
EXECUTIVE SUMMARY

MGT of America, Inc. (MGT), in association with Fields and Brown, Attorneys at Law, conducted a Second Generation Disparity Study for the City of Phoenix. This executive summary describes our methodology, findings, and recommendations.

Study Background

The study's ultimate objective was to determine whether there is a compelling governmental interest in continuing the City's M/WBE programs in procuring construction services, general services, and commodities under the guidelines established by the U.S. Supreme Court and other relevant lower court decisions. A key component of the study was to determine: the level of minority- and women-owned business participation that exists in the City's contracting and purchasing; the number of firms available (by race and gender) to provide goods and services; and, whether the evidence supports affirmative action under the applicable legal standards.

MGT designed and implemented a methodology to incorporate the guidance provided by courts. Our primary tasks included conducting a legal analysis of relevant legal opinions; analyzing City ordinances, policies, and procedures relating to M/WBE contracting; analyzing M/WBE utilization for the period January 1, 1993, through December 31, 1997; determining M/WBE availability; calculating disparity; analyzing anecdotal data from public hearings, personal interviews, and phone surveys; and developing findings and recommendations.

Legal Analysis

Key points from relevant court decisions reviewed in this report are as follows:

- (1) In *Crosby*, the United States Supreme Court determined that strict scrutiny is the appropriate standard of judicial review for race-conscious affirmative action programs.

- (2) Intermediate scrutiny applies under the equal protection clause to government-imposed gender preferences in awarding contracts. This standard requires that the government entity demonstrate the gender preference is substantially related to an important governmental objective.
- (3) To withstand strict scrutiny, an MBE program must be based on a compelling governmental interest and must be narrowly tailored to achieve that interest.
- (4) The Ninth Circuit identified two factors necessary to establish a compelling governmental interest: (1) identifiable discrimination has occurred within the local industry affected by the program; and (2) the governmental entity enacting the race-conscious program must have caused or indirectly perpetuated the discrimination to be remedied by the program.
- (5) While the Supreme Court did not specifically define the methodology that should be used to establish the evidentiary basis required by strict scrutiny, the Court did conclude that evidence of significant statistical disparities between minorities utilized and qualified minorities available satisfies strict scrutiny and justifies a narrowly tailored M/WBE program.
- (6) Under *Croson*, availability is determined by the number of qualified minority contractors willing and able to perform a particular service.
- (7) *Croson* also recognized the use of statistical comparison to measure disparity by comparing the number of available M/WBEs qualified to perform certain contracts with the amount of City contract dollars actually awarded to M/WBEs.
- (8) Anecdotal evidence is most useful as a supplement to strong statistical evidence. This evidence alone is rarely, if ever, enough to demonstrate a sufficient systematic pattern of discrimination necessary for a governmental entity to adopt an affirmative action program.
- (9) To justify a goals program based on race or gender under the Constitution's equal protection clause, a local government must demonstrate that it has historically discriminated against particular race or gender groups and/or it has become a passive participant in a system of racial exclusion practiced by local contractors.
- (10) According to the Ninth Circuit, a narrowly tailored MBE program must meet three requirements: (1) the program must be instituted either after, or in conjunction with, race-neutral efforts to increase minority business participation in public contracting; (2) the use of minority participation goals must be set on a

case-by-case basis, rather than as part of rigid numerical quotas; and (3) an MBE program must be limited in its effective scope to remedying discrimination within the boundaries of the enacting jurisdiction.

Methodology

Review of Contracting Policies, Procedures, and Practices

Relevant City policies, ordinances, operating procedures, and manuals were obtained and reviewed. Policies and procedures affecting the three business classifications of the study were analyzed. Interviews were conducted of City management and staff regarding the application of policies, discretionary use of policies, exceptions to written policies and procedures, and their impact on key users. Interviews were also conducted with external users to determine the impact of City policies on firms conducting or attempting to conduct business with the City.

Statistical Analyses

MGT collected and analyzed data for City prime and subcontractor construction contracts, and purchases for general services and commodities between January 1, 1993 and December 31, 1997. The study included the following race and gender classifications: African American, Hispanic American, Asian/Native American, non-minority women, and non-minority men. After interviewing City staff to identify the locations of contract data and purchasing records, a data collection plan was developed. Contract records were reviewed from the Engineering and Architectural Services Department and the Materials Management Division of the Finance Department.

Relevant Market Area. The overall market area is all counties in which the City spent or awarded contract or procurement dollars. For the purpose of the statistical analyses, the relevant market area was defined as those counties where the City spent

or awarded 75 percent or more of the total dollars awarded over the study period, determined separately for each business category. The relevant market area establishes the geographic boundaries for the utilization, availability, and disparity analyses. After analysis of all contracts, the relevant market area for each business category was established as follows:

- Construction – Maricopa County, AZ
- General Services – Maricopa County, AZ; Los Angeles County, CA; Cook County, IL; and Rock Island County, IL
- Commodity Purchases - Maricopa County; AZ

Subsequent data analyses were based on these counties for each respective business category.

Utilization. After the relevant market area was determined for each business category, firms within that relevant market area were identified as M/WBE or non-minority firms. From this analysis, utilization of M/WBEs and non-minorities was determined. MGT calculated the percentage of dollar amounts awarded or paid to each group within the relevant market area for each fiscal year of the study period by business category.

Availability. To determine the number of firms available in the relevant market area, data collected by the U.S. Bureau of Census were used. The data have been objectively derived free from race/gender biases that might affect the relative percentages of firms in the different M/WBE categories, thus, producing a reliable count of potentially available firms by county and industry.

Disparity. A comparison of utilization and availability by each M/WBE group is the foundation of the disparity analysis. The measurement of disparity is presented in the disparity index. A disparity index of 0.00 indicates no utilization. Conversely, a disparity index of 100 indicates parity. Parity occurs when utilization equals availability.

Anecdotal Analysis

After performing the statistical analyses and determining the existence of substantial disparity, MGT determined that a *prima facie* case of discrimination had been established. According to case law, once a significant disparity is shown, an inference of discrimination arises. To support findings of statistical disparity, *Croson* and subsequent cases require that anecdotal research tie the disparity to discriminatory practices in the market area.

Anecdotal information was collected to investigate possible discriminatory patterns in the market area. By utilizing multiple techniques, we were able to achieve results superior to results dependent upon any individual research technique. Our approach for gathering anecdotal data included:

- Public Hearings
- Personal Interviews
- Phone Surveys

Public Hearings. Two public hearings were widely advertised in the *Arizona Republic*, M/WBE publications and through announcements to M/WBE and non-minority business and trade organizations. Each public hearing provided M/WBE and non-minority business owners the opportunity to testify to their experiences contracting with the City of Phoenix or prime contractors working on its behalf. Participant discussions focused on experiences with the City, M/WBE program issues, participation barriers, and opportunities for improvement.

Personal Interviews. Sixty-nine confidential personal interviews were conducted with business owners in Maricopa County, Arizona. All interviews were conducted using a personal interview guide. Each person completing an interview was required to acknowledge by signature that the recorded responses accurately reflected the participant's responses. A content analysis of interview responses was completed

identifying key factors related to attempts to conduct business with the City, experiences with prime contractors and obstacles in the business community.

Telephone Surveys. Using vendor databases obtained from the City, a survey of 346 firms was conducted. To obtain the completed surveys, a total of 12,252 phone calls were randomly made to firms taken from the vendor databases. Survey findings for white male business owners were used for demographic information. Data sample sizes for M/WBE groups were not sufficient to analyze.

Conclusion

Although the City has improved M/WBE participation since the 1993 disparity study, there still remains significant disparity between the utilization and availability of M/WBEs.

MGT **concluded** the following:

- (1)The results of the statistical analysis in Chapter 4 support a finding that available M/WBEs in the relevant market area are significantly underutilized and have encountered significant levels of disparity and discrimination.
- (2)The results of the anecdotal analysis in Chapter 5 support a finding that the City has been:
 - A passive participant in discriminatory practices against minority- and women-owned prime contractors in the construction industry;
 - a passive participant in discriminatory practices against minority- and women-owned subcontractors in the construction industry; and
 - a passive participant in discriminatory practices against minority- and women-owned general services and commodities vendors.
- (3)Significant statistical disparities found in Chapter 4 and supporting anecdotal testimony found in Chapter 5 compel an inference of discrimination sufficient to support the **continuation** of a race-based remedial program.
- (4)The City should establish a new Small Business Enterprise (SBE) goals program for construction subcontractors, general services firms, and commodities vendors.

FINDINGS AND RECOMMENDATIONS

Based on the findings below, MGT developed recommendations addressing the City's M/WBE programs. Implementing the following recommendations will assist the City in designing a remedial program that is narrowly tailored.

Findings and Recommendations

Finding 1:

After interviewing City officials regarding implementation of the 1993 ordinances, it did not appear the City officials had established annual participation goals as required in Section 18-104. Furthermore, the ordinances do not provide a mechanism for determining if the price preference program is eliminating the disparity between utilization and availability. Although the City has made some improvement in its contracting with M/WBEs since the 1993 disparity study was completed, significant levels of disparity and discrimination continue to exist in City contracting.

Established annual participation goals will assist the City in monitoring utilization levels of M/WBEs in both construction and the procurement of goods and services.

Recommendation 1-1:

The City should modify its M/WBE program and establish annual goals for each minority or woman group in the areas of construction subcontracting, general services and commodities.

- **On an annual basis, the City should review its budget and establish annual goals, in dollars and percentages, consistent with M/WBE availability, for each M/WBE group that has demonstrated significant disparity. Only M/WBE firms in the relevant market areas should be allowed to benefit from the program.**
- **The Goals Compliance Office and Finance Department should prepare quarterly reports tracking the overall participation of each M/WBE group that has demonstrated significant disparity on each project or contract in their department, and they should compare that amount with the annual participation goal.**

- The utilization of M/WBE groups should be calculated on the dollar percentage of all contract dollars awarded for each separate business groups.
- Annual goals for each ethnic group and women should reflect M/WBE availability as referenced in this report. The purpose of annual participation goals is to assist the City in monitoring the success of the remedial program. Currently, the City does not have a method of measuring where the M/WBE participation level is on the continuum between the current level of disparity and full participation (disparity index of 100).

Finding 2:

There are inconsistencies between Article VI, the enabling ordinance for construction contracting, and the draft procedure manual for setting M/WBE subcontracting goals. According to the draft procedure, goals are to be set only on the base bid. Goals are not set for any bid alternates. Article VI, however, refers to “project” goals, which could be interpreted to include alternates.

Recommendation 2-1:

Construction project goals should apply to the base bid and any alternates included as part of the project in accordance with recommended goals setting procedures.

- The Goals Setting Committee should set project goals on contemplated bid alternates for construction projects. Goals set on alternates should be established using the same procedure as those set on the base bid. If an alternate is not selected, the goal set for the alternate is not binding on the successful bidder.

Finding 3:

According to research observations and interviews conducted with members of the Goals Setting Committee and EAS staff, the goal setting process is too subjective and results in setting conservative goals that do not reflect actual availability.

Recommendation 3-1:

EAS, the Goals Compliance Unit and the Goals Setting Committee should develop a new method for establishing project goals. The new method should be more objective and should be based on actual availability.

- The method used by EAS staff should be more objective. According to interviews, the method used in establishing recommended goals has a subjective component. The EAS staff determine recommended goals by evaluating the extent of

subcontracting activity in various trade areas. A similar evaluation is then conducted by the Goals Setting Committee. The Goals Setting Committee should be provided with recommended goals that reflect total availability.

- The concern of EAS staff that goals must be reasonable and attainable is important because it satisfies the program flexibility requirement of *narrow tailoring*, but this must be considered with the goal of increasing utilization.
- EAS should reevaluate the current formula requiring the division of the goal percentage by four. Goals should be established based on availability of potential bidders.

Finding 4:

“Construction Bid Opening Procedures” and “Setting Minority and Women Business Enterprise Subcontracting Goals” currently used by EAS, the Goals Compliance Unit, and the Goals Setting Committee are in the form of draft Administrative Regulations. Neither policy has been finalized or formally adopted, although they are being followed as if they were currently effective.

Recommendation 4-1:

Administrative policies and practices should be finalized and properly adopted.

- EAS, the Goals Compliance Unit, and the Goals Setting Committee should modify both drafts to ensure compliance with the enabling ordinance. The drafts should then be formally adopted as administrative regulations.
- The 10 percent maximum MBE and WBE combined goal outlined in the draft policy on setting M/WBE subcontracting goals should be eliminated. The objective of the subcontracting goals program should be to increase MBE and WBE utilization to reflect availability. Since certain types of projects do not have any or low participation goals, the Goal Setting Committee should have the flexibility to set goals higher than the annual goal on a project by project basis, if sufficient availability exists. For example, from information provided by EAS, the number of construction contracts with zero-zero participation goals is high. Approximately one in five or 20 percent of City construction contracts since 1993 have had zero-zero participation goals. By exceeding the annual goals when sufficient availability exists, EAS would increase the possibility of meeting the annual goals. This method will compensate for projects where low availability exists.

Finding 5:

City officials have the potential to set and attain higher participation goals in the construction industry. Of the over 500 contracts awarded since inception of this program, only 29 waivers have been requested. Additionally, on average prime contractors are exceeding the established goals. For example, a summary, report produced by EAS indicates that the required combined goals were 5.57 percent and the combined goals proposed by low bid prime contractors were 7.88 percent. The existing goals setting process does not sufficiently account for current M/WBE availability and if continued will result in inadequate goals that predictably fail to achieve sufficient M/WBE participation. With low project goals, the construction contracting program as structured results in low M/WBE participation at best.

Recommendation 5-1:

Project goals should be set higher to increase MBE and WBE participation.

- **The City should set higher, more challenging goals, in line with availability, in order to encourage prime contractors to solicit M/WBE participation more actively and more aggressively on all City projects.**

Finding 6:

One of the largest complaints during personal interviews and public hearings was that the current method of submitting bids encourages bid shopping. This observation was confirmed by staff of the Goals Compliance Unit and EAS. Written regulations governing the bidding process allow for bid shopping abuses by prime contractors. Use of the *Assurances Affidavit* encourages, if not increases, bid shopping.

Unlike prime contractors, subcontractor's price quotations are not set or defined at the time of bid opening. Accordingly, the apparent low bidder is permitted to bid shop among MBEs and WBEs over a 24-hour period. Because prime contractors are allowed to solicit bids during that 24-hour time period, MBEs and WBEs often do not have ample time to prepare bid responses. Additionally, MBEs and WBEs complained that prime contractors initially indicate they intend to seek a waiver but 24 hours later they are able to meet the goals.

Recommendation 6-1:

Prime contractors should be required to identify MBEs and WBEs and submit a utilization plan with their bid(s)—not the next day.

- **City officials should eliminate the 24 hours a bidder has to complete the M/WBE utilization form.**
- **By requiring all prime contractors to list all subcontractors proposed for a project, the City would collect accurate data on firm availability as provided in Recommendation 6.4.17.**

Finding 7:

As a policy for purchases under \$20,000, City Buyers are instructed to discontinue requesting quotations from M/WBE firms that do not respond to the City's request for quotations after two consecutive requests in a particular commodity or service area. There is no similar policy for non-M/WBE firms.

Recommendation 7-1:

The Finance Department should continue to request quotations from M/WBEs that do not respond to the City's RFQs after two consecutive requests.

- **The Finance Department should rescind the policy contained in a memorandum dated November 23, 1994 that requires M/WBE firms to be eliminated from bid lists if the firm does not respond to two consecutive solicitations.**

Finding 8:

Based on a review of documents provided by the Finance Department and personal interviews, the 2.5 percent price preference applied in the procurement of goods and services had limited success in increasing M/WBE utilization.

Recommendation 8-1:

The City should continue the price/bid preference program with modifications. Instead of having a non-flexible 2.5 percent price/bid preference, the City should establish a range and adjust the price/bid preference according to the City's utilization of M/WBE firms.

Finding 9:

M/WBE owners indicated that the size of a subcontract is sometimes a barrier to participation in City contracting. Owners complained that certain contracts are too large for their business to complete the required scope of work.

After interviewing EAS staff, Goals Setting Committee members, and M/WBEs, it was determined that prime contractors have a disproportionate impact on the level at which M/WBEs can participate in the construction contracting process. Under existing contracting procedures, prime contractors determine the scope of work on which M/WBEs may bid. Prime contractors that regularly conduct business with the City are aware of the capabilities of M/WBE subcontractors in the market area. Accordingly, by structuring the scope of work beyond the capacity of M/WBEs or limiting the scope of work to fit the City's participation goals, the prime contractor is allowed to control the level of M/WBE participation. This becomes particularly meaningful under the existing goals setting process because the levels at which goals are set are, in part, functions of prior bidding activity in a particular trade area.

Recommendation 9-1:

EAS officials should be more proactive in defining subcontracting trade areas in bid specifications to ensure that available M/WBEs are capable of bidding on more City projects. The subcontracting goals recommendation form should be modified to afford the City more input in defining bid specification subcontracting trade areas.

- The City should also consider providing bid preferences to businesses that opt to participate in a joint venture on smaller projects.

Finding 10:

Of the over 500 contracts awarded since the inception of this program, 25 waivers have been requested. Sixty percent of requests for waivers were either partially or fully granted.

Recommendation 10-1:

The City should compile a summary and analysis of the reasons given by contractors for waiver requests. The City should then address these reasons as policy, training, or self-improvement issues to increase MBE and WBE utilization.

- Providing contractors with a copy of the subcontracting goals waiver review form in the bid packet would help contractors realize the efforts necessary to demonstrate a good faith effort to solicit M/WBE participation.

Finding 11:

Since the City will be establishing race-specific goals, EOD must identify the race/ethnicity/gender certification of M/WBE firms to assist prime contractors in identifying potential subcontractors. The information gathered from this classification process should be used in developing quarterly reports.

Commendation 11-1:

EOD should be commended on its efforts to maintaining a well-run certification program. Most M/WBEs interviewed spoke highly of the attention that members of the department have given to M/WBE concerns. While several M/WBEs complained about the length of the certification application and the amount of documentation required, they also understood the need for such detail and found the application easy to understand.

Recommendation 11-2:

EOD should further divide certified MBEs and WBEs according to ethnic group and develop a Small Business Enterprise (SBE) certification process.

- **To assist in the development of an SBE program as discussed in Finding 6.4.15, certification parameters should be established and implemented.**

Recommendation 11-3:

EOD should move quickly toward one-stop certification.

One-stop certification for Maricopa County-based firms would create a larger pool of certified M/WBE businesses. Until that can be accomplished, EOD should continue to certify businesses for Maricopa County. EOD should also review the list of certified M/WBEs from the Arizona Department of Transportation (ADOT) to ascertain businesses on those lists that are not certified with the City, and encourage them to become certified with the City. Additionally, EOD should work with other certifying agencies in the consortium to establish a time line for moving toward complete reciprocity.

Finding 12:

In reviewing the certification directories prepare by EOD, businesses are not currently separated according to ethnicity and gender. Recommendation 6.4.1 suggests that the City establish annual goals for each minority and woman group; therefore, certification directories should separate businesses according to ethnicity and gender.

Recommendation 12-1:

EOD should separate certified MBEs according to ethnic group, and separate WBEs from MBEs.

- **Under each contracting category, certified firms should be divided according to ethnicity and gender.**
- **This breakdown will assist EAS staff and the Goals Setting Committee in setting project goals by facilitating the availability determination. It will also allow EOD staff to track whether certain groups are disadvantaged in the certification process, and whether there are certain groups that may simply not be aware of the certification process.**
- **Information gathered from this breakdown could be included as part of the needs analysis process for further development and utilization of MBEs and WBEs.**

Finding 13:

Arizona state law creates barriers to M/WBE participation as prime construction contractors by imposing requirements that limit the ability of M/WBEs to obtain contractor licenses.

Arizona Revised Statutes Title 32, Chapter 10 sets forth licensing requirements for individuals and organizations engaged in the construction industry. This statute requires licensure and bonding for a broad range of construction activities. As a condition of bidding public jobs, Title 34 also requires bonding at state prescribed levels.

Recommendation 13-1:

The City should petition the Arizona legislature to modify existing statutory requirements on contractor licensure and bonding. Such statutes should bear a direct relationship to the benefit derived from such measures.

The following recommendations are made in addition to the race- and gender-specific recommendations above.

Establishing a Race- and Gender-Neutral Business Program

Finding 14:

The current Small Business Assistance Program has limited impact on M/WBE participation in City contracting.

During the analyses of purchasing policies, procedures, and programs and anecdotal data, several areas of perceived discrimination were identified. Areas of perceived discrimination include the City's goal setting process, disparate treatment by City employees, non-minority contractors' bid shopping, and racist and sexist attitudes of City officials and non-minority business owners.

While *Croson* permits race and/or gender preference programs to remove statistical disparities and discrimination, it also requires the City to implement race- and gender-neutral methods.

As part of the 1993 City Ordinances establishing the M/WBE program, the City funded a Small Business Assistance Program (SBAP) within the Community and Economic Development Department. The City provided three full-time positions and operating funds to develop and implement a race- and gender-neutral program to help eliminate the disparities identified in the 1993 Disparity Study.

The SBAP consists of seven program components:

- First Point Information Center;
- technical assistance;
- consulting and counseling services;

- seminars and training;
- resource directories;
- financial assistance; and
- The Enterprise Community.

While these programs have some success, a service delivery tracking system is not in place to adequately measure the direct impact on M/WBEs. Many of the SBAP services are measured by the number of phone calls received or flyers distributed.

Further analysis of the statistical data show some improvement in the award of construction contracts on prime and subcontractor levels. The following table illustrates the minimal increase in M/WBE utilization. As shown, prior to the implementation of the M/WBE program, M/WBEs were used at a level of less than one half of a percent. After the M/WBE program was enacted, utilization rose to 2.96 percent. This increase in M/WBE utilization is primarily due to the construction subcontracting goals program and price preference program as shown in **Exhibit 1**.

Based on the data presented, the following race- and gender-neutral remedies are recommended.

Recommendation 14-1:

The City should establish a new Small Business Enterprise (SBE) goals program for construction subcontractors, general services firms, and commodities vendors.

The data presented in Chapters 3 through 5 clearly show evidence of gross statistical disparities and discrimination in the construction industry and continued systemic institutional barriers in the City of Phoenix. The City should reemphasize and in some cases implement new race- and gender-neutral methods to address identified disparities and discrimination. While the City has provided some small business assistance services, it is difficult to measure the direct impact of those services on small minority and women owned businesses. The City should develop and implement a Small Business Enterprise program to work in tandem with the current small business assistance programs.

The Small Business Enterprise program should include the following characteristics:

- Small business goals for construction subcontracts should be established to supplement M/WBE participation goals.
- On a case-by-case basis, considering availability and contract sizes, the City should reserve general services contracts and commodities purchases (non-construction contracts) for competition only among small businesses.

**EXHIBIT 1
CITY OF PHOENIX
UTILIZATION OF CONSTRUCTION SUBCONTRACTORS IN THE RELEVANT MARKET AREA
BY RACE, GENDER AND ETHNIC CLASSIFICATION
BEFORE AND AFTER M/WBE SUBCONTRACTOR PROGRAM**

STAGE OF SUBCONTRACTOR PROGRAM	AFRICAN AMERICAN		HISPANIC AMERICAN		ASIAN & NATIVE AMERICAN		NON-MINORITY				TOTAL	
							WOMEN		MEN		ALL CATEGORIES	M/WBE
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%
BEFORE PROGRAM 1/1/93-10/31/93	\$0.00	0.00%	\$105,260.06	0.21%	\$0.00	0.00%	\$127,532.56	0.26%	\$49,644,702.88	99.53%	\$49,877,495.50	0.47%
DURING PROGRAM 11/1/93-12/31/97	\$990,638.43	0.08%	\$23,049,938.51	1.84%	\$1,997,365.85	0.16%	\$11,062,806.47	0.88%	\$1,217,644,614.28	97.04%	\$1,254,745,363.54	2.96%
TOTAL	\$990,638.43	0.08%	\$23,155,198.57	1.77%	\$1,997,365.85	0.15%	\$11,190,339.03	0.86%	\$1,267,289,317.16	97.14%	\$1,304,622,859.04	2.86%

Source: Engineering & Architectural Services, Materials Management- City of Phoenix

- If the Arizona legislature amends public bidding laws in the future, the City should extend the SBE goals program to include construction prime contracts. MGT understands that current Arizona law prohibits the award of construction contracts using any factors other than the lowest responsible and “satisfactory” bid. The City should request the Arizona legislature to change public bidding laws.
- To provide technical assistance for small businesses, the City should create a supportive services program that has two goals: (1) introduce companies to the City contracting process as construction subcontractors and vendors on projects less than \$250,000; and (2) assist established businesses in expanding their ability to become qualified to compete for projects above \$250,000.
- The City should properly fund and staff implementation of the new SBE program, including program development, certification, and monitoring.

Regarding program eligibility:

- All participants should be in business in Maricopa County for a minimum of two years.
- Participants with a net worth less than \$750,000 should be classified as small businesses.
- Participants should not receive more than \$3 million over a three-year period under the program.

Recommendation 14-2:

The City should conduct a performance review of the existing small business assistance programs.

The City should conduct a performance review of the Small Business Assistance Program as managed by the Community and Economic Development (CED) Department to determine the effectiveness of this program. As part of the 1993 ordinances establishing the M/WBE program, the City created three positions in CED to assist in the development of minority and women owned businesses. In conducting this study, data provided by the City was inadequate to quantifiably measure the effectiveness of these programs. A performance review should determine the effect of the program on M/WBE firms and whether the benefits to M/WBEs warrant the cost.

Recommendation 14-3:

Improve the City’s collection and management of contract data.

It is imperative for the City to closely monitor the utilization of all businesses by race, ethnicity and gender to determine whether the small business program over time has the potential to eliminate race and gender disparities without specific race and gender goals. At this time, however, it does not.

It is also equally important to identify, for future availability analysis, the number of construction subcontractors available. Because the City does not collect this data, it is limited in the type of availability analysis it can conduct.

In order for the City to accurately monitor the small business program and assist the City in future availability analyses, it must collect and analyze the following data:

- The City should require *all* contractors to submit a list of all subcontractors contacted in preparation of their bid package. The list of potential subcontractors should include the proposed service, bid amount, and the race/ethnicity/gender of the business owner(s). The data will allow the City to accurately identify the number of actual subcontractors available.
- The City should record, as part of their purchasing vendor list, the date a vendor is added and deleted. By noting when a vendor registered with the City, the City can analyze the availability of registered vendors on an annual basis.
- The City should require that all contractors submit a list of all subcontractors utilized on a City project. This list should include all subcontractors (minority, women and non-minority) utilized, the total amount paid, and the race/ethnicity/gender of the owner. This comprehensive list should be required before the prime contractor's final payment for services. It is important to require prime contractors to identify *all* subcontractors utilized.

Recommendation 14-4:

Review and revise grievance procedures to include mediation and conflict resolution.

Some M/WBEs fear retaliation by primes or City officials if they express complaints or grievances. Thus, M/WBEs are reluctant to voice or file formal complaints or grievances. The City should consider mediation as a method of conflict resolution to follow up on verbal complaints. This method would emphasize win/win solutions without extensive documentation and encourage M/WBEs to report issues they may have with primes without fear of retaliation.

In the in-depth review process, at least one session should be held where the prime is not present, and the mediator should ensure complete confidentiality about any comments made in the session. A retaliation clause, including penalties, might be developed for primes who retaliate in any way against M/WBEs.

Recommendation 14-5:

Provide training periodically to City staff, SBEs, and M/WBEs to fully explain the proposed SBE and M/WBE Programs.

All City officials and staff involved in City purchasing (construction, general services, and commodities) should have general periodic training that explains the details of the

proposed SBE and M/WBE programs. The training should be scheduled semiannually and include newly certified SBEs, M/WBEs and City staff. This will increase understanding of the programs, their requirements, and increase the comfort level of all parties, and this will translate to better relations for all parties.

Recommendation 14-6:

Review and strengthen developmental programs and activities in order to assist small businesses.

The following programs and activities should be developed to assist SBEs:

- training programs tailored to address the particular needs of SBEs. For example:
 - more one-on-one training;
 - regional and annual conferences;
 - allowances for flexible schedules to accommodate time constraints of small businesses; and
 - emphasis on practical training where small businesses are walked through the entire contracting process.
- networking sessions for small businesses and primes arranged for the purpose of meeting, sharing information, and getting to know one another; and training for small businesses on how to market their business to prime contractors.
- providing follow-up information to small businesses on all contracts bid, such as:
 - the name of the winner;
 - their ranking;
 - analysis of lost points; and
 - ways to improve their next bid.
- research possible federal grants that could help SBEs get a head start with their businesses and provide operating loans for when they are awarded a City contract.

Recommendation 14-7:

The City should work with interested trade associations if they choose to implement the proposed Mentor-Protégé Program in conjunction with the proposed Small Business Enterprise program. However, the City should not be responsible for staffing or implementing this program.

If the Arizona General Contractors, Maricopa Contractors' Association or other business organizations choose to implement a Mentor-Protégé program, the City of Phoenix should work with them and participate in a committee format. However, this type of program has had limited success nationally, and City resources can be utilized more effectively in enhancing the SBE program.

1.0 INTRODUCTION

In July 1998, the City of Phoenix (City) contracted with MGT of America, Inc. to conduct a second-generation disparity study. This study serves as an update to the City's initial study completed in 1993 and a supplemental study completed in 1995. The primary purpose of the 1993 study was to evaluate race and gender discrimination in accordance with *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989). Upon completion of the study, the Mayor and City Council approved ordinances creating an M/WBE construction subcontracting goals program, a M/WBE goods and services price preference program, a revised M/WBE certification program, and a "race- and gender-neutral small business program." In 1995, the Associated General Contractors of America, Arizona Chapter (AGC) challenged the legality of the City's disparity ordinances by filing a lawsuit in state court. The City then conducted a supplemental study that conducted further research into the use of M/WBE subcontractors on its construction contracts. The 1995 study indicated that "racial and gender discrimination existed in the local marketplace and that there was a significant statistical disparity between the City's utilization of these businesses when compared to their availability in the market." After completion of the supplemental study, the AGC lawsuit was settled with minor adjustments to the City's program.

In this second-generation disparity study report, MGT presents its methodology, findings, and recommendations covering the period from January 1, 1993, to December 31, 1997. The study addresses the business categories of construction, general services, and purchases of goods/equipment. Professional services are excluded from this study.

The findings, conclusions, and recommendations in this study are a direct result of MGT's rigorous methodology; they reflect a full understanding of the City's contracting and M/WBE program; and they demonstrate a deep appreciation and understanding of the importance of this study to the City. The remainder of this introductory chapter outlines the study background, objectives, and scope, and it provides an overview of the technical approach MGT followed in developing our findings, conclusions, and recommendations.

1.1 Background

The first disparity study conducted for the City was primarily as a result of the U.S. Supreme Court decision in *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989). In overruling Richmond's minority set-aside plan in that case, the Supreme Court established standards which govern all non-federal minority, women, and disadvantaged business enterprise programs operated by public entities. As a result of *Croson*, disparity studies were conducted nationwide by public entities to investigate and document the existence of disparities or discrimination in their jurisdiction.

Today public entities such as the City have undertaken second-generation disparity studies. These studies incorporate the additional guidance the courts have provided over the past five years. The studies are intended to provide a public entity with statistically significant empirical and anecdotal evidence to allow the entity to determine whether to implement or maintain race- and gender-based remedial programs. The studies also help an entity determine to what extent any existing remedial programs are still appropriate based on current case law. This second-generation disparity study conducted by MGT re-evaluates the City's existing

construction contracting and procurement practices and M/WBE program within the context of the *Croson* decision and subsequent court cases.

1.2 Objective and Design of the Study

The principal objective of this study was to evaluate marketplace discrimination, if any, against minority- and women-owned businesses regarding contracting and procurement opportunities with the City, other public entities, and the private sector. The study addressed the following issues:

- Whether there are ongoing effects of past discrimination against minority- and women-owned businesses in the construction, goods, and general services sectors within the relevant market area, either by the City directly, or, as a passive participant in discriminatory behavior practiced by entities that do business with the City.
- Whether active racial and gender discrimination continues to exist in the local marketplace; whether there is still a disparity between the utilization of minority- and women-owned businesses in the local marketplace compared to their availability, and if not, whether there would be disparities but for the existing programs.
- If there were evidence of discrimination, whether race- or gender-neutral measures would be effective to remedy the discrimination.
- If race- and gender-neutral measures would not be effective to eliminate identified discrimination, whether narrowly tailored race- and gender-specific remedies could be fashioned to redress the discrimination.

Four major requirements set forth in the *Croson* decision guided the study.

- **Strict Scrutiny Standard of Review** – the *Croson* held that state and local minority business enterprise plans that rely on race-based remedies are subject to the strict scrutiny standard of review. Thus, MGT ensured that this disparity study for the City was well structured, carefully performed, and closely analyzed to maximize the possibility that if challenged by legal action, recommended programs based upon this study will survive strict scrutiny.
- **Identifiable Discrimination Directly Related to Public Entities' Contracts** – In *Croson*, the Court rejected attempts by the City of Richmond to rely on general findings of societal discrimination to support the need for its MBE plan. Instead, the Court required

specific proof of the nature and extent of discrimination against minority businesses on the local level. Therefore, MGT evaluated the number of minority businesses and non-minority businesses qualified and available to perform contracts with the City, the number in each category selected to do the work, and the disparity between the two groups.

- **The Need to Evaluate Non-Race-Based Remedies** – Even without a finding of local discrimination, a governmental organization could adopt a series of modifications to its contracting and purchasing procedures which would encourage participation by economically disadvantaged groups without regard to race. In addition, in *Croson*, the Court required consideration of solutions not based on race and gender before race and gender remedies could be adopted. Thus, this study addresses such non-race-based remedies.
- **The Solution Must Be Proportionate to the Problem** – Not only must the problem be defined at the local level, the Court has also required that the solution be based on the nature and extent of the local problem identified. Therefore, based on this standard of review, the City's program must be narrowly tailored to remedy the effects of past discrimination at the local level and must remain in place only so long as is necessary to reverse the effects of this discrimination.

1.3 Scope of the Study

The focus of this second-generation disparity study was to analyze the City's contracting practices in the procurement of construction and purchasing including general services and commodities. If MGT found discriminatory practices, then the City asked MGT to recommend corrective actions appropriate to remedy past or current discrimination. The study therefore included:

- a detailed legal analysis of relevant court cases with an emphasis on program and methodological requirements;
- an in-depth review of the City's contracting and purchasing policies, procedures, and practices;
- a rigorous review of the City's contracting and purchasing records and contract files for the study period;
- a collection of anecdotal data from testimony at public hearings, personal interviews and a telephone survey. These hearings

provided opportunities for interested person to present testimony about past instances of discrimination and opposing points of view, as appropriate, including evidence, corroboration, rebuttals, and denials;

- determination of the number of businesses owned and controlled by minority groups and/or women in the geographic area, calculated for each racial and ethnic;
- identification of the group population of “qualified, willing, and able” minority, women, and non-minority contractors and vendors available to perform work within the market area;
- calculation of the share of construction and purchasing contracts awarded to minority, woman, and non-minority-owned firms;
- performance of disparity analyses for market area firms utilized during the study period;
- evaluation of the success of the City’s price preference program (purchases) in eliminating or reducing the disparity identified in the 1993 study;
- determination of the extent of discrimination identified in the 1993 study and the extent of discrimination against minority- and/or women-owned business enterprises, if any, that would occur if the City’s M/WBE program were discontinued; and
- development of recommendations, based on study findings, to ensure that the City is not a passive participant in discrimination.

1.4 Technical Approach

In conducting the study and preparing recommendations, MGT followed a carefully designed work plan that allowed study team members to fully analyze availability, utilization, and discriminatory practices with regard to M/WBE participation in the City’s construction contracts and its procurement of goods and services. The final work plan consisted of 12 major work tasks:

- Conduct Detailed Legal Review
- Finalize Work Plan
- Review Policies, Procedures and Practices
- Analyze the Effectiveness of Race- and Gender-Neutral and Race- and Gender-Based Programs

- Conduct Utilization Analyses
- Determine Availability of Qualified Firms
- Conduct Analyses of Utilization and Availability Data for Disparity
- Conduct Regression Analysis
- Conduct Telephone Surveys
- Collect and Analyze Anecdotal Information
- Identify Narrowly Tailored Race- and Gender-Based Remedies
- Prepare Final Report

Each of these major work tasks involved the completion of several subtasks. Monthly progress reports were submitted to the contract manager and interim meetings were held with City representatives.

1.5 Organization of the Report

The final report is organized into six chapters. The chapters are designed to give the reader a comprehensive overview of the City's M/WBE program, the environment in which the program operates, and a broad understanding of key issues and patterns related to availability and utilization of minority- and women-owned firms.

In addition to this introductory chapter, the final report includes the following chapters, each of which provides background information, detailed methodology, findings, analyses, and recommendations:

- Chapter 2 presents an in-depth legal analysis of relevant court cases including a discussion of weight given to evidence of discrimination.
- Chapter 3 analyzes City contracting and procurement policies and procedures; reviews the City's M/WBE program; and analyzes race-data and gender-neutral and -specific programs.
- Chapter 4 presents the methodology used in the collection of data regarding prime and subcontractor construction contracts, general services contracts, and the purchases of commodities data as they relate to market area, utilization, availability, and disparity.
- Chapter 5 provides the analyses of anecdotal evidence collected from personal interviews, a phone survey, and public hearings.
- Chapter 6 summarizes the report and presents recommendations.

The Appendix provided under separate cover, contains:

- Appendix A which provides copies of various forms used by the City in relation to purchasing, race- and gender-neutral programs, and race- and gender-specific programs.
- Appendix B which provides the survey instrument sent to prime contractors to verify subcontractors and detailed lists of City construction and purchase contracts and subcontracts.
- Appendix C, provides a list of the National Institute of Government Purchasing (NIGP) codes and descriptions for each of the relevant categories: construction, goods and services, and commodities.
- Appendix D, provides a copy of anecdotal data collection instruments.

2.0 LEGAL REVIEW

2.1 Introduction

Since the United States Supreme Court's decision in *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989), governmental entities have struggled to establish and maintain affirmative action programs to eliminate discriminatory practices, while complying with the guidelines issued by the Supreme Court. The *Croson* decision and lower court cases that followed have set forth the legal standards that should be the basis for a well-designed disparity study. This review identifies and analyzes those standards, and it summarizes how courts evaluate the constitutionality of race- and gender-specific programs. Finally, this review discusses the application of the legal principles enunciated in those decisions to methodologies used in this disparity study.

2.2 City of Richmond v. J.A. Croson Company

In 1983, the Richmond City Council adopted a Minority Business Utilization Plan (the Plan) following a public hearing in which seven citizens testified about historical *societal* discrimination. In adopting the Plan, the Council also relied on a study which indicated that "while the general population of Richmond was 50 percent African American, only 0.67 percent of the city's prime construction contracts had been awarded to minority businesses in the five-year period from 1978 to 1983."¹ The evidence before the Council established that a variety of state and local contractor associations had little or no minority business membership. The Council also relied on statements by a Council member whose opinion was that "the general conduct of the construction industry in this area, the state, and around the nation, is one in which race discrimination and exclusion on the basis of race is

¹*City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 479-80 (1989).

widespread.”² There was, however, no direct evidence of race discrimination *on the part of the city* in its contracting activities or evidence that the city’s prime contractors had discriminated against minority-owned subcontractors.³

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-M/WBE mechanical plumbing and heating contractor, filed a lawsuit against the City of Richmond alleging that the Plan was unconstitutional and violative of the Equal Protection Clause of the Fourteenth Amendment. After the district court and Fourth Circuit Court of Appeals upheld the Plan, the Supreme Court vacated the appellate decision, and remanded the case for further consideration in light of *Wygant v. Jackson Board of Education*.⁴

On remand, a divided appellate court refused to uphold the Richmond Plan. The court held that “findings of societal discrimination will not suffice [to support a race-based plan]; the findings must concern prior discrimination by the governmental unit involved.”⁵ The court further held that the Plan was not narrowly tailored to accomplish a remedial purpose. The 30 percent set-aside requirement of the Plan was held to be arbitrarily chosen and not sufficiently related to the number of minority subcontractors in Richmond or any other relevant number.⁶ As a result, the appellate court struck down the Richmond Plan and the Supreme Court affirmed this decision.

²*Id.* at 480.

³*Id.*

⁴*Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

⁵*Croson*, 488 U.S. at 485.

⁶*Id.* at 486.

2.3 Standards of Review for Race-Specific and Gender-Specific Programs

In *Croson*, the Supreme Court determined that strict scrutiny is the appropriate standard of judicial review for race-conscious affirmative action programs such as the Minority-Owned Business Enterprise (MBE) Program in the City of Phoenix--which utilizes goals and price preferences in City contracting and purchasing. The Court concluded that a race-conscious program must be based on a compelling governmental interest; there must be a strong evidentiary basis which identifies and proves the discrimination; and the program must be narrowly tailored to achieve its objective.

Regarding the affirmative action plan in *Croson*, the Supreme Court stated:

Since the plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely on their race, *Wygant's* strict scrutiny standard of review must be applied which requires a firm evidentiary basis for concluding that the under-representation of minorities is a product of past discrimination.⁷

Strict scrutiny is the most stringent form of constitutional review, and for an MBE program to pass constitutional muster under this standard the program must be (1) based on a compelling government interest, and (2) narrowly tailored to achieve its objective.

Concerning gender-specific programs, such as the Women-Owned Business Enterprise (WBE) Program in the City of Phoenix, the Supreme Court has never directly addressed the issue of a gender-based classification in the context of WBE programs. *Croson* was limited to the review of an MBE plan. In other contexts, however, the Supreme Court has ruled that gender classifications are subject to *intermediate* scrutiny instead of the more rigorous strict scrutiny standard applied to racial classifications. Intermediate scrutiny requires the governmental entity to demonstrate an important governmental objective and means that bear a direct and substantial relationship to achieving that objective.⁸

⁷ *Croson*, 488 U.S. at 472.

⁸ *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

The Ninth Circuit has specifically applied intermediate scrutiny to WBE programs.⁹ In *Coral Construction Company v. King County*, the court noted that some degree of discrimination must be demonstrated in a particular industry before a gender-specific remedy may be instituted in that industry: "[T]he mere recitation of a benign, compensatory purpose will not automatically shield a gender-specific program from constitutional scrutiny."¹⁰ The Ninth Circuit did make one distinction between the factual predicate necessary in an MBE disparity analysis and the factual predicate necessary in a WBE analysis. Specifically, intermediate scrutiny does not require a showing of governmental involvement, active or passive, in the discrimination it seeks to remedy.¹¹ This showing is required under the strict scrutiny standard of review applied to race-conscious programs.

A. To Withstand Strict Scrutiny an MBE Program Must be Based on a Compelling Governmental Interest such as Remedying Discrimination.

Under strict scrutiny, a race-conscious affirmative action program must be based on a "compelling governmental interest" and must be "narrowly tailored" to achieve that interest.

In *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, the court stated:

In practice, the interest that is alleged in support of racial preferences is almost always the same--remedying past or present discrimination. That interest is widely accepted as compelling. . . . [T]he true test of an affirmative action program is usually not the nature of the government's interest, but rather the adequacy of the evidence of discrimination offered to show that interest.¹²

The Ninth Circuit in *Coral Construction*, identified two factors necessary to establish a compelling governmental interest. Interpreting *Croson*, the court stated that in order to

⁹*Coral Construction Co. v. King County*, 941 F.2d 910, 931 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 875 (1992); *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922, 939 (9th Cir. 1987).

¹⁰*Coral Construction Co.*, 941 F.2d at 932.

¹¹*Id.*

¹²*Engineering Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 906 (11th Cir. 1997) (citing *Ensley Branch NAACP v. Seibels*, 31 F.3d 1548, 1564 (11th Cir. 1994) (citations and internal quotation marks omitted)).

maintain a valid set-aside program a showing must be made that “identifiable discrimination has occurred within the local industry affected by the program.”¹³ Essentially, “a governmental actor cannot render race as a proxy for a particular condition merely by declaring that the condition exists.”¹⁴ The second factor necessary to show a compelling governmental interest is “the governmental actor enacting the set-aside program must have somehow perpetuated the discrimination to be remedied by the program.”¹⁵

A state or local government cannot employ a race-specific program on the basis of an amorphous claim of *societal* discrimination, simple legislative assurances of good intentions, or on congressional findings of discrimination in the national construction industry. The state or local government may only employ a race-specific remedial plan if it identifies past or present discrimination with the degree of particularity required by the Fourteenth Amendment.

1. A Strong Evidentiary Basis Must Exist That Specifically Identifies and Demonstrates the Discrimination to be Remedied by the M/WBE Program.

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

¹³ *Coral Construction Co.*, 941 F.2d at 916.

¹⁴ *Coral Construction Co.*, 941 F.2d at 916 (quoting *Croson*, 488 U.S. at 500-01).

¹⁵ *Coral Construction Co.*, 941 F.2d at 916.

- a. Evidence of significant statistical disparities between minorities utilized and qualified minorities available satisfies strict scrutiny and justifies a narrowly tailored M/WBE program.

(i) Determining Availability

Regarding statistical evidence to support a race-conscious program, the Supreme Court in *Croson* stated that “where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.”¹⁶

But the statistics may not compare the general population to prime construction contracts awarded to MBEs. The Court objected to this comparison “since the proper statistical evaluation would compare the percentage of MBEs in the relevant market that are qualified to undertake City subcontracting work with the percentage of total City construction dollars that are presently awarded to minority subcontractors.”¹⁷

Under this formula, one of the most important elements is the “availability” determination—the number of qualified minority contractors willing and able to perform a particular service for the municipality. In *Croson*, the Court stated:

Where there is a significant statistical disparity between the number of qualified minority contractors *willing and able* to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.¹⁸

The Court further noted that “where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.”¹⁹ An accurate determination of availability is necessary so that the legislative body may “determine the precise scope of the injury it seeks to remedy” by its program.²⁰ Following *Croson*’s statements on availability, lower courts have decided how legislative bodies may determine the precise scope of the

¹⁶ *Croson*, 488 U.S. at 501.

¹⁷ *Id.* at 470-71.

¹⁸ *Croson*, 488 U.S. at 509 (emphasis added).

¹⁹ *Croson*, 488 U.S. at 501-02.

²⁰ *Croson*, 488 U.S. at 498.

injury sought to be remedied by an MBE program. Where availability statistics are not accurately collected and carefully evaluated, they will be subject to attack. If the availability determination is too narrow, potential discrimination will be understated or dismissed. If the availability determination is too broad, discrimination will be exaggerated.

(ii) Racial Classifications

In determining availability, a threshold issue is the appropriate racial groups to consider. In *Croson*, the Supreme Court criticized the City of Richmond's inclusion of "Spanish-speaking, Oriental, Indian, Eskimo or Aleut persons" in the City's affirmative action program.²¹ These groups had not previously participated in city contracting, and "[t]he random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination."²² In order to properly evaluate availability, data must be gathered for separate racial groups.

(iii) Relevant Market Area

Another central 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 willing and able contractors are located, or a fixed geopolitical boundary. If the relevant market area is not properly defined, it can artificially inflate or deflate M/WBE availability. The Supreme Court has not yet established how the relevant market area should be defined. However, some courts of appeal have done so including the Tenth Circuit in *Concrete Works of Colorado, Inc. v. City and County of Denver*.²³ Concrete Works, a non-M/WBE construction company, argued that *Croson* precluded consideration of discrimination

²¹ *Croson*, 488 U.S. at 506.

²² *Id.*

²³ *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1520 (10th Cir. 1994).

evidence from the six county Denver Metropolitan Statistical Area (MSA) and, therefore, Denver should be confined to the use of data within the City and County of Denver alone. The Tenth Circuit, interpreting *Croson*, concluded, “The relevant area in which to measure discrimination . . . is the local construction market, but that is not necessarily confined by jurisdictional boundaries.”²⁴ The court further stated:

It 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.²⁵

The Tenth Circuit ruled that over 80 percent of Denver Department of Public Works construction and design contracts were awarded to firms located within the Denver MSA; therefore, the appropriate market area should be the Denver MSA—not the City and County of Denver alone.²⁶ Accordingly, data from the Denver MSA was “adequately particularized for strict scrutiny purposes.”²⁷

In light of this holding, the City of Phoenix should not be confined to counting only firms located within the City’s boundaries. To confine the permissible data to the City’s strict geographical boundaries would ignore the economic reality that contracts are often awarded to firms situated in adjacent areas.²⁸ It is, however, important that the pertinent data closely relate to the jurisdictional area. For example, in Phoenix, 92 percent of the City’s construction dollars are spent with firms located in Maricopa County. Therefore, Maricopa County is the relevant market area.

Similarly, the City spends over 75 percent of its general services dollars in Maricopa County; Los Angeles County, California; Cook County, Illinois; and Rock Island, Illinois. Accordingly, these counties comprise the general services market area. Over 75 percent of

²⁴ *Id.*

²⁵ *Concrete Works*, 36 F.3d at 1520.

²⁶ *Id.*

²⁷ *Id.*

²⁸ See *Concrete Works*, 36 F.3d at 1520.

the City's dollars spent for commodities were spent in Maricopa County. Again, it would serve as the commodities market area. The same data extraction procedures used in Maricopa County were also used in Los Angeles County, Cook County, and Rock Island.

In *Concrete Works*, the court accepted data concerning only construction and construction related services in determining the relevant market area. It should be noted, however, that the court examined the construction industry in general and did not differentiate market areas for each construction service area. In considering the market area for the City of Phoenix, separate analyses for construction, general services, and commodities were conducted.

(iv) Firm Qualifications

Another availability consideration is whether the M/WBE firms considered are qualified to perform the required services. In *Croson*, the Court noted that although gross statistical disparities may demonstrate prima facie proof of discrimination, "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."²⁹ The Court, however, does not define the appropriate mechanism for determining whether a firm is qualified.

Nevertheless, considering firm qualifications is important not only to assess whether M/WBEs in the relevant market area are capable of providing the goods and services required, but as the Supreme Court stated in *Hazelwood School District v. United States*, it also ensures proper comparison between the number of qualified M/WBEs and the total number of similarly qualified contractors in the relevant market area.³⁰ In short, proper comparisons are necessary to ensure the integrity of the statistical analysis.

²⁹*Croson*, 488 U.S. 469, 501 (citing *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 n.13 (1977)).

³⁰*Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977).

Proper comparisons in the statistical analysis in Phoenix were achieved by grouping firms by Standard Industrial Classification codes for each relevant minority and women classification in each county. The data was also disaggregated by the type of good or service provided. Finally, surveys and reviews of contracts were performed to verify the data base information used to make statistical comparisons. Not only ethnicity and gender information was verified, but also the type of service performed and contract award amounts, which confirmed the nature and volume of services that could be provided by M/WBEs. This verification served as an additional control to ensure that the pool of M/WBE candidates used to determine availability was in fact qualified.

(v) Willing

Croson requires that in order to be considered available a firm must be *willing* to provide the required services. As stated in *Croson*, an inference of discriminatory exclusion arises when there is significant statistical disparity between the number of qualified MBEs and WBEs actually engaged by the locality.³¹ In this context, it can be a difficult task to determine whether a business is willing. Cases on this issue have authorized including businesses in the availability pool that may not be on a governmental entity's certification list. In *Concrete Works*, Denver presented evidence as part of its availability analysis indicating that while most MBEs and WBEs had never participated in city contracts, "almost all firms contacted indicated that they were interested in City work."³²

In *Contractors Association of Eastern Pennsylvania, Inc.*, the Third Circuit explained, "in the absence of some reason to believe otherwise, one can normally assume that participants in a market with the ability to undertake gainful work will be 'willing' to undertake it."³³

³¹ *Croson*, 488 U.S. at 509.

³² *Concrete Works*, 36 F.3d at 1529.

³³ *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 91 F.3d 586, 603 (3rd Cir. 1996).

[P]ast discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure the work. . . . [I]f there has been discrimination in City contracting, it is to be expected that African American firms may be discouraged from applying, and the low numbers [of African American firms seeking to prequalify for City-funded contracts] may tend to corroborate the existence of discrimination rather than belie it.³⁴

In assessing the willingness of M/WBE firms in Phoenix, anecdotal evidence was adduced from M/WBEs certified with the City of Phoenix. All M/WBE firms contacted had either conducted business with the City, worked on City projects as subcontractors, or attempted to do business on a City project during the period of the study. In addition, each interviewee was asked, “Are you still interested in doing business with the City of Phoenix?”

Overwhelmingly, the answer was yes. The firms contacted for interviews were randomly selected from approximately 1,000 firms. All of the persons who testified in the public hearings either did business with the City, worked on a City project or attempted to work on a City project. Finally, the firms interviewed were located within the relevant market areas for construction, general services, and commodities, and listed in the City’s Minority, Woman, and Disadvantaged Business Directory, dated January 1, 1998.

(vi) *Able*

Another availability consideration is whether the firms considered are *able* to perform a particular service. Those who challenge affirmative action often question whether M/WBE firms have the “capacity” to perform particular services, which focuses the availability determination on firm size. *Concrete Works* recognized the shortcomings of such a focus.³⁵ Although the court observed that when a challenger introduces credible evidence of firm

³⁴ *Id.* at 603-04.

³⁵ *Concrete Works*, 36 F.3d at 1528-29.

capacity, “it becomes a factor that the court should consider.”³⁶ The court also acknowledged the City of Denver’s argument that “a construction firm’s precise ‘capacity’ at a given moment in time belies quantification due to the industry’s highly elastic nature.”³⁷

On the one hand, considering a firm’s size may be necessary to determine whether the firm is capable and available to provide the requested services. On the other hand, some argue that firm size is not very significant in the availability analysis. It can also be argued that the relevance of firm size is somewhat diminished by the practice of hiring temporary employees. It is a common practice among construction companies of all sizes to routinely vary the size of their employment ranks depending on the type of project being undertaken. Even though the Tenth Circuit did not rule on the above issue, the court’s acknowledgment of both sides of the argument justifies a position that limits the significance of firm size when determining whether a firm is to be considered available.

In Phoenix, in order to determine whether statistical disparities are better explained by race or gender discrimination as opposed to size, an examination of the subcontracting disparities would be more relevant in view of the fact that such contracts tend to be smaller, and the vast majority of MBEs and WBEs participate in City construction contracting through subcontracts. If underutilization is found to persist at such levels, it is probative of the conclusion that size is not the distinguishing feature.

(vii) The Use of Census Data to Measure Availability

Census data has the benefits of being accessible, comprehensive, and objective in measuring availability. In *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, the Eleventh Circuit Court approved the use of census data in the consultant’s disparity study. The County presented the study as evidence of discrimination

³⁶ *Id.* at 1528.

³⁷ *Id.*

against African American-owned construction firms and analyzed the business receipts of these firms based on the Census Bureau's Survey of Minority-Owned Business Enterprises (SMOBE) and Survey of Woman-Owned Business Enterprises (SWOBE) from the years 1977, 1982, and 1987. The study found substantial disparities for African American-owned construction business receipts for 1977, 1987, but not 1982.³⁸

In *Contractors Association of Eastern Pennsylvania, Inc.*, the Third Circuit Court of Appeals also approved the use of census data. The City's consultant calculated a disparity using data from the City concerning 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.³⁹

These cases indicate that the use of census data has been permitted by the courts. But in studies using census data the statistical evidence presented included more data sources than just the census alone. Other options for measuring availability are surveys and certification lists. The use of census data is at least a sound beginning for an overview of availability, but other data sources should be used in addition to, or in conjunction with, census data in the final statistical analysis.

MGT's availability analysis for Phoenix not only included the Survey of Minority-Owned Business Enterprises, the Survey of Women-Owned Business Enterprises, and County Business Patterns, but also included a special data base from the Census Bureau that contained the number of firms by Standard Industrial Classification Codes for each relevant minority and women classification in each county in the United States. The Census Bureau also provided a tabulation of the total number of firms located in each county by industry division. This data was disaggregated by the type of good or service provided. Finally,

³⁸ *Engineering Contractors Ass'n of South Florida, Inc.*, 122 F.3d at 923.

³⁹ *Contractors Ass'n of Eastern Pennsylvania, Inc.*, 91 F.3d at 604.

certification lists from the City of Phoenix were used to assist in identifying the availability of MBE and WBE firms.

(viii) Measuring Utilization/Evidence of Underutilization

To demonstrate an evidentiary basis for enacting a race- or gender-conscious program and to satisfy *Croson*'s compelling interest prong, governmental entities must present evidence of underutilization of MBEs and WBEs that would give rise to an inference of discrimination in public contracting.⁴⁰ To measure utilization, courts have accepted the standard disparity index. The Supreme Court in *Croson* recognized the use of statistical comparison to measure disparity by comparing the number of available M/WBEs qualified to perform certain contracts with the amount of City construction dollars that were actually being awarded to M/WBEs in order to demonstrate discrimination in the local construction industry.⁴¹ In Phoenix, the disparity index was calculated by dividing the percentage participation in dollars of minority/women groups by their percentage availability or composition in the relevant market area and multiplying the results by 100.

The Ninth Circuit, in *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, approved the use of disparity indices in establishing discrimination. The court stated:

Using the City and County of San Francisco as the "relevant market," the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for the 1987-88 fiscal year.⁴²

The court concluded, "In our recent decision [*Coral Construction*] we emphasized that such statistical disparities are 'an invaluable tool' in demonstrating the discrimination necessary

⁴⁰ *Croson*, 488 U.S. at 509.

⁴¹ *Croson*, 488 U.S. at 470-71.

⁴² *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1414 (9th Cir. 1991).

to establish a compelling interest.”⁴³ Several U.S. courts of appeal have recognized the use of disparity indices or similar measures to examine the utilization of minorities or women in a particular industry.⁴⁴

In *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, the Eleventh Circuit addressed what constitutes a significant level of disparity. Generally, disparity indices of 80 percent or greater—which are close to full participation—are not considered significant.⁴⁵ The court referenced the Equal Employment Opportunity Commission’s disparate impact guidelines, which establish the 80 percent test as the threshold for determining a prima facie case of discrimination.⁴⁶ According to this court, no circuit that has explicitly endorsed using disparity indices has held that an index of 80 percent or greater is probative of discrimination.⁴⁷ But these courts have held that indices below 80 percent indicate “significant disparities.”⁴⁸ Accordingly, in Phoenix, indices below 80 percent were considered determinative of significant disparity.

In support of the use of standard deviation analyses to test the statistical significance of disparity indices, the Third Circuit observed that “social 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 other factor than chance.”⁴⁹ With standard deviation analyses, the reviewer can determine

⁴³ *Associated General Contractors of California, Inc.*, 950 F.2d at 1414 (citing *Coral Construction Co.*, 941 F.2d at 918; see also, *Croson*, 488 U.S. at 509).

⁴⁴ *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1523 n.10 (10th Cir. 1994) (recognizing disparity index to demonstrate underutilization); *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990, 1005 (3rd Cir. 1993) (relying on disparity indices); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915-16 (11th Cir. 1990) (employing similar statistical analyses).

⁴⁵ *Engineering Contractors Ass’n of South Florida, Inc.*, 122 F.3d at 914.

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

⁴⁷ *Engineering Contractors Ass’n of South Florida, Inc.*, 122 F.3d at 914 (referencing *Contractors Ass’n of Eastern Pennsylvania, Inc.*, 6 F.3d at 1005, crediting disparity index of 4 percent; and *Concrete Works*, 36 F.3d at 1524, crediting disparity indices ranging from 0 percent to 3.8 percent).

⁴⁸ *Id.*

⁴⁹ *Engineering Contractors Ass’n of South Florida, Inc.*, 122 F.3d at 914 (citing *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1556 n.16 (11th Cir. 1994)).

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

b. Anecdotal evidence of the experiences of non-MBE, minority, and woman-owned firms may be used to justify an M/WBE program.

Most disparity studies utilize anecdotal evidence along with statistical data. The Supreme Court in *Croson* discussed the relevance of anecdotal evidence and explained: "Evidence 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."⁵⁰ While the Supreme Court in *Croson* did not expressly consider the form of or level of specificity required for anecdotal evidence, the Ninth Circuit has addressed both issues.

Regarding the appropriate *form* of anecdotal evidence, the Ninth Circuit in *Coral Construction* noted that the record provided by King County was "considerably more extensive than that compiled by the Richmond City Council in *Croson*."⁵¹ The King County record contained affidavits of at least 57 minority or women contractors, each of whom complained in varying degrees of specificity about discrimination within the local construction industry. The *Coral Construction* court stated that the M/WBE affidavits "reflected a broad spectrum of the contracting community" and the affidavits "certainly suggested that ongoing discrimination may be occurring in much of the King County business community."⁵² The affiants in King County, like the interviewees in Phoenix, reflected a broad spectrum of the contracting community. The breakdowns compare as follows:

⁵⁰ *Croson*, 488 U.S. at 509.

⁵¹ *Coral Construction Co.*, 941 F.2d at 917.

⁵² *Coral Construction Co.*, 941 F.2d at 917-18.

<u>Affiants – King County</u>		<u>Interviewees – Phoenix</u>	
African American contractors	23	African American MBEs	16
Hispanic contractors	13	Hispanic MBEs	27
Asian contractors	10	Asian MBEs	8
Native American	6	Native American MBEs	3
Women contractors	3	WBEs	15
Other	2		
Total	57	Total	69

There is a striking similarity between the kind and quality of comments in King County's anecdotal record and the anecdotal record in Phoenix. The assertions of discrimination in the King County affidavits mirrored the types of comments recorded in the Phoenix interviews. In addition to the interviews in Phoenix, two public hearings were conducted during which 18 M/WBEs testified to similar instances of discrimination.

In *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, the Ninth Circuit addressed the *specificity* of anecdotal evidence required by *Croson*.⁵³ AGCC contended that the City's evidence lacked the specificity required by both *Croson* and *AGCC I*. The court held that the City's findings were based on substantially more evidence than the anecdotes in the two prior cases, and "they are 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."⁵⁴

Reiterating the City's perspective, the court stated that the City "must simply demonstrate the existence of past discrimination with specificity; there is no requirement that the legislative findings specifically detail each and every instance that the legislative body had relied upon in support of its decision that affirmative action is necessary."⁵⁵

Lower courts have relied on anecdotal data to demonstrate the existence of past and present discrimination. Both the Ninth and Eleventh Circuits have indicated that while anecdotal evidence alone is generally not sufficient to prove discrimination, the combination

⁵³ *Associated General Contractors of California, Inc.*, 950 F.2d at 1414 (9th Cir. 1991).

⁵⁴ *Id.* at 1416.

⁵⁵ *Id.*

of specific incidents of discrimination in conjunction with significant statistical disparities satisfies the “strong-basis-in-evidence” test for establishing discrimination to justify a narrowly tailored race- and gender-conscious program.

In *Coral Construction*, the Ninth Circuit addressed the use of anecdotal evidence *alone* to prove discrimination. While the court concluded that King County’s anecdotal evidence was extensive, the court noted the absence in the record of any statistical data in support of the program. The Ninth Circuit recognized that the Supreme Court considers statistical analysis an essential means for evaluating race discrimination: “[W]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.”⁵⁶ The Ninth Circuit continued, “While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a *systemic pattern of discrimination necessary for the adoption of an affirmative action plan*.”⁵⁷ The court concluded that “the combination of convincing anecdotal and statistical evidence is potent.”⁵⁸

2. The Governmental Entity Enacting an MBE Program Must be Shown to Have Actively or Passively Perpetuated the Discrimination.

The Ninth Circuit held in *Coral Construction* that a municipality enacting a race-based program must have perpetuated the discrimination the program was designed to remedy.⁵⁹

However, the court stated, “*Croson* does not require a showing of *active* discrimination by the enacting agency; *passive* participation, such as the infusion of tax dollars into a discriminatory industry, suffices.”⁶⁰ This holding follows from the Supreme Court’s statement in *Croson*: “It is beyond dispute that any public entity, state or federal, has a *compelling*

⁵⁶ *Associated General Contractors of California, Inc.*, 950 F.2d at 1416 (citing *Croson*, 488 U.S. at 501).

⁵⁷ *Coral Construction Co.*, 941 F.2d at 919 (emphasis added).

⁵⁸ *Id.*

⁵⁹ *Id.* at 922.

⁶⁰ *Coral Construction Co.*, 941 F.2d at 922 (emphasis added).

interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of *private* prejudice.”⁶¹

The Ninth Circuit in *Associated General Contractors of California, Inc. v. Coalition for Economic Equity* also recognized instances in which a governmental entity would be responsible for remedying private discrimination.

[A] municipality has a compelling interest in redressing, not only discrimination committed by the municipality, itself, but also discrimination committed by private parties within the municipality’s legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program.⁶²

Accordingly, municipalities such as Phoenix must be active or passive participants in the discrimination occurring within its jurisdictional boundaries to design and implement a race-based program. Assuming there is no creditable evidence of active discrimination by Phoenix, and it pays contract dollars to prime contractors who are in turn engaging in a pattern or practice of discrimination, then the City has a compelling interest in remedying such discrimination.

B. To Withstand Strict Scrutiny, an MBE Program Must be Narrowly Tailored to Remedy Identified Discrimination.

In *Coral Construction*, the Ninth Circuit ruled on the issue of whether King County’s program was narrowly tailored. To be narrowly tailored, an MBE program should be instituted either after, *or in conjunction with*, race-neutral efforts to increase minority business participation in public contracting. Further, the use of minority participation goals must be set on a case-by-case basis, rather than as part of rigid numerical quotas. Finally, an MBE program must be limited in its effective scope to remedying discrimination within the boundaries of the enacting jurisdiction.⁶³

⁶¹ *Coral Construction Co.*, 941 F.2d at 922 (citing *Croson*, 488 U.S. at 492) (emphasis added).

⁶² *Associated General Contractors of California, Inc.*, 950 F.2d at 1413 (citing *Croson*, 488 U.S. at 491-92).

⁶³ *Coral Construction Co.*, 914 F.2d at 922.

1. Race-Neutral Alternatives

Concerning race-neutral alternatives, the Supreme Court concluded that a governmental entity must demonstrate that it has evaluated the use of race-neutral means to increase minority business participation in contracting or purchasing activities.⁶⁴ In *Coral Construction*, the Ninth Circuit reasoned that "while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative."⁶⁵

With regard to King County's comprehensive plan to increase minority participation, the Ninth Circuit concluded that "inclusion of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored."⁶⁶ Thus, a governmental agency need not forestall instituting an affirmative action program if it is instituted either after, or in conjunction with, race-neutral measures. The court acknowledged that King County incorporated some race-neutral measures into its program (e.g., training sessions for small businesses and information on accessing small business assistance programs) and for this reason had fulfilled the burden of considering race-neutral alternatives. Similar race-neutral measures have been implemented in Phoenix.

2. Flexibility

The court also concluded that King County passed the second aspect of the narrowly tailored test, which is flexibility. "Under the set-aside method, the prescribed percentage of MBE subcontractor participation is determined individually on each contract according to the availability of qualified MBEs."⁶⁷ Even though the program was locked into a five percent

⁶⁴ *Croson*, 488 U.S. at 507.

⁶⁵ *Coral Construction Co.*, 914 F.2d at 923.

⁶⁶ *Id.*

⁶⁷ *Id.* at 924.

preference allotted to MBEs, the court determined that under the circumstances “such a fixed preference is not unduly rigid.”⁶⁸

Another feature of program flexibility is a waiver provision. King County's program permitted prime contractors to request a waiver of the MBE participation requirement when a non-MBE was the sole source of a good or service, or if no MBE was otherwise available or competitively priced. In addition, under the preference method, if no MBE was within five percent of the lowest bidder, a non-MBE was awarded the contract. Therefore, the court concluded that "King County's MBE program is not facially unconstitutional for want of flexibility."⁶⁹ The goals setting program in Phoenix also incorporates a waiver provision. Further, if no M/WBE's bid is within 2.5 percent of the lowest bidder, a non-M/WBE is awarded the contract.

3. Geographic Scope

The third tailoring requirement is that the MBE program must be limited in its geographical scope to the boundaries of the enacting jurisdiction.⁷⁰ In *Coral Construction*, the Ninth Circuit concluded that the King County MBE program failed this aspect of the narrowly tailored requirement. Specifically, the definition of MBEs eligible to benefit from the program was over broad. It included MBEs that had no prior contact with King County if the MBE could demonstrate that discrimination occurred "in the particular geographic areas in which it operates."⁷¹

This MBE definition suggested that the program was designed to eradicate discrimination not only in King County, but also in the particular area in which a non-local MBE conducted business. In essence, King County's program focused on the eradication of *society-wide* discrimination, which is outside the power of the state or local entity. Since

⁶⁸ *Coral Construction Co.*, 941 F.2d at 924.

⁶⁹ *Id.* at 925.

⁷⁰ *Id.*

⁷¹ *Coral Construction Co.*, 941 F.2d at 925.

"the County's interest is limited to the eradication of discrimination within King County, the only question that the County may ask is whether a business has been discriminated against in King County."⁷²

In clarifying an important aspect of the narrowly tailored requirement, the court defined the issue of eligibility for MBE programs as one of participation, not location. For an MBE to reap the benefits of an affirmative action program, the business must have been discriminated against in the jurisdiction that established the program.⁷³ As a threshold matter, before a business can claim to have suffered discrimination, it must have attempted to do business with the County.⁷⁴ Significantly, "if the County successfully proves malignant discrimination within the King County business community, an MBE would be presumptively eligible for relief if it had previously sought to do business in the County."⁷⁵

According to the court, the presumptive rule requires that the enacting governmental agency establish that systemic discrimination exists within its jurisdiction and that the MBE is, or attempted to become, an active participant in the agency's business community.⁷⁶ Since King County's definition of MBE permitted participation by those with no prior contact with King County, its program was over broad.

2.4 Conclusion

When developing and implementing a race- or gender-conscious program, it is crucial to understand the case law that has developed in the federal courts. These cases establish specific factors that must be addressed in order for such programs to withstand judicial review. Before instituting affirmative action programs, the governmental entity involved must engage in a specific fact-finding process to compile an evidentiary foundation. It is also

⁷²*Id.*

⁷³*Id.*

⁷⁴*Coral Construction Co.*, 941 F.2d at 925.

⁷⁵*Id.*

⁷⁶*Id.*

important to understand the kinds of evidence that will be necessary and acceptable to provide a sufficient factual predicate for a race- or gender-conscious program. Ultimately, MBE and WBE programs can be successful and instrumental in remedying identified discrimination if enacting jurisdictions comply with the requirements outlined by the Supreme Court in *Croson* and the lower court cases that followed. The methodology used in this disparity study to determine whether there is significant statistical disparity between the availability and utilization of minorities and women in the City's contracting program incorporates the legal principles discussed herein.

3.0 ANALYSIS OF PURCHASING POLICIES, PROCEDURES, AND PROGRAMS

This chapter provides a comprehensive description and analysis of the City's purchasing and contracting policies, procedures, and programs as they relate to the participation of minority- and women-owned businesses. This chapter also provides an evaluation of the effectiveness of the City's race- and gender-based programs, as well as its race- and gender-neutral programs. The race- and gender-based programs implemented by the City are restricted to construction and purchasing of goods and services. Therefore, this analysis is limited to those areas. Additionally, this chapter contains a review of the City's minority- and women-owned business certification procedures. The chapter is organized into five sections:

1. Methodology;
2. Construction Policies, Procedures, and Programs;
3. Procurement Policies, Procedures, and Programs;
4. Certification Policies, Procedures, and Programs; and
5. Small Business Assistance Program.

3.1 Methodology

This section will discuss the steps taken to analyze the City's contracting and purchasing policies, procedures, and programs, and evaluate the extent to which the City's race- and gender-based programs, the City's race- and gender-neutral programs, and the City's M/WBE certification process facilitate or operate as a barrier to M/WBE participation.

The analysis included the following steps:

1. Collect, review and summarize City contracting and purchasing manuals currently in use. Discuss with managers the changes that contracting and purchasing policies have undergone during the 1993-97 time frame and their effects on the MBE and WBE programs. The manuals reviewed are limited to those provided by the City.

2. Develop questionnaires and conduct interviews of key City contracting and purchasing officials and staff to determine how existing contracting and purchasing policies have been implemented.
3. Interview M/WBE and non-M/WBE owners to determine whether barriers exist within the City's contracting and purchasing procedures and programs.
4. Analyze the effect of City contracting and purchasing procedures on the utilization of M/WBEs by the City.
5. Review applicable City ordinances, regulations, resolutions, and policies that guide M/WBE programs and race- and gender-neutral programs. Discuss with appropriate personnel in the City and M/WBE owners the operations, policies, and procedures of the M/WBE programs. Discuss the changes over time of the M/WBE program in the City. The policies and procedures reviewed are limited to those provided by the City.

First, we were provided with and reviewed the ordinances implemented as a result of the minority- and women-owned business enterprise program, and amendments to those ordinances, up to and including the current ordinances. Specifically, we evaluated the following ordinances:

1. Phoenix City Code, Chapter 18, Article VI, effective October 15, 1993
- An ordinance amending Chapter 18, of the Phoenix City Code by adding Article VI creating a new Minority-Owned Business Enterprise and Woman-Owned Business Enterprise Participation Program for the construction industry.
2. Phoenix City Code Chapter 18, Article VII, effective December 8, 1993
- An ordinance amending Chapter 18 of the Phoenix City Code by adding Article VII creating a new Minority-Owned Business Enterprise and Woman-Owned Business Enterprise Procurement Program.
3. Amendments to Chapter 18, Article VI, effective December 8, 1993
- An ordinance amending Chapter 18 of the Phoenix City Code by making technical amendments to Article VI, the Minority-Owned Business Enterprise and Woman-Owned Business Enterprise Participation Program for the construction industry.
4. Phoenix City Code Chapter 18, Article VIII, effective October 13, 1993
- An ordinance amending Chapter 18 of the Phoenix City Code by adding Article VIII relating to the certification of Minority-Owned Business Enterprises and Women-Owned Business Enterprises; by establishing criteria for certification; by establishing appeal procedures.
5. Amendments to Chapter 18, Articles VI and VII, effective November 13, 1995 - An ordinance amending Chapter 18, Articles VI and VII, of the Phoenix City Code by amending Section 18-101(K), pertaining to the

definition of “Eligible Project;” by amending Section 18-106, pertaining to requirements for compliance by bidders on City construction contracts with MBE/WBE project participation goals, to procedures to obtain waivers of such goals, and to creation of a Program Oversight Committee; by amending Section 18-204, pertaining to bid preferences for Minority-Owned Business Enterprises and Woman-Owned Business Enterprises for certain City contracts.

In reviewing each ordinance, we noted areas that would require additional information from City officials regarding how the ordinances are being applied. City officials in all relevant City departments also provided additional documentation that their department utilizes to implement the ordinances. Each department involved with and affected by the M/WBE program was asked to provide us with relevant documentation. We reviewed the following documents:

1. The certification application and any additional information provided by firms attempting to become certified with the City of Phoenix;
2. The City’s Minority- and Woman-Owned Business Participation Program Certification training manual;
3. A *draft* procedure manual for setting minority and woman business enterprise subcontracting goals;
4. A *draft* procedure manual for construction bid opening;
5. Materials containing information on the Goals Compliance Unit;
6. A *draft* regulation used by the Goals Compliance Unit to implement Article VI as it relates to monitoring goals on construction projects; and
7. Information from the Finance Department regarding the success of the price preference program.

As part of our review of the above documents, we noted areas that needed additional information regarding application. While some of the documents provided were stamped “DRAFT,” we were informed that the draft policies were operational.

After reviewing all documents collected, interview instruments were prepared for each department involved in City contracting and purchasing. Interviews were scheduled with a number of City officials including department heads and key staff members. M/WBE construction companies and businesses that provide goods and services to the City were

interviewed. The group of business owners interviewed was a cross section of minority, non-minority, and women business owners. Once the interview schedule was finalized, the interviewers developed additional questions and tailored each interview instrument to each department.

Interviews were held in Phoenix the week of September 14, 1998. Each interview was designed to last approximately one hour and was held at the City of Phoenix offices. One City official was interviewed by telephone because she was unavailable at the time the interviewers were in Phoenix. A total of 16 City officials were interviewed from the following areas: the City Manager's Office, the Equal Opportunity Department (EOD), the Engineering and Architectural Services Department (EAS), the Goals Compliance Unit, the Finance Department, and the Community and Economic Development Department (CED). In addition to the interviews of City officials, four female, four non-minority, one African American, and four Hispanic business owners were interviewed.

Each interview was tape recorded and transcribed. The questions asked of City officials were designed to elicit a better understanding of how the City's ordinances, policies, programs, and procedures have been applied in each relevant department. The following sections summarize our review of the City's policies, procedures, and practices listed above and information gathered from the interviews conducted.

3.2 Construction Policies, Procedures, and Programs

Chapter 18, Article VI, of the Phoenix City Code, outlines the City's policies on minority- and women-owned business participation in the construction industry. According to the ordinance's statement of policy, this Article was enacted to reverse past practices of awarding a disproportionate number of City contracts to non-minority owned business enterprises and non-woman owned business enterprises as determined in the City's first disparity study in 1993. In practice, the City's ordinance is designed to increase the

participation of minority-owned business enterprises and women-owned business enterprises in the City's construction contracting program by increasing subcontracting opportunities.

3.2.1 Establishing Project Goals

Section 18-103 of the ordinance, states that the City Manager is responsible for establishing project subcontractor goals. The City Manager has delegated this responsibility to the City Engineer. Construction subcontractor goals are initiated in EAS and are finalized by the Goals Setting Committee. Sections 18-104 and 18-105 of this ordinance require the establishment of annual participation goals, as well as individual project participation goals and outline criteria to be considered when establishing these goals.

First, in order to set a project goal, there must be at least one certified MBE or WBE for a trade. Second, in determining the project goal, the ordinance states that City officials shall consider: 1) the availability¹ of certified MBEs and WBEs in various industry classifications and professions which are ready, willing and able to provide labor and materials on the particular contract; 2) the level of participation by such firms in past contracts awarded by the City; 3) the design plans and contract specifications; and 4) any other relevant factors.

Based on interviews with City officials, the actual process of establishing project goals is as follows. Initially, the administrative assistant in EAS receives cost estimates and project plans from the project manager. The assistant then records the cost estimates on the M/WBE subcontracting goals recommendation form. See Appendix A-1 M/WBE Subcontracting Goals Recommendation Form. MBEs and WBEs in the current City of Phoenix Construction Directory for Maricopa County,² that are certified to work in each trade, are then listed in the appropriate area on the recommendation form.³ The total number of

¹ Chapter 4.0 of this Report provides a detailed discussion on the issue of availability.

² This Directory will be discussed in Section 3.4 of this chapter concerning the certification process.

³ General contractors are informed that the list provided may not be a complete and current, and they are encouraged to consult the directory to verify eligibility. See also, Section 3.2.2 of this chapter concerning the bidding process.

MBEs and WBEs in each subcontracting trade area determines whether that subcontracting area will count toward calculating a project goal, and ultimately whether a project goal will be set.

In order to include a subcontracting trade area in setting a project goal, there should be at least three certified MBEs or WBEs in the trade. Program administrators provided the rationale for this threshold -- if there are less than three certified subcontractors in a trade area, then including that area in calculating the project goal is likely to adversely affect competition and less likely to result in reasonable and attainable project goals. Finally, to recommend the project goal, the administrative assistant adds the percentages of the total contract dollar amount in each subcontracting trade area with three or more MBEs and WBEs listed, and divides that total percentage amount by four. The resulting percentage is the recommended goal for the project. According to program administrators, the purpose of dividing by four is based on their observations and experience that historically, only one of four certified businesses will bid on a subcontracting trade area of a project.

While the above process is largely objective, in actuality, our research revealed that there is a subjective component in determining the recommended goal. The administrative assistant considers the level of participation of certain businesses in past City contracts to determine whether the business should be considered in the subcontracting trade area for the project. In essence, a preliminary determination is made about the level of bidding activity of businesses in the trade area under consideration. For example, the administrative assistant may conclude that a subcontracting trade area should be included in determining the recommended goal even though only two certified subcontractors exist in that trade area.

Conversely, the administrative assistant may not include a subcontracting trade area in determining the recommended goal even if three or more subcontractors exist in that trade area if she knows that those six subcontractors generally do not bid. The M/WBE

subcontracting goals recommendation form is then submitted to the Goals Setting Committee.

The Goals Setting Committee is comprised of representatives from the Goals Compliance Unit of the City Manager's Office, EAS, and EOD. The Goals Setting Committee meets weekly to establish participation goals on City construction projects. The Committee reviews project plans with the project manager, the Goals Recommendation Form, and reviews recommended project goals.

At the discretion of the Committee, the recommended goals may be increased or decreased based on the Committee members' experience and knowledge of the construction community. Considerations include: 1) a subcontractor's current work load; 2) a subcontractor's bonding capacity; 3) whether the business has the required licenses to perform the work needed; 4) whether the businesses listed have historically bid on the type of work listed; and 5) the volume of work in a subcontracting area to determine whether the listed MBE or WBE has the capacity to complete the job. Committee members also make telephone calls to the MBEs and WBEs in various subcontracting areas for the limited purpose of determining whether the business intends to bid on the project. The Committee ultimately makes decisions similar to those made by the administrative assistant. Once this information is gathered and evaluated, the Committee then sets the final project goals.

City officials have a draft policy, "Setting Minority and Woman Business Enterprise Subcontracting Goals," dated September 30, 1996, which describes a process similar to the current process of setting goals with a few notable differences. The first major difference is that the draft policy sets a maximum goal of 10 percent for the final MBE goal and the final WBE goal combined. This limit was placed on goals because 10 percent was the upper limit of disparity documented in the enabling study. The second difference is that the draft policy specifically indicates that the ratio of MBE goals to WBE goals should be approximately four

to one because there are four times as many MBE firms as WBE firms in the Phoenix Metropolitan Statistical Area.

Third, the draft policy states that the City Code exempts projects estimated at \$50,000 or less from the goal setting process. This reflects a reduction in the contract amount from \$75,000 or less, originally set in the 1993 ordinance. This change was a result of the 1995 settlement agreement in AGC v. City of Phoenix. In many instances subcontractors may not express an interest in subcontracts on jobs less than \$50,000 because the subcontracting opportunities are too small. Also, a project requiring only one trade or a specialty trade may have a zero-zero subcontracting goal. The draft policy also recommends seasonal variations or adjustments in the level of subcontracting goals according to the level of need. The rationale for this recommendation was based on the observation that the number of construction projects advertised in the Valley can vary dramatically depending on the time of year. Finally, the draft policy states that subcontracting goals are only set for the base bid because many projects contain bid alternates which may or may not be awarded and allowances which may or may not be used, depending on the amount of the low bid and the project budget.

3.2.2 The Bidding Process

The bidding process has changed significantly since the original ordinance was enacted in 1993. On projects with established participation goals, the original ordinance required all contractors bidding on the project to submit an M/WBE utilization plan⁴ or a waiver request in an envelope separate from their bid in order to be considered for the contract award. The utilization plan was to be opened at a specified time, before bid opening. The waiver request would include evidence of the bidder's efforts to meet the

⁴ The M/WBE utilization plan was to include a listing of the names, addresses, and contact persons for the MBEs and WBEs to be used in the contract, the type of work or services each business would perform, and the percentage of the total contract dollar amount to be distributed to each MBE and WBE.

project goals. If the subcontracting goal was met, the bid would be opened later and considered along with all other eligible bids. If the subcontracting goal was not met, and the bidder requested a waiver, the waiver would be resolved in the manner described in Section 3.2.3, Waivers. If the goal was not met and no waiver request was submitted, then the bid would not be opened.

The process has since changed in several ways, primarily as a result of the 1995 settlement agreement in the AGC v. City of Phoenix litigation. Currently, when bids are opened, all bidders are required to submit an M/WBE Assurances Affidavit with their bid in which the bidder certifies that the established project goals will be met or that the bidder intends to request a waiver. See Appendix A-2 M/WBE Assurances Affidavit. Bidders intending to meet the project goals must submit a completed subcontractor goals packet by the close of business on the day following bid opening. Bidders requesting a waiver of the project goals must also submit formal documentations of their efforts to meet the project goals by close of the day on the day following bid opening. Only the apparent low bidder and other bidders who desire to remain in contention for the award are required to actually submit the subcontractor goals packet or waiver request.

According to Section 18-106(B), the subcontractor goals packet includes the M/WBE utilization plan for the project, a complete list of MBE and WBE subcontractors the bidder intends to utilize for the project, and the proposed M/WBE percentage of the total contract dollar amount. See Appendix A-3 M/WBE Utilization Form. As stated on the M/WBE Utilization Form, a bid will not be read in two instances: 1) if the Assurances Affidavit is not included; and 2) if the Affidavit is included, but the bidder fails to properly certify that it intends to submit the required subcontractor goals packet or a fully documented waiver.

Pre-bid meetings are held one to two weeks prior to the bid date on most projects. The purpose of the meeting is to answer questions about the project and to provide information about the administration of the goals program. The project manager, the project

engineer or architect, a representative from EOD, and a representative from the Goals Compliance Unit attend pre-bid meetings. Potential bidders receive a copy of the Subcontracting Goals Recommendation Form. This form is identical to the Subcontracting Goals Recommendation Form used by EAS to establish the recommended goals, except that the form provided during the pre-bid meeting does not include cost estimates or contract dollar percentage amounts. The rationale for removing the cost estimates and percentage amounts is to avoid assisting prime contractors in preparing their bids.

On the form distributed at pre-bid meetings, prime contractors are only provided with the subcontracting trade areas for the project and a list of all certified M/WBEs for each trade, regardless of whether the trade was included in determining the recommended goals. The list of all certified subcontractors in each trade area remains on the form distributed at pre-bid meetings to assist prime contractors in meeting the project goals. Prime contractors are also instructed at pre-bid meetings and in bid specifications to consult the most recent monthly Directory of Certified Firms for a complete and accurate list of all certified firms in all subcontracting trade areas.

Once prime contractors submit their M/WBE utilization form, the form is forwarded to EOD for approval. EOD confirms that the M/WBEs listed on the form are in the current certification directory. If the M/WBEs listed are not in the current directory, the prime contractor's bid will be rejected as non-compliant.

The other significant change in the bidding process occurred in the first amendment to Article VI in December 1993. The first amendment added Section 18-106(A)(1) regarding prime contractor participation. This section provided that on contracts of \$250,000 or less, a certified MBE or WBE prime contractor could meet the MBE or WBE project goal by utilizing the work actually performed by its own employees. The purpose of this Section was to allow MBE and WBE contractors that are capable of functioning as prime contractors to utilize their own employees to meet project participation goals. The 1995 amendment to

Article VI, however, repealed this provision, and it is not applicable to the current bidding process.

City officials also have a second policy in draft form, "Construction Bid Opening Procedure," dated October 14, 1996, that outlines the bid opening process along with the entire bidding process. The draft also includes the procedure for submitting an Assurances Affidavit and the information required to substantiate a waiver request. See Section 3.2.3, Waivers. These processes appear to be identical to the bidding process described above by City officials during interviews, although the draft has not yet been adopted in final form.

3.2.3 Waivers

Bidders unable to meet project goals may request a complete or partial waiver and must indicate the scope of any partial waiver sought. All waiver requests must provide evidence of the bidder's good faith efforts to attempt to meet the project goals. Section 18-106(C) of the ordinance outlines a series of ways in which the bidder can demonstrate efforts made to meet project goals. The ordinance requires: 1) copies of written notification to MBEs and WBEs indicating the general contractor's desire to obtain quotes for subcontracting work; 2) evidence of efforts made to divide the work into economically feasible units to increase the likelihood of achieving the stated goals; 3) evidence of efforts made to negotiate with M/WBEs; 4) evidence of efforts made to assist M/WBEs contacted that need assistance in obtaining required bonds and insurance; 5) a written statement regarding reasons for any decision that an M/WBE subcontractor is not qualified; and 6) written quotes or records of verbal quotes solicited from all MBEs or WBEs seeking subcontract work.

While the criteria for obtaining a waiver has not significantly changed from 1993 to the present, the practical application of the waiver process has significantly changed. Research reflects that from 1993 until the 1995 amendments, the City's policy regarding meeting project goals was seemingly rigid. City officials indicated that between 1993 and 1995, they

did not grant waivers on projects with at least one general contractor who was able to meet the project goals. The attitude was that if one contractor was able to meet the goals, then all contractors should be able to meet the goals. Now the City takes a more flexible approach in reviewing waiver requests.

In 1994, the City established a Waiver Review Committee that is responsible for deciding whether to recommend waiver requests to the City Engineer. The Committee has established a Subcontracting Goals Waiver Review Form. See Appendix A-4 Subcontracting Goals Waiver Review Form. The form lists the criteria used by the Committee to determine whether to grant a waiver request. The Committee reviews each category on the form and evaluates the contractor's good faith efforts in attempting to meet project goals. Bidders requesting waivers must submit a letter explaining their reason(s) for the waiver along with supporting documentation demonstrating efforts made to solicit MBEs and WBEs as subcontractors on a project. The Committee then decides whether to grant the waiver based on the total number of categories in which the contractor has sufficiently complied with the requirements. Based on interviews with City officials, the criteria listed for granting or denying a waiver are not ranked in order of importance, the criteria are not weighted, and City officials have not established a definite number of categories that need to be satisfied to obtain a waiver.

The City awarded 504 projects with M/WBE goals between October 1993, when the participation program began, and September 1998. The waiver summary report for that time period is as follows:

- Waivers requested: 25
- Waivers rejected: 10
- Partial Waivers granted: 11
- Full Waivers granted: 4

The above numbers reflect only whether the low bidder on a project submitted a request for a waiver. At times, the second or third lowest bidder requests a waiver if he is still in contention for the bid award as a protester.

Article VI, Section 18-106(C) as amended in 1995, created a provision allowing a partial waiver of the MBE or WBE participation goal for situations in which all quotes submitted by MBEs and/or WBEs in a subcontracting trade area exceed the lowest bid from a non-M/WBE in the same trade by 20 percent or \$100,000. According to City officials, this provision was designed to minimize the effect of price gouging in the competitive bidding process. City officials indicated that prime contractors complained price gouging was a problem before the 1995 amendment. Since the amendment, however, price gouging has significantly decreased.

3.2.4 Monitoring Compliance

City officials have instituted several methods of monitoring compliance with the M/WBE participation program and project subcontracting goals. The Goals Compliance Unit was established as a means of monitoring compliance. The Unit consists of a compliance supervisor, a contract compliance specialist, and a part-time secretary. Unit members assist in the process of establishing project goals as representatives on the Goals Setting Committee and participate on the Waiver Review Committee. Unit members also assist general contractors in obtaining subcontractors to meet participation goals. The Unit's primary functions, however, are to monitor general contractors' compliance with participation goals once a contract has been awarded and to track utilization of M/WBEs.

For example, once an M/WBE utilization plan has been approved by EOD and a contract has been awarded, the Unit sends letters to all subcontractors listed on the general contractor's utilization plan to confirm that they are aware of the project and ascertain whether they intend to participate on the project. The Unit also confirms the subcontract dollar amount quoted to the general contractor. The Goals Compliance Unit sends a

representative to pre-construction meetings to review M/WBE program compliance requirements with the general contractors.

Throughout the duration of the project until completion, the Unit reviews the general contractor's monthly utilization reports, monitors payments, mediates any payments disputes, reviews any changes to the work performed by the MBE or WBE subcontractor, approves the substitution and/or release of M/WBE subcontractors, makes on-site visits to ensure compliance, and revises goals when necessary.

Contractors awarded contracts incorporating M/WBE participation goals are required to submit monthly participation reports to the Goals Compliance Unit summarizing the number and dollar amounts of subcontracting awards. Section 18-110 outlines possible sanctions for failure to meet project participation goals. For example, City officials may withhold up to 10 percent of all future payments until the contractor is in compliance with program requirements. In addition, City officials may refuse all future bids or offers from the contractor or cancel the project for noncompliance with the program. According to the Goals Compliance Unit supervisor, during the study period sanctions have not been needed to ensure compliance. The availability of sanctions has been sufficient to ensure compliance with participation program requirements.

3.2.5 M/WBE Program Oversight Committee

Article VI, Section 18-106, as amended in 1995, established the Program Oversight Committee in order to monitor certain aspects of implementing the M/WBE participation program. The ordinance provides that the Committee is comprised of six persons: two members nominated by the City; two members from the Associated General Contractors of America, and two members from the minority construction community. In addition to the above six members, the Committee has a seventh non-voting member. The Committee's primary effort has been to design a Mentor-Protégé Program involving established

contractors and certified MBEs and WBEs. In addition, the Committee was to develop administrative rules to implement Article VI and specifically the waiver provisions.

In May 1998, the Committee completed a preliminary draft of the Mentor-Protégé Program.

The Program has not been approved by the City Council.

3.3 Procurement Policies, Procedures, and Programs

Chapter 18, Article VII, of the Phoenix City Code, outlines the City's policies involving procurement of goods and non-professional services as they relate to minority- and women-owned businesses. According to the ordinance's statement of policy, this Article was enacted in December 1993, to reverse the past practices of awarding a disproportionate number of City contracts to non-minority and non-women-owned business enterprises as determined in the City's first disparity study in 1993, and to promote full and equal business opportunity for all persons doing business with the City.

3.3.1 The Structure of City Procurement

Procurement is defined in Section 18-201 as "buying, purchasing, renting, leasing or otherwise acquiring goods or services." Procurement also includes all functions that pertain to obtaining any good or service, including a description of requirements, selection and solicitation of sources, preparation and award of a contract, and all phases of contract administration.

The Purchasing Division of the City's Finance Department enters into contracts through the competitive procurement process to purchase goods and services on behalf of City departments.⁵ These contracts are administered through the Central Purchasing Office of the Purchasing Division. To increase the competitiveness of M/WBEs in the procurement

⁵ Many goods and services used on a repetitive basis are purchased through requirements contracts through the competitive public bidding process in central purchasing. Other items are competitively purchased on a one-time contract basis. Departmental purchases, however, are not required to be competitively procured, nor are these purchases subject to the bid preference program.

process, the City has established a bid preference program for MBEs and WBEs in the procurement of goods and non-professional services⁶ for centralized purchases.

The procurement process is administered and monitored by the Purchasing Division of the Finance Department, the Accounts Division of the Finance Department, City buyers, business liaisons, and other department staff in each City department seeking to obtain goods or services. Section 18-203 of Article VII delegates to the City Manager the responsibility of monitoring the bid preference program in the City's procurement efforts, as well as the responsibility of ensuring compliance with the program. The City Manager's Office has promulgated administrative regulations (A.R.) applicable to central purchasing and departmental purchasing, which will be discussed in the following section.

3.3.2 The Procurement Process

The City Manager through Administrative Regulations requires all City departments to follow designated procedures for purchasing based on the dollar amount of the purchase.

All procurement actions by the Central Purchasing Office are conducted in accordance with AR 3.24, "Purchasing of Commodities, Capital Equipment and Non-Professional Services."

AR 3.29 applies to departmental purchases and the use of the departmental purchase order (DPO) for purchases under \$1,000.

Departmental Purchasing

Departments use petty cash for purchases under \$100. According to A.R. 3.29, for purchases of incidental and non-recurring goods and services between \$100 and \$1,000, a department can use a DPO. These purchases under \$1,000 are generally not processed through the Central Purchasing Office because departments have the option to make

⁶ For purposes of this Study, this analysis of the City's procurement program will not include professional, architectural, or engineering services. All professional service contract procurement is decentralized and handled by the City department requesting the service. City department directors have the authority to contract professional services for their department that do not involve architecture or engineering services.

purchases under \$1,000 on their own with a DPO, or to request that the Central Purchasing Office make the purchase.⁷ When using a DPO, departments are responsible for determining that the price of the item or service is fair and reasonable.

A.R. 3.29 governs the use of DPOs and establishes the following guidelines concerning the City's M/WBE Program. Departments are responsible for supporting the City's M/WBE participation program by using MBEs or WBEs whenever practical, considering fair pricing and competitive quality. Departments should reference the MBE/WBE Directory produced by EOD for consideration of any M/WBE. M/WBE firms should be given ample opportunity to compete for DPO purchases. DPO forms contain a section in which the department making the purchase can indicate the vendor(s) contacted and the price quoted. The DPO form states that department staff are encouraged to use MBEs and WBEs whenever possible and that they will report any utilization of certified MBEs and WBEs on the DPO form.

A.R. 3.24 also discusses purchases under \$1000 and states that for such purchases, the number of vendors to be contacted is discretionary. If only one supplier has been contacted, the buyer is required to document that the price is fair and reasonable. Prices may be obtained verbally or in writing. A.R. 3.24 states that DPOs should be used for purchases of goods and services costing less than \$500.00 and references A.R. 3.29 for an outline of policies and responsibilities for DPO purchases.

Centralized Purchasing

Purchases over \$1,000 must be made through the Central Purchasing Office in accordance with A.R. 3.24. For purchases between \$1000 and \$5000, a minimum of three vendors must be contacted. However, if three potential sources are not known, the lack of

⁷ A department may elect not to purchase their own commodities with the DPO for any reason and request that the Central Purchasing Office handle a purchase under \$1000. For example, the department may lack staff or resources to conduct their own purchase and refer the purchase to central purchasing.

competition will be recorded and a documented determination must be made that the price is fair and reasonable. Prices may be obtained verbally or in writing.

For purchases between \$5,000 and \$20,000 a formal Request for Quotations (RFQ) is prepared in writing and faxed or mailed to known suppliers. RFQs are also publicized through the Phoenix Chamber of Commerce. Purchases over \$20,000 are handled through a competitive sealed bidding process and require a formal Invitation for Bid (IFB) or a Request for Proposals (RFP). Notices of IFBs and RFPs are sent to bidders on the City's Bidder's List and these opportunities are advertised in the *Arizona Business Gazette* and *Bid Source*.

Regarding purchasing conducted by designated City buyers in the Central Purchasing Office, the Purchasing Division has a written policy dated October 26, 1988, that requires buyers to consult the City's MBE and WBE Certification Directory and contact known MBEs or WBEs when considering a purchase. A September 30, 1994, policy memorandum amended the above policy concerning the use of M/WBEs. The policy made it no longer mandatory for buyers to continue to contact M/WBEs that did not respond to the City's RFQs.

If an M/WBE fails to respond to two consecutive requests for quotation in a particular commodity or service area, buyers are to discontinue requesting quotations from that firm for that area. Once a buyer concludes that an MBE or WBE will not be asked to participate in future quotation processes, the buyer is required to notify the M/WBE procurement manager. The notification consists of the name of the business, the commodity or service area, and the requisition numbers of the requests to which no response was received. The M/WBE procurement manager is to maintain a file of the notices and contact the business to determine why there was no response to the RFQs. The M/WBE procurement manager then advises the buyer accordingly.

The September 30, 1994, memorandum further explains that the above changes do not affect the City's current procedures covering the formal bid process for purchases over

\$20,000. M/WBEs are not to be removed from the formal bidders mailing lists without the approval of the deputy finance director. Buyers were responsible for ensuring that appropriate M/WBE firms were on these lists until a policy memorandum dated November 23, 1994, gave the M/WBE procurement manager this responsibility.

As stated above, buyers in the Purchasing Division are also governed by A.R. 3.24, which covers the purchasing of commodities, capital equipment, and non-professional services. A.R. 3.24 establishes the general policy that the Finance Department will “fairly and impartially purchase through open competition and give equal opportunity for vendors to participate in the procurement process.” In addition, A.R. 3.24 requires that all known M/WBE firms able to quote shall be solicited for all purchases covered by the regulation.

The Bid Preference Program

Section 18-204 of Article VII establishes a competitive bid preference for certified MBEs and WBEs that bid on eligible contracts. This section, as amended in November 1995, states that the City may allocate up to a 2.5 percent competitive bid preference to certified MBEs and WBEs that bid on eligible contracts under \$250,000. Before the 1995 amendment, the original ordinance established a competitive bid preference percentage of up to five percent on all eligible contracts under \$500,000. The 1995 amendment to Article VII reduced the bid preference percentage to 2.5 percent, and the maximum contract dollar amount to \$250,000.

In determining the lowest responsive bid, the bid preference is applied to a bid submitted by a certified MBE or WBE by reducing the business' bid price(s) by up to 2.5 percent. The adjustment is only for the purpose of establishing the apparent low bidder and the actual contract amount awarded is the original bid submitted by the MBE or WBE. All eligible contracts are subject to bid preference requirements, unless the contract is exempt under Section 18-204(C) or the contract is not considered an “eligible contract” by definition.

Article VII defines an eligible contract as any contract for goods and services for use in City operations unless otherwise precluded by law. The term “eligible contract” does not include sole source contracts, petty cash purchases, emergency purchases, contracts for professional services, architectural and engineering services, or contracts for City utility payments, phone payments, rents, professional association fees, magazine subscriptions, payments to other governmental entities, and bank transfers.

Article VII also contains a provision for bid preference requirements involving joint ventures. A joint venture involving an MBE or WBE receives a 2.5 percent bid preference on an eligible contract when the MBE’s or WBE’s joint venture participation exceeds 35 percent. The MBE or WBE partner must be responsible for a clearly defined portion of the work to be performed and share in the ownership, control, management responsibilities, risks and profits of the joint venture. The MBE’s or WBE’s portion of the contract must be assigned a commercially reasonable dollar amount and the work must be detailed separately from the work to be performed by the non-MBE or non-WBE joint venture partner. The City Manager’s Office must have access to all records pertaining to joint venture agreements before and after the contract award to the extent necessary to ensure compliance with this Article.

Bid Preference Exemptions

It is important to note that the bid preference does not apply to contracts with the City that exceed \$250,000 in total annual value, contracts with non-profit agencies, contracts for the provision of services paid for directly by citizens and not from City funds, contracts covered under Article VI of the Phoenix City Code regarding construction, and contracts for architectural and engineering services. In addition, Article VII, as amended in 1995, provides an additional exception to the bid preference requirement.

MBE or WBE vendors or suppliers entering into a contract or contracts receiving a bid preference under this Article, with a cumulative contract total gross value exceeding

\$350,000 within any fiscal year, are excluded from the bid preference requirement. The exclusion is applied on a year-by-year basis, computed as of the date of bid opening, with no carryover from any prior year and regardless of the date of completion of any contract. The rationale for this provision was to eliminate businesses from the program that have, as a result of increased revenue, “graduated” from the program and are no longer in need of assistance. As a result of their status as MBEs or WBEs, businesses can benefit from the price preference program to the extent that they are no longer eligible to receive any further benefits from the program in a given year. According to City officials, this exemption has only affected one business since the inception of the program.

3.3.3 Monitoring the Procurement Program

City officials have decided to approach the disparity issue from a departmental perspective and allow each department to identify its business goals and establish its own affirmative action objectives in identifying and conducting business with MBEs and WBEs. Each City department voluntarily establishes its own departmental business affirmative action goals based on the Affirmative Action Plan Guidelines provided by the City’s Equal Opportunity Department.⁸ EOD provides guidelines for developing and implementing a department’s business affirmative action plan, and provides examples of how departments can be assessed full, partial, or no credit for adopting and implementing certain activities designed to increase participation of, and outreach to, MBEs and WBEs.

EOD and the Finance Department monitor each department’s business affirmative action plan as it relates to the department’s business objectives⁹ and procurement efforts. In partnership, EOD and the Finance Department evaluate each City department on its established objectives and demonstrated efforts to involve MBEs and WBEs in their

⁸ Departments do not establish numeric goals in their business affirmative action plans.

⁹ City departments separate their affirmative action plans into two areas: employment objectives and business objectives. This study is concerned only with the business component of the departments’ plans, which involves the availability and utilization of MBEs and WBEs.

respective contracting and purchasing activities. The Finance Department maintains logs and produces monthly reports on utilization of MBEs and WBEs, as well as outreach efforts to increase participation of MBEs and WBEs. Although EOD does not conduct formal monitoring during the year, departments provide EOD with mid-year progress reports and annual reports on efforts to meet their affirmative action objectives, which include spending objectives, EOD notification efforts, outreach efforts, and purchasing summaries. An Equal Opportunity specialist along with the Finance Department's M/WBE procurement manager review the reports and evaluate each department to determine the extent that the department has met its business affirmative action objectives.

EOD also monitors the level of MBE and WBE participation achieved in contracts covered under this Article. EOD staff maintain a database on availability and utilization of certified MBEs and WBEs. This database includes certified MBEs and WBEs across all procurement categories and each City department has access to the computerized database. Each department is also provided with monthly copies of the City of Phoenix MBE and WBE Certification Directory for Maricopa County, which reflects all newly certified businesses, as well as any other changes in a business' certification status. A bound copy of the Directory is published every six months which includes listings of all M/WBEs, as well as DBEs located outside of Maricopa County. See discussion in Section 3.4.3, Certification Process, infra.

The Finance Department's records provide additional methods to monitor and evaluate M/WBE utilization efforts in procurement. Section 18-203(K) of Article VII indicates that the monitoring process for the procurement program includes determining: 1) whether the bid preference is sufficient to make MBE and WBE firms competitive; and 2) whether a significant adverse price impact to the City results from the use of the bid preference. The Accounts Division of the Finance Department develops annual and cumulative reports on citywide procurement activity concerning utilization of, and dollars paid to MBEs and WBEs. The Purchasing Division of the Finance Department also produces a Procurement Activity

Summary reflecting procurement activity and M/WBE utilization by the Central Purchasing Office of the Finance Department.

This summary monitors the impact of the price preference program by comparing the total dollars spent in procurement to the total dollars spent with MBE and WBE firms. The summary also measures the total dollars spent through the bid preference program. Finally, the summary calculates additional costs to the City as a result of the program. For departmental purchases, the Accounts Division of the Finance Department produces monthly Departmental Controlled Purchases Reports reflecting procurement activity and M/WBE utilization by each City department. The Accounts Division also prepares the Citywide Procurement Activity Report, which includes a summary of both departmental purchases and centralized purchases.

3.3.4 The M/WBE Procurement Manager

As a result of the 1993 ordinances, City officials created a position for an M/WBE procurement manager to implement and monitor the Disparity Program as it relates to the Finance Department. The M/WBE procurement manager is primarily responsible for 1) implementing MBE and WBE procurement program; 2) performing outreach activities directed toward MBE and WBE communities; 3) performing "inreach" activities directed toward departmental purchasing agents, business liaisons, and end users; 4) data collection and reporting regarding utilization of MBEs and WBEs; 5) training; and 6) documenting all developmental activities. In essence, the M/WBE procurement manager acts as a liaison between City departments and the MBE and WBE communities, working directly with businesses that have demonstrated an interest in doing business with the City. The M/WBE procurement manager reports directly to the deputy finance director for the Purchasing Division.

On a day-to-day basis, the M/WBE procurement manager is involved in multiple activities. As outreach efforts, the M/WBE procurement manager contacts MBE and WBE

owners by phone, interviews owners who visit City offices, or visits their business for an on-site interview in order to develop a relationship with the owner(s) and to be a centralized source of information. The M/WBE procurement manager attends meetings, conferences, trade fairs, and workshops to identify new MBE and WBE resources for participation in the City's program, often participating as a panelist or presenter. The M/WBE procurement manager also conducts workshops to provide information to small-, minority-, and women owned businesses on doing business with government entities.

The M/WBE procurement manager actively identifies new businesses and refers them to the EOD for certification, and similarly, EOD refers certified businesses to the M/WBE procurement manager to include those businesses in the City's procurement program. EOD also refers businesses to the M/WBE procurement manager that have not responded to EOD's request to become recertified with the City. Follow-up phone calls are made to determine reasons for declining recertification, and the M/WBE procurement manager has been successful in getting businesses to recertify with the City. The M/WBE procurement manager distributes current bidding information, including bidding opportunities and the buyers responsible for certain commodities and services, to MBE and WBE organizations and their respective Chambers of Commerce.

Generally, the M/WBE procurement manager assists businesses in conducting business with the City and forwards business cards and product information to specific City employees and buyers responsible for an MBE's or WBE's respective purchasing area. To assist businesses not yet certified with the City, he sends out certification forms to potential M/WBE resources to encourage them to become certified. To assist certified MBEs and WBEs in the bidding process, public information may be provided such as previous pricing for upcoming bids to encourage businesses to submit a bid.

In order to encourage businesses to become more competitive in the bidding process, the M/WBE procurement manager may also suggest that businesses give the City a two

percent prompt payment discount, which will further enhance their bid price. All unsuccessful bidders are sent information on bid tabulations and encouraged to continue bidding on work with the City. The M/WBE procurement manager also refers businesses to the City's Community and Economic Development Department's Small Business Assistance Program for financial and technical assistance.

The M/WBE procurement manager meets with various City departments as needed and assists them in developing their business affirmative action plan, revising or restructuring departmental goals, and discusses ways the department can improve program participation. The M/WBE procurement manager updates bidder lists to include newly certified businesses, participates in pre-bid conferences when needed, reviews IFBs and RFPs for MBE and WBE involvement, and makes calls to MBEs and WBEs for follow-up participation on an IFB or RFP.

The M/WBE procurement manager is assisted by an Accountant II. The Accountant II tracks M/WBE expenditures and prepares monthly reports. The Accountant II's time is shared between M/WBE program functions and general accounts payable duties.

3.4 Certification Policies, Procedures, and Programs

Chapter 18, Article VIII, of the Phoenix City Code, enacted in October 1993, outlines the City's policies relating to the certification of minority- and women-owned business enterprises, establishes criteria for certification, and creates an appeal process when an applicant is denied certification.

3.4.1 Equal Opportunity Department

The City's Equal Employment Opportunity Department has been delegated the authority to administer and enforce Article VIII, and to establish written procedures to implement the Article. The City Manager's Office has promulgated A.R. 1.88 to establish procedures to implement Article VIII. EOD and the City Auditor's Office are responsible for

implementing A.R. 1.88. EOD has the primary duty of certifying contractors, subcontractors, vendors, and suppliers as “bona fide” MBEs or WBEs eligible to conduct business with the City of Phoenix in accordance with the standards set forth in Article VIII.

In addition, EOD has representatives on the Goals Setting Committee to assist in setting construction project goals and is responsible for the approval of M/WBE utilization plans submitted by prime contractors in construction bidding. EOD is also represented on the Waiver Review Committee. In addition, EOD is responsible for developing and maintaining a public database of certified MBEs and WBEs, as well as maintaining statistical data on the availability of MBEs and WBEs. In addition to M/WBE responsibilities, EOD also provides all bidders information regarding the City’s Affirmative Action Programs during pre-bid conferences. EOD maintains a database of over 60,000 vendors who are eligible to conduct business with the City.

3.4.2 Certification Application

According to City officials, the Cities of Phoenix and Tucson, Maricopa and Pima Counties, the Arizona Department of Transportation (ADOT) and the Tucson Airport Authority developed an intergovernmental agreement in 1996. Currently, operating under limited reciprocity, these six agencies have agreed to develop procedures to establish “one-stop certification.” A joint, intergovernmental application is the first step toward one-stop certification. The intergovernmental certification application used by these six entities is designed to assist them in gathering required information regarding standards for certification as discussed in Section 3.4.3, Certification Process, *infra*. This application was designed to simplify the certification process by requiring each agency to utilize the same application, request the same information, and allow the materials requested to be used by each agency in its certification process. In addition, the application was designed to increase customer satisfaction.

The movement toward one-stop certification consists of three stages. The current intergovernmental application is part of the first stage — limited reciprocity. To effectuate this stage, the entities developed standardized forms and documentation requirements that are currently in use in all participating agencies. Additionally, an applicant is only required to submit paperwork to one jurisdiction. However, this stage allows each entity to continue to process all applications submitted to the respective agency and make an independent determination of the applicant's eligibility. Under limited reciprocity, a certification application is reviewed in the following manner.

If an applicant seeks certification with a particular agency, the applicant must complete the certification process with that agency before the applicant can be certified with another agency, even if the applicant desires immediate certification with another agency. If a business is certified with Maricopa County and then sought certification from the City, for example, the business would indicate on the second application that it is certified with Maricopa County. The City would request from Maricopa County all the material gathered during the original certification process. The City would then review Maricopa County's application and documentation and not require the business to reproduce the same documentation. The City can then certify the business based on the first certification application. The City could also, at its discretion, conduct its own independent investigation and can decide not to certify the business even if the business is already certified with another agency. Even though EOD is delegated authority to accept the certification of another certifying agency through limited reciprocity, EOD still reviews each certification application, conducts its own investigation, and makes an independent determination regarding certification. According to City officials, this is conducted to ensure the accuracy of the City's certification list.

The second stage of the movement toward one-stop certification is complete reciprocity. This process would still require a business to seek certification with one agency

initially. However, the business can indicate on its application any additional agencies with which it would like to seek certification. Once the original agency certifies the business, the business would automatically be certified with the other requested agencies. The benefit would be to enable a business certified by one entity to be certified with the other entities solely on the strength of the initial certification.

The final stage is complete one-stop certification. This would allow a business to be certified with all six entities through one certification application. The certification application and review process could be funded and staffed through a consortium of the participating entities. According to City officials, the movement toward one-stop certification will be difficult because of decisions regarding the source of funding and staffing.

3.4.3 Certification Process

Section 18-302 outlines standards for certifying MBEs and WBEs for participation in the City's M/WBE participation program. EOD certifies a business as an MBE or WBE for inclusion in the City's participation program as follows. If an individual is a minority, as defined in Article VI, and is so regarded by that particular minority community, then that individual is considered to be a member of a bona fide minority group, and his or her business would be eligible as an MBE or WBE for the participation program.

As a primary matter, the business must be an independent and continuing operation for profit, performing a commercially useful function, and owned and controlled by one or more minorities or women. The ownership and control by a minority or a woman must be real and substantial, and must be indicated by customary incidents of ownership. A minority or woman must possess the power to direct or cause the direction of the management and policies of the business and to make day-to-day decisions, as well as decisions on matters of management, policy, and operations. There can be no formal or informal restrictions limiting the discretion of a minority or woman owner.

In addition, there can be no restrictions by partnership agreements, charter requirements, or other arrangements that would prevent a minority or woman owner from making a business decision without the cooperation or vote of any owner who is not a minority or woman. If the actual management of a business is contracted out to individuals other than the owner, then those persons with the ultimate power to hire and fire the managers can be considered as controlling the business. Any securities constituting ownership and control of an entity for purposes of establishing it as an MBE or WBE must be held directly by a minority or a woman. No securities held in trust or by a guardian for a minor can be considered held by a minority or a woman in determining the ownership or control of a business. Ownership and control are also measured as though not subject to the community property interest of a spouse.

According to A.R. 1.88, businesses seeking certification must meet size standards commensurate with small business status. A determination of small business status is based on annual gross receipts averaged over the three previous fiscal years. General contractors must have average gross receipts for the past three years less than or equal to \$16,015,000; specialty contractors less than or equal to \$7,000,000; and engineering, architectural, and surveying firms less than or equal to \$2,500,000.

While not in Article VIII, the cover letter attached to the intergovernmental application states that in order to be certified as an MBE or WBE with the City, the business seeking certification must be located in Maricopa County. Businesses located in Maricopa County receive certification as both an M/WBE and a DBE. The letter further states that businesses located outside Maricopa County do not qualify to participate in the City's incentive programs and will be certified as DBEs only.

The intergovernmental application is the only application used to certify businesses. Firms located inside Maricopa County complete the application to obtain certification as an M/WBE and a DBE. Businesses located outside Maricopa County complete the same

application to obtain certification as a DBE. Before March 4, 1999, the City was able to certify businesses as DBEs using the intergovernmental application because the United States Department of Transportation (USDOT) regulations presumed that individuals belonging to one of the identified ethnic or gender groups cited in USDOT regulations were socially or economically disadvantaged.

As of March 4, 1999, however, the USDOT issued regulations requiring proof of social and economic disadvantage for a business to be certified as a DBE. As a result of these new regulations, EOD is currently sending letters to all certified M/WBEs to inform them that in order to maintain DBE status, they must submit additional information and documentation including a personal financial statement, copies of personal income tax returns for the last three years, and a statement of social disadvantage.

In practice, the City's certification process is as follows. When EOD receives a completed certification application, it is assigned to a program assistant. He or she ensures that the application is complete and all required documentation is attached by completing a checklist. According to A.R. 1.88, if the application is incomplete, notification is sent by mail requesting the missing items. EOD will attempt to contact the applicant by phone to follow up on the request for additional information. If a response is not received within 15 days of the original request, a certified letter is sent informing the applicant that his or her file is being assigned inactive status. The applicant may submit the requested information within three months from the date of the letter to reactivate the file. If no response is received within three months, the applicant must file a new application with all appropriate documentation to reapply.

If the application is complete, it is assigned to a member of the certification staff. That individual conducts a desk audit. The audit includes a review of all the submitted documentation for an examination of the ownership, control, and expertise of the business along with a determination of whether the operation is a viable business. If the certification

staff member has any questions regarding any of the above issues or any of the documentation, follow-up questions are asked of the applicant by both telephone and letter.

Once the desk audit is complete, the same staff member schedules and conducts an on-site interview with the business owner. This interview is conducted to determine whether the business is in fact operated by a minority or woman and to verify by sight that the business is viable and does provide the purported services. Section 18-302(D) authorizes EOD to conduct a specific certification investigation of MBE and WBE ownership arrangements beyond formal documents submitted by each business in certain circumstances. For example, City officials may conduct further investigation if: 1) the business is applying for certification with the City for the first time; 2) it is a newly formed business, or a business with less than 100 percent minority or woman ownership; 3) there is a previous or continuing employer-employee relationship between or among present owners; 4) a non-MBE or non-WBE has an interest in the business; 5) ownership of the business has changed since documents were last submitted to EOD; or 6) a review of the documents submitted with the application raises serious concerns regarding either ownership or control of the business.

Once the on-site interview is complete, the certification staff member completes the on-site report, conducts a final review of the application, and makes a final recommendation regarding the application. The total application, including the site report, is then reviewed by another certification staff member with power to disagree with the final recommendation.

If both individuals agree that the business should be certified, then the decision is final and certification is awarded. If certification is denied by both certification staff members or the staff members do not agree, the lead equal opportunity specialist makes the final decision to grant or deny certification or request additional information.

EOD grants certification for a period of one year. A business denied certification on the basis of information submitted cannot reapply for a period of six months. Between

October 1993 and December 1997, only 19 businesses have been denied certification or recertification. Generally, a business will withdraw its application for certification before a denial is issued because this allows the business to correct the problem and reapply within as little as six weeks. A business has the right to appeal a denial of certification and may still be certified if the appeal is decided in its favor. The appeal process is discussed further in Section 3.4.5, Recertification, Decertification and Appeals, *infra*.

From October 1993 to December 1997, 3,330 applications for either first time certification or recertification were made to EOD. The following are the results:

Certifications granted	2,753
First time certifications	1,202
Recertification applications	1,551
Applications denied	19
Applications withdrawn	558

The City provides several outreach efforts to assist applicants with the certification process and to increase the number of certified businesses. City officials conduct approximately six certification workshops annually. These workshops walk the applicant through the certification process and department personnel answer any questions owners may have regarding the process. EOD personnel attend various community events and activities to provide information regarding the City's certification process and the benefits businesses receive by certifying. EOD also requires a certification staff member to be available during business hours to assist potential applicants with questions regarding the application process. Staff members rotate the responsibility of taking telephone calls and questions from walk-ins.

3.4.4 Certification Directories

Once a business is certified as a minority- or woman-owned business, it is placed in the City of Phoenix Minority- and Woman-Owned Business Enterprise Certification Directory.

This directory is divided into two sections: 1) an index listing by business type; and 2) an alphabetical listing by business name. Section one divides businesses into four major categories: construction contractors, consultants, services, and vendors and suppliers. Each category is further divided into particular services provided to the City within that category. The certified M/WBEs are listed under the subcategory for the services they provide. Section two lists the certified companies in alphabetical order. The company address, phone and fax numbers, and contact person are also provided. Also included are the type of business and certification expiration date. It was noted, however, that businesses are not divided according to the owner's ethnicity.

In addition to the above directory which lists all certified businesses regardless of trade, EOD also provides two additional monthly directories to EAS. One directory lists certified M/WBEs in the construction industry. This directory is restricted to businesses located in Maricopa County. The second directory, also provided to EAS, lists businesses certified as DBEs for federally funded projects. It includes all certified MBEs and WBEs, along with any businesses located outside of Maricopa County that are certified as DBEs for federal projects.

The City updates its certification lists daily; however, the directories are printed and distributed monthly to EAS for use in construction bidding and to the business liaisons in each procurement department. In addition to providing the monthly directories to departments within the City, EOD makes the directories available to non-M/WBE businesses to assist them in locating and identifying businesses to solicit as subcontractors.

Every six months both directories are combined and bound for distribution to the public. This bound directory lists not only businesses located in Maricopa County that are certified as M/WBEs for the City's construction and procurement programs, but also all businesses including those outside of Maricopa County that are eligible for Federal Disadvantaged Business Enterprise Program projects.

3.4.5 Recertification, Decertification, and Appeals

Under Section 18-302(D), to remain certified all MBEs and WBEs appearing in the certification database are required to submit a disclosure affidavit with required documentation annually to EOD. The disclosure affidavit and related documents are evaluated for thoroughness and accuracy to determine whether any changes have occurred that affect the status of the business as a bona fide MBE or WBE. An investigation may be conducted to evaluate an applicant for recertification as deemed appropriate by the EOD director. All certified MBEs or WBEs are subject to monitoring by EOD to ensure that the appropriate ownership and control continues.

To assist in recertifying businesses, EOD sends a notice along with an application for recertification to the certified business not less than 45 days before the date certification expires. The notice indicates that the business must have its application completed and returned to EOD before the expiration date. City officials will not allow a business' certification to expire if the business submits its application before the expiration date even if the review of the application is not complete. If the applicant indicates no changes in its business status, the City will renew the certification. If the applicant indicates changes in its business status, the City will request documentation regarding those changes and render a determination based on the newly submitted information. The City also requires a certified business to complete a full certification application every five-years. The rationale is that a business is likely to undergo several changes in a five-year period.

According to Section 18-302(E), EOD may decertify a business if it finds that the business is no longer a bona fide MBE or WBE. Specific reasons for decertification include: 1) the entity has changed to the extent that the business no longer satisfies the requirements of ownership, control, and/or size; or 2) the MBE or WBE fails to submit information requested by EOD within a reasonable time period. These reasons are not intended to be all inclusive. The City's position is that once a business has been certified, the business has

a vested interest in the City's contracting and purchasing programs; therefore, the City accepts the burden of proving a business should be decertified.

Generally, a decertification inquiry results from two situations. First, a third party may challenge a business' certification. Second, EOD may become aware of information causing it to question a business' certification status. Once a decertification inquiry begins, EOD will conduct an investigation requesting documentation of a business' minority- or woman-owned status. The business owner will have the opportunity to meet with EOD to discuss the allegations. Businesses decertified for reasons other than by voluntary request may not apply for recertification for such time as may be specified, up to one-year. A business that is decertified has the same appeal rights under Section 18-303 as a business denied certification. Since October 1993, only one business has been decertified.

Section 18-303 and A.R. 1.88 outline the procedures for appealing a denial of certification. If the EOD director denies an MBE or WBE certification, he must notify the affected party in writing within 15 days by registered mail, and explain the reasons for his decision. Any contractor, subcontractor, vendor, or supplier who has been denied certification as an MBE or WBE by EOD may appeal the decision by filing a written notice of appeal with the EOD director within seven working days of receipt of the denial of certification. This written notice must state the reasons for the appeal.

Within three working days after receipt of the notice of appeal from the aggrieved party, the EOD director forwards the notice to a hearing officer. Within seven days of the date of receipt of notice from the Equal Opportunity Department, the hearing officer provides the aggrieved party with notification of a hearing date. The hearing officer then notifies all parties of the hearing by certified mail, setting forth with particularity the charges filed by the aggrieved business, and including the hearing date, time, and place.

All parties must be provided a fair and impartial hearing and are allowed to produce any and all evidence in either party's possession concerning the determination of

noncompliance with the requirements of Article VIII or the denial of certification. Within seven working days of the hearing, the hearing officer issues written notice of the decision on the appeal to all parties by certified mail. His or her decision affirms, alters, or reverses the denial of certification by EOD and sets forth the reasons for the decision. If the hearing officer finds for the aggrieved party, then the business is certified as an MBE or WBE and added to the City's certification database. The officer's decision is binding on all parties, subject to the right of appeal as provided by law.

3.5 Small Business Assistance Program

The City's Small Business Assistance Program (SBAP) was established in November 1993, and formally initiated in May 1994. This program represents an effort by City officials to develop race- and gender-neutral remedies to assist small minority- and women-owned businesses. SBAP was created as part of the Community and Economic Development Department and is administered by the economic development administrator.

While the program was in its formative stages, program administrators developed an action plan based on a series of recommendations from the Disparity Study Task Force in order to facilitate implementation of the City's race- and gender-neutral programming. Administrators formulated the primary objectives: to promote and support the inception and growth of small businesses located in Phoenix and to assist Phoenix small businesses by providing technical and financial assistance and networking opportunities.

SBAP has several strategies currently in place to reach these objectives:

- maintaining the First Point Information Center;
- providing management and technical assistance services;
- providing financial assistance services;
- developing consulting and counseling service partnerships;
- providing seminars, training, and networking opportunities;

- providing Enterprise Community program coordination;
- conducting small business assistance outreach; and
- coordinating the economic development component of the Community Development Block Grant program.

SBAP works in partnership with many organizations to bring small business resources to the Phoenix community. For example, SBAP partners with Maricopa Community College's Small Business Development Center to provide one-on-one counseling in the First Point Information Center at Phoenix City Hall. Each activity designed to implement the above goals is described below.

Although SBAP is a race- and gender-neutral program, administrators make special efforts to reach minority- and women-owned businesses. SBAP works with many business organizations including minority Chambers of Commerce, the Greater Phoenix Urban League, Chicanos Por La Causa, the Grand Canyon Minority Supplier Development Council, and the National Association of Women Business Owners. SBAP's Community Development Block Grant open allocation process also provides limited funding to support organizations including minority Chambers of Commerce.

In addition, SBAP targets minority and women business owners by sponsoring four major annual outreach events: a business seminar in Spanish, Minority Enterprise Development Week Awards Breakfast and Business Opportunity Trade Fair, Asian American Business Expo, and Enterprise Breakfast and Small Business Trade Fair. The SBAP submits city council reports on each of these events, and maintains monthly reports that provide project status information and a current list of all SBAP activities.

When a business first contacts the SBAP, the staff member assigned to the initial intake session, either by phone or in person, completes an Information Request Tracking Form (IR). The form standardizes the information requested from businesses and lists all of the available resources throughout SBAP. A copy of the Information Request Tracking

Form is attached as Appendix A5. Referrals are then made to the appropriate program within SBAP according to the business needs assessed in the intake process.

3.5.1 Small Business Assistance Program Components

SBAP actually consists of seven smaller programs: 1) First Point Information Center; 2) technical assistance; 3) consulting and counseling services; 4) seminars and training; 5) resource directories; 6) financial assistance; and 7) the City's Enterprise Community. Business roundtables are held annually, and are comprised of small business owners, representatives from financial institutions, and small business assistance providers. These roundtable discussions are designed to ensure that SBAP continues to address the critical needs of the small business community and does not duplicate other existing small business programs.

The First Point Information Center is designed to provide coordinated assistance to Phoenix area businesses. The Center is located within CED and professionals provide intake, referral, and follow-up services to small business owners. Specifically, the Center provides information regarding City licensing and tax requirements, the certification process for women- and minority-owned businesses, ombudsman services for all City of Phoenix offices, assistance in securing business with the City, referrals to other community support programs, and assistance with the City's Enterprise Community. In addition to the above services, the Center provides a "hotline" to assist callers with various business needs. During calendar year 1998, over 5,000 small businesses phoned or visited the Center for assistance.

SBAP also provides small businesses with several forms of technical assistance. First, the program contracts with professionals to counsel in general business administration and marketing to assist businesses in developing business plans, human resource plans, and business risk assessment plans. The business counselors also provide assistance in preparing financial reports and any other necessary business reports.

The program provides finance counselors who offer detailed financial assistance to support businesses' external financing requirements, as well as bond packaging assistance. Bond packaging assistance involves preparing detailed information to support a construction company's performance payment, and other business-related bonding requirements. The final form of technical assistance provided is a "business needs assessment." This assessment evaluates the adequacy of a company's accounting system, management capabilities, and marketing plan.

SBAP has a consulting program that was developed through a joint partnership with Maricopa Community College's Small Business Development Center. Business consultants are available by appointment to assist with business planning, marketing strategies, financial management, inventory management, and other business-related issues. During 1998, consultants met with approximately 300 businesses.

Seminars and training programs are sponsored by SBAP regularly and SBAP often co-sponsors events with other City departments, businesses, and community organizations. Some of these events include a home-based business seminar, procurement seminars, subcontractor success seminars, Asian American Business Expo, seminars in Spanish, Small Business Week, Minority Enterprise Development Week breakfasts, and trade fairs. In 1998, a total of approximately 10,000 people attended these SBAP events. See Appendix A6 for a sample schedule of events.

SBAP maintains a resource directory of traditional and non-traditional lending institutions, technical assistance providers, and bonding companies. The directory lists lending sources, along with their credit programs, and general application requirements. The list of technical assistance providers includes the various types of assistance available, as well as general requirements. Additionally, in 1997, through cooperation with several City departments, City officials developed a "Guide to Operating a Business in the City of Phoenix." The Guide outlines comprehensive, step-by-step procedures for starting a

business in the Phoenix area. As of March 1999, approximately 4,000 guides had been distributed.

SBAP also has several financial assistance programs available. The Expansion Assistance and Development Program (EXPAND) was established by the City of Phoenix to provide access to capital for growing businesses. The program allows businesses to secure financing from traditional lending institutions with collateral offered by EXPAND. EXPAND is not a substitute for conventional loans. The City does not loan funds directly to businesses, rather, it places a collateral reserve account at a bank. The business is then required to secure financing from a lending institution, which may be conditioned on receipt of additional collateral supplied by EXPAND. EXPAND maintains a collateral reserve account, and offers businesses collateral enhancement, which is generally 25 percent of the loan amount. EXPAND funds may be used for new construction, to purchase existing buildings (including land), to remodel an existing building, for working capital, equipment and machinery, and leasehold improvements.

In order to be eligible for the program, a business must be located within the City of Phoenix, owned by a citizen or lawful permanent resident of the United States, have a net worth of less than \$7.5 million, and profits (after federal income tax) of less than \$2.5 million (averaged over the last two-year period). It also must have at least two years of operating history and be a for-profit retail, manufacturing, wholesale, or service company. Priority is given to businesses in the City's redevelopment areas and for economic development projects. As of March 1999, 77 businesses have obtained approximately \$17 million in loans that were partially collateralized through EXPAND.

Small businesses may pursue two other sources of financial assistance funded through SBAP. The Self Employment Loan Fund Program (SELF) assists low-income individuals with business start-up or expansion. The SELF program provides training, technical assistance, peer support, and business loans from \$100 to \$5,000. The second

source of financial assistance is Chicanos Por La Causa, which offers microloans ranging from \$2,000 to \$5,000.

The City's Enterprise Community program (EC) includes funding to enhance and target financial assistance in the EC. The EC is a federally designated area in the Phoenix urban core that has been targeted for comprehensive revitalization due to its high levels of socioeconomic distress. Federal funds are earmarked for small business assistance programs including loan programs, technical assistance, and collateral for EXPAND funds.

SBAP has also developed several programs designed to promote business growth in the EC. First, the City established four small business incubators. These agencies provide technical assistance such as assistance with creating business plans, marketing strategies, tax preparation, and consulting services. Incubator services such as access to computers, copiers, fax machines, telephones, and office supplies are provided to small businesses within the EC. The current incubators are in the following locations:

1. Greater Phoenix Urban League, 1402 South 7th Avenue;
2. Community Excellence Project, 2457 East Broadway Road;
3. Chicanos Por La Causa, 1102 East Tonto Street; and
4. Carl Hayden Center, 3216 West Van Buren.

City staff also visit one-on-one with small businesses located in the Enterprise Community. The City also provides seminars targeted at businesses in the Enterprise Community. These seminars are designed to provide information on various topics including procurement, marketing, financing, and services provided by the City. Finally, the City has awarded the Self Employment Loan Fund (SELF)/Association for Supportive ChildCare (ASCC) partnership with a \$50,000 grant to leverage and administer a childcare revolving microloan pool project.

4.0 STATISTICAL ANALYSIS

This chapter provides statistical analyses of the City's contracting and purchasing activities including an examination of the City's market area, the utilization and availability of M/WBEs (Minority/Woman-Owned Business Enterprises), and disparity results. All analyses were conducted for three business categories (construction contracting, general services contracting, and purchasing of commodities). Also included is the methodology for the statistical analyses.

The analyses sought to determine the existence and, if applicable, the extent of disparity between the availability of minority- and women-owned businesses and the City's utilization of such businesses. The study included all construction, general services contracts, and purchases of commodities made between January 1, 1993, and December 31, 1997. The data MGT collected from the Engineering and Architectural Services Department and the Finance Department Materials Management Division included exhaustive information on all construction and procurement in each of the City's departments.

The following sections comprise the chapter:

- Methodology
- Construction
- General Services
- Commodities

4.1 Methodology

This section details the methodological procedures associated with:

- Business Categories
- M/WBE Classifications
- Data Collection
- Geographic Market Area
- Utilization Analysis
- Availability Analysis

- Determination of Disparity
- Significance of Proportions Test

The following subsections explain the methodology MGT used in its analyses.

4.1.1 Business Categories

MGT conducted M/WBE utilization, availability, and disparity analyses for three business categories: construction, general services, and commodities. The categories were defined by the types of purchases made and contracts awarded by the City departments during the study period. The study period included calendar years 1993 through 1997. MGT based the analysis of each business category on the service provided by the individual contract or purchase, regardless of which department or section procured the item.

Construction

All construction-related business including:

- Building Construction
- Heavy Construction (road construction, bridge construction)
- Specialty Trades Construction (carpentry, electrical, plumbing)
- Miscellaneous (major landscaping and horticultural services)

General Services

All services that are labor intensive and not a professional or construction service, including:

- Printing and Publishing Services
- Transportation Services
- Electric, Gas, and Sanitary Services
- Business Services
- Auto Repair Services
- Educational and Training Services
- Miscellaneous Repair Services

Procurement of Commodities

All equipment, consumable items purchased in bulk, services, or deliverable products including:

- Equipment and parts (vehicles, machinery, and furniture);
- Consumable commodities and supplies (office supplies, books, food, and uniforms).

4.1.2 M/WBE Classifications

For analytical purposes, MGT classified firms as either M/WBEs or non-M/WBEs. M/WBEs are those firms that are at least 51 percent owned and controlled by members of one of four groups—African American, Hispanic American, Asian/Native American, and non-minority women. The City created the nomenclature for this study. MGT conducted availability, utilization, and disparity analyses for M/WBEs and non-M/WBEs according to the following M/WBE and non-M/WBE classifications:

- **African American:** U.S. citizen or lawfully admitted permanent resident having an origin in any of the Black racial groups of Africa.
- **Hispanic American:** U.S. citizen or lawfully admitted permanent resident of Mexican, Cuban, Puerto Rican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race.
- **Asian/Native American:** U.S. citizen or lawfully admitted permanent resident originating from the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands; or a U.S. citizen or lawfully admitted permanent resident originating from any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition.
- **Non-Minority Woman:** U.S. citizen or lawfully admitted permanent resident who is a non-Hispanic white woman.
- **Non-Minority Man:** U.S. citizen or lawfully admitted permanent resident who is a non-Hispanic white man.

Since minority women more closely identify with discrimination due to their race, rather than gender, minority women are included in their respective minority categories.

MGT used information it obtained from the City and Maricopa County to develop a database of M/WBE vendors and contractors differentiated by ethnicity. In addition, MGT used community resources for additional names of M/WBE firms. MGT also maintained a record of vendors who participated in personal interviews or the public hearings as part of the study, who identified themselves as M/WBE firms. From these sources, MGT compiled a master list of M/WBE vendors for use in subsequent utilization analyses. Among the sources of M/WBE information were the following:

- Arizona Asian-Pacific Yellow Pages
- Arizona Department of Commerce
- Arizona Department of Transportation
- Arizona Hispanic Chamber of Commerce
- City of Phoenix Finance Department
- City of Phoenix M/WBE Goals Compliance Unit
- City of Phoenix Economic Development Department
- City of Phoenix Engineering and Architectural Services Department
- City of Phoenix Equal Opportunity Department
- City of Tucson
- Grand Canyon Minority Supplier Development Council
- Maricopa County
- State of Arizona Registrar of Contractors

4.1.3 Data Collection

MGT assessed the City's data records to determine the type and format of data available. Based on that assessment, MGT designed a data collection plan outlined in the paragraphs below. The collection of data occurred during the month of August 1998. Each City department provided confirmation that all City construction contracting was

conducted through the Engineering and Architectural Services Department or the Finance Department's Materials Management Division; procurement of commodities and services was conducted through the Materials Management Division. Further, MGT received confirmation that payments for all procurement were made through the City's Finance Department.

During the review of database contents, MGT excluded the following records:

- Records of intergovernmental transactions with government agencies or non-profit organizations. These records indicated that competition was limited to government agencies or non-profit organizations.
- Records for which all information critical for analysis (vendor name, zip code, or date) could not be found. These records comprised less than 0.1 percent of the total dollar amount in the final database.
- Records with zero dollar amounts. These records indicated that the purchase requests were not fulfilled and the work was rebid.
- Reimbursements to employees for expenses incurred. Vendors used for employee expenses were not listed.
- Utilities such as water, gas, and electricity. These records were beyond the scope of the study. Public utilities are not part of a competitive bidding process.
- Mortgages, certificates of deposit, other banking transactions, salaries, refunds, petty cash, fringe benefits, and insurance payments. These records represent administrative transactions beyond the scope of the study.

Construction

The following section examines the data collection process for prime contracts and subcontracts in the construction category.

Prime Contracts

MGT received an electronic data file from the Engineering and Architectural Services Department containing a list of contracts approved by the City Council. The file contained only construction contracts with M/WBE goals awarded through the Engineering and Architectural Services Department from November 1993, through

December 1997. The database listed 475 of these contracts that were approved during the relevant study period. Included in the database were:

- Index Number
- Date
- Contract Status
- Prime Contractor
- Award Amount
- Proposed M/WBE Utilization Goals

After obtaining the data, MGT entered the construction contract information into a comprehensive database that included all elements of data essential to conduct the analyses. MGT also reviewed all bid award records to determine the total number of contracts awarded from January 1, 1993, through December 31, 1997, with and without goals. The total number of projects for which the City received bids was 641. MGT received an electronic payment database from the Finance Department for November 1993, through December 1997. Records from the 4,770 monthly progress payments were then classified as construction-related using National Institute of Government Purchasing (NIGP) codes. This list of NIGP codes were presented in Appendix C.

From the records reviewed and the electronic data provided, MGT assembled an exhaustive collection of data for analysis. Before the data were ready, all information was supplemented where necessary. Supplementing data involved supplying addresses for prime contractors and subcontractors where needed and identifying firms as either M/WBEs or non-M/WBEs according to their primary ownership. The determination of firms' addresses was important because market areas cannot be established unless the county in which the prime contractor is located is known.

MGT verified the database information and collected additional information on contracts awarded during the study period but not included in the electronic data. The information included prime contractor and subcontractor data such as:

- Name
- Address
- Type of Service Performed
- Award Amount

- Final Payment Amount

MGT reviewed 347 contracts and associated project files in the Central Records section of Engineering and Architectural Services and 294 contracts at the City Clerk's Records Management Division Records Center. Data collection staff reviewed each contract file and recorded the relevant information on data sheets. Information from the MGT data sheets were then entered into a database file to facilitate analysis. The database structure documented the following data elements:

- Index Number
- Date of Award
- Project Description
- Service Provided
- Final Dollar Amount
- Contractor
- Address
- City
- State
- Zip Code
- Contact Person
- M/WBE Status

Subcontracts

Contract files also contained information on subcontractors, generally as prime contractor lists of subcontractors and 20-day lien notices. The collection team recorded the subcontractor data on worksheets for subsequent entry into databases. The subcontractor data included:

- Subcontractor
- Address
- City
- State
- Zip Code
- Service Provided
- Award Amount
- M/WBE Status

MGT determined the M/WBE status of the remaining subcontractors by comparing subcontractor names with M/WBE lists maintained by the City, Maricopa County, the Arizona Department of Transportation, and the City's EOD database of vendor eligibility

status with the City. If the databases conflicted regarding the race or gender of a firm, MGT contacted the firm directly to ascertain the correct classification. In addition to matching subcontracting firms with their ethnicity, firms' proper names were established to ensure a consistent format for analysis.

MGT designed a verification survey to corroborate subcontractor information collected from contract files. Survey forms and a cover letter were sent to prime contractors requesting that they verify subcontractors utilized, owner ethnicity and gender classification (if any), and the subcontractor dollar amounts. The cover letter also stated that if the prime contractor did not respond, MGT would conclude that subcontractor information on the verification report was correct. If the subcontractors had a dollar amount of zero, according to the City's contract files, these subcontractors were included in the verification process.

Of the 200 surveys distributed, 61 (31 percent) were completed and returned by the recipients, while 29 (15 percent) ultimately could not be delivered because of incorrect addresses. For the 110 surveys mailed that were not returned, MGT attempted to call the prime contractors to request that a completed survey be mailed or faxed to MGT. Seven prime contractors faxed the verification reports with no changes and eight others sent reports with corrections. Of the 76 prime contractors who ultimately responded to the survey, 39 made changes in the subcontractor information either by adding additional subcontractors, altering the dollar award amounts of subcontracts, or altering the M/WBE classification. The survey responses included multiple projects for the primes.

MGT received an acceptable response from the verification survey to reliably measure the validity of the City's subcontracting records. The survey responses demonstrated that primes found the subcontracting data to be accurate.

The database reflected the changes indicated by the prime contractors, except for some discrepancies on M/WBE status of subcontractors. The database did not include changes to some subcontractors' M/WBE status because none of the other data sources could corroborate the changes indicated by the prime.

Appendix A contains a complete listing of all construction contracts. Contracts are arranged in chronological order, from most recent to oldest. Following the list of prime contracts, Appendix A also includes a list of subcontracts with subcontractor ethnicity, arranged in fiscal year order. All contracts are included in these listings whether the prime contractor was located within or outside the relevant market area. Note that all contract data listed in the appendices are not included in utilization since the utilization analysis is based only on contracts in the relevant market area.

General Services and Commodities

MGT received a database from the Finance Department containing City purchasing records from January 1, 1994, through December 31, 1997. For 1993 purchasing information, MGT reviewed records at the City Clerk's Records Management Division Records Center and recorded the data on data collection forms. MGT separated the database into two tables, one for service payments and one for commodity purchases. The NIGP codes indicated whether each purchase was a commodity or service. A list of NIGP codes and classifications are presented in Appendix D. After payments were separated into two business categories, the data collected at the Records Center was added to the electronic data provided by the City.

Payments were sorted by NIGP code and subject. Of the 597,423 records in the original database, 43,804 were purchases deemed beyond the scope of the study and consequently, were removed from the tables used for analysis.

Items eliminated from the database included:

- Payments to charities and nonprofit organizations;
- Payments to government entities;
- Utility and telephone service payments;
- Building mortgages or rent payments;
- Land leases or purchase payments;
- Conference fees; and
- Parking fees.

These items were not purchased competitively. Additionally, payments to employees for reimbursements and checks made out to petty cash were not collected or analyzed because vendor data is not available for these items. Finally, banking transactions, insurance payments, refund checks, salary payments, and garnishments were not collected because they are administrative items rather than purchases. MGT used object codes assigned to purchases by the City to define the purchase type, determine the business category, and determine which purchases were within the scope of the study. These purchases were then analyzed to determine utilization.

MGT collected a sample of general services payment data for the five-year study period in order to verify the electronic data. The total number of payments for each year was determined and a sufficient sample was taken to establish at least a 95 percent confidence level.

NIGP codes were used to determine service descriptions. Refer to Appendix D for a complete listing of the NIGP codes and services for each category.

4.1.4 Geographic Market Area

Consistent with legally accepted disparity study methodology, MGT grouped contracts into categories according to the prime contractors' geographical location. Once contracts were classified into geographical categories, MGT could determine where the City conducted its business for construction-related projects. MGT selected the county as the geographical unit of analysis based on the following:

- courts have accepted counties as a standard geographical unit of analysis in conducting equal employment opportunity and disparity analyses;
- county boundaries are determined by the state legislature and hence are free from any bias that might result from the researcher's determination of boundaries of geographical units of analysis; and
- census and other federal and state data are routinely collected and reported by county.

The potential relevant market area MGT considered for its disparity analyses was all counties in the U.S. from which the City hires contractors for construction services. MGT defined the relevant market area as all counties with prime contractors that were awarded at least 75 percent of the City's contracting dollars in a business category during the study period of January 1993, through December 1997. Therefore, MGT included in the market area all counties containing contractors that received 75 percent of City contracting dollars.

MGT summarized final construction contract dollar amounts by county and sorted the contract awards by county in descending order. MGT adopted 75 percent as the market area based on the rationale used by the Tenth Circuit in *Concrete Works of Colorado v. City and County of Denver*.¹ In *Concrete Works*, the court held that the relevant market area need not be confined by jurisdictional boundaries, but it is important that the pertinent data closely relate to the jurisdictional area of the municipality enacting the program.² By including in the market area all counties containing contractors that received 75 percent of contracting dollars, MGT considered the Court's guidance and balanced the economic reality that contracts are often awarded to firms located in adjacent areas, with the concept that pertinent data must closely relate to the jurisdiction enacting the program.³

¹ *Concrete Works of Colorado v. City and County of Denver*, 36 F.3d 1513,1520 (10th Cir. 1994).

² *Id.*

³ *Id.*

MGT examined the contract dollars paid at the prime level to determine the relevant market area.

4.1.5 Utilization Analysis

Using final contract amounts paid to primes and award amount data for subcontractors, MGT calculated the percent of contract and subcontract dollars within the relevant market area. Utilization of subcontractors was based on those prime contracts that had subcontracting activity. MGT analyzed the percent of contract dollars for each M/WBE classification per calendar year at the prime contracting and subcontracting level. The next step was to calculate the percent of prime contract (and subcontract) dollar amounts by M/WBE classification for the entire five-year period. Utilization was calculated for each M/WBE classification individually.

The dollar amounts for each calendar year included all contracts awarded to prime contractors within the relevant market area; all contracting dollars going to prime contractors located outside the market area were excluded from the analyses. Based on MGT's calculations of the relevant market area, the excluded dollars comprised less than 10 percent of total dollars awarded. For subcontractors, awards to M/WBE firms working for prime contractors in the market area were used in calculating the percent of M/WBE subcontracting.

MGT analyzed the final construction contract dollar amounts by county for the relevant five-year period of the study. In addition, the data were also analyzed by:

- number of contracts or purchase orders;
- percent of contracts or purchase orders;
- number of unique firms;
- percent of total firms;
- dollars spent or awarded; and
- percent of total dollars.

In order to depict the total dollars retained by non-M/WBE and M/WBE prime and subcontractors of construction contracts after project completion, MGT used the following methodology:

- In the first step, the dollars retained by primes in each M/WBE classification were calculated by deducting subcontractor award amounts from prime contract award amounts:

[e.g., Prime Contract Award \$ (MBE₁) – Subcontractor \$ (MBE_{1...N}) = Prime Retained \$ (MBE₁)]

- In the second step, to report the total dollars for each group's primes and subcontractors combined, the amounts awarded to each group's subcontractors were then combined with the amount of dollars retained by primes in each group:

[e.g., Prime Retained \$ (MBE₁) + Subcontractor \$ (MBE₁) = MBE₁ Combined \$]

4.1.6 Availability Analysis

Determining the available pool of minority-owned, woman-owned, and non-minority-owned vendors able to provide services to an agency is critical to a disparity study. The number of available firms is compared to the utilization of firms to determine whether disparity exists. Through the use of Standard Industrial Classification (SIC) codes,⁴ the geographic unit of analysis, and census data, MGT determined M/WBE availability in the relevant market area for construction and purchasing. MGT used the following U.S. Bureau of Census (Census Bureau) documents:

- *Survey of Minority-Owned Businesses (SMOBE)*
 - SMOBE contains the number of MBEs by county, by MBE ethnic classifications, by gender, and by SIC code.
 - The SMOBE survey is conducted every five years. The last two surveys were conducted in 1987 and 1992.

⁴ The Federal Office of Management and Budget establishes SIC codes. The classification divides companies by the type of business activity in which they are primarily engaged. The activity is determined by the major product produced or service rendered. This coding system consists of 11 major industries in which there are 99 major groups of firms. These groups are further divided into a multitude of minor groups identified by a four-digit SIC code. The SIC codes chosen were used to identify the availability of construction firms.

- *Survey of Women-Owned Businesses (SWOBE)*
 - *SWOBE* contains a list of all women-owned firms by county and by SIC code.
 - The *SWOBE* survey is conducted every five years. The last two surveys were conducted in 1987 and 1992.
- *County Business Patterns*
 - *County Business Patterns* contains the total number of business establishments by state, county, and by SIC code.
 - *County Business Patterns* is published annually.

Census data were used because the approach to determining availability based on census data has numerous inherent strengths.

- the data have been derived through rigorous statistical methods;
- the data have been objectively derived with no race/gender biases that might affect the relative percentages of firms in the different race/gender categories;
- the data are readily available on a county by county basis;
- all firms have a proven history of earning revenues in their field(s) of service and, therefore, in our professional opinion, can be considered as available and capable of providing services in their respective service field(s);
- prime and subcontracting firms are included;
- the data are equally reliable for historical time periods;
- the data are statistically reliable in identifying the race/gender category of firm owners;
- the data are statistically reliable in identifying the field(s) of service (*i.e.*, SIC categories) of the firms; and
- the data provide the most accurate and reliable count of available firms by race/gender/ethnic category.

To obtain more detailed data than was available in published reports, MGT requested and received a 1992 database from the Census Bureau containing the number of firms by SIC code in each minority and women classification for each county

in the United States. The Census Bureau also provided a tabulation of the total number of firms located in each county by industry division.

In determining the number of firms available in each business category, MGT was careful to include only those firms that provided the same types of commodities and services as in construction contracting and purchasing respectively. Exhibit 4-1 provides a list of the SIC codes that were used to calculate the availability of firms in the market area. The number of M/WBEs by ethnic/gender classification was taken from the *SMOBE* and *SWOBE* reports and special tabulations requested from the Census Bureau. The number of non-M/WBEs is the difference between the total number of firms and the number of M/WBE firms in all ethnic/gender categories.

**EXHIBIT 4-1
BUSINESS CATEGORIES AND
STANDARD INDUSTRIAL CODES (SIC)
USED FOR THE CITY OF PHOENIX ANALYSIS**

BUSINESS CATEGORY / CATEGORY DESCRIPTION	SIC CODES
CONSTRUCTION PRIME CONTRACTS	
Construction Industries:	
Building Construction	15
Heavy Construction, Except Buildings	16
CONSTRUCTION SUBCONTRACTS	
Building Construction	15
Heavy Construction, Except Buildings	16
Special Trade Contractors	17
GENERAL SERVICES	
Service Industries:	
Printing & Publishing	27
Transportation Services	47
Electric, Gas, & Sanitary Services	49
Business Services	73
Auto Repair, Services & Parking	75
Misc. Repair Services	76
Educational Services	82
COMMODITIES	
Wholesale Trade:	
Wholesale Trade - Durable	50
Wholesale Trade - Non-durable	51
Retail Trade:	
Building Materials & Garden Supp.	52
General Merchandise Stores	53
Auto Dealers & Service Stations	55
Apparel & Accessory Stores	56
Furniture & Home Furnishing Stores	57

Exhibit 4-2 shows the actual number of construction firms in Maricopa County for 1987 and 1992 according to the U.S. Economic Census. The growth in the number of firms between the two census years was extrapolated to determine the number of available firms for the study years from 1993 to 1997. The census provided data for each business category and was used to determine the availability of firms during the study period.

EXHIBIT 4-2
NUMBER OF CONSTRUCTION PRIME CONTRACTORS IN MARICOPA COUNTY
BASED ON 1987 AND 1992 ECONOMIC CENSUS DATA

	AFRICAN AMERICAN	HISPANIC	ASIAN & NATIVE AMERICAN	NON-MINORITY FEMALE	NON-MINORITY MALE	TOTAL FIRMS
1987 CENSUS	4	17	3	60	557	641
1992 CENSUS	3	19	18	165	477	682

Source: U.S. Economic Census 1987, 1992.

As indicated, the last two editions of *SMOBE* and *SWOBE* reported data only for 1987 and 1992, requiring MGT to determine the number of M/WBE and non-M/WBE firms for all other years in the study. MGT estimated availability for 1993 through 1997 using a straight-line growth formula for each M/WBE classification in each business category. MGT calculated a straight-line (non-compound) growth as follows:

- We determined the total growth (decline) of M/WBEs and non-M/WBEs by classification for each business category in the relevant market area from 1987 to 1992 based on census data;
- We divided by five to find average growth/decline;
- We multiplied the average growth/decline rate for each M/WBE classification by the number of firms;
- We multiplied the average growth/decline rate for each M/WBE classification by the number of firms available for that classification in 1992, the base year, to obtain the number of firms to add to/subtract from each year; and
- The derived number of firms were added to the number of firms in the base firms in the base year to obtain 1993. The same derived number of firms were then added to the 1993 totals to obtain 1994 figures, and so on through 1997.

To obtain a straight-line (non-compound) growth, we added the derived number of firms to the number of firms in the base year to obtain 1993 figures, then added that same derived number of firms to 1993 figures to obtain 1994 figures, etc. through 1997.

The use of straight-line growth yields a lower estimation of firm availability than using a compound growth rate, which is frequently used for economic projections. MGT was confident in using straight-line growth here since M/WBEs frequently have higher growth rates than the market as a whole. Straight-line growth calculations are, therefore, not only a theoretically sound approach, but also a conservative approach for projecting the number of M/WBE firms currently available in Maricopa County.

4.1.7 Determination of Disparity

MGT compared the utilization of each group with its availability within the relevant market area to determine whether disparity exists for an M/WBE or non-M/WBE group within a specific business category. The disparity index reveals any level of disparity. A disparity index of 0.00 shows no utilization. An index of exactly 100 indicates parity between utilization and availability. A disparity index below 100 constitutes underutilization. For the purpose of this disparity study, an M/WBE or non-M/WBE group with a disparity index below 80 is substantially underutilized and is marked with an asterisk (*) in the disparity analysis exhibits later in this chapter.

While a number of indices could be used, the index must be easy to calculate, interpret, and compare. Multiply the ratio of the percentage of utilization to the percentage of available firms in an M/WBE classification by 100 to obtain the disparity index of choice. Equation 1 summarizes the formula:

$$(1) \text{ Disparity Index} = \frac{\%Um_1p_1}{\%Am_1p_1} \times 100$$

Where: Um_1p_1 = utilization of M/WBE₁ for procurement₁
 Am_1p_1 = availability of M/WBE₁ for procurement₁

As with any ratio, a disparity index value of 100 signifies equality between the numerator and denominator. The disparity index point of 80 is based on the Equal Employment Opportunity Commission's "80 percent rule" adopted in the Uniform Guidelines on Employee Selection Procedures.

In the employment discrimination context, a disparity ratio below 80 indicates a substantial level of disparity demonstrating adverse or disparate impact⁵. The Supreme Court accepted the use of the 80 percent rule in *Connecticut v. Teal*⁶. To determine significant underutilization of minority- and women-owned businesses contracting with municipalities, the Eleventh Circuit in *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County* adopted the 80 percent rule.⁷ In determining this threshold, the court referenced the Equal Employment Opportunity Commission's disparate impact guidelines.⁸ Thus, MGT based its designation of disparity on the Supreme Court decision.

4.1.8 Significance of Proportions Test

In addition to the disparity index, MGT conducted a significance of proportions test to determine whether statistical differences exist between utilization and availability. The significance of proportions test compares whether two proportions come from equivalent samples. At a very simple level, the test determines whether there is a difference between two values. More formally, the significance of proportions test examines the following hypothesis:

$$H_o: \pi = \pi_o$$

$$H_a: \pi \neq \pi_o$$

⁵ See 29 C.F.R. §.1607.4D (1981).

⁶ *Connecticut v. Teal*, 457 U.S. 440 (1982).

⁷ *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d895,914 (11th Cir. 1997).

⁸ *Id.*

(π = Utilization proportion, π_o = Availability proportion)

A hypothesis is simply a statement about some characteristic of a variable or variables. This hypothesis tests whether two proportions are statistically equivalent or could be representative of the same variable. The null hypothesis (H_o) provides the statement for testing. In the case of the significance of proportions test, the null hypothesis states that the two proportions are statistically equivalent. The alternative hypothesis (H_a) accounts for the opposite of the null hypothesis or, for our purposes, the chance that the proportions are not equal. In order to draw a conclusion regarding the two hypotheses, a test statistic is produced. The test statistic is compared to a range of values determined by the researcher and a conclusion is drawn regarding the likelihood of the null hypothesis' validity.

The decision to accept or reject the null hypothesis⁹ is contingent on the decision rule, or the alpha level selected. The alpha level is the probability that the result or outcome could occur by chance. The smaller the alpha level, the more difficult it will be to reject the null hypothesis between availability and utilization. An alpha level of .05 reflects the probability that the obtained result could occur by chance is only five out of 100. This probability is so small that we can be 95 percent certain that we will not reject the null hypothesis between availability and utilization when none exists.

The alpha level is used to produce the confidence interval for testing the hypothesis. The confidence interval indicates how likely it is that a variable will fall within a range of values and provides a good idea of the faith one can have in the likelihood of the occurrence of a value. Using the normal distribution, we can assume that 90, 95, and 99 percent of values fall within 1.64, 1.96, and 3.00 standard deviations of the

⁹ The null hypothesis tests if there is a statistically significant difference between availability and utilization for accuracy that no difference is present.

mean, respectively. When performing a hypothesis test, we select a confidence interval for decision-making and compare the test statistic to the interval ranges. For example, assuming a 95 percent confidence interval, the range for failing to reject the null hypothesis or failing to find sufficient evidence against the statement would be between -1.96 and 1.96 . Therefore, in this example, if the test statistic yields a value greater than 1.96 or less than -1.96 , the conclusion would be drawn that insufficient evidence is present to support the null hypothesis and it would be rejected.

The hypothesis listed above is a two-tail test. Meaning that both ends of the normal distribution are considered in decision-making. However, by including a greater or less than sign in the alternative hypothesis, a one-tail specification could be represented. The one-tail test is useful when the researcher has an idea about the direction the relationship should follow. When ascertaining the confidence interval for the one-tail test, the interval is concentrated on one side of the normal distribution. Consequently, the interval for one-tail tests would be 1.28 , 1.65 , and 2.33 for 90 , 95 , and 99 percent levels of confidence.

Equation 2 summarizes the test statistic used to judge the hypothesis.

$$(2) \quad Z = \frac{(\pi - \pi_o)}{\sqrt{\pi_o(1 - \pi_o)/n}}$$

Where:

Z = z-statistic
 π = utilization probability
 π_o = availability probability
 n = sample size

When dealing with a sample size less than 30 , a t -statistic is generated, while a z -statistic is used for larger samples. If the test statistic falls in the range specified by the confidence interval, then statistical disparity is very unlikely. Conversely, if the value lies outside of the range, disparity between utilization and availability is present.

4.2 Construction

MGT's findings for construction contracting for the City of Phoenix are provided in this section.

The City let \$1.4 billion in construction contracts from January 1, 1993, through December 31, 1997. These contracts were let through the City's Engineering and Architectural Services Department and Materials Management Division of the Finance Department. All construction contracts let by the City during the five-year study period are analyzed in this section.

Our analyses includes the following:

- Market Area Analysis
- Prime Contractor Utilization Analysis
- Prime Contractor Availability Analysis
- Prime Contractor Disparity Analysis
- Subcontractor Utilization Analysis
- Subcontractor Availability Analysis
- Subcontractor Disparity Analysis
- Findings and Recommendations

4.2.1 Market Area Analysis

Exhibit 4-3 shows Phoenix's market area for construction contracts—all U.S. counties in which the City of Phoenix awarded construction dollars to firms located in these counties. The relevant market areas, on the other hand, are those counties in which Phoenix awarded 75 percent or more of its total construction dollars to firms located there.

MGT concluded that firms located in Maricopa County received well over 75 percent of City construction dollars; therefore, it is the relevant market area for the study. Almost 93 percent of the City's construction dollars went to firms located in Maricopa County. Five of every six firms hired for construction services were located in Maricopa County and approximately 87 percent of the contracts let during the study period were

**EXHIBIT 4-3
MARKET AREA ANALYSIS
CONSTRUCTION
CALENDAR YEARS 1993 THROUGH 1997**

COUNTY	# OF CONTRACTS	% OF CONTRACTS	# OF FIRMS	% OF FIRMS	DOLLARS	%OF DOLLARS	CUM% ¹
MARICOPA, AZ	4695	86.80%	496	83.22%	\$1,304,529,231.03	92.93%	92.93%
JEFFERSON, CO	68	1.26%	1	0.17%	\$48,316,624.87	3.44%	96.37%
LOS ANGELES, CA	72	1.33%	13	2.18%	\$18,877,422.53	1.34%	97.71%
GALLATIN, MT	16	0.30%	1	0.17%	\$7,957,391.27	0.57%	98.28%
PIMA, AZ	46	0.85%	7	1.17%	\$6,851,463.39	0.49%	98.77%
SALT LAKE, UT	15	0.28%	2	0.34%	\$3,571,869.15	0.25%	99.02%
BERGEN, NJ	1	0.02%	1	0.17%	\$2,282,000.00	0.16%	99.19%
VENTURA, CA	2	0.04%	1	0.17%	\$1,722,970.40	0.12%	99.31%
ORANGE, CA	21	0.39%	7	1.17%	\$1,121,416.63	0.08%	99.39%
DAUPHIN, PA	6	0.11%	2	0.34%	\$1,090,673.29	0.08%	99.47%
COOK, IL	21	0.39%	9	1.51%	\$1,083,923.30	0.08%	99.54%
HENNEPIN, MN	1	0.02%	1	0.17%	\$1,071,978.00	0.08%	99.62%
MOHAVE, AZ	9	0.17%	1	0.17%	\$1,067,882.01	0.08%	99.70%
ANOKA, MN	6	0.11%	1	0.17%	\$957,185.87	0.07%	99.76%
DAKOTA, MN	5	0.09%	1	0.17%	\$472,754.10	0.03%	99.80%
YAVAPAI, AZ	4	0.07%	1	0.17%	\$464,665.24	0.03%	99.83%
HARRIS, TX	289	5.34%	3	0.50%	\$341,587.00	0.02%	99.86%
DALLAS, TX	4	0.07%	7	1.17%	\$333,018.24	0.02%	99.88%
HARTFORD, CT	11	0.20%	1	0.17%	\$284,547.51	0.02%	99.90%
SAN DIEGO, CA	6	0.11%	3	0.50%	\$258,311.57	0.02%	99.92%
DENVER, CO	10	0.18%	3	0.50%	\$231,722.33	0.02%	99.93%
SAN FRANCISCO, CA	11	0.20%	1	0.17%	\$217,568.99	0.02%	99.95%
ALLEGHENY, PA	8	0.15%	2	0.34%	\$174,964.82	0.01%	99.96%
CLARK, WA	10	0.18%	1	0.17%	\$132,294.00	0.01%	99.97%
BERNALILLO, NM	1	0.02%	1	0.17%	\$95,896.65	0.01%	99.98%
MIDDLESEX, MA	6	0.11%	1	0.17%	\$89,112.45	0.01%	99.98%
KING, WA	2	0.04%	3	0.50%	\$50,598.48	0.00%	99.99%
SANTA FE, NM	1	0.02%	1	0.17%	\$42,350.00	0.00%	99.99%
WASHINGTON, OR	19	0.35%	1	0.17%	\$18,750.00	0.00%	99.99%
NEWTON, GA	1	0.02%	1	0.17%	\$18,366.86	0.00%	99.99%
SOMERSET, NJ	2	0.04%	1	0.17%	\$14,872.00	0.00%	100.00%
RICHMOND (CITY), VA	7	0.13%	1	0.17%	\$11,980.63	0.00%	100.00%
LAKE, IL	6	0.11%	2	0.34%	\$9,141.25	0.00%	100.00%
HILLSBOROUGH, FL	1	0.02%	1	0.17%	\$8,852.22	0.00%	100.00%
MECKLENBURG, NC	4	0.07%	1	0.17%	\$7,430.90	0.00%	100.00%
UINTA, WY	1	0.02%	1	0.17%	\$5,059.47	0.00%	100.00%
ONONDAGA, NY	1	0.02%	1	0.17%	\$4,987.32	0.00%	100.00%
OAKLAND, MI	1	0.02%	1	0.17%	\$3,541.69	0.00%	100.00%
ROCK ISLAND, IL	1	0.02%	1	0.17%	\$2,655.14	0.00%	100.00%
SAN MATEO, CA	6	0.11%	2	0.34%	\$2,253.14	0.00%	100.00%
EL PASO, TX	1	0.02%	1	0.17%	\$2,212.63	0.00%	100.00%
DOUGLAS, NE	1	0.02%	1	0.17%	\$2,089.77	0.00%	100.00%
CONTRA COSTA, CA	3	0.06%	1	0.17%	\$2,025.00	0.00%	100.00%
CLARK, NV	1	0.02%	1	0.17%	\$1,335.89	0.00%	100.00%
ESSEX, MA	1	0.02%	1	0.17%	\$1,250.94	0.00%	100.00%
PEORIA, IL	1	0.02%	1	0.17%	\$1,173.75	0.00%	100.00%
CUYAHOGA, OH	1	0.02%	1	0.17%	\$680.00	0.00%	100.00%
PINAL, AZ	1	0.02%	1	0.17%	\$435.00	0.00%	100.00%
POLK, IA	1	0.02%	1	0.17%	\$408.25	0.00%	100.00%
KANE, IL	1	0.02%	1	0.17%	\$37.50	0.00%	100.00%
TOTAL	5,409	100.00%	596	100.00%	\$1,403,810,962.47		

SOURCE: City of Phoenix Engineering & Architectural Services, City Clerk's Archives, Materials Management

¹ Cumulative total of percentage of dollars in market area.

² Counties above the line are included in the relevant market area.

let to firms located in Maricopa County. The market area analysis for construction clearly demonstrates that Maricopa County is the relevant geographic area for conducting availability, utilization, and disparity analyses for the City of Phoenix's construction procurement.

4.2.2 Prime Contractor Utilization

The City's construction expenditures varied considerably over the course of the five-year study period. It is important to note that the City's current M/WBE program did not take effect until November 1993. While there was not a consistent increase in spending from year to year, the City's construction costs for calendar year 1997 were over seven times greater than costs for 1993. City spending increased almost 300 percent from 1993 to 1994. The increase continued from 1994 to 1995, but it slowed to a 66 percent increase. Spending for 1996 was down about 34 percent from 1995; and 1997 saw a 75 percent increase in spending compared to 1996.

The first year of the study contained substantially fewer contracts, for a smaller dollar amount per contract than in subsequent study years. Exhibit 4-4 compares the number of contracts let for each year and the average amount of each contract within that calendar year.

**EXHIBIT 4-4
CONSTRUCTION CONTRACTS
CONTRACTS PER YEAR AND AVERAGE CONTRACT AMOUNT**

YEAR	NUMBER OF CONTRACTS	AVERAGE AMOUNT OF CONTRACT	TOTAL
1993	263	\$214,976.56	\$56,538,835.69
1994	923	\$239,703.92	\$221,246,718.30
1995	1,064	\$344,580.99	\$366,634,172.71
1996	1,074	\$223,699.36	\$240,253,114.93
1997	1,371	\$306,240.96	\$419,856,359.40
ALL YEARS	4,695	\$277,854.99	\$1,304,529,201.03

Source: Engineering & Architectural Services Central Records

Exhibit 4-5 shows the 15 contracts the City awarded in excess of \$10 million. Six of those contracts were awarded in 1997 and represent 40.4 percent of the dollar total for contracts over \$10 million. There was one contract over \$10 million in 1996 for 2.6 percent; five in 1995 are 45.3 percent of the total; three in 1994 comprise 11.7 percent; and no contracts were awarded in 1993.

**EXHIBIT 4-5
CONSTRUCTION CONTRACTS OVER \$10 MILLION
BY YEAR, COUNTY, AND AMOUNT
CITY OF PHOENIX**

YEAR	COUNTY	AMOUNT	PROJECT DESCRIPTION
95	MARICOPA, AZ	\$64,019,763.00	Waste Water Treatment Plant
97	MARICOPA, AZ	\$55,991,649.70	Airport Runway & Taxiway
95	MARICOPA, AZ	\$52,816,360.00	Water Treatment Plant Expansion
97	MARICOPA, AZ	\$45,486,965.00	Criminal Justice Facility
95	MARICOPA, AZ	\$33,169,248.00	Airport Terminal Expansion
97	MARICOPA, AZ	\$26,355,447.00	Civic Plaza East Garage
95	MARICOPA, AZ	\$22,457,446.14	Landfill Environmental Cleanup
94	MARICOPA, AZ	\$21,363,493.00	Little Theatre/Art Museum
94	MARICOPA, AZ	\$16,877,097.00	Arizona Science Museum
97	MARICOPA, AZ	\$15,888,000.24	Maryvale Baseball Stadium
95	MARICOPA, AZ	\$15,717,574.00	Waste Water Treatment Plant
97	MARICOPA, AZ	\$12,270,112.00	Aircraft Maintenance Complex
97	MARICOPA, AZ	\$11,661,257.05	Access Road Construction
96	MARICOPA, AZ	\$10,992,613.00	27th Avenue Waste Management
94	MARICOPA, AZ	\$10,396,874.00	Civic Plaza Refurbishment

Source: Engineering & Architectural Services Central Records

The seven highest contract dollar amounts were awarded in 1997 and 1995, contributing to the higher average dollar amount in those two years relative to the other years.

Exhibit 4-6 shows the utilization of prime contractors by year and ethnicity/gender classification.

Calendar Year 1993

- African American, Asian, and Native American-owned prime contractors were not utilized on any of the City's construction projects. Hispanic and woman-owned firms each received about 0.2 percent of the contract dollars.

**EXHIBIT 4-6
UTILIZATION OF PRIME CONSTRUCTION FIRMS
BY RACE, ETHNIC, AND GENDER CLASSIFICATION
FOR CALENDAR YEARS 1993 THROUGH 1997
CITY OF PHOENIX**

CALENDAR YEAR	AFRICAN AMERICAN		HISPANIC AMERICAN		ASIAN & NATIVE AMERICAN		NON-MINORITY WOMEN		NON-MINORITY MEN		TOTAL	TOTAL MINORITY
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%
1993	\$0.00	0.00%	\$126,831.00	0.22%	\$0.00	0.00%	\$111,239.00	0.20%	\$56,300,765.69	99.58%	\$56,538,835.69	0.42%
1994	\$0.00	0.00%	\$5,093,134.26	2.30%	\$164,159.83	0.07%	\$0.00	0.00%	\$215,989,424.21	97.62%	\$221,246,718.30	2.38%
1995	\$0.00	0.00%	\$5,614,226.46	1.53%	\$0.00	0.00%	\$417,563.62	0.11%	\$360,602,382.63	98.35%	\$366,634,172.71	1.65%
1996	\$85,706.09	0.04%	\$4,192,572.63	1.75%	\$0.00	0.00%	\$61,248.50	0.03%	\$235,913,587.71	98.19%	\$240,253,114.93	1.81%
1997	\$0.00	0.00%	\$6,537,370.37	1.56%	\$522.95	0.00%	\$1,140,024.53	0.27%	\$412,178,441.55	98.17%	\$419,856,359.40	1.83%
TOTAL	\$85,706.09	0.01%	\$21,564,134.72	1.65%	\$164,682.78	0.01%	\$1,730,075.65	0.13%	\$1,280,984,601.79	98.20%	\$1,304,529,201.03	1.80%

SOURCE: Engineering & Architectural Services, Materials Management - City of Phoenix

- All M/WBE prime contracting for the first year of the study period accounted for just over 0.4 percent of the total construction contract dollars. Non-minority male-owned firms were awarded 99.58 percent, almost all of the construction contract dollars for 1993.
- Of the 263 contracts awarded in 1993, minority prime contractors were awarded eight (two Hispanic-owned and six women-owned contractors were awarded contracts).

Calendar Year 1994

- There was no utilization of African American prime contractors in 1994. Asian and Native American-owned firms did receive contracts for 0.07 percent of 1994 construction dollars. Non-minority women-owned firms were not awarded any contracts, while Hispanic firms received a substantial increase in contract dollars compared to their 1993 amount. Hispanic firms collected 2.3 percent of contract dollars.
- The total prime contract dollars awarded to M/WBE contractors increased from the previous year's 0.42 percent to 2.38 percent. This rate of utilization is the highest percentage during the study period. Non-minority male-owned primes performed over 97.6 percent of the prime construction work in 1994.

Calendar Year 1995

- For the third year of the study period, African American prime contractors did not receive any of the construction dollars. Hispanic firms saw an increase in their utilization for the second consecutive year, although their utilization percentage dropped to 1.5 percent of the construction dollars. Asian and Native American firms received no contracts for the year. However, woman-owned firms, that had received no contracts in the previous year were awarded just over 0.11 percent of the dollars for 1995.
- In all, M/WBEs were awarded 1.65 percent of the construction procurement for 1995, down from over 2.3 percent from 1994. Non-minority male-owned firms again performed over 98 percent of the prime construction.

Calendar Year 1996

- In 1996, the City utilized African American prime contractors in 0.04 percent of the construction procurement. The contract to an African American firm brought the overall utilization of African American-owned primes to 0.01 percent for the study period. Hispanic-owned primes were awarded 1.75 percent, women-owned companies received 0.03 percent in 1996, and Asian and Native American companies had no utilization.

- M/WBE utilization overall rose to 1.81 percent of construction for 1996. Overall spending for 1996 was down 34 percent from the previous year.

Calendar Year 1997

- The City did not award any contracts to African American prime contractors in 1997. Utilization of Hispanic firms saw the highest dollar amount during the study period. The Hispanic portion, \$6.5 million, represented 1.56 percent of the total for 1997. Asian and Native American primes received one contract for a negligible amount, while women-owned firms accounted for 0.27 percent of the prime construction dollars for 1997.
- Overall, construction spending increased from the 1996 amount. Construction procurement for 1997 was 75 percent higher than in the previous year. Despite the increase in dollar expenditures, the utilization of minority firms remained consistent, even gaining a small amount on the 1996 percentage. In 1997, as in the preceding four years, utilization of non-minority male prime contractors was at least 97 percent.

4.2.3 Prime Contractor Availability

Exhibit 4-7 shows the estimated availability of prime construction firms to conduct work for the City during the five years of the study period. The average availability of non-minority male-owned prime construction contractors during the five-year period from 1993 through 1997 was 66.48 percent. Non-minority woman-owned firms comprised 26.5 percent of the companies available to perform the City's construction projects. Hispanic contractors were 2.86 percent; Asian and Native American firms were 3.81 percent; and African American-owned firms represented only 0.34 percent of the total available firms.

After reviewing the availability of construction prime contractors for Maricopa County, MGT found:

- Over the five years of the study, African American prime contractors decreased in availability, though only by a single firm. The total number of available firms increased, further reducing the relative availability of African American firms.

EXHIBIT 4-7
ESTIMATED AVAILABILITY OF PRIME CONSTRUCTION CONTRACTORS IN MARICOPA COUNTY
BASED ON CENSUS DATA
FOR CALENDAR YEARS 1993 THROUGH 1997
CITY OF PHOENIX

YEAR	AFRICAN AMERICAN ¹		HISPANIC AMERICAN ¹		ASIAN & NATIVE AMERICAN		NON-MINORITY WOMEN ²		NON-MINORITY MEN ³		TOTAL FIRMS ⁴
	#	%	#	%	#	%	#	%	#	%	
1993	3	0.43%	19	2.75%	21	3.04%	151	21.88%	496	71.88%	690
1994	3	0.43%	20	2.87%	24	3.44%	169	24.21%	482	69.05%	698
1995	2	0.28%	20	2.83%	27	3.82%	188	26.63%	469	66.43%	706
1996	2	0.28%	21	2.94%	30	4.20%	206	28.81%	456	63.78%	715
1997	2	0.28%	21	2.90%	33	4.56%	224	30.98%	443	61.27%	723
AVG	2	0.34%	20	2.86%	27	3.81%	188	26.50%	469	66.48%	706

NOTE: Details may not add to TOTAL FIRMS due to rounding.

SOURCES OF DATA: U.S. Bureau of the Census

- Survey of Minority Owned Businesses (SMOBE) - 1987 & 1992 (African Americans, Hispanic Americans, Asian Americans, Native Americans and Other Minorities).
- Survey of Women Owned Businesses (SWOBE) - 1987 & 1992.

¹ Minority men and women firms are included in their respective minority classifications.

² The number of NON-MINORITY WOMEN construction firms was estimated by subtracting the number of minority women-owned construction firms from the census count of total women-owned construction firms. According to national statistics, African American women-owned construction firms comprise 6.28 percent of African American construction firms; Hispanic women-owned construction firms comprise 4.37 percent of Hispanic American construction firms; and other minority women-owned construction firms comprise 7.38 percent of other minority construction firms.

³ Number of NON-MINORITY MEN firms derived by subtracting all M/WBE firms from TOTAL FIRMS.

⁴ TOTAL FIRMS derived from the U.S. Bureau of Census and County Business Patterns.

- Hispanic-owned firms increased over the study period. The number of available Hispanic-owned firms increased from 19 in 1993, to 21 in 1997. Hispanic firms experienced a very slight growth in availability during the study period.
- Asian and Native American-owned firms experienced growth in availability greater than that of Hispanic prime contractors. Asian and Native American firms increased from 21 in 1993, to 33 in 1997, representing a 57 percent increase over the course of the study period.
- Non-minority women-owned prime contractors were the largest category of M/WBE prime contractors. These contractors comprised almost 22 percent of available firms in the first year of the study period. By the end of the study, women-owned firms were 31 percent of available firms. Women-owned firms also experienced the largest growth in availability during the study, increasing over 48 percent from 1993 to 1997.

Non-minority male-owned firms decreased significantly in availability during the study period. This was the only group of available prime contractors that experienced a significant decline in availability during the study period. In 1993, non-minority male contractors represented over 70 percent of all contractors. By 1997, non-minority male contractors were just over 60 percent of available firms. Available non-M/WBE prime contractors decreased by over 10 percent from 1993 to 1997.

4.2.4 Prime Contractor Disparity

Exhibit 4-8 details the disparity analysis for prime construction contractors. This chart compares utilization by the percent of contract dollars paid in the first column and availability by percent of available firms in the second column. To determine the disparity index, multiply the ratio of utilization to availability by 100. An index of 100 indicates parity between utilization and availability. An index of less than 80 shows “substantial disparity” and an index above 100 shows overutilization.

EXHIBIT 4-8
PRIME CONSTRUCTION CONTRACTORS
DISPARITY ANALYSIS BY RACE, ETHNIC, AND GENDER CLASSIFICATION
USING CENSUS DATA
FOR CALENDAR YEARS 1993 THROUGH 1997
CITY OF PHOENIX

M/WBE CLASSIFICATION	% OF CONTRACT DOLLARS ¹	% OF AVAILABLE FIRMS ²	DISPARITY INDEX ³	DISPARATE IMPACT OF UTILIZATION ⁴	SIGNIFICANCE OF PROPORTION ⁵
CALENDAR YEAR 1993					
AFRICAN AMERICAN	0.00%	0.43%	0.00	* UNDERUTILIZATION	-0.11
HISPANIC	0.22%	2.75%	8.15	* UNDERUTILIZATION	-0.67
ASIAN & NATIVE AMERICAN	0.00%	3.04%	0.00	* UNDERUTILIZATION	-0.81
NON-MINORITY WOMEN	0.20%	21.88%	0.90	* UNDERUTILIZATION	* -6.45
NON-MINORITY MEN	99.58%	71.88%	138.53	OVERUTILIZATION	* 13.72
CALENDAR YEAR 1994					
AFRICAN AMERICAN	0.00%	0.43%	0.00	* UNDERUTILIZATION	-0.11
HISPANIC	2.30%	2.87%	80.34	* UNDERUTILIZATION	-0.15
ASIAN & NATIVE AMERICAN	0.07%	3.44%	2.16	* UNDERUTILIZATION	-0.90
NON-MINORITY WOMEN	0.00%	24.21%	0.00	* UNDERUTILIZATION	* -7.35
NON-MINORITY MEN	97.62%	69.05%	141.37	OVERUTILIZATION	* 13.58
CALENDAR YEAR 1995					
AFRICAN AMERICAN	0.00%	0.28%	0.00	* UNDERUTILIZATION	-0.08
HISPANIC	1.53%	2.83%	54.05	* UNDERUTILIZATION	-0.35
ASIAN & NATIVE AMERICAN	0.00%	3.82%	0.00	* UNDERUTILIZATION	-1.04
NON-MINORITY WOMEN	0.11%	26.63%	0.43	* UNDERUTILIZATION	* -8.22
NON-MINORITY MEN	98.35%	66.43%	148.06	OVERUTILIZATION	* 14.64
CALENDAR YEAR 1996					
AFRICAN AMERICAN	0.04%	0.28%	12.75	* UNDERUTILIZATION	-0.07
HISPANIC	1.75%	2.94%	59.42	* UNDERUTILIZATION	-0.32
ASIAN & NATIVE AMERICAN	0.00%	4.20%	0.00	* UNDERUTILIZATION	-1.15
NON-MINORITY WOMEN	0.03%	28.81%	0.09	* UNDERUTILIZATION	* -9.12
NON-MINORITY MEN	98.19%	63.78%	153.97	OVERUTILIZATION	* 15.29
CALENDAR YEAR 1997					
AFRICAN AMERICAN	0.00%	0.28%	0.00	* UNDERUTILIZATION	-0.07
HISPANIC	1.56%	2.90%	53.61	* UNDERUTILIZATION	-0.37
ASIAN & NATIVE AMERICAN	0.00%	4.56%	0.00	* UNDERUTILIZATION	-1.26
NON-MINORITY WOMEN	0.27%	30.98%	0.88	* UNDERUTILIZATION	* -9.94
NON-MINORITY MEN	98.17%	61.27%	160.22	OVERUTILIZATION	* 15.94
SUMMARY					
AFRICAN AMERICAN	0.01%	0.34%	1.93	* UNDERUTILIZATION	-0.08
HISPANIC	1.65%	2.86%	57.82	* UNDERUTILIZATION	-0.32
ASIAN & NATIVE AMERICAN	0.01%	3.81%	0.33	* UNDERUTILIZATION	-1.03
NON-MINORITY WOMEN	0.13%	26.50%	0.50	* UNDERUTILIZATION	* -8.19
NON-MINORITY MEN	98.20%	66.48%	147.70	OVERUTILIZATION	* 14.55

¹ Percent of construction contract dollars awarded to firms. See Exhibit 4-6.

² Percent of available firms. See Exhibit 4-7.

³ The disparity index is the ratio of percentage utilization to percentage availability multiplied by 100.

⁴ An asterisk (*) in front of UNDERUTILIZATION indicates a substantial level of disparity - index below 80.00.

⁵ The significance of proportions test examines whether there is a statistical difference between utilization and availability. The test statistic is computed by taking the difference between utilization and availability and dividing by the square root of availability times one minus availability divided by the available firms. If the test statistic is greater than 2.0, overutilization is assumed. Conversely, if the test statistic is less than -2.0, underutilization is assumed. An asterisk is used to represent significant difference between utilization and availability.

Overall, the disparity analysis of prime construction contractors indicates overutilization of non-minority male-owned firms and substantial underutilization of M/WBE firms in all years of the study period. Exhibit 4-8 demonstrates:

- African American firms had an average availability of 0.34 percent during the study period, yet in only one year were they awarded any of the City's prime construction dollars. The average disparity index for African American prime contractors during the entire study period was 1.93. Firms in this category were substantially underutilized during the study period.
- The average availability of Hispanic-owned firms during the study period was 2.86 percent, while those firms were utilized at a rate of 1.65 percent during the study period. The City let contracts to Hispanic firms in every year of the study, with the highest disparity index in 1994. Hispanic prime contractors were the most heavily utilized M/WBE classification, even though Hispanic-owned firms were still substantially underutilized during the years of the study.
- Asian and Native American firms had an average availability of 3.81 percent during the study period. However, only in 1994 were these contractors awarded prime construction dollars. Asian and Native American companies were only awarded 0.01 percent of construction dollars during the five years of the study. With a disparity index of 0.33 over the study period, Asian and Native American firms were substantially underutilized.
- Non-minority women-owned prime contractors were available at an average rate of 26.5 percent over the study period. However, they received only 0.13 percent of the construction contract dollars in the same period. The City awarded contracts to women-owned firms in four of the five years of the study, resulting in a disparity index of 0.50. Women-owned companies were substantially underutilized during the study period.
- Non-minority male-owned firms had the highest availability during the study period, constituting an average 66.48 percent of available firms during the study period. The City's utilization of those firms was over 98 percent in every year except one year of the study. The average disparity index for non-M/WBEs was 147.7, indicating substantial overutilization.

4.2.5 Subcontractor Utilization Analysis

Exhibit 4-9 illustrates the utilization of subcontractors for construction projects in the City of Phoenix. Subcontractor dollars were classified within their respective

**EXHIBIT 4-9
UTILIZATION OF PRIME AND SUBCONTRACTORS
BY RACE, ETHNIC, AND GENDER CLASSIFICATION
FOR CALENDAR YEARS 1993 THROUGH 1997
CITY OF PHOENIX**

CALENDAR YEAR	AFRICAN AMERICAN		HISPANIC AMERICAN		ASIAN AMERICAN		ASIAN & NATIVE AMERICAN		NON-MINORITY WOMEN		NON-MINORITY MEN		TOTAL ALL CATEGORIES	TOTAL M/WBE
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%
1993	\$0.00	0.00%	\$109,942.06	0.19%	\$0.00	0.00%	\$0.00	0.00%	\$1,176,432.06	2.08%	\$55,252,461.57	97.72%	\$56,538,835.69	2.28%
1994	\$0.00	0.00%	\$4,702,801.65	2.13%	\$0.00	0.00%	\$182,129.83	0.08%	\$585,022.68	0.26%	\$215,776,764.14	97.53%	\$221,246,718.30	2.47%
1995	\$38,360.00	0.01%	\$7,226,663.83	1.97%	\$0.00	0.00%	\$33,991.56	0.01%	\$3,091,128.45	0.84%	\$356,244,028.87	97.17%	\$366,634,172.71	2.83%
1996	\$301,207.69	0.13%	\$4,487,262.03	1.87%	\$0.00	0.00%	\$12,118.00	0.01%	\$1,057,824.78	0.44%	\$234,654,783.44	97.56%	\$240,513,195.94	2.44%
1997	\$651,070.74	0.16%	\$6,628,529.00	1.58%	\$0.00	0.00%	\$1,769,126.46	0.42%	\$5,279,931.06	1.26%	\$405,361,279.14	96.59%	\$419,689,936.40	3.41%
TOTAL	\$990,638.43	0.08%	\$23,155,198.57	1.77%	\$0.00	0.00%	\$1,997,365.85	0.15%	\$11,190,339.03	0.86%	\$1,267,289,317.16	97.14%	\$1,304,622,859.04	2.86%

Source: Engineering & Architectural Services, Materials Management- City of Phoenix

ethnic/gender category. The prime contractor for each contract was assigned the residual amount and those dollars were classified in the ethnic category of the prime contractor.

As Exhibit 4-9 shows:

- Approximately 2.9 percent of the total dollar amount spent on construction services during the study period went to M/WBE firms. Hispanic American firms were the most utilized group of M/WBEs. Hispanic-owned firms received 1.77 percent of the contract dollars for the study period while non-minority women-owned firms captured 0.86 percent of the total dollar amount.
- Asian and Native American-owned firms and African American-owned firms received 0.15 percent and 0.08 percent of construction dollars respectively. Overall, M/WBE utilization increased from 2.28 percent in 1993, to 3.41 percent in 1997. Utilization of minority subcontractors increased in every year of the study period except 1996. However, between 1996 and 1997, utilization rose from 2.44 percent to 3.41 percent, the highest rate within the study period.

Further, Exhibit 4-9 shows:

Calendar Year 1993

- African American, Asian, and Native American-owned firms were not utilized on any of the City's construction projects in 1993. Hispanic-owned firms were utilized at a rate of 0.19 percent, while women-owned contractors saw their highest utilization during the entire study period, 2.08 percent.
- The total M/WBE utilization for the first year of the study period was 2.28 percent. Non-minority male-owned firms were awarded 97.72 percent of the contract dollars. 1993 had the lowest utilization of M/WBE contractors during the five-year study period.

Calendar Year 1994

- African American contractors were not utilized in 1994. Utilization of Hispanic-owned firms increased to 2.13 percent. Asian and Native American contractors were awarded 0.08 percent of the construction dollars, while women-owned firms captured only 0.26 percent. Women-owned firms were utilized at their lowest rate during the study period in 1994.
- Overall minority utilization increased from 2.28 percent in 1993 to 2.47 percent in 1994. Non-minority male-owned firms captured 97.53 percent of the City's construction dollars for 1994. Construction spending almost quadrupled from the previous year and percent utilization of M/WBEs still managed to increase.

Calendar Year 1995

- 1995 was the first year of the study period in which African American contractors were used, though only at a rate of 0.01 percent. Hispanic-owned firms were awarded over \$7 million in 1995, accounting for almost two percent of the total. Asian and Native American firms were also awarded 0.01 percent, a considerable decrease from 1994. Utilization of women-owned firms increased to 0.84 percent.
- Non-M/WBE utilization was down for the second consecutive year to 97.17 percent. M/WBE firms received 2.83 percent of the total construction dollars for 1995. Utilization of minority subcontractors rose for the second consecutive year, and overall construction spending rose again as well.

Calendar Year 1996

- For only the second year in four years, African American contractors received construction dollars for work on the City's projects. African American-owned firms received 0.13 percent of the work, while Hispanic firms' utilization went down to 1.87 percent from 1.97 the previous year. Asian and Native American firms again received 0.01 percent. Women-owned firms were utilized at 0.44 percent.
- In 1996, the City awarded non-M/WBEs 97.56 percent of the construction dollars for contracts in that calendar year. M/WBE utilization went down for the first time during the study period. Overall construction spending also experienced its first downturn of the five-year period. Construction spending was down over 34 percent from 1995.

Calendar Year 1997

- The last year of the study period was the third consecutive year that utilization of African American-owned firms increased. African American contractors obtained 0.16 percent of the construction dollars for 1997. Hispanic-owned companies received 1.58 percent, their lowest utilization since 1993. However, Asian and Native American firms saw a substantial increase in their receipts to 0.42 percent. Women-owned contractors were utilized at their highest rate since 1993, achieving 1.26 percent.
- The final year of the five-year period was the best for utilization of minority contractors. In none of the previous four years did the City's awards to M/WBE firms exceed 2.83 percent. In 1997, overall utilization of minority contractors was up to 3.41 percent of construction dollars for that year. Consequently, utilization of non-minority firms was at its lowest level of the study period at 96.59 percent.

percent. Overall construction spending was at its highest point during the study in 1997, totaling almost \$420 million.

4.2.6 Subcontractor Availability

Exhibit 4-10 shows the estimated number of construction subcontractors available to conduct City work during the five-year study period. African American firms composed, on average, one percent of the companies available to perform work over the study period. Asian and Native American firms represented 3.53 percent of contractors available for construction procurement. Hispanic American companies were approximately 8.2 percent and women-owned firms were 26.67 percent of the available pool of contractors during the five-year study period. The largest individual group of contractors, comprising 60.61 percent of the total number of contractors for the study, was non-minority male-owned firms. All categories of M/WBE firms had steady increases in availability resulting in a corresponding decrease in the availability of non-M/WBE construction contractors.

Reviewing the availability of construction contractors in Exhibit 4-10 shows the following results:

- African American contracting firms increased in availability during the study period from 0.89 percent to 1.1 percent. African American-owned firms constituted the smallest category of available firms in Maricopa County.
- Hispanic-owned firms were the second largest M/WBE category in Maricopa County from 1993 through 1997. Hispanic contractors were 8.19 percent of the available pool of vendors.
- Asian and Native American-owned construction firms were available, on average, at a rate of 3.53 percent during the five years of the study period. These firms did not exceed five percent of available companies over the period of the study.

EXHIBIT 4-10
ESTIMATED AVAILABILITY OF CONSTRUCTION SUBCONTRACTORS IN MARICOPA COUNTY
BASED ON CENSUS DATA
FOR CALENDAR YEARS 1993 THROUGH 1997
CITY OF PHOENIX

ESTIMATED NUMBER OF AVAILABLE FIRMS											
YEAR	AFRICAN AMERICAN ¹		HISPANIC AMERICAN ¹		ASIAN & NATIVE AMERICAN ¹		NON-MINORITY WOMEN ²		NON-MINORITY MEN ³		TOTAL FIRMS ⁴
	#	%	#	%	#	%	#	%	#	%	
1993	28	0.89%	243	7.76%	88	2.81%	709	22.65%	2,062	65.88%	3,130
1994	30	0.95%	253	7.99%	101	3.19%	782	24.69%	2,001	63.18%	3,167
1995	32	1.00%	262	8.18%	113	3.53%	854	26.65%	1,943	60.64%	3,204
1996	34	1.05%	272	8.39%	126	3.89%	927	28.60%	1,882	58.07%	3,241
1997	36	1.10%	282	8.60%	138	4.21%	1,000	30.51%	1,822	55.58%	3,278
AVG	32	1.00%	262	8.19%	113	3.53%	854	26.67%	1,942	60.61%	3,204

NOTE: Details may not sum to TOTAL FIRMS because of rounding.

SOURCES OF DATA: U.S. Bureau of the Census

- Survey of Minority Owned Businesses (SMOBE) - 1987 & 1992 (African Americans, Hispanic Americans, Asian Americans, Native Americans and Other Minorities).
- Survey of Women Owned Businesses (SWOBE) - 1987 & 1992.

¹ Minority men and women firms are included in their respective minority classifications.

² The number of NON-MINORITY WOMEN construction firms was estimated by subtracting the number of minority women-owned construction firms from the census count of total women-owned construction firms. According to national statistics, African American women-owned construction firms comprise 6.28 percent of African American construction firms; Hispanic women-owned construction firms comprise 4.37 percent of Hispanic American construction firms; and other minority women-owned construction firms comprise 7.38 percent of other minority construction firms.

³ Number of NON-MINORITY MEN firms derived by subtracting all M/WBE firms from TOTAL FIRMS.

- Women-owned contractors were the largest M/WBE category, composing 26.67 percent of available firms for the study period. These firms increased from 22.7 percent in 1993 to 30.5 percent in 1997. In 1993, women-owned firms were less than one-quarter of available vendors; by 1997, they were almost one-third.
- Non-minority men were the largest category of available contractors even though their presence declined both in real numbers and as a percentage of the total for the study period. While the total number of firms available for construction work increased from 1993 to 1997, the number of non-M/WBE firms decreased during the same time.

4.2.7 Subcontractor Disparity

Exhibit 4-11 displays the disparity analysis for construction subcontractors. The disparity analysis compares utilization by percent of contract dollars paid in the first column and availability by percent of available firms in the second column. To determine the disparity index, multiply the ratio of utilization to availability by 100. An index of 100 indicates exact parity between utilization and availability. An index of less than 80 shows that there is “substantial disparity” and an index above 100 demonstrates overutilization.

The disparity analysis of construction subcontracts shows overutilization of non-minority male-owned firms and substantial underutilization of M/WBE firms in each of the five years included in the study.

Exhibit 4-11 shows:

- African American firms were available during the study period at a rate of one percent, and although utilization was 0.00 for the first two years of the study, utilization increased in each of the three subsequent years. However, the disparity index for African American contractors clearly indicates that those vendors were substantially underutilized.
- Hispanic construction firms were the most utilized minority contractors. Although 8.19 percent were available during the study period, utilization of Hispanic-owned businesses only once exceeded two percent and averaged 1.77 percent. The disparity index, while higher than any other M/WBE category, indicates a substantial level of disparity.

EXHIBIT 4-11
CONSTRUCTION SUBCONTRACTORS
DISPARITY ANALYSIS BY RACE, ETHNIC, AND GENDER CLASSIFICATION
USING CENSUS DATA
FOR CALENDAR YEARS 1993 THROUGH 1997
CITY OF PHOENIX

M/WBE CLASSIFICATION	% OF CONTRACT DOLLARS¹	% OF AVAILABLE FIRMS²	DISPARITY INDEX³	DISPARATE IMPACT OF UTILIZATION⁴	SIGNIFICANCE OF PROPORTION⁵
CALENDAR YEAR 1993					
AFRICAN AMERICAN	0.00%	0.89%	0.00	* UNDERUTILIZATION	-0.50
HISPANIC	0.19%	7.76%	2.50	* UNDERUTILIZATION *	-4.41
ASIAN & NATIVE AMERICAN	0.00%	2.81%	0.00	* UNDERUTILIZATION	-1.60
NON-MINORITY WOMEN	2.08%	22.65%	9.19	* UNDERUTILIZATION *	-13.09
NON-MINORITY MEN	97.72%	65.88%	148.34	OVERUTILIZATION *	30.50
CALENDAR YEAR 1994					
AFRICAN AMERICAN	0.00%	0.95%	0.00	* UNDERUTILIZATION	-0.54
HISPANIC	2.13%	7.99%	26.61	* UNDERUTILIZATION *	-3.44
ASIAN & NATIVE AMERICAN	0.08%	3.19%	2.58	* UNDERUTILIZATION	-1.78
NON-MINORITY WOMEN	0.26%	24.69%	1.07	* UNDERUTILIZATION *	-15.84
NON-MINORITY MEN	97.53%	63.18%	154.36	OVERUTILIZATION *	31.85
CALENDAR YEAR 1995					
AFRICAN AMERICAN	0.01%	1.00%	1.05	* UNDERUTILIZATION	-0.56
HISPANIC	1.97%	8.18%	24.10	* UNDERUTILIZATION *	-3.67
ASIAN & NATIVE AMERICAN	0.01%	3.53%	0.26	* UNDERUTILIZATION *	-2.03
NON-MINORITY WOMEN	0.84%	26.65%	3.16	* UNDERUTILIZATION *	-17.06
NON-MINORITY MEN	97.17%	60.64%	160.23	OVERUTILIZATION *	32.95
CALENDAR YEAR 1996					
AFRICAN AMERICAN	0.13%	1.05%	11.94	* UNDERUTILIZATION	-0.53
HISPANIC	1.87%	8.39%	22.23	* UNDERUTILIZATION *	-3.88
ASIAN & NATIVE AMERICAN	0.01%	3.89%	0.13	* UNDERUTILIZATION *	-2.25
NON-MINORITY WOMEN	0.44%	28.60%	1.54	* UNDERUTILIZATION *	-18.97
NON-MINORITY MEN	97.56%	58.07%	168.02	OVERUTILIZATION *	34.72
CALENDAR YEAR 1997					
AFRICAN AMERICAN	0.16%	1.10%	14.13	* UNDERUTILIZATION	-0.54
HISPANIC	1.58%	8.60%	18.36	* UNDERUTILIZATION *	-4.21
ASIAN & NATIVE AMERICAN	0.42%	4.21%	10.01	* UNDERUTILIZATION *	-2.22
NON-MINORITY WOMEN	1.26%	30.51%	4.12	* UNDERUTILIZATION *	-20.09
NON-MINORITY MEN	96.59%	55.58%	173.77	OVERUTILIZATION *	35.22
SUMMARY					
AFRICAN AMERICAN	0.08%	1.00%	7.60	* UNDERUTILIZATION	-0.52
HISPANIC	1.77%	8.19%	21.67	* UNDERUTILIZATION *	-3.79
ASIAN & NATIVE AMERICAN	0.15%	3.53%	4.33	* UNDERUTILIZATION	-1.95
NON-MINORITY WOMEN	0.86%	26.67%	3.22	* UNDERUTILIZATION *	-17.06
NON-MINORITY MEN	97.14%	60.61%	160.26	OVERUTILIZATION *	32.95

¹ Percent of construction contract dollars awarded to firms. See Exhibit 4-9.

² Percent of available firms. See Exhibit 4-10.

³ The disparity index is the ratio of percentage utilization to percentage availability multiplied by 100.

⁴ An asterisk (*) in front of UNDERUTILIZATION indicates a substantial level of disparity - index below 80.00.

⁵ The significance of proportions test examines whether there is a statistical difference between utilization and availability. The test statistic is computed by taking the difference between utilization and availability and dividing by the square root of availability times one minus availability divided by the number of available firms. If the test statistic is greater than two standard deviations, overutilization is assumed. Conversely, if the test statistic is less than -2, underutilization is assumed. An asterisk is used to represent significant differences between utilization and availability at two standard deviations or more.

- Asian and Native American firms were utilized in every year of the study except one. However, their average utilization for the study period is only 0.15 percent, while availability is 3.53 percent. The disparity index for Asian and Native American firms indicates substantial disparity.
- Non-minority women had the largest pool of available vendors among M/WBE firms. Yet, the City awarded less than one percent of construction dollars to women-owned firms during the study period. The disparity index for women-owned firms indicates that this group had the most substantial underutilization between 1993 and 1997.
- Non-minority male-owned firms were the only contractors that had a disparity index over 100 during the study. This group was overutilized in every year of the study, and the disparity index indicates that in each year of the study, overutilization of non-M/WBE contractors increased from the previous year.

4.3 General Services

In this section, the market area, utilization, and availability of general services firms are analyzed. The disparity indices for general services firms follow.

4.3.1 Market Area

The overall market area for general services firms consisted of 99 counties in Arizona and other states. However, four of the counties captured over 75 percent of the dollars in this business category; thus, the relevant market area for general services is Maricopa County; Los Angeles, CA; Cook, IL; and Rock Island, IL; as shown in Exhibit 4-12.

4.3.2 Utilization Analysis

Exhibit 4-13 displays the utilization data for general services. General services spending increased during the study period. From 1994 to 1995, the City increased its spending by almost 200 percent. Calendar year 1996 saw an 81 percent increase. In the final year of the study, spending changed only slightly, increasing by less than six

EXHIBIT 4-12
MARKET AREA ANALYSIS
GENERAL SERVICES PROCUREMENT
FOR CALENDAR YEARS 1993 THROUGH 1997
CITY OF PHOENIX

COUNTY	# OF CONTRACTS	% OF CONTRACTS	# OF FIRMS	% OF FIRMS	DOLLARS	%OF DOLLARS	CUM% ¹
MARICOPA, AZ	56,399	74.48%	603	64.49%	\$43,246,242.19	56.64%	56.64%
LOS ANGELES, CA	5,958	7.87%	74	7.91%	\$8,348,233.75	10.93%	67.57%
COOK, IL	1,344	1.77%	35	3.74%	\$3,628,885.57	4.75%	72.33%
ROCK ISLAND, IL	260	0.34%	3	0.32%	\$2,584,588.23	3.39%	75.71%
SALT LAKE, UT	251	0.33%	3	0.32%	\$2,074,582.89	2.72%	78.43%
DALLAS, TX	2,719	3.59%	32	3.42%	\$1,655,037.71	2.17%	80.60%
PIMA, AZ	817	1.08%	18	1.93%	\$1,601,115.36	2.10%	82.69%
SAN FRANCISCO, CA	626	0.83%	7	0.75%	\$1,424,502.20	1.87%	84.56%
FULTON, GA	268	0.35%	11	1.18%	\$1,418,787.10	1.86%	86.42%
HARRIS, TX	451	0.60%	5	0.53%	\$1,302,780.19	1.71%	88.12%
MECKLENBURG, NC	200	0.26%	5	0.53%	\$1,171,279.24	1.53%	89.66%
HAMILTON, TN	445	0.59%	2	0.21%	\$978,817.53	1.28%	90.94%
ST. LOUIS (CITY), MO	45	0.06%	4	0.43%	\$623,315.00	0.82%	91.75%
NEW YORK, NY	80	0.11%	2	0.21%	\$529,121.88	0.69%	92.45%
BRAZORIA, TX	93	0.12%	1	0.11%	\$462,607.10	0.61%	93.05%
YAVAPAI, AZ	39	0.05%	1	0.11%	\$456,362.47	0.60%	93.65%
PINAL, AZ	502	0.66%	4	0.43%	\$455,533.01	0.60%	94.25%
FRANKLIN, OH	1,248	1.65%	3	0.32%	\$347,952.28	0.46%	94.70%
SAN DIEGO, CA	280	0.37%	4	0.43%	\$287,566.64	0.38%	95.08%
PHILADELPHIA, PA	98	0.13%	4	0.43%	\$279,408.31	0.37%	95.45%
AUSTIN, TX	40	0.05%	1	0.11%	\$247,818.11	0.32%	95.77%
ORANGE, CA	775	1.02%	7	0.75%	\$218,426.76	0.29%	96.06%
BERNALILLO, NM	89	0.12%	1	0.11%	\$208,279.75	0.27%	96.33%
HENRICO, VA	298	0.39%	1	0.11%	\$198,566.29	0.26%	96.59%
HENNEPIN, MN	84	0.11%	4	0.43%	\$195,554.50	0.26%	96.85%
MULTNOMAH, OR	30	0.04%	1	0.11%	\$147,483.16	0.19%	97.04%
ESSEX, NJ	37	0.05%	3	0.32%	\$138,162.56	0.18%	97.22%
QUEENS, NY	32	0.04%	1	0.11%	\$132,420.41	0.17%	97.39%
KING, WA	12	0.02%	2	0.21%	\$125,060.73	0.16%	97.56%
SUFFOLK, MA	21	0.03%	2	0.21%	\$122,062.02	0.16%	97.72%
SAN MATEO, CA	142	0.19%	2	0.21%	\$117,359.67	0.15%	97.87%
SPOKANE, WA	5	0.01%	1	0.11%	\$103,781.64	0.14%	98.01%
KANE, IL	177	0.23%	3	0.32%	\$87,407.27	0.11%	98.12%
JEFFERSON, AL	18	0.02%	1	0.11%	\$84,319.67	0.11%	98.23%
MILWAUKEE, WI	3	0.00%	2	0.21%	\$82,400.58	0.11%	98.34%
SANTA BARBARA, CA	7	0.01%	1	0.11%	\$81,984.60	0.11%	98.45%
GRANT, WA	27	0.04%	1	0.11%	\$76,068.09	0.10%	98.55%
HINDS, MS	62	0.08%	1	0.11%	\$74,241.00	0.10%	98.64%
WESTCHESTER, NY	153	0.20%	3	0.32%	\$59,923.78	0.08%	98.72%
VOLUSIA, FL	3	0.00%	1	0.11%	\$55,440.00	0.07%	98.79%
STEVENS, WA	6	0.01%	1	0.11%	\$53,995.52	0.07%	98.87%
BOULDER, CO	7	0.01%	1	0.11%	\$50,273.80	0.07%	98.93%
ALLEGHENY, PA	54	0.07%	3	0.32%	\$48,601.83	0.06%	98.99%
JO DAVIESS, IL	309	0.41%	1	0.11%	\$48,363.88	0.06%	99.06%
CERRO GORDO, IA	15	0.02%	1	0.11%	\$44,118.00	0.06%	99.12%
TUCKER, WV	65	0.09%	1	0.11%	\$42,714.93	0.06%	99.17%
SEMINOLE, FL	70	0.09%	1	0.11%	\$36,736.97	0.05%	99.22%
RICHMOND, GA	12	0.02%	1	0.11%	\$36,067.44	0.05%	99.27%
WINNEBAGO, WI	9	0.01%	1	0.11%	\$34,469.05	0.05%	99.31%
TARRANT, TX	11	0.01%	2	0.21%	\$34,176.11	0.04%	99.36%

EXHIBIT 4-12 (Continued)
MARKET AREA ANALYSIS
GENERAL SERVICES PROCUREMENT
FOR CALENDAR YEARS 1993 THROUGH 1997
CITY OF PHOENIX

COUNTY	# OF CONTRACTS	% OF CONTRACTS	# OF FIRMS	% OF FIRMS	DOLLARS	% OF DOLLARS	CUM% ¹
CUYAHOGA, OH	116	0.15%	1	0.11%	\$33,104.30	0.04%	99.40%
WAYNE, MI	110	0.15%	2	0.21%	\$28,982.80	0.04%	99.44%
RAMSEY, MN	32	0.04%	1	0.11%	\$23,576.42	0.03%	99.47%
STARK, OH	42	0.06%	1	0.11%	\$23,432.00	0.03%	99.50%
SAINT LOUIS, MO	49	0.06%	1	0.11%	\$22,597.94	0.03%	99.53%
BEAVER, PA	1	0.00%	1	0.11%	\$21,534.00	0.03%	99.56%
LAKE, IL	28	0.04%	3	0.32%	\$21,400.03	0.03%	99.59%
JACKSON, MO	4	0.01%	1	0.11%	\$19,877.70	0.03%	99.61%
TULSA, OK	4	0.01%	2	0.21%	\$19,680.64	0.03%	99.64%
PASSAIC, NJ	4	0.01%	1	0.11%	\$18,720.00	0.02%	99.66%
WAUPACA, WI	17	0.02%	2	0.21%	\$18,464.80	0.02%	99.69%
JEFFERSON, KY	5	0.01%	2	0.21%	\$18,003.95	0.02%	99.71%
FAIRFIELD, CT	44	0.06%	2	0.21%	\$16,911.64	0.02%	99.73%
DE KALB, GA	4	0.01%	1	0.11%	\$16,780.50	0.02%	99.75%
DOUGLAS, NE	6	0.01%	1	0.11%	\$15,846.13	0.02%	99.77%
LEWIS, WA	13	0.02%	1	0.11%	\$15,238.52	0.02%	99.79%
OCEAN, NJ	16	0.02%	1	0.11%	\$14,575.97	0.02%	99.81%
DUTCHESS, NY	7	0.01%	1	0.11%	\$13,563.27	0.02%	99.83%
MIDDLESEX, MA	3	0.00%	1	0.11%	\$12,675.00	0.02%	99.85%
HILLSBOROUGH, FL	27	0.04%	2	0.21%	\$10,644.58	0.01%	99.86%
LUBBOCK, TX	3	0.00%	1	0.11%	\$10,150.00	0.01%	99.88%
SHELBY, TN	272	0.36%	1	0.11%	\$9,952.53	0.01%	99.89%
KINGS, NY	40	0.05%	1	0.11%	\$9,107.85	0.01%	99.90%
DADE, FL	33	0.04%	1	0.11%	\$8,978.07	0.01%	99.91%
NEW LONDON, CT	35	0.05%	1	0.11%	\$8,401.83	0.01%	99.92%
POLK, IA	3	0.00%	2	0.21%	\$6,643.50	0.01%	99.93%
HUNTERDON, NJ	1	0.00%	1	0.11%	\$6,471.20	0.01%	99.94%
NEVADA, CA	4	0.01%	1	0.11%	\$6,218.55	0.01%	99.95%
DUVAL, FL	4	0.01%	2	0.21%	\$5,576.55	0.01%	99.96%
SUWANNEE, FL	12	0.02%	1	0.11%	\$4,477.71	0.01%	99.96%
ALAMEDA, CA	1	0.00%	1	0.11%	\$4,304.00	0.01%	99.97%
WASHOE, NV	2	0.00%	1	0.11%	\$4,080.00	0.01%	99.97%
CHESTER, PA	1	0.00%	1	0.11%	\$3,767.79	0.00%	99.98%
ERIE, NY	37	0.05%	2	0.21%	\$3,752.71	0.00%	99.98%
VENTURA, CA	2	0.00%	2	0.21%	\$2,187.50	0.00%	99.99%
BUCKS, PA	15	0.02%	1	0.11%	\$1,525.45	0.00%	99.99%
LORAIN, OH	1	0.00%	1	0.11%	\$1,435.00	0.00%	99.99%
OAKLAND, MI	2	0.00%	1	0.11%	\$1,312.95	0.00%	99.99%
JOHNSON, KS	3	0.00%	2	0.21%	\$1,158.06	0.00%	99.99%
POTTER, TX	1	0.00%	1	0.11%	\$1,070.00	0.00%	99.99%
HAMILTON, IN	2	0.00%	1	0.11%	\$1,048.12	0.00%	100.00%
BRONX, NY	13	0.02%	1	0.11%	\$979.75	0.00%	100.00%
DENVER, CO	3	0.00%	1	0.11%	\$710.15	0.00%	100.00%
MARATHON, WI	2	0.00%	1	0.11%	\$708.85	0.00%	100.00%
WAUKESHA, WI	1	0.00%	1	0.11%	\$357.10	0.00%	100.00%
MONTGOMERY, PA	1	0.00%	1	0.11%	\$327.00	0.00%	100.00%
HURON, OH	1	0.00%	1	0.11%	\$242.00	0.00%	100.00%
HAMILTON, OH	3	0.00%	1	0.11%	\$217.50	0.00%	100.00%
HOWARD, MD	1	0.00%	1	0.11%	\$16.00	0.00%	100.00%
TOTAL	75,727		935		\$76,353,784.68		

SOURCE: City of Phoenix Engineering & Architectural Services, City Clerk's Archives, Materials Management

¹ Cumulative total of percentage of dollars in market area.² Counties above the line are included in the relevant market area.

EXHIBIT 4-13
UTILIZATION OF GENERAL SERVICES CONTRACTORS
BY RACE, ETHNIC, AND GENDER CLASSIFICATION
FOR CALENDAR YEARS 1993 THROUGH 1997
CITY OF PHOENIX

CALENDAR YEAR	AFRICAN AMERICAN		HISPANIC AMERICAN		ASIAN & NATIVE AMERICAN		NON-MINORITY WOMEN		NON-MINORITY MEN		TOTAL FOR ALL CATEGORIES	TOTAL M/WBE
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%
1993	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$566,689.03	100.00%	\$566,689.03	0.00%
1994	\$33,347.25	0.87%	\$1,703.10	0.04%	\$186,593.27	4.86%	\$31,752.74	0.83%	\$3,589,689.25	93.41%	\$3,843,085.61	6.59%
1995	\$229,877.75	2.01%	\$27,038.84	0.24%	\$284,825.05	2.49%	\$412,858.35	3.60%	\$10,502,917.45	91.67%	\$11,457,517.44	8.33%
1996	\$699,084.95	3.37%	\$134,069.76	0.65%	\$335,172.40	1.62%	\$614,574.49	2.97%	\$18,943,725.91	91.40%	\$20,726,627.51	8.60%
1997	\$514,998.09	2.34%	\$277,394.33	1.26%	\$356,241.25	1.62%	\$1,529,381.79	6.96%	\$19,290,791.09	87.81%	\$21,968,806.55	12.19%
TOTAL	\$1,477,308.04	2.52%	\$440,206.03	0.75%	\$1,162,831.97	1.99%	\$2,588,567.37	4.42%	\$52,893,812.73	90.32%	\$58,562,726.14	9.68%

SOURCE: City of Phoenix Finance Department

percent. In 1997, spending on general services was 5.7 times the spending in 1994. The number of general services purchases increased substantially over the study period approximately corresponding to the increase in spending.

Non-minority male-owned firms received 90.3 percent of all dollars paid to general services contractors over the five-year study period. M/WBE firms were awarded almost 9.7 percent of City dollars for general services.

Overall, African American firms received 2.52 percent of the total dollars; Hispanic-owned firms received 0.75 percent of the total dollars; Asian and Native American firms collected two percent; and non-minority women-owned firms received 4.42 percent of the total dollars for general services contracting over the study period.

Findings for each of the five years of the study reveal:

- In 1993, there was no utilization of M/WBE general services providers. The only category of general services providers to receive any of the City's dollars were non-M/WBEs. It is important to note that the City's current M/WBE program took effect in the last two months of 1993.
- In 1994, African American firms were utilized for 0.87 percent of the City's general services needs; Hispanic-owned firms performed 0.04 percent of the work; Asian and Native American firms were utilized at almost five percent. Non-minority women were awarded 0.83 percent of contract dollars, and non-minority men were awarded 93.41 percent.
- For 1995, utilization of African American firms increased for the second consecutive year to two percent of contract dollars. Hispanic utilization was at 0.24 percent, as Asian and Native American utilization decreased to 2.49 percent. Women-owned firms received 3.6 percent of contract dollars and non-minority male-owned companies received 91.67 percent during calendar year 1995.
- For the third consecutive year, utilization of African American firms increased. Utilization of Hispanic firms also increased from 0.24 in 1995 to 0.65 percent in 1996. Asian and Native American firms received 1.62 percent of contract dollars in 1996, while white female firms were awarded almost three percent of 1996 dollars. Non-minority male-owned firms captured 91.40 percent of the general services dollars for 1996.
- In the last year of the study, African American firms collected 2.34 percent of the general services dollars for the City. Hispanic firms

also saw their highest utilization during the study period, 1.26 percent. Asian and Native American firms received 1.62 percent of the dollars for the second consecutive year, and women-owned firms were awarded nearly seven percent of the dollars. Non-minority male-owned firms again captured their lowest total during the study period, 87.81 percent.

4.3.3 Availability Analysis

Exhibit 4-14 presents the estimated availability of general services firms to conduct work for the City during the five-year study period. The availability of all M/WBEs decreased during the period and the availability of non-M/WBEs increased. The average availability of non-minority male-owned firms over the study period was 57.51 percent of the total firms. Non-minority women-owned firms over the same period constituted 31.8 percent. Hispanic firms comprised 5.22 percent; Asian and Native American firms represented 4.29 percent; and African American firms represented 1.18 percent of the available firms from 1993 through 1997.

The availability table, Exhibit 4-14, shows:

- All M/WBE categories decreased in availability from 1993 through 1997. Although some groups of firms experienced growth in real numbers, their availability decreased relative to the total number of available firms.

4.3.4 Disparity Analysis

Exhibit 4-15 details the disparity analysis for general services firms. This chart compares utilization by the percent of contract dollars paid in the first column and availability by the percent of available firms in the second column. The disparity index in the third column reflects the ratio of these two numbers multiplied by 100. An index of 100 indicates parity between utilization and availability. An index of less than 80 shows

EXHIBIT 4-14
ESTIMATED AVAILABILITY OF GENERAL SERVICES FIRMS
BY RACE, ETHNIC AND GENDER CLASSIFICATION
USING CENSUS DATA
FOR CALENDAR YEARS 1993 THROUGH 1997
CITY OF PHOENIX

YEAR	AFRICAN AMERICAN ¹		HISPANIC AMERICAN ¹		ASIAN & NATIVE AMERICAN ¹		NON-MINORITY WOMEN ²		NON-MINORITY MEN ³		TOTAL FIRMS ⁴
	#	%	#	%	#	%	#	%	#	%	
1993	90	1.58%	349	6.13%	257	4.51%	1,841	32.33%	3,157	55.44%	5,694
1994	83	1.37%	343	5.65%	267	4.40%	1,947	32.05%	3,434	56.54%	6,074
1995	76	1.18%	337	5.22%	277	4.29%	2,052	31.79%	3,712	57.51%	6,454
1996	70	1.02%	331	4.84%	287	4.20%	2,158	31.57%	3,989	58.36%	6,835
1997	63	0.87%	325	4.50%	297	4.12%	2,263	31.37%	4,267	59.14%	7,215
AVG	76	1.18%	337	5.22%	277	4.29%	2,052	31.80%	3,712	57.51%	6,454

NOTE: Details may not sum to TOTAL FIRMS because of rounding.

SOURCES OF DATA: U.S. Bureau of the Census

- Survey of Minority Owned Businesses (SMOBE) - 1987 & 1992 (African Americans, Hispanic Americans, Asian Americans, Native Americans and Other Minorities).
- Survey of Women Owned Businesses (SWOBE) - 1987 & 1992.

¹ Minority men and women firms are included in their respective minority classifications.

² The number of NON-MINORITY WOMEN general services firms was estimated by subtracting the number of minority women-owned general services firms from the census count of total women-owned general services firms. According to national statistics, African American women-owned general services firms comprise 6.28 percent of African American general services firms; Hispanic women-owned general services firms comprise 4.37 percent of Hispanic American general services firms; and other minority women-owned general services firms comprise 7.38 percent of other minority general services firms.

³ Number of WHITE MEN firms derived by subtracting all M/WBE firms from TOTAL FIRMS.

⁴ TOTAL FIRMS derived from the U.S. Bureau of Census and County Business Patterns.

**EXHIBIT 4-15
GENERAL SERVICES FIRMS
DISPARITY ANALYSIS BY RACE, ETHNIC, AND GENDER CLASSIFICATION
USING CENSUS DATA
FOR CALENDAR YEARS 1993 THROUGH 1997
CITY OF PHOENIX**

M/WBE CLASSIFICATION	% OF CONTRACT DOLLARS¹	% OF AVAILABLE FIRMS²	DISPARITY INDEX³	DISPARATE IMPACT OF UTILIZATION⁴	SIGNIFICANCE OF PROPORTION⁵
CALENDAR YEAR 1993					
AFRICAN AMERICAN	0.00%	1.58%	0.00	* UNDERUTILIZATION	-1.20
HISPANIC	0.00%	6.13%	0.00	* UNDERUTILIZATION	-4.77
ASIAN & NATIVE AMERICAN	0.00%	4.51%	0.00	* UNDERUTILIZATION	-3.49
NON-MINORITY WOMEN	0.00%	32.33%	0.00	* UNDERUTILIZATION	-29.66
NON-MINORITY MEN	100.00%	55.44%	180.36	OVERUTILIZATION	50.37
CALENDAR YEAR 1994					
AFRICAN AMERICAN	0.87%	1.37%	63.50	* UNDERUTILIZATION	-0.39
HISPANIC	0.04%	5.65%	0.78	* UNDERUTILIZATION	-4.50
ASIAN & NATIVE AMERICAN	4.86%	4.40%	110.45	OVERUTILIZATION	0.37
NON-MINORITY WOMEN	0.83%	32.05%	2.58	* UNDERUTILIZATION	-29.53
NON-MINORITY MEN	93.41%	56.54%	165.22	OVERUTILIZATION	43.59
CALENDAR YEAR 1995					
AFRICAN AMERICAN	2.01%	1.18%	170.38	OVERUTILIZATION	0.67
HISPANIC	0.24%	5.22%	4.52	* UNDERUTILIZATION	-4.11
ASIAN & NATIVE AMERICAN	2.49%	4.29%	57.92	* UNDERUTILIZATION	-1.48
NON-MINORITY WOMEN	3.60%	31.79%	0.73	* UNDERUTILIZATION	-27.42
NON-MINORITY MEN	91.67%	57.51%	159.38	OVERUTILIZATION	42.10
CALENDAR YEAR 1996					
AFRICAN AMERICAN	3.37%	1.02%	329.34	OVERUTILIZATION	1.95
HISPANIC	0.65%	4.84%	13.36	* UNDERUTILIZATION	-3.56
ASIAN & NATIVE AMERICAN	1.62%	4.20%	38.51	* UNDERUTILIZATION	-2.18
NON-MINORITY WOMEN	2.97%	31.57%	9.39	* UNDERUTILIZATION	-28.59
NON-MINORITY MEN	91.40%	58.36%	156.61	OVERUTILIZATION	42.33
CALENDAR YEAR 1997					
AFRICAN AMERICAN	2.34%	0.87%	229.77	OVERUTILIZATION	1.26
HISPANIC	1.26%	4.50%	5.24	* UNDERUTILIZATION	-2.82
ASIAN & NATIVE AMERICAN	1.62%	4.12%	60.39	* UNDERUTILIZATION	-2.16
NON-MINORITY WOMEN	6.96%	31.37%	11.49	* UNDERUTILIZATION	-25.02
NON-MINORITY MEN	87.81%	59.14%	155.00	OVERUTILIZATION	38.10
SUMMARY					
AFRICAN AMERICAN	2.52%	1.18%	213.11	OVERUTILIZATION	1.08
HISPANIC	0.75%	5.22%	14.40	* UNDERUTILIZATION	-3.69
ASIAN & NATIVE AMERICAN	1.99%	4.29%	46.27	* UNDERUTILIZATION	-1.89
NON-MINORITY WOMEN	4.42%	31.80%	13.90	* UNDERUTILIZATION	-26.63
NON-MINORITY MEN	90.32%	57.51%	157.06	OVERUTILIZATION	40.44

¹ Percent of general service contract dollars awarded to firms. See Exhibit 4-13

² Percent of available firms. See Exhibit 4-14

³ The disparity index is the ratio of percentage utilization to percentage availability times 100.

⁴ An asterisk (*) in front of UNDERUTILIZATION indicates a substantial level of disparity - index below 80.00.

⁵ The significance of proportions test examines if there is a statistical difference between utilization and availability. The test statistic is computed by taking the difference between utilization and availability and dividing by the square root of availability times one minus availability divided by the available firms. If the test statistic is greater than two standard deviations, overutilization is assumed. Conversely, if the test statistic is less than -2, underutilization is assumed. An asterisk is used to represent significant differences between utilization and availability at two standard deviations or more.

“substantial disparity” and an index above 100 demonstrates overutilization. Overall, the disparity analysis of general services firms indicates overutilization of non-minority male-owned firms and substantial underutilization of all M/WBE groups in all years of the study.

The disparity analysis of general services follows:

- African American-owned general services contractors represented an average of 1.18 percent of the available firms during the study period, yet they were awarded 2.52 percent of the general services dollars by the City. Two characteristics are prominent, however, in the disparity analysis. African American utilization increased in every year of the study except 1997, and the disparity index indicates a move toward parity from 1993 to 1994 and overutilization from 1995 to 1997. Although, African American general services providers were overutilized, there was not a statistically significant difference between utilization and availability.
- Hispanic American firms comprised 5.22 percent of the relevant market area's firms for general services contracting. However, the City utilized Hispanic firms at a rate of 0.75 percent. The disparity index for Hispanic firms was 14.4 for the study period, indicating that the City substantially underutilized Hispanic-owned businesses from 1993 through 1997.
- Asian and Native American firms were available at a rate of 4.29 percent during the study period. The City, however, only awarded two percent of the general services dollars to Asian and Native American firms during the relevant period. Although there was almost parity in 1994, no other year did Asian and Native American firms have a disparity index over 61. During the entire five-year study, Asian and Native American firms were awarded only three contracts, and they were substantially underutilized over the course of the study.
- Women-owned businesses providing general services were available at a rate of 31.8 percent during the study period. The utilization of non-minority women-owned firms was 4.42 percent. The City's utilization of non-minority women resulted in a disparity index of 13.9, making non-minority women the most underutilized minority category during the study.

Of all the M/WBE firms available to the City for general services, African American firms fared best. The other M/WBE categories were severely underutilized relative to their availability within the relevant market area. The availability of non-minority male-

owned firms rose over the study period and their disparity indices declined proportionately from year to year.

4.4 Commodities

This section analyzes the City's commodity procurement dollar awards. MGT first determined the market area, the utilization and availability of commodity vendors, and then calculated disparity results.

4.4.1 Market Area

The relevant market area for commodity purchases consists only of Maricopa County since over 75 percent of the dollars spent by the City for commodities went to firms located in Maricopa County. Exhibit 4-16 shows the breakdown of the City's commodity purchases by county and state. Firms located in Maricopa County received 75.31 percent of the City's business. Appendix B contains a complete market area chart for commodity purchases.

4.4.2 Utilization Analysis

Exhibit 4-17 presents the utilization of commodity vendors within the relevant market area. The City's expenditures on commodities over the five-year study period increased after the first year and remained fairly constant in later years. The total increase from 1993 to 1997 was approximately 55 percent; however, most of that increase occurred after the first year of the study period. M/WBEs were utilized at less than three percent.

Exhibit 4-18 shows the utilization of Bottomline Enterprises, Inc. in the City's purchasing of commodities.

**EXHIBIT 4-16
COMMODITIES
MARKET AREA ANALYSIS
FOR CALENDAR YEARS 1993 THROUGH 1997
CITY OF PHOENIX**

COUNTY	# OF PURCHASES	% OF P.O.s	# OF VENDORS	% OF VENDORS	DOLLARS	% OF DOLLARS	CUM% ¹
MARICOPA, AZ	336,860	70.49%	16,029	63.94%	\$ 1,062,801,624.80	75.31%	75.31%
LOS ANGELES, CA	21,450	4.49%	770	3.07%	\$ 74,779,251.61	5.30%	80.61%
COOK, IL	27,648	5.79%	544	2.17%	\$ 40,636,821.33	2.88%	83.49%
DALLAS, TX	9,713	2.03%	337	1.34%	\$ 25,375,545.32	1.80%	85.29%
SAN FRANCISCO, CA	5,785	1.21%	134	0.53%	\$ 20,975,518.01	1.49%	86.77%
FULTON, GA	1,882	0.39%	117	0.47%	\$ 11,150,330.01	0.79%	87.56%
ORANGE, CA	2,879	0.60%	202	0.81%	\$ 9,531,366.66	0.68%	88.24%
SAN MATEO, CA	514	0.11%	74	0.30%	\$ 7,348,755.23	0.52%	88.76%
PIMA, AZ	4,254	0.89%	250	1.00%	\$ 7,018,436.79	0.50%	89.26%
MILWAUKEE, WI	1,559	0.33%	64	0.26%	\$ 5,830,059.68	0.41%	89.67%
HAMILTON, TN	697	0.15%	5	0.02%	\$ 5,246,232.89	0.37%	90.04%
SALT LAKE, UT	5,471	1.14%	91	0.36%	\$ 5,202,712.24	0.37%	90.41%
HENNEPIN, MN	3,310	0.69%	107	0.43%	\$ 5,146,241.56	0.36%	90.78%
MECKLENBURG, NC	1,294	0.27%	65	0.26%	\$ 5,085,540.30	0.36%	91.14%
RIVERSIDE, CA	161	0.03%	44	0.18%	\$ 4,650,133.11	0.33%	91.46%
WASHOE, NV	1,794	0.38%	15	0.06%	\$ 4,614,188.35	0.33%	91.79%
HARRIS, TX	2,950	0.62%	92	0.37%	\$ 4,337,258.26	0.31%	92.10%
SAN DIEGO, CA	2,806	0.59%	186	0.74%	\$ 3,847,825.69	0.27%	92.37%
SAINT LOUIS, MO	393	0.08%	38	0.15%	\$ 3,767,049.62	0.27%	92.64%
WASHINGTON, DC	878	0.18%	267	1.07%	\$ 3,423,606.77	0.24%	92.88%
NEW YORK, NY	1,070	0.22%	181	0.72%	\$ 3,334,748.96	0.24%	93.12%
DENVER, CO	2,155	0.45%	95	0.38%	\$ 3,090,258.05	0.22%	93.34%
SUFFOLK, MA	767	0.16%	83	0.33%	\$ 2,910,214.63	0.21%	93.54%
FAIRFAX, VA	297	0.06%	68	0.27%	\$ 2,816,909.81	0.20%	93.74%
MIDDLESEX, MA	546	0.11%	102	0.41%	\$ 2,799,714.27	0.20%	93.94%
EL PASO, CO	166	0.03%	27	0.11%	\$ 2,722,727.45	0.19%	94.13%
ONONDAGA, NY	114	0.02%	14	0.06%	\$ 2,670,696.94	0.19%	94.32%
SAN BERNARDINO, CA	646	0.14%	51	0.20%	\$ 2,426,830.47	0.17%	94.50%
ESSEX, NJ	525	0.11%	66	0.26%	\$ 2,404,324.51	0.17%	94.67%
KING, WA	2,111	0.44%	132	0.53%	\$ 2,359,059.82	0.17%	94.83%
ALAMEDA, CA	422	0.09%	86	0.34%	\$ 2,162,943.01	0.15%	94.99%
SANTA CLARA, CA	537	0.11%	120	0.48%	\$ 2,130,924.24	0.15%	95.14%
SACRAMENTO, CA	150	0.03%	51	0.20%	\$ 2,115,600.17	0.15%	95.29%
BERNALILLO, NM	632	0.13%	43	0.17%	\$ 2,087,812.53	0.15%	95.43%
SAINT LOUIS CITY (CITY), MO	696	0.15%	56	0.22%	\$ 2,055,834.74	0.15%	95.58%
SHELBY, TN	3,282	0.69%	14	0.06%	\$ 1,980,686.90	0.14%	95.72%
ALL OTHER COUNTIES	31,478	6.59%	4,450	17.75%	\$ 60,389,142.45	4.28%	100.00%
TOTAL	477,892	100.00%	25,070	100.00%	\$ 1,411,226,927.18	100.00%	

SOURCE: City of Phoenix Materials Management Department

¹Cumulative total of percentage of dollars in market area.

²Counties above the line are included in the relevant market area.

EXHIBIT 4-17
UTILIZATION OF COMMODITIES VENDORS
BY RACE, ETHNIC AND GENDER CLASSIFICATION
FOR CALENDAR YEARS 1993 THROUGH 1997
CITY OF PHOENIX

CALENDAR YEAR	AFRICAN AMERICAN		HISPANIC AMERICAN		ASIAN & NATIVE AMERICAN		NON-MINORITY WOMEN		NON-MINORITY MEN		TOTAL FOR ALL CATEGORIES	TOTAL M/WBE
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%
1993	\$286,828.00	0.20%	\$85,074.00	0.06%	\$426,929.00	0.30%	\$271,220.00	0.19%	\$139,959,901.00	99.24%	\$141,029,952.00	0.76%
1994	\$893,868.20	0.33%	\$794,720.54	0.30%	\$1,613,614.81	0.60%	\$574,715.23	0.21%	\$264,239,082.52	98.55%	\$268,116,001.30	1.45%
1995	\$1,922,706.65	0.92%	\$1,384,995.78	0.66%	\$3,307,332.64	1.59%	\$652,010.78	0.31%	\$201,004,053.41	96.51%	\$208,271,099.26	3.49%
1996	\$1,632,488.23	0.72%	\$2,665,712.65	1.17%	\$2,071,840.09	0.91%	\$770,158.99	0.34%	\$220,225,107.22	96.86%	\$227,365,307.18	3.14%
1997	\$1,608,857.08	0.74%	\$1,574,389.61	0.72%	\$2,178,040.17	1.00%	\$1,480,592.65	0.68%	\$211,160,900.56	96.86%	\$218,002,780.07	3.14%
TOTAL	\$6,344,748.16	0.60%	\$6,504,892.58	0.61%	\$9,597,756.71	0.90%	\$3,748,697.65	0.35%	\$1,036,589,044.71	97.54%	\$1,062,785,139.81	2.46%

Source: City of Phoenix Finance Department.

**EXHIBIT 4-18
COMMODITY PURCHASES
UTILIZING BOTTOMLINE ENTERPRISES INC
CITY OF PHOENIX**

YEAR	DOLLAR AMOUNT TO BOTTOMLINE	DOLLAR AMOUNT TO ALL AFRICAN AMERICAN FIRMS	BOTTOMLINE'S SHARE OF AFRICAN AMERICAN UTILIZATION
1994	\$857,323.50	\$893,868.20	95.91%
1995	\$1,555,913.19	\$1,922,706.65	80.92%
1996	\$1,401,383.78	\$1,632,488.23	85.84%
1997	\$1,311,070.00	\$1,608,857.08	81.49%
TOTAL	\$5,125,690.47	\$6,057,920.16	84.61%

Source: City of Phoenix Finance Department.

As Exhibit 4-18 shows, of the six million dollars the City spent with African American firms, over five million was spent with one company. Bottomline Enterprises collected 84 percent of the dollars the City spent with African American commodity vendors.

During the study period, no minority category had an average utilization over one percent. The highest rate of utilization was for Asian and Native American firms at 0.90 percent for the five years. The next highest utilization rate was for Hispanic American firms, although the rate for African American firms was close. Utilization rates for these two groups were 0.61 percent and 0.60 percent, respectively. Total M/WBE utilization did not exceed 3.5 percent in the relevant market area for any of the years of the study.

Exhibit 4-19 showing utilization of vendors for commodity purchases demonstrates:

- Every ethnic/gender classification had some utilization for each year of the study. African American firms had an increase in utilization for two years and then utilization began to taper. The highest utilization of African American vendors was in 1995, with those firms receiving just under one percent of the commodities dollars.
- Hispanic American firms had a consistent rise in utilization through 1996, but they received only 0.61 percent of the total dollars during the study period. Their highest rate was in 1996 when they captured 1.17 percent of the commodities expenditures for that year.

EXHIBIT 4-19
ESTIMATED AVAILABILITY OF COMMODITIES VENDORS IN MARKET AREA
BASED ON CENSUS DATA
FOR CALENDAR YEARS 1993 THROUGH 1997
CITY OF PHOENIX

ESTIMATED NUMBER OF AVAILABLE FIRMS											
YEAR	AFRICAN AMERICAN ¹		HISPANIC AMERICAN ¹		ASIAN & NATIVE AMERICAN		NON-MINORITY WOMEN ²		NON-MINORITY MEN ³		TOTAL FIRMS ⁴
	#	%	#	%	#	%	#	%	#	%	
1993	20	0.69%	83	2.88%	93	3.22%	896	31.05%	1,794	62.16%	2886
1994	23	0.74%	92	2.94%	104	3.33%	975	31.21%	1,930	61.78%	3124
1995	25	0.74%	102	3.03%	116	3.45%	1054	31.35%	2,065	61.42%	3362
1996	28	0.78%	111	3.08%	127	3.53%	1133	31.47%	2,201	61.14%	3600
1997	30	0.78%	121	3.15%	138	3.60%	1213	31.61%	2,336	60.87%	3838
AVG	25	0.75%	102	3.03%	116	3.44%	1054	31.36%	2,065	61.43%	3362

NOTE: Details may not sum to TOTAL FIRMS because of rounding.

SOURCES OF DATA: U.S. Bureau of the Census

- Survey of Minority Owned Businesses (SMOBE) - 1987 & 1992 (African Americans, Hispanic Americans, Asian Americans, Native Americans and Other Minorities).
- Survey of Women Owned Businesses (SWOBE) - 1987 & 1992.

¹ Minority men and women firms are included in their respective minority classifications.

² The number of NON-MINORITY WOMEN construction firms was estimated by subtracting the number of minority women-owned construction firms from the census count of total women-owned construction firms. According to national statistics, African American women-owned construction firms comprise 6.28 percent of African American construction firms; Hispanic women-owned construction firms comprise 4.37 percent of Hispanic American construction firms; and other minority women-owned construction firms comprise 7.38 percent of other minority construction firms.

³ Number of WHITE MEN firms derived by subtracting all M/WBE firms from TOTAL FIRMS.

⁴ TOTAL FIRMS derived from the U.S. Bureau of Census and County Business Patterns.

- Utilization of Asian and Native American firms increased over the study period as well. The 1.59 percent of the dollars that these firms received in 1995 represented the highest utilization of any M/WBE category in any year of the study. Commodities vendors owned by Asian and Native Americans were utilized 0.90 percent of the time. That rate is the highest overall utilization of any of the categories.
- Non-minority women were the least utilized group. Non-minority women only captured 0.35 percent of the commodities dollars from the City during the study period. However, utilization of women-owned firms did increase in every year of the study with the final year yielding a utilization of 0.68 percent.

4.4.3 Availability Analysis

Exhibit 4-19 shows the estimated availability of commodities firms within the relevant market area. On average, non-minority male-owned firms represented 61.43 percent of the available firms while M/WBEs accounted for the other 38.57 percent. Although the total number of available firms increased over the study period, the representation of minority firms in the market exceeded the pace of overall growth and minority firms became a larger percentage of total firms.

- The availability of African American firms increased during the study period. African American firms increased from 0.69 percent of available firms to 0.78 percent. In terms of the actual number of firms, African American-owned firms increased 50 percent from 1993 to 1997. Hispanic firms increased in availability from 2.88 percent to 3.15 percent in Maricopa County. The number of Hispanic firms increased from 83 in 1993, to 121 in 1997, a 46 percent increase.
- Asian and Native American commodities firms also saw a rise in their numbers during the five-year study period. The 138 firms in 1997 represented a 48 percent increase in the number of available firms from 1993's number. The number of non-minority women-owned firms increased slightly during the study period. The estimated number of women-owned firms rose 35 percent between 1993 and 1997, while non-M/WBEs fell from availability of 62.16 percent to 60.87 percent. The growth rate in the number of non-minority male-owned companies did not keep pace with the overall growth rate in the total number of available vendors from 1993 to 1997.

4.4.4 Disparity Analysis

Exhibit 4-20 illustrates the disparity analysis for commodities. This exhibit compares utilization by the percent of contract dollars paid in the first column and availability by the percent of available firms in the second column. The disparity index in the third column reflects the ratio of these two numbers multiplied by 100.

An index of 100 indicates parity between utilization and availability. An index of less than 80 shows “substantial disparity” and an index above 100 demonstrates overutilization. Overall, the disparity analysis of commodities firms indicates overutilization of non-minority male-owned firms and African American firms but substantial underutilization of all other M/WBE group in all years of the study.

The disparity analysis of commodities shows:

- African American-owned commodities vendors represented an average of 0.75 percent of the available firms during the study period, but they were awarded 0.60 percent of commodity dollars by the City. Again, most of the dollars, 84 percent, spent on African American commodity vendors went to one firm.
- Hispanic American firms represented slightly over three percent of the relevant market area’s commodity firms. However, the City utilized Hispanic firms for only 0.61 percent of commodity dollars. The disparity index for Hispanic firms was 20.21 for the study period. The disparity index shows that the City substantially underutilized Hispanic-owned businesses from 1993 through 1997.
- Asian and Native American firms were available at a rate of 3.44 percent during the study period. The City, however, only awarded 0.90 percent of the commodities dollars to Asian and Native American firms during the study period. During the entire five-year period of the study, these firms were substantially underutilized.
- Women-owned commodity vendors were available at a rate of 31.36 percent during the study period. The utilization of non-minority women-owned firms was a mere 0.35 percent. The City’s utilization of firms in this group resulted in a disparity index of only 1.12. This group of M/WBEs was the most underutilized during the study period.

**EXHIBIT 4-20
COMMODITIES VENDORS
DISPARITY ANALYSIS BY RACE, ETHNIC, AND GENDER CLASSIFICATION
USING CENSUS DATA
FOR CALENDAR YEARS 1993 THROUGH 1997
CITY OF PHOENIX**

M/WBE CLASSIFICATION	% OF CONTRACT DOLLARS¹	% OF AVAILABLE FIRMS²	DISPARITY INDEX³	DISPARATE IMPACT OF UTILIZATION⁴	SIGNIFICANCE OF PROPORTION⁵
CALENDAR YEAR 1993					
AFRICAN AMERICAN	0.20%	0.69%	29.35	* UNDERUTILIZATION	-0.26
HISPANIC	0.06%	2.88%	2.10	* UNDERUTILIZATION	-1.53
ASIAN & NATIVE AMERICAN	0.30%	3.22%	9.39	* UNDERUTILIZATION	-1.59
NON-MINORITY WOMEN	0.19%	31.05%	0.62	* UNDERUTILIZATION	* -19.96
NON-MINORITY MEN	99.24%	62.16%	159.65	OVERUTILIZATION	* 32.38
CALENDAR YEAR 1994					
AFRICAN AMERICAN	0.33%	0.74%	45.28	* UNDERUTILIZATION	-0.23
HISPANIC	0.30%	2.94%	10.07	* UNDERUTILIZATION	-1.50
ASIAN & NATIVE AMERICAN	0.60%	3.33%	18.08	* UNDERUTILIZATION	-1.55
NON-MINORITY WOMEN	0.21%	31.21%	0.69	* UNDERUTILIZATION	* -20.89
NON-MINORITY MEN	98.55%	61.78%	159.52	OVERUTILIZATION	* 33.25
CALENDAR YEAR 1995					
AFRICAN AMERICAN	0.92%	0.74%	124.15	OVERUTILIZATION	0.10
HISPANIC	0.66%	3.03%	21.92	* UNDERUTILIZATION	-1.39
ASIAN & NATIVE AMERICAN	1.59%	3.45%	46.02	* UNDERUTILIZATION	-1.10
NON-MINORITY WOMEN	0.31%	31.35%	1.00	* UNDERUTILIZATION	* -21.72
NON-MINORITY MEN	96.51%	61.42%	157.13	OVERUTILIZATION	* 32.76
CALENDAR YEAR 1996					
AFRICAN AMERICAN	0.72%	0.78%	92.31	UNDERUTILIZATION	-0.04
HISPANIC	1.17%	3.08%	38.02	* UNDERUTILIZATION	-1.16
ASIAN & NATIVE AMERICAN	0.91%	3.53%	25.83	* UNDERUTILIZATION	-1.60
NON-MINORITY WOMEN	0.34%	31.47%	1.08	* UNDERUTILIZATION	* -22.57
NON-MINORITY MEN	96.86%	61.14%	158.43	OVERUTILIZATION	* 34.38
CALENDAR YEAR 1997					
AFRICAN AMERICAN	0.74%	0.78%	94.41	UNDERUTILIZATION	-0.03
HISPANIC	0.72%	3.15%	22.91	* UNDERUTILIZATION	-1.53
ASIAN & NATIVE AMERICAN	1.00%	3.60%	27.79	* UNDERUTILIZATION	-1.64
NON-MINORITY WOMEN	0.68%	31.61%	2.15	* UNDERUTILIZATION	* -23.17
NON-MINORITY MEN	96.86%	60.87%	159.14	OVERUTILIZATION	* 35.65
SUMMARY					
AFRICAN AMERICAN	0.60%	0.75%	79.65	* UNDERUTILIZATION	-0.09
HISPANIC	0.61%	3.03%	20.21	* UNDERUTILIZATION	-1.42
ASIAN & NATIVE AMERICAN	0.90%	3.44%	26.26	* UNDERUTILIZATION	-1.50
NON-MINORITY WOMEN	0.35%	31.36%	1.12	* UNDERUTILIZATION	* -21.70
NON-MINORITY MEN	97.54%	61.43%	158.78	OVERUTILIZATION	* 33.71

¹ Percent of commodity procurement dollars awarded to firms. See Exhibit 4-17

² Percent of available firms. See Exhibit 4-19.

³ The disparity index is the ratio of percentage utilization to percentage availability multiplied by 100.

⁴ An asterisk (*) in front of UNDERUTILIZATION indicates a substantial level of disparity - index below 80.00.

⁵ The significance of proportions test examines whether there is a statistical difference between utilization and availability. The test statistics is computed by taking the difference between utilization and availability and dividing by the square root of availability times one minus availability divided by the available firms. If the test statistic is greater than two standard deviations, overutilization is assumed. Conversely, if the test statistic is less than -2, underutilization is assumed. An asterisk is used to represent significant differences between utilization and availability at two standard deviations or more.

Of all the M/WBE firms available to the City for commodities, African American firms fared the best, as their disparity index was 79.65. The other M/WBE categories were severely underutilized relative to their availability within the relevant market area. Overall utilization of minority firms relative to their availability in the relevant market area was still quite low despite gradual improvement over the study period.

5.0 ANECDOTAL EVIDENCE SUMMARY

This chapter describes the results of anecdotal information collected from personal interviews, public hearings, and telephone surveys. The collection and analysis of anecdotal data are important components of this disparity study because the data provides a better understanding of the culture of contracting and purchasing with the City of Phoenix by reciting personal accounts of incidents of discrimination.

Courts have relied on anecdotal data in disparity studies to demonstrate the existence of past discrimination. Regarding the use of anecdotal evidence, the Supreme Court in *Croson* explains, “Evidence 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.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

Courts have indicated that while anecdotal evidence alone is generally not sufficient to prove discrimination, the combination of specific incidents of discrimination in conjunction with significant statistical disparities is effective to satisfy the “strong-basis-in-evidence” test to establish discrimination and justify a race- and gender-conscious program.

In applying *Croson*, the Ninth Circuit Court of Appeals in *Associated General Contractors of California, Inc. v. City and County of San Francisco*, addressed the appropriate manner in which a race- and gender-conscious program should be evaluated. Concerning anecdotal evidence, the court stated, “As pointed out by the City, it must simply demonstrate the existence of past discrimination with specificity; there is no requirement that the legislative findings specifically detail each and every instance that the legislative body has relied upon in support of its decision that affirmative action is necessary.” *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 950 F.2d 1401, 1416 (9th Cir. 1991). Based on this case, this chapter outlines allegations of specific

instances of discrimination that minority and women business owners have experienced in contracting and purchasing with the City of Phoenix.

5.1 Methodology

Several methods were used to collect anecdotal data from individuals representing minority-, women-, and non-minority-owned businesses. Personal interviews, public hearings, and telephone surveys were used to document specific incidents and patterns of discrimination. Personal testimonies included in the analysis are limited to firms that have conducted or attempted to conduct business with the City of Phoenix and are located in Maricopa County.

Public Hearings

Two public hearings were conducted to receive testimony and exhibits relevant to minority and female participation in construction and procurement contracting in Phoenix and the City's M/WBE program. Both public hearings were held in Phoenix on February 2 and 4, 1999. The hearings were advertised through local newspapers and by flyers to M/WBE and non-M/WBE owners and organizations.

Individuals in attendance at the public hearings received speaker instructions and a speaker's card to complete. In order to be eligible to present testimony at the hearing, individuals had to have either worked for, or attempted to work for, the City of Phoenix, or worked for, or attempted to work for, a contractor or vendor engaged on a City of Phoenix project.

If an individual was interested in speaking at the hearing and met the criteria to present testimony, then he/she completed the speaker's card before presenting his or her testimony. The cards were collected and given to the hearing officer.

A total of 18 MBE and WBE owners presented testimony at two public hearings. Six speakers presented testimony on February 2, 1999. Thirteen speakers testified on February

4, 1999. One speaker at the second hearing also testified at the first hearing, but was allowed to give additional comments at the end of the second hearing after all other speakers presented their testimony. One additional speaker submitted a speaker's card, but stated on the record that he did not meet the criteria to be able to present testimony.

The public hearings were conducted by a hearing officer and the hearing panels were comprised of members of the Human Relations Commission, the Human Relations Minority and Women Development Committee and the M/WBE Oversight Committee. The hearing officer then informed the audience of the legal background for the disparity study and the role of hearing participants in establishing a factual record for the anecdotal portion of the study.

The participants also were instructed to provide specific testimony about incidents of discrimination they experienced in conducting business with the City of Phoenix. Although each speaker was asked to keep his or her testimony to approximately five minutes, all were given the opportunity for full participation. As part of the hearing testimony, speakers were required to identify themselves, including their name, the business they represented, ethnic or gender group, certification status, and how long they have been in business. After each speaker's testimony, the hearing officer and panel members asked questions to clarify the testimony. A court reporter recorded both proceedings.

Personal Interviews

One-on-one personal interviews were also conducted to elicit examples of specific incidents of discrimination on the basis of ethnicity and gender. An interview guide was used and covered a range of questions concerning a firm's experiences conducting business with the City of Phoenix, experiences in the private sector, and the firm's business operations.

In collecting anecdotal evidence relevant to the existence of discriminatory practices, the interviewers were objective in identifying the participants, drafting interview questions, asking questions during the interviews, and in eliciting follow-up responses from individuals.

The interviewers made no attempt to prompt or guide the testimony or responses of individuals, but tried to identify any unrecognized or acknowledged discriminatory practices.

For personal interviews, approximately 1,000 firms were selected randomly from a database of firms that bid on construction projects let by the City of Phoenix or bid on contracts to provide goods and services to the City between the years of 1993 and 1997.

Ninety-two interviews were scheduled and 70 were actually conducted. The results of 69 interviews are included in the interview findings. The companies interviewed represent a cross section of firms in both construction and procurement areas. Twenty-seven Hispanic firms, 16 African American firms, three Native American firms, eight Asian firms, and 15 women-owned firms were interviewed.

Each interview was held on-site at each owner's office and ranged in length from 45 minutes to two hours. The interviews were recorded on tape and later transcribed. Before each interview, business owners were informed that their responses to the questionnaire would be confidential and would not be distributed to any other person or firm with their identity revealed—except if legal action were filed, in which case, all documentation would be provided to the court.

Telephone Surveys

MGT employed a subcontractor to conduct telephone interviews of all operating and receptive firms listed on the City of Phoenix vendor list. Due to the under-representation of minority firms on the City's vendor list compared to the number of non-minority firms, the number of minority firm responses was not sufficient for standard statistical analysis. In order to conduct proper statistical analysis, it is necessary to compare the response frequencies of two or more different groups. In this case, it would be necessary to compare the responses of minority and non-minority business owners. The lack of cases for minority-owned businesses inhibit useful comparisons with the non-minority business responses.

In order to rectify the non-comparability problem, phone survey data for non-minority businesses are compared to the personal interview data for minority-owned firms. The inclusion of personal interview data for minority businesses allows for sufficient sample size and enables meaningful comparisons with the survey responses of non-minority business owners. By joining the phone and personal interview data, comparisons of operation, primary line of business, number of employees, and gross revenues could be made. Section 5.4 summarizes the results of the comparisons.

5.2 M/WBE-Owned Firm Demographics

5.2.1 Business Characteristics

The interview instrument included questions designed to establish a business profile for each business interviewed. From the interview, information was gathered concerning the primary line of business, number of years each firm has been in business, organizational structure, gross revenues, and firm size.

Primary Line of Business

Exhibit 5-1 summarizes demographic data on M/WBEs primary line of business.

**EXHIBIT 5-1
PRIMARY BUSINESS CATEGORIES FOR M/WBE FIRMS IN THE CITY OF PHOENIX**

Business Category	African American	Hispanic	Asian	Native American	WBE	Total	Percent
	Total	Total	Total	Total	Total		
Building Construction	3	8	2	1	3	17	25%
Highway/Bridge Construction	0	2	0	0	2	4	6%
General Services	11	13	3	2	5	34	49%
Supplies/Commodities	2	3	1	0	5	11	16%
Other	0	1	2	0	0	3	4%

Source: M/WBE Personal Interviews

The categories are building construction, which included general contractors and all subcontractors that perform services related to building construction; highway/bridge construction, which included any contractor that performs highway, bridge, or road construction, or any subcontractor that performs services related to highway, bridge, or road construction; general services; or supplies/commodities. The final category — “other” — includes three engineering firms. In addition to the information above, the chart also reflects the number and percentage of businesses in each category by ethnicity.

As shown in Exhibit 5-1, of the firms interviewed, 25 percent were in the building construction category; six percent were in the highway/bridge construction category; 49 percent were in the general services category; 16 percent were in the supplies/commodities category; and four percent were in the “other” category.

Years in Business

Seventy-five percent of the African American firms interviewed were established between 1990 and 1998. Only one firm (six percent) was established before 1980. Of the Hispanic firms interviewed, 41 percent of the firms were established between 1990 and 1998. Sixty-seven percent of the firms were established between 1986 and 1998. Only 19 percent of the firms were established before 1980. Nearly 40 percent of the Asian American and Native American firms were established between 1990 and 1998. More than half (53 percent) of the WBE firms interviewed were established between 1990 and 1998. Only 13 percent of all the firms interviewed were established prior to 1980. The foregoing data is summarized in Exhibit 5-2.

**EXHIBIT 5-2
YEAR BUSINESS FORMED
BY BUSINESS OWNER RACE/ETHNICITY AND GENDER
PERSONAL INTERVIEWS
CITY OF PHOENIX, ARIZONA**

YEARS	AFRICAN AMERICAN		HISPANIC AMERICAN		ASIAN AMERICAN		NATIVE AMERICAN		WHITE WOMEN	
	TOTAL	%	TOTAL	%	TOTAL	%	TOTAL	%	TOTAL	%
1920-29	0	0%	0	0%	0	0%	0	0%	0	0%
1930-39	0	0%	0	0%	0	0%	0	0%	0	0%
1940-49	0	0%	1	4%	0	0%	0	0%	0	0%
1950-59	0	0%	2	7%	0	0%	0	0%	0	0%
1960-69	0	0%	0	0%	0	0%	0	0%	0	0%
1970-75	0	0%	1	4%	0	0%	0	0%	1	7%
1976-79	1	6%	1	4%	0	0%	0	0%	2	13%
1980-85	2	13%	4	15%	1	13%	1	33%	2	13%
1986-89	1	6%	7	26%	4	50%	0	0%	2	13%
1990-95	7	44%	8	30%	2	25%	1	33%	6	40%
1996-98	5	31%	3	11%	1	13%	1	33%	2	13%
Total Responding	16	100%	27	100%	8	100%	3	100%	15	100%

Source: Personal Interviews

Organizational Structure

The majority of African American firms (63 percent) and Native American firms (67 percent) interviewed were sole proprietorships. The majority of the Hispanic (85 percent), Asian (71 percent) and women-owned businesses (80 percent) are corporations. See Exhibit 5-3.

Gross Revenues

Information concerning gross revenues is summarized in Exhibit 5-3. The following reflects information obtained during the interviews. Of the African American firms interviewed, no firm had gross revenues over \$4,000,000. Only one firm had gross revenues

EXHIBIT 5-3
SELECTED DEMOGRAPHICS BY BUSINESS OWNER
RACE/ETHNICITY AND GENDER
PERSONAL INTERVIEWS
CITY OF PHOENIX

CATEGORY	AFRICAN AMERICAN		HISPANIC AMERICAN		ASIAN AMERICAN		NATIVE AMERICAN		WHITE WOMEN	
	TOTAL	%	TOTAL	%	TOTAL	%	TOTAL	%	TOTAL	%
Organizational Structure										
Self employed	10	63%	4	15%	1	14%	2	67%	2	13%
Partnership	1	6%	0	0%	1	14%	0	0%	1	7%
Corporation	5	31%	23	85%	5	71%	1	33%	12	80%
Other	0	0%	0	0%	0	0%	0	0%	0	0%
Total Responding	16	100%	27	100%	7	100%	3	100%	15	100%
Gross Revenues										
Under \$500,000	9	69%	6	23%	2	29%	1	50%	8	53%
\$500,000 - \$999,999	2	15%	3	12%	1	14%	0	0%	0	0%
\$1,000,000 - \$1,999,999	1	8%	8	31%	1	14%	0	0%	5	33%
\$2,000,000 - \$2,999,999	0	0%	2	8%	1	14%	1	50%	0	0%
\$3,000,000 - \$3,999,999	1	8%	3	12%	1	14%	0	0%	1	7%
\$4,000,000 - \$4,999,999	0	0%	0	0%	1	14%	0	0%	1	7%
\$5,000,000 - \$5,999,999	0	0%	1	4%	0	0%	0	0%	0	0%
\$6,000,000 - \$6,999,999	0	0%	1	4%	0	0%	0	0%	0	0%
\$7,000,000 - \$7,999,999	0	0%	0	0%	0	0%	0	0%	0	0%
\$8,000,000 - \$8,999,999	0	0%	1	4%	0	0%	0	0%	0	0%
\$9,000,000 - \$9,999,999	0	0%	0	0%	0	0%	0	0%	0	0%
Above \$10,000,000	0	0%	1	4%	0	0%	0	0%	0	0%
Total Responding	13	100%	26	100%	7	100%	2	100%	15	100%
Number of Employees										
0	3	19%	0	0%	0	0%	2	67%	2	13%
1-10	7	44%	13	48%	4	50%	1	33%	6	40%
11-50	5	31%	12	44%	4	50%	0	0%	7	47%
51-75	1	6%	1	4%	0	0%	0	0%	0	0%
over 75	0	0%	1	4%	0	0%	0	0%	0	0%
Total Responding	16	100%	27	100%	8	100%	3	100%	15	100%

Source: Personal Interviews of M/WBE Business Owners

between \$3,000,000 and \$3,999,999. Only one firm had gross revenues between \$1,000,000 and \$1,999,999. The remaining African American firms, 84 percent, had gross revenues under \$1,000,000.

Of the Hispanic firms interviewed, 66 percent had gross revenues of less than \$2,000,000. Only three firms had gross revenues over \$5,000,000, with one firm having gross revenues over \$10,000,000. More than half (53 percent) of the WBE firms interviewed had gross revenues of less than \$1,000,000. Only two firms had gross revenues over \$2,000,000. Fifty percent of the Native Americans interviewed had gross revenues under \$500,000. The remaining 50 percent had gross revenues between \$2,000,000 and \$2,999,999. Of the Asian firms interviewed, three firms (38 percent) had gross revenues over \$2,000,000.

Firm Size

Seven of the 16 African American firms interviewed had between one and 10 employees. No African American firm had over 75 employees. Only one African American firm had over 50 employees. Thirteen Hispanic firms had between one and 10 employees. Only two Hispanic firms had over 50 employees. No Asian, Native American, or woman-owned firm had more than 50 employees. Only one of the Native American firms interviewed had employees other than the owners, and that firm had five employees. All Asian American firms had between one and 50 employees. Of the women-owned firms, 47 percent of the firms had between 11 and 50 employees. Forty percent of the WBEs had between one and 10 employees. See Exhibit 5-3.

5.3 White Male-Owned Firm Demographics

Significant demographic information about white male business owners resulted from the surveys. The demographic information is summarized in Exhibit 5-4 below.

**EXHIBIT 5-4
SELECTED DEMOGRAPHICS OF WHITE MALE BUSINESS OWNERS
TELEPHONE SURVEY
CITY OF PHOENIX**

DEMOGRAPHICS	WHITE MEN %
Years in business:	
1994-98	8%
1990-93	9%
1980 -89	28%
Pre-1980	55%
Primary line of business:	
Construction (Bldg)	6%
Construction (Road)	2%
General Services	23%
Commodities	52%
Other	17%
Number of Employees:	
0	1%
1 - 10	2%
11 - 50	23%
51 - 75	52%
over 75	17%
Gross revenues:	
Less than \$100,000	7%
\$100,001 to \$500,000	14%
\$501,000 to \$1,000,000	11%
\$1,000,000 to \$5,000,000	32%
\$5,000,000 to \$10,000,000	14%
Over \$10,000,000	22%

Source: City of Phoenix Telephone Survey

Years In Business

More than half (55 percent) of the businesses owned by white men were established before 1980. Of the firms surveyed, only eight percent of the businesses owned by white men were established after 1993.

Primary Line of Business

Of the firms surveyed, six percent were in the building construction category; two percent were in the road construction category; 23 percent were in the general services category; 52 percent were in the commodities category; and 17 percent were in the "other" category.

Firm Size

Fifty-two percent of the businesses owned by white men had between 51 to 75 employees. Only one percent of the firms owned by white men had no employees. Seventeen percent of the businesses owned by white men had over 75 employees.

Gross Revenues

Thirty-six percent of the businesses owned by white men had gross revenues of \$5,000,000 or greater. Only seven percent of the businesses owned by white men had gross revenues of less than \$100,000.

5.4 Comparison of M/WBE and Non-Minority Demographics

Several differences exist between minority and women-owned businesses and majority male-owned businesses. First, businesses owned by white males have been in existence longer than those owned by minorities and women. More than half the businesses owned by white men were established before 1980. Only 13 percent of the minority and women owned businesses were established before 1980. Seventeen percent of the businesses owned by white men were established in the 1990s. In contrast, more than half of the businesses owned by minorities and women (52 percent) were established in the 1990s.

Businesses owned by white men have higher gross revenues than those owned by minorities and women. Twenty-two percent of the businesses owned by white men had gross revenues over \$10,000,000. Only one minority or woman owned firm (one percent) had gross revenues over \$10,000,000. Twenty-one percent of the businesses owned by white men had revenues less than \$500,000 while 46 percent of the businesses owned by minorities and women had gross revenues less than \$500,000.

Businesses owned by white men are larger than those owned by minorities and women. Seventeen percent of the businesses owned by white men had over 75 employees. Fifty-two percent of the businesses had more than 50 employees. Conversely, only one

minority or woman owned business (one percent) had more than 75 employees. Only three businesses (four percent) had more than 50 employees. For the number of employees in a white male owned firm, the largest numbers of businesses (52 percent) were in the category of 51 to 75 employees. The largest category for the number of employees for minority and women owned firms (45 percent) was one to 10 employees.

5.5 Specific Incidents of Discrimination

5.5.1 Bid Shopping, Bid Manipulation, and Good Faith Efforts

The most pervasive and widespread complaint found among MBEs of almost every ethnic group as well as WBEs was the discriminatory abuse and manipulation of the City's bidding procedures by majority prime contractors against MBEs and WBEs, and the City's tolerance of those practices. MBEs and WBEs allege that the bidding policies for construction contracts, as written by the City and as implemented by majority contractors since 1994, operate in a disparate and discriminatory fashion against MBEs and WBEs. Under the existing bidding procedures, prime contractors, who are almost exclusively white, are not required to list their MBE or WBE participants until after the lowest bidder is determined. Then they are given 24 hours to define the level of MBE and WBE participation. MBEs and WBEs state that this practice is discriminatory in two ways.

First, M/WBEs are required to bid against each other within a very short time frame with inadequate information. Prime contractors are generally given ample time and detailed specifications to prepare their bids. Whereas, M/WBE firms are given limited time to render significant bids. These practices often result in MBEs and WBEs performing contracts at a loss or with marginal profits. Second, MBEs and WBEs allege that since prime contractors are not required to define the level of MBE and WBE participation before bid opening, they often solicit quotations from MBEs and WBEs with no intention of actually using them on a project.

A certified female African American paint contractor who had been awarded two contracts over the five-year period (1993-97) of this study (one of which did not materialize), cited her experience as an example of the unfairness of the bidding process to MBEs. For one year during the five-year period, she submitted approximately 18 bids per month without success or even a response. It was at that point, after some investigation, she realized that majority contractors were documenting their good faith efforts and they had no intention of doing business with her company. In a personal interview, she stated:

[W]e found out a lot of information about submitting bids all the time, about 18 a month. We found out that a lot of them were just using our numbers, and had no intentions of using us, and all they had to do is show the City that they attempted to get us to bid with them.

A similar account was provided by a certified Hispanic concrete contractor. Over the five-year period of the study, he received one subcontract. During a personal interview, the owner described practices that majority prime contractors commonly use to get around having to use minority or women-owned businesses as subcontractors. He confirmed the common practice that prime contractors request bids from business owners who do not work in the requested area or businesses that do not have the capacity to complete the job. He indicated that when this solicitation pattern began, he felt the requests for bids were sincere; however, his opinion regarding the sincerity quickly changed.

Initially, this owner would read the invitation and recognize that the dollar amount of the contract was too large for his firm's capacity. He would respond to the general contractor to thank him for the solicitation and indicate that the contract was beyond his capacity. The next time that prime contractor had a project available for bidding, he would receive another invitation to bid. He responded:

[T]here's that big dollar amount that there's no way in heck I can do it . . . I send it back. They send me a third one, and something in my brain clicks . . . I call over there and I say, 'Listen guys, I appreciate you sending me these solicitations, but please, this is the amount of dollar work that I can do. If you have projects that I can work on for you, if you have projects of

this size, I would be glad to bid to your company and do appreciate your participation in this. . . . [C]all me with one of these projects.'

He stated that when the same prime contractor sent him another solicitation on a large project he threw it away because he is aware that these contractors are soliciting quotes from subcontractors that do not have the capacity to bid the project in an attempt to meet their good faith requirement.

In a personal interview, a Hispanic general contractor expressed frustration with practices non-minority contractors use to manipulate the City's subcontracting goals program, which allow non-minority general contractors to avoid using minority subcontractors. According to this general contractor, the City's bid process makes waiver of goals easy for majority prime contractors to obtain. Commenting on how, unlike his majority competitors, his company complies with the intent of the policies, he stated:

When we bid our work, we follow the book. We utilize minorities and we don't turn in any waivers because we can find the people. When we turn in our bid, everybody waives theirs except for a couple of people. We called and said why can these people waive their stuff and I can get minority people and they can't. She says they just waive everything . . . they can sign a waiver and turn around and meet the goals the next day. They can change their minds and say oh I found my minority participation. To me that is kind of backward in hindsight. You can tell a sub hey you want this job. . . that's the part I don't like. I can't say I am going to meet the goals and then request a waiver the next day. I don't think it works in reverse.

It is important to note that in many instances, majority prime contractors request waivers of the goals established by the City when they submit their bids on construction projects. Yet, within 24 hours, as noted by the above-mentioned MBE, prime contractors are able to find MBE and WBE contractors who are willing and able to perform. MBE and WBE contractors that were not contacted before the time of bid submission are often asked within the 24-hour window to match or beat a quotation from another MBE or WBE. This is often done with little or no advance notice to MBEs and WBEs. In many instances, neither the MBE or WBE contacted prior to the submission of the waiver request, nor those contacted

after the prime contractor receives the award, receive subcontracts. Either the prime or a non-M/WBE subcontractor performs the work.

This same business owner also expressed frustration with the fact that majority prime contractors solicit minority subcontractors with knowledge that the minority contractor does not perform the type of services requested or simply as a tool to document their so-called good faith effort. In his interview, he stated:

These real big contractors like 10 million, 24 million dollar contracts, they send me faxes left and right. I get faxes from at least five or six of these big primes that are bidding these jobs wanting me to participate in it as a subcontractor, but I am not a subcontractor.

According to this owner, the contractors use his lack of response as an example of their good faith efforts even though the majority prime contractors know that he is a prime contractor and does not bid subcontracting work. When asked for examples of contractors that make these requests, he identified three. He explained that this practice happens when there is a large City project up for bid.

One Hispanic MBE in a personal interview expressed how prime contractors have used him to put together a project to get the lowest bid, and ultimately he is never used on the project. In such instances, he presents his company as willing and able to perform. However, he is bypassed and the prime contractor or another majority subcontractor does the work. He was initially told, “[Y]ou’re the only concrete bid we’ve got.” He explained:

I’ve bid it, and guess what, you should have a job; at that point you get an invitation to bid. Well what’s this? I already bid this job. Well you maybe want to look at it; they put the bid out to everybody else to get the job bought down. You don’t get the project. So my time has been wasted, because my bid is my bid. I’ve already submitted it; they’ve got the project, by rights you should go to work.

[O]ne of the ones that sends me solicitations is [name]. They’re the ones that get me to budget the prices for them, for the sake of winning the projects again.

Here’s a perfect situation . . . I budgeted this job, and then they send me a bid solicitation. After I took my time to go out to the job with zero plans, just one sketch, and I go out there, and I look at the project and I say, based on

my expertise, I'm not an architect, I'm not an engineer, but based on my expertise I can go out there and say okay, we're going to have to put this wall here, this is going to be bearing . . . this is going to carry this kind of weight . . . the concrete will be this type . . . I put that project together.

[T]hey take that bid, and they put the prices for the rest of that project together . . . and they say, we believe we can build you this job for this amount of money. They win the project, the project is theirs, now they get a set of plans made up with specs, footings, maybe based on what I gave them, I don't know. . . . [T]hey get plans and they say, here we got the plans, bid as per plans, specifications, and that's not right. What should be right is, look, you were a part of this budget stuff together, here's the plans that come out, check it and see if it's more or less than what you budgeted and what we need to do to stay in the parameters of this budget, to say it to me, but not to say it to the entire industry.

In some instances it is alleged that City officials overlook the RFP process for goods and services altogether and contract directly with majority suppliers and do not give WBEs and MBEs the same opportunity to contract. For example, in one of the hearings, a WBE testified as follows:

WBE: We are proud to be a City of Phoenix Certified Women-Owned Business. I'm also a very strong supporter of the certification process itself. I'm speaking on behalf of my own company as well as the National Association of Women Business Owners, NAWBO. NAWBO polled our members a few months back to see what it - what they thought was important, what they had to do to go after public business . . . Included are RFPs that should have gone out, did not go out, and contracts awarded to noncertified businesses. Personally, I witnessed this firsthand about a year ago. One of the women I was going through the certification process with chose not to get certified. She, however, did get a large contract for the Civic Plaza. Here I am a certified minority-owned business, I work for the City very much . . . and we weren't notified the contract was going out. She said it didn't go out. I just happened to get a phone call from the City and they asked if I wanted it and I did it. That's my first experience . . .

Hearing Officer: Let me go back to the incident that you mentioned where you bid as a certified WBE and another business received the business or received the contract that was not certified. Do you recall the incident?

WBE: Yes, the Civic Plaza.

Hearing Officer: Tell me when this occurred.

WBE: This would have occurred less than six months ago.

Hearing Officer: Was the business that received the contract a non-minority business? . . . I guess what I'm getting at, is she receiving that business as a majority business owner?

WBE: Yes.

The same WBE also cited an example of how majority prime contractors contact WBE companies and solicit bids to satisfy the good faith effort requirements with the intention of ultimately doing business with another majority contractor and not using the WBE.

WBE: Another experience of an RFP being awarded to a majority business looking for another minority business, saying they asked us to submit our ideas in a proposal. They told us we have the contract within their contract. We waited and waited. They took our ideas and gave it to a non-minority owned business. That's twice we have had major problems.

Finally, the WBE stated that there were instances in which WBEs did not receive RFPs from the City even though the bid codes (type of work) matched their codes (type of business). In such instances, the WBEs are willing and able to work, but are bypassed by the City.

WBE: As far as other woman-owned members, they mentioned RFPs weren't sent to their businesses, though the bid specifically matched their codes. They had the corresponding codes but the bid never came to them. It came to other businesses in their same type of business but they didn't get it. Specifically members in the technology arena, they felt RFPs are written for specific businesses, and those not on the good old boy's network didn't have a chance.

An African American MBE owner of a company that provides security officers commented in a personal interview on the good faith requirement.

I think that 'good faith' is making a sincere effort to contact and respond to minority contractors . . . I've filled out the thing, sent it in, called the company, tried to contact the person who was the actual responsible person for doing that bid, never got a response. They're always busy. They're always doing something. So you really have no idea or knowledge of what's going on . . . they're not really being responsive.

I think they're sending out the information, but they're not responsive to do any follow up on it, so they might be getting a waiver on it, and just not saying that they didn't get any response on it, you know, we sent the information out but we didn't get a response. And so then they say well we can apply for a waiver, we sent it to these people. . . . I really don't see a

sincere effort on their behalf. . . . [T]hey're not being very responsive . . . I know that I've made efforts, and I know the response that I got.

Another certified WBE firm that supplies imprinted business gifts and promotional products alleges there is a "good old boy" network that operates in connection with the City of Phoenix contracting process. The firm received three contracts over the last five years after 25 bids. Referring to the City of Phoenix officials, she stated:

I would say that people are comfortable doing business with ones they have done business with in the past. My feeling is that they go through motions of putting things out for bids but not having any real intention of being fair about it.

In support of this contention, this WBE cited the following incident:

Back last June, I was low bidder on a contract for the police department and I was called being told I was the low bidder and awarded the contract. A week later they called me back and said 'we don't have any money, we aren't going to do this.'

An Asian MBE owner testified about her negative experiences with the RFP process.

A particular instance that we have encountered for the first three years, we had - we were asked to be on a proposal and to fulfill the minority requirements, and they got the job, we didn't. We were not notified they got the job and we didn't get any part of the work. I think that was the Union Hills water treatment plant.

There's another instance, we sent out a proposal. There was three people responded, three companies that responded. Then we asked - they went back for a resubmittal and we asked why and they said they didn't have enough participation, didn't have enough proposals. I know of instances where there's been one proposal and they got the job. I don't know why they threw it out and re-sent out the RFP, but we were definitely qualified to do the work. Other than that, those are the two incidents that I had that would suggest there's definitely a need for this program.

Hearing Officer: I would like to go back to your incident and put a time frame on it, the first one, what were you saying, a majority contractor received a bid from you and that particular contractor received the award but you weren't given the work.

MBE: We do design services, we don't do construction. We were on their proposal suggesting we were going to do part of the work. We never saw the proposal. Sometimes we get a copy of it, sometimes we don't. We never heard from them, and then we called and said what is going on with the job? Oh, we got it. We said, what portion of it is our work? Well, they

had already started, and we just didn't have any portion of the work so we weren't involved, even though our name was in the proposal.

Hearing Officer: Essentially you were used.

MBE: Just to fulfill minority requirement. Ten percent of evaluation is based on minority participation.

Hearing Officer: I wasn't sure I followed the last example, the proposal was thrown out. Was this one where you bid on it directly and that was thrown out or were you bidding as a subcontractor? Would you explain that for me?

MBE: We ended up bidding it twice, I think - if I remember right, it was a couple of years ago, we were prime on it at first, we had subbed out a couple of the other portions of the work, the civil work and stuff, and when they threw it out and they said they were going to do a re-RFP, send it out again, and because they said there wasn't enough response and they had three. The second time we ended up being the sub and the other half was the prime and we still didn't get it.

Hearing Panel Member: I have a question. In reference to the majority contractor, I guess I'm confused. You proposed under that majority contractor part of the bid or a specific - the design component; is that right?

MBE: That's correct.

Hearing Panel Member: The design component. And you did not receive the work. Do you know who received the work?

MBE: For that? No. They ended up doing the whole thing. We just do electrical.

Hearing Panel Member: Do you know whether or not that particular portion was subbed out?

MBE: No. They have their own electrical division, it is kind of small, but they put us on their proposal to do the electrical work . . . They did it themselves.

Hearing Panel Member: Melinda, can you share with this panel who this consultant was? Who did this project?

MBE: [yes]

In one instance, a certified Asian MBE supplier of computer equipment was the low bidder on a project, but did not receive the award of the contract. Over the period of this study, the MBE owner stated that on average, he responded to purchase orders and bid

requests at the rate of three to five attempts every 10 days. With regard to whether his company was willing and able, he stated that he is called by the City's Purchasing Division quite often before the bids go out to get his assistance and expertise in putting together bid specifications. In an interview, this owner related the specific incident in which he was the low bidder but did receive the contract. He stated:

One time I won one bid and I didn't know I won but they have a record on public and my technician happened to be there and we knew we were the lowest. I called [City Employee] and said how come I didn't get that bid. He said well I didn't even know you bid on it. I said well my name is there so I must have bid on it. It turns out that he found my bid under his desk. [City Employee] is in Water Works. I haven't seen a bid from him in a long time.

The WBE owner of a certified paving and grading contracting company who has attempted to do business on City projects about 20 times over the period of this study, but has not received any contracts, noted that majority firms have often sent requests for bids and not allowed sufficient time for the WBE to reasonably respond. She stated that prime contractors use this tactic to get around using WBEs. In short, she stated:

The same thing applies. They send you a fax at the last minute requesting a bid and you don't have enough time to prepare. So, you submit a no. And then, they're able to fulfill their requirement of asking so many WBEs and being turned down. I'm not aware of any other practices.

A certified Hispanic MBE electrical construction firm allege that majority prime contractors as a matter of practice engage in bid shopping to discourage MBEs and to get around having to use minority owned businesses. Over the past five years this MBE has bid on approximately 200 jobs as a subcontractor. He has been awarded approximately 20 contracts in that same period. He described bid shopping by majority prime contractors in the following way:

They'll make a call saying, John Doe Electric is at \$100,000 and they say if you can match that price you can have the project. I need the minority status. I just don't think that's right.

The owner of a certified WBE millwork firm that has bid on City of Phoenix projects 10 to 12 times over the last five years and received approximately six contracts, referred to an

instance in which her company was not treated fairly under the bidding process. In discussing how prime contractors get around using WBEs, she cited the following incident:

I can't even remember the job because I didn't do the job. I was told I was the low bidder at bid time, and then when the job came around I contacted the contractor that won the project, and I asked them, I thought we were low? Oh no, you weren't low, someone else after-bid, someone else came in lower than you. And so the City contacted me, they said you were asked to bid the project and I said yes, and were you told where you were at? And I said yes I was, and I told them that we were told that we were low, but then after the fact we didn't get the job because they said someone else came in and beat us. . . . I bid the project and was told at the bid time that I was the low subcontractor.

When it came time to do contracts and stuff like that, City of Phoenix is calling me asking me if I got my contract, and I said no I did not, and they asked me why and I said I was told that I was low and they were also told that I was the one who was going to do the project

The City officials were told that I was going to be doing the project. They were calling me to verify that I was doing the project, and I said, no I was told that I was not low. They contacted the contractor. The contractor called me and told me that is correct, you were not low, but we did put your name in at bid time, this other number came in after bid time and we're using them. So the City of Phoenix called me back and asked me about that, and I said, well they just told me that someone else came in lower.

Interviewer: Do you know who contacted you from the City?

WBE: No I don't.

Interviewer: Do you know what prime contractor that was?

WBE: No, because it was probably about two years ago, and I didn't do the job, so the job name doesn't stick in my head.

The owner of a certified WBE supplier of promotional products, who bid on approximately 50 contracts during the period covered by this study and received three contract awards, stated how the limited time to respond to bids discourages M/WBEs from bidding and limits the number of projects on which they can bid. She stated:

We will get a fax like this afternoon and the bid will be due by 9:00 a.m. the following day. You have to find the costs, engraving costs, product, shipping, and it is not just opening a catalog and looking at it. There have been a couple we couldn't bid on because we didn't have time to do it.

During his interview, one certified Asian MBE painting contractor, who has bid four times as a prime contractor and 24 times as a subcontractor over the period of this study, and has been awarded 14 contracts, made the following observation in response to the question of whether the bid process was fair:

As fair as it can be. I know of several contracting firms that will shop their subcontractors so I am only answering that it is as fair as it can be. In this office we tend to bid only the general contractors that are fair. If we are aware of shopping then we don't use them and put them on a list. We are wasting our time bidding them so we choose not to.

MBEs have described bid shopping as a widespread pattern and practice by prime contractors, and they complained that it is allowed by the City. One certified Hispanic mechanical supply MBE described the practice as he has observed it during the period of the study. This particular MBE has bid on approximately 25 contracts and has been awarded approximately five during the period of this study. In describing the practice of bid shopping, he stated:

MBE: In other words the general waits until the last minute until he decides, well let's go find minorities. It's going to be bid Monday and they call us Thursday morning and say 'Hey we gotta have a bid but it's got to be here by Monday.' So now they have made their effort to get a minority bid.

Interviewer: So you feel that is all it is, a good faith effort?

MBE: Just to say that they asked a minority, yeah.

Interviewer: So do you feel that maybe they knew that it wasn't enough time?

MBE: Of course.

Interviewer: And that happens frequently?

MBE: All the time.

MBE: That's one of the reasons the work has slacked off for the City because we are wasting our time. We don't know what is going on and when we do know what is going on, there is not enough time. Normally a week sometimes longer.

MBE: But even when you do bid the jobs, the person that's awarded the contract is a general. They end up turning it around on you later and saying

that somebody else's prices were lower and we're going to use them even though they used us as a minority in their proposal signature.

It is clear from personal interviews and comments in public hearings that prime contractors have been allowed to circumvent the good faith requirements under the City contracting program to the detriment of M/WBEs. Several business owners indicated that prime contractors solicit bids with no intention of utilizing the M/WBE. When bids are solicited from M/WBEs for the purpose of documenting a good faith effort, with no intention of utilizing the MBE or WBE, this is an abuse of the process and a waste of the M/WBEs' time. The owners reported that it is common for prime contractors to request bids from businesses that they know do not work in the requested area or businesses that do not have the capacity to complete the job request. Minority and women business owners believe that non-minority general contractors in these situations request the bid only to meet the good faith requirement.

Further, as a result of personal interviews and testimony from public hearings, we concluded:

- At the time of bid submissions, prime contractors' prices are fixed. At that time, the apparent low bidder's contract rights are established. Whereas M/WBE prices, at the time of bid submissions, are merely numbers from which to begin negotiation. In other words, a prime contractor can be the low bid and be guaranteed the project but if an M/WBE subcontractor is the low bid at the time of bid submission, the MBE or WBE is not guaranteed the contract.
- MBEs and WBEs often do not have ample time to prepare bid responses.
- Departmental purchases sometimes result in bypassing MBEs and WBEs because of the noncompetitive bidding process.

5.5.2 The Goal Setting Process

Concerning the City's goal setting process, MBEs and WBEs assert that goal setting is often arbitrary and the resulting goals are often too low in comparison to the availability of MBEs and WBEs willing and able to perform. In personal interviews, several owners

indicated that the percentage goals on some projects have been too low. (See Chapter 3.0 for a description of the goal setting process.) Consequently, if there were no set goals on a project, or the goals were too low, prime contractors would not utilize minorities or women on the project. The reason for this, according to one WBE owner, is prime contractors believe they can save money by using other subcontractors.

Another owner indicated that he sees too many projects with zero-zero participation goals, as well as too many projects that have to be rebid because the budgets were not correct. Based on documentation provided by the Engineering and Architectural Services Department, the number of construction contracts with zero-zero participation goals is high. Approximately one in five, or 20 percent, of City construction contracts since 1993 have had zero-zero participation goals. For example, in one of the public hearings, an African American MBE construction contractor expressed his concern that the City's M/WBE participation goals are too low, and City officials have not been very aggressive in setting goals.

The MBE explained that he has experienced this as a problem since the beginning of the program.

I've been continually certified ever since the program has been in existence, and the goals have always been too low. As a matter of fact, the goals were higher before you did the first disparity study, but there was the MBE program. It was like 10 percent across the board . . . Now you are lucky to get four or five percent with the staff. Most of them are zero, one and two, and the prime comes in with \$50 million and has to meet a one percent goal.

Reading from a document listing nine City projects to be bid, the MBE reported:

Three of those projects are DBEs, federally funded projects for DBE. Those three projects have 12 percent DBE requirement. Three have zero. Those three are not DBEs. They are regular MBE and WBE. They have zero goals. No males and no females. Two others out of the remaining six, one has five percent, one has two percent, and both of those are MBEs or WBEs. Now sometimes in my experience with the City, the City has a big stick, but is not allowed to use it. Also, I think sometimes you have a fox going into the henhouse where the City has the authority and the power to influence some of these things, but they are not doing it. Now if the City

staff set the goals, City staff was granting the waiver, the City is not helping the MBE/WBE program at all.

[Name] is a prime contractor and we as an MBE prime contractor ourselves also have to meet the goals. We have never failed to meet a goal. As a matter of fact, our minority participation exceeds 50 percent participation for the things we do for the City. The thing about not being able to meet the goals or not being able to find the people is not true because we as a subcontractor bid regularly on City projects, and the day after the bids are open, he has to submit his people that he is going to use a minority subcontractors. I go down and check and see and bid with every prime contractor who bids on the contract. I will be listed on two or three of the prime contractors and two or three I will not be listed.

So the prime contractor that got the project last Tuesday . . . this was the 91st Avenue water treatment plant, and only two prime contractors bid the proposal, 2.7 million dollars. And the low bidder, which he's the low bidder by \$97,000 had .7 percent minority. The other contractor had 5.7, and the goal was five percent. There should be something done by the City to correct that. Why would you give him a waiver with a .7 percent and the goal was five percent?

A certified WBE construction painting company that bid an average of five jobs per month with the City of Phoenix during the five-year period of this study and has received an average of 10 contracts per year, complained that the goals for WBE participation are arbitrarily set and are too low. Her company has the capacity and experience to do more than she has been contracted to do. In that regard, in an interview she stated:

WBE: It'll come out sometimes, 10 to 13 percent minority, and 1 percent WBE, very seldom will it be over one percent for the women, but what I think it is, there's few WBEs in this area that are qualified. . . .and what I think that they're afraid of, is that they won't be able to meet the quota¹ if they make it too high, but I will always bid the City mechanical work, and I can normally come in at one percent, I can normally come in within that range, so it's like, jobs that I know I could probably get if the quota were higher.

The owner of a certified WBE states that her firm was discriminated against by the City of Phoenix's Fire Department because her company has on numerous occasions since 1993 attempted to respond to requests for proposals to supply medical products to the Fire Department and has been virtually ignored. On one specific occasion, after attempting to

¹ It is believed the reference to quota was intended to mean goal. There are no quotas in the Phoenix Program.

respond to purchase orders, representatives of her company went to the Fire Department to meet with its representatives and they were told that the Fire Department only did business with a particular majority medical supplier.

The WBE owner was quoted in her interview as follows:

I think like with the Fire Department – it is the good old boy system. It is very difficult to get in there. We went down and met with whoever it is that actually requests the orders for the Fire Department. His attitude was “well we do business with ProMed” [a majority supplier].

Another MBE testified regarding the low goals that are set on City of Phoenix construction projects. He stated that goals are set much lower on City projects than federal government projects and that prime contractors are granted waivers with a much greater frequency on City projects than federal projects. The MBE provided an example concerning the difference in goals set on two courthouse projects. One courthouse was constructed with City funds and the other courthouse will be constructed with federal funds. He testified that while the courthouses were directly across the street from each other, the MBE and WBE participation on the federal project was considerably higher than on the City project.

The MBE described this situation as follows:

MBE: I wanted to make a comparison and I went and got my fax . . . in regard to the goals on both projects. The City of Phoenix on the Criminal Justice Facility had a goal of five percent for MBE and two percent for WBE. The low bidding contractor . . . [name] came in with .44 percent for his MBE and .78 percent for his WBE and was awarded the project. The one I want to compare him to, . . . the United States Courthouse, which is located across the street, didn't really have a goal. They had a good faith effort. And that contractor who was the lowest bid on that, which we also bid on that project, was the [Name], out of Philadelphia. The [Name], as we stand here tonight, the MBE that they have achieved already on the project is 15.5 percent. And this was very surprising to me, and the WBE is 16.9 percent. Now these two buildings are both high-rise courthouses, one financed with the federal government and one financed by the City of Phoenix. Both high-rise, both garages underground, both jailhouses underground, very similar in construction. Many of the same subcontractors are working on both projects. Now, we have completed the project with [Name] with the City of Phoenix, but we have not yet started with the one on the federal building yet.

Hearing Officer: Let me ask one follow-up question. On the project [Name] received the bid, I think the state courthouse.

MBE: Criminal Justice Facility, City of Phoenix courthouse.

Hearing Officer: The municipal courthouse, what were the goals on that project?

MBE: The goals on that project were five percent for MBE, two percent for WBE. And I want to leave these documents for the committee so you can have them for your records.

Panel Member: I have a couple of questions. Are you suggesting that on federal projects where there are higher goals that those goals are being met as opposed to the City having the small goals, they still don't meet the small goals? So you think if the goals are increased, that's a better opportunity to at least try to meet them?

MBE: Absolutely. The federal government has basically got a minimum of 10 percent, and it is met at all times, and the reason why it is met is because there's no waiver for that. If a prime contractor bid on a federally funded project, submits a bid and doesn't come in with 10 percent, his bid is not read. His bid is not recognized, and he will not be awarded the contract.

One certified WBE that performs asphalt paving described a specific incident on a Sky Harbor Airport project in which the prime contractor misrepresented to the City that the WBE would do a level of work that exceeded the goal, but in actuality allowed the WBE to do only the level of work that met the minimum amount of work to satisfy the goal. This WBE has received 15 subcontracts over the last five years. Clearly, the WBE was willing and able to perform. The owner related the incident as follows:

WBE: On the airport job we had went in to do more work, and we ended up having to, we ended up just getting the paving off of it when we were going to do additional work just so that they could meet the percentage that they had to obtain the contract.

Interviewer: Who was the general?

WBE: Who was the general? I don't want to give that name. . . . I mean, it was another general contractor that utilized my certification as a woman-owned business. We had went in with certain additional work and then they just cut us back right to the percentage that they needed in order to get the job.

The above example illustrates the point made by a number of MBEs and WBEs that

the process of setting goals appears to them arbitrary and limits the level of MBE and WBE participation. MBE and WBE owners perceive that the City's participation goals are too low.

Further, goals appear to be arbitrarily set and waivers granted when perhaps it was not necessary to grant a waiver. As a result of the personal interviews and testimony at the public hearing, MGT concluded:

- M/WBE participation goals are set without a realistic assessment of availability.

5.5.3 *Racist and Sexist Attitudes Toward M/WBEs*

Both minority and women business owners alleged that they have encountered hostility, prejudices, and sexism from City officials and majority business owners. Often M/WBEs are stereotyped as incapable of providing quality goods and services. These attitudes create feelings of frustration with M/WBE owners and serve as barriers for M/WBE participation with the City of Phoenix in contracting and purchasing.

In personal interviews, several MBEs and WBEs indicated they had negative experiences on job sites. The business owners described hostile experiences that made completing a project difficult. An African American business owner described overhearing racial epithets while on a job site. He stated that when a "quick fix" (on equipment) on the job had to be made in order to finish the job or until the equipment could be removed off the job and onto the yard to make the proper repair, he heard statements referring to the repair as "nigger-rigging" the equipment. He stated, "You overhear this stuff and then you have to deal with it internally. Well, are you going to say something, are you going to address this, or act like you didn't hear this or what are you going to do? You're stuck with it the rest of the day."

In a personal interview, one African American owner of a company providing security officers and investigative services discussed a problem he had on a three-year contract with the Aviation Department, which began in February 1998.

[T]hey were just giving us a really hard time. We had some racist people out there. My company is predominately black, and we had black employees out there, and they were just mistreating them, very discriminatory, talk down at them. It just created a tremendous communication problem.

He feels the City has discriminated against his company and listed several individuals and entities to whom he reported the incidents of harassment in a formal complaint. The owner recounted the incidents of discrimination:

They were very rude, very discriminatory. We were working out of booths. They would lock the guys, lock my guards out of their booths. They were making accusations that they weren't doing their jobs, when in fact they were doing little things to hamper them from doing their jobs. Then they would go run and complain like, 'The guard here is not doing his job.' Or, 'I came to the booth and the guard wasn't there, I couldn't see where the guard was.' They don't say, well 15 minutes ahead of that they locked the booth where the guard couldn't get in the booth, and the guard's trying to figure out how to get in. But then they'll say, the guard was away from the booth so I locked it. It was crazy, it was just little things that they were doing, and I really believe it was a manipulative effort to try and run us off.

In the public hearings, female business owners recounted experiencing stereotypical attitudes and a general atmosphere of disrespect. A WBE owner of a construction company testified concerning a threatening phone call she received after being on a television interview about a construction job. She stated, "I received threats advising me not to back minorities and stay in the kitchen where I belonged or else." She encounters other inappropriate comments regularly.

On a daily basis as a woman contractor I have to defend my right to be in my position. . . . I've lost many contracts as a result of owners not wanting to deal with a woman, they ask for the man in charge; the mentality exists that it takes a man to do this type of job. They happen on every single job I've had some kind of controversy, either the general contractor or fellow subcontractor, even sometimes employees because it is hard being a woman out there on the highway and building jobs in the City of Phoenix. . . . [T]hey don't respect you as well.

A certified Asian MBE supplier of marble and tile expressed how prime contractors avoid or decline to do business with him because of his accent. He has attempted to do business with the City and has received contracts during the period of this study. He is

willing and able to supply marble and tile on City projects. He described the environment in which he works through the following incident.

MBE: One time I get a bid request, I called and asked a question they kind of just like hang up the phone on me, so I didn't bid the job, because I didn't know what they want so how am I supposed to give them numbers.

Interviewer: You don't remember who the person was?

MBE: No, but that happened one time.

Interviewer: When did that happen?

MBE: Last year.

Interviewer: Someone just hung up on you when you had questions.

MBE: Basically, it's just like, I don't know what he's saying.

Interviewer: Because of your accent is that what they said?

MBE: Probably, I don't know, I always talk nice. I call and say I have this bid request, and I need to know what's the scope of work; they kind of just, hello, put me on hold, long time, and then I just hang up.

Interviewer: You hung up or someone hung up on you.

MBE: Both ways, because I don't know, if I'm still on, they say hold on, but if you wait at least 10 minutes, it's long time, I put on speaker phone while I'm doing something else: then to a point it becomes disconnected. Maybe I should call again. It not normal.

A certified African American female paint contractor stated that she experienced discrimination on the basis of gender in 1997 from a prime contractor. This MBE has bid on a number of contracts with the City of Phoenix both as a prime contractor and as a subcontractor. In this particular instance, she stated:

MBE: . . . I had the woman thing, the discrimination against women, they couldn't believe that I could handle what I needed to do on that job.

Interviewer: How long ago was that?

MBE: First part of 1997.

Interviewer: And what exactly happened?

MBE: We were doing some work on a hospital, no I was going to get info, there were questions. We had bid on some plans and I went into the office, and the gentleman asked me do you even know how to read plans. And I was like, okay, yes I do . . . he wouldn't have said that to my husband I know he wouldn't.

WBEs allege that they are still treated differently by prime contractors even after they have demonstrated over a period of years that they are willing and able to perform jobs satisfactorily. The owner of a certified WBE described a specific incident in her interview that reflected this negative attitude toward WBEs.

I had been challenged on one job. We'd worked with this one general contractor and since I had gotten a divorce and we had two of the contracts pending with them and I had a project manager point blank they held a meeting when they found out that my ex-husband had not had anything to do with my company before it was completely mine, started by me and challenged me that if . . . I didn't think we could perform the work on the next project that we would not then have the contract which had already been discussed. We had already pulled permits for the following contract, and I told him yes I did and I had my foreman, he's been with me for sixteen years, and I was completely floored. I was devastated that that contractor that we dealt with two years on that had even did that to me.

The owner of a certified WBE marketing and public relations firm stated that she was approached by a majority firm to be a WBE front for that firm around 1994 or 1995. This WBE bid on 10 prime contracts over the period of the study and was awarded three contracts. She continues to be willing and able to provide marketing services on her own. Regarding being asked to be a front for a majority firm, she stated:

Interviewer: So you've had companies approach you with that?

WBE: Yeah, they need a woman. They need a woman or they need a minority, they need that certification piece, but they don't really need my company for anything other than my certification. I'm not interested and I've never done it. . . . It's not like I'm doing anything, but I've had companies call me.

Interviewer: Do you remember any of those companies?

WBE: No, it's been awhile, I haven't had any of those in quite a while.

Interviewer: Was that between '93 and '97?

WBE: Yeah, but it was more like '94, '95 when that happened.

A Hispanic MBE owner of a marketing group, first commented on the City's certification process and stated:

I have never worked so hard to be called disadvantaged, but to this point I never felt that I needed to be certified to win a contract. I've been in my own business for 25 years, and I have had my own business for the past 10 and we've been able to win contracts without that label. I think at this point it served more as a detriment than a help.

She further testified about a problem she experienced in the City's RFP selection process for the Sky Harbor terminal advertising program. When her company was denied the contract, she appealed the decision and contested the grading system used in awarding the RFP. Concerning this appeal, she stated:

[O]ne of the Airport Committee Members, and this was a comment that was made before one of our councilmen, in asking how the decision was arrived at, they said they chose the other company because they were not about to award a contract of this size to a bunch of DBEs. Now, whether that was a racial or whether that was because of gender, I don't think that's the issue. I think the issue was that it was because of the labeling of DBE.

Overall, this WBE believes that the DBE label has had an adverse effect on her company, specifically, one of "tokenism."

WBE: [W]hen we were before the review committee, one of the participants asked, well, as a DBE, do you think you have the ability to provide marketing for the airport? Like I said, I've been in business in marketing for 25 years, I would not have a problem feeling I was qualified. Were they questions of merit or were they questioning the fact that we were a DBE because when they asked the question, they asked the question as a DBE if you feel you can perform.

Hearing Officer: Staying on that point, is it your testimony that there are certain presumptions that attached to the label DBE that didn't attach to you prior to you receiving that designation?

WBE: Yes, one of tokenism.

Hearing Officer: Are you saying the process rejected you because they did not want to have women or minorities as prime contractors?

WBE: One of the notes that we acquired from comments made by the airport staff was questioned - and this was a note provided by the review panel - they questioned the ability of the DBE to perform the job. And they didn't question the ability of [name]; they questioned the ability of the DBE.

In a personal interview, one WBE owner of a trucking company also discussed a problem she had with back charges from a prime contractor. Her company allegedly did not supply proper trucks, and the prime contractor asked her to pay for additional trucks that were on standby to perform a certain portion of the job. She did not report the incident and she did not contest the back charges with the prime contractor because she did not have the money to fight the company. As a result of the back charges, her company received approximately \$5,500.00 less than the amount they were to receive according to the original contract. She indicated that, like other small contractors, she was intimidated by the size of the company in this situation.

She also suggested that the City investigate two prime contractors, [names provided] concerning subcontractor payment issues.

The contractor we were working for, we bid with them, and was awarded the trucking portion of it. It was for [name]; and at one point, we were called to haul wet cement, which we had not contracted to do in the first place. We were gonna be working directly for the [company name]. So, we did work for them. As a result, we got out there and a lot of the trucks, since we didn't have belly dumps in the first place, which everybody knew, so we had to take them on, the owner/operators as ours, like we were leasing the trucks and we had as the drivers were our employees. So, we paid their workman's comp. Anyway, it was a big mess for us. . . . [Name] is such a large company anyway. They faxed over a contract for me to sign with them, but we had originally got the trucking through [name]. So, how [name] came into this I'll never know. Well, I signed, actually a proposal. [name] came in when we got ready to haul the concrete. Prior to that, our contract was with [name]. And then as a result though, [name] ended up docking us because they said they would order like 15 trucks. I told them, 'We cannot. We don't have any control over these trucks.' Cause they'd go out there, then the trucks would be leaking. And they'd say, 'Well, this one's gotta go home. That one's gotta go home.' They back charged us an enormous amount. We had right at \$60,000.00 coming from them. To begin with, when they got through back charging us, we had maybe \$10,000.00. Needless to say, I just about had a second heart attack. So, I went over and met with the [name] and the end results was they finally said they would settle for just charging us \$5,000.00 and something. Then, we had used all of these other people's trucks. So, then we had to go down and do the same thing to them. Whatever we were charged. I mean we couldn't have paid them that because all we made, really was seven percent on that portion of that job.

And I pulled in an attorney at that point with the [name] and they threatened me with everything. They said, 'We have 14 attorneys on our payroll day to day to day that are just waiting to get a hold of you.' And so, I think I was kind of, very much intimidated.

On the basis of the interviews and hearing testimony of the MBEs and WBEs, it is the perception that sexist and racist attitudes still persist in the contracting environment within the City of Phoenix. These attitudes carry with them negative assumptions about the capabilities of minorities and women. More importantly, such assumptions have a negative impact on the contracting opportunities for minorities and women. Therefore, as a result of the personal interviews and testimony at the public hearings, we concluded:

- The hostile contracting environment perpetuates racial and gender stereotypes and ultimately discourages M/WBE bidding.

5.5.4 Barriers Faced by M/WBEs

Bonding and Financing

Obtaining financing and securing bonding are often difficult for small, minority, and women-owned business. Five of the speakers at the public hearings testified concerning bonding or financing problems. One MBE, an Asian/African American woman, stated that because her businesses are so small, bonding is a problem that prevents her from bidding certain jobs.

One Hispanic MBE in the construction industry testified that bonding and financing issues have also prevented him from obtaining jobs. Specifically, he stated:

When you are asked to bid a job and really you have no chance to get the job or a part of that job because number one, you don't have the funding to carry the job; number two, you can't acquire the bonding; and number three, the job is way out of your league. As a new business, not having the background of the funding, the banking, all this to go with. I'd like to see the City of Phoenix increase minority programs that will allow us to participate in a fair manner.

Further, he concluded that without the financing to start the business and a financial history, it is difficult to even be afforded an opportunity to do business and stay in business.

Prime contractors have told him to contact them if he needed assistance in acquiring bonding and they might be able to assist him. He reported that he recently did contact the contractor on a project regarding bonding and the contractor informed him that it would be more helpful if he could acquire his own bonding.

One WBE owner of a construction company felt that bonding and finances have been obstacles for her. When she started her business, she related, it was very difficult.

We could not get a line of credit. The banks would not give us a second look. Bonding was out of the question. Lending bids was a frustrating experience. It was an extremely difficult and demoralizing time.

As a general contractor trying to obtain jobs, even after being certified, she stated:

I still had the problem of bonding and financial wherewithal. The only way I could get bonding was through personal surety, and now that's not allowed in the City of Phoenix.

Overall, the size of most City jobs prevents her from bidding as a general contractor because she cannot financially afford to do the project.

At one of the hearings, an MBE who operated a small business for 27 years gave relevant testimony concerning the bonding issue.

It was interesting every time we had a situation with a bonding requirement, it was a double-edge sword. Very difficult, even though we had a banking relationship and we had access to a bonding company, it was Catch 22. If you got the bonding, typically the prices you had to pay for the bond oftentimes knocks you out the saddle with the bid because the competitor was possibly able to pick up the bond at a lower rate. . . . [I]t got to the point where if it is a contract with the city, county, or state that had a bonding situation, we began to shy away from the business because it was a lot of work up front with no return on the investment of time. . . . [E]ven if a lot of these folks are not being able to get a bond, oftentimes when you do, the cost of it will knock you out of the bidding.

Clearly, bonding and financing issues present obstacles for minority and women owned businesses in contracting with the City of Phoenix, which ultimately prevent the financial growth of MBEs and WBEs and exclude these businesses from larger contracting opportunities.

As noted in Exhibit 5-2, the average existence of M/WBE firms is less than 10 years; whereas, 55 percent of the non-minority firms have been in existence more than 20 years. Accordingly, it is not surprising that financing and bonding requirements are much more difficult for MBEs and WBEs to meet.

Slow Payment

Slow payment by prime contractors often works a disproportionate hardship against minorities and women and is a barrier inhibiting M/WBE participation in City contracting and purchasing. Several businesses have had to initiate lawsuits concerning City projects. One Hispanic MBE owner in a personal interview discussed four lawsuits he has filed against prime contractors, all for nonpayment.

MBE: Absolutely, try sitting in a meeting, and they're looking at you, while you have all financial factors, you're wrong. Well the bottom line is, if the prime was paid 99 percent, and I was only paid 80, all the facts are there. And you're perceived as being stupid and non-educated, and non-reliable, so the perception is reality. We come off as a troublemaker, or combative, or hostile.

Interviewer: What do you do when you experience these problems?

MBE: We have to challenge them in a meeting; we call [City employees], and we'll say we're going to take this on, we're going to do it, but then you have them in the back door saying no, you know, they might be right, then not conduct any meeting. Then we're stranded, alone, fighting our own battles, which we don't have a problem doing at all, the City will tell you. Then we have to divert to additional costs, and we'll just take them to an attorney, and that's an additional expense to us.

Interviewer: How many times have you had to take legal action?

MBE: Four times out of our 20 contracts.

Interviewer: Can you explain what those situations were, and why you had to retain an attorney?

MBE: Non-payment, every time it's been non-payment.

Interviewer: Did you receive payment?

MBE: No, they're still pending.

An African American MBE owner who has been in the construction business in Phoenix for 22 years, testified in a hearing that City staff need better enforcement regarding payment of minority contractors. "That's a very sensitive issue when the guys don't get paid. And we've suffered that many times. It is either slow pay or no pay." As a minority subcontractor on the City project involving the Criminal Justice Facility, the City's new courthouse, this MBE is experiencing problems with slow payment apparently as a result of change orders.

It has been a year now. That is there by [name] as prime contractor. The bid amount was like 45 million dollars, but it has exceeded that greatly at this point. I understand last week there was over 6 million dollars in changes and corrections. The City will have to pick up that tab. Now, the problem I'm having on that project is the slow pay not only by the prime contractor but the City of Phoenix also. The City of Phoenix has a project where the prime contractor can't get paid; the subcontractor can't get paid. The reason why is because on change orders and any additional money the City don't meet but once every three to four months to decide those issues, and we've been finished with the project for two months. We have completed the project, and we haven't been paid, and the reason why is during the summer the City Council takes a break, and they don't meet to decide these change orders.

The owner of a certified WBE trucking company that received a significant number of subcontracts on City projects, discussed the City's treatment of WBEs and said that for several years they experienced difficulty in getting paid. She stated:

Back in '93,'94,'95, you know. Most of the time we would eventually get paid, but it would be whenever they darned well felt like it. Or, they would spend your money on maybe buying more equipment or whatever and then when they maybe got monies two or three months down the road of an entirely different job they'd pay you. So, that was one complaint I used to have. That they would not guarantee us, even though we would go ahead and file our liens. So, the City of Phoenix knew that we were trucking on that job. They would not discuss it with us or they would go ahead and pay the general without obtaining waivers from us. So, having the general in other words, pay us, get the waiver and so on and so forth. So, that was a complaint I had. Not so much now.

Bid Specifications

Bid specifications on goods and services procurements often give an unfair advantage to majority contractors who have worked with the City over an extended period of time and

perpetuate the perception of the “good old boy network.” Several business owners complained that bid specifications were drafted to require a specific brand of product to be used. Several owners indicated that the cost of obtaining the specific brand precluded them from bidding competitively. Further, owners reported that requiring a specific brand tends to favor the City’s current supplier of that good or it favors large companies that can purchase the required good at a discounted price. The following are examples of the effect of drafting bid specifications in this fashion.

During a personal interview, an African American business owner stated that he did not intend to re-certify with the City. He expressed frustration with the requirements the City imposed on businesses attempting to provide supplies. Specifically, he stated:

I didn’t see any advantage in certifying with them . . . in my field, the computer field, the City has chosen to buy only this type of system and to break into that industry, the company that they buy from wants you to have a store front, whether you can support their product or not, in order for you to even say you are authorized to sell or work on it. So you can’t break into the market. It is a locked market . . . The only way that I can actually bid on the contracts is to go through basically a retailer. If I have to bid at a retail price then I am automatically non-competitive.

A former MBE owner testified that bid specifications were drawn more favorably to his competitor.

MBE: [O]ftentimes you get into a potential RFP or contract that you would go through the diligence process and the waiting process of the award, and we would see that there were different things that would happen through that process that would impact evaluation on the final outcome. I’m talking about - I’ll give you a specific case in 1995, a large major project for the new City Hall. Specifications for that bid was specified to the specifications of my competitor’s line of furniture, which had to do specifically with the issue of cabling, and we had to have a customization to our furniture line in order to meet the specification. And by virtue of having the alteration, it drove the price of our product up where we were not on a level playing field with the competitor there. So there can be a specification that truly impacts and doesn’t allow you to be on level playing field. I think that’s an important issue.

Hearing Officer: Have you seen that on any other occasion where the specifications were drawn more favorable to your competitor?

MBE: Have I seen it outside of that particular instance? That one had the most effect on me. And we see it a lot in the commercial end of the business. In fact in that particular case we brought in - we went into an arbitration. We brought in specialists, City specialists, and it was interesting. We went into arbitration, and the electronic specialist who are far more educated in the area of distribution of power and cable and communication cable, they talked very specifically about how it was too much, too much capacity for the requirements of the City bidding the number of cables into it. And we went through the process, had a retired judge listen, shook his head, and ultimately ruled in favor of my competitor.

Hearing Officer: Was your competitor a majority person?

MBE: Yes.

5.5.5 Continuation of the M/WBE Program

Concern has been expressed regarding the impact that discontinuation of the M/WBE contracting program would have on minority- and women-owned business contracting with the City. Several individuals, including minority and women business owners and City officials, stated that discontinuation of the City's program would result in greater underutilization of minority- and women-owned businesses. The belief is that without programs requiring utilization of minority- and women-owned businesses, the contracting environment in Maricopa County is such that minority- and women-owned businesses would have even fewer contracting opportunities than they presently have. Minority business owners cite negative treatment by prime contractors in the private sector as examples of how M/WBEs are treated when no goals are required and no monitoring of M/WBE participation is provided.

An African American owner of a janitorial business described an incident he experienced approximately one-year ago bidding in the private sector.

I bid on a job with [name] and I was like number three out of 21 different companies, and they called me in for an interview. After the interview, they selected two other companies to take care of their facility, and they said I didn't line up with their philosophy, so I couldn't understand that. Ever since then I've been doing research to try and find out what they mean by 'their philosophy,' trying to get some idea so the next time I bid, maybe I'll fit . . . Define philosophy; we're there to clean and so I could prove I could handle

that type of job from employee to management support, to financial equipment, everything they needed for me to perform, I could provide, so what is philosophy?

When asked whether minority businesses would be given the opportunity to demonstrate their abilities if the City did not have this program, the same contractor said:

No, it would be much tougher, knowing the environment, the 'air' here in Arizona. It's kind of spoken, it's more or less demonstrated for the most part, if you're black or minority and there's a white company out there, that's where the job's going to go, and I'm saying that if you didn't have the government intervening and laws that were set up to help treat minorities fairly . . . we wouldn't get nothing . . . there is not a clear cut case of somebody saying 'we're going to discriminate against that guy' or whatever, but they go out of their way to do things to make themselves justify what they're doing to you and to me. It's there, and I've had to dig my way out of holes because of just wanting to work. I just want to work.

A WBE owner of a construction company, testified in a public hearing:

I get a lot more respect now because I've been in the business a long time, for 10 years with the City of Phoenix, and I've earned that respect. And I don't have the problems I had when I started out, I will grant you that, but I still dare say that if the program ended, I still would not get a phone call. It would go back to the good old boy network. . . . Typically when I bid on jobs, when there are goals, I have tremendous response and contractors have broken down jobs for me, given me pieces, different types of trades, so they have really helped. But without the program, they are not interested.

The WBE continued,

The M/WBE programs by the City of Phoenix and ADOT were the only reason we survived. We were working very hard to become independent of the programs but still derive a large portion of our contracts from them. Without them we couldn't survive. . . . When the COP [City of Phoenix] eliminated the goal program because of the Croson decision, all of our building came to a halt. We bid all the projects and did not get a response. . . . When the goals were lifted, I could not get a call back . . . [W]e are all taxpayers and we deserve a portion of the City contracts. The City of Phoenix goals program gives women and minorities an opportunity to participate.

A WBE owner of an advertising and public relations agency, expressed in a public hearing that discontinuation of the program would have a great impact.

[T]here still is . . . unawareness among minority businesses that the program exists. . . . [T]here are still a lot of minority businesses that do not have the information about the program, and it would benefit their small business as well as the City if they were contacted and knew about the

program. If the program was discontinued, it would have a severe negative impact on my business and other women-owned businesses and minority businesses.

In a public hearing, a WBE owner spoke on her own behalf and on behalf of the National Association of Women Business Owners. When asked what would happen if the program ended, she responded, "I think it would be devastating. I think it would go back to [the] era of the '60s and '70s where we had to fight to get the contracts."

An Asian MBE owner who has been in business four years, stated in a public hearing:

[I]f it wasn't for the MBE program, I probably wouldn't be here today as a business owner. It gave me the opportunity to do business with the City of Phoenix, and I would have to say the first three years we were on a lot of proposals basically . . . to fulfill the requirements. It was usually 10, 15 percent of the proposal was based on . . . minority participation. I would have to say the last year it . . . is probably more like 50 percent.

The MBE corrected this statement later in her testimony and said that actually closer to 90 percent of the jobs she received were attributable to her certification status. She continued:

Now we are basically selected because we do qualified work. I would really be sad if the program went away. I think it would be a disservice because it does give you the opportunity to start the business and to prove we can do qualified work.

Based on the above findings, absent the City's M/WBE participation program, the level of M/WBE participation in City purchasing and contracting activity will decline.

6.0 SUMMARY, FINDINGS, AND RECOMMENDATIONS

MGT of America, Inc. (MGT), in association with Fields and Brown, Attorneys at Law, conducted a Second Generation Disparity Study for the City of Phoenix. This summary describes our methodology, findings, and recommendations.

6.1 Study Background

The study's ultimate objective was to determine whether there is a compelling governmental interest in continuing the City's M/WBE programs in procuring construction services, general services, and commodities under the guidelines established by the U.S. Supreme Court and other relevant lower court decisions. A key component of the study was to determine: the level of minority- and women-owned business participation that exists in the City's contracting and purchasing; the number of firms available (by race and gender) to provide goods and services; and, whether the evidence supports affirmative action under the applicable legal standards.

MGT designed and implemented a methodology to incorporate the guidance provided by courts. Our primary tasks included conducting a legal analysis of relevant legal opinions; analyzing City ordinances, policies, and procedures relating to M/WBE contracting; analyzing M/WBE utilization for the period January 1, 1993, through December 31, 1997; determining M/WBE availability; calculating disparity; analyzing anecdotal data from public hearings, personal interviews, and phone surveys; and developing findings and recommendations.

6.2 Legal Analysis

Key points from relevant court decisions reviewed in this report are as follows:

- (1) In *Croson*, the United States Supreme Court determined that strict scrutiny is the appropriate standard of judicial review for race-conscious affirmative action programs.
- (2) Intermediate scrutiny applies under the equal protection clause to government-imposed gender preferences in awarding contracts. This standard requires that the government entity demonstrate the gender preference is substantially related to an important governmental objective.
- (3) To withstand strict scrutiny, an MBE program must be based on a compelling governmental interest and must be narrowly tailored to achieve that interest.
- (4) The Ninth Circuit identified two factors necessary to establish a compelling governmental interest: (1) identifiable discrimination has occurred within the local industry affected by the program; and (2) the governmental entity enacting the race-conscious program must have caused or indirectly perpetuated the discrimination to be remedied by the program.
- (5) While the Supreme Court did not specifically define the methodology that should be used to establish the evidentiary basis required by strict scrutiny, the Court did conclude that evidence of significant statistical disparities between minorities utilized and qualified minorities available satisfies strict scrutiny and justifies a narrowly tailored M/WBE program.
- (6) Under *Croson*, availability is determined by the number of qualified minority contractors willing and able to perform a particular service.
- (7) *Croson* also recognized the use of statistical comparison to measure disparity by comparing the number of available M/WBEs qualified to perform certain contracts with the amount of City contract dollars actually awarded to M/WBEs.
- (8) Anecdotal evidence is most useful as a supplement to strong statistical evidence. This evidence alone is rarely, if ever, enough to demonstrate a sufficient systematic pattern of discrimination necessary for a governmental entity to adopt an affirmative action program.
- (9) To justify a goals program based on race or gender under the Constitution's equal protection clause, a local government must demonstrate that it has historically discriminated against particular race or gender groups and/or it has become a passive participant in a system of racial exclusion practiced by local contractors.

- (10) According to the Ninth Circuit, a narrowly tailored MBE program must meet three requirements: (1) the program must be instituted either after, or in conjunction with, race-neutral efforts to increase minority business participation in public contracting; (2) the use of minority participation goals must be set on a case-by-case basis, rather than as part of rigid numerical quotas; and (3) an MBE program must be limited in its effective scope to remedying discrimination within the boundaries of the enacting jurisdiction.

6.3 Methodology

6.3.1 Review of Contracting Policies, Procedures, and Practices

Relevant City policies, ordinances, operating procedures, and manuals were obtained and reviewed. Policies and procedures affecting the three business classifications of the study were analyzed. Interviews were conducted of City management and staff regarding the application of policies, discretionary use of policies, exceptions to written policies and procedures, and their impact on key users. Interviews were also conducted with external users to determine the impact of City policies on firms conducting or attempting to conduct business with the City.

6.3.2 Statistical Analyses

MGT collected and analyzed data for City prime and subcontractor construction contracts, and purchases for general services and commodities between January 1, 1993 and December 31, 1997. The study included the following race and gender classifications: African American, Hispanic American, Asian/Native American, non-minority women, and non-minority men. After interviewing City staff to identify the locations of contract data and purchasing records, a data collection plan was developed. Contract records were reviewed from the Engineering and Architectural Services Department and the Materials Management Division of the Finance Department.

Relevant Market Area. The overall market area is all counties in which the City spent or awarded contract or procurement dollars. For the purpose of the statistical analyses, the relevant market area was defined as those counties where the City spent or awarded 75 percent or more of the total dollars awarded over the study period, determined separately for each business category. The relevant market area establishes the geographic boundaries for the utilization, availability, and disparity analyses. After analysis of all contracts, the relevant market area for each business category was established as follows:

- Construction – Maricopa County, AZ
- General Services – Maricopa County, AZ; Los Angeles County, CA; Cook County, IL; and Rock Island County, IL
- Commodity Purchases - Maricopa County; AZ

Subsequent data analyses were based on these counties for each respective business category.

Utilization. After the relevant market area was determined for each business category, firms within that relevant market area were identified as M/WBE or non-minority firms. From this analysis, utilization of M/WBEs and non-minorities was determined. MGT calculated the percentage of dollar amounts awarded or paid to each group within the relevant market area for each fiscal year of the study period by business category.

Availability. To determine the number of firms available in the relevant market area, data collected by the U.S. Bureau of Census were used. The data have been objectively derived free from race/gender biases that might affect the relative percentages of firms in the different M/WBE categories, thus, producing a reliable count of potentially available firms by county and industry.

Disparity. A comparison of utilization and availability by each M/WBE group is the foundation of the disparity analysis. The measurement of disparity is presented in

the disparity index. A disparity index of 0.00 indicates no utilization. Conversely, a disparity index of 100 indicates parity. Parity occurs when utilization equals availability.

6.3.3 Anecdotal Analysis

After performing the statistical analyses and determining the existence of substantial disparity, MGT determined that a *prima facie* case of discrimination had been established. According to case law, once a significant disparity is shown, an inference of discrimination arises. To support findings of statistical disparity, *Croson* and subsequent cases require that anecdotal research tie the disparity to discriminatory practices in the market area.

Anecdotal information was collected to investigate possible discriminatory patterns in the market area. By utilizing multiple techniques, we were able to achieve results superior to results dependent upon any individual research technique. Our approach for gathering anecdotal data included:

- Public Hearings
- Personal Interviews
- Phone Surveys

Public Hearings. Two public hearings were widely advertised in the *Arizona Republic*, M/WBE publications and through announcements to M/WBE and non-minority business and trade organizations. Each public hearing provided M/WBE and non-minority business owners the opportunity to testify to their experiences contracting with the City of Phoenix or prime contractors working on its behalf. Participant discussions focused on experiences with the City, M/WBE program issues, participation barriers, and opportunities for improvement.

Personal Interviews. Sixty-nine confidential personal interviews were conducted with business owners in Maricopa County, Arizona. All interviews were conducted using a personal interview guide. Each person completing an interview was required to

acknowledge by signature that the recorded responses accurately reflected the participant's responses. A content analysis of interview responses was completed identifying key factors related to attempts to conduct business with the City, experiences with prime contractors and obstacles in the business community.

Telephone Surveys. Using vendor databases obtained from the City, a survey of 346 firms was conducted. To obtain the completed surveys, a total of 12,252 phone calls were randomly made to firms taken from the vendor databases. Survey findings for white male business owners were used for demographic information. Data sample sizes for M/WBE groups were not sufficient to analyze.

6.3.4 Conclusion

Although the City has improved M/WBE participation since the 1993 disparity study, there still remains significant disparity between the utilization and availability of M/WBEs.

MGT **concluded** the following:

- (1)The results of the statistical analysis in Chapter 4 support a finding that available M/WBEs in the relevant market area are significantly underutilized and have encountered significant levels of disparity and discrimination.
- (2)The results of the anecdotal analysis in Chapter 5 support a finding that the City has been:
 - A passive participant in discriminatory practices against minority- and women-owned prime contractors in the construction industry;
 - a passive participant in discriminatory practices against minority- and women-owned subcontractors in the construction industry; and
 - a passive participant in discriminatory practices against minority- and women-owned general services and commodities vendors.
- (3)Significant statistical disparities found in Chapter 4 and supporting anecdotal testimony found in Chapter 5 compel an inference of discrimination sufficient to support the **continuation** of a race-based remedial program.
- (4)The City should establish a new Small Business Enterprise (SBE) goals program for construction subcontractors, general services firms, and commodities vendors.

FINDINGS AND RECOMMENDATIONS

Based on the findings below, MGT developed recommendations addressing the City's M/WBE programs. Implementing the following recommendations will assist the City in designing a remedial program that is narrowly tailored.

6.4 Findings and Recommendations

Finding 6.4.1:

After interviewing City officials regarding implementation of the 1993 ordinances, it did not appear the City officials had established annual participation goals as required in Section 18-104. Furthermore, the ordinances do not provide a mechanism for determining if the price preference program is eliminating the disparity between utilization and availability. Although the City has made some improvement in its contracting with M/WBEs since the 1993 disparity study was completed, significant levels of disparity and discrimination continue to exist in City contracting.

Established annual participation goals will assist the City in monitoring utilization levels of M/WBEs in both construction and the procurement of goods and services.

Recommendation 6.4.1:

The City should modify its M/WBE program and establish annual goals for each minority or woman group in the areas of construction subcontracting, general services and commodities.

- **On an annual basis, the City should review its budget and establish annual goals, in dollars and percentages, consistent with M/WBE availability, for each M/WBE group that has demonstrated significant disparity. Only M/WBE firms in the relevant market areas should be allowed to benefit from the program.**
- **The Goals Compliance Office and Finance Department should prepare quarterly reports tracking the overall participation of each M/WBE group that has demonstrated significant disparity on each project or contract in their department, and they should compare that amount with the annual participation goal.**

- The utilization of M/WBE groups should be calculated on the dollar percentage of all contract dollars awarded for each separate business groups.
- Annual goals for each ethnic group and women should reflect M/WBE availability as referenced in this report. The purpose of annual participation goals is to assist the City in monitoring the success of the remedial program. Currently, the City does not have a method of measuring where the M/WBE participation level is on the continuum between the current level of disparity and full participation (disparity index of 100).

Finding 6.4.2:

There are inconsistencies between Article VI, the enabling ordinance for construction contracting, and the draft procedure manual for setting M/WBE subcontracting goals. According to the draft procedure, goals are to be set only on the base bid. Goals are not set for any bid alternates. Article VI, however, refers to “project” goals, which could be interpreted to include alternates.

Recommendation 6.4.2:

Construction project goals should apply to the base bid and any alternates included as part of the project in accordance with recommended goals setting procedures.

- The Goals Setting Committee should set project goals on contemplated bid alternates for construction projects. Goals set on alternates should be established using the same procedure as those set on the base bid. If an alternate is not selected, the goal set for the alternate is not binding on the successful bidder.

Finding 6.4.3:

According to research observations and interviews conducted with members of the Goals Setting Committee and EAS staff, the goal setting process is too subjective and results in setting conservative goals that do not reflect actual availability.

Recommendation 6.4.3:

EAS, the Goals Compliance Unit and the Goals Setting Committee should develop a new method for establishing project goals. The new method should be more objective and should be based on actual availability.

- The method used by EAS staff should be more objective. According to interviews, the method used in establishing recommended goals has a subjective component. The EAS staff determine recommended goals by evaluating the extent of

subcontracting activity in various trade areas. A similar evaluation is then conducted by the Goals Setting Committee. The Goals Setting Committee should be provided with recommended goals that reflect total availability.

- The concern of EAS staff that goals must be reasonable and attainable is important because it satisfies the program flexibility requirement of *narrow tailoring*, but this must be considered with the goal of increasing utilization.
- EAS should reevaluate the current formula requiring the division of the goal percentage by four. Goals should be established based on availability of potential bidders.

Finding 6.4.4:

“Construction Bid Opening Procedures” and “Setting Minority and Women Business Enterprise Subcontracting Goals” currently used by EAS, the Goals Compliance Unit, and the Goals Setting Committee are in the form of draft Administrative Regulations. Neither policy has been finalized or formally adopted, although they are being followed as if they were currently effective.

Recommendation 6.4.4:

Administrative policies and practices should be finalized and properly adopted.

- EAS, the Goals Compliance Unit, and the Goals Setting Committee should modify both drafts to ensure compliance with the enabling ordinance. The drafts should then be formally adopted as administrative regulations.
- The 10 percent maximum MBE and WBE combined goal outlined in the draft policy on setting M/WBE subcontracting goals should be eliminated. The objective of the subcontracting goals program should be to increase MBE and WBE utilization to reflect availability. Since certain types of projects do not have any or low participation goals, the Goal Setting Committee should have the flexibility to set goals higher than the annual goal on a project by project basis, if sufficient availability exists. For example, from information provided by EAS, the number of construction contracts with zero-zero participation goals is high. Approximately one in five or 20 percent of City construction contracts since 1993 have had zero-zero participation goals. By exceeding the annual goals when sufficient availability exists, EAS would increase the possibility of meeting the annual goals. This method will compensate for projects where low availability exists.

Finding 6.4.5:

City officials have the potential to set and attain higher participation goals in the construction industry. Of the over 500 contracts awarded since inception of this program, only 29 waivers have been requested. Additionally, on average prime contractors are exceeding the established goals. For example, a summary, report produced by EAS indicates that the required combined goals were 5.57 percent and the combined goals proposed by low bid prime contractors were 7.88 percent. The existing goals setting process does not sufficiently account for current M/WBE availability and if continued will result in inadequate goals that predictably fail to achieve sufficient M/WBE participation. With low project goals, the construction contracting program as structured results in low M/WBE participation at best.

Recommendation 6.4.5:

Project goals should be set higher to increase MBE and WBE participation.

- **The City should set higher, more challenging goals, in line with availability, in order to encourage prime contractors to solicit M/WBE participation more actively and more aggressively on all City projects.**

Finding 6.4.6:

One of the largest complaints during personal interviews and public hearings was that the current method of submitting bids encourages bid shopping. This observation was confirmed by staff of the Goals Compliance Unit and EAS. Written regulations governing the bidding process allow for bid shopping abuses by prime contractors. Use of the *Assurances Affidavit* encourages, if not increases, bid shopping.

Unlike prime contractors, subcontractor's price quotations are not set or defined at the time of bid opening. Accordingly, the apparent low bidder is permitted to bid shop among MBEs and WBEs over a 24-hour period. Because prime contractors are allowed to solicit bids during that 24-hour time period, MBEs and WBEs often do not have ample time to prepare bid responses. Additionally, MBEs and WBEs complained that prime contractors initially indicate they intend to seek a waiver but 24 hours later they are able to meet the goals.

Recommendation 6.4.6:

Prime contractors should be required to identify MBEs and WBEs and submit a utilization plan with their bid(s)—not the next day.

- **City officials should eliminate the 24 hours a bidder has to complete the M/WBE utilization form.**
- **By requiring all prime contractors to list all subcontractors proposed for a project, the City would collect accurate data on firm availability as provided in Recommendation 6.4.17.**

Finding 6.4.7:

As a policy for purchases under \$20,000, City Buyers are instructed to discontinue requesting quotations from M/WBE firms that do not respond to the City's request for quotations after two consecutive requests in a particular commodity or service area. There is no similar policy for non-M/WBE firms.

Recommendation 6.4.7:

The Finance Department should continue to request quotations from M/WBEs that do not respond to the City's RFQs after two consecutive requests.

- **The Finance Department should rescind the policy contained in a memorandum dated November 23, 1994 that requires M/WBE firms to be eliminated from bid lists if the firm does not respond to two consecutive solicitations.**

Finding 6.4.8:

Based on a review of documents provided by the Finance Department and personal interviews, the 2.5 percent price preference applied in the procurement of goods and services had limited success in increasing M/WBE utilization.

Recommendation 6.4.8:

The City should continue the price/bid preference program with modifications. Instead of having a non-flexible 2.5 percent price/bid preference, the City should establish a range and adjust the price/bid preference according to the City's utilization of M/WBE firms.

Finding 6.4.9:

M/WBE owners indicated that the size of a subcontract is sometimes a barrier to participation in City contracting. Owners complained that certain contracts are too large for their business to complete the required scope of work.

After interviewing EAS staff, Goals Setting Committee members, and M/WBEs, it was determined that prime contractors have a disproportionate impact on the level at which M/WBEs can participate in the construction contracting process. Under existing contracting procedures, prime contractors determine the scope of work on which M/WBEs may bid. Prime contractors that regularly conduct business with the City are aware of the capabilities of M/WBE subcontractors in the market area. Accordingly, by structuring the scope of work beyond the capacity of M/WBEs or limiting the scope of work to fit the City's participation goals, the prime contractor is allowed to control the level of M/WBE participation. This becomes particularly meaningful under the existing goals setting process because the levels at which goals are set are, in part, functions of prior bidding activity in a particular trade area.

Recommendation 6.4.9:

EAS officials should be more proactive in defining subcontracting trade areas in bid specifications to ensure that available M/WBEs are capable of bidding on more City projects. The subcontracting goals recommendation form should be modified to afford the City more input in defining bid specification subcontracting trade areas.

- The City should also consider providing bid preferences to businesses that opt to participate in a joint venture on smaller projects.

Finding 6.4.10:

Of the over 500 contracts awarded since the inception of this program, 25 waivers have been requested. Sixty percent of requests for waivers were either partially or fully granted.

Recommendation 6.4.10:

The City should compile a summary and analysis of the reasons given by contractors for waiver requests. The City should then address these reasons as policy, training, or self-improvement issues to increase MBE and WBE utilization.

- Providing contractors with a copy of the subcontracting goals waiver review form in the bid packet would help contractors realize the efforts necessary to demonstrate a good faith effort to solicit M/WBE participation.

Finding 6.4.11:

Since the City will be establishing race-specific goals, EOD must identify the race/ethnicity/gender certification of M/WBE firms to assist prime contractors in identifying potential subcontractors. The information gathered from this classification process should be used in developing quarterly reports.

Commendation 6.4.11:

EOD should be commended on its efforts to maintaining a well-run certification program. Most M/WBEs interviewed spoke highly of the attention that members of the department have given to M/WBE concerns. While several M/WBEs complained about the length of the certification application and the amount of documentation required, they also understood the need for such detail and found the application easy to understand.

Recommendation 6.4.11:

EOD should further divide certified MBEs and WBEs according to ethnic group and develop a Small Business Enterprise (SBE) certification process.

- **To assist in the development of an SBE program as discussed in Finding 6.4.15, certification parameters should be established and implemented.**

Recommendation 6.4.12:

EOD should move quickly toward one-stop certification.

One-stop certification for Maricopa County-based firms would create a larger pool of certified M/WBE businesses. Until that can be accomplished, EOD should continue to certify businesses for Maricopa County. EOD should also review the list of certified M/WBEs from the Arizona Department of Transportation (ADOT) to ascertain businesses on those lists that are not certified with the City, and encourage them to become certified with the City. Additionally, EOD should work with other certifying agencies in the consortium to establish a time line for moving toward complete reciprocity.

Finding 6.4.12:

In reviewing the certification directories prepare by EOD, businesses are not currently separated according to ethnicity and gender. Recommendation 6.4.1 suggests that the City establish annual goals for each minority and woman group; therefore, certification directories should separate businesses according to ethnicity and gender.

Recommendation 6.4.13:

EOD should separate certified MBEs according to ethnic group, and separate WBEs from MBEs.

- **Under each contracting category, certified firms should be divided according to ethnicity and gender.**
- **This breakdown will assist EAS staff and the Goals Setting Committee in setting project goals by facilitating the availability determination. It will also allow EOD staff to track whether certain groups are disadvantaged in the certification process, and whether there are certain groups that may simply not be aware of the certification process.**
- **Information gathered from this breakdown could be included as part of the needs analysis process for further development and utilization of MBEs and WBEs.**

Finding 6.4.13:

Arizona state law creates barriers to M/WBE participation as prime construction contractors by imposing requirements that limit the ability of M/WBEs to obtain contractor licenses.

Arizona Revised Statutes Title 32, Chapter 10 sets forth licensing requirements for individuals and organizations engaged in the construction industry. This statute requires licensure and bonding for a broad range of construction activities. As a condition of bidding public jobs, Title 34 also requires bonding at state prescribed levels.

Recommendation 6.4.14:

The City should petition the Arizona legislature to modify existing statutory requirements on contractor licensure and bonding. Such statutes should bear a direct relationship to the benefit derived from such measures.

The following recommendations are made in addition to the race- and gender-specific recommendations above.

Establishing a Race- and Gender-Neutral Business Program

Finding 6.4.14:

The current Small Business Assistance Program has limited impact on M/WBE participation in City contracting.

During the analyses of purchasing policies, procedures, and programs and anecdotal data, several areas of perceived discrimination were identified. Areas of perceived discrimination include the City's goal setting process, disparate treatment by City employees, non-minority contractors' bid shopping, and racist and sexist attitudes of City officials and non-minority business owners.

While *Croson* permits race and/or gender preference programs to remove statistical disparities and discrimination, it also requires the City to implement race- and gender-neutral methods.

As part of the 1993 City Ordinances establishing the M/WBE program, the City funded a Small Business Assistance Program (SBAP) within the Community and Economic Development Department. The City provided three full-time positions and operating funds to develop and implement a race- and gender-neutral program to help eliminate the disparities identified in the 1993 Disparity Study.

The SBAP consists of seven program components:

- First Point Information Center;
- technical assistance;
- consulting and counseling services;

- seminars and training;
- resource directories;
- financial assistance; and
- The Enterprise Community.

While these programs have some success, a service delivery tracking system is not in place to adequately measure the direct impact on M/WBEs. Many of the SBAP services are measured by the number of phone calls received or flyers distributed.

Further analysis of the statistical data show some improvement in the award of construction contracts on prime and subcontractor levels. The following table illustrates the minimal increase in M/WBE utilization. As shown, prior to the implementation of the M/WBE program, M/WBEs were used at a level of less than one half of a percent. After the M/WBE program was enacted, utilization rose to 2.96 percent. This increase in M/WBE utilization is primarily due to the construction subcontracting goals program and price preference program as shown in **Exhibit 6-1**.

Based on the data presented, the following race- and gender-neutral remedies are recommended.

Recommendation 6.4.15:

The City should establish a new Small Business Enterprise (SBE) goals program for construction subcontractors, general services firms, and commodities vendors.

The data presented in Chapters 3 through 5 clearly show evidence of gross statistical disparities and discrimination in the construction industry and continued systemic institutional barriers in the City of Phoenix. The City should reemphasize and in some cases implement new race- and gender-neutral methods to address identified disparities and discrimination. While the City has provided some small business assistance services, it is difficult to measure the direct impact of those services on small minority and women owned businesses. The City should develop and implement a Small Business Enterprise program to work in tandem with the current small business assistance programs.

The Small Business Enterprise program should include the following characteristics:

- Small business goals for construction subcontracts should be established to supplement M/WBE participation goals.
- On a case-by-case basis, considering availability and contract sizes, the City should reserve general services contracts and commodities purchases (non-construction contracts) for competition only among small businesses.

**EXHIBIT 6-1
CITY OF PHOENIX
UTILIZATION OF CONSTRUCTION SUBCONTRACTORS IN THE RELEVANT MARKET AREA
BY RACE, GENDER AND ETHNIC CLASSIFICATION
BEFORE AND AFTER M/WBE SUBCONTRACTOR PROGRAM**

STAGE OF SUBCONTRACTOR PROGRAM	AFRICAN AMERICAN		HISPANIC AMERICAN		ASIAN & NATIVE AMERICAN		NON-MINORITY				TOTAL	
							WOMEN		MEN		ALL CATEGORIES	M/WBE
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%
BEFORE PROGRAM 1/1/93-10/31/93	\$0.00	0.00%	\$105,260.06	0.21%	\$0.00	0.00%	\$127,532.56	0.26%	\$49,644,702.88	99.53%	\$49,877,495.50	0.47%
DURING PROGRAM 11/1/93-12/31/97	\$990,638.43	0.08%	\$23,049,938.51	1.84%	\$1,997,365.85	0.16%	\$11,062,806.47	0.88%	\$1,217,644,614.28	97.04%	\$1,254,745,363.54	2.96%
TOTAL	\$990,638.43	0.08%	\$23,155,198.57	1.77%	\$1,997,365.85	0.15%	\$11,190,339.03	0.86%	\$1,267,289,317.16	97.14%	\$1,304,622,859.04	2.86%

Source: Engineering & Architectural Services, Materials Management- City of Phoenix

- If the Arizona legislature amends public bidding laws in the future, the City should extend the SBE goals program to include construction prime contracts. MGT understands that current Arizona law prohibits the award of construction contracts using any factors other than the lowest responsible and “satisfactory” bid. The City should request the Arizona legislature to change public bidding laws.
- To provide technical assistance for small businesses, the City should create a supportive services program that has two goals: (1) introduce companies to the City contracting process as construction subcontractors and vendors on projects less than \$250,000; and (2) assist established businesses in expanding their ability to become qualified to compete for projects above \$250,000.
- The City should properly fund and staff implementation of the new SBE program, including program development, certification, and monitoring.

Regarding program eligibility:

- All participants should be in business in Maricopa County for a minimum of two years.
- Participants with a net worth less than \$750,000 should be classified as small businesses.
- Participants should not receive more than \$3 million over a three-year period under the program.

Recommendation 6.4.16:

The City should conduct a performance review of the existing small business assistance programs.

The City should conduct a performance review of the Small Business Assistance Program as managed by the Community and Economic Development (CED) Department to determine the effectiveness of this program. As part of the 1993 ordinances establishing the M/WBE program, the City created three positions in CED to assist in the development of minority and women owned businesses. In conducting this study, data provided by the City was inadequate to quantifiably measure the effectiveness of these programs. A performance review should determine the effect of the program on M/WBE firms and whether the benefits to M/WBEs warrant the cost.

Recommendation 6.4.17:

Improve the City’s collection and management of contract data.

It is imperative for the City to closely monitor the utilization of all businesses by race, ethnicity and gender to determine whether the small business program over time has the potential to eliminate race and gender disparities without specific race and gender goals. At this time, however, it does not.

It is also equally important to identify, for future availability analysis, the number of construction subcontractors available. Because the City does not collect this data, it is limited in the type of availability analysis it can conduct.

In order for the City to accurately monitor the small business program and assist the City in future availability analyses, it must collect and analyze the following data:

- The City should require *all* contractors to submit a list of all subcontractors contacted in preparation of their bid package. The list of potential subcontractors should include the proposed service, bid amount, and the race/ethnicity/gender of the business owner(s). The data will allow the City to accurately identify the number of actual subcontractors available.
- The City should record, as part of their purchasing vendor list, the date a vendor is added and deleted. By noting when a vendor registered with the City, the City can analyze the availability of registered vendors on an annual basis.
- The City should require that all contractors submit a list of all subcontractors utilized on a City project. This list should include all subcontractors (minority, women and non-minority) utilized, the total amount paid, and the race/ethnicity/gender of the owner. This comprehensive list should be required before the prime contractor's final payment for services. It is important to require prime contractors to identify *all* subcontractors utilized.

Recommendation 6.4.18:

Review and revise grievance procedures to include mediation and conflict resolution.

Some M/WBEs fear retaliation by primes or City officials if they express complaints or grievances. Thus, M/WBEs are reluctant to voice or file formal complaints or grievances. The City should consider mediation as a method of conflict resolution to follow up on verbal complaints. This method would emphasize win/win solutions without extensive documentation and encourage M/WBEs to report issues they may have with primes without fear of retaliation.

In the in-depth review process, at least one session should be held where the prime is not present, and the mediator should ensure complete confidentiality about any comments made in the session. A retaliation clause, including penalties, might be developed for primes who retaliate in any way against M/WBEs.

Recommendation 6.4.19:

Provide training periodically to City staff, SBEs, and M/WBEs to fully explain the proposed SBE and M/WBE Programs.

All City officials and staff involved in City purchasing (construction, general services, and commodities) should have general periodic training that explains the details of the

proposed SBE and M/WBE programs. The training should be scheduled semiannually and include newly certified SBEs, M/WBEs and City staff. This will increase understanding of the programs, their requirements, and increase the comfort level of all parties, and this will translate to better relations for all parties.

Recommendation 6.4.20:

Review and strengthen developmental programs and activities in order to assist small businesses.

The following programs and activities should be developed to assist SBEs:

- training programs tailored to address the particular needs of SBEs. For example:
 - more one-on-one training;
 - regional and annual conferences;
 - allowances for flexible schedules to accommodate time constraints of small businesses; and
 - emphasis on practical training where small businesses are walked through the entire contracting process.
- networking sessions for small businesses and primes arranged for the purpose of meeting, sharing information, and getting to know one another; and training for small businesses on how to market their business to prime contractors.
- providing follow-up information to small businesses on all contracts bid, such as:
 - the name of the winner;
 - their ranking;
 - analysis of lost points; and
 - ways to improve their next bid.
- research possible federal grants that could help SBEs get a head start with their businesses and provide operating loans for when they are awarded a City contract.

Recommendation 6.4.21:

The City should work with interested trade associations if they choose to implement the proposed Mentor-Protégé Program in conjunction with the proposed Small Business Enterprise program. However, the City should not be responsible for staffing or implementing this program.

If the Arizona General Contractors, Maricopa Contractors' Association or other business organizations choose to implement a Mentor-Protégé program, the City of Phoenix should work with them and participate in a committee format. However, this type of program has had limited success nationally, and City resources can be utilized more effectively in enhancing the SBE program.