using SPSS Statistics software.

\* indicates a significant adverse disparity at the 15% level or better (85% confidence).

\*\* indicates the disparity is significant at a 10% level or better (90% confidence).

\*\*\* indicates significance at a 5% level or better (95% confidence).

These findings demonstrate that minorities and women, in general, are statistically significantly less likely than expected to own their businesses based upon their observable demographic characteristics, including age, education, geographic location, industry, and trends over time. Additionally, as with wage and business earnings, these groups are at a significant disadvantage to nonminority males whether they work as wage and salary employees or as entrepreneurs. These findings are consistent with results that would be observed in a discriminatory market area.

### 6.4.6 Disparities in Rates of Self-Employment

The analyses of self-employment rates and 2016-2020 ACS self-employment earnings revealed general disparities, consistent with business market discrimination, between minority and nonminority self-employed individuals whose businesses were located in the Essex County marketplace. **Table 6-15** presents the results of observed formation rates vs. expected formation rates from the logistic regression. Column A presents the observed rates as seen in **Table 6-13**. Column B is calculated using the regression results and adjusting the observed rates accordingly. For example, for an African American in professional services, the percentage difference compared to a nonminority male controlling for all other variables is 53 percent, indicating that the expected self-employment rate for an African American should be 53 percent higher than what is observed (7.94%) or 12.11percent. Column C is the disparity ratio between observed rates and expected rates.

TABLE 6-15. OBSERVED AND PREDICTED SELF-EMPLOYMENT RATES ESSEX COUNTY MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	OBSERVED SELF-EMPLOYMENT RATES (A)	EXPECTED SELF-EMPLOYMENT RATES (B)	DISPARITY RATIO I
<b>Overall</b>			
African American Firms	2.64%	4.02%	66
Asian American Firms	3.09%	3.90%	79
Hispanic American Firms	6.61%	10.29%	64
Native American Firms	3.61%	5.93%	61
MBE Firms	3.81%	5.70%	67
Nonminority Female Firms	3.85%	6.03%	64
M/WBE Firms	3.84%	5.63%	68
<b>Construction</b>			
African American Firms	7.94%	12.11%	66
Asian American Firms	7.72%	11.28%	68
Hispanic American Firms	13.13%	20.18%	65
Native American Firms	7.53%	12.18%	62
MBE Firms	8.42%	12.62%	67
Nonminority Female Firms	13.17%	17.86%	74
M/WBE Firms	10.15%	15.21%	67
<b>Architecture &amp; Engineering</b>			
African American Firms	4.54%	6.22%	73
Asian American Firms	5.73%	8.21%	70
Hispanic American Firms	6.25%	6.97%	90
Native American Firms	9.11%	9.83%	93
MBE Firms	5.74%	7.50%	77
Nonminority Female Firms	6.62%	9.19%	72
M/WBE Firms	6.22%	8.25%	75
<b>Professional Services</b>			
African American Firms	3.40%	4.80%	71
Asian American Firms	5.63%	7.14%	79
Hispanic American Firms	7.44%	9.82%	76
Native American Firms	4.90%	9.43%	52
MBE Firms	4.74%	6.16%	77
Nonminority Female Firms	5.12%	7.87%	65
M/WBE Firms	4.99%	6.65%	75
<b>Goods &amp; Services</b>			
African American Firms	1.69%	3.32%	51
Asian American Firms	2.21%	2.88%	77
Hispanic American Firms	7.11%	12.59%	56
Native American Firms	3.02%	4.44%	68
MBE Firms	3.17%	5.92%	53
Nonminority Female Firms	4.36%	5.87%	74
M/WBE Firms	3.81%	6.00%	64

Source: PUMS data from 2016-2020 American Community Survey (Essex County marketplace) and MGT Consulting Group, LLC, calculations using SPSS Statistics software.

The findings provide evidence that for M/WBEs, discriminatory barriers exist to achieving the same level of self-employment rates as their non-M/WBE counterparts. The results further show that discriminatory marketplace factors are the cause of these differences in several instances.

## 6.5 Access to Credit

As noted throughout this chapter, discrimination occurs when different outcomes occur for individuals of different races, ethnicities, and genders after holding all of the personal characteristics constant. This might happen in private and public labor markets when equally productive individuals in similar jobs are paid different wages because of their race, ethnicity, or gender. In credit markets, it might occur when loan approvals differ across racial or gender groups with otherwise similar financial backgrounds. In this chapter, MGT examined whether there is evidence consistent with the presence of discrimination in the private sector against M/WBE businesses. Discrimination in the credit market against M/WBEs can significantly affect the likelihood that they will form and succeed, negatively impacting the business's size and longevity.

This section summarizes some national analyses about credit disparities and thus offers illustrative evidence of M/WBE firms' barriers to accessing credit. This information provides guidance to the results provided throughout the private-sector analysis.

### 6.5.1 Minority Business Development Agency

The U.S. Department of Commerce, Minority Business Development Agency published a report in January 2010 entitled, *"Disparities in Capital Access between Minority and Nonminority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs."* Findings highlighted that access to affordable credit remains one of the main impediments to minority-owned firm growth.

General findings show that minority-owned businesses: pay higher interest rates on loans, are more likely to be denied credit, and are less likely to apply for loans because they fear their applications will be rejected.

- ◆ Among high sales firms, 52% of nonminority firms received loans compared with 41% of minority firms.
- ◆ The average loan amount for all high sales minority firms was \$149,000. The nonminority average was more than twice this amount at \$310,000.
- ◆ Among firms with gross receipts under \$500,000, loan denial rates for minority firms were about three times higher, at 42%, compared to those of nonminority-owned firms, at 16%.
- ◆ Among firms with gross receipts under \$500,000, 33% of minority firms did not apply for loans because of fear of rejection compared to 17% of nonminority firms.
- ◆ For all firms, minority firms paid 7.8% on average for loans compared with 6.4% for nonminority firms.

## 6.5.2 The Federal Reserve Small Business Credit Survey

The Small Business Credit Survey (SBCS) is a national collaboration of the 12 Reserve Banks of the Federal Reserve System<sup>135</sup>. This survey has been conducted annually since 2015. Survey responses are collected from firms throughout the United States. While statistics are provided regarding how many responses are from each census region and division<sup>136</sup>, the data provided online does not report race by division. The reports vary somewhat from year to year. For example, the 2016 reports include specific reports for minority and female-owned firms; and the 2018 reports included one regarding disaster-affected firms. Overall, each year's report documents that minority- and female-owned firms, particularly Black-owned firms, have less access to credit and pay more for credit than similarly situated white-owned firms. Data from four consecutive years documents the continuing challenge that minority-owned firms, particularly Black-owned firms, face regarding access to, and cost of, credit. Summary information from reports for employer firms is provided below.<sup>137</sup>

### SBCS 2016

#### Report on Minority-Owned Firms

The 2016 SBCS fielded in Q3 and Q4 2016 yielded 7,916 responses from employer firms with race/ethnicity information in 50 states and the District of Columbia.

- ◆ Black-owned firm application rates for new funding are ten percentage points higher than White-owned firms, but their approval rates are 19 percentage points lower.
- ◆ 40% of Black-owned firms did not apply for financing because they were discouraged (i.e., they did not think they would be approved), compared with 14% of White-owned firms.
- ◆ Looking at just firms approved for at least some financing, when comparing minority- and nonminority-owned firms with good credit scores, 40% of minority-owned firms received the total amount sought compared to 68% of nonminority-owned firms.
- ◆ Black-owned firms report more credit availability challenges (58% vs. 32%) and difficulty obtaining funds for expansion (62% vs. 31%) than White-owned firms.

#### Report on Female-Owned Firms

- ◆ Low credit risk female-owned firms were less likely to be approved for business loans than their low credit risk male counterparts (68% compared to 78%).
- ◆ Sixty-four percent of female-owned firms reported a funding gap, receiving only some or none of the financing sought, compared to 56% of male-owned firms.

---

<sup>135</sup> The survey methodology provides for sample weighting to adjust for any sampling biases; race, ethnicity, and gender imputation by using statistical models to capture missing data; comparisons and adjustments to past reports; and credibility intervals to aide in survey estimates.

<sup>136</sup> Census regions and divisions are areas delineated for the purposes of statistical analysis and presentation.

<sup>137</sup> Source: Small Business Credit Survey, Federal Reserve Banks.

- ◆ Fewer female-owned firms received all of the funding sought than male-owned firms, and more females received none. Among low credit risk firms, 48% of female-owned firms received all of the financing requested, compared to 57% of male-owned firms.

## SBCS 2017

### Report on Employer Firms

Fielded in Q3 and Q4 2017, the survey yielded 8,169 responses from small employer firms in the 50 states and the District of Columbia.

- ◆ Minority-owned firms report higher rates of financial challenges in the previous 12 months due to lack of credit availability than White-owned firms.
  - For firms with revenues less than \$1M, Black-owned firms (58%) reported financial challenges at twice the rate of White-owned firms (32%) (Asian 42%, Hispanic 45%).
  - MGT sees the same ratio for firms with revenues at more than \$1M: Black-owned firms, 49%, and White-owned firms, 24% (Asian 38%, Hispanic 34%).
- ◆ Rates of firms receiving at least some of the financing requested: for Black-owned firms, 61%, and White-owned firms 80% (Asian 73%, Hispanic 74%).
- ◆ For low credit risk firms, 85% of nonminority-owned firms received at least some of the financing requested compared with only 75% for similarly situated minority-owned firms.
- ◆ For low credit risk firms receiving total financing, 68% of nonminority-owned firms were approved compared to only 40% of minority-owned firms.

## SBCS 2018

### REPORT ON EMPLOYER FIRMS

There were 8,072 responses received for this survey from firms throughout the United States.

- ◆ Minority-owned firms report higher rates of financial challenges in the prior 12 months due to credit availability than White-owned firms. Rates were: Black-owned firms, 50 percent; Asian, 33 percent; Hispanic, 41 percent; and White-owned firms, 28 percent.
- ◆ Rates of firms receiving at least some of the financing requested ranged from a high of 80 percent for White-owned firms to a low of 59 percent for Black-owned firms.
- ◆ Rates of firms receiving the total amount requested ranged from a high of 49 percent for White-owned firms to a low of 23 percent for Black-owned firms.
- ◆ 38 percent of Black-owned firms did not apply for financing because they were discouraged (i.e., they did not think they would be approved), compared with 12 percent of White-owned firms.

## SBCS 2019

### Report on Minority-Owned Firms & Report on Employer Firms

The annual survey of businesses was fielded in the third and fourth quarters of 2018 and generated 6,614 responses from employer firms.

- ◆ Minority-owned firms report higher rates of financial challenges in the prior 12 months due to credit availability than White-owned firms. Rates were: Black-owned firms, 51 percent; Asian, 36 percent; Hispanic, 40 percent; and White-owned firms, 30 percent.
- ◆ Rates of firms receiving at least some of the financing requested ranged from a high of 80 percent for White-owned firms to a low of 62 percent for Black-owned firms.
- ◆ Rates of firms receiving the total amount requested ranged from a high of 49 percent for White-owned firms to a low of 31 percent for Black-owned firms.
- ◆ Twenty-eight percent of Black-owned firms did not apply for financing because they were discouraged (i.e., they did not think they would be approved), compared with 13 percent of White-owned firms.
- ◆ On average, Black- and Hispanic-owned firm applicants received approval for smaller shares of the financing they sought than White-owned small businesses that applied for financing.
- ◆ Larger shares of Black- and Hispanic-owned firm applicants did not receive any financing they applied for—38 percent and 33 percent, respectively—compared to 20 percent of White-owned business applicants.
- ◆ Forty-nine percent of White-owned business applicants received approval for all the financing they applied for, compared to 39 percent of Asian-, 35 percent of Hispanic-, and 31 percent of Black-owned firm applicants.

## 6.6 Conclusions

Analysis of the U.S. Census 2012 SBO data, 2017 ABS data, and the PUMS 2016-2020 data demonstrate, in response to the overarching research question driving this analysis, that marketplace discrimination exists for M/WBE firms operating in the private sector within Essex County's marketplace. Thus, based on the courts' guidance in this domain, Essex County has a compelling interest in continuing its current MBE program.

To the more specific research questions:

- ◆ Findings from the U.S. Census 2012 SBO and 2017 ABS data indicate substantial disparities for most M/WBE firms across industry sectors resembling the procurement categories identified for this study.
- ◆ Findings from the 2016-2020 PUMS data indicate that:
  - Minority and women wages were significantly less in 2016-2020 than those of nonminority males, holding all other variables constant.
  - M/WBE firms were significantly less likely than nonminority males to be self-employed.
  - If they were self-employed, most M/WBE firms earned significantly less in 2016-2020 than self-employed nonminority males, holding all other variables constant.
  - Analysis of observed vs. predicted self-employment rates show that marketplace discrimination impacted these rates. Further, this analysis indicates that holding all factors consistent, race, ethnicity, and gender play a role in the lower level of self-employment for M/WBEs.

A review of access to credit indicates that minorities and females tend to receive less than the requested amount of credit when they are approved than nonminority men; they are approved for credit less frequently than nonminority males, and that credit costs them more than nonminority males.

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



# 7 Qualitative Analysis

## 7.1 Introduction

This chapter examines anecdotal evidence of conditions and obstacles faced by M/WBE firms in the study market area in their experiences working with the County of Essex, the County’s prime contractors, and the private sector. The collection and analysis of anecdotal data was focused on firms registered to do business with the County and helps to explain and provide context for the quantitative data analyses found in **Chapter 4, Market Area and Availability Analyses** and **Chapter 5, Product Market, Utilization, 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 County’s procurement transactions.

### CHAPTER SECTIONS

- 7.1 Introduction
- 7.2 Qualitative Background
- 7.3 Methodology
- 7.4. Online and Telephone Business Survey
- 7.5 In-Depth Firm Interviews
- 7.6 Suggested Remedies from Qualitative Respondants
- 7.7 Professional Organizations Interviews
- 7.8 Conclusions

Qualitative or 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 that has been compiled to substantiate these perceptions. Unlike conclusions derived from other types of analysis in this report, the conclusions derived from anecdotal analyses 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.

The collective qualitative data collection activities gathered input from over 60 business owners or representatives regarding their opinions and perceptions of their experiences working with the County, or on County projects as subcontractors.

## 7.2 Qualitative Background

A major component of this study is collecting and analyzing quantitative data from the entity’s procurement and contracting records to determine if discrimination bears any relationship to the extent to which businesses are “chosen” in government contracting and procurement to provide needed goods and services that government cannot deliver on its own. Government purchasing records identifying race, ethnicity, or gender of utilized businesses provide the quantitative record for determining inferences of discrimination. To provide context to the quantitative results, an account of business owner experiences in dealing with the government procurement processes and with other businesses, in a given jurisdiction, qualitative and anecdotal information is also gathered in the form of telephone, online surveys, and individual interview sessions. The data collected are intended to explain the quantitative results from purchasing and procurement data by providing insight into purchasing trends that might explain how discrimination plays out and evolves in the marketplace.

## 7.3 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 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 basis and motivation for collection and analysis of anecdotal data is contained in **Chapter 2, Legal Review**.

MGT used a combination of surveys, community meetings, online comments, focus groups, and one-on-one interviews with businesses to collect anecdotal data 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 focus groups with area trade associations and business organizations to gather anecdotes on their perceptions on the County's procurement process and impact of the M/WBE program to firms in the market area, both MWBEs and non-MWBEs. 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 and broadens the collection of M/WBE firms' experiences doing business or attempting to do business with the County.

### 7.3.1 Business Outreach & Engagement

MGT developed a master vendor database of firms that incorporated data sets from the County's vendor and certification lists; membership lists provided by area trade associations and business organizations; and vendor and certification lists collected from other public agencies to establish a base for the outreach efforts. This database was created to ensure that a broad range of firms in the marketplace were notified about the qualitative data collection activities.

MGT worked with the County to create a community outreach plan that included various outreach methods geared to inform and encourage the business community's involvement and engagement for the anecdotal data collection activities. Outreach methods included:

- ♦ MGT and the County 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 of anecdotal data collection activities and asked to encourage their members to participate.
- ♦ Email blasts and follow up phone calls to the business community to increase awareness and engagement.

- ◆ MGT sent out a Postcard with a QR Code to the business community to take the business survey.

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.

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

The data from the survey responses were analyzed to determine the types of firms represented in the findings included within this chapter. These survey demographics are included as **Appendix E, Demographics of Business Survey Respondents**.

In-depth interviews were one-on-one interviews with M/WBE and non-M/WBE business owners or representatives to gather information about the firms' experiences in attempting to do, and conducting, business with the County (both directly as a prime and/or as a subcontractor). During the interviews we gathered demographic information such as the firm's primary line of business, ethnicity, gender, education/training background of the owner, business history, and size and gross revenues during selected calendar and/or fiscal years. The in-depth interviews were structured settings in which an interviewer or facilitator used an interview guide (**Appendix F**) to obtain input from participants. The interviews provided more latitude for additional information gathering on issues that are unique to the respondents' experiences than the community meetings or surveys. 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 County or its prime contractors.

The focus groups were small group conversations with businesses in the relevant geographic market area to gather information about the firms' experiences in attempting to do, and conducting, business with the County (both directly as a prime and/or as a subcontractor). MGT scheduled focus groups by industry and invited firms to participate. MGT hosted four focus groups where firms participated. The industries were professional services, others services, and goods; construction subcontractors; construction prime contractors; and then one group for all industries. The four focus groups included four firms.

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 provide their feedback on procurement processes from the perspective of the objectives of the organization. In addition, stakeholders were asked to disseminate community meeting notices and encourage their members to participate in the anecdotal data collection activities.

Stakeholders were also asked to provide MGT with a copy of membership or vendor lists which were used to help build the master vendor outreach database. The organizations and associations included in these efforts are identified in **Appendix H, List of Professional Organizations**.

### 7.3.2 Sampling

MGT's sampling methodology for the in-depth interviews and business surveys 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. 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.

## 7.4 Online and Telephone Business Survey

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

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, Vender Survey Instrument**.

The data from the survey responses were analyzed to determine the types of firms represented in the findings included within this chapter. These survey demographics are included as **Appendix E, Vendor Survey Results**.

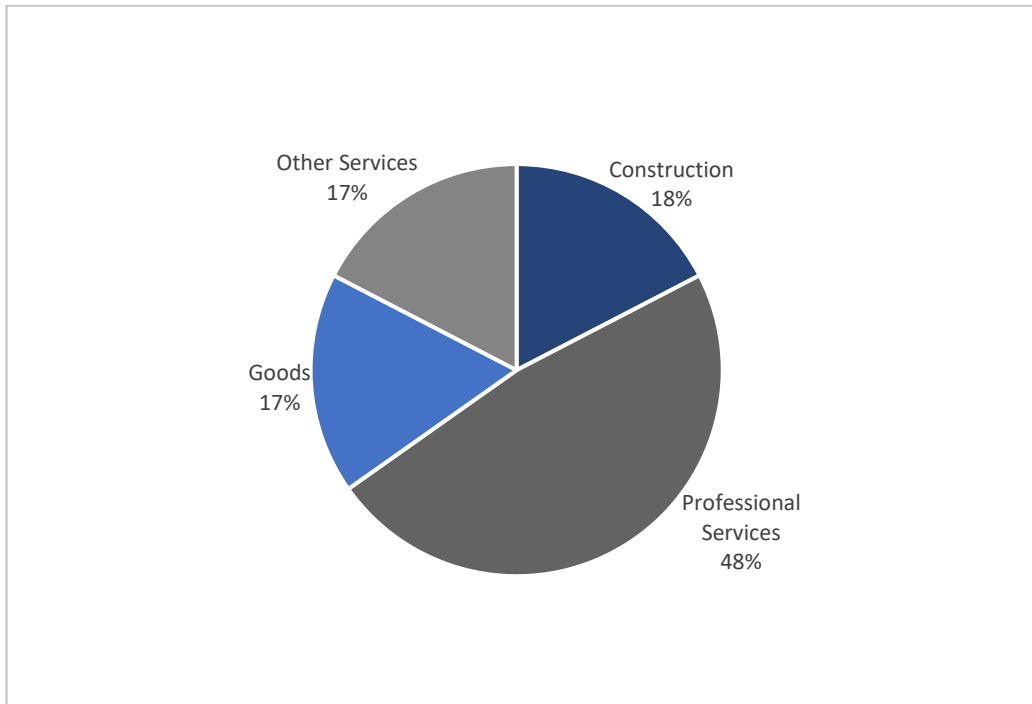
This survey collected 33 responses from firm owners and representatives in the County's relevant market area. **Table 7-1** provides the race, ethnicity, and gender of respondents. M/WBE firms accounted for 78 percent of the total respondents with Nonminority Women firms representing 35 percent of those who participated, followed by African American firms at 30 percent, Asian American firms at 9 percent and Hispanic firms at 6 percent. In total, there were 27 M/WBE respondents. **Figure 7-1** shows response rates per business category.

TABLE 7-1. COUNTY OF ESSEX SURVEY OF VENDORS DEMOGRAPHICS: PROPORTION OF RESPONDENTS BY M/WBE CLASS

Business Ownership Classification	Construction	Professional Services	Goods	Other Services	Total
African American	25%	27%	75%	0%	30%
Asian American	0%	18%	0%	0%	9%
Hispanic American	0%	9%	0%	0%	4%
Native American	0%	0%	0%	0%	0%
<b>Total MBE</b>	25%	55%	75%	0%	43%
Nonminority Women	25%	36%	25%	50%	35%
<b>Total M/WBE</b>	<b>50%</b>	<b>91%</b>	<b>100%</b>	<b>50%</b>	<b>78%</b>

Source: Vendor Surveys, Custom Research International 2023.

EXHIBIT 7-1. ESSEX COUNTY SURVEY OF VENDORS DEMOGRAPHICS: PROPORTION OF RESPONDENTS BY INDUSTRY



Source: Vendor Surveys, Custom Research International 2023.

### 7.4.1 Discriminatory Behaviors to Doing Business

Included below (Table 7-2) is a summary of survey of vendors responses by firms as to whether they encountered disparate treatment or discrimination working with the County, or with the County primes. Proportions of M/WBEs indicating such experiences were as follows:

- African American Firms experienced the largest variety of discriminatory behaviors.
- Nonminority Women only noted experiencing discrimination of unequal access to bonding, credit, or financing.

TABLE 7-2. ESSEX COUNTY  
DISCRIMINATION EXPERIENCES IDENTIFIED BY SURVEY RESPONDENTS PRIME AND  
SUBCONTRACT FIRMS

Discriminatory Behavior	African American	Asian American	Hispanic American or Latino	Native American	TOTAL MBE	Nonminority Women	TOTAL M/WBE
Harassment on the Jobsite	0%	0%	0%	0%	0%	0%	0%
Prequalification requirements	17%	100%	50%	0%	40%	0%	24%
An informal network of prime contractors and subcontractors that has excluded my company from doing business ("Good ole boy" network)	33%	100%	0%	0%	40%	0%	24%
Use of racial slurs or workplace violence, intimidation, or sabotage	0%	0%	50%	0%	9%	0%	5%
Exclusion from events, organizations, or business networks	20%	100%	50%	0%	44%	0%	25%
Collusion and conspiracy by trade by competitors and suppliers	20%	50%	0%	0%	22%	0%	12%
Refusal by agencies, primes, suppliers and/or customers to deal with minorities or women	29%	0%	0%	0%	20%	0%	11%
Obtaining insurance (general liability,	14%	0%	50%	0%	18%	0%	11%

Discriminatory Behavior	African American	Asian American	Hispanic American or Latino	Native American	TOTAL MBE	Nonminority Women	TOTAL M/WBE
professional liability, etc.)							
Double standards in measuring performance	20%	50%	0%	0%	22%	0%	11%
Denial of opportunity to bid	20%	50%	0%	0%	22%	0%	11%
Unfair denial of contract award	17%	50%	0%	0%	20%	0%	11%
Slow payment or non-payment for project work	20%	50%	50%	0%	33%	0%	24%
Unfair contract termination	0%	0%	0%	0%	0%	0%	0%
Predatory business practices such as price discrimination by suppliers/inspectors, bid shopping, slow payment, or non-payment	20%	50%	0%	0%	22%	0%	11%
Unequal access to bonding, credit, or financing as compared to nonminority or non-woman owned companies	29%	0%	0%	0%	18%	20%	11%
Other: (Please describe other discriminatory behaviors experienced)	17%	50%	0%	0%	20%	0%	17%

Source: Vendor Surveys, Custom Research International 2023.

Note: Percentages are calculated based on responses within each individual race, ethnicity, or gender category.

## 7.4.2 Prime Contracting Inclusion of M/WBEs on Projects With and Without Goals

Firms that participated in the qualitative data collection who also work in the private sector as primes noted that relationships are the foundation of their success. However, M/WBE subcontractor firms were not as fortunate in developing such relationships because the private sector does not historically have M/WBE goal requirements on their contracts, which means without goals, primes hire M/WBE subcontractors for their projects at lower rates than their non-M/WBE counterparts. In *Builders Association of Greater Chicago v. City of Chicago*, the court held that the failure of prime contractors

even to solicit qualified M/WBE firms is a “market failure” that is significant evidence in helping to establish a government’s compelling interest in remedying such failures<sup>138</sup>.

Survey respondents who indicated they were subcontractors or suppliers were asked how often prime contractors/vendors solicited their firm to bid on projects with M/WBE goals compared to those without M/WBE goals. The survey sought to determine if prime contractor behavior was the same when projects applied M/WBE goals versus projects without goals.

Nonminority Women participants agreed that primes that solicit bids for public sector work were not soliciting M/WBE firms for private projects. **Table 7-4** below details survey respondents' experiences with primes when projects do not include M/WBE goals. The survey asked, “How often do prime contractors/vendors who use your firm as a subcontractor on public-sector projects with M/WBE goals solicit your firm on projects (private or public) without M/WBE goals?” For M/WBEs collectively, 57 percent indicated that they are seldom or never solicited on projects without goals. Individually, Nonminority Women firms experienced the impact of exclusion when there were no goals within the Construction procurement category.

TABLE 7-3. PRIMES LACK OF SOLICITATION OF M/WBE FIRMS ON PROJECTS WITHOUT GOALS

Business Ownership Classification	Construction	Professional Services	Goods	Other Services	Total
African American	100%	100%	0%	0%	100%
Asian American	0%	100%	0%	0%	100%
Hispanic American	0%	0%	0%	0%	0%
Native American	0%	0%	0%	0%	0%
Total MBE	100%	100%	0%	0%	100%
Nonminority Women	100%	0%	0%	0%	25%
Total M/WBE	100%	40%	0%	0%	57%

Source: Vendor Surveys, Custom Research International 2023.

<sup>138</sup> *Builders Association of Greater Chicago v. City of Chicago*, 298 F.Supp. 2d 725, 737 (N.D. Ill. 2003).



Further evidence of “Market Failure” can be seen in **Table 7-4**. This table summarizes the firms’ experiences being released from Essex County and non-Essex County projects after the project has been awarded. As shown above, in **Table 7-3**, M/WBE firms are seldomly asked to participate in nongoal projects. When M/WBEs are asked to be a part of non-Essex County projects, the table shows that the prevalence of M/WBEs being dropped from the project is much higher on non-Essex County projects than on Essex County projects. African American-owned & Asian American-owned businesses experienced being dropped from non-Essex County projects at the highest degree, followed by Nonminority Women.

TABLE 7-4. M/WBE FIRMS DROPPED AFTER PROJECT AWARD

PROJECT TYPE	AFRICAN AMERICAN	ASIAN AMERICAN	HISPANIC AMERICAN	NATIVE AMERICAN	NONMINORITY WOMEN	TOTAL M/WBE
Essex County Project	0%	0%	0%	0%	0%	0%
Non-Essex County Project	50%	50%	0%	0%	20%	36%

Source: Vendor Surveys, Custom Research International 2023.

### 7.4.3 Discrimination and Disparate Treatment on Private Projects

This section examines understanding and identifying the type of discriminatory treatment encountered by M/WBEs working private projects. A trend for firms that participated in the surveys was the indication that discrimination is prevalent and happens frequently in subtle ways and even to their peer competitors in the private marketplace. **Table 7-5** shows the type of discrimination felt by those indicating they were discriminated against based on their race, ethnicity, or gender. Individually, African American firms indicated experiencing the highest levels of direct discrimination against them due to race on private projects. Additionally, all other groups indicated direct discrimination compared to nearly no indication for non-M/WBEs.

TABLE 7-5. DISCRIMINATORY TREATMENT IDENTIFIED BY PRIMES AND  
SUBCONTRACTORS' PRIVATE PROJECTS

Discriminatory Behavior	African American	Asian American	Hispanic American or Latino	Native American	TOTAL MBE	Nonminority Women	TOTAL M/WBE
Harassment on the Jobsite	0%	0%	100%	0%	11%	11%	11%
Prequalification requirements	57%	50%	100%	0%	60%	33%	47%
An informal network of prime contractors and subcontractors that has excluded my company from doing business ("Good ole boy" network)	57%	50%	100%	0%	60%	14%	41%
Use of racial slurs or workplace violence, intimidation, or sabotage	0%	0%	100%	0%	13%	0%	6%
Exclusion from events, organizations, or business networks	33%	50%	100%	0%	44%	11%	28%
Collusion and conspiracy by trade by competitors and suppliers	20%	0%	100%	0%	25%	0%	13%
Refusal by agencies, primes, suppliers and/or customers to deal with minorities or women	33%	0%	100%	0%	33%	0%	18%
Obtaining insurance (general liability, professional liability, etc.)	0%	0%	100%	0%	10%	0%	6%
Double standards in measuring performance	20%	0%	100%	0%	25%	0%	13%
Denial of opportunity to bid	17%	0%	100%	0%	22%	0%	12%
Unfair denial of contract award	33%	0%	100%	0%	33%	0%	18%
Slow payment or non-payment for project work	29%	50%	100%	0%	40%	38%	39%
Unfair contract termination	0%	0%	100%	0%	13%	0%	6%

Discriminatory Behavior	African American	Asian American	Hispanic American or Latino	Native American	TOTAL MBE	Nonminority Women	TOTAL M/WBE
Predatory business practices such as price discrimination by suppliers/inspectors, bid shopping, slow payment, or non-payment	17%	0%	100%	0%	22%	13%	18%
Unequal access to bonding, credit, or financing as compared to nonminority- or nonwoman-owned companies	29%	0%	100%	0%	30%	0%	19%
Other: (Please describe other discriminatory behaviors experienced)	20%	0%	100%	0%	25%	0%	13%

Source: Vendor Surveys, Custom Research International 2023.

## 7.5 In-Depth Firm Interviews

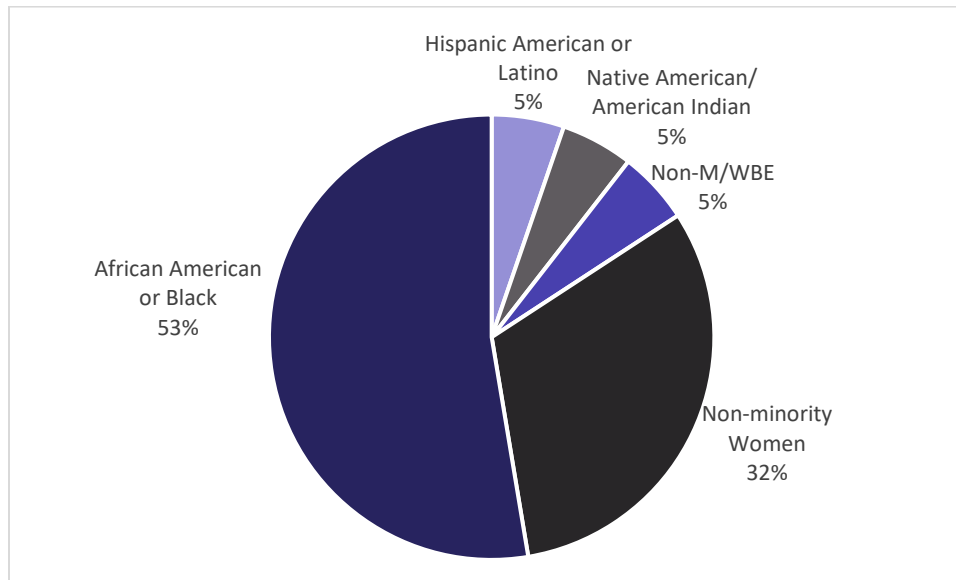
The findings below reflect the opinions and perceptions of anecdotal participants characterized in the preceding demographic summary. As such, the themes are drawn from a very broad base of participants reflecting a comprehensive array of viewpoints and experiences regarding work with the County or its primes.

In the successive sections, findings are generally organized around themes of concerns expressed by vendors, with evidence divided between (1) items identified through qualitative input from anecdotal research participants (interviews and open-ended comments), and (2) quantitative summaries of perceptions collected through the custom census business surveys. In some cases, content is limited to one category of findings or the other based on the scope of information collected through either medium.

The in-depth interviews were conducted with randomly selected firms extracted from the master vendor database and located in the County’s relevant market area.<sup>139</sup> MGT cross referenced the list of firms for the interviews to ensure they were not previously selected for other anecdotal activities. In total, 19 firms were interviewed. The racial and ethnic composition of the firms that completed an interview are illustrated in **Figure 7-2**.

<sup>139</sup> See Chapter 4, Market Area and Utilization Analyses.

EXHIBIT 7-2. COUNTY IN-DEPTH INTERVIEW DEMOGRAPHICS: M/WBE CLASSIFICATION



Source: In-Depth Interviews, Market Analytics International 2023.

### 7.5.1 Procurement Process Issues and Challenges of M/WBEs

Procurement process issues and challenges are frequent issues of concern among vendors in the relevant market. The fair and equal opportunity to bid or propose on the County contracts is critical to the growth and success of all firms, and particularly those of disadvantaged social or economic circumstances, such as M/WBEs.

Included below is a sampling of comments from participants reflecting specific instances of these barriers:

- ♦ A Woman Owned clinic claimed that even after signing up for email notifications with the County on receiving bids they never received any opportunities to bid and said “I mean for all I know there's like 50 bids I missed out on, but I don't know because there's no communication at all.”
- ♦ An African American Woman owned healthcare company stated “I live in Essex County and so I spent at least 3 years trying to do business with Essex County’s school system, nonprofits, public sector, all public sector, really... They say, we need your service, we will do business with you and then they never do. So, you continue to market to them, and then they invite you to events where you market and there is nothing happening. I have heard this from other people, black minority owned, male or female.”
- ♦ In reference to submitting a bid for the County, a Woman owned business stated “By the time I was done with all the work that we put in and answering all the questions and filling out all the forms, it was 30 pages. It took me literally three days. And then you have to get it certified. And then you have to package it up the way they want it, and you have to deliver it. It was

kind of a little more ominous than I'm used to because in corporate world, you do a PowerPoint presentation.

- ◆ An African American woman owned business stated “Well, I didn't bid on a project because I was under the threshold. However, I do not know how to bid with Essex County. I wouldn't even know where to start. And I don't know what their bidding process is.”

## 7.5.2 Financial Barriers Expressed by M/WBE Firms

Limited access to capital and inconsistent cash flow impacts M/WBE and small firms' ability to successfully complete projects, apply for and receive bonds, hire employees, and operate their businesses. Similarly, cash flow becomes a barrier for M/WBE firms, particularly smaller M/WBE firms, because it limits the amount of work they can bid.

Included below is a sampling of comments on this barrier.

- ◆ An African American Woman-owned hospitality business commented on the size of contracts that come through from the city being too big for small businesses to work on and bid for and recommended they be broken up in an “à la carte” type of approach to be more inclusive of smaller businesses with less resources and employees.
- ◆ An African American business respondent wrote “The credit access is very limited. The term and condition of the loan is discriminatory.” as response to the vendor survey.
- ◆ When asked about the challenges M/WBE business face, an African American women owned business stated “So, one, it is having the capital necessary to be able to participate in the RFP process to begin with. We do not necessarily have the funding available to us that we would need.”

## 7.5.3 Experiences from M/WBEs on Prime Behavior

Subcontracting offers M/WBE firms a way to grow their businesses. Primes that treat M/WBEs unfairly or deny the opportunity to bid on contracts impacts the local economy but also potentially negatively impacts the growth of M/WBEs in the marketplace. Specific issues and challenges noted in this area include:

- ◆ 57% of African American owned businesses, 50% of Asian American owned businesses, and 100% of Hispanic American owned businesses responded that they have noticed “An informal network of prime contractors and subcontractors that has excluded my company from doing business (‘Good ole boy’ network)”
- ◆ 100% of Hispanic American owned businesses and 33% of African American owned businesses responded that they noticed “Refusal by agencies, primes, suppliers and/or customers to deal with minorities or women”.

TABLE 7-6. ESSEX COUNTY  
DISPARATE TREATMENT IDENTIFIED BY SUBCONTRACTORS

Discriminatory Behavior	African American	Asian American	Hispanic American or Latino	Native American	TOTAL MBE	Nonminority Women	TOTAL M/WBE	Non-M/WBE
Harassment on the Jobsite	0%	0%	100%	0%	11%	11%	11%	0%
Prequalification requirements	57%	50%	100%	0%	60%	33%	47%	0%
An informal network of prime contractors and subcontractors that has excluded my company from doing business ("Good ole boy" network)	57%	50%	100%	0%	60%	14%	41%	0%
Use of racial slurs or workplace violence, intimidation, or sabotage	0%	0%	100%	0%	13%	0%	6%	0%
Exclusion from events, organizations, or business networks	33%	50%	100%	0%	44%	11%	28%	0%
Collusion and conspiracy by trade by competitors and suppliers	20%	0%	100%	0%	25%	0%	13%	0%
Refusal by agencies, primes, suppliers and/or customers to deal with minorities or women	33%	0%	100%	0%	33%	0%	18%	0%
Obtaining insurance (general liability, professional liability, etc.)	0%	0%	100%	0%	10%	0%	6%	0%
Double standards in measuring performance	20%	0%	100%	0%	25%	0%	13%	0%
Denial of opportunity to bid	17%	0%	100%	0%	22%	0%	12%	0%
Unfair denial of contract award	33%	0%	100%	0%	33%	0%	18%	0%
Slow payment or non-payment for project work	29%	50%	100%	0%	40%	38%	39%	0%
Unfair contract termination	0%	0%	100%	0%	13%	0%	6%	0%
Predatory business practices such as price discrimination by suppliers/inspectors, bid shopping, slow payment, or non-payment	17%	0%	100%	0%	22%	13%	18%	0%

Discriminatory Behavior	African American	Asian American	Hispanic American or Latino	Native American	TOTAL MBE	Nonminority Women	TOTAL M/WBE	Non-M/WBE
Unequal access to bonding, credit, or financing as compared to nonminority- or nonwoman-owned companies	29%	0%	100%	0%	30%	0%	19%	0%
Other: (Please describe other discriminatory behaviors experienced)	20%	0%	100%	0%	25%	0%	13%	0%

Source: Business Surveys, Custom Research International 2023.

### 7.5.4 Procurement Process Issues and Challenges for M/WBEs

Survey respondents who indicated that they were subcontractors or suppliers were asked how often prime contractors/vendors solicited their firm to bid on projects where there were M/WBE goals compared to those projects without M/WBE goals. The survey sought to determine if prime behavior was the same when projects applied M/WBE goals versus projects without goals. 0% of African American owned businesses, Asian American owned businesses, Hispanic American owned businesses, and Native American owned businesses claimed that they were solicited for projects (private or public) when there were no M/WBE contract goals. Of the M/WBE subcontractors, 43 percent responded they are “very often” or “sometimes” solicited to bid on projects without goals. 57 percent of the M/WBE subcontractors that responded stated that they were “seldom” or “never” solicited to bid on projects without goals.

The top three barriers for all anecdotal participants were:

- ◆ Slow payment or non-payment for project work
- ◆ Exclusion from events, organizations, or business networks
- ◆ Issues with the email distribution of available contracts to bid on (i.e. Contracts for the wrong designation, only receiving emails that claim there are no available contracts when there really are)

### 7.6 Suggested Remedies from Qualitative Respondents

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

- ◆ An Asian American owned business wrote “there should be a set-aside % of contract to include subcontractors who can demonstrate the capabilities without experience.”

- ♦ An Asian American owned business wrote “We strongly support extension of and expansion of the MWDBE and similar programs. Smaller and even established midsize firms like ours have tremendous difficulty ‘breaking in’ to these markets. We have experienced dramatic double standards in access and opportunity and having a robust program to further DEI [Diversity, Equity, and Inclusion] goals will go a long way to leveling the playing field.”
- ♦ An African American owned business stated “They need to be meeting the companies. They [County] need to conduct marketing and outreach. They need to be visible because it is so easy to make a decision about someone without having gone out and hearing what they are saying is their problem and having an aptitude and an awareness of who they are.”
- ♦ A Woman owned business stated “Do not make the procurement process so hard.”

## 7.7 Professional Organizations Interviews

Stakeholders were identified as area trade associations and business organizations that have a stake in the development and growth of area businesses, including minority- and women-owned businesses. MGT invited stakeholders to participate in interviews. The stakeholder organizations that participated in the interviews provide capacity building, advocacy, and technical and/or business development to their members, many of which are M/WBE firms. The common themes expressed by stakeholders included:

- ♦ In response to a question about M/WBE access to self-employment, one organization said “Anecdotally, I know sometimes it is harder for them to get access to financial resources to be able to start up a business. The initial outweigh investment/startup costs are more difficult to have the resources to be able to do that. “
- ♦ Another Chamber of Commerce owner touched on the County being more inclined to use companies from other towns that use the readily available businesses, usually M/WBEs, that operate in Essex County.
- ♦ A common theme has been the lack of proper childcare services that are rolled out on a local level and the impact that has particularly on Women-owned businesses.

## 7.8 Conclusions

Qualitative data were collected using multiple methods and included a broad reach of diverse businesses and business industries. Despite extensive marketing and outreach, there was lack of participation from area firms. Disparity studies in general may create low participation rates due to the business owner’s unfamiliarity of disparity studies and how it will help their business.

Overall, there was a general consensus that firms did not feel discriminated against when trying to do business with the County. The data revealed that minority firms did feel other barriers excluded them from doing business with the County. These barriers include lack of access to capital, informal networks, and implicit biases experienced in the marketplace but have an impact on doing or attempting to do business on County contracts. The anecdotes from this broad population of businesses can provide a footprint of policies and procedures that could meet the need of businesses in the market area.



# 8 Findings, Commendations, and Recommendations

## 8.1 Introduction

The County of Essex engaged MGT to conduct its **Disparity Study** to determine if there is a disparity between the number of viable minority- and woman-owned businesses that are able to perform Construction, Professional Services, Non-Professional Services, and Goods and Services contracts, and the number of these same business types who are actually participating in contracts with County of Essex (County).

CHAPTER SECTIONS	
8.1	Introduction
8.2	Findings
8.3	Aspirational Goals Methodology
8.4	Commendations and Recommendations
8.5	Conclusions

### 8.1.1 Background

In 2005, the County released its disparity study results. In 2024, the State of New Jersey released its statewide disparity study report. The State of New Jersey 2024 Procurement Study’s methodology is significantly different than MGT’s and therefore a comparative analysis is not possible. **Table 8-1** below provides a general overview of M/WBE utilization between the County’s 2005 and 2024 reports.

TABLE 8-1. DISPARITY STUDIES COMPARATIVE ANALYSIS, ESSEX COUNTY

	County of Essex 2005 Study	County of Essex 2024 Study
Minority-Owned Businesses	3.02%	3.62%
Women-Owned Businesses	1.65%	6.91%

Within the context of studying the County’s procurement practices, the study was conducted in a manner consistent with disparity study best practices, controlling local legal precedents, and constitutional law in order to properly advise the County about the legal basis for potential remedies, if necessary. 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 analyses for the County’s study had many barriers to producing a detailed quantitative and qualitative analysis. In addition, the study period included two years of data from a legacy system which required a complex migration process. MGT and the County worked for a significant time to create a comprehensive prime utilization database. The analyses for the County’s study had many barriers to producing a detailed quantitative and qualitative analysis. COVID and less than robust subcontractor reporting requirements in New Jersey caused extended time in the collection of data. As noted, the State of New Jersey does not require prime contractors to report “audited/verified” subcontractor data. Therefore, MGT requested subcontract data from firms that held contracts with the County during the study period. However, there are efforts by the County to ensure diverse business inclusion do not go

unnoticed as it was estimated that \$17 million in DBE spending was not included in the County's utilization which was required to be reported per FHWA rules.

Firms in the Essex County marketplace were not responsive to or interested in participating in the qualitative data gathering component of the study. The County, MGT, and MGT's subconsultants spent considerable time reaching out to firms to encourage their participation. Qualitative data is a major pillar to determining if discrimination is occurring in the marketplace.

The results of this study and conclusions drawn are presented in detail in **Chapters 3 -7** of this report. This chapter summarizes 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 County?* MGT's findings and evidence are based on fact finding to analyze County procurement trends and practices between the study period; evaluation of the impact of race-and gender-neutral remedial efforts; and evaluation of options for future program development. *MGT found sufficient evidence of disparity to recommend the continuation of a narrowly tailored race- and gender-based procurement program to address identified disparities.*

## 8.2 Findings

### 8.2.1 Finding A: Relevant Geographic Market Area

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. If these boundaries are stretched too far, the universe of vendors becomes diluted with firms with no interest or history in working with the governmental entity, 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 governmental entity, and thus may also skew the prospective analyses of disparity.

The relevant market area was determined by examining geographic areas from which the majority of its purchases are procured. Based on the results of the market area analysis conducted for each business category, the recommended relevant market area are 12 New Jersey counties within the New York-Newark-Jersey City, NY-NJ-PA MSA. The recommended relevant market area includes Bergen County, NJ; Essex County, NJ; Hudson County, NJ; Hunterdon County, NJ; Middlesex County, NJ; Monmouth County, NJ; Morris County, NJ; Ocean County, NJ; Passaic County, NJ; Somerset County, NJ; Sussex County, NJ; and Union County, NJ.

TABLE 8-2. MARKET AREA ANALYSIS, CONTRACTS DISTRIBUTION OF DOLLARS BY BUSINESS CATEGORY, ESSEX COUNTY MARKET AREA

<b>CONSTRUCTION</b>	<b>Amount</b>	<b>Percent</b>
<i>Inside MSA</i>	\$294,091,074.00	77.68%
<i>Outside MSA</i>	\$84,490,059.00	22.32%
<b>CONSTRUCTION, TOTAL</b>	\$378,581,133.00	100.00%
<b>PROFESSIONAL SERVICES</b>	<b>Amount</b>	<b>Percent</b>
<i>Inside MSA</i>	\$114,309,623.00	56.70%
<i>Outside MSA</i>	\$87,298,550.00	43.30%
<b>PROFESSIONAL SERVICES, TOTAL</b>	\$201,608,173.00	100.00%
<b>NON-PROFESSIONAL SERVICES</b>	<b>Amount</b>	<b>Percent</b>
<i>Inside MSA</i>	\$140,142,550.00	84.36%
<i>Outside MSA</i>	\$25,977,020.00	15.64%
<b>NON-PROFESSIONAL SERVICES, TOTAL</b>	\$166,119,570.00	100.00%
<b>GOODS &amp; SERVICES</b>	<b>Amount</b>	<b>Percent</b>
<i>Inside MSA</i>	\$103,971,433.00	72.43%
<i>Outside MSA</i>	\$39,567,030.00	27.57%
<b>GOODS &amp; SERVICES, TOTAL</b>	\$143,538,463.00	100.00%
<b>ALL BUSINESS CATEGORIES</b>	<b>Amount</b>	<b>Percent</b>
<i>Inside MSA</i>	\$652,514,680.00	73.33%
<i>Outside MSA</i>	\$237,332,659.00	26.67%
<b>ALL BUSINESS CATEGORIES, TOTAL</b>	\$889,847,339.00	100.00%

Chapter 4, Market Area and Availability Analyses

## 8.2.2 Finding B: Utilization Analysis

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 County’s contracting and procurement activities.

The utilization analysis is based on the defined relevant market area, as described in the preceding sections of this chapter. The payments data included within this analysis encompass both (1) total dollars paid to primes located within the market area (excluding all subcontracting payments), and (2) dollars allocated to subcontractors located within the market area, independent of their respective prime contractor location. Analysis of these data is broken down by the procurement categories of Construction, Professional Services, Non-Professional Services, and Goods and Services and encompasses payments between July 1, 2016, to June 30, 2021.

TABLE 8-3. UTILIZATION ANALYSIS BY BUSINESS OWNERSHIP CLASSIFICATION,  
ALL PROCUREMENT CATEGORIES

BUSINESS OWNERSHIP CLASSIFICATION	ALL PROCUREMENT CATEGORIES	
	Dollars (\$)	Percent (%)
African Americans	\$2,893,381.00	0.33%
Asian American	\$26,194,607.00	2.94%
Hispanic Americans	\$3,139,187.00	0.35%
Native Americans	\$0.00	0.00%
<b>Total MBE Firms</b>	<b>\$32,227,175.00</b>	<b>3.62%</b>
Nonminority Females	\$61,526,433.00	6.91%
<b>Total M/WBE Firms</b>	<b>\$93,753,608.00</b>	<b>10.53%</b>
Non-M/WBE Firms	\$796,093,721.00	89.46%
<b>TOTAL</b>	<b>\$889,847,329.00</b>	<b>100.00%</b>

Source: MGT developed a Master Utilization File based on County's system between July 1, 2016, to June 30, 2021.

### 8.2.3 Finding C: M/WBE Availability Estimates

MGT's data assessment and evaluation of alternative methods for measuring the numbers of firms of the types and classifications available to work with the County confirmed that a version of a custom census of firms in the relevant market area would provide the most accurate representation of available firms. The custom census approach used by MGT in this instance required development of representative samples of firms within each of the four procurement categories identified for the study, each of which had to cover the defined 12-county geographic boundaries of the relevant market area.

First, an intensive examination of the County's procurements was required to define the appropriate characteristics of the universe of prospective vendors, in terms of the types of goods and services offered. County procurements were assigned NAICS codes that Dun & Bradstreet uses to classify firms' primary lines of business. These industry selections were then used to establish weighting criteria to be used in random selections of vendors to be surveyed. Target response thresholds were established for each industry subsector to ensure a 95 percent confidence interval and +/-5 percent margin of error for findings. Second, a survey was designed and administered to sampled firms by telephone and email to (1) determine and/or validate the race, ethnicity, and gender of ownership, as well as (2) to elicit these representative firms' interest in working with the County.

Results of the survey were then extrapolated to the full scale of the applicable universe to arrive at an estimation of available firms by ethnicity/gender classification and procurement category.

TABLE 8-4. ESTIMATION OF AVAILABLE FIRMS, ALL PROCUREMENT CATEGORIES

BUSINESS OWNERSHIP CLASSIFICATION	% OF AVAILABLE FIRMS
AFRICAN AMERICAN	4.37%
ASIAN AMERICAN	3.36%
HISPANIC AMERICAN	7.41%
NATIVE AMERICAN	0.08%
MBE	15.22%
NONMINORITY FEMALE	16.53%
M/WBE	31.75%

Source: Custom Census Analysis.

## 8.2.4 Finding D: Disparity Results

Disparity, in this context, is the analysis of the differences between the respective availability of minority- and women-owned firms (as presented in **Chapter 4**), and the utilization of those firms (**Section 5.2**). Thus, MGT calculated disparity indices to examine whether minority- and women-owned firms received a proportional share of dollars based on the respective availability of minority- and women-owned firms located in the study’s defined relevant market area (as presented in **Chapter 4**).

MGT applies two major tests to determine statistical significance: (1) whether the disparity index is less than or equal to 80 percent of respective M/WBE availability, which is labeled “substantial disparity” and (2) whether the disparity index passes the t-test determination of statistical significance. In cases where one, or especially both, measures hold true, a remedy is typically deemed to be justifiable by courts, making these results critical outcomes of the subsequent analyses.

TABLE 8-5. DISPARITY INDICES AND SIGNIFICANCE TESTING, ALL PROCUREMENT CATEGORIES

Business Ownership Classification	Utilization	Availability	Disparity Index	Disparity Impact	Statistical Significance	Disparity Conclusion
<b>African Americans</b>	<b>0.33%</b>	<b>4.37%</b>	<b>7.44</b>	<b>Underutilization</b>	<b>***</b>	<b>Disparity</b>
Asian Americans	2.94%	3.36%	87.66	Underutilization		Disparity
<b>Hispanic Americans</b>	<b>0.35%</b>	<b>7.41%</b>	<b>4.76</b>	<b>Underutilization</b>	<b>***</b>	<b>Disparity</b>
Native Americans	0.00%	0.08%	0.00	Underutilization		Disparity
<b>Total MBE Firms</b>	<b>3.62%</b>	<b>15.22%</b>	<b>23.80</b>	<b>Underutilization</b>	<b>***</b>	<b>Disparity</b>
<b>Nonminority Females</b>	<b>6.91%</b>	<b>16.53%</b>	<b>41.82</b>	<b>Underutilization</b>	<b>***</b>	<b>Disparity</b>
<b>Total M/WBE Firms</b>	<b>10.54%</b>	<b>31.75%</b>	<b>33.18</b>	<b>Underutilization</b>	<b>***</b>	<b>Disparity</b>
Non-M/WBE Firms	89.46%	68.25%	131.09	Overutilization	***	No Disparity

Note: Disparity index values may vary slightly from calculations of depicted figures due to rounding of presented levels of utilization and availability.

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

## 8.2.5 Finding E: Private Sector Analysis

Analysis of the U.S. Census 2012 SBO data, 2017 ABS data, and the PUMS 2016-2020 data demonstrate, in response to the overarching research question driving this analysis, that marketplace discrimination exists for M/WBE firms operating in the private sector within Essex County's marketplace. Thus, based on the courts' guidance in this domain, Essex County has a compelling interest in continuing its current MBE program.

To the more specific research questions:

- ◆ Findings from the U.S. Census 2012 SBO and 2017 ABS data indicate substantial disparities for most M/WBE firms across industry sectors resembling the procurement categories identified for this study.
- ◆ Findings from the 2016-2020 PUMS data indicate that:
  - Minority and women wages were significantly less in 2016-2020 than those of nonminority males, holding all other variables constant.
  - M/WBE firms were significantly less likely than nonminority males to be self-employed.
  - If they were self-employed, most M/WBE firms earned significantly less in 2016-2020 than self-employed nonminority males, holding all other variables constant.
  - Analysis of observed vs. predicted self-employment rates show that marketplace discrimination impacted these rates. Further, this analysis indicates that holding all factors consistent, race, ethnicity, and gender play a role in the lower level of self-employment for M/WBEs.

A review of access to credit indicates that minorities and females tend to receive less than the requested amount of credit when they are approved than nonminority males; they are approved for credit less frequently than nonminority males, and that credit costs them more than nonminority males.

## 8.2.6 Finding F: Qualitative Data Analysis

Qualitative data were collected using multiple methods and included a broad reach of diverse businesses and business industries. Despite extensive marketing and outreach, there was lack of participation from area firms. Disparity studies in general may create low participation rates due to the business owner's unfamiliarity of disparity studies and how it will help their business.

Overall, there was a general consensus that firms did not feel discriminated against when trying to do business with the County. The data revealed that minority firms did feel other barriers excluded them from doing business with the County. These barriers include lack of access to capital, informal networks, and implicit biases experienced in the marketplace but have an impact on doing or attempting to do business on County contracts. The anecdotes from this broad population of businesses can provide a footprint of policies and procedures that could meet the need of businesses in the market area.

## 8.3 Aspirational Goals Methodology

Estimates of MBE availability in the County’s market area provide the starting point for countywide annual aspirational goals for contracting across all industry categories. As the County continues to review its achievement toward the annual aspirational goals, it should assess whether race-and gender-based remedies are necessary for all industry categories. The proposed M/WBE aspirational goal reflected in **Table 8-6** for MBE firms: Construction is 20 percent, Professional Services is 20 percent, Non-professional Services is 15 percent, and Goods & Services is 15 percent. For WBE firms: Construction is 20 percent, Professional Services is 20 percent, Non-professional Services is 15 percent, and Goods & Services is 15 percent.

The proposed goals are based on a weighted average of utilization and availability. Aspirational goals are based on an accumulation of all spending within County and should not be applied rigidly to every individual procurement. Future adjustments to the agency’s aspirational goals should be based on relative availability and adjusted as needed.

TABLE 8-6. M/WBE ASPIRATIONAL GOALS

	MBE	WBE
CONSTRUCTION	20%	20%
PROFESSIONAL SERVICES	20%	20%
NON-PROFESSIONAL SERVICES	15%	15%
GOODS & SERVICES	15%	15%

## 8.4 Commendations and Recommendations

The County of Essex is commended for its dedication to the economic inclusion of minority and women businesses. M/WBE outreach is the County’s initial approach to encourage businesses to engage with the County. A well-rounded disparity study has three major components: 1) quantitative, 2) qualitative, and 3) private sector analysis. The correlation between the three components is important in assessing marketplace discrimination.

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

### 8.4.1 Commendations

#### Essex County has established a Small Business Enterprise (SBE) Program

Essex County has established an SBE program, targeting specific contracts for competition among registered SBEs. SBE programs have the advantage that they are generally not subject to constitutional challenges. Combining SBE programs and M/WBE programs has become common across agencies to expand the economic inclusion of firms in a market area. Public agencies establish size standards using the USDOT Personal Net Worth thresholds to calculate one-fourth of the Small Business Administration’s size standards by industry.

## Office of Small Business Annual Report

The Essex County Office of Small Business Development maintains an annual report. This report provides accountability and transparency around progress toward M/WBE goals.

### Expanded Data Collection and Management

The County of Essex currently collects contract data in MSI, the current financial system that includes commodity codes that align with the purchase order description, contact name, address, phone number, and email addresses of vendors. The County uses MSI Financial System as its contract compliance system to track contracts and spending. Major departments within the County can use the contract compliance system to collect subcontractor data and spending. However, it is not yet required by the NJ State local public contract laws. The Essex County Office of Small Business Development collects subcontractor data for Public Works New Jersey Department of Transportation and federally funded projects as required by law.

The Essex County Office of Small Business maintains a list of certified M/WBE firms in the established relevant market area. The database of firms located in the relevant market is readily available to County departments and potential bidders or proposers. The Office of Small Business also maintains a collection of certification lists from the state and other municipalities in the relevant geographic market area.

The Essex County Office of Small Business collects and maintains bids and proposal responses and identifies firms that are M/WBE firms. Bid and proposal data assist the County 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 County has contacted firms and determined the cause.

MSI Financial System connects intuitively with the County's payment data system from the beginning of a contract to its completion and maintains reports on the expenditures and percentage of spending by each County department. The County should also consider aligning their procurement categories or industries with those identified by the State.

## 8.4.2 Race- and Gender-Neutral Recommendations

### Expand Veteran Business Inclusion

The County of Essex should establish a comprehensive veteran business program to foster economic inclusion through proactive outreach and engagement efforts. This program should set a clear aspirational target of the county's expenditures to be allocated to veteran-owned businesses. To facilitate this initiative, the County must incorporate "veteran business" as a distinct registration classification, enabling the identification and support of such enterprises.

### Develop a Long-Term Procurement Forecast

Essex County agencies should develop a six to 12-month procurement forecast of planned contracting opportunities in all industries, including anticipated capital improvement projects and informal procurements. The Essex County Purchasing Portal is a comprehensive and transparent site that provides information on upcoming bid opportunities that will assist all firms in accessing procurement



information. The County should seek to enhance the use of the Purchasing Portal to publicly shared procurement forecasts on the County's website.

### **Develop a Formal Strategy for Business Relationships with Organizations**

The Essex County Office of Small Business Development should develop a formal and structured business relationship with organizations that promote M/WBE growth and development for a more comprehensive and effective outreach and technical assistance effort.

The Essex County Office of Small Business Development should enhance its budget to support outreach, workshops, marketing, professional development, and overall capacity building of M/WBE firms. Outreach to and engagement of the business community are critical to the success of M/WBE inclusion. Collaboration with professional organizations allows the County to extend training, workshops, and professional development opportunities that encourage participation and increase access to services.

### **Expand the Scope of the Office of Small Business**

The Essex County Office of Small Business should expand its targeted initiatives to increase the participation of small, minority, veteran, and women businesses in its procurement and to address the disparity identified in this report. The County should consider expanding its Office of Small Business to execute more robust program management, outreach, reporting, and compliance.

### **Establish and Implement Project-Specific M/WBE Goals**

The County currently follows the U.S. Department of Transportation's (USDOT) goal-setting methodology to establish contract goals for NJDOT projects. The County should follow the same methodology to ensure all M/WBE firms in the relevant market area are afforded contracting opportunities, realistic project-specific subcontracting goals should be established where there is availability for specific scopes of work across all procurement categories, Construction, Professional Services, Non-Professional Services, and Goods and Services, and based on the historical participation of M/WBE on identical or similar projects. Project-specific subcontract goals will assist the County in addressing the identified disparities found in this report. The Office of Small Business Development should be an integral part of contract administration to ensure bid/proposal requirements are met and in compliance with the County program.

### **Enhance Data Collection**

To assess M/WBE utilization and the attainment of aspirational M/WBE goals, the County should collect data on subcontractors awarded across all industry categories. Other than construction services, there are limited subcontracting opportunities. Contracts for professional and non-professional services are direct contracts. Goods and services are usually purchased through cooperative agreements.

The County should implement existing data systems and processes to monitor and track progress on key performance indicators (KPIs) and establish solid processes to collect and analyze M/WBE utilization data by race, ethnicity, and gender to monitor goal attainment. Although not required by the New Jersey State Local public contract laws, Essex County strongly encourages primes to report subcontractor and supplier utilization (both M/WBE and non-M/WBE) by race, ethnicity, and gender. As identified in this report, limited M/WBE subcontracting data was available. All subcontracting/supplier utilization should be maintained to analyze and report total M/WBE and non-MBE subcontracting participation.

### 8.4.3 Race- and Gender-Conscious Recommendations

#### Narrowly Tailored M/WBE Program

Any modifications to the existing M/WBE Program implemented to address the findings of this study should be narrowly tailored to specifically address the identified disparity in accordance with guidance from case law regarding race-based procurement programs. Developments in court cases involving federal DBE programs provide important insight into the design of local M/WBE programs. Federal courts have consistently found DBE regulations in 49 Code of Federal Regulation (CFR) 26 to be narrowly tailored.<sup>140</sup> The federal DBE program has the features in **Table 8-7** that contribute to this characterization as a narrowly tailored remedial procurement preference program. The County should adopt these features in any new M/WBE program.

TABLE 8-7. NARROWLY TAILORED M/WBE PROGRAM FEATURES

NARROWLY TAILORED GOAL-SETTING FEATURES	DBE REGULATIONS
The County should not use M/WBE quotas.	49 CFR 26(43)(a)
The County should use race- or gender-conscious set-asides only in extreme cases.	49 CFR 26(43)(b)
The County 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.

## 8.5 Conclusions

The completion of this study was extended to address and collect the appropriate and complete quantitative data necessary for the utilization, availability, and disparity analyses. The study recommends a data collection strategy that should provide the County with accurate metrics of future program efficacy.

The study found no discrimination in the purchasing program of the County of Essex. However, the analysis of the U.S. Census 2012 SBO data, 2017 ABS data, and the PUMS 2016-2020 data demonstrate that significant marketplace discrimination exists for M/WBE firms operating in the private sector within the County of Essex’s Market Area. A review of access to credit indicates that minorities and women tend to receive less than the requested amount of credit when they are approved than nonminority males; they are approved for credit less frequently than nonminority males, and that credit costs them more than nonminority males.

This evidence of passive discrimination stands alongside the disparities observed in public sector contracting to illustrate that substantial discriminatory inequities that exist in the County’s Market Area, supporting a finding that the County may have a compelling interest in implementing remedies to address these gaps.

The Study identified significant disparity in the utilization of M/WBE firms in the County’s relevant market and private market. In partnership with and support from the County, there were extensive

<sup>140</sup> *Adarand v. Slater*, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000), *Gross Seed. v. State of Nebraska*, 345 F.3d 968 (8<sup>th</sup> Cir. 2003); cert denied, 158 L.Ed. 2d 729 (2004).

outreach campaigns that encouraged businesses to participate in the qualitative data collection in the marketplace to participate in the study. However, the qualitative data did not determine that discrimination was prevalent among M/WBE due to the limited qualitative data gathered.

The data obtained and analyzed for this report should provide a foundation for the County to implement a narrowly tailored race- and gender-based program that can address the disparities identified, supported by race- and gender-neutral business inclusion programs.