

Report

The City of Bridgeport Disparity Study Regarding Minority Participation in Contracting Executive Summary

Submitted to:
The City of Bridgeport
Connecticut

Submitted by:
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ACKNOWLEDGMENT

In 2004, the City of Bridgeport (City) commissioned Mason Tillman Associates, Ltd., to perform a Disparity Study (Study). The Study could not have been conducted without the cooperation of the local chambers of commerce and business organizations, and the many City business owners who demonstrated their commitment to the Study by participating in community meetings and interviews. City staff played a critical role in making available documents needed to perform the Study and in assisting with the data collection. In particular, Dennis Scinto, Jr., Contract Compliance Officer, provided the essential subcontractor data for the Study.

Deborah Caviness, Mayoral Aide to Mayor John Frabrizi, managed the performance of this Study and Ronald Pachaca, Associate City Attorney of the Office of the City Attorney, supervised the Study's operations. Their leadership and guidance helped keep the process of the Study focused and on target.



STUDY BACKGROUND AND SCOPE

The purpose of the Disparity Study (Study) was to analyze the City's use of minority and woman-owned business enterprises (M/WBEs) on City construction, architecture and engineering, professional services, and goods and non-professional services contracts. The study period covered July 1, 2000 to June 30, 2003.

A 1989 United States Supreme Court decision, *City of Richmond v. J.A. Croson Co.* (*Croson*),¹ raised the standard by which public contracting affirmative actions programs must be predicated. An understanding of *Croson*, which applies to local governments, is necessary in developing sound Minority Owned Business Enterprise (MBE) and Woman-owned Business Enterprise (WBE) programs. The *Croson* decision set forth the following: 1) available businesses must be both willing and able to perform the agency's contracts; 2) disparity between available and utilized businesses must be separately measured for prime contractors and subcontractors; and 3) race conscious remedies predicated on the statistical findings must be narrowly tailored.

The review of *Croson* and related case law provided the legal framework for conducting this Study. This case law set the standards for the methodology employed. City contract records were collected in order to perform the Study's statistical analysis. The Study's statistical analysis involved the following three steps:

Analysis	Objective
Utilization Analysis	To determine the type of M/WBE and non-M/WBE prime contractors and subcontractors used on City contracts, by industry
Availability Analysis	To determine the appropriate pool of market area businesses willing and able to provide services
Disparity Analysis	To calculate the ratio of utilization to availability for M/WBEs and non-M/WBEs, by industry

Statistical evidence alone often does not account for the complex factors and motivations guiding contracting decisions. Anecdotal evidence was collected to provide the Minority and Woman-owned Business Enterprises' perspective of the perceived barriers to public contracting. Finally, the statistical, anecdotal, and the City's procurement procedures were reviewed and recommendations were crafted to enhance the City's efforts of contracting with businesses in its market area.



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

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EXECUTIVE SUMMARY

I. STUDY OVERVIEW

The purpose of the City of Bridgeport (City) Disparity Study was to **determine if a statistically significant disparity existed between the number of available ready, willing, and able minority and woman-owned business enterprises (M/WBEs) and their use on City contracts.** The prime utilization analysis included construction, architecture and engineering, professional services, and goods and non-professional services contracts awarded between July 1, 2000 and June 30, 2003.

II. LEGAL FRAMEWORK

Two United States Supreme Court decisions, *City of Richmond v. J.A. Croson Co.*¹ (*Croson*) and *Adarand v. Peña*² (*Adarand*), raised the standard by which federal courts review M/WBE programs. In those decisions, the Court announced that the constitutionality of affirmative action **programs that employ racial classifications would be subject to “strict scrutiny,” the highest level of constitutional review.** An understanding of *Croson*, which applies to state and local governments, is necessary in developing sound MBE and WBE programs that can withstand a strict scrutiny review. Broad notions of equity or general allegations of historical and societal discrimination against minorities are insufficient to meet the requirements of the Equal Protection clause of the Constitution. Instead, governments may adopt race-conscious programs only as a remedy for identified discrimination, and this remedy must impose a minimal burden upon unprotected classes.

Adarand, which followed *Croson* in 1995, applied the strict scrutiny standard to federal programs. The U.S. Department of Transportation amended its regulations to focus on outreach to Disadvantaged Business Enterprises (DBEs).

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

² *Adarand Constructors, Inc. v. Federico Pena*, 115 S.Ct. 2097 (1995).



Although **no recent decisions regarding disparity studies have come from the Second Circuit or Connecticut’s District Court**, the existing case law provides the constitutional framework within which the City of Bridgeport’s disparity study must fit.

From a legal standpoint, the **purpose of this disparity study is threefold**: (1) to examine the conditions that exist in the City’s market area; (2) to determine from an analysis of those conditions, whether, pursuant to the *Croson* standard, the conditions justify a race-conscious affirmative action program; and (3) if the findings support such a program, to make appropriate recommendations.

III. METHODOLOGY

As set forth in *Croson* and subsequent cases, a disparity study must **document minority contracting history** in the jurisdiction under review. The first step in the review is a statistical analysis of the jurisdiction’s contracting records. The objective of the statistical analysis is to determine the level of M/WBE prime contractor utilization compared to non-M/WBE prime contractor utilization.

Croson established that a local government should not rely on society-wide discrimination as the basis for a race-based program, but should instead identify **discrimination within its own jurisdiction**.³ In *Croson*, the Court found the City of Richmond’s Minority Business Enterprise (MBE) construction program to be unconstitutional due to insufficient evidence of discrimination in the local construction market.

While *Croson* did much to emphasize the importance of the local market area, it provided **little assistance in defining its parameters**. However, it is informative to review the Court’s definition of market area in the City of Richmond context. In discussing the scope of the constitutional violation that must be investigated, the Court interchangeably used the terms “relevant market,”⁴ “Richmond construction industry,”⁵ and “city’s construction industry”⁶ to define the proper scope of the examination of the existence of discrimination. This substitution of terms lends support to a **definition of market area that coincides with the boundaries of a jurisdiction**.

The determination of **availability must follow from the definition of an entity’s market area**. The City’s market area is defined as Fairfield County and New Haven County for this

³ *Croson*, 488 U.S. at 497.

⁴ *Croson*, 488 U.S. at 471.

⁵ *Id.* at 500.

⁶ *Id.* at 470.



Study because the majority of businesses utilized are domiciled within the jurisdiction of these counties.

Under a fair and equitable system of awarding contracts, the proportion of contract dollars awarded to MBEs and WBEs would be equal to the proportion of available MBEs and WBEs⁷ in the relevant market area. If a disparity exists between either proportion, a statistical test could determine the probability that the disparity is due to chance. **If there is a very low probability that the disparity is due to chance,⁸ Croson states that an inference of discrimination can be made.** This analysis should be applied to both MBEs and WBEs by ethnicity and gender.

The United States Supreme Court, in its 1989 decision *City of Richmond v. J.A. Croson Co.*,⁹ specified the **use of anecdotal testimony** as a means to determine whether remedial race and gender-conscious relief may be justified in a particular market area. While anecdotal testimony alone cannot be used as justification for a race based program, it provides context to statistical findings. In its *Croson* decision, the Court stated that “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proofs, lend support to a [local entity’s] determination that broader remedial relief [be] justified.”¹⁰

IV. NOTABLE FINDINGS

Statistically significant prime contract disparity was found for formal contracts under \$500,000 that require public advertising, and informal contracts under \$7,500 and under \$25,000 that do not require public advertising in the construction, architecture and engineering, professional services, and goods and non-professional services industries. **Subcontracting disparity was found for African Americans in the construction industry and Minority Business Enterprises in the architecture and engineering industry.** The tables below delineate the dollar thresholds where ethnic and gender disparities were identified in the City’s informal and formal prime contracting and for subcontracting.

⁷ Availability is defined as willing and able firms. The methodology for determining willing and able firms is detailed in Chapter 5 of the Disparity Study Report.

⁸ When conducting statistical tests, a confidence level must be established as a gauge for the level of certainty that an observed occurrence is not due to chance. It is important to note that a 100 percent confidence level or a level of absolute certainty can never be obtained in statistics. A 95 percent confidence level is considered by the courts to be an acceptable level in determining whether an inference of discrimination can be made. Thus, the data analyzed here was done within the 95 percent confidence level.

⁹ 488 U.S. 469 (1989)/

¹⁰ *Id.* at 509



Table 1 Summary of Disparity Findings: Informal Prime Contracts

Informal Contracts				
Ethnicity and Gender	Construction	Architecture and Engineering	Professional Services	Goods and Non-Professional Services
	Under \$7,500	Under \$25,000	Under \$25,000	Under \$7,500
African Americans	Yes	No	Yes	Yes
Asian Americans	---	No	Yes	---
Hispanic Americans	Yes	Yes	Yes	Yes
Native Americans	---	---	---	---
Women Business Enterprises	No	Yes	Yes	Yes
Minority Business Enterprises	Yes	Yes	Yes	Yes
Minority and Women Business Enterprises	Yes	Yes	Yes	Yes

Yes = Statistically significant disparity was found

No = Statistically significant disparity was not found

--- = There was underutilization, but there were insufficient records to determine statistical disparity



Table 2 Summary of Prime Disparity Findings: Formal Prime Contracts

Formal Contracts Under \$500,000				
Ethnicity and Gender	Construction	Architecture and Engineering	Professional Services	Goods and Non-Professional Services
African Americans	Yes	No	No	Yes
Asian Americans	---	Yes	Yes	---
Hispanic Americans	Yes	Yes	Yes	No
Native Americans	---	---	---	---
Women Business Enterprises	No	Yes	Yes	Yes
Minority Business Enterprises	Yes	No	Yes	Yes
Minority and Women Business Enterprises	Yes	No	Yes	Yes

Yes = Statistically significant disparity was found

No = Statistically significant disparity was not found

--- = There was underutilization, but there were insufficient records to determine statistical disparity



Table 3 Summary of Disparity Findings: Subcontracts

Subcontracts All Prime Dollars		
Ethnicity and Gender	Construction	Architecture and Engineering
African Americans	Yes	No
Asian Americans	---	No
Hispanic Americans	No	No
Native Americans	No	---
Women Business Enterprises	No	No
Minority Business Enterprises	No	Yes
Minority and Women Business Enterprises	No	No

Yes = Statistically significant disparity was found

No = Statistically significant disparity was not found

--- = There were insufficient records to determine statistical disparity

V. RACE AND GENDER-CONSCIOUS RECOMMENDATIONS

A. Prime Contractor Remedies

- *Formal Prime Contract Remedies:* Evaluation credits should be granted on architecture and engineering and professional services contracts to identified target groups. Evaluation credits are incentive points awarded to the target groups when scoring proposals so that their competitive disadvantage can be balanced in regard to non-targeted firms.
- *Informal Prime Contract Remedies:* A Sheltered Market program should be established for all informal contracts. In a Sheltered Market program, small public works contracts are set aside for competition among a limited number of small firms, including M/WBEs.



- *City Staff Due Diligence Criteria:* City purchasing agents and contracting officers should be required to document their efforts in soliciting quotes from the target groups. This type of documentation effort is especially needed in the administration of informal contracts, which do not require advertising and are under the discretion of staff in their selection.

B. Subcontractor Remedies

- *Overall African American Subcontracting Goals:* African Americans were found to have a statistically significant underutilization in the City's construction subcontracts. An overall subcontractor goal should be set at 5.63 percent for African American firms, based on the availability analysis. The overall goal should be reviewed periodically.
- *Overall MBE Subcontracting Goals:* MBEs were found to have a statistically significant underutilization in the City's architecture and engineering subcontracts. An overall subcontractor goal should be set at 10.68 percent for MBE firms, based on the availability analysis. The overall goal should be reviewed periodically.
- *Contract-Specific Subcontracting Goal:* In addition to the overall subcontracting goals, contract-specific subcontracting goals should be set. The contract-specific, goal setting method ensures that each contract goal is reasonably attainable because it reflects the actual availability for the project. In setting a contract-specific goal, both the items of work in the contract and the availability of the target group must be determined.
- *Require Subcontracting Information in Bid Proposals:* Prime contractors should be required to name all subcontractors and the value of their subcontracts in their submissions. The listing of subcontractors will minimize the possibility of bid shopping.
- *Require Prime Contractor Good Faith Effort:* When a contract solicitation includes subcontracting goals, a waiver provision is necessary to address circumstances when goals cannot be met.
- *Disadvantaged Business Enterprise Utilization:* Federal Disadvantaged Business Enterprise (DBE) subcontracting goals should be utilized whenever federal dollars are used to procure products or services for the City.

C. Race Neutral Recommendations

The implementation of race neutral recommendations can improve access for small businesses, in general, to City contracts and in so doing address some of the racial and gender disparities identified.



- *Develop a small local business classification:* The city should develop a Small Local Business Enterprise (SLBE) program. The program would grant preferences to small businesses located within the City limits.
- *Set Small Local Business Enterprise Goals on All City Contracts:* SLBE goals should be applied to all City contracts with subcontracting opportunities. In addition, M/WBE participation should count toward satisfying the SLBE goal.
- *Develop Prompt Payment Requirements:* The City should develop prompt payment requirements for all contracts. Delayed payments can be a significant hardship for small businesses.

In addition, prime contractors should be required to incorporate prompt payment guarantees in their contracts with their subcontractors. Prime contractor payments made by the City should be posted to the Internet, as a mechanism to inform subcontractors when to expect payment. Internet posting of prime contractor payments will also eliminate calls from subcontractors to the City inquiring about invoice payment status.

- *Develop Subcontract Substitution Standards:* Formal subcontractor substitution standards should be developed that apply to all contracts in all industries. Eliminating a subcontractor from a project or reducing its scope of work can pose a significant hardship on a small contractor. Formalizing subcontractor substitution standards ensures that prime contractors are accountable to commitments made at the time of bid or proposal submission.

A subcontractor should be notified in writing of an intended substitution and afforded due process to respond. Substitutions should only be allowed after a hearing, which would consider a subcontractor's response with the approval of the City. Any reduction in the subcontractor's scope of work or contract value should be considered a substitution

D. Administrative Recommendations

- *Train All Staff with M/WBE, DBE, and SLBE Program Requirements:* Purchasing agents, contracting officers, project managers, resident engineers, and inspectors all have interaction with M/WBEs, DBEs, and SLBEs. Training would ensure that regulations are followed and that participation of M/WBEs, DBEs, and SLBEs is recorded on a regular basis.
- *Conduct Outreach and Implement Marketing Strategies:* Outreach should be focused on attracting new vendors and promoting new M/WBE, DBE, and SLBE programs enacted by the City. In addition, marketing strategies should focus on soliciting firms to certify with the City and advertising contracting opportunities.



The table below lists the strategies that can be used to market City programs, inform the business community of the new requirements, and attract M/WBEs firms to certify with the City and bid on its contracts.

Table 4 Outreach Strategies

Strategy	Tactics
Design tag line and display signage	<ul style="list-style-type: none"> • Develop tag line • Design signage with placement of existing logo and new tag line
Define design standards for the organization, including the layout and appearance of procurement documents	<ul style="list-style-type: none"> • Revise all procurement materials to include the program logo and tag lines in order to have a uniform appearance
Develop collateral print material for outreach campaign	<ul style="list-style-type: none"> • Revise brochure to reflect program changes • Develop articles and media packets
Launch outreach campaign	<ul style="list-style-type: none"> • Distribute media packets and press releases • Place public service announcements • Pitch campaign to broadcast media
Host semi-annual contractors' open house and other networking events	<ul style="list-style-type: none"> • Plan and coordinate open house events • Send out invitations via mail, fax, and e-mail • Make informal contract opportunities available • Distribute contract forecasts and certification forms
Distribute forecasts of contracting opportunities via facsimile and e-mail	<ul style="list-style-type: none"> • Distribute contract forecast • Post to website • Distribute through fax and e-mail
Partner with agencies and organizations to disseminate program information	<ul style="list-style-type: none"> • Continue current agency partnerships • Develop local business and trade group partners
Conduct an annual program evaluation	<ul style="list-style-type: none"> • Establish measurable outcomes • Conduct surveys • Examine bidding history

- **Recognize Staff Who Utilize M/WBEs, DBEs and SLBEs:** Purchasing agents, contracting officers, and project managers who comply with the program requirements to utilize MWBEs, DBE, and SLBEs on informal and formal contracts should be recognized.



- ***Publish M/WBE, DBE, and SLBE Utilization Reports:*** Prime contractor and subcontractor utilization should be reported on a regular basis. Regular reports will measure the success of the M/WBE, DBE, and SLBE program efforts and determine if modifications are required.
- ***Code Contracts by Industry Classification:*** Contracts should be coded by industry and entered into the computer system at the time of contract award. Coding each record according to industry would facilitate compliance reporting.
- ***Design a Utilization Tracking System:*** A utilization tracking database should be designed so that M/WBE, DBE, and SLBE utilization can be tracked.

VI. CONCLUSION

The City has both the statistical findings and the legal basis to support race and gender-conscious programs. The law also supports the recommendation for a small local business program. The recommendations offered in this chapter provide remedies to address the identified disparity of M/WBEs, and the proposed SLBE program would extend incentives to all small local firms to do business with the City. In addition, recommendations to enhance the City's organizational, administrative, and data management systems are examples of best management practices which will streamline procurement processes. In combination these recommendations could eliminate the barriers experienced by all firms, including M/WBEs, DBEs, and SLBEs, in contracting with the City and ultimately reduce the City's costs in delivering goods and services to its citizens while recycling tax dollars within its jurisdiction.

City decision-makers should carefully examine the recommendations offered as a result of this Study to establish measurable objectives, set definitive time lines, and determine incremental costs to maximize the opportunities for the M/WBE, local, and small businesses.



VII. CITY OF BRIDGEPORT DISPARITY STUDY REPORT OUTLINE

- *Chapter 1:* Legal Analysis presents a comprehensive discussion of the legal cases that form the basis for disparity study methodology.
- *Chapter 2:* Prime Contractor Utilization Analysis presents the distribution of prime contracts by industry, ethnicity, and gender
- *Chapter 3:* Subcontractor Utilization Analysis presents the distribution of subcontracts by industry, ethnicity, and gender
- *Chapter 4:* Market Area Analysis presents the legal basis for geographical market area determination and defines the City's market area
- *Chapter 5:* Availability Analysis presents the distribution of available businesses in the City's market area
- *Chapter 6:* Prime Contractor Disparity Analysis presents prime contractor utilization, compared to prime contractor availability, by industry, ethnicity and gender, and whether the comparison is statistically significant
- *Chapter 7:* Subcontractor Disparity Analysis presents subcontractor utilization, compared to subcontractor availability, by industry, ethnicity and gender, and whether the comparison is statistically significant
- *Chapter 8:* Anecdotal analysis presents the business barriers identified by the City's business owners
- *Chapter 9:* Recommendations present best management practices

