SOUTH CAROLINA
DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION
P.O. BOX 191
COLUMBIA, S.C. 29202

DANIEL P. FANNING
EXECUTIVE DIRECTOR

November 22, 1993

MEMORANDUM TO: Valentine Burroughs, Executive Assistant

FROM: W. L. McIlwain, Interim Director
Division of Finance and Administration

SUBJECT: Project Files at the Block House

Please coordinate all activities involving the removal of records from the block house with Supply Depot Supervisor, Perry Huckabee. His phone number is 737-6331.

I suggest that you set up a meeting with Supply and Equipment Engineer Bob Blair and Mr. Huckabee to discuss the logistics of the record removal.

W. L. McIlwain
Interim Director
Division of Finance and Administration

CC: Executive Director Fanning
Supply Deport Supervisor Huckabee
Supply and Equipment Engineer Blair
State Highway Engineer White

SOUTH CAROLINA
DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION
P.O. BOX 191
COLUMBIA, S.C. 29202

DANIEL P. FANNING
EXECUTIVE DIRECTOR

MEMORANDUM

TO: Buddy Keller, Director of Construction

FROM: Valentine Burroughs, Jr.

DATE: November 19, 1993

SUBJECT: To review a request for project files to be removed from the Block House

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The Disparity Study Committee is considering alternatives for having the Disparity Study conducted. The State Agency Consortium is one of the options.

However, we were asked if the Construction Project Files could be removed from the Block House to the Dennis Building to input the row data.

I requested the attached letter be written to Mr. Fanning in order for the Department to make a determination and establish the appropriate procedure and controls to ensure the confidentially and security of the files.

I would appreciate having a preliminary discussion on this request today if possible.

cc: Daniel P. Fanning
Linda McDonald

STATE OF SOUTH CAROLINA

State Budget and Control Board

DIVISION OF RESEARCH & STATISTICAL SERVICES

REMBERT C. DENNIS BUILDING
1000 ASSEMBLY STREET, SUITE 425
COLUMBIA, SOUTH CAROLINA 29201
(803) 734-3793
FAX (803) 734-3619

BOBBY BOWERS
DIRECTOR

November 17, 1993

Mr. Daniel P. Fanning
Executive Director
South Carolina Department of Transportation
955 Park Street
Columbia, South Carolina 29202

Dear Mr. Fanning:

As discussed in our meeting of the State agency consortium proposing to conduct the Department of Transportation Study on Disparity (for want of a better name) on Wednesday, November 17th, the Division of Research and Statistical Services is requesting that the State agency contracting records for road/bridge construction and maintenance projects solely funded by state dollars between 1977 and June 30th, 1993 be made available at a location other than their current storage site. Our preference would be that the Division be permitted to move the selected boxes to the Division's offices in the Dennis Building at 1000 Assembly Street. Our purpose in making this request is that the current storage site appears to be unheated, limited in electrical outlets, and without facilities. These physical conditions could seriously jeopardize both our data collection activities and our need to monitor and supervise the data collection process.

For the past 17 years, the Division has been collecting and analyzing individual identifiable data for a number of State agencies. In that time period, no instance of record loss, record tampering, or inappropriate release or breech of confidentiality has ever been alleged or demonstrated. To insure the confidentially and security of the these records while they are in our possession, we propose the following procedure:

1. The Department of Transportation certify the total number of records present in each box.

2. Upon pickup, the Division will verify that the number of records inventoried is correct and will sign a document which states that while the records are in the possession of the Division, (1) they will be accessed by authorized persons only, (2) they will be stored in a secure location, (3) they will be returned as quickly as possible to the storage site where the record number can be verified again, (4) the machine-readable files generated from the records will be placed on a secured computer with access by authorized persons only, and (5) the machine-readable files generated from these records will be removed from the Division's computer and returned to the Department once the study has been completed.

If either you or your legal counsel should desire any additional information concerning our procedures for insuring the security and confidentially of your records while they are in our possession, please let me know. Personally, I feel that if the records can be abstracted "in-house", the data base development can be completed more quickly and the quality of the data base will be enhanced by constant staff supervision.

In closing, I want to commend you and your staff for the professional manner in which you have approached this study. We are pleased to have been requested to propose our services.

Sincerely,

Bobby M. Bowers
Division Director

cc: Valentine Burroughs, SCDOT

SOUTH CAROLINA

DEPARTMENT OF TRANSPORTATION

FACSIMILE TRANSMISSION COVER SHEET

DATE: January 8, 1994

TO: Honorable Joe E. Brown
Chairman Legislative Black Caucus

FAX NUMBER: 734-2925

FROM: Val. Burroughs, Jr. SCDOT

TOTAL PAGES INCLUDING THIS COVER: 3

COMMENTS: Attached is a copy of MR Jackson letter to MR. Fanning.

OFFICE OF THE EXECUTIVE DIRECTOR - SCDOT
POST OFFICE BOX 191
COLUMBIA, SOUTH CAROLINA 29202

PHONE NUMBER (803) 737-1300
FAX NUMBER (803) 737-2038

STATE OF SOUTH CAROLINA

State Budget and Control Board

DIVISION OF GENERAL SERVICES

HELEN T. ZEIGLER
DEPUTY DIRECTOR

MATERIALS MANAGEMENT OFFICE
1201 MAIN STREET, SUITE 600
COLUMBIA, SOUTH CAROLINA 29201
(803) 737-0600

HARDY L. MERRITT, Ph.D.
ASSISTANT DIVISION DIRECTOR

VIA FAX

June 9, 1994

M. Elaine Johnson
Director of Procurement Services
S.C. Department of Transportation
P.O. Box 191
Columbia, SC 29202

Re: RFP No. B401014 - Conduct a Study of Minority and Women-Owned Business Participation in the S.C. Department of Transportation's Construction Contracts.

Dear Elaine Johnson:

To follow up on SCDOT's request to determine why L. Oliver Wilson & Associates and Research & Evaluation Associates did not respond to the above referenced RFP, I have received the following information:

Telecon 06/07/94 - Although Larry Wilson, President of L. Oliver Wilson & Associates cited other work commitments which prevented him from responding, he expressed a concern that SCDOT had already determined the company they wished to do business with. While I reassured him that the RFP process is a fair and equitable selection method and his company would receive equal consideration, he would not commit to submitting a proposal on a resolicitation.

Telecon 06/08/94 - According to Peggy Richmond, President of Research & Evaluation Associates, the employee who was assigned to prepare the proposal response left the company in the middle of the solicitation process. She was unable to assign someone to the project in the middle of the process and therefore did not respond. She said her company is very interested in submitting a response to a resolicitation and hoped that only those pre-qualified firms would be invited to submit.

Regarding the question of MGT of America's solicitation package, I find no evidence that an incorrect address was provided on the mail list. The company address in the MMO database matches the address given by the company during the Request for Qualifications process. If they did not receive a copy of the RFP, it must have been lost by the U.S. Postal Service.

Val Burroughs called me yesterday afternoon and I passed along the information regarding L. Oliver Wilson & Associates and MGT of America, Inc. He is not aware of the response by Research & Evaluation Associates.

Val also expressed an interest as to why National Economic Research Associates elected to shorten the Scope of Work information review to 1989-1993. While we share this interest, MMO is hesitant to initiate contact with N.E.R.A. considering they may not yet have received the rejection notice. Hopefully, they will contact me in the next couple of days to find out why they were rejected. I will pass along any information I receive.

If you have any questions, please call me.

Sincerely,

John R. Stevens

John R. Stevens, CPPB
Procurement

cc: J. Culbreath
D. Horton
file

END

S.C. Minority Contractors Association
114 Bombay Drive
Columbia, South Carolina 29209

June 1, 1994

Mr. Daniel P. Fanning
Executive Director
South Carolina Department of Transportation
Post Office Box 191
Columbia, S.C. 29202

Dear Mr. Fanning:

The Minority Contractors Association (MCA) is an organization of African-American contractors dedicated to the pursuit of parity in state procurement opportunities for members of socially and economically disadvantaged groups. While South Carolina's dismal record of minority participation in contracting has traditionally been an issue of major concern to the MCA, the problem so aroused the attention of the General Assembly during the 1993 legislative session, that the body charged you Agency with the execution of a disparity study to document possible statistical disparities between the percentage of contracts awarded to minority business enterprises versus the percentage awarded to majority firms.

It has recently come to our attention that the Department of Transportation has yet to fully comply with this mandate. It is our understanding that DOT is just requesting proposals for the consulting services necessary to perform such a study. Even more disturbing is the proposed composition of the evaluation panel. The MCA has reason to believe that the Associated General Contractors (AGC) will be represented on the panel. As you know, the AGC has consistently been on record in opposition to minority business preferences in public contracting. Clearly, an AGC presence on the evaluation panel will have a significant adverse impact on the object and purpose of the study. Accordingly, we request that either the AGC representative on the panel be removed or that a representative from the MCA be appointed as well.

It is imperative that this issue be resolved prior to further action by your Agency. To that end, I am available at to more fully discuss the issues raised here. Your prompt attention to this matter will be greatly appreciated.

With Regards,

Richard Jackson
President, Minority
Contractors Association

cc: Dr. W. F. Gibson, President
NAACP, South Carolina Conference

J. T. McLawhorn, President and CEO
Columbia Urban League

Representative Joe E. Brown, Chairman
South Carolina Legislative Black Caucus

FILE COPY

SCDOT

South Carolina
Department of Transportation
P.O. Box 191
Columbia, S.C. 29202

Daniel P. Fanning, P.E.
Director

June 13, 1994

S.C. Minority Contractors Association
114 Bombay Drive
Columbia, South Carolina 29209
Attention: Richard Jackson

Re: Croson decision Disparity Study Evaluation Panel

Dear Mr. Jackson:

Thank you for your June 1, 1994 letter in regard to the Croson decision disparity study to be performed for the Department. We appreciate your interest in this important study.

You first express concern about the progress of the study. The Department is progressing with deliberate speed to procure a thorough, accurate and legally-defensible study. A Scope of Work has been prepared, bidders have been qualified, and proposals have been solicited. We are currently taking steps to re-solicit the proposal, because of a lack of response to our first request for proposals.

You also express concern about the composition of the committee which is charged with the responsibility of evaluating the proposals submitted. The Department has attempted to assure representation of a broad range of viewpoints on the nine person committee. The four members of the committee outside the Department are Shirley C. Robinson, attorney, S. C. Legislative Black Caucus; John Gadson, Director of the Small Business Development Center at South Carolina State University; Dr. John Grego, Director, Statistics and Research Lab, University of South Carolina; and Michael Covington of the Carolinas Associated General Contractors Association.

We feel that the evaluation committee as presently composed will adequately represent the viewpoint of the Minority and Women Contractors Association. However, the Department has no objection to your organization appointing a representative to serve on the committee if this would improve your comfort level. We would

require, however, to avoid any problems with conflict of interest, that the representative not be a contractor who has bid on Department contracts.

If you choose to have a representative on the evaluation committee, I would appreciate your submitting his or her name to Val Burroughs, Jr. by Monday, June 20, 1994.

The urgency is because the names of the evaluation panel must be submitted to the State Procurement Office as soon as possible.

Thank you again for your concern in this matter.

Sincerely,

Daniel P. Fanning
Director

cc:Dr. W.F. Gibson, President
NAACP, South Carolina Conference

J. T. McLawhorn, President and CEO
Columbia Urban League

Representative Joe E. Brown, Chairman
South Carolina Legislative Black Caucas

Valentine Burroughs, Jr.
Executive Assistant for Minority Affairs

SOUTH CAROLINA
DEPARTMENT OF TRANSPORTATION
P.O. BOX 191
COLUMBIA, S.C. 29202

DANIEL P. FANNING
EXECUTIVE DIRECTOR

February 25, 1994

Dr. John Grego
Department of Statistics USC
Columbia, South Carolina 29208

Dear Dr. Grego:

I appreciated the opportunity to brief you on the status of the Disparity Study.

We would certainly appreciate your input on the scope of services (see attached copy). We would be interested in your comments, suggestions and recommendations on the draft scope of services.

We would appreciate your consideration of our request to serve on the evaluation team to evaluate the proposals, also we would like to have the opportunity to discuss with you the feasibility of your managing this study for the Department. This is with the understanding that the particular details would have to be worked out and specifically defined.

As always it was good talking with you and I am looking forward to your input.

Sincerely,

Val.

Valentine Burroughs, Jr.
Executive Assistant

SOUTH CAROLINA
DEPARTMENT OF TRANSPORTATION
P.O. BOX 191
COLUMBIA, S.C. 29202

DANIEL P. FANNING
EXECUTIVE DIRECTOR

MEMORANDUM

TO: Dr. John Grego
Director Statistical Lab

FROM: Valentine Burroughs, Jr. VBJr.
Executive Assistant

DATE: March 1, 1994

SUBJECT: Revised Request for Qualification

Per our discussion, I have enclosed a copy of the revised Request for Qualification to prospective offerors. This request was mailed out to a list of consultant firms on February 23, 1994 by the Material Management Office. You may disregard the initial document that was forwarded for your review.

Thanks

SOUTH CAROLINA
DEPARTMENT OF TRANSPORTATION
P.O. BOX 191
COLUMBIA, S.C. 29202

DANIEL P. FANNING
EXECUTIVE DIRECTOR

MEMORANDUM

TO: Elaine Johnson
Director, Procurement Services

FROM: Valentine Burroughs, Jr. VBJr.

DATE: February 25, 1994

SUBJECT: Request for Qualification

Please forward this consultant firm's name and address to Material Management to be added to the mailing list to receive a Request for Qualification.

The request should be forwarded to:

Research and Evaluation Associates
100 Europa Drive Suit 590
Chapel Hill, North Carolina 27514
Attn: Gloria Wheatley

Thank you

M E M O R A N D U M

TO: Ms. Elaine Johnson
Director of Procurement

FROM: Val Burroughs
Executive Assistant

DATE: March 1, 1994

SUBJECT: Request for Qualifications

Please forward this consultant firm's name to the Material Management Office to be added to the mailing list to receive a Request for Qualifications for the Disparity Study.

The request should be forwarded to:

Mr. Gerald L. Jackson
G. L. Jackson Consulting
3205 Shimmy Lane
Tallahassee, Florida 32308

W. C. Benton and Associates, Inc.
500 Embassy Square, Suite 502
Louisville, Kentucky 40299

SOUTH CAROLINA
DEPARTMENT OF TRANSPORTATION

OFFICE OF CHIEF COUNSEL

VICTOR S. EVANS
CHIEF COUNSEL

ELIZABETH S. MABRY
DEPUTY CHIEF COUNSEL

SILAS N. PEARMAN BUILDING
955 PARK STREET - SUITE 343
P.O. BOX 191
COLUMBIA, S.C. 29202
FAX NUMBER 803-737-2071
TELEPHONE 803-737-1347

ASSISTANT CHIEF COUNSEL
PATRICK M. TEAGUE
NATALIE J. MOORE
LINDA MCDONALD
GLENNITH C. JOHNSON
BARBARA M. WESSINGER

February 3, 1994

M E M O R A N D U M

TO: M. Elaine Johnson, Director of Procurement Services
Val Burroughs, Executive Assistant
Benjamin F. Byrd, Director, Office of Compliance
Don Freeman, Assistant Director of Construction
Glennith C. Johnson, Assistant Chief Counsel

FROM: Linda C. McDonald, Assistant Chief Counsel LCM

RE: Croson Decision Disparity Study

Attached is the Request for Qualifications and Specific Scope of Work for the Croson Disparity Study as revised in our meeting today. These documents should allow us to solicit the qualification of proposed offerors before requesting full proposals in accordance with S.C. Code §11-35-1530(5). Please let me know if any further revisions are necessary to proceed.

cc: Victor S. Evans, Chief Counsel
Elizabeth S. Mabry, Deputy Chief Counsel

Val
Here are 2 copies for you -
Linda

January 11, 1994

Honorable William D. Boan
Member, House of Representatives
525 Blatt Building
Columbia, South Carolina 29211

Dear Representative Boan:

Reference Proviso 74.25 (Croson Decision Disparity Study) the Department is in the process of preparing a "Request for Proposal" to be advertised by April 1994 to conduct a disparity study. The study will be based on requirements of the Richmond Supreme Court decision (copy enclosed) and would cover a statistical analysis as well as surveys, interviews, and public hearings on the practices of the construction industry in South Carolina. We anticipate that the study would take anywhere from ten to twelve months, but in any event would be concluded as soon as possible.

Sincerely,

D. P. F.

Daniel P. Fanning
Executive Director

Enclosure

STATE OF SOUTH CAROLINA

State Budget and Control Board

DIVISION OF GENERAL SERVICES

HELEN T. ZEIGLER
DEPUTY DIRECTOR

MATERIALS MANAGEMENT OFFICE
1201 MAIN STREET, SUITE 600
COLUMBIA, SOUTH CAROLINA 29201
(803) 737-0600

HARDY L. MERRITT, Ph.D.
ASSISTANT DIVISION DIRECTOR

November 18, 1993

The Honorable Ralph Anderson
House of Representatives
District No. 23 - Greenville County
315 Elder Street
Greenville, South Carolina 292607

Dear Representative Anderson:

Thank you for your interest in the Department of Transportation Disparity Study. The study is being conducted under the auspices of the South Carolina Department of Transportation. The Division of General Services is neither funding nor awarding the contract under which this study will be executed. Mr. Val Burroughs of the Department of Transportation is directing this effort and will be recommending alternatives to Mr. Fanning, the Director, for his decision on how to proceed.

Mr. Burroughs has created a Disparity Study Committee to advise him on the particulars of the study. This committee is comprised of representatives from the Department of Transportation Office of Compliance, the Director of the Small Business Development Center and the Departments of Political Science and Business of South Carolina State University, The Institute of Public Affairs and the Statistics and Research Laboratory of the University of South Carolina, and the Budget and Control Board's Division of Research and Statistical Services and Division of General Services. I was asked to serve on the committee due to my academic background in statistics and survey research.

The sole concern of the Disparity Study Committee is that the study be rigorously constructed and executed absolutely free of bias or prejudice and that it be completed before the deadline of April 15, 1994, set by the General Assembly. The Committee must insure that the study be able to withstand any legal,

statistical or procedural challenges to its findings.

I am impressed with the excellence of the credentials of the individuals from South Carolina State University, The University of South Carolina and the Division of Research who have agreed to work as a consortium to execute the study if that is the decision of the Department of Transportation. This consortium brings together the finest minds in the state. Its composition and the research plan it has proposed brings additional assurance that the concerns you raise in your letter remain in the forefront of the study.

I feel certain that Mr. Burroughs and the members of the Disparity Study Committee Working Group would be pleased to give you a full briefing on this matter. By copy of this letter to Mr. Burroughs I am making him aware of your concerns.

Sincerely,

Hardy L. Merritt, Ph.D.
Materials Management Officer

cc: D. P. Fanning
Val Burroughs

House of Representatives

State of South Carolina

Ralph Anderson
District No. 23 - Greenville County
315 Elder Street
Greenville, S.C. 29607

Committees:
Education and Public Works

[illegible] Officer

Re: SC Department of [illegible]

It has come to my attention that the selection of state and related agencies to conduct the South Carolina Department of Transportation Disparity Study has created a tremendous amount of concern among the state's minority business community.

It is my understanding that throughout the nation, disparity studies are contracted to independent and unbiased consultants that possess the [illegible] necessary to accurately access disparity. It seems odd, that state agencies who may not have been able to attain minority purchasing and subcontracting goals within their own agencies should be given the opportunity to conduct [illegible]. The selection of state agencies to perform a $250,000 disparity study is comparable to a "fox conducting a study of disparity in the henhouse". It is [illegible] completely ludicrous to assume that the state's minority business [illegible] or would be agreeable to such a travesty. This study will have far-reaching [illegible] on the future of many minority businesses in this state. Historically, the state's minority business community have been decided without [illegible] tion being given to the consequences that evolve from these insensitive [illegible] It is imperative that this study be conducted equitably and fairly. With this in mind, I would like to request that before the study is begun that you reconsider the selection process for the study and that a meeting be convened to discuss the selection of [illegible] the study.

Your immediate attention regarding this matter is requested.

Sincerely,

Ralph Anderson

Ralph Anderson

cc: D. P. Fan[illegible] Executive Director, [illegible]blic Trans.
Joe Brown, President Black Caucus

STATE OF SOUTH CAROLINA

State Budget and Control Board

DIVISION OF GENERAL SERVICES

MATERIALS MANAGEMENT OFFICE
1201 MAIN STREET, SUITE 600
COLUMBIA, SOUTH CAROLINA 29201
(803) 737-0600

HARDY L. MERRITT, Ph.D.
ASSISTANT DIVISION DIRECTOR

November 18, 1993

The Honorable Ralph Anderson
House of Representatives
District No. 23 - Greenville County
315 Elder Street
Greenville, South Carolina 292607

Dear Representative Anderson:

Thank you for your interest in the Department of Transportation Disparity Study. The study is being conducted under the auspices of the South Carolina Department of Transportation. The Division of General Services is neither funding nor awarding the contract under which this study will be executed. Mr. Val Burroughs of the Department of Transportation is directing this effort and will be recommending alternatives to Mr. Tanning, the Director, for his decision on how to proceed.

Mr. Burroughs has created a Disparity Study Committee to advise him on the particulars of the study. This committee is comprised of representatives from the Department of Transportation Office of Compliance, the Director of the Small Business Development Center and the Departments of Political Science and Business of South Carolina State University, The Institute of Public Affairs and the Statistics and Research Laboratory of the University of South Carolina, and the Budget and Control Board's Division of Research and Statistical Services and Division of General Services. I was asked to serve on the committee due to my academic background in statistics and survey research.

The sole concern of the Disparity Study Committee is that the study be rigorously constructed and executed absolutely free of bias or prejudice and that it be completed before the deadline of April 15, 1994, set by the General Assembly. The Committee must insure that the study be able to withstand any legal,

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I feel certain that Mr. Burroughs and the members of the Disparity Study Committee Working Group would be pleased to give you a full briefing on this matter. By copy of this letter to Mr. Burroughs I am making him aware of your concerns.

Sincerely,

Hardy L. Merritt, Ph.D.
Materials Management Officer

cc: D. P. Fanning
Val Burroughs

END

STATE OF SOUTH CAROLINA

State Budget and Control Board

DIVISION OF GENERAL SERVICES

HELEN T. ZEIGLER
DEPUTY DIRECTOR

MATERIALS MANAGEMENT OFFICE
1201 MAIN STREET, SUITE 600
COLUMBIA, SOUTH CAROLINA 29201
(803) 737-0600

HARDY L. MERRITT, Ph.D.
ASSISTANT DIVISION DIRECTOR

November 18, 1993

The Honorable Ralph Anderson
House of Representatives
District No. 23 - Greenville County
315 Elder Street
Greenville, South Carolina 292607

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I feel certain that Mr. Burroughs and the members of the Disparity Study Committee Working Group would be pleased to give you a full briefing on this matter. By copy of this letter to Mr. Burroughs I am making him aware of your concerns.

Sincerely,

Hardy L. Merritt, Ph.D.
Materials Management Officer

cc: D. P. Fanning
Val Burroughs

SOUTH CAROLINA
DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION
P.O. BOX 191
COLUMBIA, S.C. 29202

DANIEL P. FANNING
EXECUTIVE DIRECTOR

October 6, 1993

Ms. Deirdre D. Kyle
L. Oliver Wilson & Associates, Inc.
2661 Executive Center Circle West
Clifton Building, Suite 301-A
Tallahassee, Florida 32301

Dear Ms. Kyle:

Thank you for your October 1, 1993 letter concerning your interest in assisting the Department in its efforts to have a disparity study conducted.

Please be advised that we are in the process of making preliminary plans to address our needs for a disparity study. We therefore are not in a position to review proposals from interested parties at this time. However, I will circulate a copy of your letter to the members of the Disparity Study Committee for their information. We will advise you of opportunities to participate in this effort as appropriate.

Thank you for your interest.

Sincerely,

Pamela R. McKie

Pamela R. McKie
Compliance Program Administrator

SOUTH CAROLINA
DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION
P.O. BOX 191
COLUMBIA, S.C. 29202

DANIEL P. FANNING
EXECUTIVE DIRECTOR

October 4, 1993

MEMORANDUM TO: DIRECTOR OF COMPLIANCE - MR. B. F. BYRD
EXECUTIVE ASSISTANT - MR. VALENTINE BURROUGHS
ASSISTANT CHIEF COUNSEL - MS. LINDA McDONALD
DIRECTOR OF PROCUREMENT - MS. ELAINE JOHNSON

This is to transmit a copy of a letter I received from L. Oliver Wilson and Associates, Inc., Tallahassee, Florida. This firm is obviously marketing its services to the various agencies that have not conducted disparity studies.

Pamela McKie
Compliance Program Administrator

L. OLIVER WILSON & ASSOCIATES, INC.

October 1, 1993

Ms. Pamela McKie
South Carolina Department of Transportation
Post Office Box 191
Columbia, South Carolina 29202

Dear Ms. McKie:

L. Oliver Wilson & Associates, Inc. is very interested in having the opportunity to submit a proposal to conduct a Disparity Study for your state. However, a review of the company's project commitments and timelines has revealed a strong possibility that existing commitments will conflict with your anticipated study period. Therefore, I am available to assist you with the production of the scope of services for the Disparity Study Request for Proposals.

The following proposal is for your consideration:

- L. Oliver Wilson & Associates will meet with the selection committee and review all legislation and legislative history. This will assist in gaining a clear understanding of the intent and spirit as well as the letter of the law requiring the study.
- Draft the Scope of Services and Selection Criteria sections of the RFP for review by the contract manager or the selection committee.
- Finalize the Scope of Services and Selection Criteria.
- Review the final product with the contract manager and/or the selection committee to ensure full understanding.
- Advise the selection committee during the selection process which will include attending the oral presentations.
- The above outlined services can be performed for $9,500.00 plus travel expenses.

Corporate Headquarters
1717 Apalachee Parkway #447
Tallahassee, Florida 32301
(904) 878-3910

Operations
2661 Executive Center Circle West
Clifton Building, Suite 301-A
Tallahassee, Florida 32301
(904) 877-9875

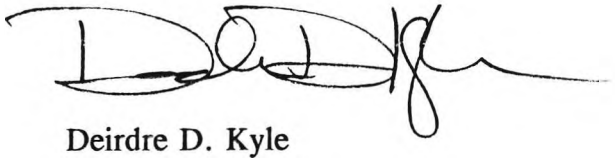
Manufacturing
3000 NW 125th Street
Miami, Florida 33167
(305) 769-1200

It is clearly understood that if L. Oliver Wilson & Associates, Inc., is chosen to perform the services listed above, we will not be eligible to compete for the Disparity Study as a prime or subcontractor. We also understand that we cannot do any work on the Disparity Study once the contract has been awarded.

If you have any questions or if I can be of service to your or your agency, do not hesitate to call. Please notify me of your intent as soon as possible so that we may plan accordingly.

Thank you for your consideration.

Sincerely,



Deirdre D. Kyle

DDK/ms

December 3, 1993

Honorable Ralph Anderson
Member, House of Representatives
315 Elder Street
Greenville, South Carolina 29607

Dear Representative Anderson:

Referencing our phone conversation of yesterday, please find enclosed a copy of a memorandum regarding Mr. Keith Merrero and another regarding our decision to utilize outside consultants to prepare a disparity study for South Carolina Department of Transportation.

Sincerely,

D.P.F.

Daniel P. Fanning
Executive Director

Enclosures

bc: Mr. Val Burroughs

SOUTH CAROLINA
DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION
P.O. BOX 191
COLUMBIA, S.C. 29202

DANIEL P. FANNING
EXECUTIVE DIRECTOR

MEMORANDUM

TO: Mr. Daniel P. Fanning, Executive Director
FROM: C. H. Mikell, Building Engineer
DATE: December 2, 1993
SUBJECT: Consultant Selection for Anderson Maintenance Complex
AMI Architects

It is my understanding that some questions have been raised regarding the architectural consultant selection for the above referenced project - particularly concerning AMI Architects.

The Architectural Selection Committee "short-listed" and consequently interviewed AMI Architects for the Anderson project. AMI and its principal, Mr. Keith Merrero, made a very impressive presentation. They had given much thought to our project and, quite frankly, scored quite well on the SE-215, A/E Evaluation forms (copy attached). However, AMI did not have as much experience in working with maintenance complex projects as the rest of the firms interviewed. Consequently, AMI did not receive strong scoring on item (g), Related Experience on Similar Projects and ended up tied for third place in the voting. Be advised that the seven criteria indicated on the forms are the only criteria that may be used for consultant selection and the committee followed this strictly.

I spoke by phone with Mr. Merrero the day following the interviews and we discussed his presentation and his placement in the ratings. We also discussed how the presentation could have been made stronger, and I believed at that time that, although disappointed, he understood the situation and felt he was treated fairly. During this conversation I told him I would keep an eye out for some Small Consulting Contract work for his firm. These contracts are for $18,000.00 or less and do not require the interview selection process. However, with the loss of DMV and Patrol, we currently do not have any consulting work available nor do I anticipate any in the near future.

I hope this provides you with the information you need regarding this matter. If you have any questions please feel free to call me at 737-1298.

cc: File

ARCHITECT - ENGINEER EVALUATION

AGENCY/OWNER: _____
(NAME)

PROJECT: _____ _____
(NUMBER) (NAME)

EVALUATION CRITERIA	RANKING RANGE	FIRMS					
		A	B	C	D	E	F
a) Past Performance							
b) Ability of Professional Personnel							
c) Willingness to Meet Time and Budget Requirements							
d) Location							
e) Recent, Current and Projected Work Load of the Firm							
f) Creativity and Insight Related to the Project							
g) Related Experience on Similar Projects							
TOTAL							

NOTES:	FIRM NAMES:
	A - _____ B - _____ C - _____ D - _____ E - _____ F - _____

CERTIFICATION:

I hereby certify that the agency selection committee held interviews with all or at least five (5) persons or firms who responded and were deemed most qualified based on the information available prior to interviews. The agency selection committee evaluated and ranked all persons or firms interviewed based on their (a) past performance; (b) the ability of professional personnel; (c) willingness to meet time and budget requirements; (d) location; (e) recent, current and projected work loads of the firms; (f) creativity and insight related to the project; and (g) related experience on similar projects; and no other criteria was used.

_____ _____
(PRINT OR TYPE NAME) (DATE)

_____
(SIGNATURE)

SOUTH CAROLINA
DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION
P O BOX 191
COLUMBIA S C 29202

DANIEL P FANNING
EXECUTIVE DIRECTOR

December 2, 1993

Dr. Doug Dobson, Executive Director
Institute of Public Affairs USC
937 Assembly Street, Room 1511
Columbia, South Carolina 29208

Dear Dr. Dobson:

The SC Department of Transportation greatly appreciates the spirit of cooperation and professional dedication shown by the consortium in its response to the Department's request for assistance preparing a Croson Disparity Study. The Department has reviewed your proposed work plan with great interest. Because of our concern about the public perception of having this sensitive study performed by fellow state agencies, we believe now that a consultant firm outside of state government recommended by an evaluation committee, would be in the best interest of all parties. The outside consultant would provide the public with the assurance that the results are independent of state interest.

The Department's decision is not intended to question the quality of your work product or your ability to be objective in this matter. Our concern is simply with the public's perception of government.

We appreciate the consortium's participation in the process of developing the study to this point. Our meetings with you have increased our understanding of the scope and difficulty of the task ahead. We hope that we will have the opportunity to work with you in the future on research projects which require the expertise of the consortium. Such cooperation has great potential for the State in the future.

Sincerely,

Daniel P. Fanning
Executive Director

cc: Valentine Burroughs, Jr.

Section 1 of this act, to fund public trans ...rovisions of this section are effective only until June 30, 19

Cross references—

As to submission of priority list of projects to be funded under the Strategic Highway Plan for Improving Mobility and Safety to the Select Oversight Committee created by this section, see § 12-27-1280.

§ 12–27–1310. Department of Highways and Public Transportation to cooperate in implementation of this article.

The Department of Highways and Public Transportation shall cooperate in providing information and assistance to implement the provisions of this article.

HISTORY: 1987 Act No. 197 § 1, eff July 1, 1987.

§ 12–27–1320. Goals or set-asides for businesses owned and controlled by socially and economically disadvantaged ethnic minorities and disadvantaged females.

(A) Of total state source highway funds expended in a fiscal year on highway, bridge, and building construction, and building renovation contracts, the Department of Highways and Public Transportation shall ensure that not less than:

(1) five percent are expended through direct contracts with estimated values of two-hundred fifty thousand dollars or less with small business concerns owned and controlled by socially and economically disadvantaged ethnic minorities (MBEs); and

(2) five percent are expended through direct contracts with estimated values of two-hundred fifty thousand dollars or less with firms owned and controlled by disadvantaged females (WBEs).

The two hundred fifty thousand dollars value limits may be raised in the discretion of the department as MBEs/WBEs are able to provide bondability.

(B) The department shall certify eligible firms under this section and shall give at least thirty days' notice to certified firms of contracts to be let. The department must take into consideration the location and availability of MBE or WBE firms in the State when designating projects to be set aside. No certified MBE or WBE may participate after June 30, 1999, or nine years from the date of the firm's first contract, whichever is later, if that firm performed at least three million dollars in highway contracts for four consecutive years while certified as a WBE or MBE. Firms performing less than three million dollars in highway contracts for four consecutive years may be recertified for additional five-year periods based upon recertification reviews by the department.

(C) To achieve the set-asides set forth in subsection (A) of this section, the department shall advertise a number of highway construction projects at each regularly scheduled highway letting to be bid exclusively by MBEs and WBEs. The total annual value of those projects awarded must equal at least ten percent of total state source highway funds expended in each fiscal year, or otherwise documented as described in subsection (D). Projects must be awarded when the lowest responsive and responsible bidder submits a bid within ten percent of the official engineer's estimate. If the lowest responsive bid exceeds the engineer's estimate by more than ten percent, the department may enter into negotiation with the low bidder making reasonable changes in the plans and specifications as necessary to bring the contract price within the

ten percent range. If the low bidder agrees to the changes and the revised contract price, the contract must be awarded to the low bidder at the revised price. If the low bidder can show just cause for his bid exceeding the ten percent range, the department may award the contract without making any changes in the plans and specifications or the contract price. If the department fails to award any advertised project, that project may be readvertised through the normal bid process and must not be readvertised for the purpose of achieving the set-asides.

(D) If no MBE or WBE firms certified pursuant to this section are available to perform a contract, the department shall verify and record this fact, and the verification must be preserved in department records.

(E) To facilitate implementation of this section, the department may waive bonding requirements for contracts let pursuant to this section with estimated construction costs not exceeding two hundred fifty thousand dollars a contract, and any contract set aside and awarded to any MBE or WBE contractor without bonding shall provide expressly that termination of the contract for default of the contractor renders the contractor ineligible for any further department nonbonded contracts for a minimum period of two years from the date of the notice. The department shall act as bonding company when bonding requirements have been waived. Any claims brought by subcontractors or suppliers in connection with nonbonded projects must be heard by the Department Claims Committee and all legitimate claims must be paid by the department. The committee shall take into account circumstances such as unsettled payments and disputes with the department or other circumstances that are beyond the MBE/WBEs control. Claims resulting in monetary settlements shall render the MBE/WBEs ineligible for any further department nonbonded projects until the MBE/WBE has reimbursed or has made acceptable arrangements to reimburse the department for the amount due as a result of the settlement.

(F) In awarding any contract pursuant to this section, preference must be given to an otherwise eligible South Carolina contractor submitting a responsible bid not exceeding an otherwise eligible out-of-state contractor's low bid by two and one-half percent.

(G) The department shall establish written guidelines to be used in the selection and design of projects awarded under this section. Those guidelines shall outline the types of projects best suited for this program and other related criteria.

(H) When a MBE or WBE receives a contract, the department shall furnish a letter, upon request, stating the dollar value and duration of, and other information about the contract, which may be used by the MBE or WBE in negotiating lines of credit with lending institutions.

(I) The department shall issue an annual report listing all contracts awarded pursuant to this section. That report must also include a listing of all contracts and subcontracts awarded pursuant to Section 106(C) of the Federal Surface Transportation Act of 1987 (STAA-1987; P.L. 100-17, Section 106(c)). The listings must be both chronological and by name of participating firms. Entries must include file numbers, locations, and dollar amounts. The report must also contain information relating to cancelled contracts and subcontracts, subcontractor substitutions, and final payments to MBE/WBEs.

(J) Any MBE or WBE acting as a prime contractor shall perform at least thirty percent of the work with his own forces. If thirty percent of the work is

performed with his own forces, the total amount of the contract is counted toward the MBE/WBE set-asides. If less than thirty percent is performed by the MBE/WBE, then only that portion performed by the MBE/WBE is counted toward the set-asides.

(K) The department shall make available technical assistance for MBEs and WBEs for not less than three hundred thousand dollars. Any of these funds awarded to small consulting firms owned and controlled by MBEs or WBEs may count toward the set-asides established in subsection (A) of this section. The selected firms must be South Carolina based and experienced in assisting with the development of minority firms.

(L) Technical assistance provided under subsection (K) of this section shall include written and verbal instruction on competitive bidding, management techniques, and general business operations. Firms certified under this section must be represented by a company officer in at least twenty hours of continuing education a year in order to remain certified. The department shall implement a system that will designate a lead engineer to work with MBE/WBEs. This engineer shall work with the office of compliance, the supportive services contractor, and with the department's engineers to provide early technical assistance to MBE/WBEs with contracts in each highway district. The support shall include professional and technical assistance aimed toward meeting the standards, the specifications, the timing, quality, and other requirements of their contracts. The department shall also endeavor to utilize the expertise of established highway, bridge, and building contractors when providing technical and support services.

(M) Any contracts awarded through the normal bid process to certified MBEs or WBEs may count toward the set-asides. Subcontracts entered into between prime contractors and certified MBE/WBEs without regard to these provisions may be counted toward the set-asides outlined in subsection (A) of this section if these subcontracts are verified through the department records.

(N) If any part or provision of this section is declared to be unconstitutional or unenforceable by a court of competent jurisdiction of this State, the court's decision, nevertheless, has no effect on the constitutionality, validity, and enforceability of the other parts and provisions of this section which are considered severable.

(O) Within one hundred twenty days of the effective date of this section the department shall promulgate and implement regulations to administer the provisions of this section.

HISTORY: 1987 Act No. 197 § 1, eff July 1, 1987; 1989 Act No. 189, Part II, § 45B, eff June 8, 1989 (became law without the Governor's signature); 1990 Act No. 612, Part II, § 28B, eff July 1, 1990 (became law without the Governor's signature).

Editor's Notes—

Section 45A of 1989 Act No. 189, Part II, eff June 8, 1989, provides as follows:

"Whereas, in South Carolina we are indeed grateful for our country's treasured free enterprise system. We know that the foundation and great benefit of our free enterprise system are the opportunity and individual freedom it provides each citizen to pursue the great "American Dream" to his or her fullest potential; and

"Whereas, our national and state history teaches us that not all citizens have been provided a fair opportunity to fully participate in our treasured economic system. Past discrimination based on race and gender has prevented many citizens from participating, achieving, and developing their fullest potential and talents; and

"Whereas, leaders of our State recognized this problem over a decade ago and as a result implemented programs and policies including race and gender-neutral efforts and specific set-aside programs in an attempt to eliminate these discriminating barriers; and

"Whereas, in 1979, the General Assembly created, by joint resolution, the Small Business

File

SOUTH CAROLINA
DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION
P O BOX 191
COLUMBIA S C 29202

DANIEL P FANNING
EXECUTIVE DIRECTOR

November 18, 1993

Professor Doug Dobson
Institute of Public Affairs USC
Carolina Plaza
Columbia, South Carolina 29208

Dear Professor Dobson:

As a follow-up to our discussion, I wish to assure you that the Funds allocated for the Legislative Mandated Disparity Study is 100% state funds appropriated from the State Motor Fuel Tax.

Please advise if you need any additional information.

Sincerely,

Val. Burroughs, Jr.

Valentine Burroughs, Jr.
Executive Assistant for
Minority Affairs

SOUTH
DEPARTMENT OF HIGHWAYS
P O I
COLUMBI

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To Val Burroughs	From Doug Dobs
Co. DOT	Co. Inst. & Public Affairs
Dept.	Phone # 777 8157
Fax #	Fax #

October 29, 1987

FYI - They have honored this agreement since 1987. We are not aware that the policy has changed.

Mr. J. Steven Beckham
Executive Assistant to the President
University of South Carolina
Columbia, South Carolina 29208

Dear Mr. Beckham:

This letter is in response to Mr. Thomas A. Cogswell's letter of [illegible] 1987. You have been advised by letter dated October [illegible], 1987 of the Department's current policy relative to negotiated Indirect Cost Rates with Institutes of Higher Education.

The Department has reviewed the University's proposed indirect cost rate of 75% of your federally approved rate used on NCHRP and find such to be satisfactory. Until such time a revision is approved by Department.

In an effort to have the Department's files support the negotiated rate, it will be necessary for the University to submit to the Department's Supervisor of Grants and Contract Services, at the above address, verification of your latest federally approved rate and continue this process for rate revisions as they occur.

The Department appreciates and attests to the concerns of the University over "tight budgets". The Department has begun a careful review of all projects to determine the most economical means of having our various projects performed by way of in-house personnel, consultants, or Institutes of Higher Education in-state and out of state.

If you have any questions, please contact our Supervisor of Grants and Contract Services at the above address or by phone at (803) [illegible].

Yours very truly,

H. P. Snyder
State Highway Engineer

SOUTH CAROLINA
DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION
P.O. BOX 191
COLUMBIA, S.C. 29202

DANIEL P. FANNING
EXECUTIVE DIRECTOR

November 22, 1993

John Gadson
SCSU
Small Business Development Center
300 College Avenue NE
Orangeburg, South Carolina 29117

Dear Dr. Gadson:

Per our discussion, I am sending you a copy of the Federal Legislative History of the Disadvantage Business Enterprise (DBE) Program for your information.

If I can be of further assistance , please let me know.

Sincerely,

Val.

Val. Burroughs, Jr.
Executive Assistant

SOUTH CAROLINA
DEPARTMENT OF TRANSPORTATION

OFFICE OF LEGAL CHIEF COUNSEL

VICTOR S. EVANS
CHIEF COUNSEL

ELIZABETH S. MABRY
DEPUTY CHIEF COUNSEL

SILAS N. PEARMAN BUILDING
955 PARK STREET - SUITE 343
P.O. BOX 191
COLUMBIA, S.C. 29202
FAX NUMBER 803-737-2071
TELEPHONE 803-737-1347

ASSISTANT CHIEF COUNSEL
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NATALIE J. MOORE
LINDA MCDONALD
JOSEPH H. LUMPKIN, JR.
GLENNITH C. JOHNSON
BARBARA M. WESSINGER

October 12, 1993

Ms. Dixie Jacobs
State Procurement
AT&T Building, 6th Floor
Columbia, South Carolina 29201

RE: Croson disparity study

Dear Dixie:

Attached are the following items as promised:

1. Copy of Section 124.29 of the State Appropriations Act for 1993-1994 which requires the Department of Transportation (hereinafter "DOT") to perform a disparity study;

2. Copy of S.C. Code Ann. §12-27-1320 which requires DOT to set-aside contracts for minority and women-owned businesses;

3. Copy of Jim Ryon's memorandum concerning the City of Richmond v. Croson case;

4. Copies of North Carolina and Florida disparity studies prepared by MGT of America, Inc.

The Croson decision

Please let me know if you need anything further from us.

Sincerely yours,

Linda

Linda C. McDonald
Assistant Chief Counsel

LCM/sla
Enclosures

cc: Val Burroughs, Executive Assistant

SOUTH CAROLINA
DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION
P.O. BOX 191
COLUMBIA, S.C. 29202

December 2, 1992

Dr. Damien Ejigiri
P.O. Box 11280
Dept. of Public Administration
Southern University
Baton Rouge, LA 70813

Dear Dr. Ejigiri,

Your letter to Governor Carroll A. Campbell, Jr., Governor of South Carolina dated September 3, 1992, was referred on November 18, 1992 to the South Carolina Department of Highways and Public Transportation (SCDHPT).

We are delighted that you have under taken such an important task of researching and analyzing the various disparity studies around the country. We would be highly interested in your findings and recommendations.

However, the Department has not conducted a disparity study on its State Set-aside Program. We are currently taking preliminary steps to review the Merit of such a study.

To our knowledge, the City of Columbia, S.C. is the only Unit of Government in the state that has publicize plans to conduct a disparity study.

We are enclosing a copy of the State Set-aside Legislation, section 12-27-1320 and the Regulation governing the implemention of the Set-aside Program.

For additional information, you may contact my Executive Assistant for Minority Affairs, Valentine Burroughs Jr., at (803) 737-1300. Please advise if we can assist you in any way in the future.

Sincerely Yours,

Walker P. Ragin
Interim Executive Director

cc:Dr. James D. Bradford, M.D.
Office of the Governor

Kenneth D'Vant Long
State Reorganization Commission

State of South Carolina
State Reorganization Commission
P. O. Box 11949
Columbia, South Carolina 29211
(803) 734-3152
Fax: (803) 734-3163

November 18, 1992

Kenneth D'Vant Long
Director

Mr. Walker Ragin
Interim Executive Director
Department of Highways and Public Transportation
955 Park Street
Columbia, SC 29201

Dear Mr. Ragin:

Dr. Damien Ejigiri, from the Department of Public Administration at Southern University, has written the State of South Carolina requesting "a copy of the executive summary of...disparity studies" conducted in response to the 1989 U.S. Supreme Court decision in the case City of Richmond v. J.A. Croson Co., in which the Supreme Court struck down the set-aside program of the City of Richmond, Virginia. Dr. Ejigiri sent his requests to the Governor's Office, which has now forwarded them to the State Reorganization Commission. However, given that the Highway Department is the state agency responsible for implementing the state set-aside program, I am forwarding Dr. Ejigiri's letters to your office.

Sincerely,

Kenneth D'Vant Long
Director

Enclosures

cc: Dr. Damien Ejigiri

Dr. James D. Bradford, M.D.
Office of the Governor

SOUTHERN UNIVERSITY
SOUTHERN BRANCH POST OFFICE
BATON ROUGE, LOUISIANA 70813-2100

DEPARTMENT OF PUBLIC ADMINISTRATION

(504) 771-3103
771-3104

September 3, 1992

Governor Carroll A. Campbell Jr.
P.O. Box 11369
Columbia, SC 29211

Dear Governor Campbell Jr.:

The purpose of this letter is to request your office to send me a copy of the executive summary of your disparity studies (City of Richmond v. Croson) and any other related document of your set-aside program. I am the lead professor of a faculty team at the Department of Public Administration, Southern University Baton Rouge campus conducting a content analysis of post Croson disparity studies.

As you know, it has been almost two years since the U.S. Supreme Court's decision in the case City of Richmond v. J.A. Croson Co., 57 U.S.L.W. 4132. Since then many states have commissioned disparity studies on their set-aside programs. We think that a comprehensive analysis of the various studies that have been commissioned by states and cities is needed. We need your assistance to make this study a success. In order to ensure prompt delivery of the executive summary please use the address below:

Dr. Damien Ejigiri
P.O.Box 11280
Dept. of Public Administration
Southern University
Baton Rouge, LA 70813

It would be my pleasure to send you a summary of our findings if you wish. Thank you for your assistance and I look forward to a favorable response to my request.

Sincerely,

Damien Ejigiri
Associate Professor and Chair

SOUTHERN UNIVERSITY
SOUTHERN BRANCH POST OFFICE
BATON ROUGE, LOUISIANA 70813-2100

DEPARTMENT OF PUBLIC ADMINISTRATION

(504) 771-3103
771-3104

October 23, 1992

Governor Carroll A. Campbell Jr.
P.O. Box 11369
Columbia, SC 29211

Dear Governor Campbell Jr.:

I wrote you over a month ago, about a research project my department is conducting, regarding the Supreme Court's decision in the case of City of Richmond v Croson and set-Aside programs for women and minorities (letter attached). Because I have not heard from you, I thought I might remind you knowing how busy your schedule can be. Please excuse this reminder if your reply is in transit.

This is a very important study and I am sure you will agree with me that the Croson decision has had and will continue to have overwhelming ramifications. I need your assistance to make this study a success. If you have not commissioned any disparity studies, would you please identify for me cities in your state that might have conducted such studies. Again, I know how tight your schedules must be, but I will appreciate any support your office can render to make this study a success.

In order to ensure prompt delivery of the executive summary or any relevant information, please use the address below:

Dr. Damien Ejigiri
P.O.Box 11280
Dept. of Public Administration
Southern University
Baton Rouge, LA 70813

Thank you for your assistance.

Sincerely,

Damien Ejigiri
Associate Professor and Chair

attachment

State of South Carolina

Office of the Governor

CARROLL A CAMPBELL JR
GOVERNOR

OFFICE OF EXECUTIVE
POLICY AND PROGRAMS

November 13, 1992

Dr. Damien Ejigiri
Southern University
Department of Public Administration
Post Office Box 11280
Baton Rouge, Louisiana 70813-2100

Dear Dr. Ejigiri:

Thank you for your recent letter to Governor Campbell regarding your request for copies of any disparity studies that have been conducted by the our Office. Governor Campbell asked that I respond to your request.

The only study conducted by the Governor's Office was a report issued in July 1992 by the Governor's Office of Small and Minority Business Assistance. I have enclosed the report for your review.

I am unaware of any other similar reports or studies that may have been conducted, however, I have forwarded a copy of your letter to the State Reorganization Commission for a response. The Reorganization Commission was created by the state legislature for the purposes of increasing efficiency and effectiveness of state government operations to the fullest extent practicable, promoting economy, and reducing generally the cost of government. It is possible that they may have issued a similar type of study.

If I can be of further assistance to you in the future, please do not hesitate to contact me.

Sincerely,

James D. Bradford, M.D.

James D. Bradford, M. D.
Director
Office of Research

enclosure:

South Carolina
Department of Transportation

Office of Chief Counsel
955 Park Street - Suite 343
Post Office Box 191
Columbia, South Carolina 29202-0191
(803) 737-1347 FAX (803) 737-2071

Victor S. Evans
Chief Counsel
Elizabeth S. Mabry
Deputy Chief Counsel

Assistant Chief Counsel
Natalie J. Moore
Linda McDonald
Glennith C. Johnson
Barbara M. Wessinger
Freedom of Information Act Officer
Martha Craig

July 12, 1994

TRANSMITTED BY FAX
FAX NO. 904-385-4501

Mr. W. K. Boutwell
Senior Executive Officer
MGT of America, Inc.
P.O. Box 38430
Tallahassee, FL 32315

Re: South Carolina Department of Transportation
Disparity Study - RFP No. B401221

Dear Mr. Boutwell:

Thank you for your letter of July 1, 1994, and your interest in the South Carolina Department of Transportation (SCDOT) Disparity Study. We appreciate your questions and hope that the following answers will clarify what SCDOT seeks to achieve with its Disparity Study.

QUESTION 1 The methodology required in the RFP dramatically exceeds the requirements for a sound and defensible "Croson Decision Disparity Study" and in our view (after having done over 20 studies including 2 departments of transportation) cannot be done as specified. In view of this concern we have two questions

QUESTION 1a) Is there a reason why the requirements far exceed the requirements for all other disparity studies and the requirements of the courts that would help us understand what you are trying to achieve?

ANSWER SCDOT is anxious to obtain a Disparity Study which clearly and accurately documents the availability and utilization of minority and women-owned businesses in SCDOT contracting. We anticipate that the study will be used to determine the need for a minority and women-owned business program in SCDOT contracting and provide the outline for such a program. Because of the importance of this study, SCDOT desires to obtain a study that will be detailed enough to withstand critical review.

SCDOT's Disparity Study was mandated by the South Carolina General Assembly in the 1993-94 Appropriations Act. This Act mandated that SCDOT

> have a study performed to determine if a significant statistical disparity exists between the number of available, qualified minority and women-owned contractors willing and able to perform highway/bridge, preconstruction, construction, building construction and renovation and the number of such contractors actually engaged by the Department or contractors working for the Department (emphasis supplied).

Except for the addition of the word "available," the Act uses the same language used by the Croson court to describe the evidence necessary to establish an inference of discrimination in the contracting practices of a specific locality. See Croson, 109 S. Ct. 706, at 730. The addition of the word "available" to the Croson standard indicates that the South Carolina General Assembly was particularly interested in obtaining a study that would accurately measure "availability." Obviously, an accurate determination of the pool of "available' minority and women-owned contractors is essential to an accurate and useful study. In fact, one of the criticisms of the North Carolina DOT Disparity Study was its overinclusiveness in counting the firms available to perform various types of work. (See LaNoue, "Review of the 'Study of Minority and Women Business Participation in Highway Construction," January 26, 1993.")

With these factors in mind, SCDOT designed its RFP to require great detail in the collection of data. The detail in the collection of data enables a detailed and accurate analysis of the data to determine disparity and the reasons for the disparity.

The purpose of a disparity study is to measure discrimination on the basis of race or gender. Therefore, it is imperative that the study examine and analyze factors which may cause disparity but which are not related to gender and/or race so that discrimination may be isolated as the cause of disparity.

QUESTION 1b) Is the Department open to alternative methodologies which fully meet the requirements of the courts?

ANSWER Yes, if the consultant can show that the methodology proposed in the RFP is unworkable and unnecessary and as long as the consultant's methodology adequately responds to the legislative mandate and to the requirements of Croson.

QUESTION 2 Is it the Department's position that only those firms for which the contractor has information concerning the firm's name, ethnic group and/or gender, principal location and type of work performed shall be considered as available firms? Or may reliable estimated numbers of available firms (without names) be used?

ANSWER SCDOT recognizes that it will be difficult, to obtain the name, ethnic group and/or gender, principal location and type of work performed for all minority and women-owned firms that were available for the years 1980-1993. The RFP requires the consultant to make an exhaustive effort to collect this information and to document its efforts and its results (See Paragraphs 3(A)(2) and (3), pages 7 and 8 of the RFP). If this information cannot be obtained, then the consultant will have to use other reliable sources and support the reliability of its sources.

However, it seems to SCDOT that a business cannot be deemed "available" if its name, principal business location, and expertise is not known to the business community. Certainly, if the race and/or gender is not known, the purpose of the disparity study would be defeated. The information requested should not be difficult to obtain for the more recent years of the study (at least from 1990-1993), and SCDOT would consider the disparity study incomplete without this information.

The consultant must document its attempts to obtain the requested information and explain why the requested information is not collectable and/or unnecessary to a valid disparity study. The consultant must support it conclusions that such information is unnecessary by reference to other proven and accepted disparity studies.

QUESTION 3 Is it the intent of the Department that the level of historical disparity shall be determined for each of the 13 years for each category and subcategory of work as specified in paragraph (3) of Section A on page 8 of the RFP?

ANSWER Yes, where the information is available. SCDOT recognizes that the determination of disparity for each of the 13 years in each category of work will tedious and time-consuming. However, if the consultant is able to collect the base data (i.e., the type of work a contractor performs, the type of work the contracts require), the determination of disparity should not be unreasonable.

On the other hand, if the consultant is not able to collect the base data information, it would be unreasonable to require a determination of disparity for every year. In this event, SCDOT would expect the consultant to document its efforts to collect the information for a given year and explain why it is impossible to develop a disparity index based upon categories of work for that year.

SCDOT would expect that the consultant could collect the information on the type of work for at least the most recent years of the study (1990-93). SCDOT's contract files should contain the information necessary to make this disparity measure.

QUESTION 4 Is it the intent of the Department that the level of disparity be determined for each type of contract (i. e., state-funded (set-aside and non-set-aside) and federal (with goals and without goals))?

ANSWER Yes, where the information is available. The purpose of this measure or index would be to see if there is less disparity when the use of minority and women-owned firms is required than where the use of minority and women-owned firms is not required. If this disparity index would not achieve this result, then the consultant should suggest how this information can be determined and provide that information.

QUESTION 5 Is it the intent that separate disparity levels be established for each geographical area of the state? If so, how many geographical areas?

ANSWER Yes, where the information is available. The purpose of this index or measure would be to show whether the geographical location of the project is a significant factor in creating disparity. The geographical areas could be the 46 counties of the State or SCDOT's seven engineering districts.

QUESTION 6 Is it the intent that separate disparity levels be established by size categories of firms?

ANSWER Yes, where the information is available. The purpose of this measure or index is to help determine whether the size of a firm is a significant factor in creating disparity.

QUESTION 7 Is it the intent that separate disparity levels be established by bonding capacities of firms?

ANSWER Yes, where the information is available. The purpose of this measure is to determine whether bonding capacity is a significant factor in creating disparity.

QUESTION 8 Is it the intent that separate disparity levels be established for all combinations of the variables specified in paragraph (2) of Section C on page 10 of the RFP? For example, by race/sex group, by funding source, by geographical location, by size of firm, by bonding capacity, by work category and subcategory? If the answer is yes, we estimate the combinations could yield over 269,000 separate disparity indices.

ANSWER The purpose of measuring disparity based upon all the factors cited above is to provide sufficient information to

determine whether the disparity reported is attributable to race and/or gender-related factors or to factors which are not related to race and/or gender. It may not be necessary to determine the disparity levels for all combinations of these factors to make this determination. It would seem, however, that disparity levels would need to be determined based upon each of the factors cited in order to isolate the causes of overall disparity.

QUESTION 9 Does the Department's contract or contract files contain all of the information required to properly determine the amount of money going to prime and subcontract firms by the work category and subcategories specified in paragraph (3) of Section A on page 8 of the RFP?

ANSWER Yes.

QUESTION 10 Can you provide us with the number of and dollar volume of contracts by year?

ANSWER Yes, we have Annual Reports which provide this information.

QUESTION 11 Can we send representatives to inspect the contract data files of the Department for the period 1980-1993? Will such be readily available for our inspection?

ANSWER Yes, the files can be made available for your inspection upon three (3) days notice. The files are in file boxes in several different SCDOT locations. Some files are in offices presently in use, others are in offices used only for storage p u r p o s e s . Arrangements can be made for your examination of these files at these offices.

Please let us know if you have further questions or if you need further clarification of these answers.

Thank you again for your interest in this study.

Sincerely,

Linda C. McDonald
Assistant Chief Counsel

cc: Mr. John R. Stevens
Mr. Valentine Burroughs

South Carolina
Department of Transportation
P.O. Box 191
Columbia, S.C. 29202

Daniel P. Fanning, P.E.
Director

MEMORANDUM

TO: Don Freeman, Construction
Bill DuBose, Preconstruction
Chuck Mikell, Building Engineer
Doug MacFarlane, Grants and Contracts
Charlie Matthews, Bridge Construction
J.B. Wannamaker, Procurement Services
Mark Hunter, Building Renovations
R. B. Werts, Traffic Engineering
Ben Byrd, Compliance

DATE: July 19, 1994

SUBJECT: Preliminary File Review for the Disparity Study

South Carolina Department of Transportation (SCDOT), through the General Services Materials Management Office, is currently soliciting requests for proposals to conduct a Disparity Study of minority and women-owned business participation in SCDOT construction contracts.

The Disparity Study was mandated by the South Carolina General Assembly in Proviso 124.29 of the 1993-94 Appropriation Act. The study applies to highway/bridge, preconstruction, construction, building construction and building renovation contracts.

The study will cover the period from 1980 through 1993. The four (4) consultant firms that have qualified to bid on the RFP are being given an opportunity to inspect the various office files pertaining to SCDOT contracts during this period. These files shall be made available for inspection upon three (3) days notice given to the Department by an interested consultant.

I have appointed Valentine Burroughs, Jr. my assistant to coordinate with the consultants and your office during the on site inspection by representatives of the consultant firms.

Please provide Mr. Burroughs with a one paragraph summary of where your files are located for the periods from 1980 through 1993. Please also provide a very brief summary and sample of the data available. State whether there is a card or some other data summary sheet for each project file.

The purpose of this inspection visit is to allow the interested consultants to examine the condition of SCDOT files and to determine how complete and organized the data is. This information is necessary to prepare their response and cost projections for the study.

Your cooperation is essential to the success of this comprehensive study. Please contact Val or Linda McDonald if you have any questions.

Sincerely,

B. K. Jones
Acting Director

South Carolina
Department of Transportation
P.O. Box 191
Columbia, S.C. 29202

Daniel P. Fanning, P.E.
Director

MEMORANDUM

TO: Elaine Johnson, Director of Procurement Services

DATE: June 9, 1994

SUBJECT: Re-advertising the Disparity Study RFP

Based on John R. Stevens, Procurement Specialist, Material Management Office, memorandum dated June 9, 1994 summarizing the reasons that the consultant firms reported for not responding to the RFP, I am requesting that you take the appropriate action required to re-solicit the Disparity Study Request for Proposal from the same four top firms that originally qualified to submit an RFP. (see the attached list).

Please advise if I can assist you in this process.

Thank you,

Val.

Valentine Burroughs, Jr.
Executive Assistant

cc:Daniel P. Fanning
Linda McDonald
Ben Byrd

FILE COPY

South Carolina
Department of Transportation
P.O. Box 191
Columbia, S.C. 29202

Daniel P. Fanning, P.E.
Director

MEMORANDUM

TO: Benjamin F. Byrd, Director Office of Compliance
Don H. Freeman, Road Construction
Linda McDonald, Asst. Chief Counsel
Shirley C. Robinson, Attorney/Staff Director S.C. Legislative Black Caucus
Michael Covington, Director, Highway Heavy Division
Dr. John Grego, Director Statistics and Research Lab, USC
John W. Gadson, Sr.,Director Small Business Development Center, SCSU
Anthony Hunter, President of Hunter Construction Company

DATE: July 28, 1994

SUBJECT: Briefing of the Evaluation Panel

The Evaluation Panel for the SCDOT Disparity Study proposals is scheduled to meet on Wednesday August 17, 1994 at 10:00 a.m. at the Materials Management Office of the AT&T Building 1201 Main Street, Suite 600 in the Conference Room.

Mandatory attendance is required by all panel members. The briefing will be conducted by John R. Stevens, Procurement Manager, State Procurement Office (803) 737-0612.

The second meeting of the Evaluation Panel is scheduled for Friday, August 26, 1994 at 10:00 a.m. to evaluate the proposals. Again mandatory attendance is a requirement.

Thanks for serving on this panel and I look forward to working with you.

Sincerely,

Val. Burroughs, Jr.

Valentine Burroughs, Jr.
Executive Assistant

cc:John R. Stevens

Post-it™ brand fax transmittal memo 7671 | # of pages ▸

To Valentine Burroughs	From Steve Humphreys
Co. SC DOT	Co. MGT of America
Dept	Phone # 904.386.3191
Fax # 803.737.2038	Fax #

MGT of America, Inc

P.O. Box 6130 • 2425 Torreya Dr. • Tallahassee, FL 32315 • (904) 386-3191 • FAX (904) 385-4501

discussion earlier today regarding my request to visit the SCDOT in order
contract data files for the period 1980-1993. We would also like to review your
regarding the number and dollar volume of contracts by year. As we agreed,
office on Wednesday, August 3, 1994, between 1:00 and 1:30 in the
available that afternoon and the morning of Thursday, August 4

your efforts to arrange this visit so we can develop a carefully tailored proposal
to the DOT's disparity study request. Of course, we believe we are particularly
in light of the fact that the North Carolina Court of Appeals has upheld our study
challenge brought by Dickerson Carolina in its suit against the
individual members of the Board of Transportation.

Tim Thompson (MGT)

FILE COPY

South Carolina
Department of Transportation
P.O. Box 191
Columbia, S.C. 29202-0191

Daniel P. Fanning, P.E.
Director

MEMORANDUM

TO: Don Freeman, Construction
Chuck Mikell, Building Engineer
Doug MacFarlane, Grants and Contracts
Charlie L. Matthews, Bridge Construction
Benjamin Byrd, Compliance
J.B. Wannamaker, Procurement Office

FROM: Valentine Burroughs, Jr.

DATE: August 1, 1994

Attached is a tentative schedule for Mr. Stephen F. Humphrey, MGT of America, Inc. visit to review any annual reports and project file.

Thank you for your assistance on the project.

cc: B.K. Jones, Interim Director
Linda McDonald, Asst. Chief Counsel

SOUTH CAROLINA
DEPARTMENT OF TRANSPORTATION
P.O. BOX 191
COLUMBIA, S.C. 29202

DANIEL P. FANNING
EXECUTIVE DIRECTOR

February 4, 1994

Honorable John W. Matthews, Jr.
613 Gressette Building
Columbia, South Carolina 29202

Dear Senator Matthews:

We appreciate the opportunity to meet with the leadership of the Legislative Black Caucus to review several priority issues and matters relating to the Department.

Thank you for your interest in the DBE Program and the Croson Disparity Study.

We would appreciate receiving your comments and or your suggestions on the proposed scope of work for the Disparity Study by February 18, 1994.

The anticipated time for conducting this study is approximately ten to twelve months. The projected cost will increase from $250,000 to approximately $350,000 to have a comprehensive Disparity Study performed.

We look forward to receiving your comments.

Sincerely your,

DPF

Daniel P. Fanning
Executive Director

South Carolina
Department of Transportation
P.O. Box 191
Columbia, S.C. 29202

Daniel P. Fanning, P.E.
Director

MEMORANDUM

TO: Linda McDonald, Assistant Chief Counsel

FROM: Valentine Burroughs, Jr.

DATE: July 7, 1994

SUBJECT: Questions on the RFP

This is the first set of questions regarding the RFP. MGT of America, Inc. has several questions or concerns regarding clarification and/or information on the contracts filing system.

I would hope that you and I are able respond to these questions in light of the numerous discussions we have had on this subject.

Val.

Thanks

SOUTH CAROLINA

DEPARTMENT OF TRANSPORTATION

SCDOT

FACSIMILE TRANSMISSION COVER SHEET

DATE: 7/26, 1994

TO: Ms Cindy Stamm

FAX NUMBER: 734 - 2730

FROM: Val. Burroughs, JR.

TOTAL PAGES INCLUDING THIS COVER: 2

COMMENTS: This is the letter forwarded to Sen. Matthews, Chairman of Economic Development Sub-Committee of Legislative Black Caucus. The General Assembly never officially acted to increase the amount from $250 to $350,000. I appreciate your assistance.

OFFICE OF THE EXECUTIVE DIRECTOR - SCDOT
POST OFFICE BOX 191
COLUMBIA, SOUTH CAROLINA 29202

PHONE NUMBER (803) 737-1300
FAX NUMBER (803) 737-2038

STATE OF SOUTH CAROLINA

REQUEST FOR PROPOSAL

RFP NO: B401221 AMEND NO: 002
DATE : 07/13/94
BUYER : JOHN STEVENS NO: 026
PHONE : (803)-737-0612

RETURN BID NO LATER THAN:
CLOSING DATE: 08/10/94
CLOSING TIME: 2:30 P.M.

RETURN BID TO:
MATERIALS MGMT. OFFICE
P.O. BOX 101103
COLUMBIA, SC 29211

EXPRESS/HAND-CARRY TO:
1201 MAIN ST.-SUITE 600
CAPITOL CENTER
AT&T BUILDING
COLUMBIA, SC 29201

AMENDMENT NO. 002 TO RFP B401221

TITLE: DISPARITY STUDY

TRANSPORTATION SC DEPT OF
SC DEPT OF HWY & PUB TRANS
955 PARK ST
VALENTINE BURROUGHS
COLUMBIA SC 29201

MUST BE SIGNED TO BE VALID

***** RFP NO. AND CLOSING DATE MUST BE SHOWN ON SEALED ENVELOPE *****

AUTHORIZED SIGNATURE | PRINTED NAME | DATE

COMPANY | STATE VENDOR NO. (IF KNOWN)

MAILING ADDRESS | SOCIAL SECURITY OR FEDERAL TAX NO.

CITY | STATE | ZIP CODE | PHONE

THE ATTACHED QUESTIONS AND RESPONSES ARE HEREBY INCORPORATED INTO THE SOLICITATION.

THIS AMENDMENT IS BEING FAXED TO ALL PROSPECTIVE OFFERORS.

NOTE: THE PROPOSAL OPENING DATE IS CHANGED TO AUGUST 10, 1994 AT 2:30 P.M.

ACKNOWLEDGE RECEIPT OF THIS AMENDMENT PRIOR TO DATE AND TIME SPECIFIED IN THE SOLICITATION, OR AS AMENDED, BY ONE OF THE FOLLOWING METHODS: (A) BY SIGNING AND RETURNING ONE COPY OF THIS AMENDMENT WITH YOUR BID; (B) BY ACKNOWLEDGING RECEIPT OF THIS AMENDMENT ON EACH COPY OF THE OFFER SUBMITTED; OR (C) BY SEPARATE LETTER OR TELEGRAM WHICH INCLUDES A REFERENCE TO THE SOLICITATION AND AMENDMENT NUMBER(S). FAILURE OF YOUR ACKNOWLEDGEMENT TO BE RECEIVED AT THE ISSUING OFFICE PRIOR TO DATE AND TIME SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. IF, BY VIRTUE OF THIS AMENDMENT YOU DESIRE TO CHANGE AN OFFER ALREADY SUBMITTED, SUCH CHANGE MAY BE MADE BY LETTER OR TELEGRAM, PROVIDED SUCH LETTER OR TELEGRAM MAKES REFERENCE TO THE SOLICITATION AND THIS AMENDMENT, AND IS RECEIVED PRIOR TO DATE AND TIME SPECIFIED.

REFERENCE AGENCY RESPONSE TO QUESTION NO. 11.

CONTACT PERSON FOR FILE REVIEW IS: MR. VALENTINE BURROUGHS, JR.
S.C. DEPT. OF TRANSPORTATION
P.O. BOX 191
COLUMBIA, SC 29202
(803)-737-6361

Re: South Carolina Department of Transportation
Disparity Study - RFP No. B401221

QUESTION 1 The methodology required in the RFP dramatically exceeds the requirements for a sound and defensible "Croson Decision Disparity Study" and in our view (after having done over 20 studies including 2 departments of transportation) cannot be done as specified. In view of this concern we have two questions

QUESTION 1a) Is there a reason why the requirements far exceed the requirements for all other disparity studies and the requirements of the courts that would help us understand what you are trying to achieve?

ANSWER SCDOT is anxious to obtain a Disparity Study which clearly and accurately documents the availability and utilization of minority and women-owned businesses in SCDOT contracting. We anticipate that the study will be used to determine the need for a minority and women-owned business program in SCDOT contracting and provide the outline for such a program. Because of the importance of this study, SCDOT desires to obtain a study that will be detailed enough to withstand critical review.

SCDOT's Disparity Study was mandated by the South Carolina General Assembly in the 1993-94 Appropriations Act. This Act mandated that SCDOT

> have a study performed to determine if a significant statistical disparity exists between the number of available, qualified minority and women-owned contractors willing and able to perform highway/bridge, preconstruction, construction, building construction and renovation and the number of such contractors actually engaged by the Department or contractors working for the Department (emphasis supplied).

Except for the addition of the word "available," the Act uses the same language used by the Croson court to describe the evidence necessary to establish an inference of discrimination in the contracting practices of a specific locality. See Croson, 109 S. Ct. 706, at 730. The addition of the word "available" to the Croson standard indicates that the South Carolina General Assembly was particularly interested in obtaining a study that would accurately measure "availability." Obviously, an accurate determination of the pool of "available' minority and women-owned contractors is essential to an accurate and useful study. In fact, one of the criticisms of the North Carolina DOT Disparity Study was its overinclusiveness in counting the firms available to perform various types of work. (See LaNoue, "Review of the 'Study of Minority and Women Business Participation in Highway Construction," January 26, 1993.")

With these factors in mind, SCDOT designed its RFP to require great detail in the collection of data. The detail in the collection of data enables a detailed and accurate analysis of the data to determine disparity and the reasons for the disparity.

The purpose of a disparity study is to measure discrimination on the basis of race or gender. Therefore, it is imperative that the study examine and analyze factors which may cause disparity but which are not related to gender and/or race so that discrimination may be isolated as the cause of disparity.

QUESTION 1b) Is the Department open to alternative methodologies which fully meet the requirements of the courts?

ANSWER Yes, if the consultant can show that the methodology proposed in the RFP is unworkable and unnecessary and as long as the consultant's methodology adequately responds to the legislative mandate and to the requirements of Croson.

QUESTION 2 Is it the Department's position that only those firms for which the contractor has information concerning the firm's name, ethnic group and/or gender, principal location and type of work performed shall be considered as available firms? Or may reliable estimated numbers of available firms (without names) be used?

ANSWER SCDOT recognizes that it will be difficult, to obtain the name, ethnic group and/or gender, principal location and type of work performed for all minority and women-owned firms that were available for the years 1980-1993. The RFP requires the consultant to make an exhaustive effort to collect this information and to document its efforts and its results (See Paragraphs 3(A)(2) and (3), pages 7 and 8 of the RFP). If this information cannot be obtained, then the consultant will have to use other reliable sources and support the reliability of its sources.

However, it seems to SCDOT that a business cannot be deemed "available" if its name, principal business location, and expertise is not known to the business community. Certainly, if the race and/or gender is not known, the purpose of the disparity study would be defeated. The information requested should not be difficult to obtain for the more recent years of the study (at least from 1990-1993), and SCDOT would consider the disparity study incomplete without this information.

The consultant must document its attempts to obtain the requested information and explain why the requested information is not collectable and/or unnecessary to a valid disparity study. The consultant must support it conclusions that such information is unnecessary by reference to other proven and accepted disparity studies.

QUESTION 3 Is it the intent of the Department that the level of historical disparity shall be determined for each of the 13 years for each category and subcategory of work as specified in paragraph (3) of Section A on page 8 of the RFP?

ANSWER Yes, where the information is available. SCDOT recognizes that the determination of disparity for each of the 13 years in each category of work will tedious and time-consuming. However, if the consultant is able to collect the base data (i.e., the type of work a contractor performs, the type of work the contracts require), the determination of disparity should not be unreasonable.

On the other hand, if the consultant is not able to collect the base data information, it would be unreasonable to require a determination of disparity for every year. In this event, SCDOT would expect the consultant to document its efforts to collect the information for a given year and explain why it is impossible to develop a disparity index based upon categories of work for that year.

SCDOT would expect that the consultant could collect the information on the type of work for at least the most recent years of the study (1990-93). SCDOT's contract files should contain the information necessary to make this disparity measure.

QUESTION 4 Is it the intent of the Department that the level of disparity be determined for each type of contract (i. e., state-funded (set-aside and non-set-aside) and federal (with goals and without goals))?

ANSWER Yes, where the information is available. The purpose of this measure or index would be to see if there is less disparity when the use of minority and women-owned firms is required than where the use of minority and women-owned firms is not required. If this disparity index would not achieve this result, then the consultant should suggest how this information can be determined and provide that information.

QUESTION 5 Is it the intent that separate disparity levels be established for each geographical area of the state? If so, how many geographical areas?

ANSWER Yes, where the information is available. The purpose of this index or measure would be to show whether the geographical location of the project is a significant factor in creating disparity. The geographical areas could be the 46 counties of the State or SCDOT's seven engineering districts.

QUESTION 6 Is it the intent that separate disparity levels be established by size categories of firms?

ANSWER Yes, where the information is available. The purpose of this measure or index is to help determine whether the size of a firm is a significant factor in creating disparity.

QUESTION 7 Is it the intent that separate disparity levels be established by bonding capacities of firms?

ANSWER Yes, where the information is available. The purpose of this measure is to determine whether bonding capacity is a significant factor in creating disparity.

QUESTION 8 Is it the intent that separate disparity levels be established for all combinations of the variables specified in paragraph (2) of Section C on page 10 of the RFP? For example, by race/sex group, by funding source, by geographical location, by size of firm, by bonding capacity, by work category and subcategory? If the answer is yes, we estimate the combinations could yield over 269,000 separate disparity indices.

ANSWER The purpose of measuring disparity based upon all the factors cited above is to provide sufficient information to

determine whether the disparity reported is attributable to race and/or gender-related factors or to factors which are not related to race and/or gender. It may not be necessary to determine the disparity levels for all combinations of these factors to make this determination. It would seem, however, that disparity levels would need to be determined based upon each of the factors cited in order to isolate the causes of overall disparity.

QUESTION 9 Does the Department's contract or contract files contain all of the information required to properly determine the amount of money going to prime and subcontract firms by the work category and subcategories specified in paragraph (3) of Section A on page 8 of the RFP?

ANSWER Yes.

QUESTION 10 Can you provide us with the number of and dollar volume of contracts by year?

ANSWER Yes, we have Annual Reports which provide this information.

QUESTION 11 Can we send representatives to inspect the contract data files of the Department for the period 1980-1993? Will such be readily available for our inspection?

ANSWER Yes, the files can be made available for your inspection upon three (3) days notice. The files are in file boxes in several different SCDOT locations: Some files are in offices presently in use, others are in offices used only for storage purposes. Arrangements can be made for your examination of these files at these offices.

Please let us know if you have further questions or if you need further clarification of these answers.

Thank you again for your interest in this study.

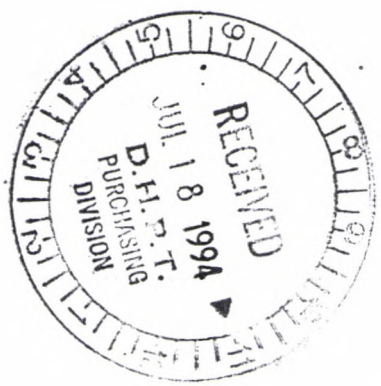
Sincerely,

Linda C. McDonald
Assistant Chief Counsel

cc: Mr. John R. Stevens
Mr. Valentine Burroughs

MATERIALS MANAGEMENT OFFICE
1201 MAIN ST - SUITE 600
COLUMBIA, SC 29201

BID DOCUMENT ENCLOSED



VENDOR NO. 1112103
S.C. DEPT OF TRANSPORTATION
955 PARK STREET
ELAINE JOHNSON
*****IMS***** SC 99999

South Carolina
Department of Transportation
P.O. Box 191
Columbia, S.C. 29202

Daniel P. Fanning, P.E.
Director

MEMORANDUM

TO: Elaine Johnson

FROM: Valentine Burroughs, Jr.

DATE: March 22, 1994

SUBJECT: Evaluation Panel

Attached is a brief synopsis of each individual appointed to serve on the Evaluation Panel for the Disparity Study.

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

DISPARITY STUDY

EVALUATION PANEL

March 22, 1994

Benjamin F. Byrd
Director, Office of Compliance, Disadvantaged Business Enterprise Program.

Donald H. Freeman
Road Construction Engineer, The Construction Office, responsible for statewide Highway Construction Projects.

Linda O. McDonald
Assistant Chief Counsel, and designated Attorney for the Disadvantaged Business Enterprise Program.

M. Elaine Johnson
Director of Procurement Services and the implementation of the Department's MBE Utilization Plan.

Shirley C. Robinson
Attorney/Staff Director, S. C. Legislative Black Caucus.

Michael Covington
Director, Heavy Highway Division, General Contractor Association of South Carolina.

John W. Gadson, Sr.
Director Small Business Development Center, SCSU and Former Director of the Governor's Small and Minority Business Assistance Office.

Valentine Burroughs, Jr.
Executive Assistant for Minority Affairs, and coordinate special projects for the Department.

U2

South Carolina
Department of Transportation
P.O. Box 191
Columbia, S.C. 29202

Daniel P. Fanning, P.E.
Director

MEMORANDUM

TO: Elaine Johnson, Director of Procurement

FROM: Val. Burroughs, Jr. VBJr

DATE: March 28, 1994

SUBJECT: Revised Evaluation Panel

The list of Evaluation Panel Members that I forwarded to you on March 22, 1994 didn't include Dr. John Grego, Director of Statistics and Research Laboratory, USC.

Dr. Grego's name was inadvertently left off the initial list that included the synopsis, however he was on the original list of panelist appointed by Mr. Fanning.

I brought this omission to Doug Horton's attention this morning prior to our meeting and he made a note for the record.

South Carolina
Department of Transportation
P.O. Box 191
Columbia, S.C. 29202

Daniel P. Fanning, P.E.
Director

June 27, 1994

S.C. Minority Contractors Association
114 Bombay Drive
Columbia, South Carolina 29209

Attention: Richard Jackson

Dear Mr. Jackson:

We appreciate your letter dated June 20, 1994 regarding the review panel for the Croson Disparity Study Proposals.

We have considered your request and agree to include Mr. Anthony Hunter on the review panel. Please keep in mind that the sole task of the review panel will be to evaluate the proposals received and to recommend to the Director the proposal which most adequately address the Request for Proposals.

Please advise Mr. Hunter that he will be informed as to when the review panel will meet by Valentine Burroughs, Jr. in my office.

We are looking forward to a positive working review panel.

Sincerely,

B. K. Jones
Interim Director

cc: Dr. W. F. Gibson
S.C. Conf. of NAACP

Mr. J.T. McLawhorn
Cola. Urban League

Rep. Joe E. Brown
S.C. Legis. Black Caucus

J. T. McLawhorne
President Urban League
P. O. Drawer J
Columbia, S. C. 29250-0125
Phone: 799-8150

Mr. H. B. Gibson
NAACP
239 East Broad Street
Greenville, S. C. 29601
Phone:754-4584

Representative Joe E. Brown
Chairman, Legislative Black Caucus
P. O. Box 11034
Columbia, S. C. 29211

Mailed to the above address on 6-28-94

June 10, 1994

S.C. Minority Contractors Association
114 Bombay Drive
Columbia, SC 29209
Atten: Richard Jackson

Re: Croson decision disparity study -
Evaluation panel

Dear Mr. Jackson:

Thank you for your June 1, 1994 letter in regard to the Croson decision disparity study to be performed for the Department. We appreciate your interest in this important study.

You first express concern about the progress of the study. The Department is progressing with deliberate speed to procure a thorough, accurate and legally-defensible study. A Scope of Work has been prepared, bidders have been qualified, and proposals have been solicited.

You also express concern about the composition of the committee which is charged with the responsibility of evaluating the proposals submitted. The Department has attempted to assure representation of a broad range of viewpoints on the committee. The four members of the committee outside the Department are Shirley C. Robinson, attorney, S.C. Legislative Black Caucus; John Gadson, Director of the Small Business Development Center at South Carolina State University; Dr. John Grego, Director, Statistics and Research Lab, University of South Carolina; and Michael Covington of the Carolinas Associated General Contractors Association.

We feel that the evaluation committee as presently composed will adequately represent the viewpoint of the Minority Contractors Association. However, the Department has no objection to your organization appointing a representative to serve on the committee ~~if you desrie to do so~~. We would require, however, to avoid any problems with conflict of interest, that the representative not be a contractor who has bid or may bid on Department contracts.

If you choose to have a representative on the evaluation committee, I would appreciate your submitting his or her name to Val Burroughs within the ~~next two weeks~~. by this Thursday, June 16, 1994.

Thank you again for your concern in this matter.

Sincerely,

Daniel P. Fanning

The urgency is because the names of the Evaluation Panel must be submitted to the State procurement office prior to General Services soliciting bids for the Disparity Study.

cc. Val. Burroughs, JR.

DRAFT

June 10, 1994

S.C. Minority Contractors Association
114 Bombay Drive
Columbia, S.C. 29209
Attn: Richard Jackson

Dear Mr. Jackson:

I am in receipt of your June 1, 1994 letter concerning the disparity study being procured by the Department. I understand and share your concern about disparity for W/MBE's state procurement opportunities.

The Croson vs. City of Richmond case set parameters that disparity studies must follow; and a thorough analysis of these requirements was necessary prior to issuing a scope of work. This process has been completed, firms have been qualified, and proposals have been solicited.

Before submitting the evaluation panel members for consideration, numerous issues were considered. We also felt representatives, from various factions, were necessary to make certain the study results would be received with credibility. During this process, the team assembled to prepare the bid requirements determined contractors, with potential to bid and receive contracts, should not be directly involved in the evaluation process. This decision does not preclude a representative of the contractors association from participating in the process. The Department would have no objection to a representative of the S. C. Minority Contractors Association participating in the evaluation process. To expedite the solicitation process, the representative needs to be submitted as soon as possible.

Please contact (Linda McDonald at 737-1255 or Valentine Burroughs at 737-6361) to discuss the procurement requirements.

We appreciate the Association's continued interest in our procurement opportunities.

S.C. Minority Contractors Association
114 Bombay Drive
Columbia, South Carolina 29209

June 1, 1994

Mr. Daniel P. Fanning
Executive Director
South Carolina Department of Transportation
Post Office Box 191
Columbia, S.C. 29202

Dear Mr. Fanning:

The Minority Contractors Association (MCA) is an organization of African-American contractors dedicated to the pursuit of parity in state procurement opportunities for members of socially and economically disadvantaged groups. While South Carolina's dismal record of minority participation in contracting has traditionally been an issue of major concern to the MCA, the problem so aroused the attention of the General Assembly during the 1993 legislative session, that the body charged you Agency with the execution of a disparity study to document possible statistical disparities between the percentage of contracts awarded to minority business enterprises versus the percentage awarded to majority firms.

It has recently come to our attention that the Department of Transportation has yet to fully comply with this mandate. It is our understanding that DOT is just requesting proposals for the consulting services necessary to perform such a study. Even more disturbing is the proposed composition of the evaluation panel. The MCA has reason to believe that the Associated General Contractors (AGC) will be represented on the panel. As you know, the AGC has consistently been on record in opposition to minority business preferences in public contracting. Clearly, an AGC presence on the evaluation panel will have a significant adverse impact on the object and purpose of the study. Accordingly, we request that either the AGC representative on the panel be removed or that a representative from the MCA be appointed as well.

It is imperative that this issue be resolved prior to further action by your Agency. To that end, I am available at to more fully discuss the issues raised here. Your prompt attention to this matter will be greatly appreciated.

With Regards,

Richard Jackson
President, Minority
Contractors Association

cc: Dr. W. F. Gibson, President
NAACP, South Carolina Conference

J. T. McLawhorn, President and CEO
Columbia Urban League

Representative Joe E. Brown, Chairman
South Carolina Legislative Black Caucus

STATE OF SOUTH CAROLINA
BUDGET & CONTROL BOARD
DIVISION OF GENERAL SERVICES
MATERIALS MANAGEMENT OFFICE
1201 MAIN STREET, SUITE 600
COLUMBIA, S.C. 29201

JUNE 6, 1994

STATEMENT OF AWARD

REPERENCED BID NUMBER: B401014

REQUISITION NUMBER: 52412

FOR FURNISHING: CONDUCT A STUDY OF MINORITY AND WOMEN OWNED BUSINESS PARTICIPATION IN S.C. DEPT. OF TRANSPORTATION CONSTRUCTION.

ALL BIDS RECEIVED MAY 25, 1994 FOR FURNISHING A STUDY OF MINORITY AND WOMEN OWNED BUSINESS PARTICIPATION IN RESPONSE TO NOTICE DATED APRIL 20, 1994 ARE HEREBY REJECTED.

IT IS CONTEMPLATED THAT A NEW SOLICITATION WILL BE ISSUED AT A LATER DATE.

John R. Stevens

JOHN STEVENS
PROCUREMENT SPECIALIST

VOIGHT SHEALY
Chief Procurement Officer
1201 Main Street, Suite 600
Columbia, S.C. 29201

S.VC

MMO #128

EVALUATION REPORT

_____
EVALUATOR'S NAME (PLEASE PRINT)

RFP #B400812

OFFEROR: _____

AWARD CRITERIA:	POINTS ASSIGNED	POINTS AWARDED
A. Understanding of tasks and objectives.	1-70	_____
B. Soundness of approach.	1-60	_____
C. Administrative coordination, effectiveness and efficiency.	1-50	_____
D. Quality assurances.	1-40	_____
E. Organization and management.	1-30	_____
F. Cost.	1-20	_____
Total Possible Points.....	270	
TOTAL POINTS AWARDED.....		_____

_____
EVALUATOR'S SIGNATURE

DATE_____

EVALUATION PANEL INSTRUCTIONS

Please read each proposal carefully and thoroughly. Be prepared to discuss each proposal when the Evaluation Panel reconvenes. You may fill out your Evaluation Report in pencil, or fill out a working Evaluation Report prior to our next meeting. You may want to adjust your scores when the Panel reconvenes for discussion.

Do not discuss this solicitation with others, including other members of this Panel. If approached by someone from outside this procurement process, or an Offeror, do not even acknowledge that you are serving on the panel. If that fact is already known, the standard answer is "It is under evaluation." To go any further may jeopardize the integrity of the solicitation and increase the risk of a protest(s).

Please be objective in scoring each proposal, and do not allow others, or prior knowledge, to influence you. Remember, this is an independent evaluation, and you were chosen to serve on this Evaluation Panel because your expertise is valued. Do not discuss the evaluation process among yourselves outside of this forum. Remember, you may score only what is contained in each proposal. You should not consider previous contacts or experiences with any offeror(s) when evaluating and scoring.

At our final meeting you will have the opportunity to hear the opinions of all other Panel members. They may have caught something significant that you missed, or vise versa. You may adjust preliminary scores at any time prior to finalizing and turning them in.

Please do not fill in the "Cost" section on your score sheets as this final information will be provided to you by me. It is the only truly objective evaluation criteria we have and is based on a costing formula developed by the Materials Management Office, and thoroughly tested in the Procurement Review Panel's protest arena.

If you have any questions, concerns, or outside contacts regarding this procurement to report, please feel free to contact me, John Stevens, at MMO/State Procurement, 737-0612.

South Carolina
Department of Transportation
P.O. Box 191
Columbia, S.C. 29202

Daniel P. Fanning, P.E.
Director

MEMORANDUM

TO: Benjamin F. Byrd, Director Compliance Office
Don H. Freeman, Road Construction Engineer
Linda O. McDonald, Asst. Chief Counsel
M. Elaine Johnson, Director of Procurement Services
Shirley C. Robinson, Atty. Staff Director, SCLBC
Michael Covington, Director AGC
John Grego, Director USC Statistical Lab.
John W. Gadson,Sr., Director Small Bus. Dev. Center
Valentine Burroughs, Jr. , Executive Assistant

DATE: March 21, 1994

SUBJECT: Evaluation Committee for the Croson Disparity Study

The Department is requesting that you serve on the Evaluation Committee for the Croson Disparity Study.

The purpose of this committee is to evaluate the firms qualifications and the proposals for conducting the Disparity Study.

The initial meeting of the Evaluation Committee has been scheduled for Monday , March 28, 1994 at 10:30 a.m. at the Headquarters Building in Conference Room 310 .

Val Burroughs, in my office will continue to serve as the coordinator for this project with support from the Legal, Compliance and Engineering Offices.

We appreciate you taking time out of your busy schedules to serve on the Evaluation Committee.

Sincerely,

Daniel P. Fanning
Director

cc: Val. Burroughs, Jr.
Executive Assistant

SOUTH CAROLINA DEPARIMENT OF TRANSPORTATION

DISPARITY STUDY

EVALUATION PANEL

March 22, 1994

Benjamin F. Byrd
Director, Office of Compliance, Disadvantaged Business Enterprise Program.

Donald H. Freeman
Road Construction Engineer, The Construction Office, responsible for statewide Highway Construction Projects.

Linda O. McDonald
Assistant Chief Counsel, and designated Attorney for the Disadvantaged Business Enterprise Program.

M. Elaine Johnson
Director of Procurement Services and the implementation of the Department's MBE Utilization Plan.

Shirley C. Robinson
Attorney/Staff Director, S. C. Legislative Black Caucus.

Michael Covington
Director, Heavy Highway Division, General Contractor Association of South Carolina.

John W. Gadson, Sr.
Director Small Business Development Center, SCSU and Former Director of the Governor's Small and Minority Business Assistance Office.

Dr. John Grego
Director, Statistics and Research Lab, USC

Valentine Burroughs, Jr.
Executive Assistant for Minority Affairs, and coordinate special projects for the Department.

VOID

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

DISPARITY STUDY

EVALUATION PANEL

March 22, 1994

Benjamin F. Byrd
Director, Office of Compliance, Disadvantaged Business Enterprise Program.

✓Donald H. Freeman
Road Construction Engineer, The Construction Office, responsible for statewide Highway Construction Projects.

✓ Linda O. McDonald
Assistant Chief Counsel, and designated Attorney for the Disadvantaged Business Enterprise Program.

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Attorney/Staff Director, S. C. Legislative Black Caucus.

✓ Michael Covington
Director, Heavy Highway Division, General Contractor Association of South Carolina.

John W. Gadson, Sr.
Director Small Business Development Center, SCSU and Former Director of the Governor's Small and Minority Business Assistance Office.

Valentine Burroughs, Jr.
Executive Assistant for Minority Affairs, and coordinate special projects for the Department.

John Gregg, Director of Statistics & Research Laboratory USC

S C D O T

Request for Qualifications

Monday, March 28, 1994
10:30 a.m.

AGENDA

1. Welcome/Introductions
2. Overview of Process
3. Review of Request for Qualification
4. Specifics on Ranking
5. Next panel meeting date, time and place

South Carolina
Department of Transportation
P.O. Box 191
Columbia, S.C. 29202

Daniel P. Fanning, P.E.
Director

MEMORANDUM

TO: Benjamin F. Byrd, Director Compliance Office
Don H. Freeman, Road Construction Engineer
Linda O. McDonald, Asst. Chief Counsel
M. Elaine Johnson, Director of Procurement Services
Shirley C. Robinson, Atty. Staff Director, SCLBC
Michael Covington, Director AGC
John Grego, Director USC Statistical Lab.
John W. Gadson,Sr., Director Small Bus. Dev. Center
✓Valentine Burroughs, Jr. , Executive Assistant

DATE: March 21, 1994

SUBJECT: Evaluation Committee for the Croson Disparity Study

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Val Burroughs, in my office will continue to serve as the coordinator for this project with support from the Legal, Compliance and Engineering Offices.

We appreciate you taking time out of your busy schedules to serve on the Evaluation Committee.

Sincerely,

Daniel P. Fanning
Director

cc: Val. Burroughs, Jr.
Executive Assistant

MEMORANDUM

TO: Benjamin F. Byrd, Director Compliance Office
Don H. Freeman, Road Construction Engineer
Linda O. McDonald, Asst. Chief Counsel
M. Elaine Johnson, Director of Procurement Services
Shirley C. Robinson, Atty. Staff Director, SCLBC
Michael Covington, Director AGC
John Grego, Director USC Statistical Lab.
John W. Gadson,Sr., Director Small Bus. Dev. Center

DATE: March 18, 1994

SUBJECT: Evaluation Committee for the Croson Disparity Study

The Department is requesting that you serve on the Evaluation Committee for the Croson Disparity Study.

The purpose of this committee is to evaluate the firms qualifications and the proposals for conducting the Disparity Study.

The initial meeting of the Evaluation Committee has been scheduled for Monday , March 28, 1994 at 10:30 a.m. at the Headquarters Building in Conference Room 310 .

Val Burroughs, in my office will continue to serve as the coordinator for this project with support from the Legal, Compliance and Engineering Offices.

We appreciate you taking time out of your busy schedules to serve on the Evaluation Committee.

Sincerely,

D.P.F.

Daniel P. Fanning
Director

cc: Val. Burroughs, Jr.
Executive Assistant

SOUTH CAROLINA
DEPARTMENT OF TRANSPORTATION

OFFICE OF CHIEF COUNSEL

VICTOR S. EVANS
CHIEF COUNSEL

ELIZABETH S. MABRY
DEPUTY CHIEF COUNSEL

SILAS N. PEARMAN BUILDING
955 PARK STREET - SUITE 343
P.O. BOX 191
COLUMBIA, S.C. 29202
FAX NUMBER 803-737-2071
TELEPHONE 803-737-1347

ASSISTANT CHIEF COUNSEL
PATRICK M. TEAGUE
NATALIE J. MOORE
LINDA MCDONALD
GLENNITH C. JOHNSON
BARBARA M. WESSINGER

February 22, 1994

TO: Valentine Burroughs, Executive Assistant

FROM: Linda C. McDonald, Assistant Chief Counsel LCM

RE: Croson Disparity Study

Attached is the "Specific Scope of Work" which has been revised to incorporate the suggestions of Jim Rion and Don Freeman. I advise that you have John Grego look over this Scope of Work and give us his comments and suggestions from a statistical standpoint. He might also be able to advise as to how we can monitor the data retrieval and analysis to assure the validity of the results.

LCM/sla
Attachment

cc: M. Elaine Johnson, Director of Procurement Services

South Carolina
Department of Transportation
P.O. Box 191
Columbia, S.C. 29202

Daniel P. Fanning, P.E.
Director

MEMORANDUM

TO: Dr. John Grego, Director
Statistical Lab USC

DATE: March 11, 1994

SUBJECT: Scope of Work

Enclosed is a revised draft of the proposed Scope of Work for the Disparity Study.

John, we would like for you to look over this scope of work and give us your comments and suggestions especially from a statistical standpoint. We must finalize the RFP prior to April 15, 1994.

If possible, we would appreciate receiving your comments sometime next week, we also wish to discuss with you your availability to assist with monitoring the data retrieval and analysis of the progress reports etc.

I look forward to working with you.

Sincerely,

Val.

Valentine Burroughs, Jr.
Executive Assistant

AWARD CRITERIA

The proposals will be evaluated by a review panel on the basis of the following criteria:

1. **Understanding of tasks and objectives.** The extent to which the proposal demonstrates an understanding of the project tasks and objectives.

2. **Soundness of approach**. The extent to which the proposal thoroughly addresses the tasks set forth in the Scope of Work and presents a reasonable, rational, and complete work plan for accomplishing the study objectives.

3. **Organization and management**. The extent to which the work of the project will be controlled, performed and monitored by individuals with the skills and qualifications necessary to deliver a quality product. The reasonableness and completeness of the management plan.

4. **Administrative effectiveness and efficiency**. The extent to which the proposal demonstrates the offeror's ability to work effectively and efficiently with SCDOT and others in the tasks of the project, including data retrieval from SCDOT, collection of anecdotal data from other sources and the contracting community, data analysis, and delivery of products.

5. **Quality assurances** . The extent to which the work plan incorporates procedures and techniques for assuring the integrity, accuracy and validity of the data collected, the analysis of that data and the final product.

6. ~~**Timeliness**~~. The amount of time required to conduct and complete the study.

7. **Cost**. The cost of the study.

SOUTH CAROLINA
DEPARTMENT OF TRANSPORTATION

OFFICE OF CHIEF COUNSEL

VICTOR S. EVANS
CHIEF COUNSEL

ELIZABETH S. MABRY
DEPUTY CHIEF COUNSEL

SILAS N. PEARMAN BUILDING
955 PARK STREET - SUITE 343
P.O. BOX 191
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FAX NUMBER 803-737-2071
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ASSISTANT CHIEF COUNSEL
PATRICK M. TEAGUE
NATALIE J. MOORE
LINDA MCDONALD
GLENNITH C. JOHNSON
BARBARA M. WESSINGER

February 22, 1994

TO: Valentine Burroughs, Executive Assistant
M. Elaine Johnson, Director of Procurement Services
Benjamin F. Byrd, Director, Office of Compliance
Glennith C. Johnson, Assistant Chief Counsel

FROM: Linda C. McDonald, Assistant Chief Counsel

RE: Croson Disparity Study

Attached are drafts of the "Proposal Contents," "Award Criteria" and "Contract Term and Special Provisions" sections of the RFP for the Disparity Study. Please review these and give me your suggestions, corrections or additions.

LCM/sla
Attachments

SOUTH CAROLINA
DEPARTMENT OF TRANSPORTATION

OFFICE OF CHIEF COUNSEL

VICTOR S. EVANS
CHIEF COUNSEL

ELIZABETH S. MABRY
DEPUTY CHIEF COUNSEL

SILAS N. PEARMAN BUILDING
955 PARK STREET - SUITE 343
P.O. BOX 191
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ASSISTANT CHIEF COUNSEL
PATRICK M. TEAGUE
NATALIE J. MOORE
LINDA McDONALD
GLENNITH C. JOHNSON
BARBARA M. WESSINGER

March 22, 1994

M E M O R A N D U M

TO: Elaine Johnson, Director of Procurement Services

FROM: Linda C. McDonald, Assistant Chief Counsel LCM

RE: Croson Disparity Study

Attached is a revised draft of the Scope of Work, Budget, Proposal Contents, Award Criteria, and Contract and Term and Special Provisions sections of the Request for Proposals.

I have reviewed this draft with Val Burroughs, Pam McKie and Glennith C. Johnson. After your approval, I understand it will be submitted to Doug Horton, Chief Procurement Officer.

LCM/sla
Attachment

cc: Val Burroughs, Special Assistant
Benjamin F. Byrd, Director, Office of Compliance
Glennith C. Johnson, Assistant Chief Counsel

SCOPE OF WORK

The consultant shall be required to perform the following specific tasks:

1. **Demonstrate understanding of the evidentiary basis necessary for a race and gender-based remedial program.** The consultant shall provide an explanation of the evidentiary standards required for a constitutionally sound race and gender-based program, as set forth in the case of City of Richmond vs. J. A. Croson Co., 109 S.Ct. 706 (1989), and other leading cases. The consultant shall utilize these standards in the conduct of this study of minority and women-owned business participation in SCDOT contracting.

2. **Collection and analysis of historical and anecdotal data.** The consultant shall identify, collect and analyze the following data and document whether there is evidence that discrimination on the base of race and/or gender occurred in SCDOT contracting for highway/bridge preconstruction and construction and building construction and renovation, or in subcontracting by its prime contractors on those contracts, during the years 1980 - 1993:

A. Analysis of contracting practices. The consultant shall examine SCDOT contracting procedures, policies and practices in the award of contracts and approval of subcontractors, as well as the procedures, policies and practices of SCDOT prime contractors in awarding subcontracts. The consultant shall document if there is evidence that such procedures, policies or practices have had the effect of discriminating against contractors on the basis of race or gender or race or gender-related factors. The consultant shall identify any discriminatory procedures, policies and practices found and document the source of its information.

B. Collection and analysis of historical evidence. The consultant shall collect and analyze existing documents and records concerning the efforts of minority and women-owned contractors to obtain contracts from SCDOT and SCDOT contractors during the years of 1980 - 1993. Existing documents include, but are not limited to, records of public hearings sponsored by the S.C. Legislative Black Caucus, a 1983 study and report by the Governor's Office of Small and Minority Business Expansion Council and studies performed by the South Carolina Legislative Audit Council. The consultant shall document efforts to secure this information and identify all documents and records examined. The consultant shall identify and document any evidence of discriminatory patterns or practices found.

C. Conduct public hearings and private interviews. The consultant shall

conduct public hearings and private interviews and document whether there is evidence that SCDOT or its contractors engaged in discriminatory patterns or practices in SCDOT highway/bridge preconstruction and construction and building construction and renovation contracts during the years 1980 - 1993. The consultant shall document its efforts to collect this information. The consultant shall identify and document any evidence of discriminatory patterns or practices found.

3. **Statistical evaluation.** The consultant shall document whether there is a statistical disparity between the number of available qualified minority and women-owned contractors willing and able to perform highway/bridge preconstruction, construction, building construction and renovation and the number of such contractors actually engaged by SCDOT or contractors working for SCDOT during the years 1980 - 1993. The consultant's analysis must include at least the following elements:

A. Availability analysis.

1) Definition of "available, qualified, willing and able" population. The consultant shall state in its bid proposal and in its final written report the definition of "available qualified minority and women-owned contractors willing and able to perform highway/bridge preconstruction, construction, building construction and renovation" it will use in the study. The consultant shall state and explain how it defines each element of the definition (i.e., "available," "qualified," "minority-owned," "women-owned," "contractor," "willing to perform," "able to perform," "highway/bridge preconstruction and construction" and "building construction and renovation"). The definition shall include a determination of the relevant market area as required by Croson. The consultant must support its definition by reference to case law which supports a disparity study based upon such definitions or by other disparity studies which have been proved to be acceptable for the purposes of establishing or maintaining a race or gender-based remedial program.

2) Examination of data. In identifying the relevant population, the consultant will be required to identify and consult all available sources of information on minority and women-owned businesses in the relevant market area for the years 1980 - 1993 including, but not limited to the following: SCDOT lists of certified minority and/or disadvantaged business enterprises, the Governor's Office of Small and Minority Business Assistance; minority, women-owned, and small business organizations; minority, women-owned, and small business development programs of state universities and colleges; public and private businesses who assist in development of minority, women-owned or small businesses; trade organizations; bidding lists for other public and private entities who contract for highway related construction activities, census data; U.S. Department of Commerce data; and Small Business Administration data. The consultant shall document the results

of its efforts to identify the relevant population.

3) Identification of individual firms. The consultant shall identify "available, qualified, willing and able" firms by name, ethnic group and/or gender, principal business location, and type of work performed. Type of work performed shall be identified by general areas and also by specialized areas within each general area. General areas must include highway preconstruction, highway construction, bridge preconstruction, bridge construction, building construction, and building renovation. Specialized areas must include all categories of work available in each general area. For example, clearing and grubbing, curb and gutter, paving, trucking, and traffic control would be some of the specialized areas within the general area of highway construction; architectural services, sheetrocking, painting, plumbing, brick masonry, and electrical would be some of the specialized areas within building construction. Consultant shall coordinate the categories of work identified with the areas available for contracting by SCDOT or its contractors (see "Utilization Analysis" below, Paragraphs (B)(2)(a) and (B)(3)(a)). Where available, the consultant shall also identify the size (number of employees), age, bonding capacity, and amount of work performed annually (number and dollar value). The consultant shall document its efforts to obtain this information. The consultant shall identify which firms are prime contractors and which are subcontractors.

B. Utilization analysis.

1) Data to be examined. The consultant shall examine a sample of SCDOT contract files for highway/bridge preconstruction and construction and building construction and building renovation for the period from 1980 through 1993 to determine the utilization of minority and women-owned contractors by SCDOT and its contractors during those years. The consultant shall support the validity of its sample by generally acceptable statistical principles and by reference to other disparity studies that have withstood legal challenges, if available.

2) As prime contractors.

a) Identification of categories of work. The consultant shall identify all categories and subcategories of work available for direct contracting by SCDOT in the general areas of highway preconstruction, highway construction, bridge preconstruction, bridge construction, building construction and building renovation. The consultant shall identify the specialized areas within each general area as required in the "Availability analysis" set forth in Paragraph (A)(3) above.

b) Identification of contractors used in each work category. For each category, the consultant shall document the number and dollar amount of contracts awarded to minority and women-owned firms and the amount awarded to majority firms (non-minority and non-women-owned firms). The consultant

shall identify which contracts were set-aside exclusively for minority and/or women-owned contractors and on which SCDOT acted as bonding agent.

c) Identification and analysis of characteristics of contractors used. The consultant shall identify the characteristics of the contractors that obtained contracts by name, ethnic group and/or gender, geographic location, number and dollar value of contracts obtained and type of work performed. (Use categories and subcategories identified above). Where obtainable, the consultant shall identify the firm's size (number of employees), age, bonding capacity, amount of work performed annually (categorize by SCDOT projects, non-SCDOT projects and type of work). The consultant shall document efforts to obtain this information. The consultant shall compare and contrast the characteristics of the firms that were awarded contracts.

3) As subcontractors.

a) Identification of categories of work. The consultant shall identify all categories and subcategories of work available for subcontracting on SCDOT contracts in the general areas of highway construction, highway preconstruction, bridge construction, bridge preconstruction, building construction and building renovation. Consultant shall be as specialized as possible in identifying these areas, coordinating the data with the data required for the "Availability analysis" set forth in Paragraph (A)(3) above.

b) Identification of subcontractors by categories of work. For each category of subcontracting work, the consultant shall identify the number and dollar amount of subcontracts made with minority firms, women-owned firms, and majority firms. The consultant shall determine and document how often the use of minority and women-owned firms was a requirement of the contract when such firms were utilized, and how often minority and women-owned firms were used when their use was not required.

c) Identification of subcontractors by characteristics. The consultant shall identify the subcontracting firms used by name, ethnic group, gender, geographic location, number and dollar value of subcontracts obtained, and category of work performed (using specialized categories identified above). Where obtainable, the consultant shall also identify and document the subcontracting firm's size (number of employees), age, and number and dollar amount of subcontracts performed annually (categorize by SCDOT and non-SCDOT subcontracts). The consultant shall document efforts to obtain this information. The consultant shall compare and contrast the characteristics of the firms used as subcontractors.

C. Disparity analysis.

1) Identification of disparity. The consultant shall identify the disparity between the available, qualified, willing and able minority and women-owned firms and the utilization of those firms by the SCDOT and its contractors.

2) Identification by category. The consultant shall identify disparity in at least the following categories for each year of the study:

a) State-funded contracts (set-aside and non-setsaside)
b) Federally-funded contracts (with goals and without goals)
c) By type of work involved (show both specialized and general categories of work identified in utilization and availability analysis)
d) By geographical location of project
e) By ethnic group of contractor
f) By gender (distinguish minority from non-minority)
g) By size of firm
h) By bonding capacity of firm
i) Where minority and women-owned firms are prime contractor (Note where contract was set-aside.)
j) Where minority and women-owned firms are subcontractors (Note where goals were imposed.)
k) Any other categories deemed necessary by the consultant to meet the objectives of the study or case law.

3) Significance of disparity. The consultant shall determine whether any disparity found is statistically significant. The consultant shall explain why it deems any disparity found to be statistically significant or insignificant.

4. **Cross-analysis of anecdotal, historical and statistical data.**

A. Link to discrimination. The consultant shall document the extent to which any disparity found can be linked to any patterns or practices of race or gender-based discrimination by SCDOT and/or its prime contractors identified in its analysis of historical and anecdotal data.

B. Other reasons for disparity. The consultant shall document to what extent any disparity found is the result of other factors not related to discrimination which it identified in its analysis of historical and anecdotal data.

C. Effect of special programs for minority and women-owned firms. The consultant shall identify and document the extent to which state and federal requirements for the use of minority and women-owned

contractors (see Request for Qualifications, Part V, "Background") have impacted any disparity or lack of disparity found.

C. Necessity for state and/or federal programs. The consultant shall determine, based upon the data collected, the extent to which state and federal programs (see Request for Qualifications, Part V, "Background") were necessary to assure that qualified minority and women-owned contractors had opportunities to participate in SCDOT contracts, either as prime contractors or as subcontractors.

5. **Evaluation of race and gender neutral techniques**. The consultant shall determine whether evidence exists of SCDOT's use of race and gender neutral techniques to increase minority and women-owned business participation in SCDOT contracts. The consultant shall provide evidence as to the effectiveness of these techniques. The consultant shall provide evidence as to whether any disparity found can be eliminated or significantly reduced through the use of race or gender neutral techniques. If the evidence shows that such techniques are or can be effective, the consultant shall propose a program of such techniques for SCDOT and show how such techniques can be expected to significantly reduce or eliminate any disparity found.

6. **Identification of narrowly tailored, race and gender-based remedies, if necessary**. If the consultant 's evidence indicates that race and/or gender neutral remedies have been or can be expected to be ineffective to eliminate or significantly reduce any disparity found, the consultant shall propose a race and/or gender-based remedial program that is legally supported by the consultant's work product. The consultant shall define the scope and characteristics of such a program. The program must be narrowly tailored to remedy only the disparity and discrimination found and shall include a method for determining when the program has achieved its ends. The consultant shall suggest a plan of action, policy changes, and draft legislation, if necessary, to change the current State DBE law to address these changes.

7. **Expected products.** The consultant shall produce the following products:

A. Monthly progress reports. On a monthly basis, the consultant shall provide SCDOT with a written report of the progress it has made towards completing its work plan. SCDOT may require supporting documentation to verify progress.

B. Written report of study. The consultant shall produce a written report of its study, covering all tasks in this Scope of Work. The report shall explain consultant's methodology and approach to the conduct of the study in addition to presenting its findings, conclusions and recommendations. Graphic illustrations are desired where their use would clarify and illustrate findings and conclusions, but the text of the report must explain the findings and conclusions reached.

(1) Preliminary report. The consultant shall submit three (3) draft copies of its report, with an executive summary, to SCDOT for its review

and comments at least three weeks prior to final printing.

(2) Final report. The consultant shall submit a camera-ready original and fifteen (15) copies of the final report with executive summary to SCDOT no later than April 15, 1995.

C. Oral presentations. After the study is completed, the consultant shall make four, oral, presentations of its report, to, or on behalf of SCDOT, upon reasonable notice.

BUDGET

The maximum budget for this project is Three Hundred Fifty Thousand ($350,000) Dollars. Interested offerors must submit a cost analysis in accordance with Paragraph 6, Section __ ("Proposal Contents") of this Request for Proposals.

PROPOSAL CONTENTS

Offeror must submit, as a minimum, the following information, in the order listed below:

1. **Statement of understanding and approach**. Explain your understanding of the overall objectives of the study within the context of the evidentiary basis required for a constitutionally sound, race and gender-based public contracting program. Explain your understanding of the requirements of each specific task (1-7) in the Scope of Work, in the order presented in the Scope of Work. Explain how you will approach the requirements of each task and answer any questions raised in the Scope of Work. Identify any special problems you anticipate in the work of each task and state how you will address those problems. Include your understanding of the importance of each task to the overall objectives of the study and how the tasks relate to each other.

2. **Work plan**. Provide the overall timetable for the study. Provide a detailed work plan which addresses each task (1-7) of the Scope of Work, stating how you will accomplish or meet the requirements of each task. Divide each task into subtasks and identify the sequence in which the subtasks will be performed, the estimated hours necessary for each task and subtask, the estimated starting and completion dates for each subtask, staffing assignments, and management responsibilities. Describe the specific products you will deliver at the conclusion of each task or subtask. Describe the format you will use for each report required in task 7 of the Scope of Work.

3. **Administrative coordination, effectiveness and efficiency**. Describe how you will effectively and efficiently perform the work of the project locally. Describe how you will coordinate data retrieval with SCDOT to assure minimum disruption of SCDOT operations. Describe how you will effectively work within the contracting community to identify and collect historical, anecdotal and statistical data. Describe how you will achieve completeness and clarity in the submission to SCDOT of monthly invoices, monthly progress reports, the preliminary report, the final report and the oral presentations. State how you plan to assure compliance with time constraints.

4. **Quality assurance**. Describe how you will assure the integrity, accuracy and validity of the data collected, the analysis of the data and the quality and veracity of the deliverable products.

5. **Organizational chart**. Provide an organizational chart which identifies the key personnel and all subcontractors that will participate in the project. Describe the responsibilities assigned to each person or subcontractor. Estimate the number of hours each person or subcontractor will require to perform their tasks and state what percentage of the total work hours each will perform. Provide resumes for all key personnel or subcontractors if the resumes have not been previously provided with the Request for Qualifications. Indicate which subcontractors have been certified by a state or federal agency to be small businesses owned and controlled by minorities or women. Provide evidence of certified status. State the extent to which you will give

this project priority over other projects.

6. **Cost**. State the total cost you will charge SCDOT for the study. To support the reasonableness of your offer, submit a cost analysis for each task to be performed and for the overall project. The cost analysis must include the following information and must be submitted on the attached forms (Attachment B-1 and B-2):

(1) Personnel costs - Identify each category of personnel (project director, researcher, statistician, attorney, copywriter), their number of hours, their rate per hour, and total cost.
(2) Supplies and material costs;
(3) General administrative costs/ overhead, with percentage stated;
(4) Transportation costs;
(5) Other direct costs, including subcontractors - Itemize and identify each.
(6) DBE utilization;
(7) Fee;
(8) Total price of the project.

ATTACHMENT B-1

(_____)
Agency Name

(_____)
Project Title

BUDGET ESTIMATE

					TOTALS
A.	PERSONNEL COSTS/HOURS	HOURS	RATE	COST	_____
B.	SUPPLIES/MATERIAL COSTS				_____
C.	GENERAL ADMIN./OVERHEAD				_____
D.	TRANSPORTATION COSTS				_____
E.	OTHER DIRECT COSTS				_____
F.	CONTRACTOR'S DBE UTILIZATION _____%				_____
G.	FIXED FEE				_____
H.	TOTAL COST PLUS FIXED FEE				_____

ATTACHMENT B-2

_____

Project Title

For SCOHPT/PTO OFFICE USE ONLY

_____

(Contract #)

ESTIMATED PROJECT COST DISTRIBUTION SUMMARY

TASKS	PERSONNEL COST/HOURS						SUPPLIES/ MATERIAL COSTS	GENERAL ADMIN. OVERHEAD	TRANSP COSTS	OTHER DIRECT COSTS	FIXED FEE	TOTAL
	HRS	COST	HRS	COST	HRS	COST						
TOTAL												

AWARD CRITERIA

The proposals will be evaluated by a review panel on the basis of the following criteria, which are listed in order of importance:

1. **Understanding of tasks and objectives.** The extent to which the proposal demonstrates an understanding of the tasks and objectives of the study. The extent to which the proposal recognizes problem areas and presents well-reasoned and workable solutions to those problems.

2. **Soundness of approach**. The extent to which the proposal thoroughly addresses the tasks set forth in the Scope of Work and presents a reasonable, rational, and complete work plan for accomplishing the tasks and objectives of the study.

3. **Administrative coordination, effectiveness and efficiency**. The extent to which the proposal demonstrates the offeror's ability and plan to effectively and efficiently perform the work of the study locally. The extent to which the proposal demonstrates the offeror's plan and ability to effectively and efficiently coordinate the work of the study with SCDOT in the areas of data retrieval, monthly reporting and delivery of products. The extent to which the proposal demonstrates offeror's plan and ability to work effectively within the contracting community to identify and collect data. The extent to which the proposal demonstrates the offeror's plan and ability to accomplish the work of the study and deliver products within the time constraints.

4. **Quality assurances** . The extent to which the work plan incorporates procedures and techniques for assuring the integrity, accuracy and validity of the data collected, the analysis of the data and the quality and reliability of the final product.

5. **Organization and management**. The extent to which the work of the project will be controlled, performed and monitored by individuals with the skills and qualifications necessary to deliver a quality product. The extent to which the offeror will give priority to this project over other projects. The reasonableness and completeness of the management plan. The extent to which the offeror will utilize subcontractors who have been certified by a state or federal agency to be small businesses owned and controlled by minorities and/or women.

6. **Cost**. The cost of the study.

CONTRACT TERM AND SPECIAL PROVISIONS

1. **Contract period.** The term of the contract shall begin at its signing and shall end when all services have been completed in accordance with the contract, unless sooner terminated. The final written report of the study shall be delivered to SCDOT no later than April 15, 1994.

2. **Consultant resources required**. The consultant shall provide sufficient resources and expertise to conduct and complete the study. SCDOT personnel will be available for consultation on reasonable notice, but all data retrieval, collection, and analysis will be the consultant's sole responsibility.

3. **Working space**. SCDOT will provide appropriate working space on its premises for examination of SCDOT files.

4. **Payment**. Payment for all work will be made on a monthly basis if the project progresses to the satisfaction of SCDOT. Payment will be made within 30 days after receipt of invoices from the consultant and approval of progress by SCDOT. SCDOT shall retain ten (10%) percent of the amount payable under each invoice until delivery of the final written report. Three (3%) percent of the contract price shall be retained until successful completion of the final oral presentations.

5. **Contract format**. Upon award of the contract, Consultant shall execute the Agreement and Contract attached hereto as Exhibit "A" and the contract shall be governed by the terms thereof.

CROSON DISPARITY STUDY

Pursuant to the 1993-94 Appropriations Act Section 124.29 the General Assembly directed the Department of Transportation to have a Croson Disparity Study conducted to determine if a significant statistical disparity exist between the number of available, qualified Minority and Women owned Contractors willing and able to perform highway/bridge, pre-construction, construction, building construction and building renovation and the number of such contractors actually engaged by the Department or contractors working for the Department. The Appropriation Act further states that the Department may spent up to $250,000 for this study, which shall be completed and submitted to the General Assembly by April 15, 1994.

In the case of Richmond vs. Croson, 109 S. Ct.. 706 (1989) , the U.S. Supreme Court struck down as unconstitutional the City of Richmond, Virginia's Minority Business Program. Richmond's program required prime contractors to subcontract at least 30% of the dollar amount of each contract to minority businesses. The program was challenged as unconstitutional by a low bidder whose bid was rejected because he failed to meet the 30% goal. The City of Richmond tried to justify the need for the program based upon evidence that the city's population was 50% black, but only 0.67% of the city's prime construction contracts had been awarded to minority businesses over a 5 year period from 1978 to 1983.

The Supreme Court said that a generalized assertion of past discrimination could not justify the use of a race-based program. The Court said a proper statistical study would be needed which identified the number of minority businesses in the relevant market that were qualified to undertake the city's contracting and compared that number to the total city construction dollars awarded to minority businesses. If a gross statistical disparity was shown and the State was shown to be a participant in practices which led to the disparity, then a race-based program could be justified to remedy the effects of discrimination. The Supreme Court said further that any race-based program must be narrowly tailored to remedy the problems identified.

The Croson case makes clear that in order for the State to have a minority goals or set-aside program, it must have a strong basis in evidence to justify the program. The General Assembly, by mandating that the Department have such a study performed, has indicated that it intends to support the Department's set-aside program if the evidence establishes that such a program is necessary.

STATE OF SOUTH CAROLINA

State Budget and Control Board

DIVISION OF GENERAL SERVICES

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HELEN T. ZEIGLER
DEPUTY DIRECTOR

M E M O R A N D U M

CONFIDENTIAL

The legislative record concerning this legislation, §11-35-5210 (then Chapter 11 of Tile 62) which consists primarily of the House Judiciary Committee file, including tapes of its public hearing on the amendments to the Procurement Code in 1981, contains no evidence, even anecdotal, of discrimination or its effects. In fact, the only written evidence presented was the statement and section by section response of the Chairman of the Board of the Carolinas Branch, Associated General Contractors of America. (Relevant portions of House Judiciary file attached.)

City of Richmond v. J.A. Croson Co. 488 U.S. 469, 109 S. Ct. 706, 57 USLW 4132 (1989) holds that any racial classifications are subject to strict scrutiny which requires findings of discrimination based on evidence of a prima facie case and remedies closely tailored to said substantiated injuries. This calls into question the constitutionality of the entire Assistance to Minority Businesses Subarticle 3.

"Intermediate" rather than "strict" scrutiny applies to gender classifications. Gender classifications must serve an important, rather than a compelling, governmental objective, and there must also be a direct, substantial relationship between that objective and the means chosen to accomplish it. The members of the group benefitted by the classification must have actually suffered a disadvantage related to the classification, and the government's mere recital of a benign, compensatory purpose will not shield the gender-specific program from constitional scrutiny. These differences from strict scrutiny analysis are largely quantitative and matters of degree. The major qualitative difference is that the intermediate scrutiny of gender classifications, unlike the strict scrutiny of race classifications, may not require any showing of governmental

involvement, active or passive, in the discrimination it seeks to remedy. Coral Construction Co. 941 F2d 910 (9th Cir., 1991) at 931 and 932. And see Michigan Road Builders 834 F.2d at 595 (MBE preferences...cannot withstand constitional attack since evidence of record that the state discriminated against women is non-existent.) Likewise, while upholding San Franciso's WBE preference program, the Ninth Circuit was "troubled" because the "ordinance is unusal in the breadth of the subsidy it gives to women," in that it (like South Caorlina) subsidized WBE's in virtually every industry in which San Francisco contracted including industries for which there was no reason to believe that women were disadvantaged, and added that "we may reach a different conclusion if and when the WBE preferences are challenged as applied to an industry where women are not disadvantaged. Coral Construction Co., supra at 932 citing Associated General Contractors v. San Francisco, 813 F.2d at 941. The Coral Construction Co. Court also upheld the King County WBE preferential program. There, as opposed to the instant case, the evidentiary record adequately indicated discrimination against women in the King County Construction industry, including a twenty-two page affidavit of discrimination in the private consulting engineering field. The import of these decisions and distinctions is that less evidentiary record and less tailoring may be required to justify gender preferential programs, but that some such record is required. In South Carolina there is none.

If faced with litigation, the State would probably be permitted to address the deficiency in its evidentiary record of a showing of a pattern of discrimination when it passed §11-35-5210, et seq. and adopted the minority participation only program, by conducting postenactment studies. Coral Construction Co. v. King, 941 F.2d 910 (9th Cir., 1991). Because of the kind of discrimination which must be evidenced, whether such studies would remedy this deficiency can not be known and reasonable men would differ in their speculations. The Third Circuit held the District Court abused its discretion in ruling that a city contract set-aside ordinance was unconstitutional without giving the city the chance, in 1990, to pursue additional discovery on the existance of discrimination in the local construction market which could have justified the ordinance. Contractors Association of E. Pa. v. Philadelphia, 945 F.2d 1260 (3rd Cir. 1991). The "factual predicate for the program should be evaluated based upon all evidence presented to the district court," not just that before the numicipality at the time of enactment. Coral Construction Co., supra. at 920-921.

Strict Scrutiny

A governmental actor's use of racial classifications, including those that appear to be facially benign, are subject to

strict judicial scrutiny. Croson 488 U.S. at 493, 109 S. Ct. at 720 (plurality); Id. at 520, 109 S. Ct. 735. (Scalia, J. concurring). Croson requires a "strong basis in evidence," arising to proof of a prima facie case for the conclusion that the race conscious program serves a remedial purpose with respect to past discrimination by the state. Stuart v. Roche, 951 F2d. 446 at 450 (1st Cir. 1991) citing Croson 488 U.S. at 500, 106 S. Ct. at 724, and quoting Wygant v. Jackson Board of Education 467 U.S. at 267, 277, 106 S. Ct., 1849.

This strict scrutiny, as applied in Wygant, and, more closely, Croson, supra (1989), thus poses the other horn of the dilemma, which is acknowledged by Justice O'Connor's recognition that administrative convenience does not count when individuals' Equal Protection Rights are involved. Rather, as she wrote for the majority, race based classifications, quotas or set asides are subject to strict scrutiny like any other suspect classification and must be a closely tailored remedy for particular past discrimination found by a competent governmental institution from a record of relevant evidence. Id. citing Bakke at 308-309. There must be substantial evidence and a finding that actual, identifiable discrimination has occurred within the local industry affected; rather than government simply declaring the condition exists. Croson 488 U.S. at 499-501, 109 S. Ct. at 725. As stated in Shurberg Broadcasting of Hartford, Inc. v. F.C.C., 876 F.2d 902, 929 (D.C. Cir. 1989), "benign" racial or ancestral distinctions receive the same "strict scrutiny" standard of review as invidious classifications. Croson, 109 S. Ct. at 721 (O'Connor, J.), 109 S. Ct. 735 (Scalia, J.). Wygant 476 U.S. at 273, 106 S. Ct. at 1846; Fullilove 448 U.S. at 491, 100 S. Ct. at 2781 (Burger, C.J.); Bakke, 438 U.S. at 291-299, 98 S. Ct. at 2748-53 (Powell, J.). "[B]ecause racial characteristics so seldom provide a relevant basis for separate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate." Croson, 109 S. Ct. at 727, quoting Fullilove, supra, 448 U.S. at 533-35, 100 S. Ct. 2903-04 (Stevens, J., dissenting)(footnotes omitted). Such strict scrutiny examination has two phases: 1) "The racial classification 'must be justified by a compelling government interest.'" Wygant, 476 U.S. at 224, 106 S. Ct. at 1818 quoting Palmore v. Sidoti, 466 U.S. 429, 432, 104 S. Ct. 1879, 1882, 80 L.Ed.2d 421 (1984); Croson, 109 S. Ct. at 720 (O'Connor, J.), and 2) the government program used to achieve its objective must be "narrowly tailored." Croson, 109 S. Ct. at 728; Fullilove, 448 U.S. at 840, 100 S. Ct. at 2775; Wygant at 274.

In Croson, the Supreme Court struck down as unconstitutional a city ordinance requiring prime contractors receiving city construction contracts to subcontract at least 30% of the dollar value of each contract to minority business enterprises. 488 U.S. at 511, 109 S. Ct. at 730. Evaluating the City's plan under the two-prong strict scrutiny test, the Court

found first that Richmond had failed to demonstrate the existence of a compelling government interest sufficient to justify drawing a classification based on race. Id. at 497-506, 109 S. Ct. at 723-28. In particular, Richmond had failed to adequately prove that minorities had suffered from past discrimination in the Richmond construction contracting industry. Croson at 505, 109 S. Ct. at 727.

As stated in Concrete General v. Washington Suburban Sanitary Comm. 779 F. Supp. 370 (D. Md. 1991), the government's interest in remedying the effects of past discrimination is a sufficiently compelling government interest to justify the use of a race-based affirmative action program. See Croson, 488 U.S. at 504, 109 S. Ct. at 727; Wygant, 476 U.S. at 277, 106 S. Ct. at 1848; Bakke, 438 U.S. at 307, 98 S. Ct. at 2757. However, a government may not justify affirmative action programs by pointing to past general societal discrimination in an entire industry, primarily because the concept "has no logical stopping point" and could lead to a society built around rigid racial quotas. Croson, 488 U.S. at 498, 109 S. Ct. at 723 (quoting Wygant, 476 U.S. at 275, 106 S. Ct. at 1847). Instead of pointing to general societal discrimination, Defendants must provide a specific evidentiary "showing of prior discrimination by the governmental unit involved" before the limited use of racial classifications to remedy such discrimination can be allowed. Wygant, 476 U.S. at 274, 106 S. Ct. at 1847. Concrete General at 376 and 378. Classification based upon race must be justified by specific judicial, legislative, or administrative findings of past discrimination. Id. 488 U.S. at 497, 109 S. Ct. at 722 (quoting University of California Regents v. Bakke, 438 U.S. 265, 307, 98 S. Ct. 2733, 2757, 57 L.Ed,2d 750 (1978). It is the state that must show the existence of prior discrimination, and a strong evidentiary basis for concluding that remedial action is necessary. Id. 488 U.S. at 500, 109 S. Ct. at 724, cited in Podberesky v. Kirwan, 956 F.2d 52 (4th Cir. 1992).

As recognized in Johnson, Theresa, "Recent Legal Implications for Minority Set Aside Programs and Public Contractors," Vol. 40 Labor Law Journal, p.775, Croson restricts race-conscious remedial measures "to situations wherein the state can establish a prima facie case of constitutional or statutory violation against itself...It is reasonable to conclude that a state...government may be reluctant to gather evidence showing that it is in violation of the law. As Justice Marshal warned, the majority's...pronouncements will inevitably discourage or prevent governmental entities...from acting to rectify the scourge of past discrimination. Croson, 57 USLW at 4149. Similarly, L. Darnell Weeden, in "City of Richmond v. J.A. Croson And The Aborted Affirmative Action Plan," Vol. 16 p. 82, So. Univ. L. Rev. opines that the Court, in part III B of its Croson opinion, devoted a great deal of time pointing out the defects in the Richmond minority plan so as to educate lawyers that state and local affirmative action plans will be difficult to develop

in the absence of actual proof of discrimination by the state or local entity against specific victims of discrimination.

Evidentiary Basis

Since race-based classifications must be reserved strictly for remedial settings, and without any evidence of discrimination it cannot be fairly said that the state is seeking to "remedy" a problem, and it is questionable that the classification is benign, any program adapted without some legitimate evidence of discrimination is presumptively invalid. A remedy without evidence of a violation is presumptively void. Coral Construction Co. at 920 & 921 citing Croson 488 U.S. at 493-96, 109 S. Ct. at 720-722 (plurality). The record of the instant legislation reveals no evidence upon which the legislature based its "declar[ation] that business firms owned and operated by minority persons have been historically restricted from full participation in our free enterprise system to a degree disproportionate to other businesses." There is no record of evidence underlying the administrative agencies' adoption of the program designating contracts for minority participation only. Any programs involving racial classifications would thus be "presumptively invalid and void" under Croson for this reason alone.

The legislature's finding may have been based on commonly held, but unsubstantiated, general beliefs about racial discrimination in the economy prior to 1982, whereas "societal discrimination" is an inadequate basis for race-conscious classifications, because, without more, it is "too amorphous" Wygant, supra at 276. Plurality. The General Assembly may also have relied on the Congressional record of discrimination in the national construction industry, which was held to be sufficient for the federal set-aside program in Fullilove v. Klutznick, 448 U.S. 498. There may not have been much discussion and any discussion may not have involved consideration of South Carolina in particular. There is certainly no indication in the statute that discrimination in the state government's contracting was considered or is addressed. Its recitation of a "benign" remedial or legitimate purpose is of little or no weight. Coral Construction Co., supra at 931.

The absence of any record supporting the agencies' creation of the minority participation only program is also troublesome since "the degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body. "City of Richmond, O'Connor, citing Fullilove v. Klutznick, 448 U.S. 515 N14 (1980). Consequently, more specificity would be required of the agencies than of the legislature. The specific mandate of §11-35-5230(A) to do something of this nature would not necessarily remove this responsibility from the agencies, especially since the General Assembly has not complied with Croson's dictates.

Contributing to the dilemma raised by this mandate in the absence of a Croson evidentiary record is the possibility that the state has a duty to identify and address racial, if not gender, discrimination. The Court has recognized the states' power and duty to eliminate the effects of discrimination through the use of race-conscious measures. See, e.g., University of California Regents v. Bakke, 438 U.S. 265, 366 (1977) ("Bakke"); United Jewish Organizations v. Carey, 430 U.S. 144 (1977) (reapportionment). See, also Paradise, 107 S. Ct. 1065; id at 1075 (Powell, J., concurring); Wygant, 106 S. Ct. at 1856 (O'Connor, J., concurring). "A state or its political subdivision has the authority - indeed the constitional duty - to ascertain whether it is denying its citizens equal protection of the laws, and, if so, to take corrective steps." (emphasis in the original). Associated General Contractors, supra 813 F.2d at 729 cited in Coral Construction Co. supra. "The state has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself." Croson, 488 U.S. at 518, 109 S. Ct. at 734 (Kennedy concurring) (Emphasis added by Coral Construction Co. supra. at 920.) Furthermore, the states may broadly delegate this authority to political subdivisions, and to administrative or governmental units. Bakke, 438 U.S. at 366 n.42 (Brennan, White, Marshall, Blackmun, J.J.), citing Sweezey v. New Hampshire, 354 U.S. 234, 256 (1956) (Frankfurter, J., concurring).

Pre-requisite Investigation

These gradations in inadequacy may have little significance however, if any program adopted without evidence of discrimination is constitutionally presumptively invalid. Government actions must have concrete, specific evidence of discrimination in a particular industry before they may adopt a remedial program. Croson 488 U.S. at 509, 109 S. Ct. at 729, Associated General Contractors v. City and County of San Francisco, 813 F. 2d 922, 932 (9th Cir. 1987). Race-based classifications must be reserved strictly for remedial settings. Croson 488 U.S. at 493, 109 S. Ct. at 720. Without evidence of discrimination, the benign and remedial nature of the classification are questionable to establish. Coral Const. at 920.

Although, without a record of evidence, the minority participation only program is presumptively invalid, the State would have an opportunity to justify it retroactively if challenged. However, it is questionable whether the requisite evidence exists that the state participated in the kind of discrimination necessary to justify setting aside some of its prime contracts for minorities as defined in the statute.

The requisite record would be compiled of specific and objective evidence of 1) the nature and scope of whatever discriminatory injury exists or existed; 2) the historical or antecedent causes of such discrimination; and 3) the extent to which state government contributed to any discrimination or present effects of discrimination, either by discriminating in awarding its own contract, or by passive complicity in the discrimination of its prime contractors. Croson, supra. Mackie, S.C., "Florida Minority Business Hiring in Light of City of Richmond v. J.A. Croson Co." Fla. Bar J. June, '89, p.13.

Note that, whereas the government actor must have somehow perpetuated the discrimination to be remedied by the program, at least by passive participation, Croson at 492, 109 S. Ct. at 720, even the infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement. Coral Constr. Co. citing Croson supra. ("Any public entity has a compelling interest in assuring that public dollars...do not finance the evil of private prejudice.") However, Croson's tailoring requirements and its specific holding, as applied to the City of Richmond and its set aside, suggest that, to justify race preferences in awarding its own contracts with prime contractors, evidence of the states' past discrimination in such awards would be most relevant, if not required.

It is also noteworthy that King County, following the Croson amended decision, amended its MWBE program in an effort to comply with Croson's dictates. Coral Construction v. King County, 941 F.2d 914 (1990). Its second amendments incorporated two consultant studies, one documenting the impact of discrimination in the local construction, architecture and engineering fields, the other focusing on discrimination in the local goods and services industries, both using statistical and anecdotal evidence. Id. at 915. (The studies cost approximately $411,000).

Maryland Highway Contractors v. State of Maryland, 933 F.2d 1246 (4th Cir. 1991) is elucidating in that it addresses Maryland's pre Croson MBE statute after Maryland had adopted a new one. The new statute, by its terms, attempts to comply with the Supreme Court's holding regarding MBE statutes in City of Richmond v. Croson, 488 U.S. 469, 109 S. Ct. 706, 102 L.Ed.2d 854 (1989). Maryland commissioned a Minority Business Utilization Study, held legislative hearings, and determined that Maryland had engaged in discrimination against certain groups. As a result of the study, the Maryland legislature enacted a new MBE statute protecting those classes of minorities which the study showed Maryland had discriminated against: American Indians, Asians, Blacks, Hispanics, women, and physically or mentally disabled individuals. Md. State Fin. & Procurement Code Ann. §14-301(f)(1990). The legislature thus repealed the former portion of the statute which protected Alaskan natives and Pacific Islanders. Most of the remaining provisions in the old MBE statute were not changed.

According to the New York amicus brief in Croson, "the evidence of the requisite kind of participation in the requisite kind of discrimination may include pending lawsuits; court orders; testimonial evidence; earlier studies by committees; investigations; comments received in response to the publication of a rule; and unemployment statistics and census data." See, e.g., Ohio Contractors v. Keip, 713 F.2d at 17 (awareness of litigation, executive department investigations; earlier studies by committees); M.C. West, Inc. v. Lewis 522 F. Supp. at 347 (comments responding to publication of rule); South Florida v. Dade County, 723 F.2d at 846 (reference to past discrimination). See also Fullilove, 448 U.S. at 540 (Stevens, J.) (evidence of litigated claims on behalf of MBE's could provide basis). See generally Wright, Color-Blind Theories and Color Conscious Remedies, 47 U. Chi. L. Rev. 213, 217 n.9 (19___) (Suggesting use of unemployment statistics and census data).

Query whether there are any such studies, or whether there are any relevant, pending lawsuits or court orders, or investigations in South Carolina.

Analysis of unemployment statistics and census data would be part of the major, preeminent thrust of such an investigation. Indeed, the statistical evaluation may actually yield the only usable information.

"Gross statistical imbalances" may alone constitute prima facie proof of prior discrimination. Croson 488 U.S. at 501, 109 S. Ct. at 725. However, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." Id. at 501-502, 109 S. Ct. at 725.)

The kind of statistical analysis and evidence Croson suggests include:

1. How many MBE's are qualified to undertake the construction or the procurements at issue. How many other contractors or merchandisers? As in Croson, the State did not, and probably does not, know how many minority enterprises in the relevant market are qualified to undertake these contracts. Id. at 502, 109 S. Ct. at 725. Where special qualifications are involved, comparison of general population figures may just as well reflect "past effects of discrimination in education and economic opportunities" as past discrimination by the state. Id. at 503, 109 S. Ct. at 729.

2. What proportion of contracts, both numerically and monetarily, were awarded to MBE's? See Ohio Contractors Association v. Keip, 713 F 2d at 171 (Comparison of MBE's in Ohio with MBE's awarded state purchasing contracts justified MBE set aside.)

3. Possibly, data for a comparison, if any, which would indicate whether there is discrimination in the S.C. construction industry. The Supreme Court, in City of Richmond, rejected the Fourth Circuit's application of Wygant that the government body must find upon relevant probative evidence that it discriminated against MBEs, requiring instead that the government body so find that it was at least a "passive participant." Arguably, this distinction is only relevant to programs requiring or encouraging prime contractors to sub-contract with MBE's, such as the §11-35-5230 tax credit, which is not as "trammeling" of non-minorities rights and not as the set-asides.

Other kinds of relevant evidence include matters in the nature of black membership in trade organizations, although this, standing alone, cannot establish a prima facie case of discrimination, City of Richmond, supra at 721, Bazemore v. Friday, 478 U.S. 385, 407-408, and evidence of the white contractors' and decision makers' potential for resistance to hiring MBE's. South Carolina does not have the "crafts unions" from which the exclusion of blacks was so commonplace as to warrant to Court's judicial notice, in Weber. 443 U.S. at 198 n.1. However, as the Fullilove Court referred to the "direct evidence before the Congress that the pattern of disadvantage and discrimination against blacks existed with respect to state and local construction contracting, Fullilove, supra. 448 U.S. at 478, there may be other types of evidence to be discerned from somewhere in the congressional investigation, and from other employment and labor law attorneys.

Note that, even though The Record in Coral Construction Company, supra. is considerably more extensive than that compiled by the Richmond City Council in Croson, the 50-plus page record containing the affidavits of at least 57 minority or women contractors, each complaining about discrimination in the local construction industry and in subcontracting on public projects, and "a plethora of anecdotal evidence," rarely if ever can such evidence show a systemic pattern of discrimination necessary for the adoption of an Affirmative Action Plan. Coral Construction Co. supra. at 918 & 919.

Again, it appears to be difficult, if not impossible, to predict, whether these requisite kinds of evidence, in sufficient quantities, with the requisite prima facie showing of discrimination, particularly in the state's own contracting, existed when the General Assembly adopted Section 11-35-5210, et seq.; can be discovered retroactively, or exists now, especially since Croson requires "evidence of past discrimination in the specific context which the challenged program aims to remedy." Podberesky v. Kirwan, 764 F. Supp. 364, 372 (D. Md. 1991).

Specifically, there is real question whether the statistics would establish a prima facie case that the requisite

discrimination occurred, particularly by the state, when the program was adopted. Thus, the state may fail to carry its burden in any litigation.

> As the commentators immediately recognized without exception, after Croson, it will be difficult for state and local governments to adopt or continue set-aside programs. The burden of establishing specific instances of discrimination is costly and may be legally inadvisable (since such self-indictment may open a government to being sued). Statistical evidence may be just as hard to come by since discrimination is usually subtle and one can hardly expect non-minority businesses to cooperate with the government by identifying instances of discrimination. Hoogland and McGlothlen, City of Richmond v. Croson: A Setback for Minority Set-Aside Programs, 15 Empl. Rel. L.J. 5 (Summer 1989).

Tailoring

The Court's requirements for tailoring any remedy to any discrimination found, also require that the constitutionality of such a set aside cannot be determined without such a study. It is tautological that a nexus between the scope of the remedy and the requisite factual finding cannot be met without such findings. This nexus is part of the narrow tailoring required in constitutional race conscious remedies. Wygant supra. 476 U.S. at 274, 106 S. Ct. at 184. Without identification of the injury and its scope, there is nothing to which the remedy can be tailored. "A generalized assertion that there has been discrimination provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy" Croson 488 U.S. at 478, 109 S. Ct. at 723 (majority) cited in Coral Const. Co.

The Court's requirements that any remedy be narrowly or closely tailored to address the evil actually found to exist also include directions that any such program:

1. Be necessary, and be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. Croson 507, 109 S. Ct. at 728, which have a reasonable possibility of being effective. Coral Constr. Co. at 923. (This seems the best approach, stage and legal posture for the present.)

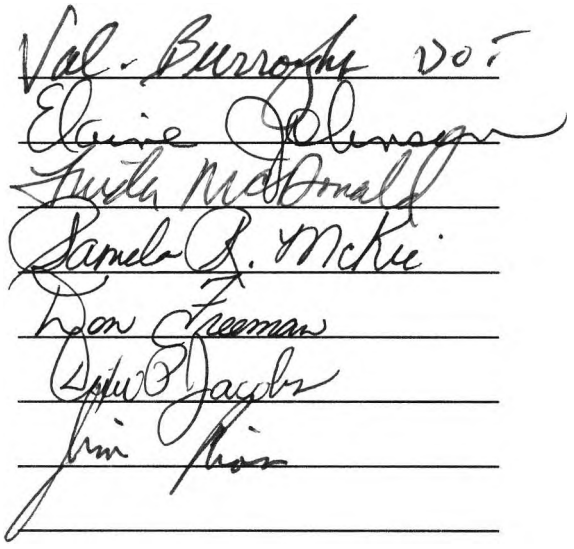
2. Use minority participation goals set on a case by case basis rather than upon a system of rigid numerical goals. Id. 507-508, 109 S. Ct. at 728-29, and

3. Be limited in its effective scope to the boundaries of the enacting jurisdiction. See id. at 491-92, 109 S. Ct. at 719-20.

4. Minimize, if not void, burdens on non-culpable third parties. Coral Const. Co. at 917, citing United States v. Paradise, 48 U.S. 149, 183, 107 S. Ct. 1053, 1073, 94 L.d. 2d 203 (1987).

DISPARITY STUDY

Sign in sheet for October 11, 1993
Room 310 at 10:00



February 11, 1994

MEMORANDUM TO: DIRECTOR OF PROCUREMENT SERVICES
MS. ELAINE JOHNSON

Re: List of Interested Consultants - Croson Disparity Study

This is to transmit a list of consultant firms that may be interested in receiving the Request for Proposal package to conduct the Croson Disparity Study for the Department.

We hope this information will be helpful to you.

B. F. Byrd/pm

B. F. Byrd
Director of Compliance

cc: Mr. Valentine Burroughs
Ms. Linda McDonald

SOUTH CAROLINA
DEPARTMENT OF TRANSPORTATION
P.O. BOX 191
COLUMBIA, S.C. 29202

DANIEL P. FANNING
EXECUTIVE DIRECTOR

Interested Consultants
for
Disparity Study Project

Mr. Skip Wright
Skip Wright Associates
210 Bratford Lane
Greenville, South Carolina 29605
299-8578

Mr. Larry O. Wilson
L. Oliver Wilson & Associates, Inc.
1717 Apalachee Parkway #447
Tallahassee, Florida 32301
(904) 877-9875

MBELDEF

Minority Business Enterprise Legal Defense and Education Fund, Inc.

Parren J. Mitchell
Founder and Chairman

Anthony W. Robinson
President

MEMORANDUM

TO: MBE/WBE/DBE PROGRAM COMPLIANCE OFFICERS
STATE & JURISDICTIONS PURCHASING OFFICERS
OTHER INTERESTED PARTIES

FROM: Courtney Billups
Chief, Investigations & Research
Office of Chief Counsel

DATE: January 3, 1994 - Update

RE: MBE PROGRAM DISPARITY STUDY CONSULTANTS

Please find attached hereto, a Directory of private consulting firms and individuals who have demonstrated an interest in performing the above-referenced studies.

Please be advised, however, that the Fund makes no recommendation as to the capability or qualifications of any of these firms or individuals to perform the work. The Directory was formulated and maintained by the Fund solely for the purpose of disseminating information as to the companies' availability.

The Fund, therefore, gives no warranty, recommendation, guarantee or other assurances of any kind as to competency and/or fitness.

The Directory undergoes continuing revision. Please feel free to call for any subsequent additions and/or deletions prior to the release of your request for proposal (RFP), if any.

220 "I" Street, N.E. Suite 240 Washington, D.C. 20002 (202) 543-0040 Fax (202) 543-4135

MBE DISPARITY STUDY DIRECTORY

CONSULTANTS

A. D. Jackson Consultants, Inc.
4415 Seventeenth Street, N.W.
Washington, D.C. 20011
ATTN: Adele D. Jackson
(202) 726-9179

Affirmative Action Consulting, Inc.
250 S. Wacker Drive
Penthouse
Chicago, IL 60606
(312) 906-8087

Aileen C. Hernandez Associates
818 47th Avenue
San Francisco, CA 94121
ATTN: Aileen Hernandez
(415) 752-4506

BBC, Inc.
155 South Madison Street
Denver, Colorado 80209
ATTN: Dean C. Coddington
(303) 321-2547

Boasberg & Norton
1233 20th Street, N.W.
Suite 501
Washington, D.C. 20036
ATTN: Edward Norton
(202) 828-9600

BPA Economics, Inc.
440 Grand Avenue
Suite 425
Oakland, CA 94610-5085
ATTN: John Gruenstein, President
(415) 465-7884

Brimmer & Company, Inc.
440 MacArthur Boulevard, N.W.
Suite 302
Washington, D.C. 20007
ATTN: Dr. Andrew F. Brimmer, President
(202) 342-6255

Comprehensive Services, Inc,
1302 Race Street, 5th Floor
Philadelphia, PA 19107
ATTN: Ray Webster
(215) 564-2900

Conta & Associates
135 West Wells Street
Suite 608
Milwaukee, Wisconsin 53203
ATTN: David Potts
(414) 276-3337

Contract Compliance, Inc.
3508 Market Street, Suite 403
Philadelphia, PA 19104
ATTN: Lynn Claytor, President
(215) 222-1600

Coopers & Lybrand
1800 M Streets, N.W.
Washington, D.C. 20036
ATTN: Carolyn Smith
(202) 822-4123

Cordoba Corporation
Oviatt Building
617 South Olive Street
Suite 500
Los Angeles, CA 90014
ATTN: George Pla
(213) 623-5535

Darryl E. Greene & Associates, P.C.
2 World Trade Center, Suite 2226
New York, New York 10048
ATTN: Marilyn R. Jackson
(212) 432-7485

D. J. Miller & Associates
600 W. Peachtree Street
Suite 1550
Atlanta, GA 30308
ATTN: David Miller, President
(404) 876-7500

Dean P. Bell & Associates
7710 Pebble Drive, Suite 200
New Orleans, LA 70128
ATTN: Dean P. Bell, President
(504) 241-5275

Dillard Consortium
202 Rosenwald Hall
Dillard University
2601 Gentilly Boulevard
New Orleans, Louisiana 70122
ATTN: Gil Rochan
(504) 286-4706

Earl Neal & Associates
111 West Washington Street
Suite 1010
Chicago, IL 60602
ATTN: Earl Neal, Esq.
(312) 641-7144

Economic Development Assistance Consortium
One Faneuil Hall Marketplace
Boston, MA 02109
ATTN: Marcus Weiss, President
(617) 742-4481

Ernst & Young
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036
ATTN: Dr. Richard Sciacca
(202) 862-7869

Gerald Jaynes, Ph. D.
Professor of Economics
P.O. Box 1972
Yale Station
New Haven, CT 06520
(203) 432-3576

Glenda Wilson
Kensington Systems, Inc.
1083 W. Kensington Road
Los Angeles, Ca. 90026-4354
(213) 977-4982

Harding & Osborn
1200 Seventeenth Street
Suite 1000
Denver, CO 80202
ATTN: Christopher F. Downs, Esq.
(303) 629-0300

Hogan & Hartson
555 Thirteenth Street, N.W.
Washington, D.C. 20004
ATTN: Elizabeth B. Heffernan
(202) 637-5600

Huey L. Perry, Ph. D.
Department of Political Science
School of Public Policy & Urban Affaire
Southern University, P.O. Box 10841
Baton Rogue, LA 70813
(504) 771-3092

Institute for Public Policy & Research
University of Cincinnati
2624 Clifton Avenue, ML 137
Cincinnati, OH 45221
ATTN: Dr. Alfred Tuchfarber, Director
(513) 556-6000

Joanne Kumamoto
Kumamoto Associates
4130 Seaview Lane
Los Angeles, CA 90065
(213) 223-6473

John Lunn, Ph. D.
Associate Professor
Department of Economics
Louisiana State University
Baton Rogue, LA 70803
(504) 388-3782

Knowledge Systems & Research , Inc.
500 S. Salina Street
Syracuse, New York 13202
ATTN: Vincent Cama
(315) 470-1350

LegalStat Associates
600 South Federal Street
Suite 506
Chicago, IL 60605
ATTN: John S. Hurd
(312) 427-5797

Leon Finney & Associates
1516 East 63rd Street
Chicago, IL 60637
ATTN: Leon Finney
(312) 667-5600

MBPD Consulting
1763 Vine Street
Denver, CO 80206
ATTN: Marcellus Jackson
(303) 369-7100

MGT of America, Inc.
P. O. Box 38430
2425 Terreya Drive
Tallahassee, Florida 32315
ATTN: Carolyn Staerker, Marketing Associate
(904) 386-3191

Marcus Alexis, Ph. D.
College of Business Administration
University of Illinois at Chicago
Box 802451
Chicago, Illinois 60680-2451
(312) 996-2661

Mason Tillman Associates
1212 Broadway, 15th Floor
Oakland, CA 94612
ATTN: Dr. Eleanor M. Ramsey, President
(415) 835-9012

Meister Leventhal & Slade
777 3rd Avenue, 26th Floor
New York, New York 10017
ATTN: Mel Leventhal
(213) 935-0800

Michael A. Millemann
Professor of Law
University of Maryland School of Law
400 W. Baltimore, Street
Baltimore, MD 21201
(301) 328-8340

National Economic Research Associates
123 Main Street, 8th Floor
White Plains, NY 10601
ATTN: David Evans, V.P.
(617) 621-0444

Omnifacts, Inc.
846 Lancaster Avenue
Bryn Mawr, PA 19010
ATTN: John H. Baker, President
(215) 526-9644

Otto Beatty, Esquire
Beatty & Roseboro
233 South High Street
Suite 300
Columbus, OH 43215-4511
(614) 221-2400

Perkins Coie
1201 3rd Avenue, Suite 4000
Seattle, Washington 98101-3099
ATTN: Dave Burman
(206) 583-8888

R. G. Orman & Company, Inc.
10800 N. Military Trail, Suite 232
Palm Beach Gardens, FL 33410
ATTN: Dr. R. G. Orman, Principal
(800) 444-2869

Reed-Brown Consulting Group
180 Union Street
Montclair, New Jersey 07042
ATTN: Geraldine R. Brown
(201) 746-1730

Spectra Business Development
221 E. Indianola
Suite 216
Phoenix, AZ 85012
ATTN: Kala Pearson
(602) 266-0403

Spectrum Consulting Associates, Inc.
1120 "G" Street, N.W.
Suite 215
Washington, D.C. 20005
ATTN: George Miller
(202) 347-3022

TEM Associates, Inc.
1200 18th Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 785-5252

Thomas D. Boston, Ph. D.
College of Management
Georgia Institute of Technology
Atlanta, Georgia 30332
(404) 894-4918

Vedder, Price, Kaufman & Kammholz
22 North LaSalle
Chicago, Illinois 60601
(312) 609-7500

WAR Associates
Human Resources & Management Consultants
P.O. Box 100
Nedrow, New York 13120
ATTN: Willie Royal
(315) 492-1772

WES Consulting
P. O. Box 18182
Seattle, Washington, 98118
ATTN: Thaddeus Spatlen
(206) 543-4778

Washington Consulting Group
Suite 808
1326 5th Avenue
Seattle, Washington 98101
(206) 624-1256

William D. Bradford
Professor of Finance
College of Business & Management
University of Maryland
College Park, MD 20742
(301) 405-2189

SOUTH CAROLINA
DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION
P.O. BOX 191
COLUMBIA, S.C. 29202

DANIEL P. FANNING
EXECUTIVE DIRECTOR

December 2, 1993

Dr. Doug Dobson, Executive Director
Institute of Public Affairs USC
937 Assembly Street, Room 1511
Columbia, South Carolina 29208

Dear Dr. Dobson:

The SC Department of Transportation greatly appreciates the spirit of cooperation and professional dedication shown by the consortium in its response to the Department's request for assistance preparing a Croson Disparity Study. The Department has reviewed your proposed work plan with great interest. Because of our concern about the public perception of having this sensitive study performed by fellow state agencies, we believe now that a consultant firm outside of state government recommended by an evaluation committee, would be in the best interest of all parties. The outside consultant would provide the public with the assurance that the results are independent of state interest.

The Department's decision is not intended to question the quality of your work product or your ability to be objective in this matter. Our concern is simply with the public's perception of government.

We appreciate the consortium's participation in the process of developing the study to this point. Our meetings with you have increased our understanding of the scope and difficulty of the task ahead. We hope that we will have the opportunity to work with you in the future on research projects which require the expertise of the consortium. Such cooperation has great potential for the State in the future.

Sincerely,

Daniel P. Fanning

Daniel P. Fanning
Executive Director

cc: Disparity Study Committee

DISPARITY STUDY COMMITTEE AND GUEST
SIGN-IN SHEET

Benjamin F. Byrd
Director, Office of Compliance _____

Linda McDonald
Assistant Chief Counsel _____

Pam McKie
Office of Compliance _____

Elaine Johnson
Director, Procurement Services _____

Don Freeman
Road Construction _____

Jim Ryon
General Service _____

Dr. John Grego
Director of Statistics and Research Lab/USC _____

Dr. William C. Gillespie
State Economist
Research & Statistical Services Division _____

Hardy Merit
Material Management, General Services _____

Professor Doug Dobson
Director, Survey and Research Lab
Institute of Public Affairs _____

Professor Bob Oldenbeck
Executive Director
Institute of Public Affairs _____

John Gadson
Director of Small Business Development
Center, SCSU _____

Dr. Ricky Hill
Chairman, Dept. of Political Science, SCSU _____

Dr. Ellen Robinson
Assistant Professor of Marketing, SCSU _____

SOUTH CAROLINA
DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION
P.O. BOX 191
COLUMBIA, S.C. 29202

DANIEL P. FANNING
EXECUTIVE DIRECTOR

MEMORANDUM

TO: Buddy Keller, Director of Construction

FROM: Valentine Burroughs, Jr.

DATE: November 19, 1993

SUBJECT: To review a request for project files to be removed from the Block House

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The Disparity Study Committee is considering alternatives for having the Disparity Study conducted. The State Agency Consortium is one of the options.

However, we were asked if the Construction Project Files could be removed from the Block House to the Dennis Building to input the row data.

I requested the attached letter be written to Mr. Fanning in order for the Department to make a determination and establish the appropriate procedure and controls to ensure the confidentially and security of the files.

I would appreciate having a preliminary discussion on this request today if possible.

cc: Daniel P. Fanning
Linda McDonald

STATE OF SOUTH CAROLINA

State Budget and Control Board

DIVISION OF RESEARCH & STATISTICAL SERVICES

REMBERT C. DENNIS BUILDING
1000 ASSEMBLY STREET, SUITE 425
COLUMBIA, SOUTH CAROLINA 29201
(803) 734-3793
FAX (803) 734-3619

BOBBY BOWERS
DIRECTOR

November 17, 1993

Mr. Daniel P. Fanning
Executive Director
South Carolina Department of Transportation
955 Park Street
Columbia, South Carolina 29202

Dear Mr. Fanning:

As discussed in our meeting of the State agency consortium proposing to conduct the Department of Transportation Study on Disparity (for want of a better name) on Wednesday, November 17th, the Division of Research and Statistical Services is requesting that the State agency contracting records for road/bridge construction and maintenance projects solely funded by state dollars between 1977 and June 30th, 1993 be made available at a location other than their current storage site. Our preference would be that the Division be permitted to move the selected boxes to the Division's offices in the Dennis Building at 1000 Assembly Street. Our purpose in making this request is that the current storage site appears to be unheated, limited in electrical outlets, and without facilities. These physical conditions could seriously jeopardize both our data collection activities and our need to monitor and supervise the data collection process.

For the past 17 years, the Division has been collecting and analyzing individual identifiable data for a number of State agencies. In that time period, no instance of record loss, record tampering, or inappropriate release or breech of confidentiality has ever been alleged or demonstrated. To insure the confidentially and security of the these records while they are in our possession, we propose the following procedure:

1. The Department of Transportation certify the total number of records present in each box.

2. Upon pickup, the Division will verify that the number of records inventoried is correct and will sign a document which states that while the records are in the possession of the Division, (1) they will be accessed by authorized persons only, (2) they will be stored in a secure location, (3) they will be returned as quickly as possible to the storage site where the record number can be verified again, (4) the machine-readable files generated from the records will be placed on a secured computer with access by authorized persons only, and (5) the machine-readable files generated from these records will be removed from the Division's computer and returned to the Department once the study has been completed.

If either you or your legal counsel should desire any additional information concerning our procedures for insuring the security and confidentially of your records while they are in our possession, please let me know. Personally, I feel that if the records can be abstracted "in-house", the data base development can be completed more quickly and the quality of the data base will be enhanced by constant staff supervision.

In closing, I want to commend you and your staff for the professional manner in which you have approached this study. We are pleased to have been requested to propose our services.

Sincerely,

Bobby M. Bowers

Bobby M. Bowers
Division Director

cc: Valentine Burroughs, SCDOT

CROSON DISPARITY STUDY

Pursuant to the 1993-94 Appropriations Act Section 124.29 the General Assembly directed the Department of Transportation to have a Croson Disparity Study conducted to determine if a significant statistical disparity exist between the number of available, qualified Minority and Women owned Contractors willing and able to perform highway/bridge, pre-construction, construction, building construction and building renovation and the number of such contractors actually engaged by the Department or contractors working for the Department. The Appropriation Act further states that the Department may spend up to $250,000 for this study, which shall be completed and submitted to the General Assembly by April 15, 1994.

In the case of Richmond vs. Croson, 109 S. Ct.. 706 (1989) , the U.S. Supreme Court struck down as unconstitutional the City of Richmond, Virginia's Minority Business Program. Richmond's program required prime contractors to subcontract at least 30% of the dollar amount of each contract to minority businesses. The program was challenged as unconstitutional by a low bidder whose bid was rejected because he failed to meet the 30% goal. The City of Richmond tried to justify the need for the program based upon evidence that the city's population was 50% black, but only 0.67% of the city's prime construction contracts had been awarded to minority businesses over a 5 year period from 1978 to 1983.

The Supreme Court said that a generalized assertion of past discrimination could not justify the use of a race-based program. The Court said a proper statistical study would be needed which identified the number of minority businesses in the relevant market that were qualified to undertake the city's contracting and compared that number to the total city construction dollars awarded to minority businesses. If a gross statistical disparity was shown and the State was shown to be a participant in practices which led to the disparity, then a race-based program could be justified to remedy the effects of discrimination. The Supreme Court said further that any race-based program must be narrowly tailored to remedy the problems identified.

The Croson case makes clear that in order for the State to have a minority goals or set-aside program, it must have a strong basis in evidence to justify the program. The General Assembly, by mandating that the Department have such a study performed, has indicated that it intends to support the Department's set-aside program if the evidence establishes that such a program is necessary.

ing)

124.23. DELETED (Rural Mail Route Pilot Project)

124.24. (Accounting Functions Transferred to Comptroller General and State Treasurer) The Department of Highways and Public Transportation shall transfer *$471,500* to the Comptroller General's Office and *$78,593* to the State Treasurer's Office for the purpose of servicing the accounting and payroll functions of the Department. *The Department shall coordinate this transfer so as to provide continuity in fiscal matters, including uninterrupted payment of personnel. The Department is further authorized to realign its FY 1993-94 authorizations into a revised structure during the first half of the fiscal year in order to reflect program changes to allow for the proper budgeting of DHPT operations.*

124.25. DELETED (SHIMS Earnings on Investments)

124.26. (License Fees) Notwithstanding any provision of Title 56 of the 1976 Code relating to the disposition of revenues, all revenues derived under Chapter 56 credited to the State Highway Fund in Fiscal Year 1992-93 must be credited to the General Fund of the state for the period July 1, 1993 through June 30, 1994.

124.27. (Boat Landing and Fishing Pier) Of funds appropriated for the Breech Inlet bridge, $100,000 shall be transferred to the Department of Wildlife and Marine Resources to construct a boat landing and fishing pier on the Cooper River at the Virginia Avenue Park.

124.28. (Special Events) The Highway Patrol must not charge any fee associated with special events for maintaining traffic control and ensuring safety on South Carolina public roads and highways unless approved by the General Assembly.

124.29. (Croson Decision Disparity Study) The Department of Highways and Public Transportation shall have a study performed to determine if a significant statistical disparity exists between the number of available qualified minority and women-owned contractors willing and able to perform

highway/bridge pre-construction, construction, building construction and renovation and the number of such contractors actually engaged by the Department or contractors working for the Department. The Department may spend up to $250,000 from the Highway Fund for this study, which shall be completed and submitted to the General Assembly by April 15, 1994.

124.30. (Transfer RAID Team Members to SLED) The Highway Department in consultation with the State Budget Division shall transfer the fourteen (14) FTE's assigned to work on the Governor's RAID Team along with the corresponding salaries, employer contributions, and associated operating costs including personally assigned equipment to the Governor's Office - SLED. This transfer shall take place on, or as soon as practicable after July 1, 1993.

VOID

THE UNIVERSITY OF SOUTH CAROLINA

Institute of Public Affairs

Center for Bioethics
Center for Citizenship
Center for Environmental Policy
Center for Health Policy
Center for Leadership and Public Management
Leadership South Carolina
Office of International Programs
Publications Program
Survey Research Laboratory

Columbia, SC 29208
Main Office 803-777-8157
Training 803-777-8156
Fax 803-777-4575

MEMORANDUM

To: John Gadson, Bill Gillespie, John Grego

From: Doug Dobson

Re: Revisions to the DOT Crowson Proposal

Date: November 18, 1993

The revised draft of our preliminary proposal is attached. I believe that I have captured all of the changes that were suggested. Please note that I have sought to develop a covering paragraph in the middle of page 3 that is intended to address concerns that John Gadson raised at our last meeting. I hope that I have been successful. Note also that I have changed the "primary responsibility" designations to "primary work responsibility" designations. This is intended to reflect the fact that various entities have agreed to assume responsibility for preparing work products for each of the tasks.

Finally, you should carefully review the revised time line and revised budget. I spoke with Val Burroughs this afternoon and he now tells me that we need to produce a phase I report prior to legislative adjournment, viz., May 31st. I intend to transmit this copy to Val in the early afternoon tomorrow. If you have any comments, suggestions, changes, etc., please fax them to me at 777-4575 not later than noon tomorrow. Thanks.

LDD:sgh
Attachment

Preliminary Proposal

An Assessment of Disparity in Contracting by the South Carolina Department of Transportation

Introduction

In 1989 the United States Supreme Court issued an opinion in the case of the City of Richmond v. J. A. Croson Company 488 U.S. 469, 109 S. Ct. 706, 57 USLW 4132 (1989). After losing a construction contract, Croson brought suit challenging the City of Richmond's Minority Business Utilization Plan, which required that prime contractors award 30 percent of the dollar amount of each city construction contract to one or more Minority Business Enterprises (MBEs). The Court remanded the case to the Fourth Circuit, which had upheld the City's plan in all respects. In its decision, the Court instructed the Court of Appeals to reconsider the case in light of its decision in Wygant v. Jackson Board of Education, 476 U. S. 267. In that case the Court applied a standard of "strict scrutiny" requiring that findings of racial discrimination be based on a prima facie case and that remedies be closely tailored to substantiated injuries. On remand, the Court of Appeals found that "(1) the Plan was not justified by a compelling governmental interest, since the record revealed no prior discrimination by the city itself in awarding contracts, and (2) the 30% set-aside was not narrowly tailored to accomplish a remedial purpose." 57 USLW 4132 (1989)

The Croson decision, as it has become known, called into question the constitutionality of Disadvantaged Business Enterprise (DBE) Assistance programs across the country. In response,

governmental agencies and general purpose governments have conducted research designed to accomplish two principal objectives. First, studies have sought to answer the question of whether disparity in the procurement/contracting process is such that a program providing preferential treatment to DBEs is justified under the Croson decision. Second, studies have sought to identify the appropriate scope of assistance programs in order to specifically address factors which demonstrably operate to affect the competitiveness of DBEs.

In 1993, the South Carolina general Assembly, following the logic of Croson, charged that "The Department of Highways and Public Transportation shall have a study performed to determine if a significant statistical disparity exists between the number of available qualified minority and women-owned contractors willing and able to perform highway/bridge pre-construction, construction, building construction and renovation and the number of such contractors actually engaged by the Department or contractor working for the Department." This proposal in intended to assist the Department of Transportation in meeting the General Assembly's mandate.

Approach

The USC Institute of Public Affairs (IPA), the Budget and Control Board's Division of Research and Statistical Services (DRSS), South Carolina State University's Small Business Development Center (SBDC), and the USC Statistics Laboratory (SL) propose to form a consortium to address the issues posed by the Croson decision and the General Assembly's mandate. Overall project coordination will be the responsibility of the IPA, with work tasks allocated among each of the consortium members.

The proposed project will be initiated on December 1, 1993 and completed in two phases.

The primary purpose of Phase I will be to examine the question of whether existing statistical and anecdotal information provides evidence suggesting disparity in DOT contracting. If the work of Phase I points toward a conclusion of disparity, Phase II will seek to identify the relative importance of major barriers to DBE competitiveness that might be addressed through policy actions by the General Assembly. Phase I will be completed by May 31, 1994. Phase II will be completed by September 30, 1994.

In the description of tasks below, various consortium mmembers are assigned responsibilities for the production of work products resulting from each task. **It is important to note, however, that all consortium members will be fully involved in each task.** The consotrium anticipates weekly meetings in which resarch and analysis issues will be fully discussed. In addition, members of the consortium are prepared to meet with DOT and General Services personnel as needed. Each of the consortium members is committed to the principle that the design, analysis, and report preparation for a project of this import requires diverse input in order to assure thatm, to the extent feasible all significant questions are addressed.

Phase I. Phase I will require the completion of several tasks. These include:

Task 1. Identification and Collection of DOT Contracting Data. *[Primary Work Responsibility: DRSS/SL* The Division of Research will assemble historical data on prime contractors and subcontractors maintained by the Department of Transportation at the "Blockhouse" and the Park Street Office for a period covering 1977 through 1993. The Department of Transportation agrees to permit the Division of Reseasrch to transport the data files from the "Blockhouse" to the offices of the Divsision. The

Division agrees to follow the Department of Transportation's procedures for maintaining accountability of the files and will return the files to the "Blockhouse". The Division will also extract the Depatrment os Transportation's exiting computer files covering the period from 1990 forward. This file will be transformed into a preliminary analysis data base in the early stages of the project. The data base will be provided to other members of the consortium. Tasks include:

1. Identify boxes containing individual contract records covered by study. Approximately 5,000 files will be included in the study.

2. Copy index cards in each file.

3. Design data base format.

4. Keypunch data from reproduced copies of card files.

5. Prepare machine readable copies of data base.

Task 2. Legal Analysis. *[Primary Work Responsibility: IPA]* In this task, we will conduct a careful examination of Croson and related decisions both preceding and following Croson. This analysis will serve to structure the statistical analysis plan to be as responsive as possible to the issues raised by Croson.

Task 3. Development of an Analysis Plan for Examining Disparity. *[Primary Work Responsibility: DRSS and SL]* Though the legal analysis referred to above may identify more, there are at least three critical issues that must be resolved prior to completion of data collection and the initiation of analyses. These include (1) resolving the definition of the "willing and

SCSU-SBDC

able" DBE population; (2) the definition of an appropriate time span for analysis; and (3) the characteristics of a measure (or measures) of disparity. These decisions are critical for they each may potentially have a significant effect on the study's outcome. For this reason, the analysis plan will be formalized as a written document in the very early stages of the project. It will be reviewed, with an invitation to provide written commentary, by each of the consortium members as well as the legal and program staff of the DOT and General Services.

Task 4. Analyses of Data. *[Primary Work Responsibility: DRSS and SL]* It is anticipated that data analysis will involve the application of standard statistical techniques. Computing equipment is available to both the University of South Carolina and the Division of Research to complete required analyses. SAS software, which provides a full complement of data management and analysis routines, will serve as the primary analysis tool.

The Division of Research will undertake an analysis of the data reported by the U.S. Bureau of Census for 1987 regarding the status of minority owned businesses. (The 1992 Census will not be available prior to November 1994) The Division will prepare a listing of the number of firms in each three digit industry code, or four digit code where available, relevant to highway construction. The listing will depict the number of firms in South Carolina classified as owned by women, blacks, hispanics, Asian, Native American, and other.

Task 5. Development of a Base of Historical Data Relating to the Question of Disparity. *[Primary Work Responsibility: SBDC and IPA]* Although the Croson decision appears to indicate that primary evidence justifying DBE assistance programs must be in the form of objective and specific statistical analysis, other forms of evidence may also be relevant. Careful examination of the historical record can help to shed light on both the underlying causes of disparity as well as the extent to which government might have contributed to discrimination. To accomplish this objective, this task will focus on an historical analysis of the record of disparity, if any, from the perspective of DBEs. Primary data will include informal interviews with DBE owners and a review of relevant written documents - e.g., scholarly studies, formal testimony, etc.

Task 6. Documentation and Analysis of DOT Programs to Assist DBEs. *[Primary Work Responsibility: IPA]* Analysis of statistical information must also be conditioned by an understanding of DOTs implementation of programs intended to assist DBEs. These include, but may not be limited to, Title VI of the Civil Rights Act of 1964; 1970 DOT Regulations 49 CFR 21; DOT Regulations 49 CFR 23; the Surface Transportation Assistance Act of 1982; the Surface Transportation and Uniform Relocation Assistance Act of 1987; the 1981 SC Procurement Code; Procurement regulations promulgated in 1988 and 1990; and State highway construction contract requirements imposed by the General Assembly in 1986, 1987, 1989, and

1990.

Research to be conducted under this Task will examine the intent and the historical record relating to DOT's implementation of these and related provisions. Analysis will include an examination of the role and function of the compliance group, compliance monitoring methods, the DBE certification process, and complaints and complaint management. Interviews with DOT personnel and examination of archival records will provide primary data for this task. The study will pay particular attention to the terms "Contract commitment," "authorized" and actual dollar impact on the DBE firms

Task 7. Preparation of a Phase I Report to the General Assembly. *[Responsibility will be distributed to consortium members consistent with major task responsibilties given above.]* The IPA will have primary coordination and editorial responsibility for the preparation of a Phase I Report to the General Assembly. Consortium members responsible for Tasks 1-6 above will prepare initial drafts of relevant sections of the report. and copies will be shared for input from each Consortium member At present, six chapters are envisioned:

I. Introduction

II. A Legal Perspective on Croson

III. An Historical Perspective on Disparity in Contracting with DBEs

IV. Review of DOT Programs to Assist DBEs

V. Analysis of Statistical Disparity in DOT Contracting

VI. Conclusions

The report will include an assessment of the statistical validity of the findings and an economic assessment of the data in terms of the objective of the study. It will also include a brief Executive Summary highlighting the study's major findings.

Phase II. Phase II of the study will be designed based on the findings of Phase I. At present, however, we anticipate five objectives. They are:

Objective 1) Convene at least two additional MBE/WBE and Majority contractors as "focus groups" to assist in the development of testable hypotheses about the causes of disparity. *[SBDC/IPA/DRSS]*

Objective 2) Design survey to test hypotheses about the causes of disparity. Emphasis on explanatory variables that can be changed by policy action. *[IPA]*

Objective 3) Develop anecdotal evidence relevant to survey findings through public hearings for MBE/WBE's. *[SBDC/IPA]*

Objective 4) Develop policy options for addressing underlying causes of disparity. *[Consortium]*

Objective 5) Provide report to General Assembly on underlying causes and policy options by September 30, 1994 *[IPA/Consortium]*

Timeline. Consortium members will meet on a weekly basis for the duration of this project. This will insure full communication and will permit any necessary adjustments to time schedules. At present,anticipate the following timeline for Phase I of this study:

May 31 - Delivery of Preliminary Report to General Assembly

May 20 - Preliminary Report to copy and binding

May 12 - Initiate final edit of Preliminary Report

May 11 - Working Group final review of Preliminary Report

May 2 - Review copy of Preliminary Report to Working Group

March 15 - Initiate writing of Preliminary Report

March 1 - Initiate analysis of data

February 15 - Data collection complete

January 5 - Final Draft of Research Design

December 15 - Draft Research Design completed for Consortium and DOT review

December 1 - Initiate Legal review and historical analysis

This time schedule is predicated on an assumption of a Phase I extension to May 31, 1994. Given the magnitude of this project, the Consortium members feel that six months is the minimum time that will be required to produce a high quality product.

Estimated Phase I Cost. This project will require a fixed-price contract in the amount of $193,311 for direct costs. The University of South Carolina will act as primary fiscal agent and will enter into fixed price agreements with other consortium members in the amounts shown below.

Division of Research and Statistics	$66,797
USC Statistics Lab	$13,000
USC Institute of Public Affairs	$73,514
South Carolina State University	~~$40,000~~ $45,000
Total	~~$193,311~~ $198,311

STATE OF SOUTH CAROLINA

State Budget and Control Board

DIVISION OF GENERAL SERVICES

FACSIMILE TRANSMITTAL FORM
Fax Number: 737-0592

DATE: October 8

TO: Val Burroughs FROM: Jim Rich

PLEASE NOTE: This is page 1 of 2. If all copies are not received please call (803) 737-3880 and ask for the sending party.

Message:

STATE OF SOUTH CAROLINA

State Budget and Control Board

DIVISION OF GENERAL SERVICES

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HELEN T. ZEIGLER
DEPUTY DIRECTOR

M E M O R A N D U M

CONFIDENTIAL

The legislative record concerning this legislation, §11-35-5210 (then Chapter 11 of Tile 62) which consists primarily of the House Judiciary Committee file, including tapes of its public hearing on the amendments to the Procurement Code in 1981, contains no evidence, even anecdotal, of discrimination or its effects. In fact, the only written evidence presented was the statement and section by section response of the Chairman of the Board of the Carolinas Branch, Associated General Contractors of America. (Relevant portions of House Judiciary file attached.)

City of Richmond v. J.A. Croson Co. 488 U.S. 469, 109 S. Ct. 706, 57 USLW 4132 (1989) holds that any racial classifications are subject to strict scrutiny which requires findings of discrimination based on evidence of a prima facie case and remedies closely tailored to said substantiated injuries. This calls into question the constitutionality of the entire Assistance to Minority Businesses Subarticle 3.

"Intermediate" rather than "strict" scrutiny applies to gender classifications. Gender classifications must serve an important, rather than a compelling, governmental objective, and there must also be a direct, substantial relationship between that objective and the means chosen to accomplish it. The members of the group benefitted by the classification must have actually suffered a disadvantage related to the classification, and the government's mere recital of a benign, compensatory purpose will not shield the gender-specific program from constitional scrutiny. These differences from strict scrutiny analysis are largely quantitative and matters of degree. The major qualitative difference is that the intermediate scrutiny of gender classifications, unlike the strict scrutiny of race classifications, may not require any showing of governmental

involvement, active or passive, in the discrimination it seeks to remedy. Coral Construction Co. 941 F2d 910 (9th Cir., 1991) at 931 and 932. And see Michigan Road Builders 834 F.2d at 595 (MBE preferences...cannot withstand constitional attack since evidence of record that the state discriminated against women is non-existent.) Likewise, while upholding San Franciso's WBE preference program, the Ninth Circuit was "troubled" because the "ordinance is unusal in the breadth of the subsidy it gives to women," in that it (like South Caorlina) subsidized WBE's in virtually every industry in which San Francisco contracted including industries for which there was no reason to believe that women were disadvantaged, and added that "we may reach a different conclusion if and when the WBE preferences are challenged as applied to an industry where women are not disadvantaged. Coral Construction Co., supra at 932 citing Associated General Contractors v. San Francisco, 813 F.2d at 941. The Coral Construction Co. Court also upheld the King County WBE preferential program. There, as opposed to the instant case, the evidentiary record adequately indicated discrimination against women in the King County Construction industry, including a twenty-two page affidavit of discrimination in the private consulting engineering field. The import of these decisions and distinctions is that less evidentiary record and less tailoring may be required to justify gender preferential programs, but that some such record is required. In South Carolina there is none.

If faced with litigation, the State would probably be permitted to address the deficiency in its evidentiary record of a showing of a pattern of discrimination when it passed §11-35-5210, et seq. and adopted the minority participation only program, by conducting postenactment studies. Coral Construction Co. v. King, 941 F.2d 910 (9th Cir., 1991). Because of the kind of discrimination which must be evidenced, whether such studies would remedy this deficiency can not be known and reasonable men would differ in their speculations. The Third Circuit held the District Court abused its discretion in ruling that a city contract set-aside ordinance was unconstitutional without giving the city the chance, in 1990, to pursue additional discovery on the existance of discrimination in the local construction market which could have justified the ordinance. Contractors Association of E. Pa. v. Philadelphia, 945 F.2d 1260 (3rd Cir. 1991). The "factual predicate for the program should be evaluated based upon all evidence presented to the district court," not just that before the numicipality at the time of enactment. Coral Construction Co., supra. at 920-921.

Strict Scrutiny

A governmental actor's use of racial classifications, including those that appear to be facially benign, are subject to

strict judicial scrutiny. Croson 488 U.S. at 493, 109 S. Ct. at 720 (plurality); Id. at 520, 109 S. Ct. 735. (Scalia, J. concurring). Croson requires a "strong basis in evidence," arising to proof of a prima facie case for the conclusion that the race conscious program serves a remedial purpose with respect to past discrimination by the state. Stuart v. Roche, 951 F2d. 446 at 450 (1st Cir. 1991) citing Croson 488 U.S. at 500, 106 S. Ct. at 724, and quoting Wygant v. Jackson Board of Education 467 U.S. at 267, 277, 106 S. Ct., 1849.

This strict scrutiny, as applied in Wygant, and, more closely, Croson, supra (1989), thus poses the other horn of the dilemma, which is acknowledged by Justice O'Connor's recognition that administrative convenience does not count when individuals' Equal Protection Rights are involved. Rather, as she wrote for the majority, race based classifications, quotas or set asides are subject to strict scrutiny like any other suspect classification and must be a closely tailored remedy for particular past discrimination found by a competent governmental institution from a record of relevant evidence. Id. citing Bakke at 308-309. There must be substantial evidence and a finding that actual, identifiable discrimination has occurred within the local industry affected; rather than government simply declaring the condition exists. Croson 488 U.S. at 499-501, 109 S. Ct. at 725. As stated in Shurberg Broadcasting of Hartford, Inc. v. F.C.C., 876 F.2d 902, 929 (D.C. Cir. 1989), "benign" racial or ancestral distinctions receive the same "strict scrutiny" standard of review as invidious classifications. Croson, 109 S. Ct. at 721 (O'Connor, J.), 109 S. Ct. 735 (Scalia, J.). Wygant 476 U.S. at 273, 106 S. Ct. at 1846; Fullilove 448 U.S. at 491, 100 S. Ct. at 2781 (Burger, C.J.); Bakke, 438 U.S. at 291-299, 98 S. Ct. at 2748-53 (Powell, J.). "[B]ecause racial characteristics so seldom provide a relevant basis for separate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate." Croson, 109 S. Ct. at 727, quoting Fullilove, supra, 448 U.S. at 533-35, 100 S. Ct. 2903-04 (Stevens, J., dissenting)(footnotes omitted). Such strict scrutiny examination has two phases: 1) "The racial classification 'must be justified by a compelling government interest.'" Wygant, 476 U.S. at 224, 106 S. Ct. at 1818 quoting Palmore v. Sidoti, 466 U.S. 429, 432, 104 S. Ct. 1879, 1882, 80 L.Ed.2d 421 (1984); Croson, 109 S. Ct. at 720 (O'Connor, J.), and 2) the government program used to achieve its objective must be "narrowly tailored." Croson, 109 S. Ct. at 728; Fullilove, 448 U.S. at 840, 100 S. Ct. at 2775; Wygant at 274.

In Croson, the Supreme Court struck down as unconstitutional a city ordinance requiring prime contractors receiving city construction contracts to subcontract at least 30% of the dollar value of each contract to minority business enterprises. 488 U.S. at 511, 109 S. Ct. at 730. Evaluating the City's plan under the two-prong strict scrutiny test, the Court

found first that Richmond had failed to demonstrate the existence of a compelling government interest sufficient to justify drawing a classification based on race. Id. at 497-506, 109 S. Ct. at 723-28. In particular, Richmond had failed to adequately prove that minorities had suffered from past discrimination in the Richmond construction contracting industry. Croson at 505, 109 S. Ct. at 727.

As stated in Concrete General v. Washington Suburban Sanitary Comm. 779 F. Supp. 370 (D. Md. 1991), the government's interest in remedying the effects of past discrimination is a sufficiently compelling government interest to justify the use of a race-based affirmative action program. See Croson, 488 U.S. at 504, 109 S. Ct. at 727; Wygant, 476 U.S. at 277, 106 S. Ct. at 1848, Bakke, 438 U.S. at 307, 98 S. Ct. at 2757. However, a government may not justify affirmative action programs by pointing to past general societal discrimination in an entire industry, primarily because the concept "has no logical stopping point" and could lead to a society built around rigid racial quotas. Croson, 488 U.S. at 498, 109 S. Ct. at 723 (quoting Wygant, 476 U.S. at 275, 106 S. Ct. at 1847). Instead of pointing to general societal discrimination, Defendants must provide a specific evidentiary "showing of prior discrimination by the governmental unit involved" before the limited use of racial classifications to remedy such discrimination can be allowed. Wygant, 476 U.S. at 274, 106 S. Ct. at 1847. Concrete General at 376 and 378. Classification based upon race must be justified by specific judicial, legislative, or administrative findings of past discrimination. Id. 488 U.S. at 497, 109 S. Ct. at 722 (quoting University of California Regents v. Bakke, 438 U.S. 265, 307, 98 S. Ct. 2733, 2757, 57 L. Ed,2d 750 (1978). It is the state that must show the existence of prior discrimination, and a strong evidentiary basis for concluding that remedial action is necessary. Id. 488 U.S. at 500, 109 S. Ct. at 724, cited in Podberesky v. Kirwan, 956 F.2d 52, 4th Cir. 1992).

As recognized in Johnson, Theresa, "Recent Legal Implications for Minority Set Aside Programs and Public Contractors," Vol. 40 Labor Law Journal, p.775, Croson restricts race-conscious remedial measures "to situations wherein the state can establish a prima facie case of constitutional or statutory violation against itself...It is reasonable to conclude that a state...government may be reluctant to gather evidence showing that it is in violation of the law. As Justice Marshal warned, the majority's...pronouncements will inevitably discourage or prevent governmental entities...from acting to rectify the scourge of past discrimination. Croson, 57 USLW at 4149. Similarly, L. Darnell Weeden, in "City of Richmond v. J.A. Croson And The Aborted Affirmative Action Plan," Vol. 16 p. 82, So. Univ. L. Rev. opines that the Court, in part III B of its Croson opinion, devoted a great deal of time pointing out the defects in the Richmond minority plan so as to educate lawyers that state and local affirmative action plans will be difficult to develop

in the absence of actual proof of discrimination by the state or local entity against specific victims of discrimination.

Evidentiary Basis

Since race-based classifications must be reserved strictly for remedial settings, and without any evidence of discrimination it cannot be fairly said that the state is seeking to "remedy" a problem, and it is questionable that the classification is benign, any program adapted without some legitimate evidence of discrimination is presumptively invalid. A remedy without evidence of a violation is presumptively void. Coral Construction Co. at 920 & 921 citing Croson 488 U.S. at 493-96, 109 S. Ct. at 720-722 (plurality). The record of the instant legislation reveals no evidence upon which the legislature based its "declar[ation] that business firms owned and operated by minority persons have been historically restricted from full participation in our free enterprise system to a degree disproportionate to other businesses." There is no record of evidence underlying the administrative agencies' adoption of the program designating contracts for minority participation only. Any programs involving racial classifications would thus be "presumptively invalid and void" under Croson for this reason alone.

The legislature's finding may have been based on commonly held, but unsubstantiated, general beliefs about racial discrimination in the economy prior to 1982, whereas "societal discrimination" is an inadequate basis for race-conscious classifications, because, without more, it is "too amorphous" Wygant, supra at 276. Plurality. The General Assembly may also have relied on the Congressional record of discrimination in the national construction industry, which was held to be sufficient for the federal set-aside program in Fullilove v. Klutznick, 448 U.S. 498. There may not have been much discussion and any discussion may not have involved consideration of South Carolina in particular. There is certainly no indication in the statute that discrimination in the state government's contracting was considered or is addressed. Its recitation of a "benign" remedial or legitimate purpose is of little or no weight. Coral Construction Co., supra at 931.

The absence of any record supporting the agencies' creation of the minority participation only program is also troublesome since "the degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body. "City of Richmond, O'Connor, citing Fullilove v. Klutznick, 448 U.S. 515 N14 (1980). Consequently, more specificity would be required of the agencies than of the legislature. The specific mandate of §11-35-5230(A) to do something of this nature would not necessarily remove this responsibility from the agencies, especially since the General Assembly has not complied with Croson's dictates.

Contributing to the dilemma raised by this mandate in the absence of a Croson evidentiary record is the possibility that the state has a duty to identify and address racial, if not gender, discrimination. The Court has recognized the states' power and duty to eliminate the effects of discrimination through the use of race-conscious measures. See, e.g., University of California Regents v. Bakke, 438 U.S. 265, 366 (1977) ("Bakke"); United Jewish Organizations v. Carey, 430 U.S. 144 (1977) (reapportionment). See, also Paradise, 107 S. Ct. 1065; id at 1075 (Powell, J., concurring); Wygant, 106 S. Ct. at 1856 (O'Connor, J., concurring). "A state or its political subdivision has the authority - indeed the constitional duty - to ascertain whether it is denying its citizens equal protection of the laws, and, if so, to take corrective steps." (emphasis in the original). Associated General Contractors, supra 813 F.2d at 729 cited in Coral Construction Co. supra. "The state has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself." Croson, 488 U.S. at 518, 109 S. Ct. at 734 (Kennedy concurring) (Emphasis added by Coral Construction Co. supra. at 920.) Furthermore, the states may broadly delegate this authority to political subdivisions, and to administrative or governmental units. Bakke, 438 U.S. at 366 n.42 (Brennan, White, Marshall, Blackmun, J.J.), citing Sweezey v. New Hampshire, 354 U.S. 234, 256 (1956) (Frankfurter, J., concurring).

Pre-requisite Investigation

These gradations in inadequacy may have little significance however, if any program adopted without evidence of discrimination is constitutionally presumptively invalid. Government actions must have concrete, specific evidence of discrimination in a particular industry before they may adopt a remedial program. Croson 488 U.S. at 509, 109 S. Ct. at 729, Associated General Contractors v. City and County of San Francisco, 813 F. 2d 922, 932 (9th Cir. 1987). Race-based classifications must be reserved strictly for remedial settings. Croson 488 U.S. at 493, 109 S. Ct. at 720. Without evidence of discrimination, the benign and remedial nature of the classification are questionable to establish. Coral Const. at 920.

Although, without a record of evidence, the minority participation only program is presumptively invalid, the State would have an opportunity to justify it retroactively if challenged. However, it is questionable whether the requisite evidence exists that the state participated in the kind of discrimination necessary to justify setting aside some of its prime contracts for minorities as defined in the statute.

The requisite record would be compiled of specific and objective evidence of 1) the nature and scope of whatever discriminatory injury exists or existed; 2) the historical or antecedent causes of such discrimination; and 3) the extent to which state government contributed to any discrimination or present effects of discrimination, either by discriminating in awarding its own contract, or by passive complicity in the discrimination of its prime contractors. Croson, supra. Mackie, S.C., "Florida Minority Business Hiring in Light of City of Richmond v. J.A. Croson Co." Fla. Bar J. June, '89, p.13.

Note that, whereas the government actor must have somehow perpetuated the discrimination to be remedied by the program, at least by passive participation, Croson at 492, 109 S. Ct. at 720, even the infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement. Coral Constr. Co. citing Croson supra. ("Any public entity has a compelling interest in assuring that public dollars...do not finance the evil of private prejudice.") However, Croson's tailoring requirements and its specific holding, as applied to the City of Richmond and its set aside, suggest that, to justify race preferences in awarding its own contracts with prime contractors, evidence of the states' past discrimination in such awards would be most relevant, if not required.

It is also noteworthy that King County, following the Croson amended decision, amended its MWBE program in an effort to comply with Croson's dictates. Coral Construction v. King County, 941 F.2d 914 (1990). Its second amendments incorporated two consultant studies, one documenting the impact of discrimination in the local construction, architecture and engineering fields, the other focusing on discrimination in the local goods and services industries, both using statistical and anecdotal evidence. Id. at 915. (The studies cost approximately $411,000).

Maryland Highway Contractors v. State of Maryland, 933 F.2d 1246 (4th Cir. 1991) is elucidating in that it addresses Maryland's pre Croson MBE statute after Maryland had adopted a new one. The new statute, by its terms, attempts to comply with the Supreme Court's holding regarding MBE statutes in City of Richmond v. Croson, 488 U.S. 469, 109 S. Ct. 706, 102 L.Ed.2d 854 (1989). Maryland commissioned a Minority Business Utilization Study, held legislative hearings, and determined that Maryland had engaged in discrimination against certain groups. As a result of the study, the Maryland legislature enacted a new MBE statute protecting those classes of minorities which the study showed Maryland had discriminated against: American Indians, Asians, Blacks, Hispanics, women, and physically or mentally disabled individuals. Md. State Fin. & Procurement Code Ann. §14-301(f)(1990). The legislature thus repealed the former portion of the statute which protected Alaskan natives and Pacific Islanders. Most of the remaining provisions in the old MBE statute were not changed.

According to the New York amicus brief in Croson, "the evidence of the requisite kind of participation in the requisite kind of discrimination may include pending lawsuits; court orders; testimonial evidence; earlier studies by committees; investigations; comments received in response to the publication of a rule; and unemployment statistics and census data." See, e.g., Ohio Contractors v. Keip, 713 F.2d at 17 (awareness of litigation, executive department investigations; earlier studies by committees); M.C. West, Inc. v. Lewis 522 F. Supp. at 347 (comments responding to publication of rule); South Florida v. Dade County, 723 F.2d at 846 (reference to past discrimination). See also Fullilove, 448 U.S. at 540 (Stevens, J.) (evidence of litigated claims on behalf of MBE's could provide basis). See generally Wright, Color-Blind Theories and Color Conscious Remedies, 47 U. Chi. L. Rev. 213, 217 n.9 (19___) (Suggesting use of unemployment statistics and census data).

Query whether there are any such studies, or whether there are any relevant, pending lawsuits or court orders, or investigations in South Carolina.

Analysis of unemployment statistics and census data would be part of the major, preeminent thrust of such an investigation. Indeed, the statistical evaluation may actually yield the only usable information.

"Gross statistical imbalances" may alone constitute prima facie proof of prior discrimination. Croson 488 U.S. at 501, 109 S. Ct. at 725. However, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." Id. at 501-502, 109 S. Ct. at 725.)

The kind of statistical analysis and evidence Croson suggests include:

1. How many MBE's are qualified to undertake the construction or the procurements at issue. How many other contractors or merchandisers? As in Croson, the State did not, and probably does not, know how many minority enterprises in the relevant market are qualified to undertake these contracts. Id. at 502, 109 S. Ct. at 725. Where special qualifications are involved, comparison of general population figures may just as well reflect "past effects of discrimination in education and economic opportunities" as past discrimination by the state. Id. at 503, 109 S. Ct. at 729.

2. What proportion of contracts, both numerically and monetarily, were awarded to MBE's? See Ohio Contractors Association v. Keip, 713 F 2d at 171 (Comparison of MBE's in Ohio with MBE's awarded state purchasing contracts justified MBE set aside.)

3. Possibly, data for a comparison, if any, which would indicate whether there is discrimination in the S.C. construction industry. The Supreme Court, in City of Richmond, rejected the Fourth Circuit's application of Wygant that the government body must find upon relevant probative evidence that it discriminated against MBEs, requiring instead that the government body so find that it was at least a "passive participant." Arguably, this distinction is only relevant to programs requiring or encouraging prime contractors to sub-contract with MBE's, such as the §11-35-5230 tax credit, which is not as "trammeling" of non-minorities rights and not as the set-asides.

Other kinds of relevant evidence include matters in the nature of black membership in trade organizations, although this, standing alone, cannot establish a prima facie case of discrimination, City of Richmond, supra at 721, Bazemore v. Friday, 478 U.S. 385, 407-408, and evidence of the white contractors' and decision makers' potential for resistance to hiring MBE's. South Carolina does not have the "crafts unions" from which the exclusion of blacks was so commonplace as to warrant to Court's judicial notice, in Weber. 443 U.S. at 198 n.1. However, as the Fullilove Court referred to the "direct evidence before the Congress that the pattern of disadvantage and discrimination against blacks existed with respect to state and local construction contracting, Fullilove, supra. 448 U.S. at 478, there may be other types of evidence to be discerned from somewhere in the congressional investigation, and from other employment and labor law attorneys.

Note that, even though The Record in Coral Construction Company, supra. is considerably more extensive than that compiled by the Richmond City Council in Croson, the 50-plus page record containing the affidavits of at least 57 minority or women contractors, each complaining about discrimination in the local construction industry and in subcontracting on public projects, and "a plethora of anecdotal evidence," rarely if ever can such evidence show a systemic pattern of discrimination necessary for the adoption of an Affirmative Action Plan. Coral Construction Co. supra. at 918 & 919.

Again, it appears to be difficult, if not impossible, to predict, whether these requisite kinds of evidence, in sufficient quantities, with the requisite prima facie showing of discrimination, particularly in the state's own contracting, existed when the General Assembly adopted Section 11-35-5210, et seq.; can be discovered retroactively, or exists now, especially since Croson requires "evidence of past discrimination in the specific context which the challenged program aims to remedy." Podberesky v. Kirwan, 764 F. Supp. 364, 372 (D. Md. 1991).

Specifically, there is real question whether the statistics would establish a prima facie case that the requisite

discrimination occurred, particularly by the state, when the program was adopted. Thus, the state may fail to carry its burden in any litigation.

> As the commentators immediately recognized without exception, after Croson, it will be difficult for state and local governments to adopt or continue set-aside programs. The burden of establishing specific instances of discrimination is costly and may be legally inadvisable (since such self-indictment may open a government to being sued). Statistical evidence may be just as hard to come by since discrimination is usually subtle and one can hardly expect non-minority businesses to cooperate with the government by identifying instances of discrimination. Hoogland and McGlothlen, City of Richmond v. Croson: A Setback for Minority Set-Aside Programs, 15 Empl. Rel. L.J. 5 (Summer 1989).

Tailoring

The Court's requirements for tailoring any remedy to any discrimination found, also require that the constitutionality of such a set aside cannot be determined without such a study. It is tautological that a nexus between the scope of the remedy and the requisite factual finding cannot be met without such findings. This nexus is part of the narrow tailoring required in constitutional race conscious remedies. Wygant supra. 476 U.S. at 274, 106 S. Ct. at 184. Without identification of the injury and its scope, there is nothing to which the remedy can be tailored. "A generalized assertion that there has been discrimination provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy" Croson 488 U.S. at 478, 109 S. Ct. at 723 (majority) cited in Coral Const. Co.

The Court's requirements that any remedy be narrowly or closely tailored to address the evil actually found to exist also include directions that any such program:

1. Be necessary, and be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. Croson 507, 109 S. Ct. at 728, which have a reasonable possibility of being effective. Coral Constr. Co. at 923. (This seems the best approach, stage and legal posture for the present.)

2. Use minority participation goals set on a case by case basis rather than upon a system of rigid numerical goals. Id. 507-508, 109 S. Ct. at 728-29, and

3. Be limited in its effective scope to the boundaries of the enacting jurisdiction. See id. at 491-92, 109 S. Ct. at 719-20.

4. Minimize, if not void, burdens on non-culpable third parties. Coral Const. Co. at 917, citing United States v. Paradise, 48 U.S. 149, 183, 107 S. Ct. 1053, 1073, 94 L.d. 2d 203 (1987).

Preliminary Proposal

An Assessment of Disparity in Contracting by the

South Carolina Department of Transportation

Introduction

In 1989 the United States Supreme Court issued an opinion in the case of the City of Richmond v. J. A. Croson Company 488 U.S. 469, 109 S. Ct. 706, 57 USLW 4129 (1989). After losing a construction contract, Croson brought suit challenging the City of Richmond's Minority Business Utilization Plan which required that prime contractors award 30 percent of the dollar amount of each city construction contract to one or more Minority Business Enterprises (MBEs). The Court remanded the case to the Fourth Circuit, which had upheld the City's plan in all respects. In its decision, the Court instructed the Court of Appeals to reconsider the case in light of its decision in Wygant v. Jackson Board of Education, 476 U. S. 267. In that case the Court applied a standard of "strict scrutiny" requiring that findings of racial discrimination be based on a prima facie case and that remedies be closely tailored to substantiated injuries. On remand, the Court of Appeals found that "(1) the Plan was not justified by a compelling governmental interest, since the record revealed no prior discrimination by the city itself in awarding contracts; and (2) the 30% set-aside was not narrowly tailored to accomplish a remedial purpose." 57 USLW 4132 (1989).

The Croson decision, as it has become known, called into question the constitutionality of Disadvantaged Business Enterprise (DBE) Assistance programs across the country. In response, governmental agencies and general purpose governments have conducted research designed to accomplish two principal objectives. First, studies have sought to answer the question of whether disparity in the procurement/contracting process is such that a program providing preferential treatment to DBEs is justified under the Croson decision. Second, studies have sought to identify the appropriate scope of assistance programs in order to specifically address factors which demonstrably operate to affect the competitiveness of DBEs.

In 1992, the South Carolina General Assembly, following the logic of Croson, charged that "The Department

of Highways and Public Transportation shall have a study performed to determine if a significant statistical disparity exists between the number of available qualified minority and women-owned contractors willing and able to perform highway/bridge pre-construction, construction, building construction and renovation and the number of such contractors actually engaged by the Department or contractor working for the Department." This proposal in intended to assist the Department of Transportation in meeting the General Assembly's mandate.

Approach

The USC Institute of Public Affairs (IPA), the Budget and Control Board's Division of Research and Statistical Services (DRSS), South Carolina State University's Small Business Development Center (SBDC), and the USC Statistics Laboratory (SL) propose to form a consortium to address the issues posed by the Croson decision and the General Assembly's mandate. Overall project coordination will be the responsibility of the IPA, with work tasks allocated among each of the consortium members.

The proposed project will be initiated on December 1, 1993 and completed in two phases. The primary purpose of Phase I will be to examine the question of whether existing statistical and anecdotal information provides evidence suggesting disparity in DOT contracting. If the work of Phase I points toward a conclusion of disparity, Phase II will seek to identify the relative importance of major barriers to DBE competitiveness that might be addressed through policy actions by the General Assembly. Phase I will be completed by May 31, 1994. Phase II will be completed by September 30, 1994.

In the description of tasks below, various consortium members are assigned responsibilities for the production of work products resulting from each task. **It is important to note, however, that all consortium members will be fully involved in each task.** The consortium anticipates weekly meetings in which resarch and analysis issues will be fully discussed and crafted. In addition, members of the consortium are prepared to meet with DOT and General Services personnel as needed. Each of the consortium members is committed to the principle that the design, analysis, and report preparation for a project of this import requires diverse input in order to assure all significant questions are addressed.

Phase I. Phase I will require the completion of several tasks. These include:

Task 1. Identification and Collection of DOT Contracting Data *(Primary Work Responsibility: DRSS)*

The Division of Research will assemble historical data on prime contractors and subcontractors maintained by the Department of Transportation at the "Blockhouse" and the Park Street Office for a period covering 1977 through 1993. The Department of Transportation agrees to permit the Division of Reseasrch to transport the data files from the "Blockhouse" to the offices of the Divsision. The Division agrees to follow the Department of Transportation's procedures for maintaining accountability of the files and will return the files to the "Blockhouse". The Division will also extract the Depatrment os Transportation's exiting computer files covering the period from 1990 forward. This file will be transformed into a preliminary analysis data base in the early stages of the project. The data base will be provided to other members of the consortium. Tasks include:

1. Identify boxes containing individual contract records covered by study. Approximately 5,000 files will be included in the study.
2. Copy index cards in each file.
3. Design data base format.
4. Keypunch data from reproduced copies of card files.
5. Prepare machine readable copies of data base.

Task 2. Legal Analysis. *[Primary Work Responsibility: IPA]* In this task, we will conduct a careful examination of Croson and related decisions both preceding and following Croson. This analysis will serve to structure the statistical analysis plan to be as responsive as possible to the issues raised by Croson.

Task 3. Development of an Analysis Plan for Examining Disparity. *[Primary Work Responsibility: DRSS and SCSU-SBDC]* Though the legal analysis referred to above may identify more, there are at least three critical issues that must be resolved prior to completion of data collection and the initiation of analyses. These include (1) resolving the definition of the "willing and able" DBE population; (2) the definition of an appropriate time span for analysis; and (3) the characteristics of a measure (or measures) of disparity. These decisions are critical for they each may potentially have a significant effect on the study's outcome. For this reason, the analysis plan will be formalized as

a written document in the very early stages of the project. It will be reviewed, with an invitation to provide written commentary, by each of the consortium members as well as the legal and program staff of the DOT and General Services.

Task 4. Analyses of Data. *[Primary Work Responsibility: DRSS and SL]* It is anticipated that data analysis will involve the application of standard statistical techniques. Computing equipment is available to both the University of South Carolina and the Division of Research to complete required analyses. SAS software, which provides a full complement of data management and analysis routines, will serve as the primary analysis tool.

The Division of Research will undertake an analysis of the data reported by the U.S. Bureau of Census for 1987 regarding the status of minority owned businesses. (The 1992 Census will not be available prior to November 1994) The Division will prepare a listing of the number of firms in each three digit industry code, or four digit code where available, relevant to highway construction. The listing will depict the number of firms in South Carolina classified as owned by women, blacks, hispanics, Asian, Native American, and other.

Task 5. Development of a Base of Historical Data Relating to the Question of Disparity. *[Primary Work Responsibility: SBDC/IPA]* The Croson decision indicates that primary evidence justifying DBE assistance programs must be in the form of objective and specific statistical data. Careful examination of the historical records will be used to supplement the statistical data and can help to shed light on both the underlying causes of any findings of disparity or the extent to which government and its systems might have contributed to discrimination. To accomplish this objective, this task will focus on an historical analysis of the record of activities by the state/SCDOT surrounding this issue. Primary data will include interviews with primes, subs and DBE owners

focus group of majority and DBE's for formal hearing on the disparity issue.

Task 6. Documentation and Analysis of DOT Programs to Assist DBEs. *[Primary Work Responsibility: IPA SCSU-SBDC]* Analysis of statistical information must also be conditioned by an understanding of DOT's implementation of programs intended to assist DBEs. These include, but may not be limited to, Title VI of the Civil Rights Act of 1964; 1970 DOT Regulations 49 CFR 21; DOT Regulations 49 CFR 23; the Surface Transportation Assistance Act of 1982; the Surface Transportation and Uniform Relocation Assistance Act of 1987; the 1981 SC Procurement Code; Procurement regulations promulgated in 1988 and 1990; and State highway construction contract requirements imposed by the General Assembly in 1986, 1987, 1989, and 1990.

Research to be conducted under this Task will examine the intent and the historical record relating to DOT's implementation of these and related provisions. Analysis will include an examination of the role and function of the compliance group, compliance monitoring methods, the DBE certification process, and complaints and complaint management. Interviews with DOT personnel and examination of archival records will provide primary data for this task. The study will pay particular attention to the terms "contract committment", "authorized" and actual dollar impacton the DBE firms.

Task 7. Preparation of a Phase I Report to the General Assembly. *[Responsibility will be distributed to consortium members consistent with major task responsibilities given above.]* The IPA will have primary coordination and editorial responsibility for the preparation of a Phase I Report to the General Assembly. Consortium members responsible for Tasks 1-6 above will prepare initial drafts of relevant sections of the report and copies will be shared for input from each consortium member. At present, six chapters are envisioned:

I. Introduction

II. A Legal Perspective on Croson

III. An Historical Perspective on Disparity in Contracting with DBEs

IV. Review of DOT Programs to Assist DBEs

V. Analysis of Statistical Disparity in DOT Contracting

VI. Conclusions

The report will include an assessment of the statistical validity of the findings and an economic assessment of the data in terms of the objective of the study. It will also include a brief Executive Summary highlighting the study's major findings.

Phase II. Phase II of the study will be designed based on the findings of Phase I. At present, however, we anticipate five objectives. They are:

Objective 1) Convene at least two additioonal MBE/WBE and Majority contractors as "focus groups" to assist in the development of testable hypotheses about the causes of disparity. *[SBDC]/IPA/DRSS*

Objective 2) Design survey to test hypotheses about the causes of disparity. Emphasis on explanatory variables that can be changed by policy action. *[IPA]*

Objective 3) Develop anecdotal evidence relevant to survey findings through public hearings for MBE/WBE's. *[SBDC/IPA]*

Objective 4) Develop policy options for addressing underlying causes of disparity. *[Consortium]*

Objective 5) Provide report to General Assembly on underlying causes and policy options by September 30, 1994 *[IPA/Consortium]*

Timeline. Consortium members will meet on a weekly basis for the duration of this project. This will insure full communication and will permit any necessary adjustments to time schedules. At present,anticipate the following timeline for Phase I of this study:

May 31 - Delivery of Preliminary Report to General Assembly

May 20 - Preliminary Report to copy and binding

May 12 - Initiate final edit of Preliminary Report

May 12 - Initiate final edit of Preliminary Report

May 11 - Working Group final review of Preliminary Report

May 2 - Review copy of Preliminary Report to Working Group

March 15 - Initiate writing of Preliminary Report

March 1 - Initiate analysis of data

February 15 - Data collection complete

January 5 - Final Draft of Research Design

December 15 - Draft Research Design completed for Consortium and DOT review

December 1 - Initiate Legal review and historical analysis

This time schedule is predicated on an assumption of a Phase I extension to May 31, 199*. Given the magnitude of this project, the Consortium members feel that six months is the minimum time that will be required to produce a high quality product.

Estimated Cost. The total budget for this project will be forwarded under separate cover.

...funds appropriated for the Breech Inlet bridge, $100,000 shall be transferred to the Department of Wildlife and Marine Resources to construct a boat landing and fishing pier on the Cooper River at the Virginia Avenue Park.

124.29. (Special Events) The Highway Patrol must not charge any fee associated with special events for maintaining traffic control and ensuring safety on South Carolina public roads and highways unless approved by the General Assembly.

need confirmation

124.30. (Disparity Study) The Department shall have a study performed to determine if a significant statistical disparity exists between the number of qualified minority and women-owned contractors willing and able to perform highway and bridge construction and the number of such contractors actually engaged by the Department or contractors working for the Department. The study shall be completed and submitted to the General Assembly by April 12, 1994.

This is actual Proviso to be inserted

129.68. (Welfare Dependency Plan) The agencies listed below are directed to develop one plan to reform welfare by maximizing strategies to reduce welfare dependence. Welfare is defined as public assistance payments or services provided by Aid to Families with Dependent Children (AFDC), Medicaid, Food Stamps and Housing assistance. This plan shall be submitted to the Governor, Chairman of Ways and Means and Chairman of Senate Finance by November 30, 1993 and must, at a minimum, address the following:

1. Agency missions and objectives for economic self sufficiency.
2. Delineation of the magnitude of the problem of dependence in terms of dollars presently spent and the projected amount to be spent five years from now.
3. Descriptive statistics on the eli...

Section 5.9 of the RFP allows the Comptroller the option of requiring that the Successful Proposer post a performance bond. Should a performance bond be required, the Successful Proposer would be responsible for bearing the entire cost of that bond. It is imperative that each proposer address this issue in its cost proposal (see Section 5.9 for evidence of application for performance bond required to be submitted with proposal."

4. Section 5.13, Payment, first paragraph, is modified to read as follows:

"Services performed under this contract shall be billed to the Comptroller on a monthly basis, commencing on October 1, 1993, for actual costs incurred through the billing date. Invoices must be accompanied with documentation that details the number of hours expended by the Successful Proposer's personnel in the performance of work under this contract. Notwithstanding the foregoing, fifty percent (50%) of each amount otherwise approved for payment to the Successful Proposer as fees for work performed on this project shall be retained by the Comptroller until such time as the retained amounts of fees approved for payment total $200,000. For amounts approved for payment as fees for work performed hereunder in excess of $200,000, twenty percent (20%) of each amount approved shall be retained by the Comptroller. Such amounts shall be retained until such time as the Comptroller has approved the final report submitted by the Successful Proposer, as revised to reflect Comptroller comments and requested modifications. Without limitation upon the foregoing, actual expenses for which documentation has been submitted and approved for payment shall be reimbursed on a current basis, and shall not be subject to retainage."

5. Section 5.3, Contract Term, first paragraph, is modified to read as follows:

The contract resulting from this RFP will have an initial term commencing upon the date of contract execution through May 31, 1995.

6. All references in the RFP to dates for the submission of proposals, the announcement of the Apparent Successful Proposer, the contract execution date, and the commencement of project activities are changed to read as follows:

•August 20, 1993	Deadline for Submission of Proposals (Late proposals will not be considered)
•August 30, 1993	Announcement of Apparent Successful Proposer
•Sept. 3, 1993	Contract Execution
•Sept. 9, 1993	Commencement of Project Activities.

7. Section 3.5.5, Methodology, is modified by renumbering item 15 as item 14, and renumbering subsequent items in that section accordingly.

REQUEST FOR PROPOSAL
QUESTIONS AND ANSWERS

1. In Section 5.13, Payment, the RFP references a 50% retainage. Can this retainage be reduced or will this requirement be negotiable upon selection of a consultant?

See RFP MODIFICATION number 4.

2. Will the Comptroller permit advance payments prior to work commencement?

No.

3. Disparity study start-ups are very expensive. Based on the start date of September 7, will it be possible to bill on October 1, rather than waiting until November 1?

See RFP MODIFICATION number 4.

4. The Texas Department of Transportation is currently conducting a disparity study. Will this study preclude the need for the state study consultant to include TxDoT in this study? If TxDoT is in the study, will the consultant be expected to reconcile differences between the studies' methodologies or findings?

a. The Texas Department of Transportation (TX DoT) must be included in this study.

b. The Successful Proposer's methodology is to be independent of any other disparity study performed. Resultant findings should relate only to work performed by Successful Proposer on this study.

5. It is our understanding that the scope of services includes all Texas agencies including the university system, subject to the answer in question #5. Is this correct or are there any exclusions? Does this study include the community college system? Please provide a list of departments/agencies to be included.

The study applies to all state agencies without exception. A list of state agencies is attached.

6. The RFP states approximately $3.5 billion of goods and services were purchased in FY 1992. (a) Is this the dollar figure for all agencies included in the study as noted in Questions #5 and #6? (b) Are expenditures available by agency, if so what are they? (c) Are expenditures available by business category (construction, professional services, other services, and supplies/commodities), if so what are they? (d) Are there any

reports providing the annual number of contracts and purchases in total and by agency? If so, can you provide copies?

The information is recorded by the General Services Commission (GSC) for non-delegated purchases and by the agencies for delegated purchases. Because this information is kept as raw data no reports or other information are available.

7. (a) Is contracting and purchasing centralized in the state or do individual departments have contracting and purchasing authority? (b) Do all departments/agencies have the same contracting and purchasing rules? (c) If purchasing and contracting are decentralized, which departments participate in the process? (d) Must departments report their purchases or contracts to a central authority?

a. Agencies can make their own open market purchases for goods valued at less than $10,000 and services of less than $100,000; higher amounts require involvement from the GSC. (Until recently, the threshold for goods was $5,000.) Agencies purchasing consultant services are subject to the Consultant Services Act, (Article 6252-11c, Texas Civil Statutes).

b. No.

c. See a. above.

d. GSC maintains records for non-delegated purchases while agencies maintain records for delegated purchases.

8. The most demanding element of a disparity study is the review of contracting and purchasing records to establish historical purchasing practices. The database developed from this research then is used to define "market area" and usage of HUBs. Therefore, location, accessibility, and availability of contract and purchasing data control much of the project's cost. (a) Does the State have a central source of this information? (b) Is this source manual or automated? (c) For how many years is this information available? (d) When do records go to the archives?

a. See response 7d.

b. Information maintained by GSC and the larger state agencies is automated, however, information in some smaller agencies is still kept manually.

c. While general guidelines exist, record retention policies are at the discretion of each agency. Therefore, while historical information is available, only the agency will know if they have it or if it has been archived.

d. See c. above.

9. (a) Does the State have a computerized data which can be used to determine the purchases and contracts awarded to firms by contract category? (b) How long has the information been automated? (c) If some information is not automated, what format does it have and where is it located?

(a) The above information is available from GSC for non-delegated purchases for a minimum of five years.

(b), (c) see responses to 7 and 8.

10. Is the State seeking a single analysis and thus a common "State" program or is there a need for agency level analyses with differing programs?

There should be one analysis covering the state as a whole.

11. Is the Comptroller recommending that only certified HUBs should be considered as available? Our research shows that many HUBs do not register with local or state governments primarily due to a belief that the "barriers" could not be overcome.

Available HUBs would include all businesses meeting the state's definition of a HUB located anywhere in the state, both certified and non-certified.

12. Croson states, "It would be sheer speculation how many minority firms there would be in Richmond absent past societal discrimination."City of Richmond v. J.A. Croson., 109 S Ct. 706, 724 (1989)." The RFP requests the estimation of the number of available HUBs had there been no barriers (page 15, Section 3.5.2.b). Will the Comptroller consider eliminating this element from the Scope of Work?

No. This issue must be addressed to further demonstrate the remedial need for this program. The Comptroller would emphasize that this area requires only an estimate.

13. If the State has a prima facie case to have an HUB program, it could be legally liable nor to operate one. In the reverse, if the State does not have justification to operate an HUB program, it could be legally liable to operate one. Therefore, would the Comptroller consider eliminating the analysis of the impact on HUBs if the program was abolished? (many states have not included this component.)

No. Again, this goes toward demonstrating the need for a remedial program.

14. Will the Comptroller accept methodologies which do not address each item under 3.5.5 if the proposer's analyses of Croson and other case law suggests alternative approaches?

Each item under Section 3.5.5 must be addressed. However, other methodologies will be given consideration.

15. (a) When did the State begin its HUB program or any prior similar efforts? Does every agency/department participate in this program? (b) Can we obtain a copy of the program documentation and examples of reports? (c) Does the program track each agency's accomplishments?

a. The General Services Commission began administering the HUB program in fiscal year 1992. Prior to this time the program was administered from the Texas Department of Commerce as part of its Small Business Program to assist HUBs in obtaining state contracts.

b. The information is recorded by the General Services Commission (GSC) for non-delegated purchases and by the agencies for delegated purchases. Because this information is kept as raw data no reports or other information are available.

c. Refer to b, above.

16. The RFP state that the consultant will be provided with business categories. Since the level of detail impacts the level of effort required, could the Comptroller provide the list of business categories prior to proposal submittal (this will effect the pricing of the proposal)?

Yes. The categories will be Professional Services (as defined by state statute), commodities, construction (services and materials), and services. Services would be all services not included under the Professional Services Procurement Act from actuaries to janitorial to underwriters.

17. Does the Comptroller intend the State of Texas to be the relevant market area? In section 3.5 scope of study, the RFP states, "the study area is to include the state of Texas in its entirety. For the purpose of this project, the term "doing business in Texas" shall be applied in the same manner as it is applied for franchise tax purposes." From this statement one might infer that the Comptroller has determined that the relevant market area for the state's purchasing of goods and services is the political jurisdiction of the State of Texas.

See RFP MODIFICATION number 2.

18. Will the Comptroller assign values to the evaluation criteria prior to proposal delivery so all consultants will be aware of how

they will be evaluated? Since the narrative suggests that numeric scores will be given to proposals, all consultants would have the same knowledge base if the points of each item were determined before August 16.

Values will be assigned to the evaluation criteria. However, that determination has not yet been made, and may not be made until shortly before the proposal due date. Evaluation criteria values will be available to all proposers following contract award.

19. Section 3.3 (Proposer Experience). This section requests that the proposer give detailed information on current and historical experience relevant to performing the study. Due to the reality of a lack of participation by minorities in the business of the State, one of the potential bidders may have less than a perfect record in performing such a study for another state agency. Accordingly, as in Section 4.3b, we would like to ask the clarification that the selection committee will evaluate a bidder's total experience with the State, not just positive ones.

All available information regarding a proposer's previous experience will be evaluated based on information in Section 4.3b of the RFP.

20. Section 3.4 (Proposer Personnel and Organization). Is the proposer to provide resumes of all management, supervisory and key personnel in its staff, and also for subcontractors to serve as management, supervisory or key personnel in performing the study (e.g., legal counsel)?

This is correct.

21. Section 3.5.1 (Capacity Assessment). In order to determine the cost of the study, it is necessary to know the exact number of procurement categories (example: 100 procurement categories would incur drastically greater costs than 10.) (a) Will the Comptroller be adding this information to the scope of service? (b) Will the request for proposal denote the necessity of compiling ethnicity and gender separately? Not included in 3.5.1 is the Court's direction on Geography or Relevant Markets. Each procurement category must be determined separately in relationship to geographic capacity. (c) Will this be part of the Capacity Assessment?

a. See response to 16.

b. Section 3.5.1 states, "Identify, by ethnicity, gender, and procurement category, the number of existing HUBs in the state." Thus, the requirement is to compile the information on ethnicity and gender separately.

c. The relevant market is the entire state. (See section 3.5)

22. Section 3.5.2c (Disparity Assessment). Considering that the key Supreme Court opinion, City of Richmond v. J.A. Croson Company, was only a plurality opinion, we would like to ask for a change in the opening paragraph in section 3.5.5 and also to the last sentence of the first paragraph of 3.5.2c, as follows: " All instances of specific discrimination shall be documented with sufficient statistical detail to withstand constitutional scrutiny"

No change.

23. Please clarify, "..is the business community and not it the general population."

The Croson decision requires that capacity be based on the number of minority and women firms in the business community and not the percentage of minority and women in the general population.

24. (a) Is 3.5.5.3 methodology and why? (b) #14 is missing.

a. Yes. Part of the methodology is not to use the methodology from other studies. This study is to be independent of any other study that has been or is currently being performed.

b. See RFP Modification number 7.

25. Section 3.6 (Progress Reports) Are not weekly reports sufficient? How can more frequent report tabulation be costed out without knowing how many/how often?

Due to the nature of this project and its time frame, progress reports may be needed more frequently than on a weekly basis. We view this more the exception than the rule, however, we will reserve the right to request them more frequently when necessary.

26. Section 4.2 (Cost of Proposal) The two sentences of the second paragraph of this section, which indicate that all travel and accommodation expenses must be factored in and included in the initial cost proposal bid. The next sentence caused me some concern. We understand what a requirement of a performance bond is, but this requirement is followed with the phrase "... and on the allowance of some substitute form of performance security." I do not understand what this means or how to factor this on my bid. I would like an explanation on this section.

The Comptroller may accept a performance bond or may elect to accept some other form of security.

27. Section 4.3.b, c. I would like to ask that the word Comptroller be changed to State in regards to a proposer's performance on previous projects.

Refer to response 19.

28. Section 4.3, second to the last paragraph. It is unclear to me how the various factors listed in A through E will be weighted. How the committee members score the proposals? That is, what weight will be given to the various factors? Is the selection of the best proposal to be determined by the aggregated scores, or by a more subjective consideration of the evaluation criteria? Would the quality of performance be considered a disparity/capacity study had been done by a proposer for another agency of the State of Texas?

Refer to response 18.

29. Section 5.13 (Payment). How a small business concern can bank for 9 months half of this study? I feel that any study for disparity that is trying to incorporate a segment without a just representation in the State's Business. Requirements for $250.000 and weekly evaluation eliminate their possibilities, especially when there are security bonds for their performance. I would like to ask to change the 50% to 10% in monies that the Comptroller will keep as guarantee in order to finish this very labor intensive contract.

See RFP MODIFICATION number 4.

30. Section 5.3 (Contract Term). Our legal counsel considers this language a concern as per the following possibility. Membership on the court changes and the Court determines differing guidelines to determine disparity. It would be in the best interest of the State of Texas to terminate this contract, but not through any fault of the contractor.

The Comptroller believes that the language as presently set forth in Section 3.3 of the RFP provides adequate protection for the State's interest and is in the best interest of the State of Texas.

31. Will indirect costs be authorized under any contract award?

Yes. It must be aggregated with direct costs and set out in the format provided in Appendix A of the RFP.

32. Define "participating" as used in 3.5, sentence 1. "The scope of the study is to develop findings and recommendations regarding the disparity and capacity of HUBs doing business in Texas and participating in the state's purchasing process."

Participating means having been awarded a contract by the state.

33. If "doing business in Texas" is to be applied in the same manner as for Franchise Tax purposes, is the study limited to only HUBs that pay Franchise Taxes?

See RFP MODIFICATION number 2.

34. How many HUBs pay Franchise taxes?

See RFP MODIFICATION number 2.

35. What information will be made available from state Franchise Tax records? What is the format of the data? In what programming language? Does the GSC data contain distinct fields with the following information:

contract number;
vendor number;
vendor name;
contact name;
contact phone number;
address;
city;
state;
zip code;
amount of payment;
date of payment;
contract or purchase order;
capitol or expense;
federal or local project;
type of project;
ethnic status of vendor;
gender status of vendor;
HUB status of vendor?

(a) See RFP MODIFICATION number 2.

(b) The GSC data is housed in a relational data base (Rdb) on equipment from Digital Equipment Corporation.

(c) The primary language is COBOL, but they also use CORVISION. The data can be extracted and placed on an ASCII file with fixed fields upon request.

(d) GSC has distinct fields for all listed information with the exception of: Capital or expense purchase (which is based on dollar and useful life limits set by statute) and federal or local project (which is available through the Comptroller's fund accounting system).

36. In RFP section 3.5.5.15, please clarify terms "hiring" and "employment data". Do they refer to employer/employee relationships? Is analysis meant to cover private and public sectors?

"Hiring" means to contract or sub-contract with an entity or person, or employing a person or persons.

"Employment data" means any employment data relevant to analyzing disparity.

37. Is the analysis limited to Texas or entire country?

The study is to include the State of Texas in its entirety. (Sec. 3.5)

38. Is the analysis of utilization level to include both the public and private sectors?

Yes. (Sec. 3.5.1.d).

39. Is the information as to discrimination intended to include both HUBs and non-HUBs?

Information from both groups is necessary to adequately assess discrimination.

40. Define the terms "professionals" and "various industries" used in section 3.5.5.9.

"Professionals" is a term defined by the Professional Services Procurement Act (article 664-4, Vernon's Texas Civil Statutes). "Various industries" would include those relevant sample industries submitted by the proposer in response to RFP section 3.5.5.9.

41. (a) In what format is GSC data stored? (b) What programming language? (c) Is the data summed by geographical dispersion, size of firm, level of involvement in state's procurement process, and type of work?

a. See answer to #35.

b. See answer to #35.

c. The records are kept by GSC as raw data, therefore no reports or other information can be provided at this time.

42. Does the state have data on contractor business licenses and professional associations, and building permit records by procurement category, gender, ethnicity, size of firm? In what kind of format is this data stored? What programming language? Is the data summed by procurement category, gender, ethnicity, size of firm?

No.

43. What are the product markets? How many are there? Does the state have data on the economic activity in various product markets (procurement categories) in the state by procurement category, gender, ethnicity, size of firm? In what format is this

data stored? What programming language? Is the data summed by procurement category, gender ethnicity, size of firm?

The product markets are the procurement categories. For the purposes of this study there are four procurement categories (see response #16). The Comptroller is uncertain as to what is meant by "economic activity". Information on non-delegated purchases is kept by GSC. Information on formatting and programming is addressed in response #35. Formatting and programming will differ from agency to agency for delegated purchases.

44. What is the correlation between product markets and procurement categories?

They are the same.

45. How many procurement categories are there? What are they?

See response #16.

46. (a) Does the state have data on HUBs certified by the state by ethnicity, gender, and procurement category, including the number of existing HUBs in the state, the owner(s) of the firm shall be identified both as to race and sex; (b) if the firm is a certified HUB by a federal, state or local governmental unit, with whom and when certified; and (c) whether the firm has done or is currently doing business with the state? (d) In what kind of format is this data stored? What programming language? (e) Is the data summed by ethnicity, gender and procurement category?

a. The state maintains this data on certified HUBs.

b. The report would only indicate if the HUB is state certified.

c. The report does not indicate whether the HUB has done, or is currently doing business with the state.

d. Yes. See process in #35.

e. The data is kept by GSC as raw data, therefore no reports or other information can be provided at this time.

47. How many years are to be covered in this analysis?

The issue as to the number of years the study must cover in order to withstand constitutional scrutiny is one the proposer is expected to address as part of the proposal.

48. Define "availability".

Refer to response #47.

49. How many years should the utilization analysis be conducted?

A sufficient number of years must be covered to ensure that the results would withstand constitutional scrutiny. Refer to response #47.

50. Will the information made available to the successful proposer be procurement or payment data, or both.

Both.

51. Does the state's data include purchase orders and contracts distinguished by ethnicity and gender of the contracting firm, and procurement category and if the firm is a certified HUB?

See response to #6.

52. How long does the state retain its procurement/contracting records?

GSC retains its procurement records for a minimum of 10 years. Retainage schedules for delegated purchases will vary between agencies.

53. How are hard copy purchase orders stored?

Current and last fiscal years hard copy reports are kept in-house at GSC for non-delegated purchases. Each agency stores purchase orders for delegated activities.

54. Is purchase order data also computerized? What is the format of the data? In what programming language?

See answer #35.

55. What dollar level initiates formal contracting?

$10,000 is the level at which competitive bids are required. Formal contract as used in this context means those requiring written competitive bidding.

56. How many formal contracts are issued per year?

This information is kept by GSC for non-delegated purchases and by the agencies for delegated purchases. The information is kept as raw data and therefore no reports are available at this time.

57. How many informal contracts are issue per year?

See answer #56.

58. Are commodities purchased on formal contracts?

Yes, if the contract price is greater than $10,000.

59. Is change order data included in the accounts/payable records?

Not by GSC (however, each state agency's procedures may differ). If a contract amount or any other field changes, the purchasing records will only reflect the new amounts.

60. Can multiple vendors be awarded one contract? If so, how is this treated in the contract data?

Only one vendor per commodity code exists for the automated contracts. Exceptions can exist on open market purchases performed by the agencies. When multiple vendors are awarded a contract each vendor is treated individually.

61. Can we identify locally and federal funded contracts?

Although this information exists, it is not kept in a segregated form. It would be necessary to compile such information from the general records of the Comptroller's Office. Such information will be made available upon request by the Succesful Proposer.

62. Does the state have any information regarding non HUB contractors?

Yes. GSC and agencies maintain the same information for non-HUBs as is maintained for HUBs.

63. Can payments be summed up to the contract/vendor level for each of the years specified in the study?

Yes, however, the information available depends on the definition of a contract.

64. (a) Does the state have data on the utilization of HUBs throughout the state summed by procurement category? (b) By dollar value of contract? (c) For each of the past 3-5 years? (d) By ethnicity and gender? (e) Does this item require a discussion of the utilization of HUBs by local as well as state government?

a. This information is available from GSC only for non-delegated procurements. Agencies have information on delegated purchases.

b. Please refer to a.

c. GSC has information from fiscal year 1992 forward. Department of Commerce information must be

reconstructed for prior years for non-delegated purchases. Agencies have information for delegated purchases.

d. Please refer to c.

e. Yes, utilization of HUBs by both the public and private sectors. (Section 3.5.2)

65. Is the analysis limited to Texas or entire country.

Study applies only to the State of Texas.

66. Describe the waiver process.

The Successful Proposer is expected to submit recommendations on a waiver process; that is, circumstances where exceptions to otherwise mandatory percentage participation in line with the results of this study might be justified.

67. Is "contractors" meant to exclude other business entities, such as commodities, professional services, etc.?

No. For the purposes of section 3.5.5 the term contractor includes all entities who enter into procurement contracts.

68. Is the requirement for a performance bond necessary, or is it an exclusionary specification?

Refer to response 26.

69. Is the 50% retainage necessary?

See RFP MODIFICATION number 4.

70. Is the proposal deadline of August 16 necessary?

See RFP Modification number 6.

71. Is prior experience with the Comptroller's Office an exclusionary specification?

No. This is only one part of one evaluation criteria all of which will be used to evaluate the proposals.

72. How are potential subcontractors supposed to get in contact with potential prime contractors?

To encourage networking, the Comptroller will provide proposers a list of all potential proposers upon request. It is ultimately up to each proposer to develop their own arrangements with other contractors.

73. Is sufficient time being allowed in this RFP process to allow for meaningful and representative bids from HUBs?

Yes. See RFP Modification number 6.

74. What are the specific HUB requirements for this contract?

Refer to section 1.2 of the RFP.

75. Will the "ethnic and procurement" categories referenced on page 14 of the RFP be provided to the proposers within a reasonable time frame prior to the required submission date?

Ethnic categories are provided in the RFP. See response 16 for procurement categories.

76. Is the Comptroller's ability to remove personnel from the proposer's team (as stated in section 3.4 of the RFP) limited to removal "for cause" only or can personnel be removed for other reasons? If personnel can be removed other than "for cause", by what legal authority is the Comptroller able to do this?

YES. The Comptroller will exercise its discretion in this matter to serve the best interests of the project. The legal authority will be the contract between the Successful Proposer and the Comptroller, and the RFP is part of that contract.

77. By what specific legal authority is the Comptroller allowed to conduct "background investigation" on project personnel?

The Comptroller believes that background checks may be helpful in examining potential conflicts of interest and overall qualifications of the project personnel, and will be limited to areas relevant to the proposer's qualifications to perform this study. Again, the legal authority is a matter of contract.

78. Section 3.5 of the RFP states that the proposer "must provide detailed statistical proof for each element of the study." We feel that "proof" is too strong a word; that is, support should be substituted. The most rigorous of statistical methods, when applied correctly, often produce results which offer strong support in favor of certain hypothesis; However, this support is always couched in terms of double negatives - "do not reject" is used in lieu of "accept."

"In other words, statistics either reinforce or cast doubt upon an argument, but do not stand alone.

No change required. It is anticipated that the veracity of proof will vary with the quality of the methods used in this study.

79. What is the precise definition of the phrase "technical and financial capability" appearing in section 3.5.1.b of the RFP. that the Comptroller wishes to use.

Technical capability pertains to available skills per procurement category. Financial capability pertains to the status as a going concern.

80. How is the successful proposer supposed to gain access to records of professional associations (which are not public records) as stipulated in section 3.5.5.5 of the RFP?

The successful proposer is to determine how to perform this task.

81. How is the successful proposer supposed to gain access to employment and hiring data of private contractors, subcontractors, vendors, and consultants (which are not public records, except inasmuch as these businesses have worked for the state and have EEO data on file) as stipulated in section 3.5.5.15 of the RFP?

Refer to response 80.

82. Section 3.5.5.17 of the RFP states that " all statistical samples should be performed with a minimum confidence level of 95%." Is it correct to interpret this statement as implying that (1) where the data allow, the strictest significance levels should be used? or (2) only those samples which allow for the use of 95% confidence levels be used? If the latter interpretation holds, then data pertaining to Native American-owned or Asian-owned firms, for instance may often have to be excluded from certain analyses desired by the RFP. On the other hand, if the first interpretation is followed, then the data dictate the strength of statistical support possible.

The strictest significance levels should be used. Neither Native American-owned nor Asian-owned businesses would have to be excluded. The use of the 95% confidence level methodology is to reiterate the Comptroller's desire that a statistically valid sample be used.

83. What is meant exactly by the phrase "the use of capacity percentages derived as HUB program goals" in section 3.5.5 of the RFP?

The Successful Proposer is to recommend to the state what capacity percentages should be used by the state in future procurements, by ethnicity, gender, and procurement category and how they should be applied.

84. What is meant exactly by the phrase in section 4.2 of the RFP "Additionally, the proposer must present its cost proposal based on a requirement of a performance bond, and on the allowance of some substitute form of performance security"? Please explain

exactly how the allowance of some substitute form of performance security is to be built into the cost proposal?

Refer to response 26.

85. Will the membership of the proposal evaluation and selection committee be made known to all proposers? If so, when will this information be made available?

All records regarding the evaluation process will be available upon written request following the successful execution of this contract.

86. Please clarify the purpose and intent of section 5.12 of the RFP "Prohibition against related bids. "Please provide an illustrative example of prohibited activity under this section.

This provision seeks to reduce the potential for future real or apparent conflicts of interest involving the Successful Proposer. It would prohibit the named entities from bidding on any procurement relating to the implementation of the Successful Proposer's report. Until there is a report, a specific example is impossible.

87. Are academic and/or other professional writings describing methods, data, and findings to be prohibited after the official release of the final report, to be exempt from the general prohibition in section 5.15 of the RFP?

To the extent that such writings describe methods, data, or findings developed or produced in connection with the services provided pursuant to this RFP, prior written approval of the Comptroller would be required to permit such use.

88. Please explain by what legal authority can the Comptroller require a 50% holdback or retainage as stipulated in section 5.13? In light of the existence of a $250,000 performance bond or its equivalent, such retainage seems both redundant and excessive. Such a holdback will effectively preclude many smaller and historically underutilized firms from successfully bidding on this study.

See RFP MODIFICATION number 4.

ALPHABETICAL LISTING OF STATE AGENCIES

Agency Name	Agency Number
Abilene State School - *Retained for Inventory, See Agency 655*	676
Adjutant General	401
Admiral Nimitz Museum Commission - *Abolished, see Agency 802*	816
Advisory Commission on Intergovernmental Relations	334
Advisory Commission on State Emergency Communication	477
Agriculture Resources Protection Authority	553
Air Control Board	519
Alamo Community College	977
Alcoholic Beverage Commission	458
Alvin Community College	951
Amarillo College	952
Amarillo State Center - *Retained for Inventory, See Agency 655*	657
American Educational Complex College	955
American Revolution Bicentennial Commission - *Abolished*	906
Angelina College	989
Angelo State University	737
Attorney General	302
Austin Community College	997
Austin State Hospital - *Retained for Inventory, See Agency 655*	677
Austin State School - *Retained for Inventory, See Agency 655*	678
Battleship Texas Commission - *Abolished*	805
Beaumont State Center - *Retained for Inventory, See Agency 655*	658
Bee County College	953
Big Spring State Hospital - *Retained for Inventory, See Agency 655*	686
Blinn College	954
Board of Athletic Trainers - *Combined with Agency 501*	523
Board of Barber Examiners	502
Board of Chiropractic Examiners	508
Board of County and District Road Indebtedness - *Dissolved*	316
Board of Dental Examiners	504
Board of Examiners in Basic Sciences - *Abolished*	510
Board of Examiners in the Fitting and Dispensing of Hearing Aids	509
Board of Examiners of Psychologists	520
Board of Landscape Architects - *Transferred to Agency 459*	468
Board of Law Examiners	203
Board of Licensure for Nursing Home Administrators	524
Board of Managers of the Texas State Railroad - *Repealed*	314
Board of Medical Examiners	503
Board of Nurse Examiners	507
Board of Pharmacy	515
Board of Physical Therapy Examiners	522
Board of Plumbing Examiners	456
Board of Podiatry Examiners	512
Board of Private Investigators and Private Security Agencies	467
Board of Regents, Texas State University System	758
Board of Registration for Professional Engineers	460
Board of Registration for Public Surveyors - *Combined with Agency 464*	463
Board of Tax Professional Examiners	337
Board of Tuberculosis Nurse Examiners - *Sunset*	516
Board of Veterinary Medical Examiners	578
Board of Vocational Nurse Examiners	511
Brazosport College	990
Brenham State School - *Retained for Inventory, See Agency 655*	688

(Continued)

Agency Name	Agency Number
Brownwood State School - *Not Currently Used, See Agency 694*	654
Building Commission - *Abolished, see Agency 303*	309
Canadian River Commission	598
Children's Trust Fund of Texas Council - *New*	355
Cisco Junior College	956
Clarendon College	957
College of the Mainland	971
Collin County Community College District	949
Commission on Fire Protection Personnel Standards & Education - *Abolished, See Agency 411*	408
Commission on Human Rights	344
Commission on Jail Standards	409
Commission on Judicial Conduct	242
Commission on Law Enforcement Officer Standards and Education	407
Commission on Uniform State Laws	107
Comptroller - Funds Management	903
Comptroller - State Fiscal	902
Comptroller of Public Accounts	304
Consumer Credit Commission	466
Cooke County College	958
Corpus Christi State School - *Retained for Inventory, See Agency 655*	670
Corpus Christi State University	760
Corsicana State Home - *Not Currently Used, See Agency 694*	651
Cosmetology Commission	505
Council on Disabilities - *Abolished*	348
Court of Appeals - Eighth Court of Appeals District	228
Court of Appeals - Eleventh Court of Appeals District	231
Court of Appeals - Fifth Court of Appeals District	225
Court of Appeals - First Court of Appeals District	221
Court of Appeals - Fourteenth Court of Appeals District	234
Court of Appeals - Fourth Court of Appeals District	224
Court of Appeals - Ninth Court of Appeals District	229
Court of Appeals - Second Court of Appeals District	222
Court of Appeals - Seventh Court of Appeals District	227
Court of Appeals - Sixth Court of Appeals District	226
Court of Appeals - Tenth Court of Appeals District	230
Court of Appeals - Third Court of Appeals District	223
Court of Appeals - Thirteenth Court of Appeals District	233
Court of Appeals - Twelfth Court of Appeals District	232
Court of Criminal Appeals	211
Court Reporter Certification Board	204
Credit Union Department	469
Criminal Justice Policy Council	410
Crockett State School - *Not Currently Used, See Agency 694*	693
Dallas County Community College	959
Dallas State Mental Health Clinic - *Retained for Inventory*	662
Del Mar College	960
Denton State School - *Retained for Inventory, See Agency 655*	660
Department of Agriculture	551
Department of Aviation - *Abolished, see Agency 601*	461
Department of Banking	451
Department of Human Services	324
Department of Information Resources	313

ALPHABETICAL LISTING OF STATE AGENCIES
(Continued)

Agency Name	Agency Number
Department of Licensing and Regulation	452
Department of Public Safety	405
District Courts - Comptroller's Judiciary Section	241
East Texas Chest Hospital - *Abolished*	666
East Texas State University	751
East Texas State University at Texarkana	764
El Paso Community College	993
El Paso State Center - *Retained for Inventory, See Agency 655*	661
Employee Incentive Commission - *Abolished, see Agency 353*	351
Employees Retirement System	327
Firemen's Pension Commission	325
Fort Worth Psychiatric Hospital	647
Fort Worth State Mental Health Clinic - *Retained for Inventory*	664
Fort Worth State School - *Retained for Inventory, See Agency 655*	667
Frank Phillips College	961
Gainesville State School - *Not Currently Used, See Agency 694*	692
Galveston College	962
Gatesville State School - *Not Currently Used, See Agency 694*	691
General Land Office	305
General Services Commission - *Revised*	303
Giddings State Home and School - *Not Currently Used, See Agency 694*	689
Good Neighbor Commission - *Sunset*	326
Governor - Executive	301
Governor - Fiscal	300
Governor's Commission on Physical Fitness - *Sunset*	521
Governor's Coordinating Office for the Visually Handicapped - *Abolished*	319
Grayson County Junior College	963
Harris County Psychiatric Center	648
Health and Human Services Coordinating Council - *Abolished*	649
Health Facilities Commission - *Sunset*	525
Hill College	965
House of Representatives	102
Houston Community College	994
Howard College	966
Inaugural Committee	343
Interagency Council on Sex Offender Treatment	346
Kerrville State Hospital - *Retained for Inventory, See Agency 655*	674
Kilgore College	967
Lamar University - Beaumont	734
Lamar University - Orange	787
Lamar University - Port Arthur	788
Lamar University System	786
Laredo Junior College	968
Laredo State Center - *Retained for Inventory, See Agency 655*	699
Laredo State University	761
Lee College	969
Legislative Budget Board	104
Legislative Information System Committee - *Inactive, see Agency 103*	117
Legislative Property Tax Committee - *Repealed*	111
Legislative Reference Library	105
Lubbock State School - *Retained for Inventory, See Agency 655*	687
Lufkin State School - *Retained for Inventory, See Agency 655*	669

Agency Name	Agency Number
Mass Transportation Commission - *Combined with Agency 601*	331
McLennan Community College	970
Mexia State School - *Retained for Inventory, See Agency 655*	672
Midland College	995
Midwestern University	735
Motor Vehicle Commission	470
Mountain View School for Boys - *Abolished*	695
National Guard Armory Board	406
Natural Resources Council - *Combined with Agency 550*	540
Navarro College	972
North East Texas Community College	998
North Harris County College	996
Odessa College	973
Office for the Prevention of Developmental Disabilities - *New*	361
Office of Court Administration	212
Office of Public Insurance Counsel - *New*	359
Office of Public Utility Counsel	475
Office of State - Federal Relations	333
Optometry Board	514
Palo Alto College	950
Panola College	974
Paris Junior College	975
Parks and Wildlife Department	802
Parks Board - *Abolished, see Agency 802*	801
Pecos River Compact Commission	599
Polygraph Examiners Board	474
Prairie View A & M University	715
Prosecutor Council - *Sunset*	214
Public Utilities Commission of Texas	473
Railroad Commission	455
Ranger Junior College	976
Real Estate Commission	329
Red River Authority	595
Red River Compact Commission	596
Richmond State School - *Retained for Inventory, See Agency 655*	668
Rio Grande Compact Commission	579
Rio Grande State Center - *Retained for Inventory, See Agency 655*	659
Rusk State Hospital - *Retained for Inventory, See Agency 655*	679
Sabine River Compact Administration	583
Sam Houston State University	753
San Angelo State School - *Retained for Inventory, See Agency 655*	671
San Antonio State Chest Hospital	673
San Antonio State Hospital - *Retained for Inventory, See Agency 655*	681
San Antonio State School - *Retained for Inventory, See Agency 655*	650
San Jacinto College	978
Savings and Loan Department	450
School for the Blind and Visually Impaired	771
School for the Deaf	772
Secretary of State	307
Senate	101
Soil and Water Conservation Board	592
South Plains College	979
South Texas Hospital	684

ALPHABETICAL LISTING OF STATE AGENCIES
(Continued)

Agency Name	Agency Number
Southwest Collegiate Institute for the Deaf	767
Southwest Texas Junior College	980
Southwest Texas State University	754
State Aircraft Pooling Board	342
State Auditor	308
State Bar of Texas	202
State Ethics Advisory Commission - *To be Abolished 1-1-93, See Agency 356*	345
State Ethics Commission - *New*	356
State Finance Commission	449
State Law Library	243
State Office of Administrative Hearings - *New*	360
State Pension Review Board	338
State Preservation Board	809
State Property Tax Board - *Abolished, see Agency 304*	336
State Prosecuting Attorney, Office of	213
State Medical Education Board	766
State Securities Board	312
Stephen F. Austin State University	755
Sul Ross State University	756
Sunset Advisory Commission	116
Supreme Court	201
Surplus Property Agency - *Retained for Inventory*	905
Tarleton State University	713
Tarrant County Junior College	981
Teacher Retirement System	323
Temple Junior College	982
Terrell State Hospital - *Retained for Inventory, See Agency 655*	682
Texarkana College	983
Texas A & I University	732
Texas A & M University (Main University)	711
Texas A & M University at Galveston	718
Texas A & M University System	710
Texas Agricultural Experiment Station	556
Texas Agricultural Extension Services	555
Texas Amusement Machine Commission - *Transferred to Agency 304*	471
Texas Animal Damage Control Services	577
Texas Animal Health Commission	554
Texas Board of Architectural Examiners - *Revised*	459
Texas Board of Irrigators	462
Texas Board of Land Surveying	464
Texas Bond Review Board	352
Texas Cancer Council	527
Texas Coastal and Marine Council - *Sunset*	585
Texas College Osteopathic Medicine	763
Texas Commission for the Blind	318
Texas Commission for the Deaf and Hearing Impaired - *Revised*	335
Texas Commission on Alcohol and Drug Abuse	517
Texas Commission on the Arts	813
Texas Commission on Fire Protection - *New*	411
Texas Conservation Foundation - *Sunset*	814
Texas Constitution Convention - *Dissolved*	115
Texas Council on Offenders with Mental Impairments	646

Agency Name	Agency Number
Texas Council on Vocational Education	702
Texas Deepwater Port Authority - *Dissolved*	586
Texas Department of Criminal Justice	696
TDCJ - Pardons and Paroles Division - *Combined with Agency 696*	697
TDCJ - Community Justice Assistance Division - *Combined with Agency 696*	698
Texas Department of Commerce	465
Texas Department of Health	501
Texas Department of Housing and Community Affairs - *New*	332
Texas Department of Insurance - *Revised*	454
Texas Department of Mental Health and Mental Retardation	655
Texas Department of Transportation - *New*	601
Texas Department on Aging	340
Texas Education Agency	701
Texas Employment Commission	322
Texas Energy and Natural Resources Advisory Council - *Sunset*	550
Texas Engineering Experiment Station	712
Texas Engineering Extension Service	716
Texas Food and Fibers Commission	904
Texas Forest Service	576
Texas Funeral Services Commission	513
Texas Higher Education Coordinating Board	781
Texas High-Speed Rail Authority - *Revised*	606
Texas Higher Education Coordinating Board	781
Texas Historical Commission	808
Texas Housing Authority - *Abolished, see Agency 332*	339
Texas Incentive and Productivity Commission	353
Texas Indian Commission - *Sunset*	663
Texas Juvenile Probation Commission	665
Texas Legislative Council	103
Texas Low-Level Radioactive Waste Disposal Authority	526
Texas Merit System Council - *Abolished*	341
Texas Music Commission - *Transferred to Agency 465*	349
Texas National Research Laboratory Commission	350
Texas Offshore Terminal Commission - *Inactive*	584
Texas Public Finance Authority	347
Texas Punishment Standards Commission - *New*	607
Texas Racing Commission	476
Texas Rehabilitation Commission	330
Texas Schools for the Blind and Deaf - *Abolished, see Agencies 771 & 772*	653
Texas 1986 Sesquicentennial Commission - *Abolished*	817
Texas Sesquicentennial Museum Board - *Inactive*	818
Texas Southern University	717
Texas Southmost College	984
Texas Space Commission - *New*	354
Texas State Board of Public Accountancy - *Revised*	457
Texas State Library and Archives Commission	306
Texas State Technical College System - *Revised*	719
Texas Structural Pest Control Board	472
Texas Tech University	733
Texas Tech University Health Science Center	739
Texas Tourist Development Agency - *Merged with Agency 465*	815
Texas Transportation Institute	727

ALPHABETICAL LISTING OF STATE AGENCIES
(Continued)

Agency Name	Agency Number
Texas Veterans Commission	403
Texas Veterinary Medical Diagnostic Laboratory	557
Texas Water Commission	582
Texas Woman's University	731
Texas Worker's Compensation Commission	453
Texas Worker's Compensation Research Center - *New*	478
Texas Youth Commission	694
The Alamo	811
The French Embassy	810
Travis State School - *Retained for Inventory, See Agency 655*	675
Treasury Department	310
Treasury - Fiscal	311
Trinity Valley Community College	964
Turnpike - Dallas North Tollway - *Retained for Inventory*	603
Turnpike - Houston Ship Channel Bridge - *Retained for Inventory*	605
Turnpike - Mountain Creek Lake Bridge - *Retained for Inventory*	604
Turnpike Authority - *Retained for Inventory*	602
Tyler Junior College	985
University of Houston - Clear Lake	759
University of Houston - Downtown	784
University of Houston - *Revised*	730
University of Houston - Victoria	765
University of Houston System	783
University of North Texas	752
University of South Texas System - *Abolished*	762
University of Texas at Arlington	714
University of Texas at Austin	721
University of Texas at Brownsville - *Revised*	747
University of Texas at Dallas	738
University of Texas at El Paso	724
University of Texas at San Antonio	743
University of Texas at Tyler	750
University of Texas Dental Branch at Houston - *Transferred to Agency 744*	728
University of Texas Dental School at San Antonio - *Transferred to Agency 745*	740
University of Texas Graduate School of Biomedical Sciences - *Transferred to Agency 745*	726
University of Texas Health Center at Tyler	785
University of Texas Health Science Center at Houston	744
University of Texas Health Science Center at San Antonio	745
University of Texas Institute of Texas Cultures at San Antonio - *Merged into Agency 743*	812
University of Texas M. D. Anderson Cancer Center	506
University of Texas Medical Branch at Galveston	723
University of Texas Medical School at Houston - *Transferred to Agency 744*	741
University of Texas Medical School at San Antonio - *Transferred to Agency 745*	722
University of Texas Mental Sciences Institute - *Transferred to Agency 744*	685
University of Texas - Pan American	736
University of Texas of the Permian Basin	742
University of Texas Southwestern Medical Center at Dallas	729
University of Texas System School of Nursing - *Deleted*	746
University of Texas School of Public Health at Houston - *Transferred to Agency 744*	725
University of Texas System	720
Vernon Regional Junior College	991
Vernon State Hospital - *Retained for Inventory, See Agency 655*	656

Agency Name	Agency Number
Veterans Land Board	328
Victoria College	986
Waco Center for Youth - *Retained for Inventory, See Agency 655*	680
Waco State Home - *Transferred to Agency 655*	652
Water Development Board	580
Water Quality Board - *Transferred to Agency 582*	518
Water Rights Commission - *Transferred to Agency 582*	552
Water Well Drillers' Board	581
Weatherford College	987
West Texas Childrens Home - *Not Currently Used, See Agency 694*	690
West Texas State University	757
Western Information Network Association - *Sunset*	782
Western Texas College	992
Wharton County Junior College	988
Wichita Falls State Hospital - *Retained for Inventory, See Agency 655*	683

MBELDEF

Minority Business Enterprise Legal Defense
and Education Fund, Inc.

SATISFYING THE CROSON STANDARD

AN OVERVIEW

Our analysis of the decision rendered in City of Richmond v. J. A. Croson Co., ____U.S. ____, 57 U.S.L.W. 4132 (january 23, 1989) and other appellate cases indicates that there are five areas that contain the majority of potential legal problems for minority business enterprise (MBE) programs:

I. Establishing that the governmental unit has the legal authority to enact such remedial legislation.

In many instances, the charters for local governments do not authorize them to do anything more than provide for the safety and welfare of their citizens. In other instances, there are charter provisions that require the government to award contracts only to responsible bidders that submit the lowest prices. Both of these obstacles may require charter amendments before a locality can properly enact affirmative action legislation on behalf of minority businesses.

II. Documenting the historical pattern of racial discrimination in procurement.

Although the Supreme Court may not require contemporaneous findings of racial discrimination, the documentation of historical discrimination will preclude subsequent challenge on that basis. The jurisdiction should build a record of testimony and statistics through hearings and other means to demonstrate an historical pattern of racial discrimination within the jurisdiction's overall procurement arena, and, if possible, on the part of prime contractors doing business with the jurisdiction. The Croson decision clearly indicates that there is no requirement of a showing that the government itself has discriminated. Statistical evidence showing a disparity in the capacity utilization of minority firms versus non-minority firms doing business with the jurisdiction should also be elicited. Historical overt barriers to entry (such as Jim Crow laws) and covert barriers to entry (such as discrimination by financial and bonding institutions) for minority businesses should also be documented on the record. It is important to demonstrate a link

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between the racial discrimination and a chilling effect on the formation of minority businesses within the jurisdiction. Such evidence is a prerequisite to the legality of a race-conscious affirmative action remedy.

III. Identifying those specific minorities that were subjected to those effects of discrimination in this particular locality.

Set-aside policy should be narrowly tailored so that it only affords a remedy to those minority groups who were subjected to racial discrimination in that locality. If no Eskimos were ever discriminated against in the jurisdiction, Eskimos should not be included in the definition of minority businesses to be covered by the set-aside policy.

IV. Ensuring that the size of the set-aside bears a rational relationship to the size of the local minority business population and minority business capacity in that locality.

To be on the safe side, the percentage figure for the set-aside should probably be somewhere in between the present percentage of all minority businesses that are capable of doing business with the government, and the maximum percentage of the potential business capacity that is currently held by minority firms. This will undoubtedly require the use of an economic expert. Another possibility is to create a sliding scale for the size of the set-aside, gradually increasing the percentage from year-to-year until the maximum level is achieved. (MBELDEF has also devised a Discrimination Index Formula for the purpose of setting the size of MBE goals based on the degree of disparity in a given marketplace.)

V. Providing for flexibility in goals and periodic review of the set-aside policy to ensure that it is performing adequately and is still serving its intended purpose.

This will preclude any claims that the set-aside is not serving a remedial purpose or that it is not narrowly tailored to address only the effects of past or present discrimination. There can be no legitimate claim that this remedy will outlive the harm it was intended to rectify.

The above suggestions are of general application. It is vital to recognize, however, that the specific evidence of discrimination within any particular jurisdiction must be established in the record and that any program that is adopted must be directly and demonstrably related to that record.

FREQUENTLY-ASKED QUESTIONS AND ANSWERS COMMON TO ALL JURISDICTIONS

I. HOW DOES THE LOCAL ENTITY DETERMINE AVAILABILITY OF MBEs.

A. Must the pool of available M/WBEs be based on M/WBEs available at the time M/WBE plans were adopted or can the pool be based on those currently available to do business?

Response

Because the Court left this question unanswered, it would appear to be permissible for a jurisdiction or governmental entity to identify the pool of available MBEs in either fashion. The better course of action however would be to determine the current availability of MBEs within an appropriate market area.

B. In light of the fact that most agencies have some form of certification, must the pool be based on certified M/WBEs or can it be based on M/WBEs who identify themselves as M/WBEs?

Response

The Court has implied that the pool arise from certified M/WBEs. Note however, that the pool need not be limited solely to those M/WBEs certified, in the first instance, by or through your programs. Assuming there exists within the market area, other M/WBE programs which possess identical or similar certification requirements, your agency should be able to reciprocally deem their M/WBEs to be entitled to certification under your program. Agencies having the same or very similar certification requirements should not have to "re-invent the wheel" for purposes of determining the availability of capable M/WBEs. But an agency desiring

to utilize this method or reciprocal certification should exercise due caution and care to ensure (1) that the laws and regulations providing for same are properly drafted and (2) that the quality and standards of those certification processes are adequate and include periodic recertification or other review procedures. Is should also be noted that there is an inherent danger in setting MBE goals at the current availability rates for certified MBEs. There must be sufficient flexibility in the goals to encourage new MBE formation, growth, and certification. Otherwise, the MBE goal will be too small to achieve its objective of compensating for the chilling effect of discrimination.

C. What procedures and safeguards should be implemented in the identification process?

Response

Other than those discussed above and the degree or level of diligence exercised by the program officer or staff, no formal, recognized safeguards exist. Unfortunately, the sources of information upon which the identification process must rely (e.g., surveys, census data) are based on the good faith of the respondents and their ability to give accurate information. Thus, the size of the pool of available M/WBEs depends, in large part, on the accuracy of the information received. One informal check may be a comparison of your agency's data with that maintained by other M/WBE Programs. Also, recent census data may be consulted to determine whether your data is way out of line.
Ultimately, the accuracy of your findings will depend upon the quality of work performed during the certification process. Here, the program officer should design adequate office procedures to require each applicant to document or satisfactorily prove all information which is capable of such documentation or proof. For example, if an applicant identifies his or her company as incorporated, require the submission of the company's Articles of Incorporation and By-Laws and/or a Certificate of Incorporation (or similar official document) issued by the State. Require the submission of income tax returns to demonstrate capacity or sales volume; proof of bonding; references or other proof of prior conduct of business; stock certificates and ledger to demonstrate percentage of ownership; neces-

sary professional licenses or educational attainment, etc.

D. What types of institutions (federal, state or local) can be utilized, if any, for assistance in the process and what type of data are they likely to have?

Response

In addition to other state and local MBE offices in your immediate area, identifiable M/WBEs can be located by consulting other sources such as:

1. The Minority Vendor Profile System
   U. S. Department of Commerce
   Minority Business Development Agency
   Washington, D. C. 20230
   (a national, computerized database available to local and state governments);

2. U. S. Small Business Administration;
   U. S. Department of Defense; and
   U. S. Department of Transportation;

3. "Try Us", published by
   National Minority Business Directories
   65 22nd Avenue, N. E.
   Minneapolis, Minnesota 55418;

4. Black Enterprise Magazine;

5. The Minority Business Telephone Book
   955 Connecticut Avenue
   Bridgeport, Connecticut 06607;

6. local MBE directories; and

7. The National Directory of Minority-Business Firms
   Business Research Services, Inc.
   2 E. 22nd Street
   Suite 308
   Lombard, Illinois 60148

In most cases, these databases or directories will provide listings by type of business, service or commodity; identify the minority type; number of employees; sales volume; trading areas, etc.

Moreover, additional W/MBEs can be obtained from local or state chapters of national minority professional trade associations such as:

* National Minority Suppliers Development Council
* Latin American Manufacturers Association
* National Association of Black Manufacturers
* National Association of Minority Contractors
* National Association of Minority Engineers
* National Association of Black Accountants
* National Bar Association, etc.

II. DISCRIMINATION ANALYSES

A. How far back should a finding of discrimination go?

Response

To the extent the jurisdiction desires to provide an historical overview of discrimination, the findings of discrimination may begin with the earliest verifiable instances. Otherwise, your inquiry should at least go back to the time at which there was no M/WBE Program.

B. What kind of testimony will be necessary at a public hearing?

Response

There is no requirement that an agency or jurisdiction hold a public hearing to obtain evidence of discrimination. The public hearing is only one method; the gathering of such evidence can take the form of confidential interviews or affidavits. Irrespective of form, the testimony taken should focus on particularized anecdotes of specific instances of discrimination in the marketplace. General, unsubstantiated, conclusory statements will not suffice.

The testimony taken should also include discussion regarding the following subjects:

(1) the existence, nature and operation of an "old-boy network" and how it has or may tend to exclude MBEs from full participation in the marketplace;

(2) Why "business as usual" under current procurement procedures can effectively perpetuate the effects of past and present discrimination;

(3) Why race-conscious remedies may be necessary (i.e., why good faith efforts and/or race-neutral remedies are ineffectual).

C. Must representatives from each racial group testify regarding discrimination in each industry type?

Response

Generally, yes. Comprehensiveness is a virtue. Moreover, to the extent possible, obtain evidence across a broad spectrum of procurement activity.

D. Since many governmental agencies did not keep records prior to the late 1970s or early 1980s of their minority contracting practices and/or did not distinguish between races and gender (all were recorded as "minority"), what other kinds of statistical data can be used to support the M/WBE plans.

Response

An agency's or jurisdiction's inquiry should include economic evidence demonstrating any statistical disparities such as in contract awards and/or payments; capacity utilization for MBEs vs. non-MBEs; and the growth rates of MBEs vs. non-MBEs. To the extent possible, the analysis should be performed for each ethnic or disadvantaged group.

Where the agency's or jurisdiction's database for any reason is inadequate or incomplete, the economist performing the study must seek the necessary data from other sources. Additional methods include (a) sending out written surveys to MBEs and non-MBEs; (b) extracting information from the agency's or jurisdiction's accounts payable or other formal records. (Once identified as companies having done business with the agency or jurisdiction, additional investigation may reveal their ethnicity and/or gender); and (c) comparing experienced MBE participation rates in the private sector with experienced non-MBE participation rates in the private sector.

III. SETTING MBE GOALS

A. Must the M/WBE goals match the percentage of the deficiencies exactly, or can another measure be used? If so, what?

Response

As a result of the study, you may find that notwithstanding the existence of discrimination and disparities, the portion of those disparities that are attributable to the effects of discrimination, are not subject to exact measurement. Therefore, when setting your goal(s), a reasonable basis for the goal should be used. One approach might be to set the goal based on the average of the several disparities found. For example, if average disparities with respect to capacity utilization, sales, and market share for MBEs are 40% below non-MBE averages, the resultant goal might be set by dividing the disparity in half (20%) and adding it to that percentage of contract dollars which the MBEs are already getting. This "halving" may serve to ensure an increase in MBE utilization while at the same time, preventing the goal from being set at a level which the MBE's could not fulfill.

A second approach might be to avoid setting a goal for the entire program. Rather, based on availability, set goals on a contract-by-contract basis. This may assist in avoiding the setting of hard and fast quotas, while providing maximum flexibility that the Court strongly encourages.

B. How should agencies address the problem that there will be small numbers of available M/WBEs in given industries due to severe exclusion of minorities by a given industry. The smaller the pool of available M/WBE, the more limited the remedy.

Response

This dilemma might be remedied by having "phased-in" goals, whereby the goal starts out very low and increases each year incrementally. This approach may spur or induce growth in business lines where there are few MBEs. The initial goal should be a very modest one based on the growth rates found in particular industries under other MBE programs. In this manner, you may be able to ascertain what size goal induces growth. For example, you may find that a 10% goal induces 3% growth in capacity and utilization.

MBE availability in industries that have had little or no minority participation might be increased by the application of a "swing capacity" theory. That is to say, there may be a few MBEs in one type of business which can convert to a comparable but different line of business in which MBEs were heretofore underrepresented.

To employ this theory in setting the goal, you should perform substantial analysis and interviewing of existing business enterprises which have converted so as to determine (1) what is needed to facilitate the swing, and (2) how many MBEs will be capable of making the conversion.

C. How should an agency determine the geographical area that the goals are applicable to: city limits, standard metropolitan statistical areas, county or state boundaries?

Response

This is one of the most important considerations. The best approach is to let the marketplace determine the geographic area to which availability and the goals apply. Use economic analysis to ascertain the geographic breadth of the pool of available MBEs as well as the reasonableness of the goals set. For

example, examinations of non-MBEs engaged in equipment repairs, horizontal construction (road paving, etc.), and the procurement of building supplies may each be limited to local or state markets. That is to say, except for "hard-to-find" or custom-made goods or services, rarely does the agency or jurisdiction seek a supplier outside the limits of the state. In these instances, if the practice of the government makes sense, a statewide geographic market for the MBE program would also be appropriate.

But if you find that with respect to the procurement of office furnishings, stationery and uniforms, for example, the procurement is usually obtained by mail order catalogues from firms far outside the region or nationwide, then the availability of MBEs and the goals set should be based on this economic reality as well.

D. Do the goals apply only to firms located within the jurisdiction and therefore non-minority firms that are located outside the area are exempt from provisions of the plan and M/WBEs located outside the area cannot benefit from the plan?

Response

No. For the same reasons discussed under Question III, C., infra, let the marketplace decide. Whoever is within the "reasonable sphere of commerce" for that agency or jurisdiction should be able to participate. Markets simply are not limited by political boundaries. By creating the commerce clause, the framers of our Constitution apparently appreciated this fact far better than Justice O'Connor. A good example is Washington, D. C. In this area, private and public procurement typically transcends many geographic boundaries. "Local" trading includes commerce taking place between entities in Washington, D. C. proper, Montgomery County, Md., Prince Georges County, Md., and the northern cities and counties of the state of Virginia. Indeed, much of the area's workforce commutes daily from each of these places and to a limited extent from locations as far away as Baltimore (approx. 40 miles).

IV. OTHER

A. Can practices which have a discriminatory effect be utilized as a basis for the M/WBE plans in place of evidence of past discrimination?

Response: Definitely.

B. What types of practices can be deemed to have a discriminatory effect through implementation and what kind of evidence can be used to show the correlation?

Response

Unreasonably restrictive bid procedures, contract specifications and bonding requirements which have no business justification. Here, the evidence must show that the practices have had or presently have an adverse impact on W/MBEs. We caution, however, that these adverse practices may be subject to remedy by race-neutral measures - and if so, due consideration should be given as to their implementation.

C. Are agencies required to attempt race-neutral remedies like Disadvantaged Business Enterprise (DBE) Programs prior to implementing M/WBE plans?

Response

No. If your examination shows that the DBE approaches attempted by other jurisdictions to correct similar problems have not been terribly effective, you need only reflect those experiences in the record when considering the appropriate remedy. It might also be adviseable that the M/WBE Program contain a variety of race-neutral tools as remedies in addition to race-conscious set-asides and preferences. With a variety of race-neutral tools available, the government would be in a stronger position to argue that it considers and uses less restrictive remedies in an effort to reach goals for MBE participation, and only resorts to race-conscious set-asides as a last resort.

D. Must an agency actually implement race-neutral methods prior to implementing M/WBE plans or can they simply review race-neutral methods and determine that such methods are unlikely to succeed?

Response

See response to above Question IV. C.

If you should have any additional questions or need further clarification, please feel free to contact myself or our Chief Counsel, Franklin Lee at (202) 543-0040.

Respectfully submitted,

Anthony W. Robinson
President, MBELDEF

SLRC

SPECIAL ISSUE

LEGISLATIVE BULLETIN

Number 8 Southern Regional Council Fall 1990

After Richmond —

Defending Minority Business Enterprise Programs

BY BRIDGET ARIMOND

In January, 1989, the United States Supreme Court ruled that the City of Richmond's minority business enterprise (MBE) program was unconstitutional. Under that program, Richmond had established a goal of awarding 30 percent of all city construction contracting dollars to MBEs. In striking down this program, the Court ruled that Richmond had failed to show (1) that MBEs in Richmond were suffering the effects of discrimination and (2) that Richmond's MBE program did more than was necessary to remedy that discrimination.

The Richmond decision does *not* mean that the days of minority business enterprise programs are over. However, it does mean that state and local governments must meet onerous new standards of proof before they can enact new MBE programs. And, state and local governments that already have such programs in place must reassess those programs and make sure that they are supported by the kind of factual predicate that the Supreme Court now has said is necessary.

In order to defend a race-conscious MBE program, a state or local government must be able to satisfy two tests. First, it must be able to show that it has a "compelling governmental interest" in implementing such a program. The Supreme Court agrees that state and local governments do have a compelling interest in remedying the lingering effects of past or present discrimination. However, if this is the stated purpose of the program, then the jurisdiction must be able to point to solid evidence that there has been discrimination against MBEs within that geographic area.

The jurisdiction may meet this test by showing that the effects of its own past or present discriminatory actions continue to deprive MBEs of fair con-

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Atlanta study shows how to meet the *Croson* standards and win

BY THOMAS D. BOSTON

In 1845, the Georgia General Assembly passed a law which made it a misdemeanor for a white person to engage in trade with a black contractor. A century and a half later, discrimination is not nearly so straightforward.

A recently completed Minority Business Enterprise (MBE) study for the City of Atlanta and Fulton County, "Public Policy and Promotion of Minority Economic Development," shows that substantial racial barriers still exist for minority entrepreneurs and that the present effects of past discrimination are profound.

Nonetheless, the growing conservatism and insensitivity of the U.S. Supreme Court to racial inequity — and the resulting preconditions the Court now demands for the establishment of MBE programs — have caused many cities to abandon their affirmative action efforts in favor of more race-neutral alternatives.

Current conditions make it necessary to ask: Is the *Croson* standard so impossible to meet?

As a member of the research team that conducted the Atlanta study, I would like to share some of our findings with you, especially since few public officials will likely have time to read the entire eight-volume study. My observations will primarily be limited to conclusions of the economic analysis, since this was the area that occupied most of my efforts. For a more general summary of the entire study, read

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About this Special Issue

Assessing the Impact of Recent Court Cases on Minority Business

In 1989, as democracy movements worldwide gained momentum, democratic ideals were under fire here at home. In *Richmond v. Croson* and other cases, the U.S. Supreme Court resurrected impediments to economic parity for minorities. We hope this special newsletter will stimulate strategic thinking among Southern legislators, city officials, and MBE program administrators to address these challenges. — SLRC STAFF

Defending Minority Business Enterprise Programs

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racting opportunities. Or, the jurisdiction may show that discrimination is so prevalent in the local marketplace that, absent remedial measures, the state or local government would become a passive participant in a discriminatory marketplace.

But in any case, there must be solid, documented evidence of discrimination against MBEs. Evidence of general societal discrimination — in schools, in housing, in voting rights, etc. — will not suffice. Instead, the evidentiary showing must specifically show the effects that discrimination has had on ongoing contracting opportunities.

Richmond's experience shows the kinds of evidence that the Court will *not* accept as probative of discrimination. Richmond attempted to rely on five kinds of evidence.

• First, the Richmond ordinance stated that the purpose of the MBE program was remedial. The court found this to be a self-serving statement that in no way proved the program actually was a remedy for discrimination.

• Second, during the city council hearings on the ordinance, the city manager and a city council member made generalized, conclusory statements that there was racial discrimination in the construction industry in Richmond and elsewhere. Given the well-known history of discrimination in the building trades, one might have thought that no formal proof would be necessary. But the Supreme Court ruled otherwise, and held that generalized, conclusory statements are not enough to show discrimination.

• Third, Richmond showed that prior to the adoption of its MBE program, minority-owned businesses received only 0.67 percent of prime contracts from the city, although minorities made up approximately 50 percent of Richmond's population. The Court refused to find any evidence of discrimination in even such a striking disparity. According to the Court, a comparison of contract participation with general population statistics is irrelevant. Instead, Richmond should have compared the proportion of MBEs in the pool of qualified contractors, with the share of contracting opportunities received by MBEs. Moreover, the Court faulted Richmond for only presenting statistics about prime contracts won by MBEs, since the city's MBE program primarily involved directing more subcontracting opportunities to MBEs. To show an underutilization of minority contractors, Richmond should also have looked at the share of subcontracting opportunities won by MBEs.

• Fourth, Richmond also relied on evidence that minority participation in local contractors' associations was extremely low. The Court found that, absent evidence of the availability of MBEs eligible for membership, the low minority membership rate was not

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Non-profit Legal Organization Helps *Croson* Victims

By Anthony W. Robinson

On January 23, 1989, this nation's minority business community was dealt a crippling blow by the United States Supreme Court's 6-3 decision in the *City of Richmond v. J. A. Croson*. The decision subsequently jeopardized 236 state and local programs designed to remedy the devastating impact of many years of racial discrimination against minority business enterprises.

The Minority Business Enterprise Legal Defense and Education Fund (MBELDEF) is actively involved in efforts to establish a "*Croson*-proof" basis for many of the programs currently under attack. The Fund was founded in 1980 by former Maryland Congressman Parren J. Mitchell as a national advocacy organization and legal representative for the minority business community.

In addition to MBE court defenses, MBELDEF also helps state and local governments in other ways as they respond to *Croson*. Based in Washington, D.C., the Fund has monitored the effects of the decision nationwide and has spread information on administrative and legal survival strategies through conferences and its membership.

The Fund has developed minimum guidelines for the performance of M/WBE disparity/fact-finding studies, published a directory of private consulting firms and academicians interested in performing this work, and helped individual state and local governments with the design and oversight of the study effort as well as in the drafting of their requests for proposals (RFPs).

The Fund also attacks discrimination in the public and private sectors of the marketplace through its 150-member National Lawyers Panel.

Membership in this nonprofit organization is comprised of individual M/WBEs, program administrators and contract compliance officers, attorneys, public officials and other interested parties.

Write MBELDEF at 300 I Street, NE, Suite 200, Washington, DC, 20002, (202-543-0040).

Tony Robinson is president of the Minority Business Enterprise Legal Defense and Education Fund, Inc. Robinson specializes in civil rights — particularly employment discrimination — and minority business legal issues.

Defending MBE

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probative of discrimination.

• Finally, Richmond relied on prior Congressional findings that there had been nationwide discrimination in the construction industry. The Court ruled that these findings had extremely limited value for proving discrimination in any particular location, since Congress had recognized that there were exceptions to the national pattern. Accordingly, evidence of discrimination specific to Richmond was required before that city could implement an MBE program.

While the Richmond opinion was very clear about the kinds of evidence that are *not* acceptable, it unfortunately provided less guidance on just how a jurisdiction *can* meet its obligation to assemble evidence of discrimination. As a result, it is imperative that proponents of MBE programs do everything possible to present comprehensive evidence of discrimination in both public and private sector contracting.

There should be evidence showing that discrimination limits contract opportunities for minority-owned businesses even when those businesses are available, equally qualified, and competitively priced. Next, there should be evidence showing that MBEs also lose contract opportunities when, although they are available to work, they are unable to submit competitive bids because of the effects of discrimination. Finally, there should be evidence that the relatively low availability of MBEs is itself the direct result of systemic, long-standing discrimination against minority entrepreneurs and would-be entrepreneurs.

All Types of Evidence

In assembling this factual predicate, supporters of MBE programs should draw from all types of evidence that can be used to show discrimination — statistical evidence, expert testimony by historians, economists, and other social scientists, and testimony by minority business owners and would-be business owners who have suffered discrimination.

At all times attention must be paid to the teachings of the Richmond decision. Thus, statistical evidence is important, but it must focus on the proper comparison. Testimony by victims of discrimination is important, but it must be more than simply generalized or conclusory complaints. Study reports and expert testimony are important, but they must focus on discrimination that affects contracting, not on general societal discrimination, and they must focus on the correct city, state or region.

> Numerical goals must be set no higher than necessary to remedy the discrimination.

Once a state or local government has shown that MBEs lack equal contracting opportunities because they continue to suffer the effects of discrimination, the jurisdiction has satisfied the first test and can move on to the second test set down in the Richmond decision. Under the second test, the jurisdiction must show that its particular MBE program is "narrowly tailored," so that it does no more than is necessary to remedy the discrimination that has been identified.

Court Set Down Standards

This "narrow tailoring" requirement stems from the legal doctrine that any racial classification —including affirmative action — can be used by a state or local government only as a last resort. It can only be used if nothing else will work, and it can only be used to the minimum extent necessary to solve the problem.

Applying this rule in the Richmond case, the Supreme Court set down a number of standards. First, a state or local government cannot adopt a program that includes a racial preference unless it has first "considered" the availability of race-neutral solutions to the problem and determined that they would be inadequate. It is important to note here that the Court used the word "considered"; it did *not* say that every jurisdiction must first go through a trial period with every conceivable race-neutral approach, before adopting an MBE program that includes an element of racial preference.

However, the consideration must be sincere. A jurisdiction will be in a stronger position if it *can* point to some race-neutral approaches that it has tried over the years (*e.g.*, technical assistance programs, local laws prohibiting racial discrimination in contracting practices, small business assistance programs), and if it can show that despite these programs minority-owned businesses continued to suffer the effects of discrimination. And, as to race-neutral approaches that the jurisdiction has not itself tried, there must be some reasoned basis for the conclusion that they would not work.

Second, a program's percentage goals must have a legitimate, legally acceptable basis. Most MBE programs utilize goals: absent waiver, either a certain percentage of contracts are set aside for bidding exclusively by MBEs, or, more commonly, a certain percentage of overall contract dollars are to go to MBEs through either prime or subcontracts. Now, if a program uses numerical goals, those goals must be set no higher than the level necessary to remedy the problem of discrimination. The goals cannot be based on minority population figures, because the Supreme Court is unwilling to accept the proposition that minorities should share in contracting opportunities in proportion to their presence in the general population.

If a city has shown that because of discrimination, MBE utilization lags behind MBE availability (i.e., the proportion of public contracting dollars going to MBEs is significantly smaller than the proportion of MBEs in the pool of qualified contractors), then a goal could be set at the level of MBE availability. The problem with this approach is that it provides no remedy for the artificially depressed availability of minority-owned businesses. In

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Defending MBE

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The business world, availability follows opportunity. This is why it is important to have evidence that shows that discrimination against MBEs has depressed the level of minority business formation and has driven many minority owned firms out of business. Based on this evidence, and aided by appropriate expert testimony, jurisdictions should attempt to determine what the availability of minority-owned businesses would be but for discrimination.

Some Goals Could Be Approved

Such evidence was not presented in the Richmond case, so the Supreme Court did not discuss whether goals could be set on the basis of such an estimate of fair availability. However, there is good reason to believe that such goals would be approved by the Court, since the purpose of the goal is to completely remedy the documented effects of racial discrimination.

Third, the program should have flexible waiver provisions. The more a program looks like a rigid quota program, the more likely it is that a court will strike it down as unconstitutional.

Fourth, the program can only provide benefits to those specific minority groups that have been shown to be victims of discrimination. Traditionally, state and local governments followed the federal government model and included as beneficiaries of their programs members of all minority groups. Now, if a city has a black population and an Hispanic population, it must show discrimination against both groups before it can include both groups as beneficiaries of its MBE program.

Fifth, the program must be temporary, not permanent. This does *not* mean that an MBE program must be terminated before the effects of discrimination have been remedied. However, a program should be subject to review at regular intervals, and it should terminate at some defined time unless the evidence at that time warrants its renewal.

To sum up, the Richmond decision is a serious but not fatal setback to efforts to increase opportunities for minority-owned businesses. Assembling the necessary evidence of discrimination and adhering to the "narrow-tailoring" standards will not be easy.

However, the stakes are too high to abandon the effort. As a direct result of MBE programs, minority-owned businesses have begun to open doors that had long been closed shut by systemic discrimination. If this progress is to continue, it is absolutely essential that state and local governments and MBEs and their advocates work together to ensure that the Richmond decision requirements are met. □

Bridget Arimond is a civil rights attorney in Chicago. She has been active in legislative issues, working with a coalition of civil rights organizations called the Joint Project to Preserve Minority Business Opportunity. The Joint Project has held several hearings with Congressional committees in Washington in anticipation of structuring new equal employment opportunity laws to deal with discrimination in the workplace. Ms. Arimond can be reached at (312) 939-2131.

Croson

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volume one.

The *Croson* standard is not as difficult or costly to meet as commonly presumed. Experience has shown that more information is typically available at the local level to satisfy the *Croson* criteria than is commonly presumed. One simply has to know where and how to look for it. The interested reader is referred to my recent paper entitled "Establishing a Factual Predicate to Meet the *Croson* Standard: The Challenge of Data Collection," prepared for the Joint Center for Political and Economic Studies conference proceedings on the *Croson* decision. That forthcoming volume also has companion papers that will provide the reader with the nuts and bolts of organizing a study to meet the *Croson* standard. [1]

Many localities have hesitated to conduct studies because the cost of Atlanta's study seems daunting. However, there is no reason why subsequent studies should be nearly as costly. Atlanta's study was unique because it was perceived as fulfilling a special mission. Specifically, Atlanta is viewed

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MBE Participation in Total Percentage of Contracting Dollars by Jurisdiction

Program Name	Year Instituted	Before Program	Until Croson (1989)
Dade Co. School Board	1984	3.00%	23.00%
Fort Worth, Texas	1986	<1.00%	15.00%
Shreveport, Louisana	1988	< 5.00%	12.38%
State of Louisana DOT	—	3.50%	10.90%
Richmond, Virginia	1985	0.67%	* 40.00%
Atlanta, Georgia	1975	0.13%	28.07%
Jacksonville, Florida	1984	0.00%	1.00%

*(1987 when program discontinued)

Croson

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...a pioneering city in the establishment of minority participation programs and, as such, was looked to for leadership in meeting the *Croson* standard. The wisdom of city officials allowed them to take up this challenge and pave the way for the continued growth and development of MBE programs nationally. By adopting the methodology and approach of the Atlanta study (where appropriate) local areas can reduce their expense greatly. In short, there is no need for another Atlanta study as I believe it is best perceived as a test case. On the other hand, the *Croson* standard can be met by a much more modest effort.

My second observation is that discrimination has been and continues to be pervasive in private and public sector contracting. Therefore, MBE programs play a crucial role in the growth and enhancement of minority business enterprises. By contrast, race neutral alternatives, no matter how creatively designed, have generally been to be ineffective at significantly improving the participation of racial minorities. Finally, MBE programs are not zero sum games where white male businessmen lose in direct proportion to the gains made by minorities. Instead, we have found that such programs serve as magnets attracting the most qualified minority businessmen into non-traditional lines of entrepreneurship, thereby expanding the income, employment and business opportunities in the local area. Likewise, by pushing for more fairness and racial inclusion, MBE programs have opened procurement opportunities up to a broader array of majority firms as well. Prior to such programs the "old boy" network ruled procurement in most locations and locked out even a large number of majority firms. Therefore, one should avoid the hysteria caused by the *Croson* decision and continue to operate these programs, albeit under the new more stringent criteria. While the benefits of an MBE program accrue to minority businesses, majority businesses and the community as a whole, the alternatives to a formal program are simply ineffective. The summary of findings below will illustrate these points.

GENERAL FINDINGS OF THE ATLANTA STUDY

- A formal MBE program is the most effective means of remedying the present effects of past discrimination in public and private markets for contractual services.
- The economic status of MBEs has improved significantly by their participation in the MBE program in Atlanta.
- A total of 768 MBEs are certified by the City of Atlanta. 43 percent are in the construction industry, which represents 6.9 percent of all construction firms in the Atlanta SMSA. An additional 8 percent of MBEs are in engineering and architectural services. Of the 377 MBEs in non-construction industries, the largest concentrations are in service (54 percent), retail trades (15 percent) and wholesale trades (11 percent). Among MBEs in the service industry, the greatest concentrations are in non-traditional areas such as management and public relations (16 percent), advertising (13 percent), computer and data processing (9 percent), and business services (9 percent). In fact, one of the greatest benefits of Atlanta's program is that it encourages minority business growth in non-traditional industries.
- 89 percent of certified MBEs are located within the Atlanta SMSA and 9.8 percent are located outside of the state. Proportionately, more non-local majority firms are awarded procurement contracts than are non-local minority firms.
- 88 percent of certified MBEs in the construction industry are owned by black entrepreneurs, 7 percent are owned by black women, 5 percent by white women, 5 percent by Asians, and 2 percent by Hispanics. Nationally, 6 percent of minority entrepreneurs in the construction industry are women.
- A unique feature of certified firms is that their legal form of organization varies from the typical minority owned firms. Nationally, 3 percent of black owned construction firms are corporations, 4 percent are partnerships and 93 percent are proprietorships. But among certified firms in Atlanta, 60 percent are corporations, 15 percent are partnerships and only 25 percent are proprietorships.
- The typical certified MBE has nothing in common with the traditional "Mom and Pop" proprietorship that has become a landmark in the black community. In 1988, the median revenue of minority construction firms certified by Atlanta was $125,529, median gross profit was $35,800, median total assets were $109,410 and median net profit before taxes was $31,252.
- Among construction industry MBEs the median business-related experience of owners is 15 years. Further, 98 percent of owners have completed high school, 75 percent have attended college, 58 percent have completed college, and 13 percent have graduate degrees. This level of attainment is far superior to the national norm for minorities in the construction industry. Among firms in non-construction industries, 99 percent of owners have completed high school, 85 percent have some college studies, 64 percent have completed college and 25 percent have graduate degrees. The national average for years of education for black business owners is 11 years.
- 55 percent of MBEs in construction employ 9 or fewer workers, 28 percent employ 10 to 19 workers and 17 percent employ 20 or more workers. The median number of workers employed by construction firms is 7 while the average is 15. The median among non-construction firms is 4 workers. In 1988, certified minority construction firms employed 3,301 workers. MBEs in non-construction industries employed a total of 1,695 workers. In 1988, all certified MBEs employed 4,996 workers and generated $270 million in business revenue.

SOME FINDINGS OF THE DISPARITY ANALYSIS

- Despite high levels of education and training and business-related experience of minority entrepreneurs, the financial status of MBEs is less favorable than that of majority firms. In the category of assets, majority firms have

(Continued on Page 6)

Croson

(Continued from Page 5)

$32,400 per worker while MBEs have $24,271, revenue per employee is $77,200 and $60,589 for majority and minority firms, net profit per employee is $3,500 and $1,503, respectively, and finally net profit per dollar of assets is $.11 as compared to $.06 for majority and minority firms, respectively.

• A large disparity exists in public and private sector construction opportunities between minority and majority firms. The median value of public sector contracts held by MBEs is 12 times the value of their private sector contracts, *i.e.*, $175,500 as compared to $15,000, respectively. Only $7.25 of every $100 in revenue received by minority firms comes from the private sector. But majority contractors in Atlanta earn more than 80 percent of their revenue in the private sector.

• Only 32 percent of minority firms have bonding capacity, the average of which is $1,244,955. The average for majority-owned firms is $5,830,861. While majority firms have 3 times the mean employment of MBEs, they have more than 5 times their mean bonding capacity. Further, this disparity is understated because 16 percent of majority firms have unlimited bonding capacity while no minority firm does.

• In Atlanta, $17.5 billion procurement dollars were awarded between 1973 and 1988. The minority participation in procurement has been greatest in the area of negotiated contracts (35.8 percent), followed by special projects (26 percent), formal contracts (17 percent), and the procurement of supplies (8.5 percent). In the three years before the program was initiated in 1976, minority participation averaged only 4.3 percent. Since the institution of the program, this has increased to 21.9 percent. Following the court-ordered suspension of the program in 1989, minority participation decreased from 36 percent to 15 percent in less than a year.

• While minority firms received 40 percent of all prime contracts (excluding joint ventures) awarded between 1978 and 1988, the median value of a prime contract to a minority firm was $13,000 while to a majority firm, it was $83,181. The median value of a subcontract to a minority firm was $17,600.

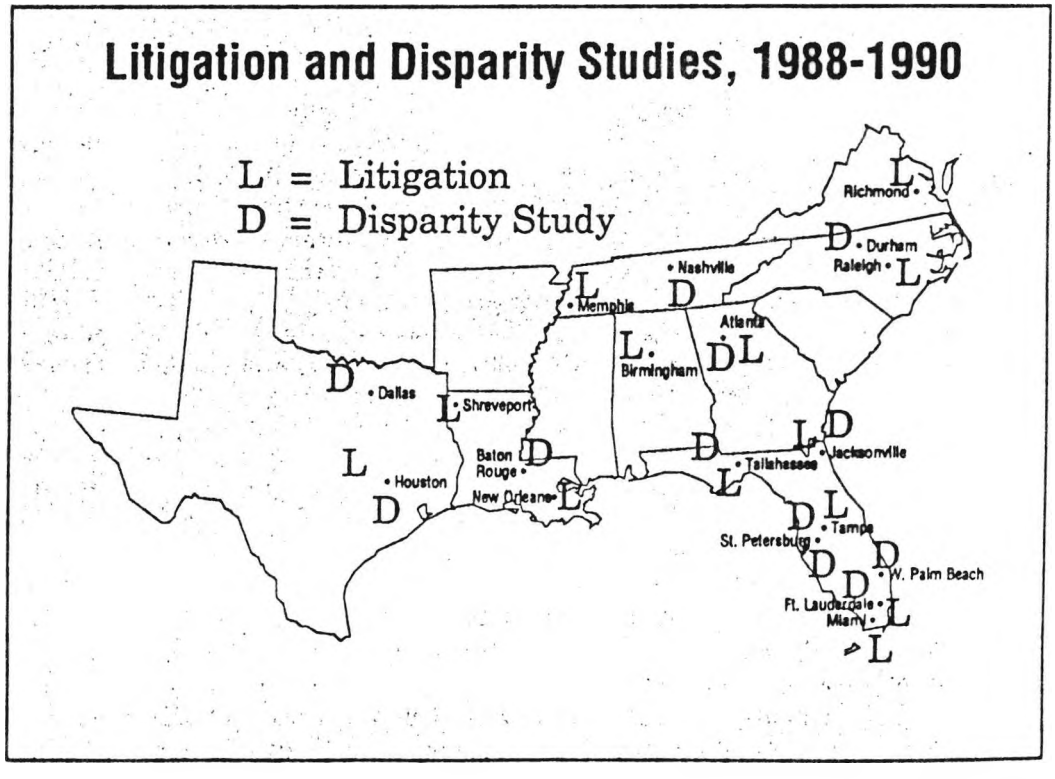
• The median size of joint venture awards to majority firms was $93,995, while it was $40,924 to a minority firm. Between 1973 and 1988, minority firms received 38.2 percent of all joint venture awards or $106,500,000.

• The MBE program is characterized by both price and bid competition as 71 percent of all formal awards had 3 or more bidders while only 11 percent had only one bidder. On the other hand, 91 percent of all contracts are awarded to the lowest bidder, 6 percent to the second lowest bidder and 3 percent to the third lowest bidder.

This data summarizes some of the most important findings of the economic analysis in the Atlanta study. Alongside other findings, it documents a pattern of significant disparity, especially in the absence of the MBE program. The MBE program is crucially important to the continued growth and viability of minority businesses in Atlanta. But the U.S. Supreme Court has offered an enormous challenge to the existence of these programs. Nevertheless, I believe it is possible to meet this challenge and, thereby, continue to provide minority businesses with the only reasonable vehicle for redressing the present effects of past discrimination. On this point, I hope that we are all in agreement. □

[1] *Contact Margaret Simms, Joint Center for Political and Economic Studies, 1301 Pennsylvania Avenue, NW, Suite 400, Washington, DC 20004, (202-626-3500). A working paper of my contribution is available from the author upon request.*

Thomas D. Boston is associate professor of economics at Georgia Tech and author of Race, Class and Conservatism. *He was on the research team that conducted the minority business enterprise study for the City of Atlanta. He can be reached at the School of Economics, Ivan Allen College of Management, Policy and International Affairs, Georgia Institute of Technology, Atlanta, GA 30332, (404-894-4918).*



CAROLINAS AGC
THE CONSTRUCTION INDUSTRY ASSOCIATION

South Carolina Highway-Heavy Division Newsletter

July, 1993

COURT UPHOLDS DIVERSION OF HIGHWAY DOLLARS

Most people consider the 1992 raid on the Highway Fund a double-cross, but the State Supreme Court says it's okay for the Legislature to levy and collect taxes under false pretenses. In a July 6th ruling issued by Chief Justice David Harwell with the concurrence of Justices Chandler, Finney, Toal and Moore, the Court ruled that the 1992 raid of highway dollars was permissable because the constitution..."only requires the Legislature to state the public purpose for which taxes are levied...(It) does not prohibit the Legislature from amending the public purpose to which tax proceeds may be applied."

Obviously, many people in the business community are frustrated and disappointed by this ruling. It sets a bad precedent not only for the Highway Fund, but for other "dedicated" funding mechanisms including the Accomodations Tax, EIA, the SUPERB Fund, the Admissions Tax, the State Retirement Fund, the Homeless Fund, the Heritage Trust Fund, the Law Enforcement Training Program, Emergency Medical Services and numerous other programs.

"The Court, in effect, has simply abolished all earmarked or specially dedicated funds," said Edward T. McMullen, President of the South Carolina Policy Council Education Foundation, which brought the suit against the State. "One shudders to think about what effects this decision will have in the financial market and on our bond and credit ratings," he added.

The political ramifications may be even greater than the financial ones. With such broad power to legally misappropriate dollars it will be almost impossible for the Legislature to organize business' support for any future revenue packages for education, transportation, environmental preservation or any other worthy cause. We have truly lost a part of our heritage when a deal is no longer a deal and laws aren't worth the paper upon which they are written.

HOUSE APPROPRIATIONS COMMITTEE CALLS FOR INCREASED HIGHWAY FUNDING

The U.S. House of Representatives Appropriations Committee is calling for an increase of $2 billion in the Federal highway obligation ceiling for 1994. This would translate into about $25 million in additional funding for South Carolina beginning October 1, 1993. We could also receive an increase of up to $30 million in minimum allocations. The full House is not expected to take up the Transportation Appropriations Bill until the week of July 19.

Michael D. Covington, Highway-Heavy Division Director
240 Stoneridge Drive•Suite 301•Columbia, S.C. 29210•803-799-5380

FEDERAL BUDGET BILL GOES TO CONFERENCE

The House of Representatives wants an energy tax for deficit reduction and the Senate wants a 4.3 cents gasoline tax to be placed in the Highway Trust Fund (but, not spent) for deficit reduction. These and other differences will be hammered out by a conference committee later this month. The outcome could have far-reaching implications on future highway revenue packages. Any increase in motor fuel taxes on the federal level could hamper our ability to increase them on the state level.

Other areas to watch are personal tax rates, the capital gains tax rate, corporate income tax rates and the deductability of association dues "attributable to lobbying activities." AGC members are encouraged to write their Congressmen and Senators about these important issues.

JUNE DIVISION MEETING A SUCCESS

If you attended the annual Highway-Heavy Division and Bridge Section Meeting in Sunset Beach last month, you know how good the program was. One of the hottest topics was safety. Several good presentations were made, including a session entitled "Getting Ready for an OSHA Visit." We also heard reports from highway officials from both states. The food and facilities at Sea Trail Plantation were exquisite and the golf courses were in top shape. The final event of the weekend was a team putting contest which was won by the North Carolina team by two strokes.

Next year's Meeting will be June 23-26 at the beautiful Crystal Sands Resort (formerly the Marriott) on Hilton Head Island, South Carolina. Mark your calendars now!

FHwA RELEASES 1992 BID OPENING REPORT

The Federal Highway Administration recently published its Bid Opening Report for calendar year 1992. The average size of a contract in 1992 was $2,643,484. The total contract value was $11,028,617,000. South Carolina did not place any projects on the list of the 40 largest contracts awarded. The average number of bidders in South Carolina was 4.3 per project compared to 5.1 nationwide. Bids were, on average, 6.4% below the engineer's estimate, compared to 9.7% nationwide.

DEPARTMENT TO UNDERTAKE DISPARITY STUDY

No one has challenged South Carolina's minority and women's set-aside law in court, but the Legislature has gone forward with a requirement that the Department of Transportation (SCDOT) undertake a study to determine if there is a disparity between the number of minorities and women who are qualified, ready, willing and able to perform highway work and the actual number of those performing work for the Department. The cost of the study could be up to $250,000. Such studies have been used by other states and local governments who have had their set-aside programs struck down by the Courts.

Carolinas AGC recently had an independent analysis of the North Carolina Disparity Study conducted. The analysis revealed a number of flaws and miscalculations in the report. Carolinas AGC staff will continue to monitor this situation. The study is due to be completed by next spring.

July 16, 1993

DRAFT

RECOMMENDATIONS FOR DISPARITY STUDY RFP

Section 124.29 of the 1993-94 Appropriation Act requires a disparity study to show the number of available qualified DBE's "willing and able to perform highway/bridge pre-construction, construction, building construction and renovation work". In developing an RFP to solicit bids for the disparity study, it is recommended that "willing and able" firms be defined as those firms who:

1) Have a principal place of business which can be contacted during normal working hours from 9:00 a.m. - 5:00 p.m.

2) Have paid income taxes for the last 2 years of its operation;

3) Have obtained any licenses required by law to operate in the firms area of work, or if no license is required, have successfully completed at least one contract in the firms area of work.

THE CHARLOTTE OBSERVER Wednesday, January 27, 1993

N.C. highway contracts biased, consultant finds

By DENNIS PATTERSON
Associated Press

RALEIGH — A study of highway construction projects over the past 10 years shows discrimination against companies owned by minorities and women, legislators were told Tuesday.

"You now have a document that shows discrimination and disparity," said Fred Aikens, a legislative staff member who specializes in transportation issues. "This (issue) is not going to be something that will go away."

The study, conducted by a Florida consulting firm, showed that $3.5 billion was spent on highway projects in North Carolina from 1982 to 1992. Of that, $3.2 billion went to contractors and subcontractors owned by white men.

Black-owned businesses got $58.2 million in contracts, while $48 million went to American Indians, $5.5 million to Asians, $9 million to disabled owners, $3.2 million to Hispanics. About $110 million went to companies owned by white women.

The legislature had set goals for minority- and women-owned companies to get highway contracts. But the goals were dropped after a lawsuit challenged them.

Courts have said discrimination must be documented before programs can set goals or amounts to be earmarked for minority and female contractors.

The study shows the state has a "compelling interest" to set goals or specific amounts of highway business for minorities and women, said Stephen Humphrey of MGT of America, the private consultant that did the study.

"That means it's not just something to do because it's nice, but because you have to do it," he told the Governmental Operations Commission.

Rep. Dave Diamont, D-Surry, questioned whether companies could hire a woman or minority as a figurehead, keeping the highway money flowing to the same hands.

The companies would face the possibility of fraud charges if they certified a business as minority- or women-owned when it wasn't, several legislators said.

The legislative Highway Oversight Committee earlier Tuesday asked the state Department of Transportation to reinstitute the goals and to continue trying to attract more bids from companies owned by minorities and women.

MBELDEF

Minority Business Enterprise Legal Defense and Education Fund, Inc.

Parren J. Mitchell
Founder and Chairman

Anthony W. Robinson
President

MEMORANDUM

TO: MBE/WBE/DBE Program Compliance Officers
State and Local Purchasing Agents
Other Interested Parties

FROM: Tyrone D. Press
Chief, Investigations and Research
Office of the Chief Counsel

DATE: March 1, 1991 (Update)

RE: Factors Affecting the Cost and Performance of MBE Disparity/Fact-Finding Studies

The following information is provided for the benefit of those jurisdictions/agencies contemplating the commission of minority business enterprise disparity fact-finding studies in response to the U.S. Supreme Court decision in City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 109 S.Ct. 706 (1989).

This memorandum shall be continuing in nature and shall be periodically updated as additional data are furnished to this office. Please assist in furnishing such data.

To date, contracts let for such studies have ranged in cost from $0.00 to $791,000.

Factors identified as price-influencing include:

a. the complexity of the MBE ordinance or legislation;

b. the number, nature and size of the soliciting political entity or entities (i.e., an entire governmental entity consisting of several agencies vs. a single agency);

c. the size and ethnic diversity of the population it serves;

d. the size and ethnic diversity of the business community to be examined;

e. the nature and scope of work to be performed;

1001 I Street, N.E. Suite 200 Washington, D.C. 20002 (202) 543-0040

f. the availability/accessibility of the jurisdiction or agency's contract data (including the extent of computerization); and

g. time for performance.

Complicating an examination of the pricing structure is the lack of uniformity of the early requests for proposal (RFPs) issuing out of the jurisdictions. RFPs reviewed by this office exhibit variances in study objective and scope of work, and often permitted or invited bidders to propose non-uniform study approaches and design.

In addition, a few jurisdictions and consultants have experienced difficulty with respect to the performance of these studies. Factors identified as adversely affecting performance include:

a. Lack of understanding by the consultant (or unreasonable expectations on the part of the jurisdiction) as to the nature of the examination and/or the types and quantum of evidence to be gathered;

b. Inadequate funding;

c. Inadequate time for performance;

d. The availability/accessibility of contract data (including the extent of computerization; missing records)

e. Lack of cooperation on the part of the sponsoring jurisdiction/agency

In response to this phenomenon, MBELDEF, has developed minimal standards/guidelines for the performance of these studies. In addition, sample RFPs (with commentary, if desired) are available from this office upon request. MBELDEF also makes itself available to state and local jurisdictions desiring technical assistance in RFP drafting, study design and/or oversight, and post-study evaluations.

For additional information regarding the experiences of specific jurisdictions or agencies, please contact:

ARIZONA STUDIES

Maricopa County (Phoenix)
($156,427; awarded to Mason Tillman Associates)
Contact: Clara Engle, Director
Minority Business Office
Department of Materials Management
(602) 233-8600

CALIFORNIA STUDIES

Contra Costa and Alameda Counties
($320,000; awarded to National Economic Research Associates)
Contact: Victor Westman, Esquire
County Counsel
(415) 646-2074

City of Hayward
($104,000; awarded to BPA Economics and Mason Tillman Associates)
Contact: Don Ballard
Assistant to City Manager
(415) 293-5000

Los Angeles
($791,502; awarded to Cordoba Corporation and Mason Tillman Associates)
Contact: Sharon Tso
City Administrative Office
(213) 485-2019

Oakland
($ allocation unknown; RFP issued, but matter was held in abeyance due to recent earthquake)
Contact: Floydean Greenlow
Affirmative Action Manager
(415) 273-3500

Regional Transit Association of the Bay Area (RTA)
($200,000 allocated; RFP issued February 15, 1991; Proposals due March 15, 1991; A multi-agency DBE utilization study for 7 transit authorities including: Alameda/Contra Costa Transit District; San Francisco Bay Area Rapid Transit District;Central Contra Costa Transit Authority; Golden Gate Bridge, Highway & Transportation District; San Francisco Municipal Railway; San Mateo County Transit District; and Santa Clara County Transportation Agency.
Contact: Carl E. Kennedy
DBE Contract Compliance Officer
San Francisco Bay Area Rapid Transit District
(415) 464-6108

City of Sacramento
($ allocation undisclosed; A joint study including the County of Sacramento, the Sacramento Housing Authority and the Sacramento Regional Transit District. RFP issued December 7, 1990; Proposals due February 1, 1991)
Contact: Robbin DeShields Randolph
Assistant Director of General Services
(916) 449-5548

Sacramento Municipal Utility District (SMUD)
($ allocation undisclosed; RFP issued; Proposals due March 13, 1991)
Contact: Kenneth M. Fleming
Affirmative Action Manager
SMUD
(916) 732-6018

San Francisco
($40,000; awarded to BPA Economic, Inc. and Aileen C. Hernandez Associates for pre-Croson efforts under separate contractual arrangements. Highly computerized contract data. Hernandez (1985) examined bonding.) Both portions completed. San Francisco is gearing up to have a comprehensive, post-Croson study performed.
Contact: Burt Campbell
Human Rights Commission
(415) 558-4901

San Jose
($100,000; awarded to joint venture of BPA Economics, Mason Tillman, and Boasberg & Norton.) Construction phases completed in December 1990. The second phase covering professional services and commodities will begin shortly.
Contact: Rodolfo G. Navarro, Director
Affirmative Action/Contract Compliance
(408) 277-4899

COLORADO STUDIES

City and County of Denver
($316,340; awarded to Nelson & Ogborn, Attorneys at Law, Browne, Bortz and Coddington, Inc. and the Minority Business & Professional Directory, Inc. Focus on construction and professional design services work.) Draft completed June, 1990. A second study is presently underway to review commodities and services. The anticipated date of completion is July, 1991.
Contact: Leo Rodriquez, Director
Affirmative Action Office
(303) 575-3808

CONNECTICUT STUDIES

New Haven
($44,000; awarded to Gerald Jaynes, Professor of Economics, Yale University.) Study completed August 1990.
Contact: Bill Wilson
Office of Contract Compliance
(203) 787-8056

DISTRICT OF COLUMBIA STUDIES

Metropolitan Washington Airports Authority
($349,000; awarded to joint venture of National Economic Research Associates and Contract Compliance, Inc.) Study completed February, 1990.
Contact: Angela Martin
Office of Equal Opportunity Programs
(703) 739-8625

FLORIDA STUDIES

State, Department of General Services
(Initial allocation of $248,000 increased to $744,500; awarded to TEM, Inc.) Phases I and II complete.
Contact: Susan B. Kirkland, Esquire
General Counsel
(904) 487-1082

Dade County (Miami area)
($345,000; awarded to Dr. Andrew Brimmer)
Contact: Marsha Jackman, Interim Director
Minority Development Office
(305) 375-4132

Dade County Public Schools
($185,000; awarded to D.J. Miller & Associates) Study completed June, 1990
Contact: Dr. Rose Cox-Barefield
Director, Bureau of Business Management
(305) 995-1494

Hillsborough County (Tampa area)
($100,000; begun pre-Croson; performed by D.J. Miller & Associates) Study completed December, 1988.
Contact: Spencer Albert
Manager
Minority Business Enterprise Office
(813) 272-5969

Jacksonville
($398,000; awarded to D.J. Miller & Associates; A multi-jurisdictional effort for the City of Jacksonville, Duval County, the Electric Authority, the School Board and the Port Authority) Study completed November, 1990.
Contact: Connell Heyward, MBE Coordinator
Department of Central Services
(904) 630-1165

Palm Beach County
($175,000; awarded to MGT of America, Inc.) Study completed December, 1990.
Contact: Clarence Ellington
Director
Office of Equal Opportunity
(407) 355-4883

St. Petersburg
($147,426.40; awarded to D.J. Miller & Associates) Study completed June, 1990 with supplemental report issued in November, 1990.
Contact: Theresa D. Jones
MBE Coordinator
(813) 893-7846

Tallahassee
($119,600; awarded to MGT of America, Inc.) Study completed January, 1991
Contact: Ben Harris
MBE Officer
(904) 599-8184

Tampa
($160,000; awarded to D.J. Miller & Associates) Study completed in November, 1990.
Contact: Pamela Hart
Manager
Equal Opportunity Office
(813) 223-8192

GEORGIA STUDIES

Atlanta School Board
($50,000; awarded to Dr. Thomas D. Boston, Professor of Economics, Georgia Tech University.)
Contact: Denise Leggett, Esquire
Legal Counsel to the Board
(404) 239-1900

City of Atlanta and Fulton County
($517,000; A multi-jurisdictional effort awarded to joint venture of Drs. Andrew Brimmer & Ray Marshall, with MBELDEF, et al. as subcontractors.) Study completed June, 1990.
Contact: Rodney K. Strong, Esquire
Director
Office of Contract Compliance
(404) 330-6010

Metropolitan Atlanta Rapid Transit Authority (MARTA)
($250,000 allocated; Proposals due February 22, 1991.)
Contact: Ron Nawrocki
Director, Contracts and Procurement
(404) 848-5000

ILLINOIS STUDIES

City of Chicago
($0.00; Study performed by "Blue Ribbon Panel", appointed by the Mayor and led principally by Susan Gedsandaner, Esquire, of Skadden Arps, Attorneys at Law; Ruben Costello, Regional Office, Mexican American Legal Defense & Education Fund; and Milton Davis, Chairman, The South Shore Bank. Panel members reportedly contributed 100% of study's cost.) Study completed April, 1990.
Contact: Mayor's Press Office
(312) 744-3334

Chicago Board of Education
($180,000; Study being performed in-house by MBE administrators with assistance from outside CPA firm and legal counsel. Study team to rely, in part, on City study and past data gathered from previous study undertaken in 1986.
Contact: Evangeline Levison, Esquire
Director of Affirmative Action
(312) 535-4521

Metropolitan Water Reclamation District (Greater Chicago)
($265,000; performed by team comprised of Earl Neal & Associates, Attorneys at Law; Leon Finney Associates, Attorneys at Law; Vedder Price; Laventhal & Horwath, and academic Dr. Marcus Alexis of the University of Illinois at Chicago.) Study completed March, 1990.
Contact: Robert Abraham, Esquire
Law Department
(312) 751-6581

LOUISIANA STUDIES

State Department of Economic Development
($240,000; Phase I of study limited to public works projects and the horizontal construction industry. Awarded to joint venture of Dr. Huey L. Perry, Southern University and Dr. John Lunn, Louisiana State University. Universities contributed one-half of costs. First portion of Phase I completed April, 1990. Additional research is reportedly necessary. Completion of Phase I is scheduled for June 1, 1991. Phase II will concentrate on vertical construction, commodities and professional services.
Contact: Angelisa M. Harris
Executive Director
Office on Minority & Women Business Enterprises
(504) 342-5373

New Orleans Water & Sewerage Board
($100,000; awarded to the Dillard Consortium)
Contact: Rose Butler
Minority Business Office
(504) 585-2114

MARYLAND STUDIES

State of Maryland
($286,000; awarded to Coopers & Lybrand and A.D. Jackson Consultants, Inc.) Study completed March, 1990.
Contact: Richard A. Conway, Director
Office of Procurement & Contracts
(301) 859-7140

Baltimore
($50,000; performed in-house by "Croson Implementation Task Force" led by Law Professor Michael Milleman, University of Maryland School of Law.) Study completed December, 1989.
Contact: Lola Smith, Director
Equal Opportunity Compliance Office
(301) 396-4355

Maryland National Capital Park & Planning Commission
($ unknown; awarded to A.D. Jackson Consultants)
Contact: LeRoy Hedgepath
Office of the Executive Director
(301) 853-4802

Prince George's County Government
($65,000; awarded to MBELDEF) Study completed February, 1991.
Contact: Sheila Tillerson, Deputy County Attorney
Office of Law
(301) 952-4028

Prince George's County Public Schools
($60,000; awarded to Financial Research Associates) Study completed January, 1990, without release to public.
Contact: Janet D. Jarvis, Coordinator
Minority Business Program
(301) 952-6563

Washington Suburban Sanitary Commission
($36,000; a pre-Croson study performed by joint venture of MBELDEF and Financial Research Associates, Inc.)
Contact: William Gormley
Office of Public Affairs
(301) 699-4173

MASSACHUSETTS STUDIES

State of Massachusetts
Public hearings before the Massachusetts Commission Against Discrimination began on August 22, 1990. Final report reportedly available.
Contact: Marcus Weiss, Esquire
Consultant to the Commission
(617) 742-4406

Massachusetts Water Resources Authority
($290,000; awarded to National Economic Research Associates, Contract Compliance, Inc., and Perkins & Coie) Study completed November, 1990.
Contact: Julius Williams
(617) 242-6000

MICHIGAN STUDIES

Grand Rapids
($35,000; this effort is being performed "in-house".
Contact: Ingrid Scott-Weekly
Director
Office of Equal Opportunity
(616) 456-3027

MINNESOTA STUDIES

State Department of Administration
($125,000; work performed in-house by Department's Management Analysis Division. Oversight provided by Ken Nicholai, Esq., outside consultant.) Study completed February, 1990.
Contact: Dorothy Lovejoy, Manager
Customer & Vendor Services
Small Business Procurement Program
(612) 296-6131

MISSISSIPPI STUDIES

State of Mississippi
($200,000 allocated; RFP issued February 20, 1991, Proposals due March 15, 1991)
Contact: Royal Walker, Jr., Director
Division of Budget & Policy Development
Department of Finance & Administration
(601) 359-6752

MISSOURI STUDIES

Kansas City
($400,000 allocated)
Contact: Les Washington
Human Relations Office
(816) 274-1432

St. Louis
($323,000; awarded to Dr. Andrew Brimmer)
Contact: Ivy Neyland-Pinkston
Strategic Planning Manager
Comptroller's Office
(314) 622-3588

NEW JERSEY STUDIES

State of New Jersey and New Jersey Transit
($500,000; RFP issued; Proposals due February, 1991)
Contact: Sonya J. Lyles
Contract Specialist
(201) 643-7400

Atlantic City
($3,000; awarded to academic, Professor Morris Wolf, Stockton State College, to perform preliminary needs assessment.)
Contact: Girard Geeter
Minority Business Development Office
(609) 347-6482

Newark
($600,000 committed; work being performed, in part, by academics Drs. Peter Jackson and Ray Scippio, with remainder being performed by battery of in-house personnel and some private subcontractors. MBELDEF is to provide legal guidance and study oversight.)
Contact: Ms. Bobbi Ruffin, Director
Affirmative Action Office
(201) 733-8527

NEW YORK STUDIES

City of New York
($460,000; Awarded to National Economic Research Association for quantitative analysis [$360,000] and Darryl Greene & Associates for anecdotal evidence [$100,000]. This is, in part, a multi-jurisdictional effort, for that the anecdotal position is being

performed not only for the City of New York, but also on behalf of the State and the Health & Hospitals Association.) Anticipated date of completion is June, 1991.
Contact: Steven Rosenberg, Esq.
General Counsel
(212) 513-6301

New York Metropolitan Transportation Authority
($500,000; awarded to D.J. Miller & Associates to examine five operating agencies under the MTA.) Completed January, 1990.
Contact: James Nixon, Director
Office of Minority Business
(212) 878-7129

City of Rochester
($90,500; awarded to Affirmative Action Consulting, Inc. This study has been terminated allegedly due to contract disputes. The City is considering the issuance of a new RFP.)
Contact: Sandra Stephens, Principal Staff Assistant
Office of the Mayor
(716) 428-7413

City of Syracuse
($137,000; awarded to Knowledge Systems & Research, Inc., Meister, Leventhal & Slade and WAR Associates) Completed January, 1991
Contact: Sue Finklestein, Senior Assistant
Office of the Corporation Counsel
(315) 448-8400

NORTH CAROLINA STUDIES

County of Durham
($62,000; awarded to MBELDEF)
Contact: Lowell Siler, Esquire
Assistant County Attorney
(919) 560-0708

OHIO STUDIES

Cincinnati
($250,000; awarded to University of Cincinnati's Institute for Public Policy Research.)
Contact: Kathi Ranford
Office of Contract Compliance
(513) 352-4547

Cleveland
($289,000; awarded to A.D. Jackson Consultants, Inc.) Study to be completed by May, 1991)

Columbus
($40,000 initially allocated; awarded to Beatty & Roseboro with assistance from Professor William D. Bradford, University of Maryland.) Study completed January, 1991.

Dayton
($200,000; awarded to D.J. Miller & Associates)
Contact: Gerald Steed, Executive Director
Human Relations Council
(513) 228-5854

Montgomery County (Dayton Area)
($50,000; awarded to Beatty & Roseboro)
Contact: Gladys Bell
Interim Contract Compliance Officer
(513) 225-4689

PENNSYLVANIA STUDIES

Philadelphia
($125,000; awarded to Comprehensive Services, Inc., A.D. Jackson Consultants, Blair Consultants, Inc., and BHK)
Contact: John Macklin
Special Assistant
(215) 686-3893

Southeastern Philadelphia Area Regional Transportation Authority (SEPTA)
($ allocation unknown)

SOUTH CAROLINA STUDIES

City of Columbia
(The City is preparing to issue an RFP)
Contact: Charles Williams
City Managers Office
(803) 733-8223

TEXAS STUDIES

Dallas Area Rapid Transit (DART)
($224,000; awarded to A.D. Jackson Consultants to perform statistical research on "Availability". A second phase of the study relating to "Disparity" may also be awarded at $94,000.)
Contact: Pat Bush
Contract Administrator
Minority Affairs Office
(214) 658-6358

City of Dallas and Dallas/Fort Worth Airport Authority
($ Allocation unknown)
Contact: Catherine Turner
Minority Business Officer
(214) 670-4172

San Antonio
($360,000; Awarded to National Economic Research Associates. This is a multi-jurisdictional effort between 6 entities including Via Metro Transit, Bexar County, Bexar Hospital District, San Antonio Water Board and San Antonio Public Services [the latter being a city-owned gas and electric utility company].)
Contact: Terry Williams or Manuel Longoria
SMBA Specialists
(512) 554-7128

VIRGINIA STUDIES

Richmond
($250,000; awarded to National Economic Research Associates) Report anticipated April, 1991
Contact: Joyce Wilson, Senior Assistant to City Manager
Department of General Services
(804) 780-5814

WASHINGTON STUDIES

Seattle
($350,000; awarded to Perkins & Cole, et al. A multi-jurisdictional effort limited solely to construction and professional services.) Participating entities included City of Seattle, Seattle School District, Port of Seattle, Municipality of

REQUEST FOR PROPOSALS FOR MBE/WBE/DBE STUDIES IN NEW ORLEANS, LOUISIANA

Celebration Park Casino, Inc. ["CPC"] hereby solicits proposals for two research studies, one regarding the Construction Phase of the Grand Palais Casino (a $250 million dollar structure to be built in New Orleans, Louisiana) and one regarding the Operations Phase of the Grand Palais Casino (which will employ approximately 5,500 persons).

Candidates can apply to perform either or both studies. Both studies will require the production of an Interim Report and a Final Report. These reports should provide the basis for a legally defensible Open Access Plan for the construction and operation of the Grand Palais Casino and for construction and employment practices of the New Orleans city government. These reports must include detailed analyses of historical and present discrimination (if any) against MBE/WBE/DBEs and individuals in the New Orleans geographic area and labor market. The focus should be upon discrimination (if any) as to pricing, bonding, financing, bid manipulation, and other areas. The reports also should include an analysis of the relevant population in the New Orleans market by race, gender, and disability. The Construction Phase Study should identify available qualified MBE/WBE/DBEs and companies owned by disabled persons, by trade, profession, size, and capabilities. The focus of the Construction Phase Study should be primarily upon trades relevant to the Grand Palais construction project, and the focus of the Operations Phase Study should be primarily upon job skills relevant to the operations of the casino. (This may require some sophisticated analysis of job comparability.) However, both should also analyze standard job classifications relevant to City government employment and standard

trades and professions relevant to City construction and procurement contracts. Also, the Report should be susceptible to use as the basis for a more far-ranging MBE/WBE/DBE plan for construction and employment by the City government.

The methodology of these disparity studies should include collection and analysis of descriptive statistics regarding discrimination (if any) against African Americans, Hispanic Americans, Asian Americans, women, persons with disabilities, and other groups deemed relevant by the candidate, and contract discrimination against businesses owned by persons from these groups. It should also involve collection of anecdotal data (regarding discrimination and present availability of qualified MBE/WBE/DBEs and individuals).

The Interim Report for the Construction Phase Study must be produced within 4 months of contracting with the successful candidate, and the Final Report must be produced within 7 months of contracting. The Interim Report for the Operations Phase must be produced within 3 months of contracting with the successful candidate, and the Final Report must be produced within 12 months of contracting. Both reports should recommend legally defensible Open Access Plans, with detailed hiring and contracting goals (if appropriate) by trade and job type and justification for same. The reports should also recommend any necessary waivers and race-neutral criteria.

Any firm (or consortium) submitting a proposal should include a multi-disciplinary research team that has experience with comparable studies. CPCI will give significant consideration to firms demonstrating that their findings or plans in this field or a closely related field have been successfully defended or favorably reviewed in a federal court.

Proposals for the construction Phase Study must be received by CPCI by 5:00 p.m. on Tuesday, May 25, 1993. The deadline for applications for the Operations Phase Study is also May 25, 1993. A much longer and more detailed Background Information Packet (describing the project, providing guidelines for applications, and articulating evaluation criteria) is available for firms interested in making a proposal. To obtain a copy of the packet contact: Jessica Grossman, Program Coordinator for Open Access Program Studies, Celebration Park Casino, Inc., 111 Rue Iberville, 6th Floor, New Orleans, Louisiana 70130. Telephone: (504) 524-4422. FAX: (504) 524-1987.

RFP MAILING LIST

Mr. Dave Miller (404) 876-7500
D.J. Miller & Associates
Suite 1550
600 W. Peachtree Street
Atlanta, GA 30308

Mr. David Keen (303) 321-2547
BBC, Inc.
155 S. Madison
Suite 230
Denver, CO 80209

Mr. Stu Hanson (510) 465-7884
Berkeley Planning Associates
440 Grand Avenue
Suite 500
Oakland, CA 94610

Mr. David J. Burman (206) 583-8888
Perkins Coie 583-8426
1201 Third Avenue
40th Floor
Seattle, WA 98101-3099

Brimmer & Company, Inc. (202) 342-6255
4400 MacArthur Blvd., NW
Suite 302
Washington, DC 20007

Dr. Mark Bendick (202) 686-0245
Bendick & Eagan, Economic Consultants
3760 39th Street, NW
Suite B-140
Washington, DC 20016

Ms. Sheila Foster (510) 835-9012
Mason Tillman & Associates
1212 Broadway
Suite 1500
Oakland, CA 94612

Ms. Barbara Speer
Peat Marwick
111 N. Congress Avenue
Suite 100
Austin, TX 78701

(512) 320-5104
(Fax) 320-5100

Mr. Bill McIntyre
Andersen Consulting
201 St. Charles Avenue
Suite 4500
New Orleans, LA 70170

(504) 581-5454

Ms. Carolyn Staerker
MGT of America, Inc.
2425 Torreya Drive
Tallahassee, FL 32303

(904) 386-3191

Ms. Adele D. Jackson
A. D. Jackson Consultants
1010 Wayne Avenue
Suite 1210
Silver Spring, MD 20910

(301) 495-3404

Mr. Franklin M Lee
MBELDEF
300 I" Street NE #200
Washington, DC 20002

(202) 543-0040

Mr John R. Posey
Renee Higginbotham-Brooks Law Office
1612 Summit Avenue
Suite 230
Fort Worth, Texas 76102

(817) 334-0106
(800) 498-0106

MGT of America, Inc.

P.O. Box 38430 • 2425 Torreya Dr. • Tallahassee, FL 32315 • (904) 386-3191 • FAX (904) 385-4501

Val -
For your info -
Linda

February 23, 1993

Ms. Linda C. McDonald
Assistant Chief Counsel
South Carolina Department of
Highways and Public Transportation
P.O. Box 191
Columbia, South Carolina 29202

Dear Ms. McDonald:

It was a pleasure to meet with you and speak before the Minority Affairs Committee. The actions you and the Committee have taken to gather input regarding the Department's DBE program are commendable.

In response to your concern over the need to annually re-evaluate your DBE program, I discussed this with our disparity team experts. I was told that in order to comply with *Croson* and subsequent court cases, the enacting agency must assure that its DBE program is narrowly tailored to ameliorate the discrimination found in its disparity study. The DBE program must also be in place only long enough to address the problem of discrimination. Therefore, the agency needs to periodically evaluate whether the program is still needed. However the court cases do not indicate exactly how often an agency should evaluate its program. The *O'Donnell* case certainly shows that one Court of Appeals thinks that 15 years is too long to operate a DBE program without an evaluation. The court said that having a program in place that long implies that the race-based program will never end.

The evaluation of the continuing need for the DBE program should be conducted regularly, probably annually. Using utilization and availability data for the given year, the evaluation could be conducted internally. However, the program should probably be evaluated by an objective third party every three to five years.

The internal evaluation should not be too difficult once the initial disparity study is conducted. The study would result in an automated database and instructions to record necessary information to assist in the evaluation. Trend and statistical analyses can be used to project availability.

I hope this addresses your concern. If you need additional information, please do not hesitate to call me or Rebecca Ros at (904) 386-3191. I look forward to meeting with you again soon.

Sincerely,

Carolyn Staerker

Carolyn Staerker
Principal

SOUTH CAROLINA
DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION
P.O. BOX 191
COLUMBIA, S.C. 29202

MEMORANDUM

TO: Highways and Public Transportation Commission
Minority Affairs Committee
FROM: Valentine Burroughs, Sr., Executive Assistant
DATE: November 13, 1992
SUBJECT: Significance of Disparity Study

Commissioners Brooks requested that I forward this background information to you on the significance of a disparity study.

We are not proposing to conduct a study of this nature today, however, we would appreciate discussing the subject for the purpose of increasing our understanding of a disparity study and the legal implication for our State Disadvantaged Business Enterprise program (DBE/WBE).

cc:
The Honorable Charles T. Brooks, Chairman
The Honorable Donald E. Wilder, Vice Chairman
The Honorable Walker P. Ragin, Interim Executive Director

A Second Look at Set-Asides

Atlanta rebuilds its minority-contracting plan

When it started in 1980, Melvin Griffin's small electrical-contracting company was treading water. Then Atlanta began an aggressive program to steer public construction contracts to minority and female-owned companies. Soon Griffin, who is black, was receiving big contracts on city jobs, and his company was pulling in around $2 million a year in revenues. All that came to an abrupt end in 1989 when a U.S. Supreme Court ruling cast doubt on many such set-aside programs. Shortly afterward, Griffin recalls, his company lost a $900,000 contract to wire the municipal-court building. Referring to the prime contractors, he says, "Once they no longer had to use me, they turned away."

Many minority-owned firms have suffered in the wake of the Supreme Court's decision. In Atlanta, the percentage of construction spending won by minority firms has fallen sharply in the last two years (chart). Dozens of other cities simply dismantled their programs, which typically set aside 10 percent of construction spending for minority firms. Now, as the administration and Congress play politics with the issue of quotas, Atlanta is trying to revive its affirmative-action program. What happens in Atlanta, home of the granddaddy of minority-contracting programs, will be watched keenly by other municipalities. And the stakes are especially high now, with more than $1 billion in construction expected before Atlanta hosts the Summer Olympics in 1996.

Next week, Atlanta Mayor Maynard Jackson is expected to propose a plan intended to satisfy the standards set down in the Supreme Court's ruling. The 6-3 decision in *Richmond v. Croson* said a program that denies contracts to white-owned companies would be constitutional only if the city shows detailed evidence of past discrimination—and shows that a remedy to correct it is "narrowly tailored." Constructing such a plan won't be easy for many cities, but Atlanta has taken up the challenge.

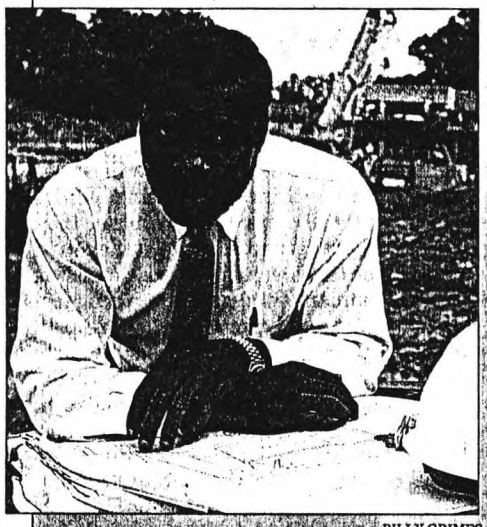
To prove past discrimination, the city spent $500,000 for a 1,100-page, eight-volume report by former Federal Reserve governor Andrew Brimmer and former labor secretary F. Ray Marshall that stretches from Civil War times to the present. The new proposal attempts a "narrowly tailored" remedy: while shooting to give minority companies a 35 percent share of city contracts, it recognizes that some specialties (such as paving airport runways) lack minority firms while others (general contracting) have many. In the original *Croson* ruling, Justice Sandra Day O'Connor suggested looking at the number of minority firms ready, willing and qualified to work, compared with the overall contracts awarded. The city study did that and found that while minority firms constitute 33 percent of all companies pursuing business with the city, they got only 23 percent of municipal contracts last year.

Opponents contend Atlanta's minority firms already get a large share of contracts without set-asides, citing the 23 percent figure. "Just that in itself would not justify what they're trying to do," says J. Ben Shapiro, general counsel for the Georgia chapter of the American Subcontractors Association, which is poised to attack Jackson's plan. But without an affirmative-action plan, Brimmer argues, the minority share of contracts will continue to drop to pre-1980 levels.

The most potentially explosive part of Jackson's program would reward white-owned contractors that gave business to minority companies. The provision is aimed at addressing the fact that few minority firms get private-sector contracts. In Atlanta, minority firms got nearly 93 percent of their business from public-sector jobs. Carolyn Stradley, owner of C&S Paving Co., says that her paving contracts virtually stopped in "midstream" when the set-aside program was suspended. She hopes the new plan will make it harder for whites to use minority "fronts" to win contracts, a charge sometimes leveled at her.

To its supporters, the set-aside notion is a valid tool that helped create a black, entrepreneurial middle class in Atlanta. The old program, says city consultant Thomas Boston, was the "driving force" behind a surge in the city's black business sector in the 1980s. Shapiro says minorities can be helped with economic aid rather than by discriminating against whites. If Jackson's program is approved, expect to see the matter end up in the courts once again.

VERN E. SMITH *in Atlanta*



BILLY GRIMES

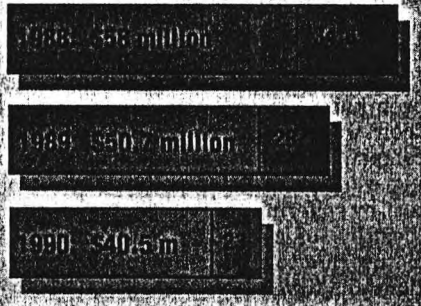
'They turned away': *Contractor Griffin*

A Smaller Slice

The share of Atlanta contracts won by minority firms has dropped sharply.

Atlanta Municipal Contracts

Minority Firms' Share in Percent



SOURCE: ATLANTA OFFICE OF CONTRACT COMPLIANCE
SOTOODEH—NEWSWEEK

ANN STATES—SABA

Stopped in midstream: *Carolyn Stradley*

North Carolina General Assembly
Legislative Services Office
Legislative Office Building
300 N. Salisbury Street, Raleigh, N. C. 27603-5925

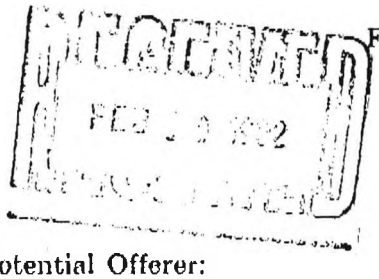
GEORGE R. HALL, JR., Legislative Administrative Officer
(919) 733-7044

M. GLENN NEWKIRK, Director
Automated Systems Division
Suite 400, (919) 733-6834

GERRY F. COHEN, Director
Bill Drafting Division
Suite 100, (919) 733-6660

THOMAS L. COVINGTON, Director
Fiscal Research Division
Suite 619, (919) 733-4910

TERRENCE D. SULLIVAN, Director
Research Division
Suite 545, (919) 733-2578



February 12, 1992

Dear Potential Offerer:

The Co-Chairmen of the Legislative Services Commission and the Joint Legislative Highway Oversight Committee of the North Carolina General Assembly have authorized a "Study of Minority and Women Business Participation in Highway Construction in the State of North Carolina". A Request for Proposal will be issued on or about March 10, 1992 for a contractor to conduct the study under the direction of the Joint Legislative Highway Oversight Committee. The study must be completed and a final report presented to the Joint Legislative Highway Oversight Committee not later than October 30, 1992.

The scope of the study will include a detailed examination of racial and gender discrimination in the highway construction industry and the degree and extent to which past discrimination existed and continues today. Because the results of the study will be used to support a goals program in highway construction enacted by the 1989 North Carolina General Assembly, it is imperative that the study be in compliance with the U.S. Supreme Court's Decision in City of Richmond v. J.A. Croson Company. Consequently, the contractor will be expected to propose remedies, a plan of action, policy changes, and draft legislation, if necessary.

The contractor must be able to provide sufficient resources and experience to the study to meet the project schedule.

STUDY ORGANIZATION: The Joint Legislative Highway Oversight Committee is the responsible entity for the Study. The Joint Legislative Highway Oversight Committee Subcommittee on Minority and Women Business Goals Program will be responsible for coordinating the day-to-day requirements of the study and reporting to the Joint Legislative Highway Oversight Committee, the Joint Legislative Commission on Governmental Operations, and the Legislative Services Commission.

REPORT REQUIREMENTS: The final report shall be submitted to the Joint Legislative Highway Oversight Committee on or before October 30, 1992. During the study process, progress reports will be required. Progress reports shall include timetables and preliminary findings.

If your firm is interested in receiving a copy of the Request for Proposal, please clearly indicate your desire and forward your request to:

Frederick Aikens
Fiscal Research Division
North Carolina General Assembly
Room 619, Legislative Office Building
Raleigh, North Carolina 27603-5925
Telephone: (919) 733-4910
Facsimile: (919) 733-3113

Richard Bostic
Fiscal Research Division
North Carolina General Assembly
Room 619, Legislative Office Building
Raleigh, North Carolina 27603-5925
Telephone: (919)733-4910
Facsimile: (919)733-3113

Your written request for a copy of the RFP must be received no later than March 4, 1992.

Sincerely,

Thomas L. Covington
Director

SPECIAL ISSUE

SLRC

LEGISLATIVE BULLETIN

Number 8 Southern Regional Council Fall 1990

After Richmond —

Defending Minority Business Enterprise Programs

BY BRIDGET ARIMOND

In January, 1989, the United States Supreme Court ruled that the City of Richmond's minority business enterprise (MBE) program was unconstitutional. Under that program, Richmond had established a goal of awarding 30 percent of all city construction contracting dollars to MBEs. In striking down this program, the Court ruled that Richmond had failed to show (1) that MBEs in Richmond were suffering the effects of discrimination and (2) that Richmond's MBE program did more than was necessary to remedy that discrimination.

The Richmond decision does *not* mean that the days of minority business enterprise programs are over. However, it *does* mean that state and local governments must meet onerous new standards of proof before they can enact new MBE programs. And, state and local governments that already have such programs in place must reassess those programs and make sure that they are supported by the kind of factual predicate that the Supreme Court now has said is necessary.

In order to defend a race-conscious MBE program, a state or local government must be able to satisfy two tests. First, it must be able to show that it has a "compelling governmental interest" in implementing such a program. The Supreme Court agrees that state and local governments do have a compelling interest in remedying the lingering effects of past or present discrimination. However, if this is the stated purpose of the program, then the jurisdiction must be able to point to solid evidence that there has been discrimination against MBEs within that geographic area.

The jurisdiction may meet this test by showing that the effects of its own past or present discriminatory actions continue to deprive MBEs of fair con-

(Continued on Page 2)

Atlanta study shows how to meet the *Croson* standards and win

BY THOMAS D. BOSTON

In 1845, the Georgia General Assembly passed a law which made it a misdemeanor for a white person to engage in trade with a black contractor. A century and a half later, discrimination is not nearly so straightforward.

A recently completed Minority Business Enterprise (MBE) study for the City of Atlanta and Fulton County, "Public Policy and Promotion of Minority Economic Development," shows that substantial racial barriers still exist for minority entrepreneurs and that the present effects of past discrimination are profound.

Nonetheless, the growing conservatism and insensitivity of the U.S. Supreme Court to racial inequity — and the resulting preconditions the Court now demands for the establishment of MBE programs — have caused many cities to abandon their affirmative action efforts in favor of more race-neutral alternatives.

Current conditions make it necessary to ask: Is the *Croson* standard so impossible to meet?

As a member of the research team that conducted the Atlanta study, I would like to share some of our findings with you, especially since few public officials will likely have time to read the entire eight-volume study. My observations will primarily be limited to conclusions of the economic analysis, since this was the area that occupied most of my efforts. For a more general summary of the entire study, read

(Continued on Page 4)

About this Special Issue

Assessing the Impact of Recent Court Cases on Minority Business

In 1989, as democracy movements worldwide gained momentum, democratic ideals were under fire here at home. In *Richmond v. Croson* and other cases, the U.S. Supreme Court resurrected impediments to economic parity for minorities. We hope this special newsletter will stimulate strategic thinking among Southern legislators, city officials, and MBE program administrators to address these challenges. — SLRC STAFF

NCHRP
National Cooperative Highway Research Program

LEGAL RESEARCH DIGEST

September 1992 Number 25

Legal Research Digests are issued to provide early awareness and encourage application of research results emanating from NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs." These Digests contain supplements and new papers that are periodically compiled as addenda to the treatise, *Selected Studies in Highway Law*, published by the Transportation Research Board.

Areas of Interest: IA Planning and Administration, IC Transportation Law, IIIB Materials and Construction, V Aviation, VI Public Transit, VII Rail

Supplement to

Minority and Disadvantaged Business Enterprise Requirements in Public Contracting

A report prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency conducting the research. The report was prepared by Orrin F. Finch. James B. McDaniel, TRB Counsel for Legal Research, was the principal investigator when this study was concluded. Robert Cunliffe and Ross D. Netherton served as principal investigators during the study.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report supplements and updates a paper in Volume 3, *Selected Studies in Highway Law* (SSHL), entitled "Minority and Disadvantaged Business Enterprise Requirements in Public Contracting," pp. 1582-N1 to 1582-N62.

This supplement will be published in a future addendum to SSHL. Volumes 1 and 2 deal primarily with the law of eminent domain and the planning and regulation of land use. Volume 3 covers government contracts. Volume 4 covers environmental and tort law, inter-governmental relations, and motor carrier law. An expandable format permits the incorporation of both new topics as well as supplements to published topics. Updates to the bound volumes are issued by addenda. The 5th Addendum was published in November 1991. Addenda are published on an average of every three years. Between addenda, legal research digests are issued to report completed research. Presently the text of SSHL totals over 4,000 pages comprising 75 papers.

Copies of SSHL have been sent, without charge, to NCHRP sponsors, certain other agencies, and selected university and state law libraries. The officials receiving complimentary copies in each state are: the Attorney General and the Chief Counsel and Right-of-Way Director of the highway agency. Beyond this initial distribution, the 4-volume set is for sale through the Transportation Research Board ($185.00).

APPLICATIONS

The foregoing research should prove helpful to highway and transportation administrators, their legal counsel, contractors, federal administrators, civil rights officials, policy and planning staff, and others involved in implementing affirmative action plans and the disadvantaged, minority, and female business enterprise programs. Officials are urged to review their practices and procedures to determine how this research can effectively be incorporated in a meaningful way. Attorneys should find this paper especially useful in their work as an easy and concise reference document in Federal requirements for public contracts.

CONTENTS

Supplement to

MINORITY AND DISADVANTAGED BUSINESS ENTERPRISE REQUIREMENTS IN PUBLIC CONTRACTING

SUPPLEMENTARY MATERIAL

Editor's note: Supplementary material to the paper "Minority and Disadvantaged Business Enterprise Requirements in Public Contracting" is referenced to topic headings therein. Topic headings not followed by a page number relate to new material.

SPLIT SPLINTERED AND STRUGGLING SUPREME COURT [1582-N11]

The first four affirmative action plan (AAP) decisions of the United States Supreme Court in the article being supplemented covered a period of six years. It revealed a court evenly divided into three distinct points of view: Three justices never saw an AAP that did not pass constitutional muster; three justices rarely found an AAP that was constitutional; and three justices provided the swing votes, twice invalidating the programs and twice upholding them on very tenuous differences.

In the intervening seven years since the original paper was prepared, the Court has filed opinions in nine more AAP cases. The Justices remain as sharply divided as before except that the middle group of three justices, which had previously provided the deciding swing votes, are now more inclined to support the more conservative members of the Court. This has resulted in more 5–4 splits on the Court with an increased emphasis on a strict scrutiny of race-conscious programs rather than the previous 3-way splits with plurality opinions.

This is partly a result of the appointment of Justice Scalia following the retirement of Chief Justice Burger and the appointment of Justice Kennedy replacing Justice Powell. Justice Stevens in the earlier cases was very skeptical of all AAPs except those devised by a court. In all the subsequent cases except one, he joined with the three most liberal justices voting to uphold the AAPs. Justice Powell continued in his role of providing the swing vote until replaced by Justice Kennedy who appears to be solidly opposed to most AAPs based on race. Justice White who earlier tended to uphold AAPs has in the later decisions been opposed to them except for the Court's most recent decision upholding the Federal Communications Commission's (FCC) minority preference policies regarding television broadcast licenses.[1] Opinions authored by Justice O'Connor since the original paper was written reveal that she is decidedly aligned with Justices Scalia and Kennedy and Chief Justice Rehnquist in applying strict scrutiny standards to all racial preference programs.

Even though the court has become more polarized on the issue, as evidenced in the recent *Croson* decision, they have persisted in the proliferation of separate opinions. Even in *Croson* where for the first time a solid 6–3 judgment invalidated the City of Richmond's AAP, six of the nine justices wrote separately.

Each of the nine cases handed down since the main article was written is discussed herein except that the chronological order is dispensed with in favor of directing emphasis first to the three most significant of these decisions in *Wygant, Croson,* and the most recent *FCC* cases.

Nearly two years after its decision in the *Stotts* case, the High Court once again addressed the issue of apportioning layoffs as a means of preserving the effects of an affirmative action hiring policy. In *Wygant v. Jackson Board of Education,*[2] as in *Stotts,* more tenured white teachers were laid off in preference to retaining probationary minority teachers in order to maintain affirmative action gains in minority hirings. This time the layoff provision was tested as against the Equal Protection Clause rather than the Civil Rights Act, with the same conclusion that the provision unconstitutionally discriminated against white workers.

In *Wygant,* the collective bargaining agreement with the teachers' union included a layoff provision retaining teachers with the most seniority except when the percentage of minority teachers laid off exceeded the percentage of minority personnel employed at the time of the layoff. Later, when it was necessary for the school board to institute layoffs, it became apparent that probationary minority teachers would be retained at the expense of tenured nonminority teachers. Rather than adhere to the collective bargaining provision the school board retained the tenured teachers and laid off the probationary minority teachers.

Initially, the union and two minority teachers filed suit in state court[3] against the school board claiming violations of the Equal Protection Clause and the Civil Rights Act, and for breach of the collective bargaining agreement. The state court ruled that the school board had breached its contract and that the layoff preference based on race did not violate the Civil Rights Act. The state court determined that there had been no history of overt past discrimination by the parties to the collective bargaining agreement, but upheld the preferential layoff provision as a permissible attempt to remedy the effects of past societal discrimination.

Thereafter the school board adhered to the layoff provision, retaining minority teachers in preference to more tenured nonminority teachers. The displaced nonminority teachers then instituted a federal action alleging violations of the Equal Protection Clause and the Civil Rights Act.

On summary judgment the federal district court ruled that as to the equal protection claim, the racial preference need not be based on findings of past discrimination. Societal discrimination and the desire to provide "role models" for minority students were sufficient to justify the preferential layoff provision against constitutional attack. The Court of Appeals agreed with this rationale.

The Supreme Court reversed, 5–4, with Justice Powell writing what was again a plurality opinion, joined by Chief Justice Burger and Justice Rehnquist. Justice O'Connor concurred in part and concurred in the judgment as did Justice White. The remaining four Justices dissented.

Justice Powell set forth the constitutional analysis that was later to serve as the basis for Justice O'Connor's deciding opinion in the *Croson* case. This rationale requires that the classification based on race be subjected to a strict scrutiny test involving an examination of whether the racial classification is justified by a compelling state interest, and that the means chosen to effectuate that purpose is "narrowly tailored."

Applying these principles, Justice Powell concluded that providing minority role models was not a compelling state interest and that reliance on societal discrimination fails to provide the needed factual predicate of evidence of prior acts of discrimination. Nor was the means chosen to accomplish the school board's race-conscious purpose specifically and narrowly tailored to accomplish that purpose.

Interestingly, Justice O'Connor writing separately analyzed the various opinions of the other justices in other AAP cases in what appears to be an attempt to rationalize the divergent views expressed up to that time suggesting the possibility of a consensus of views:

> Although Justice Powell's formulation may be viewed as more stringent than that suggested by Justices Brennan, White, Marshall, and Blackmun, the disparities between the two tests do not preclude a fair measure of consensus. . . . The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. . . .[4]

Contrary to a position she later adopted in *Croson,* Justice O'Connor expressed the view that contemporaneous finding of actual discrimination need not be adopted as long as the public entity has a firm basis for believing that remedial action is required:

> In sum, I do not think that the layoff provision was constitutionally infirm simply because the School Board, the Commission or a court had not made particularized findings of discrimination at the time the provision was agreed upon. . . .[5]

Justice White also concurred in the judgment but was unable to join in the plurality opinion. Apparently he viewed the issue with regard to a layoff situation in a more simplistic fashion:

> . . . Whatever the legitimacy of hiring goals or quotas may be, the discharge of white teachers to make room for blacks, none of whom has been shown to be a victim of any racial discrimination is quite a different matter. I cannot believe that in order to integrate a work force, it would be permissible to discharge whites and hire blacks until the latter comprised a suitable percentage of the work force. . . .[6]

Three of the dissenters framed the central constitutional issue quite differently: Whether the Constitution prohibits a union and a school board from developing a collective bargaining agreement that apportions layoffs between two racial groups as a means of preserving an AAP that has not been challenged.

Justice Stevens, dissenting separately, did not believe it necessary to find that the board had been guilty of past discrimination, particularly since he viewed this as a voluntary AAP adopted by the union membership to preserve the existing ratio of black and white teachers, and that it served a valid public purpose.

As in the earlier *Stotts* decision, the impact of layoffs to preserve affirmative action was viewed quite differently than in hiring situations.

The plurality opinion expressed this as follows:

> Significantly, none of the cases discussed above involved layoffs.... We have previously expressed concern over the burden that a preferential layoffs scheme imposes on innocent parties. [Citations omitted.] In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.[7] (Emphasis in original.)

The major significance of *Wygant* is in expressing the strict scrutiny standard of review in testing an AAP in terms of a factual predicate of prior acts of discrimination and a narrowly tailored remedy, as well as a rejection of the concept of societal discrimination as justification for the lack of a factual predicate. This opinion represented only a plurality decision but these concepts ultimately flourished as a majority opinion two and one-half years later in the *Croson* case.

The *Croson* Case [1582-N21]

Two months after its *Wygant* decision, the Supreme Court granted certiorari in *J.A. Croson Co. v. City of Richmond* and at the same time vacated the decision of the Fourth Circuit upholding the City of Richmond's bidding preference program and remanded the case to the lower appellate court with directions to reconsider its decision in light of the recent *Wygant* decision.[8]

The City of Richmond, Virginia, advertised for competitive bids to refurbish the plumbing fixtures in its city jail. The city by ordinance had established a minority preference program that required nonminority-owned prime contractors to subcontract at least 30 percent of the total contract to minority business enterprises (MBEs). J. A. Croson submitted the only bid and provided no minority participation, although several minority suppliers had been contacted without success. Croson requested a waiver of the MBE requirement, which the city denied.

A major portion of the contract involved the purchase of plumbing fixtures, so Croson next arranged for a minority supplier of the fixtures, but at a price higher than the original supplier relied upon in the bid. A higher contract price to accommodate the MBE supplier was also rejected by the city.

In the litigation that followed, the federal district court upheld the city's minority plan in all respects. The Court of Appeals initially affirmed,[9] but on remand following the Supreme Court order directing reconsideration in light of its intervening *Wygant* decision, the Circuit Court in a split decision reversed the judgment on the basis that the ordinance violated the Equal Protection Clause of the United States Constitution.[10] The Supreme Court again granted certiorari, and this time affirmed the Circuit Court's ruling.[11]

In many ways the *Croson* case is a watershed decision. Leading up to this decision the Court was split to such a degree that it was often difficult

for a majority to agree on one opinion involving an AAP. For the first time, a majority agreed that racially based preferential programs will be subject to the constitutional strict scrutiny test. Until this case, Justice White had favored an intermediate scrutiny test. Also Justice Kennedy, in his first opportunity to review an AAP, favored application of the strict scrutiny test.

In addition, this case reinforced the Court's earlier plurality ruling in *Wygant* that reliance on "societal discrimination" will not suffice. The effect of these two principles of strict scrutiny and inability to rely on societal discrimination means that classifications based on race will be presumed invalid. The three dissenters contended that the more traditional "substantial relationship" standard should apply as it would in ordinary equal protection cases.

Technically, Justice O'Connor's opinion, which was divided into six distinct parts, represented the majority views of the Court on only three of those parts: Part I, Part III-B, and Part IV. As a practical matter, however, Justice Scalia's vote can be added to those favoring her opinion. In a concurring opinion he states:

> I agree with much of the Court's opinion, and, in particular, with Justice O'Connor's conclusion that strict scrutiny must be applied to all governmental classifications by race, whether or not its asserted purpose is "remedial" or "benign." [Citation omitted.] I do not agree, however, with Justice O'Connor's dictum suggesting that, despite the Fourteenth Amendment, state and local governments may in some circumstances discriminate on the basis of race in order (in a broad sense) "to ameliorate the effects of past discrimination." [Citation omitted.][12]

Viewed in this fashion, most of Justice O'Connor's opinion represents a 6–3 judgment of the Court, and only Part II failed to achieve majority support. This part dealt with the applicability of the *Fullilove* decision, previously discussed in the main paper, as to whether it provides authority for local legislative bodies to adopt an AAP without independent findings of past discrimination.

Part I of the majority opinion[13] sets forth the facts in light of the Court's earlier *Wygant* ruling against reliance on "societal discrimination" and concludes as follows:

> There was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors.... ([The public witnesses] indicated that the minority contractors were just not available. There wasn't a one that gave any indication that a minority contractor would not have an opportunity, if he were available").[14]

Extensive quotation from the District Court of Appeals majority opinion following reconsideration is also relied on to the effect that the city council had not established a record or findings of prior discrimination and that the 30 percent set-aside was chosen arbitrarily and not narrowly tailored.

The city in its arguments relied heavily on *Fullilove v. Klutznick*[15] previously discussed in the paper being supplemented. In that case Chief

Justice Burger writing a plurality opinion concluded that Congress in establishing a 10 percent MBE federal set-aside program was not required to establish a record or adopt findings of past discrimination. The City of Richmond contended that *Fullilove* was controlling and provided the City with "sweeping legislative power to define and attack the effects of prior discrimination in its local construction industry."[16]

In distinguishing the *Fullilove* opinion, Justice O'Connor viewed sections 1 and 5 of the Fourteenth Amendment as limitations on the powers of the states and an enlargement of the power of Congress to identify and redress the effects of societal discrimination:

> . . . We simply note what should be apparent to all—§ 1 of the Fourteenth Amendment stemmed from a distrust of state legislative enactments based on race; § 5 is, as the dissent notes, " 'a *positive* grant of legislative power' " to Congress. [Citations omitted.] Thus, our treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here. . . .[17] (Emphasis in original.)

This part of the opinion was supported only by Chief Justice Rehnquist and Justice White and does not represent the views of the majority of the Court on this point. Justice Scalia, however, in concurring in the judgment adopted Justice O'Connor's rationale for recognizing broader congressional authority on this subject:

> . . . As Justice O'Connor acknowledges . . . it is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment, see U. S. Const. Amdt. 14, § 5—and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed, see Amdt. 14, § 1. . . . I do not believe our decision in that case [*Fullilove*] controls the one before us here.[18]

In his first AAP case since joining the Court, Justice Kennedy joined in all of Justice O'Connor's opinion except for Part II dealing with *Fullilove.* He concluded that the City of Richmond's action violated the Equal Protection Clause and that it would equally constitute a violation if enacted by Congress:

> . . . With the acknowledgment that the summary in Part II is both precise and fair, I must decline to join it. The process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me; but as it is not before us, any reconsideration of that issue must await some further case. . . .[19]

Thus, Justice Kennedy preferred to reserve judgment as to the future viability of the *Fullilove* plurality opinion and saw no necessity to distinguish the holding. In this light, Justice Kennedy's refusal to join in Part II should not be viewed as detracting from the overall significance of the majority's holding in *Croson.*

By far the most significant part of the *Croson* majority opinion is Part III-A. For the first time in a majority holding, the Supreme Court

ruled that all classifications based on race, whether benefitting or burdening minorities or nonminorities, will be subject to strict scrutiny. This ruling means as a practical matter that all such classifications by states and local governments will be presumed invalid:

> . . . We thus reaffirm the view express[ed] by the plurality in *Wygant* that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification. . . .[20]

Justice Marshall in his dissent would apply strict scrutiny in cases of classifications that discriminate against minorities but not racial classifications designed to remedy the effects of past discrimination:

> Racial classifications "drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism" warrant the strictest judicial scrutiny because of the very irrelevance of these rationales. [Citation omitted.] By contrast, racial classifications drawn for the purpose of remedying the effects of discrimination that itself was race-based have a highly pertinent basis . . .[21]

Justice O'Connor questioned the logic behind Justice Marshall's position:

> . . . How the dissent arrives at the legal conclusion that a racial classification is "designed to further remedial goals," without first engaging in an examination of the factual basis for its enactment and the nexus between its scope and that factual basis we are not told. However, once the "remedial" conclusion is reached, the dissent's standard is singularly deferential, and bears little resemblance to the close examination of legislative purpose we have engaged in when reviewing classifications based either on race or gender. [Citation omitted.] . . .[22]

Justice Stevens joined with the majority in invalidating the Richmond plan but refused to join in this part of the majority opinion:

> [I]nstead of engaging in a debate over the proper standard of review to apply in affirmative-action litigation [fn. No. 5], I believe it is more constructive to try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment. . . .[23]

In footnote No. 5, Justice Stevens quotes from *Craig v. Boren,*[24] which reveals the legal logic behind his position:

> "There is only one Equal Protection Clause. . . . It does not direct the courts to apply one standard of review in some cases and a different standard in other cases."

Justice Scalia, on the other hand, adopted the view that " 'discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.' "[25] In addition he quotes from *Plessy v. Ferguson*[26] that the "principle embodied in the Fourteenth Amendment [is] that '[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.' "[27]

Thus, Justice Scalia adopts a standard of *per se* invalidity of all remedial programs based on racial classifications adopted by the states with very few exceptions:

> In my view there is only one circumstance in which the States may act *by race* to "undo the effects of past discrimination": where that is necessary to eliminate their own maintenance of a system of unlawful racial classification. If, for example, a state agency has a discriminatory pay scale compensating black employees in all positions at 20% less than their nonblack counterparts, it may assuredly promulgate an order raising the salaries of "all black employees" to eliminate the differential. Cf. *Bazemore v. Friday,* 478 U.S. 385, 395–396 (1986). This distinction explains our school desegregation cases . . .[28] (Emphasis in original.)

Justice Kennedy was inclined to join with Justice Scalia's view of *per se* invalidity but opted for the case-by-case analysis of each racial-based plan with the view that it will provide the same result:

> The moral imperative of racial neutrality is the driving force of the Equal Protection Clause. Justice Scalia's opinion underscores that proposition, quite properly in my view. . . . His opinion would make it crystal clear to the political branches, at least those of the States, that legislation must be based on criteria other than race.
>
> Nevertheless, given that a rule of automatic invalidity for racial preferences in almost every case would be a significant break with our precedents that require a case-by-case test, I am not convinced we need adopt it at this point. On the assumption that it will vindicate the principle of race neutrality found in the Equal Protection Clause, I accept the less absolute rule contained in Justice O'Connor's opinion, a rule based on the proposition that any racial preference must face the most rigorous scrutiny by the courts. . . .[29]

Part III-B of the majority opinion is likewise a critical part of the decision for determining whether future AAPs will survive constitutional muster. Here the court sets forth the requirements that the "factual predicate" underlying the AAP be supported by adequate findings of past discrimination without reliance on generalized assertions of past discrimination:

> We think it clear that the factual predicate offered in support of the Richmond Plan suffers from the same two defects identified as fatal in *Wygant*. . . . Like the "role model" theory employed in *Wygant,* a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. . . .[30]

The Richmond City Council attempted to establish a factual predicate by relying on the exclusion of blacks from skilled construction trade unions and training programs, and on statements by proponents of the plan that there had been past discrimination in the industry and that minority business had received less than one percent of the prime con-

tracts from the city while minorities represented 50 percent of the city's population. But as viewed by the majority this was wanting:

> None of these "findings," singly or together, provide the city of Richmond with a "strong basis in evidence for its conclusion that remedial action was necessary." *Wygant*, 276 U.S., at 277 (plurality opinion). There is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry. [Citations omitted.][31] (Emphasis in original.)

This part of the majority opinion is must reading for anyone attempting to qualify or challenge an affirmative action plan based on bidding or subcontracting preferences. One factor that cannot be ignored is that the city was rigidly applying its preferential program as a strict quota rather than attempting to apply its provisions as a goal. For example, Croson was a sole bidder who demonstrated what could be described as good faith efforts to secure a minority supplier both before and after the bidding. Thus, the city was left with having to defend its program as a racial quota:

> While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia. Like the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admission, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.[32]

The Court concluded that "none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry" and ruled that as a consequence "the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race."[33]

In a parting shot, Justice O'Connor criticized the random preferential inclusion of Spanish-speaking, Oriental, Indian, Eskimo, and Aleut as well as blacks in the Richmond plan with "*absolutely no evidence* of past discrimination" against those minorities.[34] (Emphasis in original.)

In the next section, Part IV, the Court observed that without the specificity needed to identify the past discrimination it was almost impossible to assess whether the Richmond Plan was narrowly tailored. But in any event the 30 percent quota was not viewed by the majority as being narrowly tailored to any legitimate goal. On this score Justice O'Connor noted the failure of the city to consider any alternatives to the race-based quota system and its rigid adherence to the 30 percent quota and reticence in granting any waiver.

> Given the existence of an individualized procedure, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simple administrative convenience. But the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of

> a suspect classification. . . . Under Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination.[35]

Not to be underestimated is the significance of Part V of the majority opinion's concern with the failure of the city to explore possible "race-neutral devices" to increase contracting opportunities for small contractors of all races:

> Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. Many of the formal barriers to new entrants may be the product of bureaucratic inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms. . . .[36]

The majority emphasized that "[n]othing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction."[36] At the same time the Court noted the importance of adequate findings necessary for establishing the factual predicate:

> Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics. . . .[37]

The full impact of the *Croson* decision needs to be carefully sorted out. Minority preference programs exist at the local, state, and federal levels. More than 190 local governments and 36 states had public contract minority preference programs at the time of the decision.[38] Like the City of Richmond, most relied on the *Fullilove* decision as confirming full legislative authority supported at most with generalized statements and findings of past discrimination within the construction industry based on societal discrimination.

As a consequence of *Croson,* some local governments have terminated or suspended their preferential contracting programs, and some have attempted to retrofit existing plans. Are the existing programs invalid? Is so, can they be retrofitted or does *Croson* mean that all race-based preference programs in the awarding of public contracts will be unconstitutional?

A few observations seem evident; others will have to await further Supreme Court rulings. Several consequences seem apparent: (1) fixed quotas will be *per se* invalid; (2) preferential programs will be tested on a case-by-case basis; and (3) racial preference programs will be subject to strict scrutiny suggesting that they will be the exception rather than the rule.

A group of law school deans, professors, and constitutional scholars from the nation's leading law schools published what is titled "Constitutional Scholars' Joint Statement on Affirmative Action After *City of Richmond v. Croson.*" Remarkably the "statement" does not once refer to the strict scrutiny requirements or that it was for the first time adopted by a majority of the Court. Instead the Scholars insist that the decision does not require that affirmative action programs be dismantled:

> In light of the Supreme Court's January 1989 decision in *City of Richmond v. Croson,* some have recently argued that race-conscious remedies by local and state governments should be regarded as conflicting with the Constitution. As long-time students of constitutional law, we regard this assessment as wrong. The Supreme Court has insisted that affirmative action programs be carefully designed—not dismantled. A call for fairness and flexibility in affirmative action programs should never be equated with a call for retrenchment and retreat. It would defy not only the Supreme Court's decisions but the fundamental purposes of the Equal Protection Clause to conclude that the Constitution forbids all such inclusive remedial measures, or requires that such measures be treated in exactly the same way as the invidious discrimination of the nation's past.[39]

The Scholars concluded their statement with the following appeal to the courts:

> While cities should be responsible in modifying their programs to fit the Court's ruling in *Croson,* courts should follow the practical and sensible rule, adopted in analogous constitutional contexts, that would allow local governments the time to establish the relevant factual record if their programs are challenged while those local governments are engaged in a good faith effort to reevaluate their programs in light of *Croson.*[40]

Harvard Professor Charles Fried, the Solicitor General of the United States during the period many of these affirmative action cases were reviewed by the Supreme Court, authored a Response to the Scholars' Statement:

> *Croson* is not a disaster to be deplored and explained away. It is a firm and noble affirmation that in this area, too, the end does not justify the means; that every time the government compels the use of race in the distribution of burdens and benefits a deep value of our constitutional policy is affronted. It is just this principle that the scholars deny by their invocation of the distinction between "inclusive" and "exclusionary" measures, and by their celebration of "forward-looking" justifications for racial preferences. . . .
>
> *Croson* is also a welcome clarification and coming together by this Court under its new leadership of some themes that have been troubling the Court for more than a decade. The Court makes clear that a governmental unit may act to remedy not only its own past discrimination but that of identified others within its jurisdiction. But of greatest importance is the unequivocal affirmation that the equal protection clause protects all equally, and that all invocations of governmental power in racial terms, even those designated as benign, must overcome the highest burdens of scrutiny. . . .[41]

The Scholars added their Reply to Professor Fried concluding that he had overstated the implications of *Croson* in suggesting that the case signals a substantial change in the law of affirmative action.[42]

An overall reading of the *Croson* opinions indicates that local preferential programs based on race must be supported by a strong factual predicate, with a presumption of invalidity. No longer can reliance be placed on societal discrimination. Race neutral programs must first be explored and perhaps tried. Racial preferences will be approved only as a demonstrated last resort. Fixed quotas will be per se invalid. Each program will however be tested on a case-by-case basis.

Questions left unanswered by *Croson* include whether *Fullilove* is still good law for federal minority programs. If it is good law, does federal participation in local disadvantaged business enterprise (DBE) and minority preference programs suffice or must the states and locals establish independent factual predicates? Does strict scrutiny apply to gender-based preferences and can existing race-based programs be retrofitted with findings to insure their viability?

The *FCC* Cases [1582-N21]

The Supreme Court left two questions unanswered in the *Croson* decision: Whether its ruling would apply to affirmative action plans adopted by Congress and whether state and local entities may in turn rely on a federal-funding program to justify minority preferences as suggested by the plurality decision in *Fullilove*. *Croson* distinguished but did not overrule *Fullilove* in this regard.

Shortly after the *Croson* decision, the High Court vacated the judgment of an Eleventh Circuit ruling in *H. K. Porter, Inc. v. Metropolitan Dade County*[43] that relied on federal funding under the Surface Transportation Assistance Act of 1978 to justify an MBE requirement that would otherwise contravene *Croson*. In vacating the judgment, the Court remanded the case for reconsideration in light of *Croson*.

This remand suggested to many that a majority of the Supreme Court was preparing to overrule the plurality opinion in *Fullilove* as a repetition of the procedural history of the *Croson* case. The Eleventh Circuit, however, sent the case back to the district court, and the next cases to come before the High Court challenging a federal AAP were two Federal Communications Commission (FCC) cases. In a consolidated review, a 5–4 majority surprisingly upheld two FCC minority preference licensing programs and in addition refused to apply the strict scrutiny standards of *Croson*. Both cases came from the District of Columbia Circuit with opposite holdings.

In *Winter Park Communications, Inc. v. FCC* (consolidated with *Metro Broadcasting, Inc. v. FCC*),[44] Metro and Rainbow Broadcasting filed competing applications for a new television station in the Orlando, Florida, area. In conducting comparative licensing proceedings, FCC policies provide for an "enhancement" for minority ownership. The Review Board found that Rainbow's minority ownership credit outweighed Metro's local residence and civic participation advantage and awarded

the license to Rainbow. In a challenge by Metro, the Court of Appeals upheld the minority preference favoring Rainbow against a constitutional attack.

The companion case, *Shurberg Broadcasting of Hartford, Inc. v. FCC*,[45] involved a race preference in the "minority distress sale" policy of the FCC. This policy allows licensees whose renewal applications have been designated for a qualification hearing to transfer their licenses at a discounted "distress-sale" price to a minority-controlled firm rather than face the risk of losing the license at the renewal hearing. A divided Court of Appeals held the distress sale policy unconstitutional.

On review of the consolidated cases the Supreme Court in an unexpected 5–4 decision rejected the strict scrutiny standard and upheld both minority preference policies against constitutional attack.[46] Justices White and Stevens joined with the three most liberal members of the court to form the majority. Justice Brennan, who left the court shortly thereafter, wrote for the majority holding that benign race-conscious policies mandated by Congress are constitutionally permissible where they serve the legitimate governmental objectives within the power of Congress to promote diversity of programming by increasing minority ownership of broadcasting stations.

Justices O'Connor and Kennedy wrote separate dissenting opinions that vehemently asserted that strict scrutiny was the appropriate standard for holding true to the constitutional command of racial equality.

The majority relied upon the plurality opinion of *Fullilove* in giving "appropriate deference" to Congress, as a co-equal branch and in refusing to apply the strict scrutiny test:

> We hold that benign race-conscious measures mandated by Congress—even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.[47] (Footnote omitted.)

Justice Brennan also noted that *Croson* "does not prescribe the level of scrutiny to be applied to a benign racial classification employed by Congress."[48]

> We hold that the FCC minority ownership policies pass muster under the test we announce today. First, we find that they serve the important governmental objective of broadcast diversity. Second, we conclude that they are substantially related to the achievement of that objective.
>
> . . . [M]uch of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments. . . .[49]

Justice Stevens joined with the majority opinion and also wrote separately. He had dissented in *Fullilove*, and had concurred in *Croson*. His short, two-paragraph concurring opinion expressed his view of the exceptional nature of this case:

> I remain convinced, of course, that racial or ethnic characteristics provide a relevant basis for disparate treatment only in extremely rare situations and that it is therefore "especially important that the reasons for any such classification be clearly identified and unquestionably legitimate." [Quoting from his dissent in *Fullilove.*] . . . In addition [The Majority] Court demonstrates that this case falls within the extremely narrow category of governmental decisions for which racial or ethnic heritage may provide a rational basis for differential treatment. . . .[50]
> (Footnote omitted.)

Justice Kennedy in his dissent complained of the 50-page length of the majority opinion, but this was nearly matched by Justice O'Connor's dissent. In *Croson* she had studiously distinguished the *Fullilove* plurality opinion. But now she was prepared to apply her *Croson* principles to the federal government and Congress as well as to the states and local governments:

> The Constitution's guarantee of equal protection binds the Federal Government as it does the States, and no lower level of scrutiny applies to the Federal Government's use of race classifications. . . .
>
> Nor does the congressional role in prolonging the FCC's policies justify any lower level of scrutiny.[51]

She also observed that while a majority in *Fullilove* did not apply strict scrutiny, six members of the Court did reject intermediate level of scrutiny in favor of some more stringent form of review. She also complained that "benign racial classification is a contradiction in terms."

> The Court's emphasis on "benign racial classifications" suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater humility. Untethered to narrowly confined remedial notions, "benign" carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable. The Court provides no basis for determining when a racial classification fails to be "benevolent."[52]

Justice Kennedy's dissent, joined by Justice Scalia, noted the parallel with *Plessy v. Ferguson*[53] where 100 years earlier the Court had upheld the "equal but separate" accommodations for rail passengers on the basis that it was reasonable because it served the governmental interest of increasing the riding pleasures of railroad passengers:

> The interest the Court accepts to uphold the Commission's race-conscious measures is "broadcast diversity." Furthering that interest, we are told, is worth the cost of discriminating among citizens on the basis of race because it will increase the listening pleasure of media audiences. In upholding this preference, the majority exhumes *Plessy's* deferential approach to racial classifications. . . .[54]
>
> Once the Government takes the step, which itself should be forbidden, of enacting into law the stereotypical assumption that the race of owners is linked to broadcast content, it follows a path that becomes ever more tortuous. It must decide which races to favor. . . .[55]

Justice Kennedy viewed the strict scrutiny test as essential to maintaining racial equality: "Strict scrutiny is the surest test the Court has yet devised for holding true to the constitutional command of racial equality."[56]

Justice White had joined with Chief Justice Burger in the *Fullilove* plurality opinion and he also had joined with Justice O'Connor in every part of her *Croson* opinion. He did not write separately regarding any of these three decisions, but we must assume that he would apply *Croson* only to state and local AAPs.[57] Other distinctions do exist to possibly account for his position on these two cases. For example, *Croson* involved competitive bidding of construction work whereas the *FCC cases* concerned subjective, comparative negotiations in conferring exclusive broadcasting licenses to operate in a more social setting.

The viability of the *FCC cases* must also be questioned in light of the retirement of Justice Brennan and the extremely narrow reasoning offered by Justice Stevens in supporting Brennan's opinion. He had dissented in *Fullilove* and cannot be counted on to support any particular philosophical position in this area.

Professor Devins in a comment highly critical of the *FCC* decision, attributed this to "Brennan's ability to build coalitions that sacrifice doctrinal purity to achieve the desired outcome."[58]

Assuming *Fullilove* survives another Supreme Court test one still cannot rule out the possibility that a majority may require any state or local entity seeking the umbrella of the federal AAP to provide its own factual predicate as with any other local program. For example, the Surface Transportation Assistance Act of 1982 (STAA)[59] and the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA)[60] require the transportation or highway agency of each state to establish its DBE goals. Congress has provided that not less than 10 percent of all funding shall be to DBEs (including women) with provisions for waivers. The Supreme Court could require that each state provide the factual predicate justifying its statewide and project goals within the standards of *Croson.* Further answers must await later decisions.

Supreme Court Cases Between *Wygant* and *Croson* [1582-N21]

The *Wygant* decision was filed by the Supreme Court on May 19, 1986, and *Croson* on January 23, 1989. Five other AAP cases were ruled on in the interim between these two decisions. As a consequence these intervening cases have taken on positions of lesser importance. These interim cases plus *Martin v. Wilkes* filed shortly after *Croson* are treated here briefly in the chronological order of the Supreme Court rulings.

Basemore v. Friday[61]

This case preceded Justice Scalia's appointment to the Court, but it does represent the one circumstance where he recognized that the states may establish a race-conscious remedy to undo the effects of their own past discrimination "where that is necessary to eliminate their own maintenance of a system of unlawful racial classification."[62]

In the *Friday* case the state of North Carolina Agricultural Extension Service was responsible for the state's "4-H" program. Historically the Extension Service maintained two separate racially segregated branches and paid black employees less than white employees. To comply with federal law the two branches were merged but some salary disparities continued. A unanimous Supreme Court ruled this was a violation of Title VII, and that it was an error to have rejected the petitioners' regression analysis designed to demonstrate that blacks were paid less than similarly situated whites.

Up to this point the Court was unanimous in agreeing with Justice Brennan's opinion. Beyond this however, Justice White, writing for a majority including Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor, ruled that the Extension Service was not operated in a discriminatory manner where the segregated 4-H club policy was discontinued following the Civil Rights Act of 1964 and all existing and newly formed clubs were opened to eligible persons regardless of race. The majority found no evidence of discrimination and concluded from the District Court's finding that any racial imbalance was "the result of wholly voluntary and unfettered choice of private individuals."[63] The opinion distinguished the necessity for affirmative action programs through busing: "While school children must go to school, there is no compulsion to join 4-H [Clubs] . . ."[64]

Justices Brennan, Marshall, Blackmun, and Stevens dissented to this second part of the judgment on the basis that "[i]t is absurd to contend that the requirement that States take 'affirmative action' is satisfied when the Extension Service simply declares a neutral admissions policy and refrains from illegal segregative activities. . . ."[65]

Sheet Metal Workers v. EEOC[66]

In a particularly egregious factual setting, the High Court again split on whether the federal district court could establish a 29 percent non-white "goal" or "quota" for apprentices. The trial court had concluded that the union was engaged in a pattern and practice of discriminating against non-whites in recruiting, selection, training, and admission into the union. The court established the 29 percent minority membership requirement based on the percentage of non-whites in the relevant labor pool in New York City. The union was held in contempt several times for its failure to comply with court orders. The union contended that the membership goal exceeded the scope of remedies available under Title VII because the race-conscious preferences were extended to benefit individuals who were not identified victims of the unlawful discrimination.

The majority ruled that the correctness of the 29 percent figure was not before them because that had been the subject of a prior appeal that never reached the Supreme Court. The contempt orders were found to be civil in nature designed to coerce compliance with the court's orders, rather than to punish for contemptuous conduct.

The union, joined by the Solicitor General, argued that the membership goal and other court orders that required preferential treatment to non-

whites were expressly prohibited by Section 706(g) of Title VII[67] on the basis that this section authorized judicially ordered preferential relief only to the actual victims of unlawful discrimination. In a plurality portion of Justice Brennan's opinion this argument was rejected.

Section 706(g) expressly provides that in case of intentional unlawful employment practices "the court may enjoin . . . such . . . practice, and order such affirmative action as may be appropriate." The plurality also concluded that statements made in the congressional debates to the effect that Title VII would not require employers or unions to adopt quotas or racial preferences were not intended to limit relief under Section 706(g) but to provide assurance that quotas or racial balancing would not be required to avoid being charged with unlawful discrimination:

> [W]hile Congress strongly opposed the use of quotas or preferences merely to maintain racial balance, it gave no intimation as to whether such measures would be acceptable as *remedies* for Title VII violations.[68] (Footnote omitted, emphasis in original.)

At the same time Justice Brennan emphasized that judicially created AAP's are not always the proper remedy:

> In particular, the court should exercise its discretion with an eye towards Congress' concern that race-conscious affirmative measures not be invoked simply to create a racially balanced work force. In the majority of Title VII cases, the court will not have to impose affirmative action as a remedy for past discrimination, but need only order the employer or union to cease engaging in discriminatory practices and award make-whole relief to the individuals victimized by those practices.[69]

The plurality opinion also denied the union's contention that the membership goal violated the equal protection component of the Due Process Clause of the Fifth Amendment but acknowledged that the proper test had not been agreed on:

> We have consistently recognized that government bodies constitutionally may adopt racial classifications as a remedy for past discrimination. [Citations omitted.] We have not agreed, however, on the proper test to be applied in analyzing the constitutionality of race-conscious remedial measures. [Citations omitted.] We need not resolve this dispute here, since we conclude that the relief ordered in this case passes even the most rigorous test—it is narrowly tailored to further the Government's compelling interest in remedying past discrimination.[70]

Justice Powell concurred in part and concurred in the judgment. He expressed the view that the particularly egregious conduct of the union made injunctive relief insufficient, justifying imposition of the numerical goal within the purview of Section 706(g). Regarding the constitutional challenge, he reiterated his position expressed in *Wygant* that any preference based on race "must necessarily receive the most searching examination."[71] Applying this strict scrutiny standard he concluded that the union's outrageous violations of Title VII "establishes, without doubt, a compelling governmental interest sufficient to justify the imposition of a racially classified remedy."[72] Justice Powell then focused

intensely on the issue of whether the district court's remedy was narrowly tailored, and the factors to be considered.

Justice Powell concluded that the judicially tailored AAP did pass constitutional muster, but cautioned that this was viewed as an exceptional situation:

> My view that the imposition of flexible goals as a remedy for past discrimination may be permissible under the Constitution is not an endorsement of their indiscriminate use. Nor do I imply that the adoption of such a goal will always pass constitutional muster.[73] (Footnote omitted.)

Justice O'Connor concurred in part and dissented in part. She would have reversed the judgment on statutory grounds and would not have reached the constitutional issue, although she viewed the "goal" as a rigid racial quota. She interpreted Section 703(j) as limiting the remedial authority of the district court where it states:

> *Nothing contained in this title shall be interpreted to require* any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin. . . .[74] (Emphasis in original.)

Justice White in his dissent noted the general policy of Title VII to limit judicial relief for racial discrimination in employment to actual victims of the discrimination. In addition he concluded that the net effect of the AAP was a strict racial quota:

> [T]he cumulative effect of the revised affirmative-action plan and the contempt judgments against the union established not just a minority membership goal but also a strict racial quota that the union was required to attain. We have not heretofore approved this kind of racially discriminatory hiring practice, and I would not do so now. . . .[75]

Justice Rehnquist, joined by Chief Justice Burger, dissented based on Section 706(g):

> I express my belief that § 706(g) forbids a court to order racial preferences that effectively displace nonminorities except to minority individuals who have been the actual victims of a particular employer's racial discrimination. . . .[76]

The unique features of this case are first, the flagrant conduct of the union which repeatedly ignored and defied orders of the court regarding its membership practices, and, second, the fact that the district court's AAP did not disadvantage or displace any existing union member. As Justice Powell noted: "In contrast to the layoff provision in *Wygant,* the goal at issue here is akin to a hiring goal" where the burden is diffused to a considerable extent among society generally.[77]

Firefighters v. Cleveland[78]

The *City of Cleveland* firefighters' case, argued and decided by the Supreme Court on the same day as the *Sheet Metal Workers'* case, also involved interpretation and application of Section 706(g). The question here, however, was whether the prohibitions of that section regarding orders of the court establishing hiring or promotion goals applied to a consent decree.

The majority, with Justices White and Rehnquist and Chief Justice Burger dissenting, ruled that an AAP set forth in a voluntary settlement embodied in a consent decree was not within the orders referred to in Section 706(g) even though the firefighters' union representing the affected non-minority firefighters was not a party to the settlement or the consent decree:

> [W]e hold that whether or not § 706(g) precludes a court from imposing certain forms of race-conscious relief after trial, that provision does not apply to relief awarded in a consent decree. . . .[79] (Footnote omitted.)

Constitutional questions regarding the AAP were not before the court, thus Justice Brennan writing for a clear majority was free to rely on the *Weber* case reviewed previously in the main text, which involved a contractual AAP between private parties and thus not subject to Fourteenth Amendment review.

In the *Cleveland* case an organization known as the Vanguards, representing black and Hispanic firefighters, had filed a complaint against the city charging discrimination based on race in the hiring, assignment, and promotion of firefighters. The firefighters' union representing most of the non-minority firefighters intervened seeking an injunction requiring all promotions based on examination results.

The city and the Vanguards proposed a consent decree to implement a promotional AAP later modified and adopted by the federal district court as a consent decree over the objection of the intervening union. The decree required one-half of the 66 initial promotions to Lieutenant go to minority firefighters with goals specified for other ranks as well.

The majority noted that Section 706(g) does not restrict the ability of employers or unions to enter into voluntary AAPs which include race-conscious remedial action. Likewise, the majority treated the consent decree as a voluntary settlement of litigation rather than as a court order subject to Section 706(g):

> To be sure, consent decrees bear some of the earmarks of judgments entered after litigation. At the same time, because their terms are arrived at through mutual agreement of the parties, consent decrees also closely resemble contracts. [Citations omitted.]. . . .
>
> Because this Court's cases do not treat consent decrees as judicial decrees in all respects and for all purposes, we think that the language of Section 706(g) does not so clearly include consent decrees as to preclude resort to the voluminous legislative history of Title VII. . . . [T]he use of the verb "require" in Section 706(g) suggests that it was the coercive aspect of a judicial decree that Congress had in mind. . . .[80]

Nor did the majority deviate in its position even though the consent decree provided broader relief than the court could award following a trial and was subject to modification by the court over objections of a consenting party. Nor was lack of consent of the union critical because the decree does not impose any obligations on third parties.

Justice O'Connor joined with the majority but wrote separately to emphasize her view "that the Court's holding is a narrow one."[81] Justice White in dissenting expressed the view that an employer cannot choose to discriminate against either blacks or whites in either hiring or promotion to achieve a racially balanced work force without violating Title VII.[82] He also criticized the majority's reliance on *Steelworkers v. Weber* where the company's prior discriminatory conduct provided the predicate for the temporary remedy favoring black employees. "Th[at] case did not hold that without such a predicate, an employer, alone or in agreement with the union, may adopt race-conscious hiring practices without violating Title VII."[83] Justice White also expressed the view that the district court may not enter a consent decree that exceeds what the court could order following a contested trial. Thus, he concluded that the consent decree itself was not immune from the restrictions of Section 706(g).

Justice Rehnquist's dissent first viewed this case as having been decided in *Firefighters v. Stotts* with the only distinction being that this case involved a consent decree structured almost entirely by the parties as opposed to the *modification* of an existing decree. Second, he relies on the literal language of Section 706(g) that no order of the court shall require promotion of an individual except where the failure to receive the promotion was the result of prohibited discrimination. In the absence of a finding that the minority firemen who will receive preferential promotions were the victims of racial discrimination and awarding competitive seniority to the victim as held in *Stotts*, Justice Rehnquist would have reversed the court below.

The Paradise Case

On February 25, 1987, the Supreme Court decided *United States v. Paradise.*[84] This was another 5–4 decision with the plurality opinion authored by Justice Brennan, joined by Justices Marshall, Blackmun, and Powell. Justice Stevens concurred in the judgment and the four remaining jurists dissented.

The issue in *Paradise* involved a court-ordered AAP requiring the Alabama Department of Public Safety to promote one black trooper for each white trooper promoted and the question whether this violated the Equal Protection guarantee of the Fourteenth Amendment. The initial action was filed in 1972 by the National Association for the Advancement of Colored People (NAACP) challenging the discriminatory hiring practices of the Department, which had never hired a black trooper in all its 37-year history. The United States was joined as a plaintiff and Phillip Paradise, Jr. intervened on behalf of a class of black plaintiffs.

The district court judge ordered the Department to hire one black for each white trooper hired until the blacks constituted approximately 25

percent of the state's trooper force. This was appealed, but affirmed by the Fifth Circuit as a temporary hiring requirement.[85]

The plaintiffs returned to court several times seeking further relief from the Department's tactics to delay or frustrate compliance with the court-ordered AAP. This led to consent decrees in 1979 and 1981 pertaining to the Department's failure to promote a single black trooper to the rank of corporal or above. The Department agreed to develop a promotional procedure that would not discriminate against black troopers.

In 1983 the plaintiffs obtained an order requiring that blacks be promoted to corporal at the same one-for-one rate at which they had been hired until the promised promotional procedure was developed and implemented by the state. Certain white applicants for promotion intervened to oppose any quota, but the court imposed a 50 percent promotional quota provided there were qualified black candidates until the particular rank was composed of 25 percent black troopers.

The difference between Justice Brennan's opinion and the dissenters was based on whether the ordered relief met the strict scrutiny test. Justice Brennan did not concede the applicability of the test but took the position that the judicially tailored AAP met the higher standard:

> [A]lthough this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes, it has yet to reach consensus on the appropriate constitutional analysis. We need not do so in this case, however, because we conclude that the relief ordered survives even strict scrutiny analysis: it is "narrowly tailored" to serve a "compelling [governmental] purpose."[86] (Citation and footnote omitted.)

As in the *Sheet Metal Workers* case, the relief ordered by the district court "was imposed upon a defendant with a consistent history of resistance to the District Court's orders, and only *after* the Department failed to live up to its court-approved commitments."[87]

The one-for-one promotion quota was also determined to be narrowly tailored:

> In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties. [Citations omitted.] When considered in light of these factors, it was amply established, and we find that the one-for-one promotion requirement was narrowly tailored to serve its several purposes, both as applied to the initial set of promotions to the rank of corporal and as a continuing contingent order with respect to the upper ranks.[88]

The majority did not view the one-for-one requirement as a goal in itself but rather as the rate or speed at which the 25 percent black goal or quota was to be achieved. Unlike *Wygant* the one-for-one promotion requirement did not involve the discharge of white troopers and thus was viewed by the majority as not resulting in disproportionate harm to the

interests or rights of innocent parties. Lastly, the majority viewed the judicial remedy as temporary and flexible.[89]

Justice Stevens concurred in the judgment but not in Justice Brennan's opinion. In his view, district court judges have broad, flexible authority to remedy racially discriminatory actions by the state and should not be subjected to a strict scrutiny standard of review.[90] He would apply the broad judicial authority for fashioning race-conscious remedies found in the school desegregation cases, particularly in *Swann v. Charlotte-Meclenburg Board of Education:*[91]

> [A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interest, the condition that offends the Constitution.
>
> In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system.[92] (Citation omitted.)

Justice Powell joined in Justice Brennan's plurality opinion and wrote separately to emphasize his position that court-ordered as well as government-adopted affirmative action plans "must be most carefully scrutinized,"[93] which the Court properly did in its opinion:

> In determining whether an affirmative-action remedy is narrowly drawn to achieve its goal, I have thought that five factors may be relevant: (i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force; (iv) the availability of waiver provisions if the hiring plan could not be met; and (v) the effect of the remedy upon innocent third parties. [Citation omitted.] The Court's opinion today makes clear that the affirmative action ordered . . . was narrowly drawn to achieve the goal of remedying the proven and continuing discrimination. . . .[94]

Also Justice Powell made special note that the effect of the court-ordered AAP will have little impact on innocent white troopers.[95]

Justice O'Connor writing for the dissenters acknowledged the " 'pervasive, systematic, and obstinate discriminatory conduct' "[96] of the Department, and the court's obligation to fashion a remedy to end its egregious history of discrimination against blacks. But in doing so Justice O'Connor does not view the majority opinion as applying the strict scrutiny test:

> The plurality today purports to apply strict scrutiny, and concludes that the order in this case was narrowly tailored for its remedial purpose. Because the Court adopts a standardless view of "narrowly tailored" far less stringent than required by strict scrutiny, I dissent.[97]
>
> Given the singular *in terrorem* purpose of the District Court order, it cannot survive strict scrutiny. . . . The District Court had available several alternatives that would have achieved full compliance with the consent decrees without trammeling on the rights of nonminority troopers. . . .[98] (Emphasis in original.)

The dissent also viewed the one-for-one promotion quota as exceeding anything justified by the record.[99]

Johnson v. Transportation Agency

The *Johnson* case[100] concerned a voluntary AAP adopted by the Santa Clara County, California, Transportation Agency favoring the promotion of minorities, females, and the handicapped. The petitioner, Paul Johnson, a male employee in the road maintenance department, was passed over for promotion to dispatcher in favor of a female maintenance worker, Diane Joyce, even though it was determined he was more qualified.

Regarding the job classification relevant to the case, none of the 238 employees in that skilled position was a woman. The stated long-term goal of the AAP adopted by the Agency was to attain a work force of minorities and women in proportion to the overall area labor force. Thus, in this skilled category the Agency's goal was an eventual 36 percent women.

The district court found that the sex of Joyce was the "determining factor in her selection" and that the AAP failed to satisfy the criterion of the *Weber* case that the plan be temporary. The Ninth Circuit reversed holding that the absence of an express termination date was not dispositive.

Justice Brennan once again delivered the judgment of the Supreme Court and expressed the views of the majority of the Court in unholding the AAP as against a Title VII challenge by Johnson under the authority of the *Weber* decision. No Equal Protection challenge was made by Johnson, therefor the *Weber* decision involving a private AAP pertaining to promotional opportunities was considered controlling.

Initially, the majority opinion articulated the burden of proof regarding the invalidity of an AAP:

> As a preliminary matter, we note that petitioner bears the burden of establishing the invalidity of the Agency's Plan. . . . Once a plaintiff established a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. . . . If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid. . . . The burden of proving its invalidity remains on the plaintiff.[101]

The majority concluded that a manifest imbalance must exist to justify taking sex or race into account and found that such an imbalance did exist when compared with those in the labor force who possess the relevant qualifications. Significantly, Justice Brennan disagreed with Justice O'Connor's concurring opinion that would require the imbalance be sufficient to support a prima facie discrimination case against the employer. He also disagreed with Justice Scalia's dissenting statement that "we [the majority] do not regard as identical the constraints of Title VII and the Federal Constitution on voluntarily adopted affirmative action plans."[102]

> Justice Scalia's dissent maintains that the obligations of a public employer under Title VII must be identical to its obligations under the Constitution, and that a public employer's adoption of an affirmative action plan therefore should be governed by *Wygant*. . . . The fact that a public employer must also satisfy the Constitution does not negate the fact that the *statutory* prohibition with which that employer must contend was not intended to extend as far as that of the Constitution.[103] (Emphasis in original.)

In upholding the plan, the majority recognized that women were most egregiously underrepresented in the skilled craft job category and viewed the plan as providing direction rather than goals or quotas. Numerous factors were to be taken into account in making promotional decisions including the qualifications of female applicants for particular jobs that were proportionately underrepresented. Hiring was not based on statistics nor were the long-term goals treated as quotas.

Nor did Justice Brennan view the AAP as unnecessarily trammeling the rights of male employees:

> In addition, petitioner had no absolute entitlement to the road dispatcher position. Seven of the applicants were classified as qualified and eligible, and the Agency Director was authorized to promote any of the seven. Thus, denial of the promotion unsettled no legitimate firmly rooted expectation on the part of the petitioner. Furthermore . . . he retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions.[104] (Footnote omitted.)

Finally, the majority opinion emphasizes that the AAP sought to "attain" a balanced work force not "maintain" one, indicating that there is no intent to maintain a permanent racial and sexual balance in the work force.

Justice Stevens, concurring but writing separately, wished to emphasize his view that the majority opinion did not set the outer limit for voluntary AAPs and that both *Bakke* and *Weber* control:

> Bakke and Weber have been decided and are now an important part of the fabric of our law. . . .
>
> The logic of antidiscrimination legislation requires that judicial constructions of Title VII leave "breathing room" for employer initiatives to benefit members of minority groups. If Title VII had never been enacted, a private employer would be free to hire members of minority groups for any reason that might seem sensible from a business or a social point of view. . . .[105]

Justice O'Connor concurred in the judgment, but her opinion sounded more like a dissent. She was not on the court when *Weber* was decided, but, even though reluctant, felt constrained by *stare decisis* to apply it in this Title VII case:

> I concur in the judgment of the Court in light of our precedents. I write separately, however, because the Court has chosen to follow an expansive and ill-defined approach to voluntary affirmative action by

public employers despite the limitations imposed by the Constitution and by the provisions of Title VII. . . .[106]

At the same time Justice O'Connor viewed the application of the *Weber* decision in this case to be consistent with her views in *Wygant* that reliance cannot be placed solely on "societal discrimination" without more:

> While employers must have a firm basis for concluding that remedial action is necessary, neither *Wygant* nor *Weber* places a burden on employers to prove that they actually discriminated against women or minorities. . . . A requirement that an employer actually prove that it had discriminated in the past would also unduly discourage voluntary efforts to remedy apparent discrimination. . . . Evidence sufficient for a prima facie Title VII pattern or practice claim against the employer itself suggests that the absence of women or minorities in a work force cannot be explained by general societal discrimination alone and that remedial action is appropriate.[107]

She agreed in principle with Justice Scalia's dissent that an AAP that automatically and blindly promotes marginally qualified candidates falling within a preferred race or gender or involves a permanent plan or proportionate representation would violate Title VII. But she concluded that this lawsuit was not "such a case."[108]

The major dissenting opinion written by Justice Scalia points to the absence of findings of past or present discrimination by the Agency against minorities or women; asserts that the majority failed to properly apply the rulings of *Weber* and *Wygant;* and points out that until now *Weber* has applied only to private and not public employers.

On the first point Justice Scalia notes that "the plan's purpose was assuredly not to remedy prior sex discrimination by the Agency."[109] As emphasized by the dissent, Johnson was the leading candidate; he had earlier placed second on the promotional list and took a voluntary demotion to gain certain experience to improve his future promotional opportunities even though in earlier years he had been a road dispatcher for 17 years with a private firm; he was assigned to work out of class full-time to fill the vacant position for nine months until the permanent selection was made; and failed to be selected only because of the intervention of the Affirmative Action Coordinator. In addition, the trial court had determined that except for her sex Joyce would not have been promoted.

The dissent noted that in *Weber* there was a conscious prior exclusion by the employer of blacks from the training program essential for promotion, and that here we have a societal segregation based on longstanding social attitudes in that it has not been regarded by women themselves as desirable type of work.[110]

Lastly, Justice Scalia would not expand *Weber* to include public employers. "Another reason for limiting *Weber* to private employers is that state agencies, unlike private actors, are subject to the Fourteenth Amendment."[111] Beyond *Weber* he sees the majority opinion as requiring certain employers to discriminate in their employment practices.[112] He

concludes with the following impassioned plea on behalf of all the "Johnsons" across the country:

> In fact, the only losers in the process are the Johnsons of the country, for whom Title VII has been not merely repealed but actually inverted. The irony is that these individuals—predominately unknown, unaffluent, unorganized—suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent. I dissent.[113]

Chief Justice Rehnquist and Justice White joined in this dissent except that Justice White did not join in the last part of Scalia's dissent opposed to the extension of *Weber* from private to public employers. Justice White would have overruled *Weber* in its entirety.[114]

In light of the severe limitations placed on this decision by Justice O'Connor and the departures of Justices Powell, Brennan, and Marshall from the Court, one must question the current viability of this Title VII ruling particularly if it should come before the Court again as an Equal Protection challenge.

Martin v. Wilks[115]

In the *Wilks* case decided June 12, 1989, a group of white firefighters brought suit against the City of Birmingham, Alabama, alleging that they were being denied promotions in favor of less qualified blacks. The City admitted to making race-conscious promotional decisions but contended this was "mandated" by two consent decrees entered into between the City and a group of black firefighters.

The district court concluded that the city's actions were indeed required by the terms of the consent decrees and precluded the white firefighters from challenging the city's employment decisions. The decrees resulted from Title VII litigation commenced by the NAACP and several black individuals alleging that the city was engaging in racially discriminatory hiring and promotion practices in various public service jobs.

The white firefighters were not parties to the prior litigation but other white firefighters had opposed the consent decrees at the district court's "fairness hearing," and had unsuccessfully sought to intervene and to enjoin enforcement of the decrees. Both the denial of intervention and the denial of injunctive relief were affirmed in an earlier appeal.

In the *Wilks* appeal by the white firefighters, the Eleventh Circuit reversed, concluding that because the white firefighters were neither parties nor privy to the consent decrees their independent Title VII claims of unlawful discrimination were not precluded.

The Supreme Court granted certiorari and in another 5–4 ruling agreed with the Eleventh Circuit holding that joinder as a party is required rather than knowledge of the prior lawsuit and an opportunity to intervene.

Chief Justice Rehnquist writing for the majority did not review the merits of the reverse discrimination claims but limited the decision to the procedural question raised by the presence of the consent decrees and sent the case back for a hearing on the merits. The contention that the district court had already decided the issue on the merits upholding the

racial quotas as against a Title VII complaint was summarily disposed of by the Chief Justice:

> Petitioners point to language in the District Court's findings of fact and conclusions of law which suggests that respondents will not prevail on the merits. We agree with the view of the Court of Appeals, however, that the proceedings in the District Court may have been affected by the mistaken view that respondents' claims on the merits were barred to the extent they were inconsistent with the consent decree."[116]

Justice Stevens, who has traditionally favored judicially fashioned remedies for past discrimination, authored the dissent joined by the more predictable Justices, Brennan, Marshall, and Blackmun. Initially, Justice Stevens conceded that the white firefighters could not be deprived of their legal rights by the earlier cases because they were neither parties nor interveners:

> In this case the Court quite rightly concludes that the white firefighters who brought the second series of Title VII cases could not be deprived of their legal rights in the first series of cases because they had neither intervened nor been joined as parties. The consent decrees obviously could not deprive them of any contractual rights, such as seniority, or accrued vacation pay, or of any other legal rights, such as the right to have their employer comply with federal statutes like Title VII. [Citations omitted.] There is no reason, however, why the consent decrees might not produce changes in conditions . . . that, as a practical matter, may have a serious effect on their opportunities for employment or promotion even though they are not bound by the decrees in any legal sense.[117]

The difference between the two opinions rests on the narrow but significant divergent approaches. The majority ruled that the valid consent decrees would not preclude or defeat an otherwise valid reverse discrimination action by one not a party or otherwise bound by the decree. The dissent viewed the issue, not from the standpoint of the white claimants but in recognition that an order of the court can impact promotional opportunities of those not otherwise bound by the decree.

In the absence of any basis for collaterally attacking the consent decrees as collusive, fraudulent, or transparently invalid, Justice Stevens questioned how compliance with the terms of the valid decree remedying Title VII violations could itself result in a violation of Title VII or the Equal Protection Clause.

The Supreme Court Score Card [1582-N21]

Comparing the Supreme Court's "score card" for the last nine AAP cases (see Appendix, p. 28) with the four cases reviewed earlier reveals few dramatic differences. The AAPs in one-half of the cases were upheld, as before; the Court continues to average about five separate opinions per case; and most of the rulings are still determined by a single justice.

One notable contrast is the frequency of decision. The first four cases, from *Bakke* to *Stotts,* covered a time period of six years. The next nine cases from *Wygant* to the *FCC* cases were decided in less than four years.

Bare statistics, however, do mask the ideological shift that should be

apparent from the qualitative analysis of the opinions. The initial four cases presented relatively "clean" issues with little factual clutter that might otherwise detract from the central issue. The same cannot be said for the subsequent cases reviewed in this Supplement. Particularly, the egregious conduct present in the *Sheet Metal Workers* and *Paradise* cases and the absence of equal protection challenges in the *Cleveland* and *Johnson* cases may have influenced at least some of the justices. Nor does the chart reflect the conservative shift of the Court with the addition of Justices O'Connor, Scalia, Souter, and now Thomas, since the *Fullilove* decision in 1980.

The Appendix sets forth the statistical score card update.

Missed Opportunities [1582-N22]

The article being supplemented discussed opportunities "missed" by the Supreme Court to clarify issues following the *Fullilove* decision, particularly whether the rationale of this plurality opinion would be limited to congressionally mandated programs or would be expanded to include local and state programs and those created by federal agencies.

Croson appeared to have answered that question in the negative with a strong implication that a majority of the Court was prepared to reexamine the plurality decision in *Fullilove,* which afforded Congress virtually unfettered authority to fashion minority preference programs. The *Metro Broadcasting* decision in the FCC cases, however, has now created a new climate of uncertainty as a result of Justice Brennan's farewell opinion applying an intermediate level of scrutiny to minority preference programs generated by a federal commission and with the more conservative Justice Thomas replacing Justice Marshall. Since the *Metro* decision, the Supreme Court has again side-stepped three recent opportunities to accept cases from the circuit courts to clarify the constitutional status of United States Department of Transportation minority preference programs as administered by the states and by local government.

On January 7, 1991, the Eleventh Circuit in *S.J. Groves & Sons Co. v. Fulton County*[118] concluded that "[a]lthough the issue is hardly free from doubt, our reading of *Metro Broadcasting* leads us to conclude that the Supreme Court would utilize an intermediate level of scrutiny in evaluating the DOT [bid preference] regulations."[119]

The very next day, on January 8, 1991, in *Cone Corp. v. Florida Dept. of Transportation,*[120] the same circuit court reversed a district court decision invalidating a state DBE program unless federal funds were included. The reversal, however, was based on a lack of standing by the complaining contractors to raise constitutional issues of equal protection because the Florida statute, closely patterned after the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), does not on its face direct the state secretary of transportation to deny equal protection in the award of contracts.

The third case, *Milwaukee County Pavers Assn. v. Fiedler,*[121] from the Seventh Circuit issued an opinion on January 15, 1991, involving a Wisconsin DBE program administered both with and without federal

funding similar to the *Cone* case. The federal district court invalidated the state's bid preference program based on race because of *Croson,* but it refused to enjoin the state from administering the federal program as agent for FHWA. The Circuit Court of Appeals, unlike the *Cone* decision, affirmed the district court ruling without discussing questions relating to standing.

All three of these cases were before the Supreme Court on petitions for *Certiorari* at the same time and were all denied review within the period of one week. One can debate whether these were "missed opportunities" or not. The *Cone* and *Milwaukee County Pavers* decisions presented inconsistent opinions on federal standing. A further split in the High Court over this subsidiary issue would result in something less than a definitive ruling. In addition these two cases challenged the federal minority preference program without the presence or participation of the federal agency in the litigation.

The *S.J. Groves* case was not contaminated with these side issues.[122] The contractor had been denied a contract on its low bid for an airport runway repair project based on a lack of good faith efforts to increase its MBE participation. The project was funded 90 percent with federal funds, which carried with it MBE requirements, and USDOT was included as a defendant along with the county that had rejected the low proposal.

The appellate court concluded that the county had violated Georgia's low bid statute in awarding the contract to other than the monetary low bidder. The county however raised the defense of federal preemption, that the USDOT regulations preempted the state's low bid statute. The court agreed, but noted that only if the USDOT regulations are constitutional can they preempt state law. This caused the court to examine FAA authority to adopt minority preference measures and the standard of review in light of *Metro Broadcasting.*

The court found sufficient authority in the Airport and Airways Development Act of Congress, but concluded that the district court had applied the wrong standard for review. In empathizing with the lower court's difficulty in determining the correct standard, the opinion stated as follows:

> Our assessment of relevant case law tells us that the resolution of the proper standard to be applied to the DOT regulations is difficult. After wading through the morass of often conflicting majority, plurality and dissenting opinions that deal with race-conscious affirmative action programs issued by the members of the Supreme Court, we conclude that the district court, quite understandably, applied the incorrect standard."[123]

In conducting its own review of the various Supreme Court opinions, it analyzed the confused state of affairs and appeared to invite the Supreme Court to accept the challenge of this case:

> If *Croson* were the Supreme Court's latest word on this question [of strict scrutiny], we would probably agree that the district court, in applying the strict scrutiny standard to the DOT regulations, had proceeded correctly. However, *Croson* is not the Court's most recent treat-

ment of affirmative action. On the final day of the Court's last Term, *Metro Broadcasting, Inc. v. FCC* [citation omitted], was decided. Although the issue is hardly free of doubt, our reading of *Metro Broadcasting* leads us to conclude that the Supreme Court would utilize an intermediate level of scrutiny in evaluating the DOT regulations. . . .[124]

The Eleventh Circuit remanded the case for reconsideration in light of the appropriate judicial standard, which it described as follows:

> Therefore, it seems to us that the Court has created a dual inquiry for evaluating affirmative action programs. First, we must determine whether a state or local government has developed the program, or whether Congress has authorized the program's creation. If the former, a court must strictly scrutinize the program. That is, the means chosen must be narrowly tailored to achieve a compelling governmental interest. If the latter, however, then an intermediate level of scrutiny is appropriate. . . .[125]

Of the three cases the *S.J. Groves* decision did seem to present the best opportunity for the Supreme Court to revisit *Metro Broadcasting* in a more traditional contract setting. At the same time if one sought to rationalize the High Court's denial of review, it could rest with the fact that the case is still alive on remand to the district court and can be reviewed again on appeal similar to the procedural history of *Croson,* to decide whether *Metro Broadcasting* has indeed affirmed the plurality opinion in *Fullilove.*

AFFIRMATIVE ACTION IN THE LOWER COURTS

Fullilove Applied by the Lower Courts [1582-N25]

The District Court opinion in *Michigan Road Builders Ass'n. v. Milliken,* discussed in the article being supplemented, was reversed by the Sixth Circuit.[126] The Michigan state statute mandated set-asides of 7 percent of state contract funds for MBEs and not less than 5 percent for WBEs. The Court of Appeals struck down the state statute based on *Wygant* because of legislative reliance on societal discrimination rather than evidence of prior discriminatory acts in the award of the state's contracts.

Even under the less severe mid-level scrutiny for gender-based classifications, the court ruled that the 5 percent WBE preference also failed to withstand constitutional muster. The Supreme Court without opinion affirmed this Sixth Circuit holding.[127]

Based on *Fullilove* the federal district court judge in another case, *Milwaukee County Pavers III,*[128] in part upheld a state statute establishing the "Wisconsin Department of Transportation Disadvantaged Business Development and Training Program." The minority set-aside requirements included in the program were held valid only to the extent they were employed to implement the federal DBE provisions in section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 referred to as "STURAA."[129] This was recently affirmed by the Seventh Circuit on appeals taken by both the contractors' association and by the state.[130]

At the same time the judge invalidated the state statute to the extent that it applied to exclusively state-funded projects or to subcontractor DBE requirements on contracts set aside for disadvantaged prime contractors. Under STURAA money spent on projects awarded to disadvantaged prime contractors is counted toward the DBE goals. "It is only when the prime contractor is not a disadvantaged business that the status of the subcontractors become relevant under the federal regulations."[131]

Also invalidated was the sunset provision of the statute extending the duration of the state program beyond the limits of STURAA, expiring in 1991:

> The constitutionality of the state's program depends on its character as an implementation of the federal program. To the extent that the state steps beyond the boundaries of this federal authority, it is acting on its own authority and must base its action on specific findings of identifiable prior discrimination. Congress has authorized the disadvantaged business program in the 1987 Surface Transportation Act through 1991. It is within the power of the Wisconsin legislature to extend its set-aside program beyond 1991, but it can not do so on the basis of Congress's authority to find prior discrimination. Therefore, I conclude that [the Wisconsin statute] is unconstitutional in this respect to the extent that it authorizes the existence of the set-aside program beyond the date through which the disadvantaged business enterprise program in the 1987 Surface Transportation Act is authorized.[132]

The federal district court refused to rule on plaintiffs' claims that the state's administration of the DBE program violates Wisconsin's competitive business statute, its antidiscrimination statue, and the Wisconsin Constitution.[133]

Interestingly, plaintiffs argued to the court that as a consequence of *Fullilove* it was incumbent upon the state to establish its own independent factual predicate supporting the state's DBE goals:

> Instead of arguing that the state's administration of the 1987 Surface Transportation Act is governed by *Croson*, plaintiffs argue now that a state must make findings of past discrimination in order to ensure that the federal program it administers is narrowly tailored under *Fullilove*. Pointing out that *Fullilove* . . . did not address the constitutionality of a state's implementation of that statute, plaintiffs argue that *Fullilove* requires defendants to use findings of past discrimination in the state as a benchmark in setting overall goals under the 1987 Surface Transportation Act, in certifying disadvantaged business, in setting individual project goals, and in granting good faith waivers to prime contractors.
>
> Plaintiffs' position is not without textual support. . . .[134]
>
> Despite the clear emphasis in *Fullilove* on remedying prior discrimination, it would be inconsistent with the reasoning of the overall [*Fullilove*] opinion to adopt plaintiffs' interpretation. . . .[135]

The three published opinions of the trial judge provide an excellent overview of the operations and procedures of the federal DBE program as administered by FHWA and Wisconsin DOT under STAA of 1982 and STURAA of 1987 as well as implementation of federal regulations.[136]

In affirming the district court on appeal, the circuit court ruled that the state cannot be enjoined insofar as it is merely complying with federal law and is acting as the agent of the federal government, which has broader authority to engage in affirmative action. The appellate court noted that the contractors were not challenging section 106(c) of STURAA establishing the 10 percent federal set-aside either on its face or as applied. Rather "they argued that *Croson* prevents the state from playing the role envisaged for it by the Act and regulations unless the state is able to show that the set-aside program, as implemented in Wisconsin, is necessary to rectify invidious discrimination."[137] In rejecting this argument the court noted the broader authority conferred on the federal government:

> The joint lesson of *Fullilove* and *Croson* is that the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do. And one way it can do that is by authorizing states to do things that they could not do without federal authorization. That was *Fullilove;* it is this case as well.[138]

Surprisingly, the opinion makes no reference to *Metro Broadcasting* handed down six months earlier by the Supreme Court upholding the authority of the FCC to formulate minority preference policy.

The Inconsistent Ninth Circuit [1582-N26]

It would now appear that the latest Ninth Circuit AAP decision cited with approval no less than three times in *Croson* would resolve the inconsistency of the Ninth Circuit noted in the original text. In *Associated General Contractors of California, Inc. v. City and County of San Francisco,*[139] the city's complex AAP called for set-asides of 10 percent and 2 percent for MBEs and WBEs, respectively. It also provided 5 percent bidding preferences to MBEs, WBEs, and local business enterprises (LBEs) with a 10 percent maximum bidding advantage for local MBEs and WBEs. In addition the ordinance established an overall goal of 30 percent of the city's contracting dollars to MBEs and 10 percent to WBEs.

The Ninth Circuit ruled that the MBE provisions violated the Equal Protection Clause as well as the City Charter requirement for award to the lowest responsible bidder for contracts of $50,000 or more.

In rationalizing the plurality opinions in *Wygant* and *Fullilove,* the Court of Appeals refused to exempt the city from establishing a factual predicate justifying race-conscious remedial action and denounced its reliance upon societal discrimination:

> We recognize that the plurality opinion in *Wygant* commanded only four votes. Absent more definitive guidance, however, we consider the requirement that state and local governments act only to correct their own past wrongdoing a persuasive and principled way to reconcile *Wygant* and *Fullilove.* Moreover, we find the distinction a compelling one. . . .[140]

Applying a "mid-level" standard of scrutiny in analyzing the WBE

program, the Ninth Circuit found no constitutional violation by reason of the facial challenge to the ordinance:

> Although we find the city's WBE preference troubling, we uphold it against the challenge presented in this case. While the city's program may well be overinclusive, we believe it hews closely enough to the city's goal of compensating women for disadvantages they have suffered so as to survive a facial challenge. Unlike racial classification, which must be "narrowly" tailored to the government's objective, . . . there is no requirement that gender-based statutes be "drawn as precisely as [they] might have been" [Citations omitted.][141]

At the same time the Court reserved judgment of a different conclusion "if and when the WBE preferences are challenged as applied to an industry where women are not disadvantaged."[142] The LBE bidding preference was ruled to be valid in all respects.

The federal district court in *Coral Construction Co. v. King County*[143] upheld a state of Washington county's MBE and WBE bidding preference ordinance enacted after the *Croson* decision. The ordinance provided for a 5 percent bidding advantage to bidders who are MBEs or WBEs or will use minority or women-owned enterprises on the project. Coral Construction was the low bidder on a county guard rail construction contract, but the contract was awarded to an MBE with a higher bid, which was within 5 percent of the low proposal.

In upholding the award to the MBE, the district court viewed Justice O'Connor's *Croson* decision as a plurality opinion ignoring that a majority of justices had agreed on most issues including application of the strict scrutiny test in race-based classifications. At the same time the district court determined that the county's factual predicate was adequate within the application of the strict scrutiny test and declined to follow the Sixth Circuit's ruling in *Michigan Road Builders,* affirmed without opinion by the Supreme Court after *Croson,* which limited the required showing of past discrimination to past acts of government discrimination.

Based on *Croson's* strict scrutiny standards, the Ninth Circuit reversed the district court in part and remanded the case to allow the county to provide statistical evidence of discrimination, holding that antecdotal evidence was insufficient.[144] The appellate court ruled that "the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE [ordinance]."[145]

The Ninth Circuit declined to follow the Sixth Circuit in applying the strict scrutiny test to gender-based preferential programs. Instead the court concluded "we find ourselves powerless to overrule *Associated General Contractors* [discussed above] on this point, even if we were so inclined."[146] Thus, the court employed intermediate scrutiny and concluded that the WBE preference program survived the facial challenge. The court also remanded for further consideration the contractor's claims for civil rights damages under 42 U.S.C. §§ 1981 and 1983.

Preliminary Injunctions [New]

The federal district court judge in *Milwaukee Pavers I*[147] enjoined the State of Wisconsin's disadvantaged business program by reason of the Supreme Court's decision in *Croson,* although the judge later significantly modified the preliminary injunction:

> In this case, the challenged Wisconsin statute, despite its worth, is constitutionally suspect. The statute appears to classify individuals on the basis of race, national origin, and gender. The state had not yet put forward the evidentiary showing necessary to find that the classifications are constitutional. Because I find that plaintiffs have a likelihood of success on the merits of their claim and because the other prerequisites to the granting of injunctive relief have been met, plaintiffs' motion for a preliminary injunction will be granted.[148]

The plaintiffs were highway contractors qualified to bid on Wisconsin highway construction projects except that the statute required the state to reserve $4 million in construction contracts for "disadvantaged" businesses. Responding to the statute, Wisconsin DOT identified four state highway projects on which only disadvantaged business enterprises could bid individually as prime contractors. Plaintiffs contended that the state's program was contrary to what *Croson* allowed "because it excludes plaintiffs from bidding on $4 million of state construction contracts on the basis of their race, gender, or national origin without reliance on any detailed factual finding of prior discrimination in the construction industry in Wisconsin."[149]

The state offered an ingenious argument that this was a social and economic disadvantage program and not based on the suspect classifications of race, gender, or national origin. The court rejected this position and concluded that "for all practical purposes all members of minority groups are irrebuttably presumed socially disadvantaged for purposes of the statute."[150] Likewise in *Contractor Assn. v. City of Philadelphia*[151] the federal district court held that "the DBE concept is a cosmetic endeavor designed to camouflage a race-, ethnicity-, and gender-based ordinance."

The court in *Milwaukee Pavers* concluded that plaintiffs have a likelihood of success on the merits and would suffer irreparable harm if the awards of the set-aside contracts and the statute were not enjoined:

> The wisdom and legitimacy of affirmative action has been hotly debated in the spheres of politics, social science, and law. While politicians and social scientists are free to come to their own conclusions on the matter, lower federal courts are bound by the United States Supreme Court's decision that affirmative action is permissible only within narrowly defined limits. In *Croson,* the Court determined that affirmative action programs not meeting the requirements articulated in that decision cannot be constitutional. . . .[152]

Three months later in *Milwaukee Pavers II*[153] the district court significantly modified its preliminary injunction. The state's motion to dissolve or modify the injunction offered new evidence and arguments that the presumptions against race-based preferences were rebuttable and that

the state was merely implementing the federal DBE program. The judge again rejected the rebuttable presumption contention but concluded that the strict scrutiny standards of *Croson* would not apply if the state program was "subsidiary" to a federal program:

> The applicable standard for analyzing the constitutionality of federal affirmative action programs that impose requirements on states is found in *Fullilove v. Klutznick,* [citation omitted], the only Supreme Court decision addressing a federally imposed minority preference.[154] (Footnote omitted.)

By footnote the judge rejected plaintiffs' argument that the plurality opinion of *Fullilove* had been modified by *Croson:*

> Their contention is refuted by the Court's frequent reliance on *Fullilove* in the *Croson* opinion and its explicit distinction between the standards to be applied to review of federal and state programs.[155]

The court also ruled that as long as most of the moneys are federal and not state moneys, reliance on the constitutionality of the federal program would control. The judge would not speculate as to what particular percentage of federal funds was required to be "primarily federal funded."[156]

The preliminary injunction was thus modified permitting the state to execute the three set-aside highway contracts because they were funded primarily with federal funds. The injunction remained in effect prohibiting the state from letting contracts under the state AAP that were not primarily funded with federal funds.

In *Northeastern Florida Chapter, AGC v. Jacksonville, Fla.,*[157] the federal Court of Appeals reversed the issuance of a preliminary injunction prohibiting enforcement of a city ordinance setting aside 10% of municipal contracting moneys to MBEs pending trial on Fourteenth Amendment issues. The Circuit Court had doubts that the set-aside would survive strict scrutiny but could find no irreparable injury to warrant the injunction."[158]

Similarly, in *F-M Asphalt, Inc. v. North Dakota State Highway Department*[159] a preliminary injunction was denied relying on the availability of an adequate monetary remedy for lost profits. Plaintiff's bid was rejected for failure to properly provide certain minority and WBE utilization information in a situation suggesting a strong possibility of success on the merits based on inconsistent past practices and procedures. The appellate court affirmed, based on no abuse of discretion by the trial court, but without reflecting any view on the merits of the litigation.

After the Supreme Court handed down the *Croson* decision and the Ninth Circuit had invalidated most of the City of San Francisco's AAP previously discussed in *AGCC v. City and County of San Francisco,*[160] the City adopted an entirely different plan limited to bidding preferences. Local business enterprises (LBEs) were given a 5 percent bidding preference and local MBEs and WBEs were given a 10 percent bidding advantage. The AAP was adopted following extensive studies and hearings as an effort to satisfy the predicate requirements of *Croson.*

This new AAP led to the filing of a second action known as *AGCC II* and a motion for preliminary injunction based on the likelihood of success

following from the earlier action. This motion was denied.[161] The district court found that the bidding advantage "avoids any flat quota or set aside, imposes relatively little burden upon non-MBEs, and responds only to the identified discrimination."[162]

On appeal the Ninth Circuit affirmed the denial of a preliminary injunction based on the failure of AGCC to demonstrate probable success on the merits or that on balance the hardships that would be caused to women and minorities by issuance of a preliminary injunction is outweighed by any hardships incurred by AGCC.[163]

Effect of Affirmative Action on Competitive Bidding [1582-N29]

The Ninth Circuit in *AGCC v. San Francisco I,* previously discussed, also ruled that the city's AAP violated the city charter provision requiring contracts exceeding $50,000 be awarded to the lowest responsible bidder. As a result of this ruling, the city enacted a new AAP and also amended its charter to raise the threshold competitive bidding requirement from $50,000 to $10,000,000. This new AAP as well as the charter amendment are now being litigated in federal district court.[164]

In *Capelletti Bros., Inc. v. Broward County,*[165] the federal district court dismissed a suit brought by general contractors and subcontractors challenging the constitutionality of a Florida county's minority set-aside program. In a facial attack on the AAP, the court viewed the ordinance as setting forth guidelines for the award of contracts rather than as mandatory requirements. Thus, the court concluded that unlike the factual posture of the *Croson* case, here there was no application of the AAP being challenged and dismissed the case for "lack of standing, ripeness, and a case and controversy."[166]

In *J. Edinger & Son, Inc. v. City of Louisville, Ky.,*[167] the city by ordinance adopted a unique program that provided a 5 percent bidding advantage to minorities, women, and handicapped businesses anytime the total dollar expenditures by the city to specified classifications fell below a specific level. The Sixth Circuit affirmed the district court's holding that the city could not rely on the disparity between the percentage of minorities, women, and handicapped in the city population generally and the percentage of city dollars going to these groups:

> [T]he City's reliance upon general population statistics cannot withstand an equal protection challenge. The City is required to show some statistical disparity between the percentage of qualified minority business contractors doing business in Jefferson County and the percentage of bid funds awarded to those businesses. Defendant's reliance upon general population statistics is especially troubling given that bid systems, by definition, are inherently non-discriminatory. Thus, the City should be required to present evidence of invidious discrimination.[168]

Resolving AAP Issues by Summary Judgment [1582-N31]

In the recent appellate decision in *Cone Corp. v. Hillsborough County*[169] the Eleventh Circuit reversed a summary judgment invalidating a Hillsborough, Florida, county AAP containing MBE participation

goals of 25 percent. The appellate court, in reversing the lower court ruling, applied the *Croson* standards and contrasted the AAP with that of the City of Richmond that the Supreme Court had invalidated. The Hillsborough plan may serve as a paragon for structuring an AAP to apply the teachings of *Croson,* even though it was enacted prior to the Supreme Court ruling.

First of all, it provided for individual goals to be established on project-by-project bases taking into account the subcontractable opportunities available and requiring that at least three eligible MBE contractors be available for that work. Adequate time was required for preparation and submission of bids and subbids, and large projects were to be broken into smaller projects to facilitate small business participation. Seminars and workshops to acquaint MBEs with the county's bidding procedures and requirements were called for, and pre-bid conferences held to explain the project requirements including MBE obligations.

When bids are opened, award is to be made to the lowest bidder if the bid meets the MBE goal established for the project. If the low bidder fails to meet the goal, good faith efforts are reviewed for "responsiveness." Protest and appeal is available on the issue of "responsiveness." If the next lowest bid is either $100,000 or 15 percent higher than the low bidder the MBE goal is waived.

While some of the factors relied on in *Hillsborough County* were identical to those rejected by the Supreme Court in *Croson* others were found markedly different. The circuit court viewed the City of Richmond program as a strict quota plan that fatally relied on *Fullilove* to provide the necessary factual predicates:

> Even a cursory comparison of the Hillsborough County law and the Richmond plan demonstrates that the two are vastly different in critical areas. The County painstakingly crafted its law, and has carefully avoided the problems which caused the downfall of the Richmond plan. Under the County law, a contractor never faces the *Croson* situation, where in order to fill a rigid quota he or she is required to hire MBEs for a job that no MBEs are available, willing, or qualified to do. The County law incorporates all of the race-neutral measures which the *Croson* plurality recommended. . . .[170]

The court concluded that the studies and statistics relied on by the county were sufficient to provide a prima facie case of discrimination to avoid summary judgment and that it was narrowly tailored to remedy the prima facie discrimination to "warrant further development and scrutiny at a trial."[171]

In *American Subcontractors Assn. v. Atlanta,*[172] the validity of Atlanta's AAP was tested against the *Croson* standards on cross motions for summary judgment. In an earlier ruling, the Georgia Supreme Court never reached a decision on the merits, having determined that the city's AAP violated the charter provision that all contracts be awarded to the "lowest and/or best bidder."[173] The charter was subsequently amended to include award of contracts in compliance with the city's minority and female business participation program.

The trial court ruled the AAP valid except for the inclusion of non-black minorities, and required extensive findings by the city to continue the program. As to this directive to retrofit the program the Georgia Supreme Court stated: "We find no authority for the trial court's order requiring future findings by the city in order to continue to implement the program. . . ."[174]

In reviewing the summary judgment on appeal, the state supreme court applied the strict scrutiny test of *Croson* and despite two public hearings found that the city's AAP lacked the necessary factual predicates under its state constitution as well:

> The city failed to identify the need for a race-conscious program in the awarding of its public contracts and the program established by the city is in no way "narrowly tailored" for its asserted needs. Accordingly, Atlanta's MFBE cannot withstand the strict scrutiny analysis we have employed to test its compliance with equal protection under our state constitution.[175] (Footnote omitted.)

The federal district court in *Main Line Paving Co., Inc. v. Board of Education, School District of Philadelphia*[176] invalidated the school district's AAP on cross motions for summary judgment based on stipulated facts. By addendum to bid proposals for a demolition and asbestos removal project, goals of 15 percent for MBEs and 10 percent WBEs were added with provision for waivers if the goals were not attained. The low bidder, Main Line, failed to achieve the goals but later obtained sufficient participation. Main Line's bid was rejected as not responsible. In a Commonwealth Court action Main Line obtained a preliminary injunction preventing award to any other bidder. The school board then rejected all bids.

In the federal court action for declaratory relief and damages, summary judgment was granted to Main Line. The Court concluded that the school district's AAP failed to meet the strict scrutiny test of *Croson* in all particulars. As to the gender-based set-aside provisions, the court applied an intermediate level of scrutiny but concluded that it also failed to pass constitutional muster:

> While the joint stipulation reveals that significant barriers were faced by minorities attempting to penetrate the fold of contractors favored by the Board and its employees, the only mention of women is the fact that there were very few contracts awarded to them. The stipulation contains nothing to detail the cause of this disparity, or to say for certain that it was caused by gender discrimination, rather than other conditions in the general economy. . . .[177]

AAP APPLICATION AND BID DISPUTE LITIGATION

Supplemental AAP Information After Bid Opening [1582-N34]

The low bidder in *Gilbert Central Corp. v. Kemp*[178] failed to achieve the overall DBE goal of 14 percent in its proposal, but then learned after bid opening that one of its subcontractors' bid was based on subcontracting part of its work to a second tier MBE subcontractor, which

would provide compliance with 12 percent MBE and 2 percent WBE goals. This bid was rejected by the Kansas DOT based on a bidding requirement that the MBE/WBE information is not subject to revision after bid opening. Also as a matter of policy KDOT does not count second tier subcontracts toward MBE participation. Moreover, the department concluded that good faith efforts were lacking, where the bidder relied on "generic" solicitation letters which were "insufficiently specific" with inadequate "follow-up."

The federal district court agreed with KDOT's decision and concluded that it was justified in rejecting the supplemental DBE information:

> As to the question of timing, KDOT clearly had authority to require that all DB/WBE information be submitted at the time of plaintiff's bid. *See* 49 C.F.R. § 23.45(h)(1)(ii). The question thus becomes whether KDOT was reasonable in barring the revision of such information after the bids had been opened. In essence, KDOT views the MBE information as a matter of responsiveness, rather than responsibility. Without deciding whether it was reasonable for KDOT to treat the *identity* of MBE subcontractors as a matter of responsiveness, it is at least true that a bidder's *commitment* to meet the MBE participation goals is reasonably placed within the responsiveness category. . . .[179] (Emphasis in original.)

The court also noted that any different conclusion would provide the bidder with the option to repent its bid rather than cure the defect:

> Had plaintiff determined that its bid was *too* low, it could simply have chosen not to inform KDOT of the [second tier] subcontract. Pursuant to the applicable regulations, KDOT would then have rejected plaintiff's bid—exactly the outcome plaintiff would have desired. Plaintiff was thus well situated to decide *after* the bid opening whether to bind itself to the terms of its own bid. Such a rule would clearly undermine the integrity of the entire bidding process.[180] (Emphasis in original.)

REGIONAL BUSINESS AND EMPLOYMENT GOALS [1582-N38]

In *AGCC v. City & County of San Francisco,*[181] previously discussed, the contractors' association also contended that the city's 5 percent local business enterprise (LBE) bidding preference was unconstitutional since it promotes domestic businesses at the expense of nonresident competitors. But the appellate court held otherwise: "The city may rationally allocate its own funds to ameliorate disadvantages suffered by local business, particularly where the city itself creates some of the disadvantages."[182] (Footnote omitted.)

> In addition, the LBE preference is not a burden imposed 'discriminatorily . . . on nonresident corporations solely because they are nonresidents' [*Metropolitan Life Insurance Co. v. Ward,* 470 U.S. 869 at 882 n. 10, 105 S. Ct. [1676] at 1684 n. 10], it is an attempt to remove or to lighten a burden San Francisco businesses must bear that is not shared by others. While the distinction is a fine one, and our ruling should not be read as granting constitutional immunity to all local preferences so long as they can be characterized in this fashion, we believe that the combination of ends and means employed by the city here falls well within the discretion permitted to it under the equal protection clause.[183]

Thus, the court ruled the city's 5 percent LBE bid preference valid as a "modest attempt to support local businesses and to induce other businesses to move there."[184]

CERTIFICATIONS: FRONTS, FRAUDS, FAKES, AND APPEALS

The Current Threat [1582-N42]

In *Gauvin v. Trombatore*[185] a black owner of a trucking business challenged goal-setting procedures, certifications, and award of contracts with less than 10 percent DBE participation on a particular Interstate project in California. The court ruled that the federal DBE program did not provide a private civil action to challenge certifications where the federal regulations provide administrative procedures for challenging and appealing certification decisions. The core of plaintiff's complaint was that an insufficient amount of subcontracting work was going to black DBEs where the local community was 52 percent black. "As the DBE goal does not specify figures for each identifiable racial group, but is an aggregate for all groups, CalTrans is not required to take into account local ethnic composition in setting individual contract goals."[186]

The Federal Regulations[187] [1582-N43]

Section 105(f) of the Surface Transportation Assistance Act (STAA) of 1982 setting forth the DBE program has been replaced by section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA):[188]

> Except to the extent that the Secretary [of Transportation] determines otherwise, not less than 10 percent of the amounts authorized to be appropriated under titles I, II, and III of this Act or obligated under titles I, II, and III (other than section 203) of the Surface Transportation Assistance Act of 1982 after the date of the enactment of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

One major change is that WBEs are now presumptively included within the class of socially and economically disadvantaged individuals:

> The term "socially and economically disadvantaged individuals" has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and relevant subcontracting regulations promulgated pursuant thereto; *except that women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection.*[189] (Emphasis added.)

It also calls on the states to annually survey and compile a list of DBEs and their location in the state. It also requires the Secretary of Transportation to establish minimum uniform criteria for certifications:

> The Secretary shall establish minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection. Such minimum uniform criteria shall include but not be limited to on-site visits, personal interviews, licenses, analysis of stock

ownership, listing of equipment, analysis of bonding capacity, listing of work completed, resume of principal owners, financial capacity, and type of work preferred.[190]

Amendments to the DOT regulations were filed to implement the changes.[191] As a result of these changes only one DBE goal is established for each project and no longer are separate goals specified for WBEs. In addition, the definition of "Hispanic" was expanded to comply with SBA definition to include Portuguese-Americans. DOT determined that it was already administering uniform standards for certification and added only a requirement that recipients compile and update their DBE/WBE directories annually.[192] The credit toward DBE goals for DBE materials and supplies was increased from 20 percent to 60 percent.[193]

Section 106(c)(2)(A) of STURAA specifically limits DBE certifications to socially and economically disadvantaged concerns with average annual gross receipts not to exceed $14 million over the preceding 3 fiscal years, adjusted by DOT for inflation.[194]

Certification Denials, Challenges and Appeals [1582-N49]

Two recent decisions of the Seventh Circuit raise the specter that certification can result in a property right that can be terminated only by affording procedural due process to the recipient. In the first of these cases, *Baja Contractors, Inc. v. City of Chicago,*[195] the city established an MBE certification process by Executive Order patterned after the USDOT regulations. The plaintiff, Baja, applied for certification listing the nature of its business as "concrete contractor." It was certified in the city's MBE directory as a "concrete contractor" even though neither the city's Executive Order nor the USDOT regulations called for certification categories or classifications.

Baja was working as an MBE subcontractor supplying concrete at a city airport project. Following a city investigation of the work, Baja was informed that it needed MBE certification as a "concrete supplier." The city rejected the new application based on further investigation from which it concluded that the qualifying minority was not running the operation. An appeal was filed with USDOT[196] and a lawsuit was filed in federal district court seeking civil rights damages under 42 U.S.C. Section 1983 and for injunctive relief. The district court granted a preliminary injunction based on findings that the initial certification as a concrete contractor included certification as a supplier, that the certification established a property right, and that there was a likelihood of success based on a denial of procedural due process.

On appeal the Circuit Court concluded the certification did result in a property right, but reversed the preliminary injunction on the basis that Baja had been afforded an adequate opportunity to submit additional information. The court held the injunction invalid despite its view that the city's review process was "hardly the model of a well-constructed administrative process. . . . 'What's painfully clear from the testimony is that the rules, if they can be called that, are changing on a continuing basis. They are sort of being made up as the defendants go along.' "[197]

Despite this inadequacy the appellate court concluded that with respect to whether Baja was operating as a front, the demands of due process had been satisfied and therefor it was not entitled to the preliminary injunction.

In a subsequent case, *Cornelius v. LaCroix,*[198] the same circuit, on a different set of facts, concluded that no property interest had resulted from a self-certifying MBE program. The sewerage district in the action originally required no formal MBE certification process. Instead it invited minority firms to register as purported MBEs, and this list was made available to prospective prime contractors with a disclaimer as to whether those listed were in fact qualified minority business enterprises.

Cornelius registered with the district as an MBE and served as a minority subcontractor on several projects until the district revised its certification policy " 'to reduce the potential for fraud and abuse.' "[199] Cornelius applied for certification based on his minority status and ownership of 51 percent of the business. The district denied the application, however, because he was the only minority member among the five board members, and because the principal business administrator was one of the white board members.

The district gave Cornelius a deadline to contest the findings without providing review procedures. Instead of seeking review he went directly to federal court alleging damages and deprivation of property without due process of law. The court concluded that unlike the *Baja* case no future certification was involved. At most it was a project-by-project certification program requiring each prime contractor to submit proof of MBE status. Unlike *Baja* Cornelius had not been certified for an indefinite timespan:

> Our conclusion is buttressed by this court's decision in *Baja Contractors.* The MBE program at issue in *Baja Contractors* involved a federally approved annual certification process. [Citation omitted.] The plaintiff was certified under that procedure; later that certification was rescinded. . . .
>
> By contrast, Cornelius was *never* certified by the District prior to the . . . denial of certification. It therefore had no legitimate entitlement to continued MBE status. Undoubtedly Cornelius desired MBE certification, but at that time there was no legal rule entitling it to certification, either indefinitely, as apparently is the case under present District policy, or for a fixed timespan, as in *Baja Contractors.*[200] (Emphasis in original.)

Contract Awards: Goals and Good Faith [1582-N52]

In *Glasgow, Inc. v. Federal Highway Administration,*[201] FHWA refused to concur in a Pennsylvania DOT award of contract resulting from the negotiated settlement of litigation with the low bidder regarding its good faith efforts. The Third Circuit concluded that this refusal to concur in award and participate in the $100 million interstate project was not an abuse of discretion.

The project called for a 12 percent DBE goal and the low bidder, Glasgow, achieved 7 percent DBE participation in its bid documents.

PennDOT's DBE Review Committee rejected Glasgow's good faith efforts as insufficient, and all the remaining bids were rejected for exceeding the Department's estimate. FHWA concurred in the rejection of all bids.

Glasgow challenged PennDOT's rejection of its bid in the Commonwealth Court. As a result of plaintiff's discovery efforts, PennDOT concluded that problems existed with its DBE process and that it had probably abused its discretion. By way of a settlement, PennDOT agreed not to oppose a preliminary injunction for an award to Glasgow if it would increase its DBE participation to 10.74 percent. Glasgow complied, and the preliminary injunction was entered. However, FHWA refused to concur in the award to protect the integrity of the bidding process. Glasgow then filed this action against FHWA contending that agency's refusal to concur was arbitrary and capricious. The appellate court ruled that FHWA had not abused its discretion:

> We cannot say that the FHWA's decision to withhold concurrence predicated on its conclusion that PennDOT's action in renegotiating the DBE goal tainted the bidding process was arbitrary. To the contrary, we think that the FHWA could have found that renegotiation of the DBE participation level damaged the integrity of the bidding process and was not consistent with "free, open and competitive bidding." *See* 23 C.F.R. § 635.104(a)(1987). As the FHWA suggests in its brief, DBE participation is a variable with which a contractor deals in preparing a bid as bidders increase their bids according to the percentage of minority participation announced as the goal for the contract. . . . Thus the FHWA could have reasonably concluded that in decreasing the DBE goal for Glasgow, PennDOT accorded it a definite economic benefit as well as an advantage over the other competitive bidders. . . .[202]

Significantly, the court also noted that the Commonwealth court had not determined in contested litigation that the low bid had been unlawfully rejected.

In a Louisiana federal district court action entitled *Nolan Contracting, Inc. v. Regional Transit,*[203] the lowest responsible bidder on a Regional Transit Authority project funded by UMTA was denied the opportunity to establish good faith efforts based on the terms of the specifications. RTA set an MBE goal of 30 percent and included the old conclusive presumption regulations issued during the Carter Administration.[204] These regulations provided that if a competitor offering a reasonable price meets the MBE goals, then it will be conclusively presumed that all competitors failing to meet the goal failed to exert reasonable efforts. The low bidder challenged the constitutionality of a 30 percent MBE requirement, which greatly exceeded the 10 percent UMTA minimum, as excessive and unreasonable, and the use of the conclusive presumption as arbitrary and unreasonable.

The court held otherwise. Even though the conclusive presumption was eliminated in 1981 the court noted that the current regulations do permit the recipient to "prescribe other requirements of equal or greater effectiveness in lieu of good faith efforts."[205] The regulations also authorize recipients to exceed the 10 percent federal minimum goal. Relying exten-

sively on *Fullilove* and UMTA's approval of the higher level of MBE participation and use of the conclusive presumption, the court concluded that neither was "arbitrary, irrational or unreasonable."[206] The Fifth Circuit Court of Appeals affirmed on the basis of the district court's opinion.[207]

An earlier case, *S.A. Healy Co. v. Washington Metropolitan Transit Authority,*[208] involved an unsuccessful attempt to certify an MBE joint venturer after bid opening, questions of good faith compliance, and the right to substitute. Healy and Vanessa General Builders, a joint venture, submitted a low bid of $49.4 million on a federally funded subway project in the District of Columbia. The bid proposal indicated that the bidders would satisfy the 20 percent DBE goal by having Vanessa, a proposed MBE, perform 20 percent of the work.

Vanessa had not been previously certified, therefor the transit authority's Office of Civil Rights conducted a certification hearing and denied certification. The bidders offered to substitute five certified DBE subcontractors, which had been obtained prior to bid submission. As the result of a good faith hearing, however, the contracting officer determined Vanessa was not obligated by the joint venture agreement to perform any defined portion of the work; lacked adequate financial resources, bonding, and equipment; and concluded that Vanessa was to broker to others whatever work it would perform.

Vanessa individually, and Healy–Vanessa, as the joint venture, appealed their denials of certification to the Secretary of Transportation and filed this legal action challenging the good faith determination. While the case was pending, USDOT/UMTA affirmed the denial of the contract to Healy–Vanessa. On cross motions for summary judgment the court concluded that substitution was permissive and not mandatory under the terms of the bidding documents "in unusual situations upon submission by the successful bidder (Contractor) of a complete justification therefore."[209] In addition the court observed that a decision setting aside the ruling would provide the bidder an advantage over other bidders after bids were disclosed in being able to decide whether or not to pursue a substitution:

> For example, if Healy felt, after seeing other bids, that its bid was too low for its comfort, it would retain the practical option of forfeiting the contract by acquiescing in a challenge to Vanessa's qualifications and not attempting to substitute the subcontractors. . . .[210]

A Florida statute with a disadvantaged businesses program patterned after the federal DBE program was challenged by a low bidder denied two separate contracts in a consolidated action entitled *Capeletti Bros., Inc. v. Department of Transportation.*[211] The court affirmed the hearing officer's determination on both contracts. On one contract the hearing officer determined that because federal funds were not involved, the program lacked authority for WBE goals because the statute referred only to DBEs, and WBEs were not included, even though this may have been the result of a legislative oversight.

On the other contract the court did not reach the merits of the bidder's assertions regarding the WBE goal for failure to protest the plans and specifications within the requisite 72 hours of their receipt.

Contract Compliance: Substitutions and Sanctions [1582-N56]

In *G. Merlino Const. v. City of Seattle*[212] the city imposed a one-year debarment on the general contractor from bidding on city projects for violating a municipal code provision for underutilizing minority contractors. The Washington Supreme Court affirmed, determining *de novo* that the minority subcontractor did not perform a commercially useful function and was used merely as a prop for the prime contractor to do the work itself while appearing to comply with its minority and WBE requirements. The city was not required to follow the federal debarment regulations.[213]

Similarly, in *Adonizio Bros. v. D.O.T. Board of Review*[214] the contractor's bidding privileges were suspended for 90 days for failure of a listed DBE hauling subcontractor to perform a commercially useful function. The DBE owned only one truck. The rest were leased to him by the prime contractor who also procured the drivers and dispatched the trucks.

In reviewing the sanctions, the court stated that the burden of proof was on DOT to establish that a breach of the contract had occurred, but concluded that the evidence supported the conclusion that the contractor failed to abide by the terms of his agreement. The court found that the subcontractor was not "responsible for execution of a distinct element of the work" and did not participate "by actually performing, managing and supervising the work involved," as required by the contract. In addition, the court stated that, "The exercise of good faith or the lack of bad faith is irrelevant except perhaps for the penalty imposed."[215]

The plaintiff, a minority-owned paving contractor, in *Construction Associates, Inc. v. City of Des Moines*[216] filed suit against the city for civil rights violations and intentional interference with plaintiff's prospective business advantage. Plaintiff had submitted written subcontractor quotes for a city project awarded to a general contractor whose bid included subcontract work to be performed by a company owned by the wife of the general contractor.

Summary judgment in favor of the city was affirmed for failure to comply with the notice requirements of the Municipal Tort Claims Act. No contract existed with the plaintiff for this to be a contract claim, which in any event would also be time barred.

In *C. H. Barco Cont. v. State of Florida,*[217] Barco submitted low bids on three Florida road construction projects. All three specified DBE goals, but Barco listed zero percent participation on each bid and the awarding authority ruled the bids nonresponsive for failure to make good faith efforts to meet the goals.

Barco challenged the bid rejections asserting that the Department had not followed its prior applications and interpretations of good faith standards. For example, prior contracts had been awarded based on a 1 percent rule allowing a bidder to disregard DBE quotes that exceeded non-DBE quotations by 1 percent.

In a split decision the Florida court upheld the department's determination based on substantial evidence that revealed that Barco failed to solicit all certified DBEs performing the type of work to be subcontracted and that the low bidder in each instance relied on selectively solicited DBEs.

CONCLUSION

Despite 13 United States Supreme Court decisions spanning a time period of nearly 13 years, the constitutional limitations on affirmative action plans in competitively bid construction contracts are yet to be circumscribed. The failure of the Court to either invalidate all race-based preference programs as Justice Scalia advocates or apply the more traditional equal protection standard as advocated by Justice Brennan, leaves the Court with the task of analyzing each program on a case-by-case basis. This indicates that the arduous time-consuming judicial process will continue as it has in the past, allowing the lower courts to adopt what are clearly inconsistent results, based on their own interpretations of the Supreme Court decisions, with an occasional new Supreme Court opinion to rule a specific AAP "fair or foul."

A clear majority of the Court has agreed, however, on the application of the strict scrutiny standard of review for all race-based preference programs adopted by local and state governments. This standard calls for explicit findings if an AAP is to survive constitutional muster. But the *Croson* decision expressly left open the standard of review applicable to Congressional AAPs, and the viability of the plurality opinion in *Fullilove.*

The Supreme Court's latest *Metro Broadcasting* decision in the FCC cases unfortunately generated more confusion than clarity. The majority did reaffirm the *Fullilove* rationale, but in a noncompetitive bidding setting, if indeed this is considered to be a critical distinction. More significantly, Justice Brennan who wrote the *Metro* majority opinion has been replaced by Justice Souter whose legal views on affirmative action are as yet unexposed; and Justice Marshall who was part of the 5–4 majority has more recently been replaced by Justice Thomas.

Justice White, however, could still provide the pivotal key. He joined with Chief Justice Burger in the *Fullilove* plurality opinion, with Justice O'Connor in her *Croson* opinion, and with Justice Brennan in the *Metro* case. Significantly, since the *Fullilove* decision, Justice White has consistently expressed his views in opposition to the affirmative action plans except in the *FCC* decision. Uncharacteristic for him, he did not write separately to reveal the distinction he relied on in *Metro,* and whether it rested upon a different standard for review for federal AAPs.

The indications are that the Supreme Court is not prepared currently to write the final chapter on the constitutional limits on race-based bid preference programs or to clarify the conflicts among its opinions in *Fullilove, Croson,* and *Metro Broadcasting,* leaving the lower courts to fend for themselves. *Croson* is still good law for the proposition that state and municipal AAPs will be subject to strict judicial scrutiny, must

be narrowly tailored, and must be based on demonstrated acts of prior discrimination against the minority or group receiving the preference.

Metro Broadcasting came as a sudden surprise to most observers following the development of affirmative action law. On the surface it would appear to put to rest questions as to USDOT minority preference regulations authorized by Congress. Yet doubts persist. The High Court could limit the application of its *Metro* decision to race-based preference programs expressly created by congressional statute; or it could limit the decision to the rationale of the FCC minority preference program designed to promote diversity in First Amendment rights regarding ownership and control of the air waves to insure the dissemination of minority points of view to listeners or viewers, rather than as a remedial program to rectify for past acts of discrimination in the competition for public contracting opportunities.

Also, as a practical matter, the application of the intermediate level of review in the hands of a more conservative Court resulting from the departures of two of its most liberal members may become indistinguishable from strict scrutiny. This result can be seen where the dissenters in *Metro* vote to overturn that decision and are joined by other justices who are reluctant to overturn the decision but concur on the basis that the particular federal program fails even the lesser test.

In passing up recent opportunities to review conflicting rulings from the Circuit Courts, the High Court indicates that it has been presented with a dilemma, and probably the last thing the Court wants to see is a return to the pre-*Croson* days when divergent splits on the Court resulted often in three-way splits, six separate opinions, and plurality results. Certainly, Chief Justice Rehnquist would not wish to see this limited progress eroded.

Assuming that a majority of the Court is dissatisfied with the *Metro* holding, overruling the 5–4 decision is not easily accomplished, apart from the political implications that a reversal would have with a Congress that has already registered dissatisfaction with other cases viewed as hindering the ability of minorities and women to maintain lawsuits for discrimination in employment. If overruled, the Court must also deal with the *Fullilove* decision where Chief Justice Burger's plurality opinion gave a strong signal that the Supreme Court would defer to the Congress as a co-equal in this area of the law, and would not exact the same scrutiny that would be required of race-based preference programs created by lesser authorities.

Obviously, when the constitutionality of a congressional AAP next visits the Supreme Court the views of Justices White, Souter, and Thomas will become critical, as well as the always uncertain position of Justice Stevens who joined with the majority in *Metro* only on the basis that the particular facts of that case fell "within the extremely narrow category of governmental decisions for which racial or ethnic heritage may provide a rational basis for differential treatment."

[1] Metro Broadcasting, Inc. v. Federal Communications Commission, 497 U.S. _____, 110 S. Ct. 2997, 111 L.Ed.2d 445 (1990).

[2] 476 U.S. 267, 106 S. Ct. 1842 (1986).

[3] Initially the Union and two minority teachers filed in federal court, but following a trial the district court *sua sponte* concluded that it lacked jurisdiction. Rather than appeal, plaintiffs instituted a suit in state court.

[4] 476 U.S. at 286.

[5] *Id.* at 293.

[6] *Id.* at 295.

[7] *Id.* at 282–283.

[8] 478 U.S. 1016, 106 S. Ct. 3327, 90 L.Ed.2d 260 (1986).

[9] 779 F.2d 181 (4th Cir. 1985).

[10] 822 F.2d 1355 (4th Cir. 1987).

[11] Richmond v. J. A. Croson Co., 488 U.S. 469, 109 S. Ct. 706, 102 L.Ed.2d 854 (1989).

[12] 488 U.S. at 520.

[13] See, Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia, 735 F.Supp. 1274, 1288–1292 (E.D. Pa. 1990), for an extensive discussion of Justice O'Connor's opinion by Chief Judge Bechtle.

[14] 488 U.S. 480.

[15] 448 U.S. 448, 100 S. Ct. 2758, 65 L.Ed.2d 902 (1980).

[16] 488 U.S. at 486.

[17] *Id.* at 491.

[18] *Id.* at 521–522.

[19] *Id.* at 518.

[20] *Id.* at 494.

[21] *Id.* at 552.

[22] *Id.* at 494–495.

[23] *Id.* at 514.

[24] 429 U.S. 190, 211–212 (1976) (Stevens, J., concurring).

[25] 488 U.S. at 521, quoting from A. Bickel, *The Morality of Consent* 133 (1975).

[26] 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

[27] 488 U.S. at 521.

[28] *Id.* at 524.

[29] *Id.* at 518–519.

[30] *Id.* at 498.

[31] *Id.* at 500.

[32] *Id.* at 499.

[33] *Id.* at 505.

[34] *Id.* at 506.

[35] *Id.* at 508.

[36] *Id.* at 509–510.

[37] *Id.* at 510.

[38] Brief of Amicus Curia of the National League of Cities *et al.* in *Croson,* Appendix I.

[39] 98 YALE L.J. 1711 (1989).

[40] *Id.*

[41] C. Fried, *Affirmative Action After City of Richmond v. J.A. Croson Co.: A Response to the Scholars' Statement,* 99 YALE L.J. 155, 160–161 (1989, footnotes omitted).

[42] *Scholars' Reply to Professor Fried,* 99 YALE L.J. 163 (1989).

[43] 825 F.2d 324 (11th Cir. 1987).

[44] 873 F.2d 347 (D.C. Cir. 1989).

[45] 876 F.2d 902 (D.C. Cir. 1989).

[46] Metro Broadcasting, Inc. v. Federal Communications Commission, 497 U.S. _____, 110 S. Ct. 2997, 111 L.Ed.2d 445 (1990).

[47] 110 S. Ct. at 3008–3009.

[48] *Id.* at 3009.

[49] *Id.*

[50] *Id.* at 3028.

[51] *Id.* at 3030.

[52] *Id.* at 3032–3033.

[53] 163 U.S. 537 (1896).

[54] 110 S. Ct. at 3044.

[55] *Id.*

[56] *Id.* at 3045.

[57] Professor Devins, in a comment *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight,* 69 TEX. L. REV. 125 (n. 6), attempts to explain Justice White's apparent flip-flop and his tendency to support federal action.

[58] Devins, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight,* 69 TEX. L. REV. 125, 128 (1990).

[59] Pub. L. No. 97-424 (January 6, 1983).

[60] Pub. L. No. 100-17 (April 2, 1987).

[61] 478 U.S. 385; 106 S. Ct. 3000; 92 L.Ed.2d 315 (1986).

[62] City of Richmond v. Croson, 488 U.S. 469, 524.

[63] 478 U.S. at 407.

[64] *Id.* at 408.

[65] *Id.* at 414.

[66] Local 28 of the Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission, 478 U.S. 421, 106 S. Ct. 3019, 92 L.Ed.2d 344 (1986).

[67] 42 U.S.C. § 2000e–5(g).

[68] 478 U.S. at 463.
[69] *Id.* at 475–476.
[70] *Id.* at 480.
[71] *Id.* at 484.
[72] *Id.* at 485.
[73] *Id.* at 488–489.
[74] *Id.* at 497–498.
[75] *Id.* at 499.
[76] *Id.* at 500.
[77] *Id.* at 488.
[78] Local Number 93, International Association of Firefighters v. City of Cleveland, 478 U.S. 501, 106 S. Ct. 3063, 92 L.Ed.2d 405 (1986).
[79] 478 U.S. at 515.
[80] *Id.* at 519.
[81] *Id.* at 530–531.
[82] *Id.* at 532.
[83] *Id.* at 533.
[84] 480 U.S. 149, 107 S. Ct. 1053, 94 L.Ed.2d 203 (1987).
[85] NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974).
[86] 480 U.S. at 166–167.
[87] *Id.* at 170–171.
[88] *Id.* at 171.
[89] *Id.* at 185.
[90] *Id.* at 190.
[91] 402 U.S. 1 (1971).
[92] 480 U.S. at 191.
[93] *Id.* at 189.
[94] *Id.* at 187–188.
[95] *Id.* at 189.
[96] *Id.* at 196.
[97] *Id.* at 196–197.
[98] *Id.* at 199–200.
[99] *Id.* at 198–199.
[100] Johnson v. Transportation Agency, Santa Clara County, California, 480 U.S. 616, 107 S. Ct. 1442, 94 L.Ed.2d 615 (1987).
[101] 480 U.S. at 626–627.
[102] *Id.* at 632.
[103] *Id.* at 627 n. 6.
[104] *Id.* at 638.
[105] *Id.* at 644–645.
[106] *Id.* at 648–649.
[107] *Id.* at 652–653.
[108] *Id.* at 656.
[109] *Id.* at 659.
[110] *Id.* at 668.
[111] *Id.* at 669.
[112] *Id.* at 675–676.
[113] *Id.* at 677.
[114] *Id.* at 657.
[115] 490 U.S. 755, 109 S. Ct. 2180, 104 L.Ed.2d 835 (1989).
[116] 104 L.Ed.2d at 849.
[117] *Id.* at 848–850.
[118] 920 F.2d 752 (11th Cir. 1991) *Cert. Den.* 59 U.S.L.W. 3810 (June 3, 1991).
[119] *Id.* at 766.
[120] 921 F.2d 1190 (11th Cir. 1991) *Cert. Den.* 59 U.S.L.W. 3792 (May 28, 1991).
[121] 922 F.2d 419 (7th Cir. 1991) *Cert. Den.* 59 U.S.L.W. 3810 (June 3, 1991).
[122] The Circuit Court did rule that the contractor had no standing to challenge a subsequent MBE county resolution establishing a bid preference program based on race. But also ruled that there was standing to challenge denial of the contract.
[123] S. J. Groves & Sons Co. v. Fulton County, 920 F.2d 752, 765 (11th Cir. 1991) *Cert. Den.* 59 U.S.L.W. 3810 (June 3, 1991).
[124] *Id.* at 766.
[125] *Id.* at 767.
[126] 834 F.2d 583 (6th Cir. 1987).
[127] 489 U.S. 1061, 109 S. Ct. 2238, 103 L.Ed.2d 804 (1989).
[128] Milwaukee County Pavers Association v. Fiedler, 731 F. Supp. 1395 (W.D. Wis. 1990). Milwaukee Pavers I, 707 F. Supp. 1016 (W.D. Wis. 1989) and Milwaukee Pavers II, 710 F. Supp. 1532 (W.D. Wis. 1989), concern the issuance of a preliminary injunction and its modification discussed *infra* under the new heading entitled "Preliminary Injunctions."
[129] Pub. L. No. 100-17, April 2, 1987.
[130] Milwaukee County Pavers Assn. v. Fiedler, 922 F.2d 419 (7th Cir. 1991).
[131] 731 F. Supp. at 1413.
[132] *Id.* at 1414–1415.
[133] *Id.* at 1415.
[134] *Id.* at 1409.
[135] *Id.* at 1410.
[136] See note 128, *supra.*
[137] Milwaukee County Pavers Assn. v. Fiedler, 922 F.2d 419, 423 (7th Cir. 1991).
[138] *Id.* at 423–424.
[139] 813 F.2d 922 (9th Cir. 1987).
[140] *Id.* at 930.
[141] *Id.* at 941–942.
[142] *Id.* at 942.

[143] 729 F. Supp. 734 (W.D. Wash. 1989).

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

[145] *Id.* at 920.

[146] *Id.* at 931.

[147] Milwaukee County Pavers Association v. Fiedler, 707 F. Supp. 1016 (W.D. Wis. 1989).

[148] *Id.* at 1018.

[149] *Id.* at 1023.

[150] *Id.* at 1026.

[151] 735 F. Supp. 1274, 1293 (E.D. Pa. 1990).

[152] 707 F. Supp. 1016, 1033–1034 (W.D. Wis. 1989).

[153] Milwaukee County Pavers Association v. Fiedler, 710 F. Supp. 1532 (W.D. Wis. 1989).

[154] *Id.* at 1539–1540.

[155] *Id.* at 1540 n. 3.

[156] *Id.* at 1544 n. 6.

[157] 896 F.2d 1283 (11th Cir. 1990).

[158] *Id.* at 1286.

[159] 384 N.W.2d 663 (N.D. 1986).

[160] 813 F.2d 922 (9th Cir. 1987).

[161] *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 748 F. Supp. 1443 (N.D. Cal. 1990).

[162] *Id.* at 1453.

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

[164] *Id.*

[165] 738 F. Supp. 1415 (S.D. Fla. 1990).

[166] *Id.* at 1416.

[167] 802 F.2d 213 (6th Cir. 1986).

[168] *Id.* at 216.

[169] 908 F.2d 908 (11th Cir. 1990).

[170] *Id.* at 917.

[171] *Id.*

[172] 376 S.E.2d 662 (Ga. 1989).

[173] Georgia Branch v. City of Atlanta, 321 S.E.2d 325 (Ga. 1984).

[174] 376 S.E.2d at 663 n. 1.

[175] *Id.* at 667.

[176] 725 F. Supp. 1349 (E.D. Pa. 1989).

[177] *Id.* at 1363.

[178] 637 F. Supp. 843 (D. Kan. 1986).

[179] *Id.* at 848.

[180] *Id.*

[181] 813 F.2d 944 (9th Cir. 1987).

[182] *Id.* at 943.

[183] *Id.*

[184] *Id.* at 944.

[185] 682 F. Supp. 1067 (N.D. Cal. 1988).

[186] *Id.* at 1072 n. 4.

[187] For a good summary of the USDOT DBE regulations, see S.J. Groves & Sons Co. v. Fulton County, 696 F. Supp. 1480, 1482–1483 (N.D. Ga. 1987) *Rev'd* 920 F.2d 752 (11th Cir. 1991).

[188] Pub. L. No. 100-17 (April 2, 1987), § 106(c)(1).

[189] *Id.*, § 106(c)(2)(B).

[190] *Id.*, § 106(c)(4).

[191] 52 F.R. 39225–39231 (October 21, 1987).

[192] 49 C.F.R. Part 23, Subpart D, § 23.45 (October 21, 1987).

[193] *Id.* § 23.47.

[194] *Id.* § 23.62.

[195] 830 F.2d 667 (7th Cir. 1987).

[196] Baja appealed to USDOT apparently to protect its certification with regard to federally financed city projects. Federal regulations do not stay or enjoin a decertification and no ruling by USDOT had been issued on the appeal at the time of this opinion. See, 830 F.2d at 675 n. 7.

[197] *Id.* at 679.

[198] 838 F.2d 207 (7th Cir. 1988).

[199] *Id.* at 209.

[200] *Id.* at 211–212.

[201] 843 F.2d 130 (3rd Cir. 1988).

[202] *Id.* at 138.

[203] 651 F. Supp. 23 (E.D.La. 1986).

[204] 49 C.F.R. 23.45(i) (1980).

[205] 49 C.F.R. 23.45(h)(2)(i) (1985).

[206] 651 F. Supp. at 28.

[207] Nolan Contracting, Inc. v. Regional Transit, 809 F.2d 1053 (5th Cir. 1987).

[208] 615 F. Supp. 1132 (D.C.D.C. 1985).

[209] *Id.* at 1137.

[210] *Id.* at 1138.

[211] 499 So.2d 855 (Fla. App. 1 Dist. 1986).

[212] 741 P.2d 34 (Wash. 1987).

[213] 49 C.F.R. §§ 29.41–.55.

[214] 529 A.2d 59 (Pa. Cmwlth. 1987).

[215] *Id.* at 61.

[216] 375 N.W.2d 273 (Ia. App. 1985).

[217] 483 So.2d 796 (Fla. App. 1 Dist. 1986).

APPENDIX

UNITED STATES SUPREME COURT
AFFIRMATIVE ACTION CASES

CASE: JUSTICE	BAKKE	WEBER	FULLI-LOVE	STOTTS	WYGANT	FRIDAY	SHEET METAL	CLEVE-LAND	PARADISE	JOHNSON	CROSON	WILKS	FCC CASES	TOTAL
BRENNAN	+	+	+	+	+	+	+	+	+	+	+	+	+	13+
BLACKMUN	+	+	+	+	+	+	+	+	+	+	+	+	+	13+
MARSHALL	+	+	+	+	+	+	+	+	+	+	+	+	+	13+
STEVENS	-	0	-	-	+	+	+	+	+	+	-	+	+	8+
POWELL (KENNEDY)	-	0	+	-	-	-	+	+	+	+	(-)	(-)	(-)	5+
WHITE	+	+	+	-	-	-	-	-	-	-	-	-	+	4+
STEWART (O'CONNOR)	-	+	-	(-)	(-)	(-)	(-)	(-)	(-)	(+)	(-)	(-)	(-)	2+
BURGER (SCALIA)	-	-	+	-	-	-	-	-	(-)	(-)	(-)	(-)	(-)	1+
REHNQUIST	-	-	-	-	-	-	-	-	-	-	-	-	-	0+
JUDGEMENT	-	+	+	-	-	-	+	+	+	+	-	-	+	7+
NO. OPINIONS	5	4	5	4	5	4	5	4	5	5	6	2	4	58
DATE DECIDED	6/28/78	6/27/79	7/2/80	6/12/84	5/19/86	7/1/86	7/2/86	7/2/86	2/25/87	3/25/87	1/23/89	6/12/89	6/27/90	

\+ Vote to uphold the affirmative action plan
\- Vote against the affirmative action plan
0 Did not participate in the decision

ACKNOWLEDGMENTS

This legal study was performed under the overall guidance of NCHRP Project Committee SP20-6. The Committee is chaired by Delbert W. Johnson, Office of the Attorney General of Washington. Members are: Ruth J. Anders, Melbourne, Florida (formerly with Federal Highway Administration); Watson C. Arnold, Austin, Texas (formerly with Texas Office of the Attorney General); James M. Brown, George Washington University; Robert F. Carlson, Carmichael, California (formerly with California Department of Transportation); Kingsley T. Hoegstedt, Carmel, California; Michael E. Libonati, Temple University School of Law; Spencer A. Manthorpe, Pennsylvania Department of Transportation; Walter A. McFarlane, Office of the Governor, Commonwealth of Virginia; Joseph M. Montano, Denver, Colorado (formerly with Colorado Department of Highways); Lynn B. Obernyer, Colorado Department of Law; Jean G. Rogers, Federal Highway Administration; James S. Thiel, Wisconsin Department of Transportation; and Richard L. Tiemeyer, Missouri Highway and Transportation Commission. Edward V.A. Kussy provides liaison with the Federal Highway Administration, and Crawford F. Jencks represents the NCHRP Staff.

TRANSPORTATION RESEARCH BOARD
National Research Council
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James G. Martin, Governor

Thomas J. Harrelson, Secretary

North Carolina
Department of Transportation

Release: Immediate

Date: April 4, 1990

Contact: Paul Worley, (919) 733-2520

Distribution: NC

Release No: 0120

NCDOT ESTABLISHES ADVISORY COMMITTEE ON MINORITY BUSINESS PARTICIPATION

RALEIGH -- The N.C. Department of Transportation has established a Joint MBE (Minority Business Enterprise) Steering Committee with the Governor's Office of Minority Affairs, the Associated General Contractors, the N.C. Association of Minority Businesses, Inc. and the United Minority Contractors of North Carolina. The Steering Committee will serve as an advisory group to NCDOT for implementation of effective minority business participation in the department's programs.

A Joint MBE Task Force has also been established as a working group to meet the needs and objectives identified by the Steering Committee.

The minority businesses targeted will be those which can provide services to the department in highway and bridge design, construction and maintenance as well as vendors for materials and supplies.

"I am confident that with these efforts, we will finally have a meaningful and successful involvement of North Carolina's minority business community in the programs at NCDOT," said N.C. Transportation Secretary Thomas J. Harrelson. "Governor Jim Martin, Lt. Governor Jim Gardner and Speaker Joe Mavretic are very supportive of the program and have made it a priority with each naming members to serve on the committee."

The action to set up this committee was taken by Secretary Harrelson to help the department meet the ten percent minority participation goals in both state and federal highway legislation.

"I look forward with optimism to the results of the concerted efforts of the Steering Committee and Task Force," said George Wells, State Highway Administrator. "By working together, I am sure they will develop a positive plan of action which will help our department reach our minority participation goals."

Wells added that North Carolina needs minority prime contractors rather than continuing to meet the goals through minority subcontractors.

"We are hopeful that one of the plans developed will assist small minority businesses in expanding their capabilities to perform larger contracts for us," he said. "Our department and the contracting industry agree this is the most effective way to achieve the results we seek."

(Members of the Steering Committee and Task Force are listed on back.)

NCDOT

Public Affairs Division
P. O. Box 25201, Raleigh, N. C. 27611
(919) 733-2520
FAX: (919) 733-9150

NC DOTLINE
1-800-526-2368
Media Information Updates

Joanne V. Latham
Director of Public Affairs

NCDOT/AGC/NCAMB/UMC
JOINT MBE TASK FORCE

PURPOSE: Serves as a working group to the Joint MBE Steering Committee responsible for carrying out specific assignments from the Committee requiring thorough review and analysis.

North Carolina Department of Transportation:
Mr. James O. Murphy, Chairman
Mr. Robert W. Braam, Vice Chairman
Mr. Walter E. Brown, Jr.
Mr. Avery Bordeaux

Governor's Office of Minority Affairs:
Ms. Cynthia Meekins

Lieutenant Governor:
Dr. Norman C. Camp III
Rev. Peter Holland

Speaker Mavretic:
Mr. Joe Dickens
Ms. Joyce Dickens

Associated General Contractors:
Mr. Henry C. Clegg, Jr.
Mr. Robert Burkey
Mr. W. L. Salmon, Jr.

North Carolina Association of Minority Businesses, Inc.:
Ms. Cynthia Clemons
Mr. James Grace
Ms. Andrea L. Harris
Mr. Charles Hogan

United Minority Contractors of North Carolina, Inc.:
Mr. Henry Lanier
Mr. Donald Moore
Mr. James Rayford

NCDOT/AGC/NCAMB/UMC
JOINT MBE STEERING COMMITTEE

PURPOSE: Serves as an advisory group to NCDOT to provide guidance for development and implementation of an effective Minority Business Enterprise Program conforming with GS 136-28.4 and to provide a forum for discussion of issues relating to minority business participation in NCDOT programs.

North Carolina Department of Transportation:
Secretary Thomas J. Harrelson, Chairman
Mr. Jake F. Alexander, Vice Chairman
Mr. William C. Deal, Jr.
Mr. George E. Wells
Mr. Walter E. Brown, Jr.

Governor's Office of Minority Affairs:
Mr. James K. Polk

Lieutenant Governor:
Mr. Chandler Lee
Mr. Armstrong Williams

Speaker Mavretic:
Mr. Kermit Richardson
Mr. William Toney

Associated General Contractors:
Mr. Henry C. Clegg, Jr.
Mr. Stephen P. Gennett
Mr. Kenneth D. Murphy
Mr. Norman D. Wilhelm

North Carolina Association of Minority Businesses, Inc.:
(3 representatives to be named later)

United Minority Contractors of North Carolina, Inc.:
Mr. Phillip T. Cooper
Mr. Henry Lanier
Mr. James Rayford

ATTENTION MEDIA -- An actuality concerning this release will be featured on NC DOTLINE until 4 p.m. on Friday, April 6, 1990. The toll-free number for NC DOTLINE is 1-800-526-2368. All actualities on NC DOTLINE are suitable for broadcast.

Black Owned Businesses in South Carolina - 1982

Category	Number of Firms
Selected Services	3,963
Retail Trade	2,590
Construction	1,001
Industries Not Elsewhere Classified	966
Transportation & Public Utilities	550
Finance, Insurance, & Real Estate	235
Agricultural Services, Forestry Fishing, and Mining	219
Manufacturing	173
Wholesale Trade	95
TOTAL	**9,792**

Source: 1982 Survey of Minority-Owned Business Enterprises, Black, U.S. Dept. of Commerce, Bureau of the Census, Table $, pg 23.

Number of Business in South Carolina - 1988

Category	# of Firms	# of Employees
Services	23,367	247,100
Retail Trade	21,432	247,100
Contract Construction	7,572	101,591
Finance, Insurance Real Estate	6,107	62,862
Wholesale Trade	5,215	58,122
Not Classified Elsewhere	5,046	7,978
Manufacturing	4,548	374,828
Transportation & Other Public Utilities	2,406	51,533
Agricultural Services, Forestry, Fishing	951	6,307
Mining	88	1,679
TOTAL	**76,732**	**1,159,089**

Source: South Carolina Statistical Abstract, 1991, p.75.

North Carolina General Assembly
Legislative Services Office
Legislative Office Building
300 N. Salisbury Street, Raleigh, N. C. 27603-5925

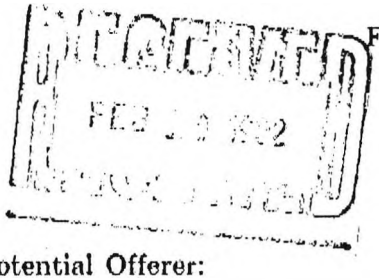
GEORGE R. HALL, JR., Legislative Administrative Officer
(919) 733-7044

M. GLENN NEWKIRK, Director
Automated Systems Division
Suite 400, (919) 733-6834

GERRY F. COHEN, Director
Bill Drafting Division
Suite 100, (919) 733-6660

THOMAS L. COVINGTON, Director
Fiscal Research Division
Suite 619, (919) 733-4910

TERRENCE D. SULLIVAN, Director
Research Division
Suite 545, (919) 733-2578



February 12, 1992

Dear Potential Offerer:

The Co-Chairmen of the Legislative Services Commission and the Joint Legislative Highway Oversight Committee of the North Carolina General Assembly have authorized a "Study of Minority and Women Business Participation in Highway Construction in the State of North Carolina". A Request for Proposal will be issued on or about March 10, 1992 for a contractor to conduct the study under the direction of the Joint Legislative Highway Oversight Committee. The study must be completed and a final report presented to the Joint Legislative Highway Oversight Committee not later than October 30, 1992.

The scope of the study will include a detailed examination of racial and gender discrimination in the highway construction industry and the degree and extent to which past discrimination existed and continues today. Because the results of the study will be used to support a goals program in highway construction enacted by the 1989 North Carolina General Assembly, it is imperative that the study be in compliance with the U.S. Supreme Court's Decision in City of Richmond v. J.A. Croson Company. Consequently, the contractor will be expected to propose remedies, a plan of action, policy changes, and draft legislation, if necessary.

The contractor must be able to provide sufficient resources and experience to the study to meet the project schedule.

STUDY ORGANIZATION: The Joint Legislative Highway Oversight Committee is the responsible entity for the Study. The Joint Legislative Highway Oversight Committee Subcommittee on Minority and Women Business Goals Program will be responsible for coordinating the day-to-day requirements of the study and reporting to the Joint Legislative Highway Oversight Committee, the Joint Legislative Commission on Governmental Operations, and the Legislative Services Commission.

REPORT REQUIREMENTS: The final report shall be submitted to the Joint Legislative Highway Oversight Committee on or before October 30, 1992. During the study process, progress reports will be required. Progress reports shall include timetables and preliminary findings.

If your firm is interested in receiving a copy of the Request for Proposal, please clearly indicate your desire and forward your request to:

Frederick Aikens
Fiscal Research Division
North Carolina General Assembly
Room 619, Legislative Office Building
Raleigh, North Carolina 27603-5925
Telephone: (919) 733-4910
Facsimile: (919) 733-3113

Richard Bostic
Fiscal Research Division
North Carolina General Assembly
Room 619, Legislative Office Building
Raleigh, North Carolina 27603-5925
Telephone: (919)733-4910
Facsimile: (919)733-3113

Your written request for a copy of the RFP must be received no later than March 4, 1992.

Sincerely,

Thomas L. Covington
Director

MBELDEF

Minority Business Enterprise Legal Defense and Education Fund, Inc.

Parren J. Mitchell
Founder and Chairman

Anthony W. Robinson
President

MEMORANDUM

TO: MBE/WBE/DBE Program Compliance Officers
State and Local Purchasing Agents
Other Interested Parties

FROM: Tyrone D. Press
Chief, Investigations and Research
Office of the Chief Counsel

DATE: March 1, 1991 (Update)

RE: Factors Affecting the Cost and Performance of MBE Disparity/Fact-Finding Studies

The following information is provided for the benefit of those jurisdictions/agencies contemplating the commission of minority business enterprise disparity fact-finding studies in response to the U.S. Supreme Court decision in City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 109 S.Ct. 706 (1989).

This memorandum shall be continuing in nature and shall be periodically updated as additional data are furnished to this office. Please assist in furnishing such data.

To date, contracts let for such studies have ranged in cost from $0.00 to $791,000.

Factors identified as price-influencing include:

a. the complexity of the MBE ordinance or legislation;

b. the number, nature and size of the soliciting political entity or entities (i.e., an entire governmental entity consisting of several agencies vs. a single agency);

c. the size and ethnic diversity of the population it serves;

d. the size and ethnic diversity of the business community to be examined;

e. the nature and scope of work to be performed;

300 I Street, N.E. Suite 200 Washington, D.C. 20002 (202) 543-0040

f. the availability/accessibility of the jurisdiction or agency's contract data (including the extent of computerization); and

g. time for performance.

Complicating an examination of the pricing structure is the lack of uniformity of the early requests for proposal (RFPs) issuing out of the jurisdictions. RFPs reviewed by this office exhibit variances in study objective and scope of work, and often permitted or invited bidders to propose non-uniform study approaches and design.

In addition, a few jurisdictions and consultants have experienced difficulty with respect to the performance of these studies. Factors identified as adversely affecting performance include:

a. Lack of understanding by the consultant (or unreasonable expectations on the part of the jurisdiction) as to the nature of the examination and/or the types and quantum of evidence to be gathered;

b. Inadequate funding;

c. Inadequate time for performance;

d. The availability/accessibility of contract data (including the extent of computerization; missing records)

e. Lack of cooperation on the part of the sponsoring jurisdiction/agency

In response to this phenomenon, MBELDEF, has developed minimal standards/guidelines for the performance of these studies. In addition, sample RFPs (with commentary, if desired) are available from this office upon request. MBELDEF also makes itself available to state and local jurisdictions desiring technical assistance in RFP drafting, study design and/or oversight, and post-study evaluations.

For additional information regarding the experiences of specific jurisdictions or agencies, please contact:

ARIZONA STUDIES

Maricopa County (Phoenix)
($156,427; awarded to Mason Tillman Associates)
Contact: Clara Engle, Director
Minority Business Office
Department of Materials Management
(602) 233-8600

CALIFORNIA STUDIES

Contra Costa and Alameda Counties
($320,000; awarded to National Economic Research Associates)
Contact: Victor Westman, Esquire
County Counsel
(415) 646-2074

City of Hayward
($104,000; awarded to BPA Economics and Mason Tillman Associates)
Contact: Don Ballard
Assistant to City Manager
(415) 293-5000

Los Angeles
($791,502; awarded to Cordoba Corporation and Mason Tillman Associates)
Contact: Sharon Tso
City Administrative Office
(213) 485-2019

Oakland
($ allocation unknown; RFP issued, but matter was held in abeyance due to recent earthquake)
Contact: Floydean Greenlow
Affirmative Action Manager
(415) 273-3500

Regional Transit Association of the Bay Area (RTA)
($200,000 allocated; RFP issued February 15, 1991; Proposals due March 15, 1991; A multi-agency DBE utilization study for 7 transit authorities including: Alameda/Contra Costa Transit District; San Francisco Bay Area Rapid Transit District;Central Contra Costa Transit Authority; Golden Gate Bridge, Highway & Transportation District; San Francisco Municipal Railway; San Mateo County Transit District; and Santa Clara County Transportation Agency.
Contact: Carl E. Kennedy
DBE Contract Compliance Officer
San Francisco Bay Area Rapid Transit District
(415) 464-6108

City of Sacramento
($ allocation undisclosed; A joint study including the County of Sacramento, the Sacramento Housing Authority and the Sacramento Regional Transit District. RFP issued December 7, 1990; Proposals due February 1, 1991)
Contact: Robbin DeShields Randolph
Assistant Director of General Services
(916) 449-5548

Sacramento Municipal Utility District (SMUD)
($ allocation undisclosed; RFP issued; Proposals due March 13, 1991)
Contact: Kenneth M. Fleming
Affirmative Action Manager
SMUD
(916) 732-6018

San Francisco
($40,000; awarded to BPA Economic, Inc. and Aileen C. Hernandez Associates for pre-Croson efforts under separate contractual arrangements. Highly computerized contract data. Hernandez (1985) examined bonding.) Both portions completed. San Francisco is gearing up to have a comprehensive, post-Croson study performed.
Contact: Burt Campbell
Human Rights Commission
(415) 558-4901

San Jose
($100,000; awarded to joint venture of BPA Economics, Mason Tillman, and Boasberg & Norton.) Construction phases completed in December 1990. The second phase covering professional services and commodities will begin shortly.
Contact: Rodolfo G. Navarro, Director
Affirmative Action/Contract Compliance
(408) 277-4899

COLORADO STUDIES

City and County of Denver
($316,340; awarded to Nelson & Ogborn, Attorneys at Law, Browne, Bortz and Coddington, Inc. and the Minority Business & Professional Directory, Inc. Focus on construction and professional design services work.) Draft completed June, 1990. A second study is presently underway to review commodities and services. The anticipated date of completion is July, 1991.
Contact: Leo Rodriquez, Director
Affirmative Action Office
(303) 575-3808

CONNECTICUT STUDIES

New Haven
($44,000; awarded to Gerald Jaynes, Professor of Economics, Yale University.) Study completed August 1990.
Contact: Bill Wilson
Office of Contract Compliance
(203) 787-8056

DISTRICT OF COLUMBIA STUDIES

Metropolitan Washington Airports Authority
($349,000; awarded to joint venture of National Economic Research Associates and Contract Compliance, Inc.) Study completed February, 1990.
Contact: Angela Martin
Office of Equal Opportunity Programs
(703) 739-8625

FLORIDA STUDIES

State, Department of General Services
(Initial allocation of $248,000 increased to $744,500; awarded to TEM, Inc.) Phases I and II complete.
Contact: Susan B. Kirkland, Esquire
General Counsel
(904) 487-1082

Dade County (Miami area)
($345,000; awarded to Dr. Andrew Brimmer)
Contact: Marsha Jackman, Interim Director
Minority Development Office
(305) 375-4132

Dade County Public Schools
($185,000; awarded to D.J. Miller & Associates) Study completed June, 1990
Contact: Dr. Rose Cox-Barefield
Director, Bureau of Business Management
(305) 995-1494

Hillsborough County (Tampa area)
($100,000; begun pre-Croson; performed by D.J. Miller & Associates) Study completed December, 1988.
Contact: Spencer Albert
Manager
Minority Business Enterprise Office
(813) 272-5969

Jacksonville
($398,000; awarded to D.J. Miller & Associates; A multi-jurisdictional effort for the City of Jacksonville, Duval County, the Electric Authority, the School Board and the Port Authority) Study completed November, 1990.
Contact: Connell Heyward, MBE Coordinator
Department of Central Services
(904) 630-1165

Palm Beach County
($175,000; awarded to MGT of America, Inc.) Study completed December, 1990.
Contact: Clarence Ellington
Director
Office of Equal Opportunity
(407) 355-4883

St. Petersburg
($147,426.40; awarded to D.J. Miller & Associates) Study completed June, 1990 with supplemental report issued in November, 1990.
Contact: Theresa D. Jones
MBE Coordinator
(813) 893-7846

Tallahassee
($119,600; awarded to MGT of America, Inc.) Study completed January, 1991
Contact: Ben Harris
MBE Officer
(904) 599-8184

Tampa
($160,000; awarded to D.J. Miller & Associates) Study completed in November, 1990.
Contact: Pamela Hart
Manager
Equal Opportunity Office
(813) 223-8192

GEORGIA STUDIES

Atlanta School Board
($50,000; awarded to Dr. Thomas D. Boston, Professor of Economics, Georgia Tech University.)
Contact: Denise Leggett, Esquire
Legal Counsel to the Board
(404) 239-1900

City of Atlanta and Fulton County
($517,000; A multi-jurisdictional effort awarded to joint venture of Drs. Andrew Brimmer & Ray Marshall, with MBELDEF, et al. as subcontractors.) Study completed June, 1990.
Contact: Rodney K. Strong, Esquire
Director
Office of Contract Compliance
(404) 330-6010

Metropolitan Atlanta Rapid Transit Authority (MARTA)
($250,000 allocated; Proposals due February 22, 1991.)
Contact: Ron Nawrocki
Director, Contracts and Procurement
(404) 848-5000

ILLINOIS STUDIES

City of Chicago
($0.00; Study performed by "Blue Ribbon Panel", appointed by the Mayor and led principally by Susan Gedsandaner, Esquire, of Skadden Arps, Attorneys at Law; Ruben Costello, Regional Office, Mexican American Legal Defense & Education Fund; and Milton Davis, Chairman, The South Shore Bank. Panel members reportedly contributed 100% of study's cost.) Study completed April, 1990.
Contact: Mayor's Press Office
(312) 744-3334

Chicago Board of Education
($180,000; Study being performed in-house by MBE administrators with assistance from outside CPA firm and legal counsel. Study team to rely, in part, on City study and past data gathered from previous study undertaken in 1986.
Contact: Evangeline Levison, Esquire
Director of Affirmative Action
(312) 535-4521

Metropolitan Water Reclamation District (Greater Chicago)
($265,000; performed by team comprised of Earl Neal & Associates, Attorneys at Law; Leon Finney Associates, Attorneys at Law; Vedder Price; Laventhal & Horwath, and academic Dr. Marcus Alexis of the University of Illinois at Chicago.) Study completed March, 1990.
Contact: Robert Abraham, Esquire
Law Department
(312) 751-6581

LOUISIANA STUDIES

State Department of Economic Development
($240,000; Phase I of study limited to public works projects and the horizontal construction industry. Awarded to joint venture of Dr. Huey L. Perry, Southern University and Dr. John Lunn, Louisiana State University. Universities contributed one-half of costs. First portion of Phase I completed April, 1990. Additional research is reportedly necessary. Completion of Phase I is scheduled for June 1, 1991. Phase II will concentrate on vertical construction, commodities and professional services.
Contact: Angelisa M. Harris
Executive Director
Office on Minority & Women Business Enterprises
(504) 342-5373

New Orleans Water & Sewerage Board
($100,000; awarded to the Dillard Consortium)
Contact: Rose Butler
Minority Business Office
(504) 585-2114

MARYLAND STUDIES

State of Maryland
($286,000; awarded to Coopers & Lybrand and A.D. Jackson Consultants, Inc.) Study completed March, 1990.
Contact: Richard A. Conway, Director
Office of Procurement & Contracts
(301) 859-7140

Baltimore
($50,000; performed in-house by "Croson Implementation Task Force" led by Law Professor Michael Milleman, University of Maryland School of Law.) Study completed December, 1989.
Contact: Lola Smith, Director
Equal Opportunity Compliance Office
(301) 396-4355

Maryland National Capital Park & Planning Commission
($ unknown; awarded to A.D. Jackson Consultants)
Contact: LeRoy Hedgepath
Office of the Executive Director
(301) 853-4802

Prince George's County Government
($65,000; awarded to MBELDEF) Study completed February, 1991.
Contact: Sheila Tillerson, Deputy County Attorney
Office of Law
(301) 952-4028

Prince George's County Public Schools
($60,000; awarded to Financial Research Associates) Study completed January, 1990, without release to public.
Contact: Janet D. Jarvis, Coordinator
Minority Business Program
(301) 952-6563

Washington Suburban Sanitary Commission
($36,000; a pre-Croson study performed by joint venture of MBELDEF and Financial Research Associates, Inc.)
Contact: William Gormley
Office of Public Affairs
(301) 699-4173

MASSACHUSETTS STUDIES

State of Massachusetts
Public hearings before the Massachusetts Commission Against Discrimination began on August 22, 1990. Final report reportedly available.
Contact: Marcus Weiss, Esquire
Consultant to the Commission
(617) 742-4406

Massachusetts Water Resources Authority
($290,000; awarded to National Economic Research Associates, Contract Compliance, Inc., and Perkins & Coie) Study completed November, 1990.
Contact: Julius Williams
(617) 242-6000

MICHIGAN STUDIES

Grand Rapids
($35,000; this effort is being performed "in-house".
Contact: Ingrid Scott-Weekly
Director
Office of Equal Opportunity
(616) 456-3027

MINNESOTA STUDIES

State Department of Administration
($125,000; work performed in-house by Department's Management Analysis Division. Oversight provided by Ken Nicholai, Esq., outside consultant.) Study completed February, 1990.
Contact: Dorothy Lovejoy, Manager
Customer & Vendor Services
Small Business Procurement Program
(612) 296-6131

MISSISSIPPI STUDIES

State of Mississippi
($200,000 allocated; RFP issued February 20, 1991, Proposals due March 15, 1991)
Contact: Royal Walker, Jr., Director
Division of Budget & Policy Development
Department of Finance & Administration
(601) 359-6752

MISSOURI STUDIES

Kansas City
($400,000 allocated)
Contact: Les Washington
Human Relations Office
(816) 274-1432

St. Louis
($323,000; awarded to Dr. Andrew Brimmer)
Contact: Ivy Neyland-Pinkston
Strategic Planning Manager
Comptroller's Office
(314) 622-3588

NEW JERSEY STUDIES

State of New Jersey and New Jersey Transit
($500,000; RFP issued; Proposals due February, 1991)
Contact: Sonya J. Lyles
Contract Specialist
(201) 643-7400

Atlantic City
($3,000; awarded to academic, Professor Morris Wolf, Stockton State College, to perform preliminary needs assessment.)
Contact: Girard Geeter
Minority Business Development Office
(609) 347-6482

Newark
($600,000 committed; work being performed, in part, by academics Drs. Peter Jackson and Ray Scippio, with remainder being performed by battery of in-house personnel and some private subcontractors. MBELDEF is to provide legal guidance and study oversight.)
Contact: Ms. Bobbi Ruffin, Director
Affirmative Action Office
(201) 733-8527

NEW YORK STUDIES

City of New York
($460,000; Awarded to National Economic Research Association for quantitative analysis [$360,000] and Darryl Greene & Associates for anecdotal evidence [$100,000]. This is, in part, a multi-jurisdictional effort, for that the anecdotal position is being

performed not only for the City of New York, but also on behalf of the State and the Health & Hospitals Association.) Anticipated date of completion is June, 1991.
Contact: Steven Rosenberg, Esq.
General Counsel
(212) 513-6301

New York Metropolitan Transportation Authority
($500,000; awarded to D.J. Miller & Associates to examine five operating agencies under the MTA.) Completed January, 1990.
Contact: James Nixon, Director
Office of Minority Business
(212) 878-7129

City of Rochester
($90,500; awarded to Affirmative Action Consulting, Inc. This study has been terminated allegedly due to contract disputes. The City is considering the issuance of a new RFP.)
Contact: Sandra Stephens, Principal Staff Assistant
Office of the Mayor
(716) 428-7413

City of Syracuse
($137,000; awarded to Knowledge Systems & Research, Inc., Meister, Leventhal & Slade and WAR Associates) Completed January, 1991
Contact: Sue Finklestein, Senior Assistant
Office of the Corporation Counsel
(315) 448-8400

NORTH CAROLINA STUDIES

County of Durham
($62,000; awarded to MBELDEF)
Contact: Lowell Siler, Esquire
Assistant County Attorney
(919) 560-0708

OHIO STUDIES

Cincinnati
($250,000; awarded to University of Cincinnati's Institute for Public Policy Research.)
Contact: Kathi Ranford
Office of Contract Compliance
(513) 352-4547

Cleveland
($289,000; awarded to A.D. Jackson Consultants, Inc.) Study to be completed by May, 1991)

Columbus
($40,000 initially allocated; awarded to Beatty & Roseboro with assistance from Professor William D. Bradford, University of Maryland.) Study completed January, 1991.

Dayton
($200,000; awarded to D.J. Miller & Associates)
Contact: Gerald Steed, Executive Director
Human Relations Council
(513) 228-5854

Montgomery County (Dayton Area)
($50,000; awarded to Beatty & Roseboro)
Contact: Gladys Bell
Interim Contract Compliance Officer
(513) 225-4689

PENNSYLVANIA STUDIES

Philadelphia
($125,000; awarded to Comprehensive Services, Inc., A.D. Jackson Consultants, Blair Consultants, Inc., and BHK)
Contact: John Macklin
Special Assistant
(215) 686-3893

Southeastern Philadelphia Area Regional Transportation Authority (SEPTA)
($ allocation unknown)

SOUTH CAROLINA STUDIES

City of Columbia
(The City is preparing to issue an RFP)
Contact: Charles Williams
City Managers Office
(803) 733-8223

TEXAS STUDIES

Dallas Area Rapid Transit (DART)
($224,000; awarded to A.D. Jackson Consultants to perform statistical research on "Availability". A second phase of the study relating to "Disparity" may also be awarded at $94,000.)
Contact: Pat Bush
Contract Administrator
Minority Affairs Office
(214) 658-6358

City of Dallas and Dallas/Fort Worth Airport Authority
($ Allocation unknown)
Contact: Catherine Turner
Minority Business Officer
(214) 670-4172

San Antonio
($360,000; Awarded to National Economic Research Associates. This is a multi-jurisdictional effort between 6 entities including Via Metro Transit, Bexar County, Bexar Hospital District, San Antonio Water Board and San Antonio Public Services [the latter being a city-owned gas and electric utility company].)
Contact: Terry Williams or Manuel Longoria
SMBA Specialists
(512) 554-7128

VIRGINIA STUDIES

Richmond
($250,000; awarded to National Economic Research Associates) Report anticipated April, 1991
Contact: Joyce Wilson, Senior Assistant to City Manager
Department of General Services
(804) 780-5814

WASHINGTON STUDIES

Seattle
($350,000; awarded to Perkins & Cole, et al. A multi-jurisdictional effort limited solely to construction and professional services.) Participating entities included City of Seattle, Seattle School District, Port of Seattle, Municipality of

North Carolina General Assembly
Legislative Services Office
Legislative Office Building
300 N. Salisbury Street, Raleigh, N. C. 27603-5925

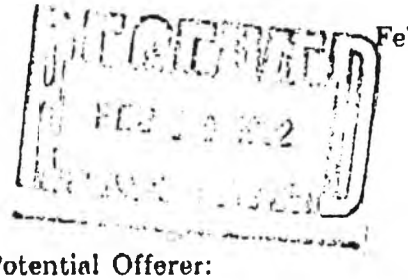
GEORGE R. HALL, JR., Legislative Administrative Officer
(919) 733-7044

M. GLENN NEWKIRK, Director
Automated Systems Division
Suite 400, (919) 733-6834

GERRY F. COHEN, Director
Bill Drafting Division
Suite 100, (919) 733-6660

THOMAS L. COVINGTON, Director
Fiscal Research Division
Suite 619, (919) 733-4910

TERRENCE D. SULLIVAN, Director
Research Division
Suite 545, (919) 733-2578



February 12, 1992

Dear Potential Offerer:

The Co-Chairmen of the Legislative Services Commission and the Joint Legislative Highway Oversight Committee of the North Carolina General Assembly have authorized a "Study of Minority and Women Business Participation in Highway Construction in the State of North Carolina". A Request for Proposal will be issued on or about March 10, 1992 for a contractor to conduct the study under the direction of the Joint Legislative Highway Oversight Committee. The study must be completed and a final report presented to the Joint Legislative Highway Oversight Committee not later than October 30, 1992.

The scope of the study will include a detailed examination of racial and gender discrimination in the highway construction industry and the degree and extent to which past discrimination existed and continues today. Because the results of the study will be used to support a goals program in highway construction enacted by the 1989 North Carolina General Assembly, it is imperative that the study be in compliance with the U.S. Supreme Court's Decision in City of Richmond v. J.A. Croson Company. Consequently, the contractor will be expected to propose remedies, a plan of action, policy changes, and draft legislation, if necessary.

The contractor must be able to provide sufficient resources and experience to the study to meet the project schedule.

STUDY ORGANIZATION: The Joint Legislative Highway Oversight Committee is the responsible entity for the Study. The Joint Legislative Highway Oversight Committee Subcommittee on Minority and Women Business Goals Program will be responsible for coordinating the day-to-day requirements of the study and reporting to the Joint Legislative Highway Oversight Committee, the Joint Legislative Commission on Governmental Operations, and the Legislative Services Commission.

REPORT REQUIREMENTS: The final report shall be submitted to the Joint Legislative Highway Oversight Committee on or before October 30, 1992. During the study process, progress reports will be required. Progress reports shall include timetables and preliminary findings.

If your firm is interested in receiving a copy of the Request for Proposal, please clearly indicate your desire and forward your request to:

Frederick Aikens
Fiscal Research Division
North Carolina General Assembly
Room 619, Legislative Office Building
Raleigh, North Carolina 27603-5925
Telephone: (919) 733-4910
Facsimile: (919) 733-3113

Richard Bostic
Fiscal Research Division
North Carolina General Assembly
Room 619, Legislative Office Building
Raleigh, North Carolina 27603-5925
Telephone: (919)733-4910
Facsimile: (919)733-3113

Your written request for a copy of the RFP must be received no later than March 4, 1992.

Sincerely,

Thomas L. Covington
Director

SLRC

SPECIAL ISSUE

LEGISLATIVE BULLETIN

Number 8 Southern Regional Council Fall 1990

After Richmond — Defending Minority Business Enterprise Programs

BY BRIDGET ARIMOND

In January, 1989, the United States Supreme Court ruled that the City of Richmond's minority business enterprise (MBE) program was unconstitutional. Under that program, Richmond had established a goal of awarding 30 percent of all city construction contracting dollars to MBEs. In striking down this program, the Court ruled that Richmond had failed to show (1) that MBEs in Richmond were suffering the effects of discrimination and (2) that Richmond's MBE program did more than was necessary to remedy that discrimination.

The Richmond decision does *not* mean that the days of minority business enterprise programs are over. However, it *does* mean that state and local governments must meet onerous new standards of proof before they can enact new MBE programs. And, state and local governments that already have such programs in place must reassess those programs and make sure that they are supported by the kind of factual predicate that the Supreme Court now has said is necessary.

In order to defend a race-conscious MBE program, a state or local government must be able to satisfy two tests. First, it must be able to show that it has a "compelling governmental interest" in implementing such a program. The Supreme Court agrees that state and local governments do have a compelling interest in remedying the lingering effects of past or present discrimination. However, if this is the stated purpose of the program, then the jurisdiction must be able to point to solid evidence that there has been discrimination against MBEs within that geographic area.

The jurisdiction may meet this test by showing that the effects of its own past or present discriminatory actions continue to deprive MBEs of fair con-

(Continued on Page 2)

Atlanta study shows how to meet the *Croson* standards and win

BY THOMAS D. BOSTON

In 1845, the Georgia General Assembly passed a law which made it a misdemeanor for a white person to engage in trade with a black contractor. A century and a half later, discrimination is not nearly so straightforward.

A recently completed Minority Business Enterprise (MBE) study for the City of Atlanta and Fulton County, "Public Policy and Promotion of Minority Economic Development," shows that substantial racial barriers still exist for minority entrepreneurs and that the present effects of past discrimination are profound.

Nonetheless, the growing conservatism and insensitivity of the U.S. Supreme Court to racial inequity — and the resulting preconditions the Court now demands for the establishment of MBE programs — have caused many cities to abandon their affirmative action efforts in favor of more race-neutral alternatives.

Current conditions make it necessary to ask: Is the *Croson* standard so impossible to meet?

As a member of the research team that conducted the Atlanta study, I would like to share some of our findings with you, especially since few public officials will likely have time to read the entire eight-volume study. My observations will primarily be limited to conclusions of the economic analysis, since this was the area that occupied most of my efforts. For a more general summary of the entire study, read

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About this Special Issue

Assessing the Impact of Recent Court Cases on Minority Business

In 1989, as democracy movements worldwide gained momentum, democratic ideals were under fire here at home. In *Richmond v. Croson* and other cases, the U.S. Supreme Court resurrected impediments to economic parity for minorities. We hope this special newsletter will stimulate strategic thinking among Southern legislators, city officials, and MBE program administrators to address these challenges. — SLRC STAFF

Defending Minority Business Enterprise Programs

(Continued from Page 1)

tracting opportunities. Or, the jurisdiction may show that discrimination is so prevalent in the local marketplace that, absent remedial measures, the state or local government would become a passive participant in a discriminatory marketplace.

But in any case, there must be solid, documented evidence of discrimination against MBEs. Evidence of general societal discrimination — in schools, in housing, in voting rights, etc. — will not suffice. Instead, the evidentiary showing must specifically show the effects that discrimination has had on ongoing contracting opportunities.

Richmond's experience shows the kinds of evidence that the Court will *not* accept as probative of discrimination. Richmond attempted to rely on five kinds of evidence.

• First, the Richmond ordinance stated that the purpose of the MBE program was remedial. The court found this to be a self-serving statement that in no way proved the program actually was a remedy for discrimination.

• Second, during the city council hearings on the ordinance, the city manager and a city council member made generalized, conclusory statements that there was racial discrimination in the construction industry in Richmond and elsewhere. Given the well-known history of discrimination in the building trades, one might have thought that no formal proof would be necessary. But the Supreme Court ruled otherwise, and held that generalized, conclusory statements are not enough to show discrimination.

• Third, Richmond showed that prior to the adoption of its MBE program, minority-owned businesses received only 0.67 percent of prime contracts from the city, although minorities made up approximately 50 percent of Richmond's population. The Court refused to find any evidence of discrimination in even such a striking disparity. According to the Court, a comparison of contract participation with general population statistics is irrelevant. Instead, Richmond should have compared the proportion of MBEs in the pool of qualified contractors, with the share of contracting opportunities received by MBEs. Moreover, the Court faulted Richmond for only presenting statistics about prime contracts won by MBEs, since the city's MBE program primarily involved directing more subcontracting opportunities to MBEs. To show an underutilization of minority contractors, Richmond should also have looked at the share of subcontracting opportunities won by MBEs.

• Fourth, Richmond also relied on evidence that minority participation in local contractors' associations was extremely low. The Court found that, absent evidence of the availability of MBEs eligible for membership, the low minority membership rate was not

(Continued on Page 3)

Non-profit Legal Organization Helps *Croson* Victims

BY ANTHONY W. ROBINSON

On January 23, 1989, this nation's minority business community was dealt a crippling blow by the United States Supreme Court's 6-3 decision in the *City of Richmond v. J. A. Croson*. The decision subsequently jeopardized 236 state and local programs designed to remedy the devastating impact of many years of racial discrimination against minority business enterprises.

The Minority Business Enterprise Legal Defense and Education Fund (MBELDEF) is actively involved in efforts to establish a "*Croson*-proof" basis for many of the programs currently under attack. The Fund was founded in 1980 by former Maryland Congressman Parren J. Mitchell as a national advocacy organization and legal representative for the minority business community.

In addition to MBE court defenses, MBELDEF also helps state and local governments in other ways as they respond to *Croson*. Based in Washington, D.C., the Fund has monitored the effects of the decision nationwide and has spread information on administrative and legal survival strategies through conferences and its membership.

The Fund has developed minimum guidelines for the performance of M/WBE disparity/fact-finding studies, published a directory of private consulting firms and academicians interested in performing this work, and helped individual state and local governments with the design and oversight of the study effort as well as in the drafting of their requests for proposals (RFPs).

The Fund also attacks discrimination in the public and private sectors of the marketplace through its 150-member National Lawyers Panel.

Membership in this nonprofit organization is comprised of individual M/WBEs, program administrators and contract compliance officers, attorneys, public officials and other interested parties.

Write MBELDEF at 300 I Street, NE, Suite 200, Washington, DC, 20002, (202-543-0040).

Tony Robinson is president of the Minority Business Enterprise Legal Defense and Education Fund, Inc. Robinson specializes in civil rights — particularly employment discrimination — and minority business legal issues.

Defending MBE

(Continued from Page 2)

probative of discrimination.

• Finally, Richmond relied on prior Congressional findings that there had been nationwide discrimination in the construction industry. The Court ruled that these findings had extremely limited value for proving discrimination in any particular location, since Congress had recognized that there were exceptions to the national pattern. Accordingly, evidence of discrimination specific to Richmond was required before that city could implement an MBE program.

While the Richmond opinion was very clear about the kinds of evidence that are *not* acceptable, it unfortunately provided less guidance on just how a jurisdiction *can* meet its obligation to assemble evidence of discrimination. As a result, it is imperative that proponents of MBE programs do everything possible to present comprehensive evidence of discrimination in both public and private sector contracting.

There should be evidence showing that discrimination limits contract opportunities for minority-owned businesses even when those businesses are available, equally qualified, and competitively priced. Next, there should be evidence showing that MBEs also lose contract opportunities when, although they are available to work, they are unable to submit competitive bids because of the effects of discrimination. Finally, there should be evidence that the relatively low availability of MBEs is itself the direct result of systemic, long-standing discrimination against minority entrepreneurs and would-be entrepreneurs.

All Types of Evidence

In assembling this factual predicate, supporters of MBE programs should draw from all types of evidence that can be used to show discrimination — statistical evidence, expert testimony by historians, economists, and other social scientists, and testimony by minority business owners and would-be business owners who have suffered discrimination.

At all times attention must be paid to the teachings of the Richmond decision. Thus, statistical evidence is important, but it must focus on the proper comparison. Testimony by victims of discrimination is important, but it must be more than simply generalized or conclusory complaints. Study reports and expert testimony are important, but they must focus on discrimination that affects contracting, not on general societal discrimination, and they must focus on the correct city, state or region.

> Numerical goals must be set no higher than necessary to remedy the discrimination.

Once a state or local government has shown that MBEs lack equal contracting opportunities because they continue to suffer the effects of discrimination, the jurisdiction has satisfied the first test and can move on to the second test set down in the Richmond decision. Under the second test, the jurisdiction must show that its particular MBE program is "narrowly tailored," so that it does no more than is necessary to remedy the discrimination that has been identified.

Court Set Down Standards

This "narrow tailoring" requirement stems from the legal doctrine that any racial classification —including affirmative action — can be used by a state or local government only as a last resort. It can only be used if nothing else will work, and it can only be used to the minimum extent necessary to solve the problem.

Applying this rule in the Richmond case, the Supreme Court set down a number of standards. First, a state or local government cannot adopt a program that includes a racial preference unless it has first "considered" the availability of race-neutral solutions to the problem and determined that they would be inadequate. It is important to note here that the Court used the word "considered"; it did *not* say that every jurisdiction must first go through a trial period with every conceivable race-neutral approach, before adopting an MBE program that includes an element of racial preference.

However, the consideration must be sincere. A jurisdiction will be in a stronger position if it *can* point to some race-neutral approaches that it has tried over the years (*e.g.*, technical assistance programs, local laws prohibiting racial discrimination in contracting practices, small business assistance programs), and if it can show that despite these programs minority-owned businesses continued to suffer the effects of discrimination. And, as to race-neutral approaches that the jurisdiction has not itself tried, there must be some reasoned basis for the conclusion that they would not work.

Second, a program's percentage goals must have a legitimate, legally acceptable basis. Most MBE programs utilize goals: absent waiver, either a certain percentage of contracts are set aside for bidding exclusively by MBEs, or, more commonly, a certain percentage of overall contract dollars are to go to MBEs through either prime or subcontracts. Now, if a program uses numerical goals, those goals must be set no higher than the level necessary to remedy the problem of discrimination. The goals cannot be based on minority population figures, because the Supreme Court is unwilling to accept the proposition that minorities should share in contracting opportunities in proportion to their presence in the general population.

If a city has shown that because of discrimination, MBE utilization lags behind MBE availability (i.e., the proportion of public contracting dollars going to MBEs is significantly smaller than the proportion of MBEs in the pool of qualified contractors), then a goal could be set at the level of MBE availability. The problem with this approach is that it provides no remedy for the artificially depressed availability of minority-owned businesses. In

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Defending MBE

(Continued from Page 2)

the business world, availability follows opportunity. This is why it is important to have evidence that shows that discrimination against MBEs has depressed the level of minority business formation and has driven many minority owned firms out of business. Based on this evidence, and aided by appropriate expert testimony, jurisdictions should attempt to determine what the availability of minority-owned businesses would be but for discrimination.

Some Goals Could Be Approved

Such evidence was not presented in the Richmond case, so the Supreme Court did not discuss whether goals could be set on the basis of such an estimate of fair availability. However, there is good reason to believe that such goals would be approved by the Court, since the purpose of the goal is to completely remedy the documented effects of racial discrimination.

Third, the program should have flexible waiver provisions. The more a program looks like a rigid quota program, the more likely it is that a court will strike it down as unconstitutional.

Fourth, the program can only provide benefits to those specific minority groups that have been shown to be victims of discrimination. Traditionally, state and local governments followed the federal government model and included as beneficiaries of their programs members of all minority groups. Now, if a city has a black population and an Hispanic population, it must show discrimination against both groups before it can include both groups as beneficiaries of its MBE program.

Fifth, the program must be temporary, not permanent. This does *not* mean that an MBE program must be terminated before the effects of discrimination have been remedied. However, a program should be subject to review at regular intervals, and it should terminate at some defined time unless the evidence at that time warrants its renewal.

To sum up, the Richmond decision is a serious but not fatal setback to efforts to increase opportunities for minority-owned businesses. Assembling the necessary evidence of discrimination and adhering to the "narrow-tailoring" standards will not be easy.

However, the stakes are too high to abandon the effort. As a direct result of MBE programs, minority-owned businesses have begun to open doors that had long been closed shut by systemic discrimination. If this progress is to continue, it is absolutely essential that state and local governments and MBEs and their advocates work together to ensure that the Richmond decision requirements are met. □

Bridget Arimond is a civil rights attorney in Chicago. She has been active in legislative issues, working with a coalition of civil rights organizations called the Joint Project to Preserve Minority Business Opportunity. The Joint Project has held several hearings with Congressional committees in Washington in anticipation of structuring new equal employment opportunity laws to deal with discrimination in the workplace. Ms. Arimond can be reached at (312) 939-2131.

Croson

(Continued from Page 1)

volume one.

The *Croson* standard is not as difficult or costly to meet as commonly presumed. Experience has shown that more information is typically available at the local level to satisfy the *Croson* criteria than is commonly presumed. One simply has to know where and how to look for it. The interested reader is referred to my recent paper entitled "Establishing a Factual Predicate to Meet the *Croson* Standard: The Challenge of Data Collection," prepared for the Joint Center for Political and Economic Studies conference proceedings on the *Croson* decision. That forthcoming volume also has companion papers that will provide the reader with the nuts and bolts of organizing a study to meet the *Croson* standard. [1]

Many localities have hesitated to conduct studies because the cost of Atlanta's study seems daunting. However, there is no reason why subsequent studies should be nearly as costly. Atlanta's study was unique because it was perceived as fulfilling a special mission. Specifically, Atlanta is viewed

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MBE Participation in Total Percentage of Contracting Dollars by Jurisdiction

Program Name	Year Instituted	Before Program	Until Croson (1989)
Dade Co. School Board	1984	3.00%	23.00%
Fort Worth, Texas	1986	<1.00%	15.00%
Shreveport, Louisana	1988	< 5.00%	12.38%
State of Louisana DOT	—	3.50%	10.90%
Richmond, Virginia	1985	0.67%	* 40.00%
Atlanta, Georgia	1975	0.13%	28.07%
Jacksonville, Florida	1984	0.00%	1.00%

*(1987 when program discontinued)

Croson

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...a pioneering city in the establishment of minority participation programs and, as such, was looked to for leadership in meeting the *Croson* standard. The wisdom of city officials allowed them to take up this challenge and pave the way for the continued growth and development of MBE programs nationally. By adopting the methodology and approach of the Atlanta study (where appropriate) local areas can reduce their expense greatly. In short, there is no need for another Atlanta study as I believe it is best perceived as a test case. On the other hand, the *Croson* standard can be met by a much more modest effort.

My second observation is that discrimination has been and continues to be pervasive in private and public sector contracting. Therefore, MBE programs play a crucial role in the growth and enhancement of minority business enterprises. By contrast, race neutral alternatives, no matter how creatively designed, have generally ...en to be ineffective at significantly ...proving the participation of racial minorities. Finally, MBE programs are not zero sum games where white male businessmen lose in direct proportion to the gains made by minorities. Instead, we have found that such programs serve as magnets attracting the most qualified minority businessmen into non-traditional lines of entrepreneurship, thereby expanding the income, employment and business opportunities in the local area. Likewise, by pushing for more fairness and racial inclusion, MBE programs have opened procurement opportunities up to a broader array of majority firms as well. Prior to such programs the "old boy" network ruled procurement in most locations and locked out even a large number of majority firms. Therefore, one should avoid the hysteria caused by the *Croson* decision and continue to operate these programs, albeit under the new more stringent criteria. While th...enefits of an MBE program accrue t... ...nority businesses, majority businesses and the community as a whole, the alternatives to a formal program are simply ineffective. The summary of findings below will illustrate these points.

GENERAL FINDINGS OF THE ATLANTA STUDY

• A formal MBE program is the most effective means of remedying the present effects of past discrimination in public and private markets for contractual services.

• The economic status of MBEs has improved significantly by their participation in the MBE program in Atlanta.

• A total of 768 MBEs are certified by the City of Atlanta. 43 percent are in the construction industry, which represents 6.9 percent of all construction firms in the Atlanta SMSA. An additional 8 percent of MBEs are in engineering and architectural services. Of the 377 MBEs in non-construction industries, the largest concentrations are in service (54 percent), retail trades (15 percent) and wholesale trades (11 percent). Among MBEs in the service industry, the greatest concentrations are in non-traditional areas such as management and public relations (16 percent), advertising (13 percent), computer and data processing (9 percent), and business services (9 percent). In fact, one of the greatest benefits of Atlanta's program is that it encourages minority business growth in non-traditional industries.

• 89 percent of certified MBEs are located within the Atlanta SMSA and 9.8 percent are located outside of the state. Proportionately, more non-local majority firms are awarded procurement contracts than are non-local minority firms.

• 88 percent of certified MBEs in the construction industry are owned by black entrepreneurs, 7 percent are owned by black women, 5 percent by white women, 5 percent by Asians, and 2 percent by Hispanics. Nationally, 6 percent of minority entrepreneurs in the construction industry are women.

• A unique feature of certified firms is that their legal form of organization varies from the typical minority owned firms. Nationally, 3 percent of black owned construction firms are corporations, 4 percent are partnerships and 93 percent are proprietorships. But among certified firms in Atlanta, 60 percent are corporations, 15 percent are partnerships and only 25 percent are proprietorships.

• The typical certified MBE has nothing in common with the traditional "Mom and Pop" proprietorship that has become a landmark in the black community. In 1988, the median revenue of minority construction firms certified by Atlanta was $125,529, median gross profit was $35,800, median total assets were $109,410 and median net profit before taxes was $31,252.

• Among construction industry MBEs the median business-related experience of owners is 15 years. Further, 98 percent of owners have completed high school, 75 percent have attended college, 58 percent have completed college, and 13 percent have graduate degrees. This level of attainment is far superior to the national norm for minorities in the construction industry. Among firms in non-construction industries, 99 percent of owners have completed high school, 85 percent have some college studies, 64 percent have completed college and 25 percent have graduate degrees. The national average for years of education for black business owners is 11 years.

• 55 percent of MBEs in construction employ 9 or fewer workers, 28 percent employ 10 to 19 workers and 17 percent employ 20 or more workers. The median number of workers employed by construction firms is 7 while the average is 15. The median among non-construction firms is 4 workers. In 1988, certified minority construction firms employed 3,301 workers. MBEs in non-construction industries employed a total of 1,695 workers. In 1988, all certified MBEs employed 4,996 workers and generated $270 million in business revenue.

SOME FINDINGS OF THE DISPARITY ANALYSIS

• Despite high levels of education and training and business-related experience of minority entrepreneurs, the financial status of MBEs is less favorable than that of majority firms. In the category of assets, majority firms have

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Croson

(Continued from Page 5)

$32,400 per worker while MBEs have $24,271, revenue per employee is $77,200 and $60,589 for majority and minority firms, net profit per employee is $3,500 and $1,503, respectively, and finally net profit per dollar of assets is $.11 as compared to $.06 for majority and minority firms, respectively.

• A large disparity exists in public and private sector construction opportunities between minority and majority firms. The median value of public sector contracts held by MBEs is 12 times the value of their private sector contracts, *i.e.*, $175,500 as compared to $15,000, respectively. Only $7.25 of every $100 in revenue received by minority firms comes from the private sector. But majority contractors in Atlanta earn more than 80 percent of their revenue in the private sector.

• Only 32 percent of minority firms have bonding capacity, the average of which is $1,244,955. The average for majority-owned firms is $5,830,861. While majority firms have 3 times the mean employment of MBEs, they have more than 5 times their mean bonding capacity. Further, this disparity is understated because 16 percent of majority firms have unlimited bonding capacity while no minority firm does.

• In Atlanta, $17.5 billion procurement dollars were awarded between 1973 and 1988. The minority participation in procurement has been greatest in the area of negotiated contracts (35.8 percent), followed by special projects (26 percent), formal contracts (17 percent), and the procurement of supplies (8.5 percent). In the three years before the program was initiated in 1976, minority participation averaged only 4.3 percent. Since the institution of the program, this has increased to 21.9 percent. Following the court-ordered suspension of the program in 1989, minority participation decreased from 36 percent to 15 percent in less than a year.

• While minority firms received 40 percent of all prime contracts (excluding joint ventures) awarded between 1978 and 1988, the median value of a prime contract to a minority firm was $13,000 while to a majority firm, it was $83,181. The median value of a subcontract to a minority firm was $17,600.

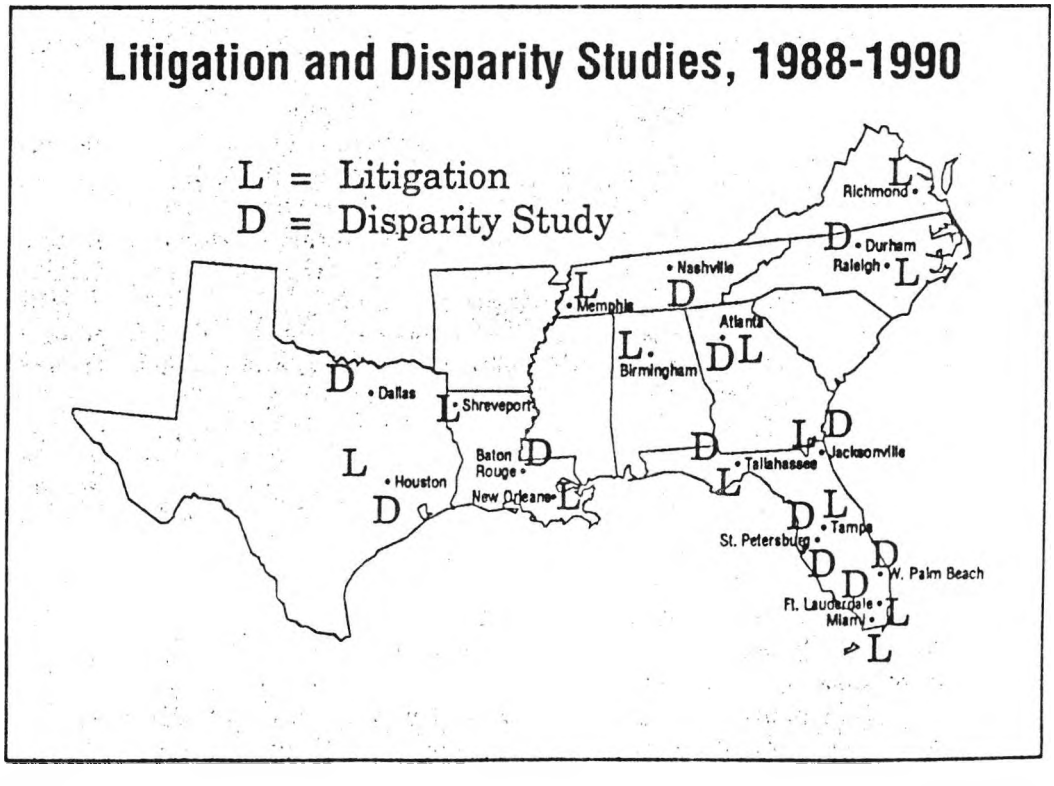
• The median size of joint venture awards to majority firms was $93,995, while it was $40,924 to a minority firm. Between 1973 and 1988, minority firms received 38.2 percent of all joint venture awards or $106,500,000.

• The MBE program is characterized by both price and bid competition as 71 percent of all formal awards had 3 or more bidders while only 11 percent had only one bidder. On the other hand, 91 percent of all contracts are awarded to the lowest bidder, 6 percent to the second lowest bidder and 3 percent to the third lowest bidder.

This data summarizes some of the most important findings of the economic analysis in the Atlanta study. Alongside other findings, it documents a pattern of significant disparity, especially in the absence of the MBE program. The MBE program is crucially important to the continued growth and viability of minority businesses in Atlanta. But the U.S. Supreme Court has offered an enormous challenge to the existence of these programs. Nevertheless, I believe it is possible to meet this challenge and, thereby, continue to provide minority businesses with the only reasonable vehicle for redressing the present effects of past discrimination. On this point, I hope that we are all in agreement. □

[1] *Contact Margaret Simms, Joint Center for Political and Economic Studies, 1301 Pennsylvania Avenue, NW, Suite 400, Washington, DC 20004, (202-626-3500). A working paper of my contribution is available from the author upon request.*

Thomas D. Boston is associate professor of economics at Georgia Tech and author of Race, Class and Conservatism. *He was on the research team that conducted the minority business enterprise study for the City of Atlanta. He can be reached at the School of Economics, Ivan Allen College of Management, Policy and International Affairs, Georgia Institute of Technology, Atlanta, GA 30332, (404-894-4918).*



DISCUSSION TOPIC

1. LEAD ENGINEER

The Department shall reassess designating a lead engineer to work out of headquarters with the DBE/WBE contractors as mandated in Section L of 12-27-1320 and Section 63-714(c) of the proposed DBE Regulations.

2. PRE-ENGINEERING CONSULTANT CONTRACT GOALS

The Department shall develop a program to include goals on pre-engineering design-consultant contracts ~~projects~~ for federal highway projects.

3. PRE-QUALIFICATION REQUIRING AUDITED FINANCIAL STATEMENTS FOR ALL CONTRACTORS

Prequalified contractors will be rated according to the following:

1. The experience of the applicant.
2. The liquid assets (shall be equal to at least fifteen percent of the contract amount) or 6.6 percent times ~~bidding capacity~~. net liquid assets.
3. Equipment.

4. LEGISLATIVE AUDIT COUNCIL

Recommendation 20 that the General Assembly may wish to review the potential effects of changing the emphasis of the minority program from participation goals on individual programs to direct contracts (set-aside).

5. CROSON DECISION

Pursue available option for funding a disparity study for the State.

Common Problems of Minority Business Development

BY TIMOTHY BATES

Here passage of laws mandating minority business set-asides and preferential procurement programs does not necessarily benefit minority enterprise. An examination of common problems plaguing poorly administered programs is instructive.

Preferential procurement programs are often adopted in vague language that does not articulate specific implementation procedures. Further, adequate staff may be unavailable to implement whatever program has been placed on the books. Predictable problems arise for potential minority vendors, including the following.

• **CERTIFICATION:** Being certified as a minority-owned business that is ready and willing to accept procurement contracts is often tricky. First, the process of certification is rarely uniform from agency to agency. Thus, the minority firm must prepare multiple certification applications, many of which are time consuming; sometimes, professional help must be hired to assist in completion of the relevant forms. Second, the certification forms, once completed, often place the minority firm in limbo, because long delays are common before actual certification is forthcoming. Some government agencies have larger backlogs of minorities than they have actual certified minority-owned businesses.

• **BIDDERS LIST:** Certification, if successful, does not guarantee that the minority firms will be notified of relevant procurement opportunities. Often, firms actually awarded government contracts are not even on the applicable bidders lists; they simply rely upon established personal relationships with individual government purchasing agents. Minority firms attempting to discover what the normal procedures are for learning about upcoming procurement opportunities may indeed find that there is no set procedure. Such unstructured environments, of course, put a premium upon having established close personal relationships with the appropriate government employees. These are exactly the sorts of contacts that minority firms lacking prior procurement experience are least likely to have. The possible result of all of this is that the status quo shuts out the new minority firm. This institutionalized discrimination encourages minority firms to waste time and money getting certified, getting on bidders lists, etc., when, in fact, they are being denied the opportunity to compete.

• **CONTRACT SIZING:** Minority firms attempting to break into government procurement are often small — much smaller than the established non-minority businesses that they are likely to be competing against. Many contracts are simply too large: the minority firm does not have the capacity to accept the business. Winning an overly large contract has the potential to destroy a minority firm, particularly if the government is slow to pay. Procurement officials can downsize many contracts if they are so inclined. Breaking down very large contracts into component parts makes procurement business much more accessible to minorities. Procurement officials may feel, however, that downsizing creates too much work for them.

> When political will is lacking, mere legislation may produce meager results.

• **SLOW PAYMENT:** Many government agencies delay payments to vendors for months and months. Minority firms, often restricted in their access to bank credit, may experience liquidity crises (often fatal) due to this slow payment. Minority firms often work as subcontractors; their general contractors may add another layer of delay by not paying the minority subs promptly after they have been paid by government.

• **SANCTIONS:** Various government rules and policies that are designed to increase minority business access to government procurement dollars may be routinely violated. Minorities may not be notified of available work; they may not be paid on time; prime contractors may obtain procurement contracts by agreeing to utilize minority subs—and then not utilize them. Minority front firms, even when they are uncovered, may have trivial (or no) sanctions imposed on them. Waivers may be granted to eliminate mandatory minority participation—even when qualified minority firms are ready and willing to participate in government procurement. The list goes on and on. Quite often these violations are ignored, and little or no recourse is available to the impacted minority firms. The problem is straightforward: the political will that is a vitally important component of a successful minority business assistance program is simply lacking.

Promoting black-owned businesses was ranked as "very important" by 86 percent of black elected officials in a study released in 1989. This attitude is responsible for the greater success of minority business preferential procurement and set-aside programs in cities where black mayors are presiding. Where the political will to promote minority business is lacking, mere legislation may produce meager results. □

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Initiatives Provide Capital to Minority Businesses

BY CATHERINE D. LOCKHART

Promoting minority entrepreneurship and business development is critical to the survival of local, state and national economies. Many federal programs and policies that once sought to provide better business and economic opportunities for minorities have ceased to be effective or, as a result of recent actions, have been retrenched and threaten the progression of minority business development.

For example, the Small Business Administration ceased its direct loan program approximately five years ago. This program was instrumental in assisting many minority business start-ups in the late 60s and throughout the early 80s.

However, many states have developed unique program models to promote the development, expansion, and retention of small minority businesses. This article will describe two innovative state programs that provide capital to minority businesses.

The first one is the Maryland Small Business Development Financing Authority. Created in 1978, the Authority has served as a national model for many other state programs in developing financial assistance programs for minority enterprises. The self sufficient state program began with a $2 million general fund appropriation. The Authority administers an equity participation investment program providing equity funds for minorities seeking franchise opportunities, or acquiring existing profitable businesses. Though the Authority is a publicly administered program whose statutory limitations limit flexibility and creativity, it has been effective in creating over 4,000 jobs for the State of Maryland and has provided over $21 million in capital assistance to over 200 firms.

The Greater Detroit BIDCO, Inc. (GDB) is the only minority owned and operated business and industrial development company in the nation. Several prominent black Michigan business persons pooled their financial resources and were able to leverage $600,000 in equity contributions with $3,000,000 from the state of Michigan and matching private funds from the Ford Foundation and Metropolitan Life Foundation, each providing $1.5 million. It took the organizers two and one-half years to find these sources of capital. In addition, the GDB received local support from the Hudson-Webber Foundation and the National Bank of Detroit.

> Minority Business Development has a rippling effect in communities.

BIDCOs are a new class of financial institutions that are designed to assume more risk in their financing than banks are able to assume, while at the same time, earn lower returns than a venture capital company. BIDCOs are designed to: (1) catalyze the formation of private financial institutions, (2) have private decision making on financing, (3) attract high caliber private sector talent, and (4) leverage private capital. The Minority BIDCO Program seeks to develop a long term mechanism for leveraging private capital for minority enterprises and enabling minorities to play a central role in the financial institution's system that provides capital to businesses. The Minority BIDCO Program contains a real subsidy and is a targeted program. The subsidy is performance based, and only realized to the extent that the Minority BIDCO is successful in creating jobs and stimulating economic activity in minority companies and distressed area companies. For the first five years of a job created, the Minority BIDCO will earn a $1,000 credit, and one percent of the increase in sales generated for a five year period as a credit towards reducing the accrued interest and principal owed to the state for its participation in the BIDCO's capitalization. This will serve to promote the long term viability and success of Minority BIDCOs by increasing their equity base over time.

The Minority BIDCO will also provide the necessary managerial and technical assistance that is a vital component to the success of the businesses that it finances. Sometimes the need for management and technical assistance is greater than the need for capital.

The GDB seeks to complement rather than replace traditional sources of financing. GDB expects to provide financing in situations where the banks will not lend all the cash needed or where the structure of the bank financing is unsuitable for the needs of the business. The investment vehicles utilized are designed to increase the attractiveness of the project to other financial resources, address specific financing needs, as well as enhance the long-term prospects of both the businesses financed and the GDB.

There are other minority programs worthy of mention here, such as the state of Florida's Black Business Investment Fund, the Pennsylvania Minority Business Development Authority and the Business Consortium Fund administered through the National Supplier Development Council. These initiatives need to be expanded throughout the nation. It is a known fact that minority business development fosters an economic rippling effect in minority communities, increasing jobs and enhancing economic activity, all of which are keys to gaining economic parity and empowerment to solidify our future and the future of our children. □

Catherine Lockhart is the president and chief executive officer of the Greater Detroit Bidco, Inc., (313) 962-4326 Ms. Lockhart has over 13 years in the commercial lending area, the last seven of which were spent with the state of Maryland's Small Business Development Financing Authority, a national model for launching and strengthening minority and small businesses.

In the Aftermath of Croson —

Minority Business Enterprise Programs Struggle to Survive

General Patterns:

The effects of *Croson* on Minority Business Enterprise (MBE) programs in the Southern states vary from locality to locality. However, a trend is prevalent: strong programs, despite legal challenges, have continued to survive. The most important factor in the survival of such programs is whether or not high level officials such as governors, mayors, county commissioners, and state legislators are willing to make a commitment to equal employment opportunity and minority business development. If high level officials are strongly supportive of MBE programs, the programs continue in one form or another despite litigation.

Most officials having a strong commitment to MBE programs are playing a waiting game in the aftermath of *Croson*. Some program directors are implementing race-neutral plans, following the lead from the *Croson* decision, in which Justice O'Connor wrote that on the state and local level, municipalities must first try such measures before establishing race-conscious programs. Careful documentation of the success or failure of race-neutral plans is necessary if a municipality eventually wants to return to a formal MBE or DBE (Disadvantaged Business Enterprise) program. Some jurisdictions think that DBE programs are safe and *Croson*-proof. However, DBE goals employed by state and local level programs have also been the target of Associated General Contractors (AGC) litigation.

In spite of the difficulties, city, county, and state MBE program coordinators in the Southern region generally agree that race-conscious programs are necessary in 1990 because the private sector, especially in the construction industry, essentially remains closed to small MBE firms. Without formal, governmental mandates, non-minority general contractors will not use minority subcontractors, even when they acknowledge the quality of the MBE subcontractors' work. For example, most people in the construction industry in New Orleans, La., acknowledge the expertise of several African American, family-owned firms that specialize in plastering and finish carpentry work. Yet, non-minority-owned, large construction firms won't hire them as subcontractors without some type of governmental requirement. Thus, competency in the trade and skill in performing the work really are not the issues.

State by State Overview

A state-by-state look at MBE programs gives us a picture of the problems and possibilities for minority business development in the region today.

■ ALABAMA

Alabama has a state bidders' law that requires a department to utilize the vendor who makes the lowest bid (this regulation applies to general fund monies). The low bidder restriction keeps many MBE firms from getting state contracts. While there is a voluntary 10 percent goal for MBE participation for each state department, there is no legal mandate that requires departments to try to meet the goal. The state level MBE office does not track minority-owned businesses' participation in state bidding; only recently has the office become computerized. The state MBE office refers MBEs to technical resources and also maintains nine plan rooms throughout the state where MBE and small businesses have access to information and government bid invitations.

The State Department of Highways does not have a state funded DBE or MBE goal program; state funded highway work, ostensibly, goes to the lowest bidder. The program utilizing federal funding has the standard 10 percent goal which was exceeded in 1989 with a 14.9 percent participation rate for DBE firms. The total federally funded portion of the budget is about $200 million. In 1989, 26 contracts were awarded to DBE firms of which 60 percent were minority-owned and 40 percent were owned by women. No specific statistics were available on the breakdown of minority groups within the DBE designation. However, an official in the office estimated that the majority of firms gaining contracts were owned by Native Americans. Some 70 percent of the total 250 to 300 DBE firms certified by the Alabama Highway Department are owned by African Americans.

■ ARKANSAS

A business development bill sponsored by minority legislators and the NAACP was about to be introduced in the state legislature in February, 1989. When the *Croson* decision became known, the bill was quickly withdrawn. Plans are underway to build a factual predicate for the program advocated in the bill, and to reintroduce it in about two years. While Arkansas' governor made a proclamation in 1983 that advocated at least a 10 percent goal for minority vendor utilization, in reality, only about 1 percent ($59,329) of the total dollar amount spent by the state for goods and services was contracted to MBEs in 1989. A 10 percent minority business goal remains in effect in the state highway department since that department utilizes mainly federal funds; the highway department is said

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to meet or exceed the goal, although no specific figures were available.

Arkansas' track record for MBE participation in state contracting, apart from highway construction projects, is not good when compared to other states. Private initiatives have attempted to fill the void. One important initiative is the NAACP's Fair Share Program. In this program, the NAACP, working with a small staff and a large number of volunteers, has involved about 50 major corporations in a voluntary affirmative action program. The NAACP office in Little Rock is also making fair share agreements with banks in order that MBE firms have greater access to venture capital and bonding.

■ FLORIDA

Approximately 19 bills concerning minority business development were proposed in the Florida State Legislature during the past legislative session; of these, 5 passed. Its legislature also appropriated $1 million for two disparity studies: one of the state department of transportation and the other for general services.

Florida's Minority Business Enterprise Assistance Office (MBEAO), in the Department of General Services, certifies MBE firms and performs a variety of functions. Besides certification, the MBEAO publishes MBE directories and a detailed booklet on "How to do Business with the State of Florida," which lists an extensive network of MBE assistance organizations.

The Black Business Investment Corporations (BBICs) in Florida were created under the Florida Small and Minority Business Act of 1985. A $5 million investment incentive trust fund was established to help capitalize black businesses by underwriting loans and investments and to address the problems inhibiting the development and expansion of black businesses. Current capitalization of the BBICs is just over $10 million.

However, despite all of this activity, the total amount of dollars going to MBE firms for general procurement and services from the state of Florida is minimal. Of 30 departments reporting procurement and services contracting activity for the year 1988-1989, only about 1.4 percent went to certified MBE firms. The percentages achieved by the individual agencies ranged from .5 percent to 40 percent. One reason for the low total percentages may be attributed to the fact that the state now has an encouragement goal of 15 percent rather than a legally required mandate.

Following the *Croson* decision, municipalities in Florida have been besieged by litigation. The cities of Jacksonville, Tallahassee, Ft. Lauderdale, Tampa, Miami, St. Petersburg, and West Palm Beach, and the counties of Dade, Hillsborough, Broward, and Palm Beach have considered and/or have already implemented disparity studies which range in price from $75,000 to $378,000.

■ GEORGIA

The State of Georgia's Administrative Services Department does not have a goal for MBE participation in contracting. Perhaps for this reason, statistics on MBE participation in state contracts were unavailable.

Georgia's Department of Transportation has a federally funded DBE highway construction program; but no MBE/DBE goals for state funded projects. Georgia has met the 10 percent federal goal for the past 5 years.

The City of Atlanta, unlike the state, has pursued a more aggressive program for minority contracting. Two months after the *Croson* decision, the Georgia Supreme Court ruled the City of Atlanta's MBE goal program as unconstitutional. Atlanta had a 35 percent MBE goal for city contracts. Since the court's decision, Atlanta commissioned a $500,000 disparity study which was completed and released during July, 1990. The study comprises 8 volumes and documents persistent discrimination against minority contractors in the construction industry (see accompanying article). The ongoing litigation has caused loss of business to MBE firms. For example, E.R. Mitchell Construction Company, a prominent MBE firm, has lost over 50 percent of its revenues in the past year and, without the city's program, is not receiving any new joint venture offers from larger, non-minority-owned general contractors. Fewer contracts for MBE firms means job loss because firms like Mitchell have had to lay off up to 20 percent of their employees. Despite the legal difficulties, the City of Atlanta plans to design a new program carefully based upon the recommendations in the disparity study.

The city administration's commitment to minority business development was successfully demonstrated in June, 1989, with the opening of Underground Atlanta, a downtown tourist attraction. A Minority Tenant Leasing Program gave MBE and WBE businesses a major stake in the enterprise with 27.8 percent MBE and 6.4 percent WBE participation. Twenty-six out of 31 street vendors were minority business people in 1989. The Atlanta Economic Development Corporation (AEDC) provided business loans for MBE firms involved in Underground Atlanta.

■ LOUISIANA

Legislation enabled the state of Louisiana to undertake a disparity study to support its Division of Minority and Women's Business Enterprise in the Department of Economic Development. While the program was not litigated against, the disparity study was undertaken as a response to *Croson* and litigation against neighboring programs, e.g., the City of Shreveport's program and against the New Orleans School Board. Much of the work for the state's disparity study was done in-house and by faculty from Southern University and Louisiana State University. The results of the study, released in June, 1990, were controversial. The study found little or no evidence that discrimination occurs in the state's contracting process. However, the study utilized a disproportionate amount of data from the highway department's federally funded program and the study was conducted

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while MBE/DBE/WBE programs were effect. When the study was released, Governor Roemer stated he feels the study provides evidence that the state's programs are working. He also renewed his commitment to minority business assistance programs. In 1989, the state program had a pool of 2,600 business owners and MBE and WBE firms were awarded $32.7 million, or 4.8 percent MBE, and 0.9 percent WBE participation in state contracts.

The state of Louisiana's Department of Transportation and Development has a federally funded goal program; state funded projects have no minority business goals. The federal DBE program in Louisiana in 1989 had a 10.9 percent participation in the total amount of funds spent. However, the majority of the contracts, some 62 percent of those awarded to DBEs, went to only 6 firms; 3 of those firms were awarded 40 percent of the total.

MISSISSIPPI

Eight bills were introduced in the Mississippi legislature during the past year; all but one died in committee. The only bill that passed was an economic development bill that provides matching funds for MBE loans in one of its provisions.

The failure of legislation dealing with set-asides underscores an attitude of extreme caution in Mississippi following *Croson*, even though there has not been any litigation in Mississippi. While the state does have an MBE office, officials there seemed reluctant to release statistical information. Some 150 MBE firms participate in the program, and WBEs are included. The MBE office informally coordinates MBE participation in state agency contracting and purchasing. While a 5 percent set-aside goal is mandated by an existing Mississippi state law, it has not been enforced following *Croson*. Tracking of MBE participation in state contracting has been lacking; plans are underway to remedy this situation. While some state officials involved in minority business assistance see the need for a disparity study, at present, there is no funding.

N. CAROLINA

At least a dozen bills concerned with minority business development were introduced in the North Carolina Legislature in the most recent session. However, the majority of these bills went to committees, particularly the Appropriations Committee, because of North Carolina's current budgetary problems. Last year, two bills passed that made provisions for MBE participation in state construction projects.

Overall, North Carolina has 10 percent goals for MBE involvement in the purchasing and contracting activities of most state agencies and departments. However, tracking and recordkeeping of the actual contracts awarded to MBE firms have been a problem in that procurement was not centralized. A new amendment to an existing state statute passed in July, 1989, called for centralized reporting and the establishment of departmental guidelines for MBE participation. Approximately 750 minority-owned businesses are certified by the state. The vast majority of these, perhaps 700, are owned by African Americans, with the remainder being Hispanic- and Asian-owned. White women are not included in the state's program because they own four times the number of businesses that blacks own; i.e., there is no need for a WBE program. However, the state highway department does include women in its program with a 3 percent WBE goal. North Carolina's Department of Transportation also has a 10 percent goal for state projects. The goals have been met for the past 5 years, averaging between 9.7 percent to 10.6 percent DBE participation. The majority of the 200 DBE firms participating in highway construction are owned by Native Americans and African Americans.

The City of Durham had a MBE program that was revised into a DBE program in the aftermath of *Croson*. Durham city officials suspended their old program because they are in the same circuit court district as the City of Richmond. The old program had incremental goals for each contract that ranged between 25 percent to 30 percent MBE participation. The new program has a lower goal of only 15 percent. The DBE program was insti-

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tuted in October, 1989, and there are currently only 33 certified firms. Under the previous plan established in December, 1984, some 240 MWBE firms participated. Durham is planning a disparity study.

■ S. CAROLINA

In 1989-1990, South Carolina legislation was uneventful regarding minority business development, with the two relevant bills dying in committee.

Each state agency is required to submit an annual MBE Utilization Plan. A goal of 10 percent of "controllable dollars" is in place for MBE participation. Controllable dollars include purchases of supplies and travel. The dollar amount or percentage actually awarded to MBE contractors was unavailable from the MBE office.

The South Carolina Department of Highways and Public Transportation has a DBE program plan that follows the pattern in the other states.

However, the highway department makes DBE firms aware of nearby minority-owned banks where they may be more likely to receive bonding. Participation of DBEs and WBEs in the highway program has ranged from 3.66 percent in 1978 to 10.41 percent in 1988.

The City of Charleston also has a DBE and WBE program. Goals for the program are separated into three categories: construction, services, and supplies. The goals for DBEs and WBE's are as follows:

CITY NEED	DBE	WBE
Construction	9 %	1 %
Services	5 %	1 %
Supplies	5 %	2 %

Charleston's program has been in place for two years. During the first year, the goals were higher, e.g., construction was 15 percent for MBEs, rather than 9 percent for DBEs. For both years, Charleston exceeded the goals. In 1989, about $1.3 million out of a total of $3 to $4 million controllable dollars went to MBE firms, mainly in the construction area; note Charleston's total annual budget is about $65 million. Figures for 1990 show that the combined DBE and WBE participation is around 12 percent.

■ TENNESSEE

The Tennessee legislature had a productive 1990 session in the area of minority business development. Monies were appropriated for the Memphis Minority Business Development Center and the Women's Demonstration Project.

The Memphis Center, operated by an accounting firm, provides management and technical assistance to minority businesses.

The Women's Demonstration Project is a joint effort of the Nashville Minority Business Development Center, the Salvation Army, the U.S. Department of Housing and Urban Development, the Tennessee Valley Authority, and the City of Nashville. The project provides professional training and assistance for low-income, single, female heads of households with the goal of developing their entrepreneurial skills.

A dozen bills were proposed, several of which passed and were signed into law by the governor. Legislation dealt with enterprise zones, encouraging urban renewal, and providing incentives for the development of DBE businesses.

A DBE business loan guarantee fund was created. The areas of job skills training and economic development were addressed also. The state of Tennessee has an Office of Minority Business Enterprise (OMBE). It provides a technical support and information function.

The goal programs only exist on the state level if federal funds are involved, such as in the State Department of Transportation (10 percent). There has been no recent litigation against Tennessee programs.

A disparity-type study was performed in-house on the state level. However, many people would like to see a consulting firm hired to make a more complete investigation. There has also been discussion about a disparity study in Knoxville; however, municipal funding is unavailable. The local minority contractors association is thinking about raising the funds to support a small-scale study.

■ TEXAS

Eighteen bills were proposed in the Texas legislature which dealt with MBE and WBE contracting, small business concerns, and micro enterprise in rural areas. Small business bills passed. Most of the MBE and WBE contracting bills did not pass in the legislature. However, a bill dealing with MBE and WBE contracting in metropolitan rapid transit authority passed.

The bill has a provision that the rapid transit authority's board can establish an overall MBE and WBE contract percentage as long as the goal does not exceed the capability of the MBE and WBE firms in the area served by the authority.

A number of MBE programs in individual municipalities have been reevaluated in Texas. For example, in Fort Worth, an interim DBE policy has been adopted. Currently the Fort Worth program has certified 500 DBE firms. DBE firms are awarded about 15 percent of the total dollars spent by the city. The percentages among the various departments range from 11 percent to 12 percent per year for construction; 7 percent to 8 percent for supplies; and 15 percent for general services. The certified DBE firms in Fort Worth include out-of- state companies as well as locally based ones. There is also a lot of private sector development going on in Fort Worth, particularly in the aviation industry. Minority firms have benefited from voluntary goals set by private corporations, such as American Airlines, that put a 20 percent MBE goal into their contracts.

■ VIRGINIA

Despite the legal challenges to the City of Richmond's MBE program, the climate for MBE programs in Virginia remains good. Most MBE office coordi-

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nators at the state and local levels feel at Croson was an issue localized in Richmond and not broadly applicable to their own programs. They point out that their programs are distinct from Richmond's set-aside.

Virginia's Department of Minority Business Enterprise was established in 1972 and was the first state program of its kind in the United States. The Department performs market development, management, and technical service functions.

There is no set-aside nor mandatory goal for agencies in the Commonwealth. Each agency sets a minimum of 3 to 5 percent goals for MBE participation out of the total percentage of dollars they spend per year.

The number of minority firms awarded contracts is not documented; the department collects information on the dollar amounts awarded from each agency.

Some 1,000 MBE firms are listed with the department. For fiscal year 88-89, $55 million went to MBE ...ms, about 4 percent of the Commonwealth's total discretionary expenditures.

This amount does not include Virginia's Department of Transportation, which operates with a 10 percent goal for federally funded projects. Last year, the DOT exceeded their goal, awarding 12 percent of the total dollars spent to DBE firms.

And what has been the situation in Richmond following *Croson*? MBE participation in total city contracts declined from 11.2 percent in January, 1989, to less than 6.4 percent for November, 1989.

Before Richmond's program was overturned by the courts in 1987, MBE construction firms were achieving nearly 40 percent of the total construction dollars spent by the city.

Since Richmond's set-aside was ruled unconstitutional in 1987, some city council members would like to conduct a disparity study. However, t... 175,000 needed to fund the study as of press time, had not yet been approved. □

How Congress Voted on the Civil Rights Act of 1990

KEY

- \+ Voted for.
- \- Voted against.
- ? Did not vote.
- x Paired against.
- f Announced for.

Democrats
Republicans

Number before name indicates Congressional District

S. 2104 CIVIL RIGHTS ACT OF 1990.

Senate version of the bill that reverses or modifies six 1989 Supreme Court decisions in the area of job discrimination law. Passed in the Senate on July 18,1990.

H.R. 4000 CIVIL RIGHTS ACT OF 1990.

House version of the bill that amends the Civil Rights Act of 1964 and strengthens civil rights laws that ban discrimination in employment. Passed in the House on August 3, 1990. The House version includes two amendments, adopted on August 2, 1990 which (a) state that nothing in the act shall be construed to require an employer to adopt hiring or promotion quotas and that the existence of a statistical imbalance in an employer's work force is not alone sufficient evidence to establish disparate impact; and (b) place a cap on punitive damages for employers with fewer than 100 employees.

CONFERENCE REPORT 101-856.

The report resolves the differences in language between the House and Senate versions of the Civil Rights Act of 1990 and clarifies provisions regarding business necessity, disparate impact, mixed motive cases, challenges to consent orders, damages, attorney's fees, final judgements, and alternative means of dispute resolution.

(OCTOBER 16) The Conference Report passed in the Senate. Note: There was no change in the voting of Senators presenting the 11 Southern states from their vote on the original bill.

(OCTOBER 17) The Conference Report passed in the House. Changes in voting between the original bill and the revised version are noted in ( ).

In the Senate, On S.2104

	(July 18)	(October 16)*
ALABAMA		
Heflin	+	
Shelby	+	
ARKANSAS		
Bumpers	+	
Pryor	+	
FLORIDA		
Graham	+	
Mack	-	
GEORGIA		
Fowler	+	
Nunn	+	
LOUISIANA		
Breaux	+	
Johnston	+	
MISSISSIPPI		
Cochran	-	
Lott	-	
NORTH CAROLINA		
Sanford	+	
Helms	-	
SOUTH CAROLINA		
Hollings	+	
Thurmond	-	
TENNESSEE		
Gore	+	
Sasser	+	
TEXAS		
Bentsen	+	
Gramm	-	
VIRGINIA		
Robb	+	
Warner	-	

In the House, on HR 4000

	(AUGUST 3)	(OCTOBER 17)
ALABAMA		
1 Callahan	-	
2 Dickinson	-	
3 Browder	+	
4 Bevill	+	
5 Flippo	+	
6 Erdeich	+	
7 Harris	+	
ARKANSAS		
1 Alexander	+	
2 Robinson	x	(-)
3 Hammerschmidt	-	
4 Anthony	+	
FLORIDA		
1 Hutto	-	
2 Grant	+	
3 Bennett	+	
4 James	+	
5 McCollum	-	
6 Stearns	-	
7 Gibbons	+	
8 Young	-	
9 Bilirakis	f	(-)
10 Ireland	-	
11 Nelson	?	(+)
12 Lewis	-	
13 Goss	-	
14 Johnston	+	
15 Shaw	-	
16 Smith	+	
17 Lehman	+	
18 Ros-Lehtinen	+	
19 Fascell	+	
GEORGIA		
1 Thomas	+	
2 Hatcher	+	
3 Ray	+	
4 Jones	+	
5 Lewis	+	
6 Gingrich	-	
7 Darden	-	
8 Rowland	+	
9 Jenkins	-	
10 Barnard	-	
LOUISIANA		
1 Livingston	-	
2 Boggs	+	
3 Tauzin	+	
4 McCrery	-	
5 Huckaby	-	
6 Baker	-	
7 Hayes	+	
8 Holloway	-	
MISSISSIPPI		
1 Whitten	+	
2 Espy	+	
3 Montgomery	-	
4 Parker	-	
5 Taylor	-	
NORTH CAROLINA		
1 Jones	+	
2 Valentine	+	
3 Lancaster	+	
4 Price	+	
5 Neal	+	
6 Coble	-	
7 Rose	+	(?)
8 Hefner	+	
9 McMillan	-	
10 Ballenger	-	
11 Clarke	+	
SOUTH CAROLINA		
1 Ravenel	-	
2 Spence	-	
3 Derrick	+	
4 Patterson	+	
5 Spratt	+	
6 Tallon	+	
TENNESSEE		
1 Quillen	-	
2 Duncan	-	
3 Lloyd	+	
4 Cooper	+	
5 Clement	+	
6 Gordon	+	
7 Sundquist	-	
8 Tanner	+	
9 Ford	+	
TEXAS		
1 Chapman	+	
2 Wilson	+	
3 Bartlett	-	
4 Hall	?	(-)
5 Bryant	+	
6 Barton	+	
7 Archer	-	
8 Fields	-	
9 Brooks	+	
10 Pickle	+	
11 Leath	?	(-)
12 Geren	+	
13 Sarpalius	-	
14 Laughlin	+	
15 de la Garza	+	
16 Coleman	+	
17 Stenholm	-	
18 Washington	+	
19 Combest	-	
20 Gonzalez	+	
21 Smith	-	
22 DeLay	-	
23 Bustamante	+	
24 Frost	+	
25 Andrews	+	
26 Armey	-	
27 Ortiz	+	
VIRGINIA		
1 Bateman	-	
2 Pickett	+	
3 Bliley	-	(+)
4 Sisisky	+	
5 Payne	+	
6 Olin	+	
7 Slaughter	-	
8 Parris	-	
9 Boucher	+	
10 Wolf	-	

The Civil Rights Act of 1990:
What It Would Have Meant

The 1989 session of the Supreme Court was marked by six decisions in which equal employment opportunity laws were severely restricted. As a response to these Supreme Court decisions, legislation was introduced in Congress on February 7,1990.

Senators Edward Kennedy (D-MA) and James Jeffords (R-VT) and Representatives Augustus Hawkins (D-CA) and Hamilton Fish (R-NY) led the bipartisan effort for the Civil Rights Act of 1990. After months of debate, two versions of the bill passed respectively in the Senate and the House in July and August.

The bill then went to Conference Committee and another vote was taken in October on the revised version. The revised bill passed 62 to 34 in the Senate and 273 to 154 in the House. President Bush, however, vetoed this measure, even after the revisions, claiming that certain provisions in the ''l necessitate "employment quotas .or minorities and women," and that the bill "would be a bonanza for lawyers."

The final vote in the Senate on October 24, 1990, was one short of the two-thirds majority needed to override a presidential veto. The roll-call vote was 66 in favor of enacting the law over Mr. Bush's objections to 34 upholding the President's position.

Voting "Yes" were 55 Democrats and 11 Republicans; voting "No" were 34 Republicans. Backers of the bill said that they will introduce an even stronger Civil Rights Act when Congress reconvenes in January.

The Civil Rights Act of 1990, in contrast to presidential objections, made no mention of quotas and, in reality, probably would have not increased the revenues of lawyers in any substantial way.

What the bill did was address some important legal principles and precedents in the area of equal opportunity ployment. It expanded interpretations of existing laws and gave all working people protections against on-the-job discrimination on the basis of gender, race, national origin and religion.

The bill provided that if a business has discriminatory hiring and promotional policies, the employer (rather than an employee who has experienced the discrimination) must prove that such policies are a business necessity.

The bill broadened Section 1981 of Title 42 of the U.S. Code, banning racial harassment and discrimination during employment (rather than just banning it in hiring).

Employers may not use race, color, religion, gender or national origin as motivating factors in employment decisions even if the same decisions included other, non-discriminatory reasons, as well.

The bill prohibited parties who did not intervene at the outset of a job discrimination suit from later challenging a court order, providing that these parties had sufficient notice that the case was being settled. The bill changed the deadline for challenging discriminatory seniority plans. Rather than challenges being tied to the time when a plan took effect, the deadline is tied to the time when a worker was harmed.

Other provisions invoked both compensatory and punitive damages, as well as attorneys fees and related legal expenses for plaintiffs, making employers liable for proven discrimination.

By extension, the act might have served as a deterrent to keep discriminatory behavior out of the workplace because employers would have had a price to pay for unfair treatment of their employees. □

Notice to first-time readers

If you are receiving the SLRC Bulletin for the first time and want to receive it regularly or want to receive further information about developments on minority business support and affirmative employment issues in the South, write or call:

Southern Legislative Research Council
Southern Regional Council
60 Walton Street, N.W.
Atlanta, GA 30303-2199
(404) 522-8764.

Call and Order

Do We Still Need Affirmative Action?

Economic disparity still exists today in the United States along the lines of race and sex.

While women and minorities may dominate the work force, their salaries still are not equal to that of their white, male counterparts. Also, a recent profile of 700 top executives compiled by the University of California Anderson School of Management and Korn-Ferry, a New York-based corporate recruiting company, found that 95 percent of senior level management jobs at major U.S. corporations are still held by white males.

Labor statistics cited by *U.S.A. Today* (June 6,1990) also show disparity: black joblessness is more than twice that of whites; the number of black, mid-level managers from 1980 to 1987 increased from four percent to only 4.9 percent; and women represent less than five percent of the senior managers in half of the top 1000 U.S. firms.

Thus, after two decades of social changes in America, affirmative action programs or similar types of programs continue to be needed in order to open the doors to economic opportunity.

...In this special issue of *SLRC Legislative Bulletin*, we examine minority business enterprise programs (MBEs) in the light of the recent Supreme Court decisions restricting affirmative action as a remedy for past discrimination. For a look at how Southerners in Congress voted on the 1990 Civil Rights Act — an effort to overcome some of the crippling effect of these decisions — see page 14.

Focus on Minority Business Development

S
Legislative Bulletin
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NATIONAL HARD HAT & SHOVEL

Official Newsletter of the National W.B.E. Association, Inc.

MARCH, 1990 * Volume 3 * Issue 1

Senator Kennedy

Moving Equality Forward

By Barbara Joann Payne,
President, NWBEA

The name Edward M. Kennedy has long been synonymous with human rights and equality, so it is no surprise to us that on January 23, 1990, Senator Kennedy introduced the Civil Rights Bill of 1990. This Bill is a most timely and welcomed piece of legislation as we move our issues to the forefront to effect the upcoming reauthorization of the Highway and Transportation Act. Following is a summary of Bill S.2104, "To amend the Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment, and for other purposes.

Protecting Americans Against Race Discrimination on the Job and in Private Contracts

Last year, in Patterson v. McLean Credit Union, the Supreme Court held that an 1866 statue barring intentional race discrimination in contracts (42 U.S.C. sec. 1981) does not prohibit racial harassment on the job and other forms of discrimination in the application of contracts. The Civil Rights Act of 1990 amends sec. 1981 to reaffirm that the right "to make and enforce contracts" includes the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship. By reaffirming the broad scope of sec. 1981, Congress will ensure that Americans may not be harassed, fired or otherwise discriminated against in contracts because of their race. Because sec. 1981 is the only federal statute barring race discrimination that is applicable to the 3.7 million employers with fewer than fifteen employees, it is vitally important to restore its broad ban on racism in contractual dealings.

Restoring the Burden of Proof in Disparate Impact Cases

For eighteen years following Chief Justice Warren Burger's unanimous opinion for the Supreme Court in the landmark case of Griggs v. Duke Power Co., Title VII had placed on employers the burden of showing that the employment practices with a "disparate impact," (i.e., that operate to exclude women and minorities disproportionately) are required by business necessity. Last year, in Wards Cove Packing Co., v. Atonio, the Court effectively overruled this Griggs rule and held that, no matter how strong the proof of discriminatory effect, the employer need no longer prove that its practices are required by business necessity. Instead, victims of discrimination must bear the heavy burden of proving that the employer has no legal justifica-

(continued on page 9)

Female Wins Discrimination Suit Against Kiewit

Former Marketing Manager of a subsidiary of Kiewit Construction, Cynthia Cole, was awarded $200,000 in damages by a jury in Denver for slander and invasion of privacy.

Cole testified that in 1985 an estimator threatened to have her fired if she didn't sleep with him and, at a company banquet in 1986, she was presented a "Puss n' Boots Award," called "a cat who called in the tomcats," and handed a can of cat food.

Ms. Cole was frequently harassed with crude remarks about her clothing or body and was even pinched on one occasion.

Defendants in Ms. Cole's suit all claimed their actions were just "jokes" or in the "spirit of fun." Well, we certainly hope Cynthia Cole is laughing all the way to the bank!!

Should States Carry Bigger Financial Load for Highways?

At a February hearing before the House Appropriations Committee's Transportation Subcommittee, Transportation Secretary Samuel Skinner questioned whether state and local governments should pay a bigger portion to build bypass highways than they do for other Interstates.

Skinner pointed out that when bypass highways are constructed, local industry develops around them and reaps the monetary benefit. "Some cost-sharing may be appropriate," he said.

Skinner speculated that there will be a push towards lifting toll road restrictions during the upcoming reauthorization of the highway program. He suggested toll roads as one means of developing "a much greater local role generally in infrastructures."

NATIONAL HARD HAT & SHOVEL

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The National Hard Hat & Shovel staff has pledged its time, talent and energy to obtain and disseminate information of interest to women in the highway construction industry. All editorial views contained in this publication are offered to promote the the attainment of economic and social equality for women in all walks of life. We welcome your comments and ideas.

Address correspondence to: Editor, National Hard Hat & Shovel, c/o National Women Business Enterprise Association, 2207 Hidden Valley Drive, Suite 205, Little Rock, Arkansas 72212.

NEWSWORTHY NOTES...

MBE LAW CHALLENGED IN MARYLAND.

A lawsuit requesting the U. S. District Court in Baltimore, Maryland to declare the Maryland Minority Business Enterprises Law unconstitutional was filed by the Maryland Highway Contractors Association (MHCA). MHCA's executive director, Robert Lathem, said the Associations's membership has "been concerned with the state's failure to act on changes to the Maryland law" following the U. S. Supreme Court's ruling that a similar law in Richmond, Virginia was unconstitutional because it didn't allow "equal protection of the laws" for non-minority contractors.

LARGEST PROJECT IN HISTORY OF ILLINOIS DOT COMPLETED.

Phase II of the Dan Ryan (I-90/94) Expressway, a $210 million project in Chicago, has been completed. The project was finished a month ahead of schedule, earning the contractors $3.7 million in bonuses. NWBEA member, Simone Kapovich was a subcontractor on this project. Ms. Kapovich said, "Not only was this a major stepping stone for my company (S&J Construction), it was the largest project we have undertaken to date. Although being a very "fast-paced" job, it was a pleasure to work along side the contractors."

NWBEA would also like to congratulate Simone Kapovich on being named the Illinois WBE of the year. Good work, Simone!!

CONSTRUCTION TRAINING FOR HIGH SCHOOL STUDENTS.

Bladensberg High School in Bladensberg, Maryland is the site of an in-school pilot project to teach high school students various skills of the construction industry. Female students are included. Traffic control and operation of various equipment, with emphasis on safety, are among the subjects being taught.

WINTER PARK V. FCC

The Federal Communications Commission's policy of showing preferences to minorities in the awarding of radio licenses is being challenged in the Supreme Court. Congress had ordered the FCC to continue this practice at one time, even though discrimination in the industry had never been determined. Some officials in the construction industry speculate that this could be as important as last year's Croson decision.

SUPREME COURT TO RULE ON UNION LIABILITY

Following a fatal underground fire in an Idaho mine which had been inspected for health and safety by members of the United Steelworkers of American, the Idaho Supreme Court ruled that unions can be sued for negligence in incidents caused by health and safety hazards. The Idaho court said that unions are bound by "due care" under a state tort law that cannot be preempted by federal labor laws.

AASHTO PROPOSES CAMPAIGN TO END MOTOR FUEL TAX EVASION

During recent testimony before the Investigation and Oversight Committee of the House Public Works Committee, Wayne Muri, chief engineer of the Missouri Highway and Transportation Department said that there are estimates that more than $1 billion per year is lost in uncollected motor fuel taxes.

On behalf of the American Association of Highway and Transporation Officials (AASHTO), Muri proposed a nationwide campaign, including criminal prosecution of evaders, to collect these funds.

HOUSE REVIEWS U.S. INFRASTRUCTURE NEEDS

A year-long review of U. S. Infrastructure needs is being conducted by the House Public Works and Transportation Committee. The review began in February and Committee Chairman Glenn Anderson (D-Calif.) said it will focus on the nation's "vast infrastructure needs and their damaging effects on productivity, competitiveness and economic growth."

MINETA MOVES TO INSURE SUCCESSFUL TRANSPORTATION PROGRAM

Representative Norman Mineta (D-Calif.), chairman of the House Public works and Transportation Committee's Surface Transportation Subcommittee has planned six reauthorization hearings across the nation to explore the possibility of drawing from the Highway Trust fund surplus to address transportation needs. Mineta said he wants to leave some of the funds as a cushion and acknowledges that he must convince congressional budget and appropriations panels to spend some of the funds.

Without the increased funding, Mineta fears it won't be possible to put together a successful transportation program. Mineta hopes to have a legislative outline by October or November, so that next year can be spent working on the specifics of a bill. The highway and transit programs expire September, 30, 1991.

3M GOES "GOLDEN"

A Minnesota highway intersection was the premier site of a traffic sign covered with reflective sheeting (invented by 3M), in 1939. With roadways around the world now equipped with reflective signs to guide motorists, 3M remains a leading supplier.

As is the case with most great achievements, reflective sheeting was not an overnight success. In their efforts to create a reflective tape to replace paint on the nation's roadways, 3M scientists produced what the American public nicknamed "3M's friendly tape." The tape wouldn't stick, but this process of "reflectorizing" was applied to signs and was a huge success. The original attempt to create pavement marking tape came to fruition 30 years later.

3M overcame two more major obstacles early on. One was selling to the government, a customer base with the most potential for their product, but requiring a whole new sales and marketing approach. The company also had to convince sign makers, who were comfortable with the process of painting their products and quite skeptical of working with 3M's new sheeting and adhesive, that there was a better way. Consequently, 3M manufactured a vacuum-based applicator system that made attaching the sheeting to the substrate easy.

As women in the highway construction industry, we are well aware of the ingredients behind 3M's development. We salute their fortitude, appreciate their products, and applaud their success. Following is a summary of the progress of 3M over the past 50 years taken from Making Roads Safer the World Over, published by 3M Traffic Control Materials Division.

1939 "Harry Heltzer's tape would shine. But it wouldn't stick. As it waved about in the breeze, passing motorists dubbed it '3M's friendly tape.' Researcher Richard Carlton had an idea: If it wouldn't work on the road, maybe it would work beside the road. On September 1, the first Scotchlite reflective sign went up on a Minneapolis street."

1940 "The safety benefits of the new material were as easy to see as the bright new signs. A small sales force began what would become an international effort, and progressive customers soon placed orders. Scotchlite reflective sheeting was introduced in California, Illinois, Missouri, and Wisconsin."

1941 "When the United States went to war, Scotchlite sheeting went along. It marked the way for convoys traveling in 'dim-outs.' It brightened signs at air-raid shelters. It reflected off the rafts, paddles and signaling mirrors of airmen downed at sea. It marked the edges of runways."

1943 "Scotchlite sheeting began to penetrate the international market. G. H. Schmidt, a sales representative for Durex, an international manufacturing organization, took some samples of Scotchlite sheeting to Mexico and Central America. Those first small sales eventually led to the safety value of brighter signage being recognized worldwide."

1944 "In 1944, 3M researchers had another bright idea. Dr. Nelson Taylor, and Warren Beck, developed new beads that reflected more light and were more weather resistant that earlier versions. The Becko Bead, named for Beck, is still used in reflective sheeting and in products that reflectorize fabric and bicycle tires."

1945 "The Lite-a-Bike safety program, co-sponsored by the Jaycees and Veterans of Foreign Wars, began. This program and Lite-a-Bumper, which began in 1953, reflectorized millions of youngsters' bikes and car bumpers. 3M supplied hundreds of thousands of rolls of Scotchlite sheeting to the award-winning safety campaigns. Together, they increased awareness of reflective sheeting and its ability to prevent accidents."

1946 "After the War; Scotchlite sheeting found plenty of civilian employment. Connecticut became the first state to use it on motor vehicle license plates. A vacuum applicator made it easy to apply the sheeting on metal substrates. And, Centerlite™ pavement marking material was introduced, at last realizing the improvement to highway safety first suggested to George Halpin in 1937."

1947 "With the War over, Americans took to the road in huge numbers. Scotchlite sheeting helped light up the night for motorists and brighten the outlook for roadside advertising firms. 3M acquired National Advertising Co. of Westminster, Maryland and began expanding it. Meanwhile, 3M sales people demonstrated reflective traffic signs in Europe where governments began standardizing the use of reflectorized signs."

1948 "Researcher Philip Palmquist developed Scotchlite™ Flat-Top reflective sheeting. The new technology, later known as Engineer Grade, increased the flexibility of its use. The sheeting's smooth top coat protected the beads from the weather and made it possible to apply legend and other design elements with weather- resistant transparent inks. The Chemolite plant near Hastings, Minnesota, was Scotchlite sheeting's first full-fledged manufacturing facility."

1950 "During the 1950's, 3M introduced a series of breakthrough products. These included wide angle, flat-top sheeting for improved visibility, pressure sensitive adhesive, and a new easy-application system. Also, Scotchcal™ films in decorative colors, Flecton™ reflective yarn, Codit™ reflective liquid, and Scotch Rok™ reflective granules were developed and introduced. In 1958, Reflecto-Lite™ sheeting was introduced and reflective license plates assisted law enforcement and helped reduce nighttime auto accidents."

1954 "Sales soared as customers in the U. S. and abroad responded to the new opportunities to make life safer. Expanding sales called for added capacity. A new plant in Guin, Alabama, was built to manufacture Scotchlite sheeting. In later years, plants were built in England, (Continued on page 11)

SBA Reworks Minority Set-Aside Program

Following the Wedtech bribery and influence-peddling scandal, the SBA is reworking its minority set-aside program. Under the new regulations, companies that misrepresent their "minority-owned" status will now be fined $500,000.00, as opposed to the previous $50,000.00 fine.

The changes included an extension of from seven to nine years for receipt of special preference, but it is expected that a company continually decrease their percentage of revenues awarded under the contract. Competitive bidding will now be required among minority-owned businesses for manufacturing contracts in excess of $5 million and product/service contracts over $3 million.

Eligible company owners must have net worths of less than $250,000.00 without the equity on their home or business. Under the old program, the maximum was $750,000.00, but home and business equity could be included.

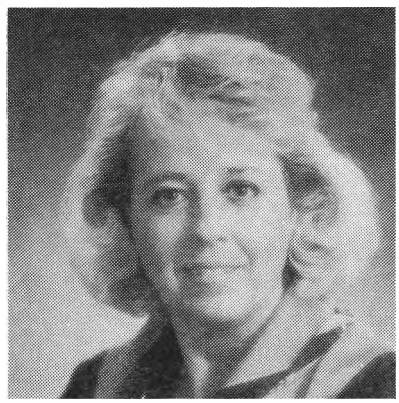
House Approves Three Year SDB Extension

The House has approved a Department of Defense spending measure that would extend its Small Business program for three years.

The action came under protest of some construction groups and sets a goal of having 5% of the Pentagon's contract monies go to SDB's. It was also said that the Pentagon "must make every reasonable effort to award" a minimum of 30 contracts in 1990 and an additional 30 in 1991 to disadvantaged firms.

The measure would also change restrictions on federal employees and contractors, in an effort to clarify ENR 7/27 p. 12, passed earlier this year. The bill would permit Department of Defense workers to talk with a prospective employer and would exempt procurement officials, unless they are involved in reviewing, drafting or approving procurement specifications; issuing, preparing or evaluating a bid; or approving or selecting procurement sources.

A Message From Our President



I would like to emphasize the importance of Senator Kennedy's Civil Rights Bill of 1990 (see cover page article "Senator Kennedy Moving Equality Forward) to all Americans. The social problems we face in America today are not Black problems, or Hispanic, problems or Asian problems, or White problems, they are American problems. When a child is hungry in this country, we are all hungry. When a portion of this population is uneducated, it lowers the standards of the entire country. It is therefore, in the best interest of the United States for all individuals to have the opportunity to be all that we can be. This can be accomplished through the reaffirmation of the Civil Rights Bill of 1990. I find it very appropriate that Senator Kennedy is the one introducing this Civil Rights legislation. As a teenager of the 1950's and 60's I spent endless hours walking from door-to-door, speaking on behalf John F. Kennedy's presidential campaign. Prior to President Kennedy's debut in the presidential arena, "No Catholic dare knock at the door of the White House." Following President Kennedy's election, the door was opened, not just for Catholics, but for all religions and people who had a dream of one day attaining a high position in our honorable United States Government. This put an end to the historical prerequisite of belonging to an elite group or network before having a chance to lead our nation.

John F. Kennedy touched us all, no matter what our heritage was. He, along with Martin Luther King, Jr. and Robert Kennedy, is a symbol of freedom, opportunity and justice. These honorable men started my personal consciousness of what's right and what I believe to be best for our country. The efforts toward equality and their influence made me a better person. It led me to the way of politics, which I still find to be a very honorable and worthwhile profession. Again, I find it most gratifying to know that the one person whom I've had the opportunity to intern for; a man that I respect; a man who shows the utmost respect for women's issues; whom I have witnessed first-hand as an outstanding public servant and an excellent father is the one who leads toward equality the way in the 1990's.

The DBE program has been established to help women-owned businesses to have an opportunity to share equal economic way of life. They are still, unfortunately, held down and pushed back at every turn and every step of the way. The interpretations of the regulations are, in themselves, discriminatory against women. We members of the National Women Business Enterprise Association, call them the "Jane Crow Regulations." Because as they are currently being interpreted, they will ultimately lead to the elimination of women in the DBE program. This newsletter contains an article regarding these "Jane Crow Regulations," as will every issue, until this matter is rectified. Thus far, we have followed protocol and tried to speak to all individuals involved in regulating the DBE program, to enumerate the inequalities being applied to these regulations and to seek solutions. Our efforts have been met with deaf ears and we must now make our voice heard via the legal system. Contributing to the efforts to eliminate female DBE members is the attitude that women do not need

(Continued on page 22)

"Innovative Contracting Practices" To Be Tested

The Federal Highway Administration will be experimenting with some new approaches to bidding on highway construction contracts. It is hoped that the experimental bidding process can be tested in two or three states, beginning as early as the summer of 1990.

One proposed method of bidding would include adding an estimate of how long it will take to complete the project being bid on. Using the "time is money" philosophy, states would calculate the cost per day of the job and the contractor proposing to complete a project quickly would be given preference.

Another, controversial but "good sense", approach that is being considered is factoring contractor performance into bid evaluation. FHWA is also considering the possibility of soliciting design-construct contracts and/or design-build-maintain contracts. Both of these would require changes in the statutes that presently prohibit FHWA from specifying proprietary products that contractors could use.

None of the proposed options would be mandated, FHWA will merely encourage states to try these new bidding techniques and provide funding to document how well they work.

Major motivation for these experiments is the desire to improve quality, as states now have fewer experienced inspectors and rehabilitation is becoming the focus of federal highway projects.

According to Norman J. Van Ness, FHWA's director of highway operations, "In some respects, the type of work we're doing is now much more sensitive to quality." ■

Injury Rates Continue to Climb

According to the Bureau of Labor Statistics, the injury and illness rate fell to 14.6 in 1988 from 14.7 in 1987. However, the construction industry still reports the most injuries among general industry categories.

The total number of injuries and illnesses in construction industry jobs rose to 656,500, an increase of 3%. The number of workdays lost due to injury or illness rose 4% and cases reported with no lost workdays were up by 2%. Contractors supplying such products as lumber, wood products and fabricated metal products were among the worst injury rates.

Although the National Safety Council reports only 2,200 construction deaths during last year, Senator Christoper Dodd (D-Conn.), claims there were almost 3,000 construction fatalities last year. Senator Dodd is sponsoring construction safety legislation.

Government Reins In Individual Sureties

A new government rule went into effect on February 25 which limits the types of assets that may be pledged in lieu of bonds required on public construction contracts. The new rule requires that an individual hold personal assets worth at least the amount of the bonds mandated by the solicitation.

According to the final rule, published in the November 28 Federal Register, some assets aren't acceptable. These assets include; accounts receivable, foreign real estate, a surety's main residence, jewelry, corporate assets and "speculative assets," such as mineral rights. The rule also states that the suretymust provide "objective evidence" of ownership of the assets.

Before accepting bid guarantees and bonds, federal contracting officers are now required to obtain a legal opinion on "the adequacy of documents pledging the assets." Any surety committing "serious improprieties" would be disbarred or suspended from federal work.

75TH AASHTO Annual Meeting/New Road Program Proposed

The American Association of State Highway and Trasportation Officials (AASHTO) called for an $84 billion, four-year federal highway program in 1992 at its 75th Annual meeting hosted by the Georgia DOT.

AASHTO approved proposals that would create a new, National Highway System, composed of the interstate system and other primary highways. This new system would serve interstate commerce and national defense needs. The proposal calls for Federal funding of reconstruction and rehabilitation as well as additional urban capacity, pavement preservation, additional mileage needs, and bridge requirements.

The approval of the report Keeping America Moving: New Transportation Concepts for a New Century comes at a time to impact debate over the next federal highway bill (the existing Surface Transportation Assistance Act of 1987 expires in 1991). The proposal calls for a federal highway funding commitment of $17.6 billion for FY 1992, increasing to $19.6 billion in 1993, $22.7 billion in 1994, and $25.9 billion in 1995.

In a press conference following his talk to AASHTO members, Skinner said, "You'll see the usage of toll roads and toll highways increase significantly over the next several years. There were some changes with the (1987) highway act, and I think that is one way highway systems can be expanded. I think you'll see more toll highway authorities, and toll bridges as we move into the 21st Century. They're more user-oriented. Our transportation policy will encourage their use where appropriate."

Kermit H. Justice, secretary of the Delaware Department of Transportation, was elected 1990 AASHTO president and Georgia DOT commissioner Hal Rives was elected vice president.

One Of Two Women UMPS Is "OUT" Of AAA

One of two professional women umpires, Pam Postema of Phoenix, Arizona, was among 8 umpires released from Class AAA, just one step away from the majors.

Randy Mobley, Triple A Alliance commissioner said, "We had heard from both major leagues that they had no interest in these umpires as future umpires. When the majors aren't interested in them as prospects, we will tender their release, and allow them to get on with their life."

Ms. Postema was the first woman to attain a position with the Triple A Alliance and worked 7 years at that level. She called her evaluation outrageous, saying, "The only thing it said was that I ejected too many people... and that my attitude went downhill." I could understand it if they said I wasn't good enough, or I wasn't strong enough on the balls and strikes, or I couldn't handle the bases."

BETTY LOU COLE 100% 'GPG' FACTOR INSURES SUCCESS FOR LU, INC.

"Don't let this so called man's world of construction intimidate you. Know your product and what you do well and you'll soon gain their respect."

"We learned early on the valuable lesson of what I call 'GPG'. **G** is for greed. Don't let greed get in your way. You aren't going to make a million dollars on a job. You'll be lucky to make a small profit or just break even and not lose money. **P** is for pride. Have pride in your work and yourself, but not the kind of pride that will cause you to increase your overhead to include offices, equipment and so forth. You really can't afford to just make a good impression. Good impressions don't pay the bills. **G** is for gullibility. Taking what the owner, the owner's representative or the prime has to say with a grain of salt. I'm not advocating that you do not have to do what the owner and prime request. You do. You work for them. If you are right on a point, stand up and be counted. If it is not in your contract, the first question you should ask is 'How am I going to be paid?' Agreeing on a price to do the extra work comes next, then if at all possible, a supplemental agreement. If for some reason there is no supplemental agreement, get the request for extra work and what price you will do it for in writing and have it signed by whoever wants you to do it. Don't let this so called man's world of construction intimidate you. Most men still feel a woman's place is in the kitchen. Know your product and what you do well and you'll soon gain their respect. On the other hand, if you are wrong be big enough to admit your mistakes."

These words of wisdom come from Betty Lou Cole, president of Lu, Inc. in Nashville, Tennessee. Lu, Inc. was incorporated in 1984 and specializes in guardrail installation, fence erection, delineation, regulatory signs, overhead and contilever structure installation, signalization, traffic control, sweeping and litter pick-up, mowing and vegetation removal. The company operates mainly as a subcontractor but is prequalified to bid as a prime contractor in Tennessee and Georgia and provides services within a 500 mile radius of Nashville.

Betty's father and husband were both in the contracting industry. She learned from and worked with them for many years. Following some serious medical problems, her husband was forced into semi-retirement and Betty, her daughter and two sons, who had worked in specialty construction since their early teens, formed Lu, Inc. in 1984. The sons are still very active in the corporation, but Betty's daughter is a comptroller for a local bank. She still provides financial consultation to the business when needed.

Lu, Inc. has been a certified DBE/WBE in Tennessee since 1984 and in Georgia since 1986.

"We started slowly taking no more work than we could easily handle and still be able to give value, service and quality workmanship. Our initial goal was and still is to be the best at what we do, thus our reputation precedes us. It's a hard lesson for a prime to learn, but low dollar is not necessarily the best price."

Betty has graciously shared the following summary of knowledge gained during her six years as CEO of Lu, Inc.:

1. Know something about the business you choose to go into. Don't decide you can build bridges, if you have had no experience at building bridges.
2. Take advantage of every learning tool that is offered to you.
3. Have a goal to be the best at what you do giving value, service and integrity.
4. Last but certainly not least, be a company that has a 'GPG' rating of 100%.

Betty is a charter member and serves as treasurer on the board of directors of the National Women Business Enterprise Association. Her technical and financial support were instrumental in securing the inclusion of women in the DBE program. We know you will join us, on behalf of women across the nation, in thanking Betty Lou Cole for her contributions to the attainment of economic equality and due recognition for women.

Civil Rights Bill of 1990

Continued from Page 1

tion for its exclusionary practices. The Civil Rights Act of 1990 restores the Griggs rule by providing that, once a person proves that an employment practice has a disparate impact, the employer must justify the practice by showing that it is based on business necessity.

Facilitating Prompt and Orderly Challenges to Consent Decrees and Court Orders.

In Martin v. Wilks, a case involving a court-approved plan by the City of Birmingham to remedy past racial discrimination in its fire department, the Supreme Court held last year that whites who sat on the sidelines could later challenge it in a new lawsuit. The Civil Rights Act of 1990 guarantees notice to persons who might be adversely affected by a proposed court order, and a reasonable opportunity to challenge the order. But subsequent lawsuits challenging the court order will be barred except under certain unusual circumstances.

Making Clear that Job Bias Is Always Illegal

In Price Waterhouse v. Hopkins, the Supreme Court suggested that employment decisions motivated at least in part by prejudice do not violate the law if the employer can show after the fact that the same decision would have been made if it had not engaged in intentional discrimination. The Civil Rights Act of 1990 provides that any reliance on prejudice in making employment decisions is illegal, while making clear that, in considering the appropriate relief for such discrimination, a court shall not order the hiring or promotion of a person not qualified for the position.

Granting Women and Religious and Ethnic Minorities the Right to Recover Damages for Intentional Employment Discrimination Now Available to Racial Minorities

Under present federal law, victims of sexual, religious, or ethnic harassment who remain on the job have no effective remedy. The Civil Rights Act of 1990 closes this loophole by amending Title VII to grant any victim of intentional discrimination the right to recover compensatory damages, and in egregious cases, punitive damages as well. The Act makes the remedies available for sex, religion and ethnic discrimination claims under Title VII the same as the remedies now available under sec. 1981 for racial discrimination.

Correcting Statues of Limitation

In Lorance v. AT&T Technologies, the Supreme Court held that the statute of limitations for challenging discriminatory seniority plans begins to run when the plan is adopted, rather than when the plan is applied to an individual. As a result, persons who were laid off pursuant to discriminatory seniority plans may be barred from bringing suit before they even knew they would be dismissed. The Act overrules Lorance and permits persons to challenge discriminatory seniority plans when those plans actually harm them, rather than only when they are adopted. At the same time, the Act confirms that proof of discrimination in the adoption of the seniority plan that actually required the lay-off is required.

Restoring Fair and Effective Civil Rights Enforcement

The Civil Rights Act of 1990 also includes additional, technical provisions to ensure fair and effective civil rights enforcement and to address other Supreme Court decisions hampering initiation of antidiscrimination cases and recovery of attorneys' fees. These provisions extend the statute of limitations under Title VII and ensure that job bias victims will be able to obtain adequate legal assistance.

Reaffirming Generous Rules of Construction in Civil Rights Cases

The Act adopts rules of construction reaffirming the intention of Congress that civil rights laws must be construed generously, in order to provide effective remedies to eliminate discrimination.

The Bill Does Not Address The Scope of Race-Conscious Remedies

The Act specifically makes clear that it does not affect or change the law governing affirmative action and other race-conscious remedies. The Act does not mandate quotas in any fashion.

(Continued on page 19)

PRESUMPTION OF SOCIAL AND ECONOMIC DISADVANTAGE TO BE ELIMINATED IN FORT WORTH, TEXAS

By Attorney Janice Cunningham

This past February a WBE in Texas called my office regarding her certification with the city of Fort Worth. Although she had been certified with the City for 6 years as a WBE they were now requiring a narrative statement of why she was socially and economically disadvantaged. Failure to do so would result in decertification. It was my opinion that if the city received Federal funds on city projects, this requirement for certification was in derogation of the Federal Regulations.

On her behalf, I contacted the Fort Worth city attorney and had several conversations with him regarding this issue. Fortunately we were successful in eliminating the requirement for the narrative. The city does plan, however, to revise their certification process to have two types of certification. When implemented, a company will have to be certified separately for city work that does not involve Federal funds. The City certification will require proving that minority/female owners are socially and economically disadvantaged.

The Federal program was implemented as a result of the realization that women and minorities have been at a disadvantage competing in the industry due to the social and economic discrimination they have suffered. It is unfortunate that the objectives of the program will be compromised by allowing individuals to use their subjective opinion on who qualifies as socially and economically disadvantaged. The very reason for the presumption in the Federal Regulations was to eliminate the potential of such a subjective decision.

In the November 1989 issue of "Hard Hat & Shovel," my column addressed the potential of women being required to prove that they are socially and economically disadvantaged, regardless of the fact that the Federal Regulations require to to be presumed. At the time I wrote that article, I did not anticipate the problem would arise so quickly.

The November article discussed the elements of social and economic disadvantage along with the evidence you will need to gather to prove your case. If what is happening in Fort Worth, Texas is any indication of things to come, I suggest all WBE's retrieve the November issue and begin contemplating the past and present discrimination they have suffered.

We can only hope that the National W.B.E. Association can be instrumental in halting this movement which will inevitably result in women being removed from the program.

U. S. Female Troops Join in Combat in Panama

In what is believed to be a first for the United States, female soldiers were among the combatants in the recent Panamanian invasion.

Army Captain Linda Bray, led a platoon in a three-hour battle to neutralize a Panamanian Defense Force attack-dog kennel. The U. S. soldiers killed three PDF troops and seized weapons, according to the Washington Post.

Paige Eversole, Army spokesperson, said, "This is the operation where women have played their biggest role. They were receiving fire and returning fire."

One hundred seventy four women from military police and combat support units fought snipers and provided security during the invasion, but no casualties were reported among these women.

Retired Admiral Gene LaRocque, director of the Center for Defense Information stated, "It's very important that women not be used in combat situations in foreign countries. This is not to denigrate the capability of women but rather to suggest that they are apt to be prime targets."

3M 50TH ANNIVERSARY

Continued from page 4

Germany, Brazil, and Japan. A plant in Brownwood, Texas opened in 1965."

1965 "3M's 'friendly tape' staged a dramatic comeback. ScotchLane™ reflective and non-reflective pavement marking materials and application equipment were introduced. 3M's commitment to constant product development and improvement had paid off with brightness and durability that set the standards in the market. A 1937 idea got a 1960s rebirth."

1970 "1970 marked the start of a decade of key breakthroughs. Dr. Chi Fang (Steve) Tung developed a new, whiter glass bead and found a way to make it with 30 percent less energy. Dr. Tung also devised a system for testing all production procedures in the laboratory. A step-by-step manufacturing process made it possible to pin-point trouble spots."

1971 "Scotchlite™ High Intensity sheeting, pioneered by Eugene L. McKenzie, tripled the brightness of earlier versions. But brightness was not the only advance. The new sheeting "encapsulated" the beads under a smooth film that improved weather resistance and added durability. Again, 3M research set a new standard for brightness and durability."

1973 "Reflective sheeting went to sea. The International Maritime Consultative Organization endorsed earlier recommendations by European and Asian nations and the International Navigation Congress. These regulations required reflectorization of life-saving equipment at sea. A major new market for Scotchlite sheeting was now wide open."

1976 "Stamark™ Pavement Marking set the standard in pavement markings. Achieving significant new levels of brightness and durability. Stamark reflective adhesive-backed polymer pavement markings gave full realization to the idea born back in 1937. It began the development of a full line of durable pavement marking which would continue to grow through the 1980s."

1980's "3M developed and marketed a full line of products for highway construction zones. The line included flexibile, durable reflective sheetings for barrels, barricades and signs as well as temporary/removable pavement markings. The result for the motoring public was safer driving conditions in the very areas where hazards were more numerous and conditions most confusing."

1988 "Market tests began on Scotchlite™ Diamond Grade reflective sheeting. The reflective capacity of its microcube corners provides a surface significantly brighter than sheetings now in use. Under development for nearly 20 years, Diamond Grade sheeting reconfirms 3M's continued long-term commitment to traffic safety."

1989 "The story of Scotchlite sheeting has only just begun. Research in reflectivity is probing ideas and possibilities undreamed of in the days of the Glass Beads Project, a d we thank the many people who have helped 'make it happen.' As the long, patient evolution of Diamond Grade sheeting demonstrates, 3M remains committed to staying on the technological frontier. It's the only way to be ready for the future that is literally coming down the road to meet us. It's the only way to assure improved safety and convenience for another 50 years and beyond."

Congratulations 3M!!

The National Women Business Enterprise Association is proud to to count 3M among our Associate Membership.

What Does The New Decade Hold for Our Nation's Highways?

As the decade drew to a close 99.2% of the 42,799 mile U. S. Interstate network was open. The time has come to focus on the future of highways in America.

On March 8th, the House Public Works and Transportation Committee's Surface Transportation Subcommittee held the first of several planned hearings before drafting a new federal highway bill. "We are in need of new ideas and proposals," Chairman Norman Mineta (D-Calif.) said in a recent statement.

The main issues to be addressed in the reauthorization are; how much money is going to be allotted and, who's going to get it? The National Women Business Enterprise Association is gearing up lobbying efforts to insure that women retain a portion of whatever amount is authorized.

One thing that's obvious is much money will have to be dedicated to the maintenance and upgrading of existing structures. There are currently 231,000 deficient bridges in America and many of those built in the 50's and 60's will require work about the same time. It is speculated that the U. S. Department of Transportation will propose state and local governments up their share of the financial load for highways; that states be given more flexibility in developing federal aid; an increase in toll roads and privatization and more concentration on research and development.

Washington now pays about 90% of all Interstate costs and officials are looking for that to shift to as much as a 50-50 split for new construction. While some states will balk at the idea of raising gas taxes, the Highway User's Federation reports that 41 states are currently considering rasing fuel taxes.

Several suggest short-term relief can be provided by spending the $11-billion balance in the Highway Trust Fund's highway account. DOT says, if these funds are used, obligations could rise to about $19 billion a year for three years, without raising taxes. Obligations would have to be cut to $15-billion, or taxes increased, in the fourth year.

Most certainly, with or without increased gas taxes and/or the boost of the Trust Fund's surplus, public money is tight. This points to major support for more toll roads and privatization.

All this leads to new challenges for contractors. According to Thomas Dailey, president of Perini Corporation's Construction Group in Framingham, Massachusetts, the reconstruction to be done is riskier for contractors because of the difficulty in estimating costs.

The contractors who will be successful in the new era of the highway industry will be those who rely on technology and management skills to rehabilitate roads as quickly as possible and, remain low bidders.

SBA DEVELOPS NETWORKING OPPORTUNITIES FOR WOMEN BUSINESS OWNERS

It has long been apparent that the "good ol' boy" network has been of great value to men in the corporate world. Women, traditionally, have been reluctant to seek assistance from their peers in the business area. Slowly -- change is taking place.

Networking has taken on a new connotation. There has been growth in the membership of women's business organizations. Women's support groups are springing up across the country. The U. S. Small Business Administration (SBA) has been a part of this change.

The SBA's Office of Women's Business Ownership (OWBO) has initiated a mentoring program for women business owners. The Women's Network for Entrepreneurial Training (WNET) matches the successful women business owners (mentors) with fledgling women business owners (protegees) for a period of one year to provide individual training and counseling. The program began in October 1988 as a pilot in California. In response to the success of WNET in California, twenty-two states have announced a WNET program. Our goal is to have a WNET program in every state by 1991.

Throughout the course of the WNET program, the OWBO monitors the progress of the mentor and protegee. Almost without exception the results have been positive. On the yearly evaluations for the pilot program in California, the following comments were made by the protegees: "I delegate more... I made changes in personnel or the organization's structure... Publicity for my company has increased... I improved (or developed) a business plan... My business expanded... I improved the financial management of my firm... I changed my fee schedule thereby increasing my gross receipts."

The OWBO is recruiting interested women business owners to participate in this program. Please contact the Women's Business Ownership Representative in the SBA office closest to you if you would like additional information.

Mentors must be female, the CEO and/or founder of her business for at least five years, and have an average of one hour per week to devote to the protegee for at least one year. Protegees must be a woman business owner for at least one year and show gross receipts of at least $50,000.

In addition to the long-term training through WNET, there are other SBA programs to assist and support women business owners on an as needed basis. The Service Corps of Retired Executives (SCORE), which includes the Active Corps of Executives (ACE), counsels people wishing to go into business, people whose business are ailing and people whose business are in the throes of growth. Each SBA Region has a female SCORE/ACE Coordinator. If you are seeking counseling, the coordinator will ensure you are assigned to someone who is well suited to answer your specific questions. If you are interested in volunteering some of your time to counsel others, the coordinators are actively recruiting volunteers.

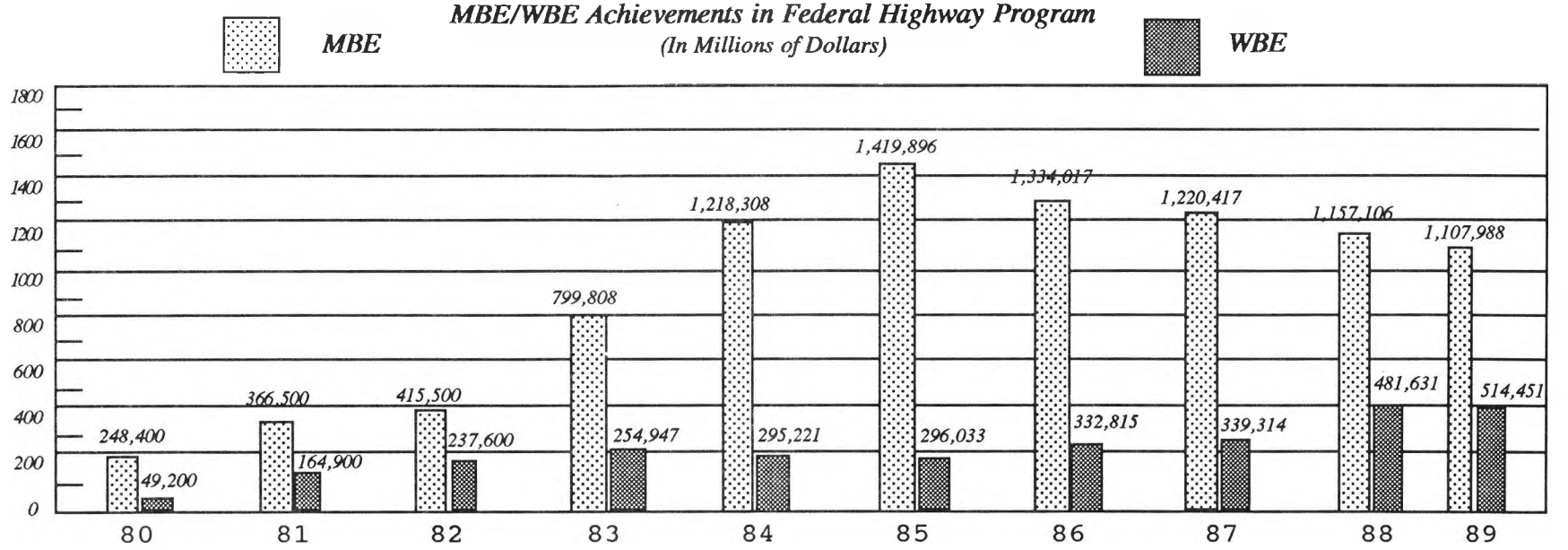
Small Business Development Centers (SBDC) are located at colleges and universities throughout the country. The purpose of the SBDC program, which is co-sponsored nationally by major educational institutions and SBA, is to utilize the multi-disciplinary resources of universities in partnership with federal and local governments, as well as the private sector, to assist small businesses. They provide a variety of educational programs, long and short-term and some in conjunction with degree programs.

There are more than 90 SBA Regional, District, Branch and Post of Duty Offices throughout the country. Every office has an OWBO Representative to assist women business owners. These dedicated individuals can serve as an invaluable resource to women who are starting or expanding businesses and they can assist women business owners through the federal process.

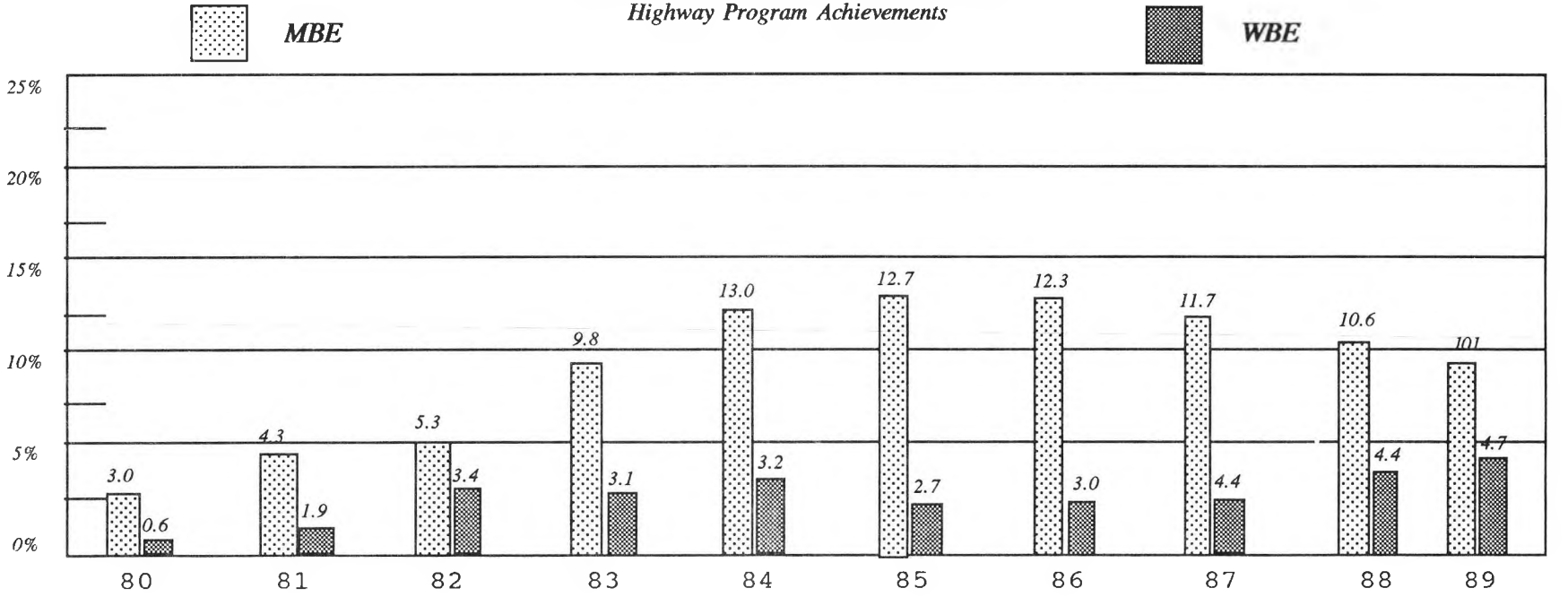
I urge you to become part of this growing network. Call SBA today to volunteer your expertise as a mentor in the WNET program or a member of SCORE/ACE. If you need assistance with your business, or want to be a protegee in WNET, call your closest SBA Office, the SBDC in your area and/or a SCORE/ACE counselor. For the SBA office in your area, call the SBA Answer Desk at 800/368-5855 (in Washington, DC 653-7561.)

MBE/WBE Achievements in Federal Highway Program

(In Millions of Dollars)



MBE/WBE Percentage of Federal-Aid Highway Program Achievements



VIRGINIA REVIEWING 14 MILE TOLL ROAD APPLICATION

The Virginia State Corporation Commission (SCC) has set a revved-up schedule for reviewing an application for a 40-year franchise to construct and own a 14 mile toll road in Loudoun County, Virginia. The application was submitted by the Toll Road Corporation of Virginia and consisted of 5,562 pages.

Only twelve days after receiving the application, the commission ordered its staff to finalize its review and make recommendations on toll rates and financing plans by April 17th. Toll Road Corporation Chairman, Ralph Stanley, speculated that they could receive a certificate of authority for the project as early as May. If the certificate provides attractive returns for investors, TRCV plans to start construction in June. Getting land owners to convey right-of-way could delay the project. However, once TRCV has been awarded a certificate, they will have two years to begin construction and sole right to build in the corridor for those two years. The county plans to use its condemnation powers to obtain the needed land if necessary.

The project is expected to cost $198 million, but financing has been arranged at rates of from 11.2% to 12.9% and these lower interest rates will help keep the toll rates to $1.50 when the road opens. The toll rate is predicted to increase to $2 through 1997.

BUSH ADMINISTRATION'S POSITION ON NEXT HIGHWAY BILL

The current highway act-the Surface Transportation Assistance Act of 1987-expires September 30, 1991. STAA '87 provides the framework under which federal excise taxes, primarily collected at the gas pump, are redistributed to states for use in their road and transportation programs.

Up until now these federal funds have been aimed at building and completing the interstate highway system; supporting construction in primary and secondary road systems through a variety of matching fund schemes; rebuilding high-cost, critical bridges; and supporting highway research through different channels. As the past highway bill reaches its goal of completing the interstate system, much debate takes place to determine its replacement.

Although the Transportation 2020 program of the American Society of State Highway and Transportation Officials (AASHSTO) has made one effort to establish a consensus position on the focus of the next bill, other groups have their own agendas. At AASHTO's annual meeting in October, the Bush administration gave state DOT officials a preview of what they expect from Capitol Hill for the 1991 Highway Bill.

DOT's concepts are focused on national objectives, such as productivity and mobility enhancements; alleviation of urban/suburban congestion; improvement of deficient bridges; and making major strides in highway safety.

Gene McCormick, deputy Federal Highway administrator, explained that the federal role in transportation is in a phase of restructuring. which would focus investments on a key national system to maximize preservation, new capacity and efficienty. In general, federal programs would be consolidated, but states would be held ac ountable for their programs. To improve intermodal connectivity, highway and transit funding would be merged where possible. Private participation in project finance and development would be emphasized.

The main components of this federal program would be:

* A national highway system made up of highways selected by the states but approved by FHWA, would replace the interstate and primary systems with a "strategic highway network" including pavement and bridge management systems.

* Categorical funding would be replaced with a formula program promoting urban and rural multimodal developments. States would have to show their approach to resolving potential urban/rural conflicts and have special consideration for metro populations of less than 200,000. Rural accessibility, congestion management, safety improvement and the environment would have to be considered.

Other suggestions include a discretionary metropolitan air quality program with fund not subject to sanctions; an apportioned program for bridges on any public road; and two discretionary programs for high-cost bridges both on- and off-system.

SO SORRY!!

We wish to apologize to Congressman Glenn Anderson for our error in referring to him as "Senator" Anderson in the caption beneath his photo which appeared in the November, 1989 issue of the Hard Hat & Shovel.

John D. Rockefeller, Jr. Offers a Creed to Live By which we feel warrants consideration by every NWBEA member...

I believe in the supreme worth of the individual and in his [her] right to life, and pursuit of happiness.

I believe that every right implies a responsibility; every opportunity, an obligation; every possession, a duty.

I believe that the law was made for man [woman] and not man [woman] for the law; that government is the servant of the people and not their master.

I believe in the dignity of labor, whether with head or hand; that the world owes no man [woman] a living, but that it owes every man [woman] an opportunity to make a living.

I believe that thrift is essential to well ordered living and that economy is a prime requisite of a sound financial structure, whether in government, business. or personal affairs.

I believe that truth and justice are fundamental to an enduring social order.

I believe in the sacredness of a promise, that a man's [woman's] word should be as good as his [her] bond; that character - not wealth or power or position - is of supreme worth.

I believe that the rendering of useful service is the common duty of mankind [womankind] and that only in the purifying fire of sacrifice is the dross of selfishness consumed and the greatness of the human soul set free.

I believe in an all-wise and all-loving God, named by whatever name, and that the individual's highest fulfillment, greatest happiness, and widest usefulness are to be found in living in harmony with His will.

I believe that love is the greatest thing in the world; that it alone can overcome hate; that right can and will triumph over might.

MWBE BUSINESS PLANS: SUPREME COURT'S CROSON DECISION

The ripple effects of the Supreme Court's Croson decision last January continue to spread. Courts still are split in trying to figure out what it really means for state and local minority contracting goal programs, but some cities are trying to put past disputes over the programs behind them.

Associated General Contractors and the city of Birmingham, Alabama, reached an out-of-court agreement, ending 12 years of litigation over the city's minority participation program. Almost simultaneously, a federal district court judge in Seattle upheld King County's minority contracting plan. But on November 29, another federal judge invalidated the Philadelphia School district's program.

Minority Business Enterprise Legal Defense and Education Fund Inc. reports that courts have rejected at least 5 minority business plans in addition to the Richmond and Philadelphia programs. More than 28 other cases are pending. About 15 localities have decided to end programs, and well over 35 are reviewing theirs.

Federal District Judge Charles J. Weiner in Philadelphia ruled that the city's school construction program violated the Constitution's Equal Protection Clause. The plan required that at least 15% of contracts over $200,000 go to minority-owned subcontractors and at least 10% go to women-owned firms.

"There is no evidence before the court that the...program is intended to specifically benefit those minority or women-owned businesses that [the city] believes were the...victims" of prior discrimination in its contracting system, said Weiner. "It is just the type of 'generalized assertions' of discrimination" the high court rejected.

Anthony W. Robinson, President of the Minority Business Enterprise Legal Defense and Education Fund Inc., claims that even to have programs suspended during municipal reviews is "devastating" to minority contractors. Many are going out of business because minority contracts have "dried up," he charged.

Subcommittee Chairman Don Edwards (D-Calif.) seems sympathetic saying legislation would be introduced to address the issue. However, he noted that it was "difficult" to write an effective law. Other than a constitutional amendment, there is not bill "sufficient to override what we have in the 14th Amendment," says Michael Kennedy, executive director for jobsite services for AGC.

UNITED INDIAN WOMEN HAVE DEEP ROOTS
"THINK GLOBALLY, ACT LOCALLY"

For the past 150 years, assimilation of Indians into the mainstream population has been an effort of the U.S. government. Dian Million, director of United Indian Women (UIW) and a member of the Alaskan Tanana River Athabascan tribe, says that those attempts always end in failure, because to this day Indian people, even those born far away from their ancestral territories, determinedly identify with their own tribal groups.

Indian women from the Portland, OR area and from a variety of tribes (including Northwest Klamath, Yakima, Black Feet and Crow) became concerned about what they saw happening to their families and dedicated themselves to social change by forming United Indian Women in 1978.

The relocation programs of the '40s, '50s, and '60s, designed to get Indians off reservations and into towns to find jobs, created disruption for the Indian population. Migrating into cities, away from home and their supportive extended family base, Indians became vulnerable to illness, alcoholism, racism, joblessness and housing shortages.

Not only do these programs prevent relocated Indians from receiving services available from their own tribal government, but they also miss out on the emotional and psychological benefits that come from living in accordance with traditional ways.

Indian spirituality, intimately connected to the land, experiences the earth as a living organism. So when resources such as oil, timber or coal are extracted, Indians may view the action as a desecration of something sacred,particularly if the resources are part of a sacred site.

Million is working with the Sacred Earth Coalition, a group of Native Americans, environmentalists and spiritual people from different denominations who are trying to protect Mt. Hood and Mt. Hood Meadows from further development.

An 1885 treaty reserves the right of Warm Springs Indians to conduct ceremonial activities in their Mt. Hood sacred areas, a religious site for thousands of years. However the first environmental study on Mt. Hood development gave consideration only to the ski industry. The Coalition protested, and Indian testimony was heard. A revised environmental impact statement, taking Indian usage into account, was issued in November. A decision on Indian access is expected soon.

Though religion is the base of Indian culture, prisons and other institutions have prevented them from gaining access to spiritual leaders and from practicing healing ceremonies. When an individual suffers from psychologenic disharmony, Indians may use a special ceremony to help that person gain control over his/her life. Regimented prison life cuts off the communal ties that could provide rehabilitation, argues Million.

In death, Indians are unable to adhere to ancient religious practice because the state mandates embalming. Indians believe such chemicals interfere with the body's physical/spiritual return to its source.

Through the efforts of people like Million and organizations such as UIW, communication has been established with other indigenous landbased people in Polynesia, Australia, Japan and the Arctic regions of North America and Greenland. After a speaking engagement in Northern Europe where Million met with Aborigine, Inuit and Ecuadorean Indian representatives, her motto is "think globally, act locally." UIW is working to educate non-Indians about who the Indian is.

IMPROVING CASH FLOW

Reprinted by permission McNeill Stokes', Preventive Legal Management, August, 1989

By Tom Barfield

This is intended to be a practical "how-to" guide for seasoned veterans as well as newcomers to the construction industry. It is based on the observation that most trade contractors feel more comfortable in selling jobs and dealing with field problems than in collecting outstanding money. Indeed, more subcontractors seem to fail because of poor cash flow management rather than lack of work or technical expertise.

Certain proven techniques work consistently in obtaining faster payments. But achieving those superior results requires diligence and a positive attitude throughout the collection process. Just remember that the rewards are great and well worth an increased emphasis on collections.

There are payment problems unique to the construction industry. For example, subcontractors must deal with ingrained practices such as retainage, lack of privity with the owner (the source of funds), front-end loading, pay-when-and-if-paid terms, inability to take back work for nonpayment, delayed partial and final payments, questionable backcharges, slow issuance of change orders and diversion of funds by prime contractors. Also, construction is a volatile industry, and even major companies are prone to sudden reversals. For these reasons, only a comprehensive and vigorous collections program can succeed.

This series will first address the collections process before the award of a job, and follow the normal job sequence through receipt of the final payment. The series will focus on situations in which subcontractors are working for general or prime contractors. However, most of the described techniques and approaches also apply to specialty contractors working directly for owners, as well as to lower-tier subcontractors and suppliers working for subcontractors.

Basic Principles

The right attitude goes a long way toward assuring a successful collections program. It is important that all parties involved in the collections process--those in your company as well as your customers--are continually made aware that timely payment for properly performed work is an important and urgent concern of your organization.

The following steps will improve your collections results:

* *Take the initiative by treating collections as a vital part of your dailyactivities.*
* *Show your desire for results through actions, not words.*
* *Demonstrate in a tangible way your desire to get earned money into your hands. There is ample evidence that the squeaking wheel gets the grease. Contractors are more likely to see that payment goes to those who show they really care rather than those who simply go through the motions.*
* *Accept the fact that many contractors have developed systems designed to keep subcontractors off-balance and on the defensive as a way of paying less than due. Assume that the contractor has someone on its payroll being paid just to slow down your payments by offering vague promises or delaying your checks.*

All of the good intentions in the world will not work without a carefully developed program. Such a program should be built on the precept that there is no substitute for actually getting money into your account. Only then can you cover the cost of project materials and work that you have financed.

The following steps are recommended as part of your program:

* *Establish a good foundation. There are three building blocks for a sturdy foundation: equitable subcontract payment terms, a billing schedule that provides adequate compensation during progress of the job, and a requisitioning system that helps your customer so that the customer does not hinder you with excuses for payment delays.*
* *Respect the lessons of a general contractor's track record. Be prepared if, based on your past experience with the customer or the reputation of the customer, there is a history of abuses such as improper backcharges and excessive deductions from payments.*
* *Use your time and employees to your advantage. Many customer collection contacts can be made during regular visits and telephone calls about other matters. It is also helpful to prioritize contacts, separating the unusual from the routine in assigning follow-up responsibilities. In most instances, office employees can carry out a systematic program of routine contacts so that senior staff can concentrate on exceptional conditions and major problems.*
* *Do not hesitate to use leverage when you can. A typical situation is when a customer is looking for a great price, a scope change. acceleration or out-of-sequence work, special favors, and especially if the customer needs your help to meet its goal. The common element in each of these situations is that the customer needs special considerations from you. when these conditions arise, it is always best to make your agreement contingent on favorable payment terms and removal of any existing obstacles to getting your money without delay.*

Special Strategies

Prior To Award

The foundations for good payment results begin prior to the award of the contract. Without unrestricted entitlement to a check covering monies earned, it is all too *(Continued on page 20)*

Civil Rights Bill of 1990, Continued

Thus far 40 Senators and 156 members of the House of Representatives have put their stamp of approval on the Civil Rights Bill of 1990. It is most appropriate that Senator Kennedy took the lead in filing this Bill. Not only is it very timely, but it is of major significance to minorities, women, and every individual who has ever been "kept in their place."

The bill does not directly address affirmative action programs and we see that as a plus at this point. For the first time in history, women have received federal procurement through the DBE Program which provides an equal opportunity of at least 10% shared by all "disadvantaged groups." In many cases Civil Rights leaders have grouped women with minorities when professing their views on the necessity of affirmative action. NWBEA also sees affirmative action as necessary. To date, only federal agencies have made efforts to advance the benefits for women by allowing women to participate in a program which allocates no less than 10%. Although the verbiage found in most state and local governments professing programs for "women and minorities" they still adhere to old policies of offering women secondary, lesser goals, or no goals at all.

To pass any form of legislation mandating the state or local programs as they exist now, would be an injustice to women. We would like to see legislation that endorses affirmative action and either include women in a joint goal, or raise the goal for women. Until this happens, women will never attain their rightful, equal position.

Minorities make up 23 percent of the national population. However 52% of our population is female (42% White women), yet women are still rendered to a secondary position. To have goals unequal to minority goals is a travesty of justice.

Thirty percent of all businesses are owned, controlled, and managed by women. By the year 2000, it is predicted that this figure will increase to 50%. Yet, only one percent of all federal procurements are with women-owned businesses. This figure drops even more dramatically at the state and local levels. We must remedy these gross forms of injustice, and have a great deal of hope that the Civil Rights Bill of 1990 will be a major step in that direction. We hope to soon see legislation and goal setting which calls for equal opportunities for women in all federal, state and local governments.

Having served an internship for Senator Kennedy several years ago, my respect, admiration, and gratitude for his major contributions to all humanity is long standing and well deserved.

Improving Cash Flow

Continued from Page 18

easy for unscrupulous contractors to hide behind unfair payment terms and answer your pleas by advising you to "read your contract." Unfortunately, stringent subcontract language may cause you to be legally obligated to continue work for extensive periods with little or no money being payable to you. Worse still, unfair contingent payment language can cause you to lose the right to sue, proceed against a surety company or even maintain a lien on the job.

The steps shown below should be built into your routine to cover specific problem areas in negotiating fair payment terms.

1. Bid On Your Own Payment Terms

It is always better to develop your own proposal form, not only to clarify the payment terms on which your bid is based, but also to confirm your understanding about the scope of work, related work by others, scheduled time for performance and any unclear, contradictory or potentially troublesome items. Wording on the printed proposal form can be worked out with your attorney, but sufficient blank space should always be provided for specific items of clarification that apply to a particular job. Items to be included in the printed wording will be shown later. However, caution should be taken to insert a specific percentage for retainage in the printed wording since that varies from job to job.

An alternative way of handling your bid clarifications is to state that the bid is subject to the payment terms of the latest American Institute of Architects Standard Subcontract (Document A-401). This approach gives you a good reason for using the A-401 form as the subcontract document for the job. Even if the contractor does not agree to use the A-401 form, you will have established the principle that your bid price was predicated on the equitable payment terms contained in that document.

Where telephone bids to a large number of potential contractors are involved, it may not be practical to clarify more than the most important points at the time verbal quotes are given. However, if you are named the successful contractor, you should confirm your bid to that organization on your proposal form or by letter including points of clarification and, of course, payment provisions. In doing so, you may want to accompany your proposal with a letter congratulating the successful contractor, expressing your interest in working on the job and perhaps including information about your organization and experience on similar projects.

2. Overcome Unfavorable Contractor (Owner) Payment Terms

Avoid any language in the bid documents stating that the contractor's or owner's standard subcontract form will be used. By bidding without clarifications, you may find that you will be offered unsatisfactory payment terms and reminded that you bid price was to be based on those terms.

To avoid being precluded at the time of bid, you should, at the very least, make your bid subject to mutually agreed upon clarifications. This approach allows you to keep your options open to negotiate reasonable payments terms after having been designated as subcontractor for your class of work. Following the award of a job, it is usually possible to obtain fair payment terms utilizing the techniques outlined in ASA's publication entitled, *Fundamentals of Fair Subcontracts*.

Another method for overcoming unsatisfactory conditions is to base your bid on your own proposal terms. This method provides a clean, more specific basis for later reference; however, use of this method may also force you into a vulnerable negotiating position if, as a result, your customer insists on discussing terms up front.

You must also watch for bid conditions that say the contractor terms apply in spite of any exceptions, clarifications or contrary terms cited in subcontractor bids. You will need to take exception to such contractor terms as part of your bid.

On public bid work, you may find that no exceptions are allowed and that even points of clarification would disqualify your bid. If you find the payment language to be unsatisfactory on such jobs, you may need to seek an addendum from the bidding agency that allows responsible pay entitlements.

"JANE CROW" REGULATIONS

Regulations were established in 1980 to implement the Minority Business Enterprise Program and the Women's Business Enterprise Program. In 1982, when it became the Disadvantaged Business Enterprise Program, the same regulations were still used to implement both programs. However, what did change was the interpretation of the regulations by the U. S. Department of Transportation's Office of Civil Rights and the Federal Highway Administration. The interpretation of the regulations which were amended in 1987 to include women, have been turned into ammunition used for barring them from federal procurement.

What has occurred is a double standard. Women who have been certified since 1980 and whose companies have undergone stock transfers or received inheritances are now being subjected to decertification, or denial of certification. Those who have managed to maintain their certification are constantly in jeopardy.

It is a proven fact that women who are certified in the Disadvantaged Business Enterprise program are scrutinized much more closely than their minority counterparts. Decertification of women DBE's has sky rocketed from an average of 30%, to 60% in the last few years.

Newly formed women-owned companies are finding it virtually impossible to obtain their certification. This is due to the interpretations being applied to the DBE regulations. We call these interpretations, which are applied solely to female DBE's, the "Jane Crow Regulations." The National Women Business Enterprise Association has tried to change these discriminatory practices through the administrative process. We have informed officials of our plight and have received promises of brighter days, but thus far, nothing has changed. I have tried on several occasions to meet personally with the Secretary of Transportation and/or Deputy Secretary Skinner and/or Deputy Secretary Choa. All unsuccessfully. I have also exhausted every effort to meet with Mr. Lawson and Mr. McCormick. It has been very difficult to get their attention.

In our system of justice we are innocent until proven guilty, but in this process we are guilty until we [women] prove ourselves innocent. Throughout this process, individual's civil rights are being violated, and something must be done.

Many women are losing their certification under the allegation that their company is a "Front." Our understanding of the word "front," is that it refers to a company that is operating as a pass-through, or is representing itself as being owned by a woman/minority when in actuality they are only "owners in name," or a company in which investors, other than women/minorities owns in excess of 51% of that company's stock. Officials, however, are accusing women businesses owners who are working 12 and 14 hours a day; who write the checks; who make the decisions; who have been running their own business for 8-10 years, of operating a "front."

They are losing certification based on money or stock transfers that they obtained as much as ten years ago, before the DBE program was even conceived.

NWBEA has no problems with denying certification of a company run completely by a contractor, a husband, a brother or a father over a long period of time, and then suddenly there was a transfer of stock and the wife or daughter owns the company. However, if a female has demonstrated her ability to run a company for a two year period, she should be looked upon objectively as any other business person.

It is totally unfair to penalize women even though their husbands may work in the company or a male counterpart works in the company. There is a fine line between 49% ownership and 51% ownership. Until the regulations are changed or Congress changes the qualifications, women should not be penalized for the wrong perception that the Administration, Congress, and the Department of Transportation has.

The federal regulations, under 49CFR part 23.5 and 49CFR part 23.53a, contains the following definition of a disadvantaged business enterprise: A small business concern which is owned and controlled by one or more minorities or women. (Owned and controlled means it is at least 51% owned by one or more minorities or women. In the case of stock, it must be owned by one or more minorities or women and the company's management and daily operations are controlled by one or more of such individuals.)

The regulations go further, saying: a) the owner must be a member of a minority group, or a woman; b) the business must be independent; c) there may not be any formal or informal restrictions which limit the customary discretion of the minority or woman business owners; d) all securities which constitute ownership must be held directly by the woman or minority; e) contributions of capital or expertise to acquire ownership must be real and substantial and must go beyond the corporate record; f) the minority or woman owner must enjoy the profits and the risk of ownership; g) the minority or woman must possess the power to direct or cause the direction of the management of policies of the firm; h) The woman or minority must possess the power to make the day to day, as well as major decisions or matters of management, policy and operation; i) a non minority owner may not be disproportionately responsible for the operation of the firm, and; those persons having the ultimate power to hire/fire the managers are considered controllers of the business.

NWBEA finds these regulations justifiable. It is their interpretation that has caused havoc to women owned businesses throughout the United States. Let's examine some actual incidents of the application of the "Jane Crow Interpretations."

A woman who is trying to break into an industry that has historically discriminated against women, because she lacks experience she (Continued on page 26)

President's Message,

Continued from Page 5

to work, or are not really socially and/or economically disadvantaged. The segment of society who has these views has obviously never taken a look at the realities of women in the work world. A woman makes 65 cents to every dollar made by a man. When a family is split by divorce women and children's standard of living drops by 72%, while the male's increases 42%. Today the one group that is below poverty level is the single white female with child. Women with a college degree, make less than a man with only a high school education. The median, year-round, full-time earnings for a woman in 1987 was $16,900.00, compared to $26,008. for men. Among the many overwhelming hurdles faced by women on a daily basis are: job discrimination; low pay; disastrous divorce results; failure to receive child support payments; a lack of day care; and a lack of medical care and affordable housing. In 1987 the Census Bureau calculated that the poverty rate was at 14.5% for all people. The rate for children under the age of 18 was 20%, for those over 65, was 12.2%, and for female, head-of households with no spouse present, 33.4% were living in poverty. More very telling statistics include:

*The National Commission on Working Women, on Census Bureau data, showed that 50% of all poor families in this country were headed by women, 40% of whom are working.

* In 1986 4.5 million women were in the work force, yet lived in poverty. Over half of these women had children.

* The median income for full-time, working mothers was a mere $7,000.

* Also, based on those who worked full-time, year-around, White women received 63% of what men earned, Black women, 57%; and Hispanic women, 54%.

* All women fell below all men in income groups.

In the House of Representatives, Representative Lynn Martin conducted a study which reported that the same discriminatory practices even held in the House. Of House Committee staffers, 72% of men made more than $40,000/year - 69% of women made less. 79% of women made less than $20,000, but only 21% of men made less than that. Every 22 seconds there is a woman in this country battered by a male. Every one and one-half minutes there is a woman raped in this country. Also, in management positions, there is only one woman in every ten in middle management. In upper management the figure is zero. Even if a woman executive makes it, she earns 42% less than a man does in the same position with the same experience.

Presently, 30% of all small businesses are owned by women. By the year 2000 it is estimated that 50% of all small businesses will be owned by women. However, as we all know, 1.1% of federal procurement goes to women-owned businesses and even less at the state and local levels. If that doesn't add up to 52% of the population still being treated as second-class citizens, I don't know what does. It's time that Congress make changes. Big changes. As women, we are responsible and hard working, and we have a lot to offer. It is our turn and we intend to take it.

I recently sent each of you a brochure entitled Tell It To Washington, which is published by the League of Women Voters. I'd like to encourage you to keep it at your side because we will be referring to it quite often in the times ahead. Please investigate and consider joining the League of Women Voters. They have much to offer us all.

We need to concentrate efforts on convincing our political powers of the importance of putting the Highway Trust Fund monies to work repairing and constructing highways and bridges across the nation.

In closing, I look forward to seeing each of you at our Annual Washington Fly-In this September. Look for the information in this and upcoming newsletters and make plans to attend! We made great progress at last year's Fly-In and you shouldn't miss the opportunity to meet with House and Senate members and express your views face-to-face!

FHWA Report FY 1990

Total DBE Participation

FY 1989	1st Qrtr. 1990
14.8%	14.6%

DBE-Ethnic Minority

FY 1989	1st Qrtr. 1990
10.1%	9.9%

DBE - WBE

FY 1989	1st Qrtr. 1990
4.7%	4.6%

NWBEA BOARD OF DIRECTORS VISIT THE NATURAL STATE

The NWBEA Board of Directors meeting was held March 31-April 1, 1990, at Sun Bay Resort in Hot Springs, Arkansas. Board members that attended were Eileen Stepanovich, Shirley Wilcox, Betty Cole, Janet Jenkins, Joann Payne, Pat Shea, Regina McManus, Ramona Andrews, Janet Schutt, Joann Hance, and Lee Givens.

During the Treasurer's report it was noted that the NWBEA had hired an Executive Secretary, Vivian Dlamini, and that Management Support Systems, a woman owned business, had been retained to publish the Hard Hat and Shovel and to prepare correspondence for the Association. It was decided that the costs of an audited financial statement be investigated and considered at the next meeting.

The proposed 1990 Budget was introduced and accepted. Many savings measures were discussed, as well as, the collection procedures that will be needed to collect dues. It was noted that all financial resources will be needed to maintain efforts in Washington, D.C. to fight the removal of the DBE Program and/or maintain the inclusion of women.

Efforts are now under way by the board to obtain a 501 (c) 3, non-profit status for the NWBEA. Board member Regina McManus will present a proposal, from a firm chosen by survey, to the board meeting scheduled in Washington, D.C. The proposal will outline the best way to raise funds and obtain the 501 (c) 3.

A restructuring of membership dues and the development of a pro-rated fiscal payment schedule of dues payment was adopted, and will be disseminated at a later date.

The board will adopt a Policy Manual after having time to review it individually, at the next board meeting.

Much discussion was given to developing chapters in Charter states. Guidelines for charter states are set by sole authority of the NWBEA. The policy manual will be reviewed and made available to board members. The national by-laws are changed so the President or an appointee can serve on a committee to coordinate with state legislative chairmen the certification that each state gets.

The board, noting that nothing had been done to this point to coordinate and form charter states, held discussions on committee chairpersons and made appointments to respective committees.

The projected direction for NWBEA was outlined by President Payne. The future direction of NWBEA includes appointing Ms. Payne to the post of Executive Director in 1992, and relocating with office personnel to Washington, D.C. to oversee day-by-day duties, organizing dues, issues, seminars, and chapter states. Specific goals will be decided at the September meeting.

Board members were able to fit an afternoon's visit to Oaklawn Park, nationally famous horse-racing venue, into their busy schedule.

TREASURY SECURITIES - A FIRM FOUNDATION

Investment portfolio's should be based on a firm foundation no matter how aggressive an investor might be. The safest investments available are US Treasury securities, because they are backed by the full faith and credit of the United States Government. During uncertain times this gives them special appeal as a haven for the cautious investor.

Less interest is paid on Treasury securities than on corporate bonds generally. Because of this they offer some special advantages such as exemption from state and local income taxes.

Investing in Treasury securities will assure you of getting full return on your investment at maturity with most of your investments. Market value may decline because of high interest rates, but if interest rates are low, market value will rise increasing the value of your investment.

There are three categories of Treasury securities: Bills, which have maturities ranging from 13 to 52 weeks with a minimum investment of $10,000; Notes, which mature in 2 to 10 years with a minimum of $5,000 for notes under 4 years, and $1,000 for longer-term; and Bonds which generally mature in 30 years.

Treasury notes and bonds provide fixed semi-annual interest payments, whereas Treasury bills are traded on a discount basis. These bills are bought at less than face value, and at maturity, the Treasury redeems them at face value. The difference being return or yield on investment

The Treasury Department regularly auctions Treasury securities as a was of financing Government debt. Explanatory booklets about the Treasury Direct program, applications and information about auction dates are available from Federal Reserve Banks and branches nation wide.

MAKE PLANS NOW TO ATTEND THE SECOND ANNUAL WASHINGTON FLY-IN

SEPTEMBER 18 - 20, 1990

PHOENIX PARK HOTEL

WASHINGTON D.C.

Monday - September 17, 1990
Arrival Throughout the Day

Reception
8:00 pm

Tuesday - September 18, 1990
Board of Directors Meeting
8 am to Noon

Registration/General Memberhsip
8 am to Noon

General Members Meeting
1 pm to 4 pm

Wednesday - September 19, 1990
General Meeting
8:30 am to 9:30 am

Members Visitation
Individual Senators/Congressmen
(Make your appointments early)
10 am to 5 pm

Congressional Reception
Awards Presentations
Guest Speakers
5 am to 7 pm

Thursday - September 20, 1990
General Meeting
Guest Speakers
8:30 am to Noon

Board of Directors Meeting
1 pm to 5 pm

Departure

Note: Rooms will cost approximately $105.00 per night.

NEW LOCATION FOR DOT

According to Richard Austin, acting administrator of the General Services Administration, a pending move to a downtown Washington site near Union Station would consolidate DOT employees from three buildings. The consolidation would save the DOT about $100 million in lease payments over a 30 year period.

The total size will be 2.7 million to 3 million square feet, with the price tag at about $600 million. Austin says if Congress approves it would make it one of the biggest among 20 federal buildings that GSA plans to construct using a type of lease-purchase financing.

The deal for the site has not yet been finalized notably because of some ''hurdles'' yet to be overcome. GSA needs congressional approval, and to acquire land and air rights. A team of CSX Realty, who owns 1/3 of the sight, with the government owning the rest, and two other firms have set up a partnership to study its parcel and possible plans for 1 million square feet of offices and related space there. They hope that the government would consider the CSX team to develop the site should it be the one selected.

"Jane Crow" Interpretations

does not get certified. The question must be asked, "How can she acquire the technical experience and expertise if she has been barred from participating in the industry?" This particular interpretation only governs women. It does not apply to men, because men have always participated in the highway construction industry. It is a male dominated profession. No matter what the race, creed or color, the male has always had the opportunity to participate in this industry.

Another "Jane Crow Interpretation" is the idea that independent company means that a woman cannot inherit money from her father and put that money into a highway construction company. However, if a minority male inherits money from his father, he's not penalized because the chances are that his father was a minority as well. Likewise, if a woman worked and contributed funds to a joint checking account and tries to draw from those funds to establish a business, "Jane Crow" interprets that not to be her money, but her husbands and she, therefore is disqualified as a DBE. Perhaps the most tragic interpretation comes when women who have been in this business for 8 - 10 years and have had sole fiscal and managerial responsibility of their company (including certification under these same regulations) are now being decertified, because the states are demanding proof that she started her business with independent funds. To deny the recertification of a woman business based on occurrences prior to the inclusion of women in the DBE program is a travesty of justice. This would very seldom apply to male minorities.

Another devastating interpretation is the assumption that a woman's involvement in her company is limited to administration or clerical, because she may not be in the field 5 days a week. No president of any corporation in the nation does it all. If she has a male working for her that manages the field, or supervises or does the estimating, she is going to be considered not to be controlling the management of her business.

ARTBA HOLDS FIRST NATIONAL CONFERENCE IN WASHINGTON D.C.

Speaking to the American Road and Transportation Builders Association's first national conference on public-private ventures, William H. Allen, a vice president of Parsons, Brinckerhoff, Quade, and Douglas, Inc., hinted that the Federal government and the construction industry appear to be ready to accept the concept of private funding for transportation projects. He says, "It's clear now that this is more than just a passing fancy. We're starting to see a lot of projects come down the pipeline."

The conference attendees, of which there were 200, were from the public sector, academe, financial institutions, accounting and law firms, and construction. About one third of those were from the public sector.

With the upcoming National Transportation Policy as a backdrop the meeting attracted many of the construction industry's top transportation firms. Companies such as CRSS, Inc., Kiewit Construction Group, Inc., Fluror Daniel, Inc., Parsons, corp., H. B. Zachry co., Brown and Root, Inc., and Parsons, Brinckerhoff were represented.

Several attendees suggested that the meeting was something of a breakthrough in the long history of transportation purification.

ARCHITECT AND ENGINEER SELECTED FOR SUPERCONDUCTING SUPERCOLLIDER

The Department of Energy chose a joint venture, Parsons, Brinkerhoff, Quade, and Douglas, Inc., as engineer and architect for the Superconducting Supercollider (SSC), the world's largest atom smasher. The contract was awarded in February, one year later than scheduled.

The SSC will provide (aside from the opportunity to discover basic particles of matter) a chance for engineers and contractors to erect the most prestigious research project to date, and make a profit in the process. The SSC project is estimated to cost about $7.6 billion, a $2 billion increase from the original $5.6 billion estimate.

A panel of physicists determined that scaling down the project would hinder the chances of making important discoveries. Doubling particle injector energy and increasing the aperture that will guide twin beams of protons around the 54 mile circumference of the tunnel are the major design changes.

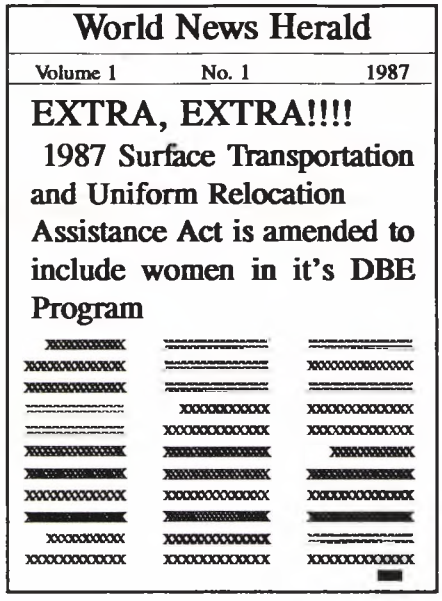
The ventures first contractor, CRSS, Inc., Houston, says that construction is generally straightforward although massive in scope.

A series of prototype magnets, which are the Department of Energy's main worry, have been produced at DOE's Fermi National Accelerator Laboratory in Illinois. A contract for development and manufacture of magnets, expected to be a $1 billion project, may be awarded by years end.

A land acquisition should begin within the month on the $319 million fiscal 1991 project. Of that budget $169 million is for construction.

What's Wrong With This Picture? PLENTY...

by Joann Payne


World News Herald

Volume 1 No. 1 1987

EXTRA, EXTRA!!!!

1987 Surface Transportation and Uniform Relocation Assistance Act is amended to include women in it's DBE Program

Women in the highway construction industry across the nation were encouraged and elated by their initial inclusion in the goals-setting process of the DBE Program. However, as any certified, female DBE knows, the thrill of victory was quickly stifled by the agonies of reality.

Women DBE's have been met with cold, discriminatory processes for maintaining their certification at the state level. What Congress has ordained, state DOT officials have extended great efforts to put asunder.

The major problem with this program is the fact that the Federal Highway Administration has not cared about the program in the past and the new administration has done nothing to show it respect. Among other major pitfalls of the DBE Program are:

Women are constantly called to the carpet to prove their status as "socially and economically disadvantaged" citizens. Although Congress has deemed (based on the virtues of women's historic struggle to attain a niche in any segment of the male-dominated business community) that a female business owner is presumed to be socially and economically disadvantaged, officials charged with the administration of the DBE regulations require constant, harassing documentation of proof.

Many women who have complied to all the rules and qualifications, dotting every 'i' and crossing every 't' along the way, are suddenly finding themselves stripped of their certification (and consequently their livelihoods) based on factors that no male, minority or non-minority is ever even questioned about. For example: Certification has been yanked from many women on the grounds that they employ one or more male family members. The assumption has been made in these cases, that if a male family member works for a company, he's the one providing the expertise and managerial skills. When a male, in any walk of life employs relatives, his managerial capacities are never questioned.

Also, when a certified, female DBE employs any male at a higher salary than she takes from the company, it is assumed that since he makes more money than she, he's the one providing the expertise and know-how and she is deprived of her certification. Any fiscally conscientious individual knows that there are times you sacrifice putting money in your own pocket to insure having valued, capable employees. The only time pay is an issue for a male DBE is when one partner is a minority and the other is not, and the non-minority makes more money than the minority.

Another major complication that female DBE's are encountering is inheritance. Should a woman inherit money or a company from a male, she is decertified. This is rarely a problem for minorities, because the individual leaving them an inheritance is usually a minority as well. Not only can she not inherit valuables and remain in the program, she is not allowed to maintain joint checking or savings accounts.

Women who are faced with these crises immediately find themselves in the proverbial "Catch 22" position. Once word has gotten around to contractors that she has lost, or is in jeopardy of losing her certification, they immediately quit subcontracting with her company.

Women also have difficulty obtaining certification based on "lack of experience." Again, Catch 22. It's pretty difficult to gain a great deal of experience in a position that you are not allowed to hold. To this insult, is added the injury of unannounced site visits by state DOT employees, who, even though they haven't the professionalism to inform the DBE of the scheduled inspection, they evaluate her poorly because she wasn't in her office when they called. It seems to be a moot point to them that she was out conducting business, such as working in the field.

Finally, there is no realistic appeals process available to women who have been unjustly decertified. State officials are allowed to devastate a woman's sole means of income and erase her years of professional development, and she's provided no means of questioning, let alone fighting, the decision.

I propose some solutions to these gross injustices.

First, Congress must push the administrative branch to clarify the "Jane Crow" interpretations of the DBE regulations.

An administrative law judge could be charged with the authority to hear all parties concerned in a certification appeal. He or she would determine the validity of the denial of certification, based on the merits of each individual case.

More women should be involved in the implementation of the DBE Program.

Congress should allocate funds for education and training to insure that the people who are certified in this program are qualified to do the work.

The elimination of multiple certification processes. Once an individual has been certified as a DBE, that certification should hold with every federally-related program in the nation. This would save millions in the duplicated certification processes now being conducted.

The elimination of having to duplicate the same paper work year after year. Arkansas has set an excellent example in this situation. The state mails a letter of inquiry yearly which provides a form questioning whether you have had any changes in your firm during the past year. If there have been no changes, you sign the form and return it, thereby eliminating costly, time consuming, harassment. The state intervenes only in the cases of change in company status, or if outside complaints are lodged against a company.

Congress' intent through 106 (c), was to include women's participation in the DBE Program. It has been DOT's vendetta to exclude them. Congressional intervention could bring this blatant discrimination to a swift and peaceful end. **Women aren't giving up. Women aren't going away.**

Why Belong To NWBEA ?

The NWBEA was established and employs full-time staff to meet the following goals:

**Maintain the single DBE 10% goal or attain equal goals if separated.
**Defend and promote the rights of women as equal citizens in our society.
**Eliminate existing double standards against women in the certification process.
**Protect interests of women in construction policies.

NWBEA provides the following services to its membership:

**Active lobbying service to monitor all legislation concerning women in the highway construction industry.
**Public relations programs.
**Active lobbying service to monitor FHWA changes in the DBE regulations.
**Personal service to women who have been decertified or are not yet certified.
**NWBEA demands accountability from Congress, FHWA, office of Civil Rights and The State Department of Transportation.
**Receipt of the National Hard Hat and Shovel, the official publication of NWBEA which provides information to all members and national public servants.
**Annual Meetings and National Conference offering a strong network of other WBE's input and support.
gton Fly-In providing the opportunity for one-on-one dialogue with our nation's leaders.

THE NATIONAL WOMEN BUSINESS ENTERPRISE ASSOCIATION, INC.
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Val Burroughs

SOUTH CAROLINA DEPT. OF HWY &
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COLUMBIA
SC 29202

Preliminary Review

of the

"Study of Minority

and Women Business

Participation in

Highway Construction"

January 8, 1992

A disparity study commissioned by the

North Carolina General Assembly

May 17, 1993

George R. La Noue,
Professor of Political Science
Director, Policy Sciences Graduate Program
University of Maryland Graduate School, Baltimore
and John C. Sullivan, Esq.

Table of Contents

I. EXECUTIVE SUMMARY

After the M/WBE [minority/women business enterprises] goals program established by the North Carolina Department of Transportation [NCDOT] was challenged in court, the North Carolina Attorney General recommended that the mandatory provisions of the program be suspended. At the same time, the Attorney General suggested an investigation to see whether there was sufficient evidence of discrimination to justify such a program. The General Assembly's sub-committee on Minority and Women's Goals selected MGT of America to do a disparity study on that subject.

What follows is a preliminary analysis of that study. Most of the analysis is based on data the study itself provides, although in some instances additional data from the Census have been obtained and used for comparative purposes. Because this analysis is largely dependent on what information the study has chosen to include and exclude about public contracting in the North Carolina highway industry, some of our conclusions may be modified if there is an opportunity to examine the raw data on which the study is based or to question its authors.

The MGT study makes some good decisions on data analysis, but contains some problems that undermine its conclusions. It reports data in disaggregated forms so that patterns can be analyzed. It properly considers the utilization of each group separately and reports prime and subcontracting data separately. The time frames for examining contract allocations are long enough to avoid the problem of distortions caused by single-year snapshots which may reflect atypical patterns. Its definition of the geographical area of the

market for NCDOT contracts as the state of North Carolina is reasonable, although in 1987, about 19% of all prime construction contracts went to out-of-state firms.

There are several crucial problems with the study's availability numbers, however, that substantially undermine its validity, and thus, any conclusion the study makes about discrimination. **First**, the study makes no definition of qualifications [bonding, licensing, experience, etc.] as *Croson* requires and thus compares only headcounts of businesses, as though they are all equally qualified and interested in public contracting. **Second**, the study depends on the census for availability, though NCDOT's list of pre-qualified contractors, licensed contractors, and approved subcontractors is probably a better measure of actual availability. **Third**, the study includes businesses even if they have no employees, although other disparity studies have conceded that such businesses are rarely competitive for public contracts. **Fourth**, the study treats all businesses regardless of their size as equally competitive for large contracts. **Fifth**, the study is overinclusive by treating as equally available for NCDOT contract dollars businesses such as painters, wallpaperers, and decorators, which function primarily in private markets along with highway contractors which are almost exclusively in the public sector. **Sixth**, by lumping together trades and heavy construction in the same availability pool, the type of firms which are most qualified for large NCDOT contracts are overwhelmed by those who are rarely appropriate or interested. **Seventh**, no analysis of the pattern of NCDOT contracts was made so that the availability pool would match spending patterns. **Eighth**, the study makes dubious assumptions in the growth of the construction industry in the period for which no census data are available.

These decisions do not have random consequences. Each has the effect of inflating the relative proportion of M/WBEs in the availability pool. Further the Census states that there is no way to determine how many of the businesses owned by women in its surveys are owned by white women. The MGT numbers must be based on estimates which the study does not explain. Finally, none of the census availability numbers MGT uses can be derived from published census data or from special tabulations provided by the Census, so there is the possibility of error.

The study does not use the kind of statistical significance tests frequently found in disparity studies. This is particularly important in centrally let contracts where only a 10% sample was used to create the utilization figures. If the margin of error for such a calculation of utilization is substantial, then in many group categories where underutilization is claimed it may be the result of too small a sample. That issue aside, underutilization in the MGT statistics occurs only if the dollar amounts are aggregated. If they are disaggregated, statistical patterns appear that make it unlikely discrimination on the basis of race or sex is the best explanation for NCDOT contracting decisions. For one thing, even in the aggregated compilations the most overutilized group is not white males, but Native Americans. It is difficult to think of a theory of discrimination that would explain that outcome and the MGT study does not try.

When the data are disaggregated, however, it is clear that non-M/WBEs are considerably larger than M/WBEs [Figure B], and are much more likely to be represented in the firms whose specialties are in fields that are appropriate for large NCDOT contracts [Figure A.] That reality has led to a situation where non M/WBEs have a comparative

advantage in competing for large contracts, while the smaller, newer M/WBEs do much better where smaller contracts are at stake [Figure C]. Indeed in smaller subcontract categories, most M/WBEs are overutilized by NCDOT, while firms owned by white males are underutilized (Figure D). This suggests that size, age, and other qualifications of firms are a much better explanation for success in bidding for NCDOT prime contracts than race or sex, while prime contractors are not treating M/WBE subs unfairly. To be really certain, a regression analysis similar to the Louisiana study would have to be performed and the MGT study has not done that. To the contrary the MGT study makes a conceptual error in the way in the way it calculated the M/WBE disparity ratios in the subcontracting categories which shows them as underutilized when the reverse is true.

Even if some underutilization should continue to be present for prime contracts after a regression analysis is completed, there remains the problem of where and how discrimination takes place in NCDOT's low bid system. The MGT study makes no suggestions, and the hearings produced nothing verified about which persons or procedures caused the alleged discrimination at NCDOT. If such discrimination actually exists, a relatively few number of people and procedures would be involved. These problems could be solved by race neutral means. Without an ability to identify the source of the discrimination, no "narrowly tailored" remedy as *Croson* requires can be fashioned.

II. PROGRAM AND STUDY HISTORY

In September 1988, the governor of North Carolina issued an executive order establishing a program to promote businesses owned by minorities, women, and the

handicapped. Two years later, the North Carolina General Assembly established the Disadvantaged Business Program, creating mandatory goals of ten percent for minority owned businesses and five percent for women owned businesses for the design, construction, and maintenance of highways, roads, and bridges for the North Carolina Department of Transportation.

On June 12, 1991, Dickerson Carolina, a local contractor, denied a contract by NCDOT despite being low bidder, filed suit against the Disadvantaged Business Program. As a result of the lawsuit, the state Attorney General recommended that the mandatory aspects of the program be suspended until the program could be formally reviewed. That lawsuit, coupled with the Supreme Court's opinion in *City of Richmond v. Croson* in 1989, led the General Assembly to commission MGT of America, a firm of 40 employees founded in 1971 and located in Tallahassee, Florida, to conduct a study "to determine if discrimination has existed and /or exists with respect to highway pre-construction and construction executed by the state of North Carolina."

MGT, which has completed disparity studies for Sacramento, Kansas City, and Tallahassee among other jurisdictions, and its consultant finished the study six months later, in January 1993. (1-1-1-4) The consultant was Research and Evaluation Associates of Chapel Hill, a firm with 85 employees, founded in 1979. While MGT is a medium sized firm experienced in this area, it is not clear which personnel actually did the study. None of the names of the researchers or their backgrounds is listed.

III. LEGAL REVIEW

The MGT study included a commendably thorough section detailing affirmative action decisions on the federal district, circuit, and Supreme Court levels, because "an understanding of the legal principles that apply to M/WBE or DBE plans is essential to program design and performance of an effective disparity study." (p. 2-1) After a fairly brief analysis of *Bakke*, *Fullilove*, *Wygant*, and *Paradise*, the study devoted seven pages to *Croson*. The study paraphrased, but does not actually quote, the central *Croson* test:

> 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. [emphasis added] *Croson* at 509.

Although the major focus of the study is seeking the statistical disparity *Croson* describes, MGT ignores the four conditions of the test that Justice O'Connor placed in it.

1. The M/WBE and non M/WBE firms have to be comparably "qualified," "willing and able." The MGT study mentions three times that the firms to be compared must be qualified [pp. 1-4, 5, 6], but then never defines or applies any concept of qualifications, with one exception. The single examination of qualifications is the study's concession that the reason for the low participation of DBEs in the state funded engineering program is that very few of them have general contracting licenses [3-40]. Had the study examined other issues of qualifications, it probably would have found other similar circumstances.

The development of employment discrimination law has long required the comparison of persons comparably qualified, where qualifications are relevant, whether the issue is hiring, promotion, or compensation. The study even says *Croson* emphatically stated

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." *Croson* at 725. [2-12]. Since the Census contains no data about the qualifications or practices of any business, using unrefined headcounts from the census, as MGT does, provides no information about the vital characteristics of businesses *Croson* says should be compared.

2. The businesses to be compared must be able to perform the same services. Companies compete for contracts only with others who offer similar services. Government agencies contract for particular services. In these situations bridge-builders do not find themselves in competition with apartment remodelers,though they may be both loosely in the construction industry. Consequently a study that puts companies with distinctively different service specialties in the same availability pool, as the MGT study does, is inconsistent with the *Croson* test.

3. The disparities must be statistically significant. Spurious statistical conclusions drawn on small or otherwise inadequate samples or inappropriate mathematical concepts are not justifications for instituting governmental racial classifications.

4. Statistics can provide only "an inference of discriminatory exclusion." They cannot necessarily conclusively prove discrimination or locate its cause or provide a basis for a narrowly tailored remedy. If underutilization is found, other explanations than discrimination should be tested before coming to the conclusion that discrimination is the cause of the disparity.

The case likely to have the greatest impact on the NCDOT Disadvantaged Business Program is *Dickerson Carolina, Inc. v. Thomas J. Harrelson.* In that case, the plaintiff not only challenged the NCDOT program, but sued NCDOT staff members individually for their official actions. In November 1991, the Wake County Superior Court found the staff protected from liability, but no ruling was made on the constitutionality of the goals. The case has been appealed to the North Carolina Court of Appeals. (2-30-31)

IV. AVAILABILITY

A. MARKETS REVIEWED

The *Croson* statistical test calls for comparisons to be made among companies "qualified," . . . "willing, and able to perform a particular service."

Unlike most disparity studies, the MGT study is limited to a single general market, highway construction. But within that market, NCDOT purchases a number of discrete, particular services. Painters do not landscape; electricians do not pave. Instead of doing a separate analysis for each of these services, or at least those where substantial amounts of money are involved, MGT grouped NCDOT purchases into three categories which combine many discrete particular services: pre-construction contracts, centrally-let contracts, and purchase orders. Centrally-let contracts are large contracts projects and represent 91.5 % of the approximately $400 million awarded annually by NCDOT for the past decade. Pre-construction contracts typically involve architecture and engineers.(4-1) Pre-construction contracts represent only 2.18% of NCDOT dollars awarded. Purchase orders amount to about 6% of NCDOT dollars. Both centrally-let and pre-construction

contracts can be either federally or state funded; the purchase orders are contracts under $300,000 and are generally too small to involve federal funds. (4-1-4-3)

The MGT study recognized,but did not solve, the problem of overinclusiveness in defining availability by considering only certain SIC codes in the Census. On p. 5-6 it lists the 12 SIC codes it included. Some of the decisions MGT made about the inclusion of these particular codes are confusing. Landscape services, 078 is inclusive of 0782 and 0783 and so it would be double counting to include them all. On the other hand, SIC 172 which MGT labels painting also includes large numbers of wallpapers and decorators. Companies in this SIC category are not equal competitors for NCDOT dollars with firms specializing in highway construction. Not even all painters are interested in or capable of completing painting projects which are part of highway construction. SIC 172 includes painters who do ship painting and white-washing, among other non-construction specialties.

More importantly, 0611, the specific SIC for highway contractors, is not listed at all. Instead MGT uses SIC code 16 encompassing all heavy construction, but in North Carolina 62% of those M/WBEs are specifically not in highway construction, so that SIC code is overinclusive as well.

The problem with using overinclusive categories is that the MGT system exaggerates the availability of M/WBEs more likely found in smaller businesses and the crafts, rather than in companies specializing in highway construction. The study recognizes the problem of overinclusiveness by citing the Ninth Circuit's criticism of a San Francisco availability analysis and then makes that same mistake in its own availability pool analysis. [2-26] The extent of this problem can be seen in Figure A on page 12.

Figure A

Firms with Employees in the SIC Codes
Used by the MGT Study (1987 data)

	Women	Blacks	Hispanics	Asians, Nat. Am.	Non-WBEs*	M/WBEs %*
SIC (172=1721) Painting, Wallpapering, Decorating	108	56	1	13	767	19%
SIC 078 Landscape	77	61	2	9	1156	11%
SIC 0782 Lawn/Garden	35	13	2	2	na	na
SIC Code 0783 Orn. Shrub/Tree	1	5	1	3	na	na
SIC (421=4210) Trucking	62	128	1	18	2350	8%
SIC 1799 Special Trade	37	12	1	3	684	7%
SIC 1791 Structural Steel	3	0	0	3	80	7%
SIC Code 1600s (Except 1611) Heavy Const.	41	14	0	4	853	7%
SIC (173=1731) Electrical	71	18	0	8	1577	6%
SIC 1794 Excav./Foundation	13	5	0	0	315	5%
SIC Code 1611 Hwy/Street Const.	**8**	**4**	**0**	**1**	**274**	**5%**
SIC (891=8911) Architects + Engineers	45	10	2	8	1380	4%
SIC 1795 Wrecking/Demolition	0	0	0	0	9	0%
Total	501	326	10	72	9445	9%

Source: Special Tabulation by the Census Bureau, based on the 1987 Surveys of Minority and Women Owned Business Enterprises by Four Digit SIC Code for North Carolina.

* These numbers include firms which are double counted because they are owned by minority women. This probably amounts to about 14 to 16 percent of the total of all M/WBEs.

First, it can be seen that in many categories that define a particular service, there are no or almost no companies owned by members of some groups. In the key category SIC 1611, highway construction, there are only 13 M/WBEs with employees, while there are 274 non-M/WBEs. On the other hand, in SIC 1721, (painting, wallpapering, and decorating) there are 178 M/WBE firms with employees and 767 non-M/WBEs with employees. In short, M/WBEs are only 5% of the highway contractors, but 19% of the painters, wallpapers and decorators. MGT's sample, however, contains three times as many painters, wallpaperers, and decorators as highway contractors. It is incorrect logically to treat these categories as equal competitors for NCDOT contract dollars.

The MGT study then makes several errors in defining markets. First, it does not aggregate its statistics in such a way that M/WBEs and non-WBEs who can perform the same particular service can be compared. It lumps all the businesses in the included SIC codes together as if they were a single market. Second, it is overinclusive by including heavy contractors (SIC 1600s) who do no highway work, and landscapers, painters, wallpaperers, and decorators who probably do little NCDOT work and possibly no public work. Third, it underestimates the central role of those in the SIC 1611 category whose specialty is highway construction. As Figure A shows, the consequence of these errors is to swamp the companies whose focus is on NCDOT contracts with companies for whom such work is peripheral or not possible at all. As a result, only 2% of all M/WBEs in the MGT sample specialize in highway and street construction. There are almost certainly many more M/WBE wall paperers and decorators included in the MGT sample than M/WBE highway contractors.

B. TIME FRAME

The study sought "to review a sample of the hard copies of all contract types over a ten year time span." (4-1) Such an expansive time span would have formed a far lengthier period than other disparity studies and is necessary to avoid distortions caused by unusual purchase patterns resulting from distinctive projects. For centrally-let construction contracts Fiscal Years 1982-1991 were used. For pre-construction contracts eight years were studied (FY 1984-1991) because contracts were available for review beginning in 1984. (4-1-4-4) For purchase orders, the period was three years (FY 1989-1991) because NCDOT districts are required to maintain three years worth of files for M/WBE participation. It is not likely that these time frames caused any distortions in the analysis.

C. GEOGRAPHICAL SCOPE

The study selected the state of North Carolina as the relevant geographical area from which NCDOT routinely obtained construction services. In making this determination, MGT staff recommended that the area selected cover at least 75 percent of total contract dollars awarded by NCDOT. While the study did not acknowledge the origin of the 75% rule, it is borrowed from anti-trust law and has been applied by many disparity studies. For all three types of contracts, the state of North Carolina formed the appropriate focus. Nevertheless dollars awarded to out-of- state firms which was more than 18% of the prime and more than 17% of the subcontract centrally let contracts, representing $677,919,621 and $66,668,187 respectively, (4-12-4-21) were not included in the study's availability and utilization analyses. There is, then, the possibility that the study's single state focus created some distortion of actual contracting results.

D. GROUPS

Six groups participated in the NCDOT program : American Indians, asians, blacks, the disabled, hispanics, and white women. Though the study did not directly explain the linkage, these groups seem to have been included because they are the ones qualifying as Disadvantaged Business Enterprises in federal DOT programs. Simply replicating groups from the federal level onto the state may be problematic, as the Supreme Court stated in *Croson*:

> The random inclusion of racial groups that, as a practical matter may never have suffered discrimination in the construction industry in Richmond, suggests that perhaps the city's purpose was not in fact to remedy past discrimination. (*Croson*, at 506.)

E. QUALIFICATION AND CAPACITY

Determining the availability of businesses for public contracting is one of the essential keys to a good disparity study. If availability is miscalculated, then all subsequent interpretations of statistics, including disparity ratios, will be in error.

Croson does not call for the comparisons of all M/WBEs to all non- M/WBEs. It is very specific in requiring the comparison of companies which are "qualified, willing, and able to perform a particular service." (*Croson*, at 509.) The MGT study, however, considers all businesses in certain SIC codes as equally available for NCDOT contracts. There is no attempt to measure whether these businesses in the Census are actually willing or able to engage in NCDOT contracts and the concept of qualifications is ignored. Thus the study has no information on bonding capacity, experience, employee size,annual revenues, licenses, equipment, or, in fact, any characteristic that would determine whether the company was a serious competitor for public contracts. Indeed the study has no information on whether any

of these companies listed in the census has ever bid or intends to bid on NCDOT contracts. In fact, many small contractors may not be financially able to bid on larger contracts since NCDOT requires a 5% bid bond or deposit for all centrally-let contracts (3-26). Over the ten year time frame covered in the study, the average centrally let contract was about $1.4 million, requiring a $70,000 bond or deposit, an amount that could well be too large for many small firms bidding on a contract they may never be awarded. Furthermore the construction industry standard is that bid preparation costs will be .5% to 2% of a contract. By that standard the bid preparation costs for the average $1,400,000 NCDOT contract will be $7,000 to $28,000 which is again a figure too high for most small firms.

The particular mission of a government agency will dictate distinctive patterns of contracts. State departments of agriculture, education, or highways, for example, will not spend their money or use contractors in the same amounts. The MGT study tries to reflect this reality by considering businesses only from certain SIC codes as described previously.

This is a necessary step but it doesn't go far enough because it considers all the businesses in these categories as equally available for the same amount of dollar contacts, when of course they are not. No attempt was made to create a formula for proportioning availability to the amount of NCDOT contract dollars available to the various SIC codes included. The MGT system counts painters and firms specializing in highway construction as equally likely to win large NCDOT contracts when in the real world that is not the case. The SIC code components of availability should match proportionally the utilization patterns of an agency, if a meaningful measure of underutilization is to be made.

Nor has the study considered interest in NCDOT contracting. Only pre-qualified prime contractors and approved subcontractors are eligible for certain categories of contracts, and only NCDOT certified firms are eligible for disadvantaged status. While M/WBEs who have not yet been approved could at some point do so, the fact they have not yet done so suggests their lack of interest or their lack of qualifications. To assume, as the study has done, that the mere availability of a firm in the census establishes its contracting interest is unjustified.

The difference in the census numbers and the NCDOT list are enormous. According to the MGT census figures, there were more that 34,230 firms available in 1992, but the NCDOT list reports only 565 pre-qualified contractors and 1234 approved subcontractors. The NCDOT lists 362 certified M/WBE firms, but the Census contains 6,635. Some of the firms on the M/WBEs' list are not in North Carolina and some are not pre-qualified or licensed, but it is certainly plausible that the NCDOT lists, if properly pruned, are a better measure of who is actually "able and willing to perform a particular service" in *Croson* terms than census data. NCDOT has information that makes comparison of the characteristics and qualification of M/WBE and non M/WBE firms possible.

This problem is exacerbated because the MGT study does not consider firm size. Other disparity studies have conceded that companies without employees are rarely effective competitors for public contracts. See for example, "The Utilization of Minority and Woman-Owned Business Enterprises by the City of New York," National Economic Research Associates, Inc., January 24, 1992, which acknowledged: "We restrict our measure [of availability] to firms with at least one employee besides the owner. Firms without

employees are often part-time businesses that would be unlikely to be in a position to perform most public sector work." (p. 56) In a study that is more comparable because it analyzed potential disparities in highway construction, the Louisiana study, the authors concluded that it was appropriate to eliminate all firms from the availability pool with fewer than five employees or annual receipts less than $50,000 because they were not likely competitors for prime contracts. (John Lunn and Huey L. Perry, "Justifying Affirmative Action: Highway Construction in Louisiana, *Industrial & Labor Relations Review*, April 1993, p. 470.)

The significance of MGT's decision to include firms with no employees and to ignore the issue of company size constitutes a major methodological flaw. While County Business Patterns, which counts only firms with employees, shows 8592 businesses in the relevant SIC codes for North Carolina in 1987, the MGT study lists 28,475.

To include companies with and without employees as equally available for NCDOT construction projects, especially the large centrally-let contracts which constitute the vast majority of dollars awarded, is not reasonable. In construction larger companies receive most of the contract dollars. Although nationally 32% of all firms listed in the highway construction census category have no employees, they did only .001% of the business in dollar terms. In 1987, only 12% of all construction companies had 5 or more employees, but they garnered 76% of all business done measured in dollars. In North Carolina, only 139 state firms actually received NCDOT centrally-let prime contracts. Those firms averaged over $20,000,000 in contracts over the decade covered. [4-14]

This same phenomena exists for firms with any kind of ownership. In 1987, in North Carolina there were 2,486 black owned construction companies but only 896 had employees. The latter firms did 78% of the business. Similarly, there were in that year, 2,823 women-owned construction businesses in North Carolina, but only 1009 had employees. The companies with employees accounted for 87% of all the revenues. Clearly the larger the company, the more likely it is to take on larger projects. The MGT study absolutely ignored that reality.

Non-M/WBEs are larger than M/WBEs. The average number of employees of non-MBE construction companies in North Carolina with employees is 10. For black-owned and women-owned construction companies, the averages are 2.8 and 5. In 1987, 147 North Carolina construction firms have 100 or more employees. These firms will be the most likely competitors for the largest contracts. A further advantage of large firms is that those firms generally have within them the capability to perform several functions even though they are categorized in a single SIC. It is not reasonable therefore to count them in the same way as tiny single purpose firms as competitors for large public contracts.

The MGT study also uses the dubious techniques of compensating for the fact that the last M/WBE census count was in 1987 to project a growth rate for these firms. The problem of old census data is a real one, but the projection technique assumes that the general climate for the construction industry was the same after 1987 as in the five years previously, and that M/WBEs grew as fast between 1987 and 1992, as between 1982 and 1987. Neither assumption is probably correct, since the construction industry generally went into a downturn in the latter period and, since there was an undercount in some MBE

categories in 1982, the 1987 figure is partly compensation for that defect as well as actual growth.

Although the MGT figures probably exaggerate the recent growth of M/WBEs, they probably are accurate in reporting that there are relatively more new M/WBEs than non-M/WBEs. According to the MGT figures [5-8], at least 65% of the M/WBEs would have had to be formed since 1982, while the comparable number of non-M/WBEs is 29%. Both numbers probably understate the growth of new businesses, since some of the 1982 businesses include in the 1992 figures are probably defunct and have been replaced by new businesses in the recent overall totals.

Finally, it is not possible to derive the number of firms owned by white women from the census, so the number MGT used must be an estimate, though no methodology is provided. Another weakness of census data is that availability of firms owned by disabled persons cannot be determined. (6-2)

The consequence of the study's failure to consider firm size can be seen in Figure B, taken from published census data. Where the MGT report finds 15.7% MBE availability in 1987 by encompassing some dubious SIC codes and firms with no employees, the census reports only 12.3%, even if the overinclusive category of all construction companies and one or more employees are included. If employee size is considered, then M/WBEs are only about 5% of availability.

Figure B

North Carolina Construction Firms With Employees (1987)

	Companies #	%	Employees #	%	Payroll (000) $	%
All	17,720	100	151,909	100	2,692,416	100
African Americans	896	5.1	2,521	1.7	31,287	1.2
Hispanics	21	0.1	29	.02	708	.03
Asians and Others	254	1.4	509	.33	8,459	.31
Women	1,009	5.7	5,187	3.4	90,567	3.4
Non-M/WBEs	15,540	87.7	143,663	94.6	2,561,395	95.1

Sources: 1987 County Business Patterns and Surveys of Minority and Women Owned Business Enterprises.

V. UTILIZATION

All 306 pre-construction contracts in FY 1984-1991 were reviewed. 233 centrally let construction contracts were studied, a 10% random sample of the ten years of contracting. (4-3-4-8) It cannot be determined how many purchase orders were examined. (4-9-4-11)

One troublesome aspect of the utilization data was the lack of ethnic and racial identification of firms, both prime and subcontractors, in all three areas of highway contracting. To identify the contracting firms, a database of minority and women was compiled from 18 M/WDBE directories, which was then forwarded to the NCDOT Civil Rights Office. The Civil Rights Office identified the firms either by reviewing their files (173 firms) or by telephoning the firm (60 firms). In both cases, the firm was self-certified. There was no mention of any attempts at verification.

Contracts going to firms that were not specifically identified as M/WBEs, were attributed to non-M/WBEs, but that is not necessarily the case. Over 90% of M/WBEs never seek certification and therefore do not show up on any government list for the purposes of a utilization count, even though they were in the census and therefore recorded by MGT as available. If they were not on some M/WBE list , the contracts they received may have wrongly been attributed as going to a non-M/WBE. A follow-up performed by examining the files or telephoning would identify firms claiming to be M/WBEs that were not, but it wouldn't identify M/WBE firms wrongfully considered non-M/WBEs. Also, it is incorrect to attribute contracts going to other governments, non-profit organizations, and stockholder corporations as non-M/WBEs. These entities should have no race or sex. For all these reasons, it is probable that the amount of contract dollars attributed to non-M/WBEs is overstated.

Even if the overcounting of M/WBEs for availability and the probable overcounting of non-M/WBES for utilization is overlooked, the disparity ratios do not establish discrimination or even consistent underutilization. Instead, the results suggest a patchwork of both under and over utilization. The disparity indices showed that in all ten years white males and in nine or ten years native Americans were overutilized as primes and subcontractors on centrally let contracts. In pre-construction, asians were underutilized some years but were frequently overutilized. Overall, they received four times as many contracts as expected in this category.

The MGT study completed disparity ratios for each group in all three types of construction contracts on both the prime and subcontract levels, but in so doing created a

major conceptual error. The disparity ratios in Chapter 5 for the three categories of subcontracting are calculated incorrectly. M/WBE subcontractors are in fact overutilized with 29% of the centrally let contracts [Ex. 4-15], 26% of the pre-construction contracts [Ex. 4-26], and 36% of the purchase order subcontract, [Ex. 4-34].

Figure C

Percentage of Total Dollars Awarded to M/WBES

By Type of State Contract

Type of Contract	M/WBE Utilization	Average Contract Size*
Centrally let contracts		
Primes	.6	1,402,978
Subcontractors	29	107,975
Pre-construction Contracts		
Primes	6	229,143
Subcontractors	26	28,188
Purchase Orders		
Primes	4	56,265
Subcontractors	36	8,447

Source: MGT study Pages 4-14, 16, 17, 19, 20, 22, 27, 34, 41, 50, 59, 62

* Contracts to North Carolina companies only.

Figure C shows two consistent patterns. First M/WBEs receive a much higher proportion of the dollars in a sub-contract role where they must negotiate usually with non- M/WBE primes, than in the prime role where they are in low bid competition before NCDOT. Second the smaller the average contract, the higher the M/WBE share.

Instead of comparing the percentage of M/WBE subcontracts to all subcontracts, the MGT study compared them as a percentage of all contracts, prime and subcontracts. That shows M/WBEs underutilized in all categories for all groups [Ex 6-2, 6-4, 6-6] when in fact that is not the case. Using the MGT approach, white males would have been underutilized as well. Perhaps the study authors knew that and that is the reason white males are left out of these exhibits, while they are included in the exhibits of prime contracts. Figure D shows the correctly calculated disparity ratios for subcontracting.

Figure D

Utilization in NCDOT

Subcontracting Categories

Contract Type	Availability Percent	Utilization Percent	Disparity Index	Outcome
Centrally-let				
American Indian	0.44	6.48	1473	Over
Asian	0.51	.025	5	Under
Black	1.73	8.00	462	Over
Hispanic	0.10	0.46	460	Over
White Women	2.84	13.10	461	Over
White Males	94.62	71.71	76	Under
Pre-Construction				
American Indian	0.65	0	0	Under
Asian	1.28	3.73	291	Over
Black	1.00	2.88	288	Over
Hispanic	0.68	01.51	222	Over
White Women	9.24	17.49	189	Over
White Males	87.68	74.38	85	Under
Purchase of Service				
American Indian	0.54	0.33	61	Under
Asian	0.63	0	0	Under
Black	8.00	14.45	178	Over
Hispanic	0.31	.00	0	Under
White Women	9.25	20.8	225	Over
White Males	81.26	64.37	79	Under

Statistics taken from the raw data in MGT Ex. 4-14 and 6-2, Ex. 4-23 and Ex. 6-4, Ex. 4-30 and Ex. 6-6.

By comparing utilization in the same contract categories, the correct percent of M/WBE utilization can be seen.

What conclusion can be drawn from such disparate results? Can discrimination explain asians receiving no purchase order subcontracts, while enjoying massive overutilization as both primes and subs in pre-construction? Why are hispanics over-utilized as centrally-let and pre-construction subs, but receive no purchase of service subcontracts? Is that discrimination or market choice on the part of firm owners? What explains the consistent overutilization of white males as primes and white women and blacks as subs? Most M/WBEs receive the fewest contract dollars in that part of the contracting system in which the low-bid allocation system permits the least discretion, while they receive the most contract dollars in their subcontracting role. That suggests firm capacities and contract size, not race and sex are the best explanations for this pattern.

VI. ANECDOTAL EVIDENCE

The anecdotal chapter of the MGT study is intended to link, as *Croson* requires, statistical underutilization with identified discrimination, because, as the study points out, the underutilization could be "the result of objective, non-biased bidding and purchasing procedures." [7-1] The anecdotal information is of three types: a random telephone survey, public hearings, and personal interviews.

The M/WBEs contacted by phone were selected from the database compiled from directories of 19 state agencies. 276 M/WBEs were called, but only 109 were actually

reached. This response rate suggests the M/WBE directories may not be very accurate. MGT attempted to contact 60 white male owned companies selected at random from four directories; 29 responded. (7-2-7-6)

Ten two-hour public hearings were sponsored by the General Assembly. The meetings, held in November 1992 around the state, were conducted by a panel of politicians, staff, and a representative from MGT or its consultant. The study does not state how many persons testified. (7-6-7-9)

Results of the telephone survey were listed by question and the text of many questions were provided, methodological steps missing in some disparity studies. However, the telephone calls, the interviews, and the public hearings all represented circumstances in which unsworn, unverified statements were reported as if factual. Since most of those testifying had a stake in preserving a race or sex preferential program, they may not have been objective in their reports. Further, most of what is claimed, difficulty with bonders, lenders, suppliers, and state inspections are problems all small businesses face.[7-41] The allegation that there is "an informal network," a sort of conspiracy theory, that half of the M/WBEs support and half deny, is far too vague to be used as evidence. [7-19]. About an equal number of M/WBEs agree and disagree with the statement that "non-minority contractors put forth an honest effort to involve minority and women owned businesses as subcontractors when bidding road construction projects"[7-21]. Whatever these attitudes, they are not very relevant to the study's statistical conclusion that M/WBEs were generally overutilized in their subcontracting role and sometimes underutilized in their prime capacity where non-M/WBEs have little direct role [Figure C].

When selections from interviews or testimony are given, the authors of the report appear to have selected comments in a very self-serving way. Only comments supporting the discrimination hypothesis are quoted. The counter views are ignored. The accounts reproduced in the study have few if any verifiable details. The ethnicity of speakers is not identified -- "a professional services MB owner" (7-28) -- is typical. Specific projects are not named. Some allegations which are obviously unsubstantiated are included : "Another MB contractor believed that there is a conspiracy to break MB/WBEs and put them out of business." (7-30) *Croson*, however, requires identified discrimination (*Croson*, at 498-99) and the anecdotal chapter has too few specifics to identify anything beyond allegations of general, societal discrimination. Specifically the anecdotes do not prove any verified information about how the NCDOT's low bid system discriminates, if it does.

VII. CONCLUSIONS

The MGT study properly recognizes that the legal basis for justifying racial classifications in public contracting is a "rigorous standard" [1-1], a "heavy burden" [2-10]. It notes that a disparity study must "rigorously follow objective criteria throughout the analytical process," must "closely observe basic research standards" and "exclude generalizations not supported by the data." [2-29]

One of the distinguishing characteristics of scientific investigation is that researchers consider alternative explanations to the phenomena being examined until they have

uncovered the best fit between theory and data. Without this step, researchers may stumble into simpleminded errors. For example, although it is true that more people die in hospitals than in automobile races, it does not follow that being in a hospital is more dangerous than racing a car. Avoiding this kind of error is particularly important in dealing with complex issues such as discrimination, which are highly controversial and which involve constitutional rights. Consequently, it is critical to examine which differences in the performance or representation of groups are best explained by discrimination and which are best explained by differences in the genetic characteristics, number, geographical location, education, income, culture, English language fluency, and the timing and character of immigration of groups, etc. Disparity studies typically ignore all other explanations except discrimination. Thus, they do not consider what social scientists call the threat to validity problem, i.e., whether there are alternative explanations to the discrimination hypothesis.

In the area of MBE utilization there are several alternative explanation or threats to validity that should be explored. The D.C. Court of Appeals mentioned some in *O'Donnell v. District of Columbia, 963 F.2d 416 [D.C., 1992]*:

1. MBEs may not have bid because "they were generally small companies incapable of taking on large projects."
2. MBEs may have been fully occupied on other projects.
3. Governmental contracts may not have been as lucrative as other contracts.
4. MBEs may not have had the expertise to perform the contracts.
5. MBEs may be bidding, but are not proportionately the low bidders.

For these reasons and others, Justice O'Connor said a pattern of statistical underutilization could create only "an inference of discrimination." By itself, underutilization does not identify the discrimination with sufficient specificity to withstand threats to the validity of the discrimination hypothesis or to create a narrowly tailored remedy. The study's anecdotal material did not establish a link between underutilization on prime contracts and NCDOT discrimination.

The problem of threats to validity has been addressed by another disparity study which focused on highway contracting in the State of Louisiana mentioned earlier. This study was conducted by an economist at Louisiana State University and a political scientist at Southern University. In the first analysis, they found that although black-owned construction firms were 10.6% of the market, they received only 5% of the prime contract dollars. On the other hand, they received 18% of the subcontract dollars. To determine whether variables other than discrimination might explain this pattern, the authors considered the variable of overall business receipts, years in business, education of owner, percent of all businesses represented by prime contracts, percent with line of credit, percent bonded, percent of firms licensed in highway, street and bridge construction, etc. A regression analysis was then run. The authors concluded that black firms obtained more state subcontract work than would be statistically predicted. Among prime contractors, black firms still received slightly fewer dollars than their predicted share, but the result was not statistically significant. The authors concluded: "Part of the reason is that prime work in highway construction often requires very large firms, and minority-owned firms tend to be smaller than the white-owned firms." [Lunn and Perry, p. 474]

Also, they found minority-and women-owned tended to work more on federal than state projects. In short, by controlling for various characteristics and qualifications of businesses, the Louisiana study subjected the discrimination hypothesis to further examination and found it not confirmed. The MGT study controlled for none of these variables and examined no other hypothesis as the *O'Donnell* case appears to require before courts will sanction the use of race conscious classifications.

None of the above threats to validity were examined by the MGT study. By not examining the types and amounts of NCDOT contracts, the study cannot draw conclusions about what the non-discriminatory proportions for M/WBEs in each category of service should be. If a specific percentage of NCDOT contracts can only be awarded to contractors who can perform a "particular service," then the availability pool must reflect that reality. When overinclusive census data are used for availability, no accurate disparity measure is possible.

Further MGT's data show that MBEs are generally newer, smaller companies, so the hypothesis that they were relatively incapable of taking on large highway construction projects is plausible enough that it should have been investigated before any conclusions about discrimination were reached. On 10-10, the study states "Because of the size of most centrally-let construction contracts, few M/WBEs are large enough to bid as primes." The study fails, however, to recognize that the reality undermines its finding of underutilization. Similarly, the possibility that MBEs lacked expertise or were not the low bidders should have been examined. At least 65% of the M/WBEs listed in the census are new companies, while the proportion of new non-M/WBEs is much lower. The study collected no data on

bidding and so does not know whether M/WBEs bid as often as non-M/WBEs or how often they were low bidders.

Moreover the study overlooks the reality that highway contractors with few exceptions must derive all their income from the public sector. While other contractors and particularly those in the trades, (painting and wallpapering, electrical, landscaping, etc.) get most of their work from the private sector. Therefore, to count these firms as equally available for large NCDOT contracts is unrealistic.

The bottom line is that the MGT study fails to identify discrimination with the particularity necessary to justify a race-conscious program and a proper analysis of its data suggests that NCDOT current contract allocation system reflects appropriate factors of size, licensing, and experience.

NORTH CAROLINA GENERAL ASSEMBLY

April 29, 1992

TO: VENDORS

As Chairmen of the Joint Legislative Highway Oversight Committee, we hereby transmit a copy of a REQUEST FOR PROPOSALS (RFP) for the "Study of Minority and Women Business Participation in Highway Construction in the State of North Carolina".

Please note that a special "reading room" will be established for use by prospective vendors in connection with this project. Prospective vendors should contact Frederick Aikens or Richard Bostic (at the address shown on Page 1 of the RFP) to schedule a time to review the material.

Sincerely yours,

Senator William D. Goldston, Jr.
Chairman

Representative R. Sam Hunt, III
Chairman

STATE OF NORTH CAROLINA

NORTH CAROLINA GENERAL ASSEMBLY

STUDY OF MINORITY AND WOMEN BUSINESS PARTICIPATION IN HIGHWAY CONSTRUCTION

REQUEST FOR PROPOSALS

April 1992

STATE OF NORTH CAROLINA
NORTH CAROLINA GENERAL ASSEMBLY
STUDY OF MINORITY AND WOMEN BUSINESS PARTICIPATION IN HIGHWAY CONSTRUCTION

REQUEST FOR PROPOSALS

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REQUEST FOR PROPOSALS

TITLE: **Study of Minority and Women Business Participation in Highway Construction**

ISSUE DATE: April 29, 1992

ISSUING AGENCY: North Carolina General Assembly
Joint Legislative Highway Oversight Committee
c/o Fiscal Research Division
Legislative Office Building
300 N. Salisbury Street
Room 619
Raleigh, North Carolina 27603-5925

Sealed proposals subject to the conditions made a part of this request must be received by 5:00 p.m., June 1, 1992, to be considered.

SEND ALL PROPOSALS DIRECTLY TO THE ISSUING AGENCY ADDRESS SHOWN ABOVE.

DIRECT ALL INQUIRIES CONCERNING THIS RFP to either of the following:

Frederick Aikens
Fiscal Research Division
North Carolina General Assembly
Room 619, Legislative Office Building
Raleigh, North Carolina 27603-5925
Telephone (919) 733-4910
Facsimile (919) 733-3113

Richard Bostic
Fiscal Research Division
North Carolina General Assembly
Room 619, Legislative Office Building
Raleigh, North Carolina 27603-5925
Telephone: (919) 733-4910
Facsimile: (919) 733-3113

NOTE: A preproposal conference for all prospective offerors is scheduled on May 18, 1992 at 10:00 a.m. in Room 643, Legislative Office Building, 300 North Salisbury Street, Raleigh, North Carolina. **Attendance at this conference is mandatory. Prospective offerors are encouraged to submit written questions in advance. A written summary of all questions and answers will be mailed to all firms receiving a copy of this request for proposal.**

INTRODUCTION

A consultant is being solicited to conduct a "study of minority and women business participation in highway construction in the state of North Carolina". The study seeks to determine if discrimination has existed and/or currently exists with respect to the highway preconstruction and construction programs executed by the State of North Carolina. Furthermore, if such discrimination is documented by the study, the consultant will be required to design a legally defensible, factually based minority and women business enterprise program for consideration by the North Carolina Department of Transportation. The consultant will be expected to propose remedies, a plan of action, policy changes, and draft legislation, if necessary. The consultant's work product must include a basis for defining the scope and characteristics of such program. The study will require a detailed examination of racial and gender discrimination in the highway construction industry, the degree and extent to which past discrimination existed and continues, and the effects of such discrimination on the development and growth of minority and women highway construction business enterprises. The study must meet the criteria established in the U.S. Supreme Court's decision in City of Richmond v. J. A. Croson Company and subsequent lower court rulings.

The study must be complete and a final report submitted by December 29, 1992. The consultant must be able to provide sufficient resources and experience to the study to meet the project schedule.

I. INFORMATION FOR VENDORS

A. BACKGROUND

1. *HIGHWAY TRUST FUND* - In its 1989 session, the North Carolina General Assembly enacted House Bill 399 (Chapter 692 of the 1989 Session Laws) which established the North Carolina Highway Trust Fund. This law substantially raised the state tax on motor fuels and increased motor vehicle registration fees to pay for an expanded system of intrastate highways, urban loops, and secondary roads throughout the State of North Carolina. The law identified specific routes, improvements to those routes, and affected counties in which roads were to be built.

2. *REVENUES AND PAVING GOALS* - The Highway Trust Fund law initially envisioned generating approximately $9.2 billion in additional state revenue over a 13.5 year time period, thereby constructing 1,756.8 miles of a four-lane Intrastate Highway System, and 212 miles of urban loops around seven major cities, paving 10,000 miles of unpaved secondary roads, and providing supplemental funds to cities for improving streets. Due to lower than expected revenues, the Department of Transportation now expects the Highway Trust Fund program to extend to approximately 17 years rather than the initial 13.5 years. The law further created a distribution formula that sought to equalize funding to all regions of the state and established the Joint Legislative Highway Oversight Committee to oversee the expenditure of Highway Trust Funds.

3. *MINORITY AND WOMEN GOALS* - In anticipation of additional state revenues for highway construction exceeding $500 million per year, beginning in 1991-92, the 1989 General Assembly further included, in the Highway Trust Fund, a 10% goal for minority contractors. The 1990 Session of the General Assembly amended G.S. 136-28.4 and included a 5% goal for women. That statute states that...

> "It is the policy of this State to encourage and promote participation by disadvantaged businesses in contracts let by the Department of Transportation pursuant to this Chapter for the design, construction, alteration, or maintenance of State highways, roads, streets, or bridges and in the procurement of materials for these projects. Further, a ten percent (10%) goal is established for participation by minority businesses and a five percent (5%) goal for participation by women businesses is established in contracts let by the Department of Transportation for the design, construction, alteration, or maintenance of State highways, roads, streets, or bridges and for the procurement of materials for these projects."

These goals are separate and apart from the federal disadvantaged business goal of 10%.

4. *DEPARTMENT'S STATUTORY RESPONSIBILITIES* - The Department of Transportation, an Executive Branch Agency, statutorily responsible for the maintenance and construction of highways and bridges throughout the state, endeavored to award contracts to minorities and women in the percentages noted above. The department was further directed to adopt written procedures specifying the steps it would take to achieve these goals. (See Attachment 1 for a copy of the statute.)

5. *GOALS STEERING COMMITTEE* - In the fall of 1989, the Department of Transportation convened a multi-disciplinary Joint Minority Business Enterprise (MBE) Steering Committee composed of individuals representing various organizations and constituencies to develop rules and regulations for implementing the goals program. Organizations represented included the Carolinas Association of General Contractors, United Minority Contractors of North Carolina, Inc., North Carolina Association of Minority Businesses, Inc., and the Department of Transportation.

6. *ATTORNEY GENERAL'S OPINION* - On January 25, 1990, the Attorney General issued a legal opinion supporting the constitutionality of G.S. 136-28.4 which established the state goals program to be implemented by the North Carolina Department of Transportation.

7. *GOAL REQUIREMENTS IMPLEMENTED* - The July 1990 letting marked the beginning of specific goal requirements for minority businesses in state projects and the November, 1990 letting marked the beginning of specific and separate goals for minority and women businesses in state funded highway construction projects.

8. *DEPARTMENT OF TRANSPORTATION EFFORTS* - The department undertook a series of steps to acquaint general contractors, minority and women contractors, and the appropriate Department personnel with the goals program. These steps included:

- Providing training to field engineering staff;
- Conducting four regional seminars during 1991;
- Discussing the goals program at the annual contractor-engineer conferences held during January, 1991;
- Continuation of the Department's annual Entrepreneurial Development Program during February and March 1991 at North Carolina A&T State University; and,
- Sponsoring a seminar in 1991 to assist minority and women businesses in preparing to take the general contractors' licensing/examination.

9. *CONTRACTOR REQUIREMENTS* - Contractors were required to achieve a specific MBE and Women Business Enterprise (WBE) percentage participation goal for each construction contract awarded by the Department of Transportation, or failing to achieve the specified goal, were required to submit documentation demonstrating that a "good faith effort" was made to achieve the goal. If the department's Goals Compliance Committee determined that a low bidder failed to achieve the specified goals and failed to demonstrate a "good faith effort", a recommendation was made to the North Carolina Board of Transportation that the bid proposal be rejected and the contract awarded to the next low bidder.

10. *DICKERSON LAWSUIT* - On June 12, 1991, Dickerson Carolina, Inc. filed a lawsuit against the Department of Transportation in connection with a March 1, 1991 decision of the Board of Transportation to award the contract for Project Number 6.671043 to the second low bidder, rather than to Dickerson, the low bidder. The Goals Compliance Committee had determined that Dickerson Carolina, Inc. had not made a "good faith effort" to include minority participation in its bid on project 6.671043.

11. *PROGRAM SUSPENSION* - This lawsuit resulted in a subsequent opinion on August 26, 1991 from the Office of the Attorney General for the State of North Carolina (see Attachment 2), recommending suspension of the mandatory aspects of the goals program, pending a review and investigation to ascertain whether sufficient evidence of discrimination exists to justify continuation of the mandatory aspects of the goals program.

STATE OF NORTH CAROLINA
NORTH CAROLINA GENERAL ASSEMBLY
STUDY OF MINORITY AND WOMEN BUSINESS PARTICIPATION IN HIGHWAY CONSTRUCTION
REQUEST FOR PROPOSALS

I. INFORMATION FOR VENDORS

B. PROJECT DESCRIPTION

1. *ELIMINATION OF DISCRIMINATION* - The "Study of Minority and Women Business Participation in Highway Construction" will be conducted by the consultant selected by the Joint Legislative Highway Oversight Committee (JLHOC) Subcommittee on Minority and Women Business Goals Program in consultation with the North Carolina Department of Transportation.

   The consultant will be required to conduct a detailed examination of the extent to which racial minority and gender firms have participated in the highway construction industry and the degree and extent, if any, to which past discrimination existed and continues. The examination will identify specific ethnic groups affected, include a review of files on individual highway construction projects dating as far back as 10 years, and a review of manual card files on individual highway contractors. The consultant will also be required to plan and conduct public hearings across the state to obtain input from the public and from businesses involved in highway construction activities. Sufficient resources and expertise to complete the study must be provided in order to meet the timetable established.

2. *STATISTICAL BASED REQUIREMENTS* - It is expected that the study will establish a statistical basis to support a realistic goal which confirms (1) the current level of minority and women business participation, (2) the availability of opportunities in highway construction and related activities, and (3) the availability and capacity of minority and women-owned businesses to respond to these demands. The consultant will be required to conduct historical research on the national highway construction industry, determine the extent to which discrimination (if any) existed and continues, and determine the link (if any) between patterns of discrimination of the national highway construction industry and the highway construction industry in North Carolina. The consultant must also determine if there is a compelling governmental interest to adopt a race and gender conscious goals program to rectify the effects of past discrimination, and how the adoption of such a program might affect the State's economy.

3. *CONSISTENCY WITH CROSON* - In items 7(c) and 7(d) below, the consultant will be required to assess the extent to which sufficient evidence is available to support a minority and women goals program in highway construction, consistent with the U.S. Supreme Court's decision in City of Richmond, Virginia v. J.A. Croson Company. Therefore, the consultant must gather information on the highway construction industry in North Carolina, document the number, location, and size of majority highway construction firms doing business in this state, identify subcontracting firms used by majority highway contractors and, if possible, document how most highway construction firms got started.

4. *DOCUMENT PARTICIPATION RATES* - While the goals program noted above is applicable to the use and expenditure of State funds, only, the study seeks to document minority and women vendors' participation rates for all funds received by the Department of Transportation and awarded for activities related to the preconstruction or construction of highways. This includes the use of federal aid for highways, the North Carolina Highway Fund, and the North Carolina Highway Trust Fund, and other state, local or private funds administered by the Department of Transportation.

5. *PROJECT STATUS REPORTS* - Project status reports will be required weekly and a final report by December 29, 1992. The final report must contain proposed remedies, a plan of action, policy changes, and draft legislation, if necessary.

6. *STAFF ASSISTANCE* - The JLHOC Subcommittee on Minority and Women Goals Program, the staff of the Fiscal Research Division, and the staff of the Department of Transportation will be available to assist with certain aspects of the study. It is the responsibility of the consultant to conduct the study and compile the necessary documentation, findings and conclusions.

7. *STUDY OBJECTIVES* - The primary objectives of the study are listed below:

   (a) *Document Discrimination* - Document whether discrimination has occurred in the highway construction industry;

   (b) *Discrimination is Proven* - If discrimination is documented in North Carolina, the consultant must:

   - Document the extent to which such discrimination continues;
   - *Identify Patterns and Practices* - Identify patterns and practices of discrimination in the highway construction industry that effectively denied, and/or continue to deny, minority (by race) and women business enterprises a fair share of state highway construction dollars, and how these patterns and practices might have affected MBE/WBE development and the estimated extent of injury;
   - *Document Underutilization* - Document if under-utilization of minority (by race) and women firms exists in the highway construction program and related highway construction activities of the Department of Transportation. If so documented, is such under-utilization the result of documented racial and gender discrimination;

   (c) *Document Legal Authority* - Document that the State of North Carolina has the legal and constitutional authority to establish and implement a goals program for minorities and women. In this regard, the study must establish a legally defensible and factual basis for such a program and identify sufficient statistical, anecdotal or other evidence legally relevant to conducting an MBE/WBE program, if such a program is warranted;

   (d) *Necessity of Department of Transportation Efforts* - Determine if the method(s) employed by the Department of Transportation to implement the goals program were necessary to assure that minorities and women were afforded opportunities to participate;

(e) *Document Utilization by Ethnicity* - Document MBE/WBE utilization by source of funding, type of highway construction activity, geographic location (by highway division), and ethnicity for the period July 1, 1982 through June 30, 1992. Identify minority and women highway construction firms by race by name, location, and size of firm (number of employees, annual dollar volume of highway construction work performed), and number of projects. Identify MBE/WBE prime contractors and subcontractors and document if any were low bidders as primes or subcontractors but were not awarded the contract.

Project Utilization - If present rates of utilization are held constant, project the utilization of highway construction enterprises owned by minorities and women through the estimated life of the Highway Trust Fund to determine the proportion of highway construction business activity these firms might receive.

(f) *Show Majority Contractors* - Document MBE/WBE utilization by majority highway construction firms for the period July 1, 1982 through June 30, 1992. Data should show majority highway construction contractors by name, location, amount of highway construction funds received and number of awards by year for the fiscal years 1982-83 through 1991-92. The consultant is expected to identify by name and race, minority and women firms used by specific majority contractors on specific projects and dollar amount of the firm's subcontracting work, and whether the use of such firms was a requirement in the contract provisions;

(g) *Document Department of Transportation Contracts* - Document the categories of construction, procurement, and professional services contracts in the preconstruction and construction area, typically available from the Department of Transportation, and the dollar amount and number of awards awarded to majority firms and minority and women firms. Analyze the department's procedures for the award of contracts and identify impediments (if any) to greater participation by minority and women firms;

(h) *Availability and Capacity Studies* - Document the measure of availability of minority and women businesses in highway construction activities in the relevant geographic markets for appropriate categories of construction, procurement, and professional service contracts. Develop availability and capacity studies, and a goal-setting methodology supported by that data;

(i) *Identify Disparity* - Conduct a statistical analysis to identify the disparity between the actual availability and capacity of highway construction firms owned by minorities and women, and the availability and capacity of such firms that would reasonably be expected to exist, absent past discrimination. Recommend a methodology to determine when parity will be achieved at which time such programs instituted will no longer be required;

(j) *Neutral Techniques* - Provide evidence of past attempts by the State of North Carolina and the private sector to develop and implement race-and-gender-neutral means to increase minority and women business participation in highway construction. Identify and determine the effectiveness of

race or gender neutral techniques that might have been used to increase minority and women business participation in highway construction activities. Include efforts by the Department of Transportation to involve minority and women contractors in highway construction without mandates from the General Assembly or the federal government;

(k) *Discriminatory Laws and Practices* - Identify laws enacted by the General Assembly or policies, administrative rules, or practices implemented by the Department of Transportation that might serve to discriminate against minorities and women directly and discuss their impacts on MBEs/WBEs. Document whether the department, or the General Assembly, has been a passive participant to discrimination which may have contributed to disparity in the highway construction industry;

8. *EXPECTED RESULTS* - **As noted previously, if discrimination is documented the consultant will be expected to propose remedies, policy changes and draft legislation, if necessary. The proposed plan of action is to be narrowly tailored to include only qualified MBEs/WBEs and limited to the specific racial or ethnic groups found to have been discriminated against in the past and that continue to suffer from the effects of such discrimination.**

These proposals should be innovative, far-reaching, results-oriented and realistic in their application. In addition, the consultant's proposals should consider whether it is in the best interest of the State of North Carolina to provide for diversity in the award of contracts for highway construction and related activities.

9. *MONITOR COURT FINDINGS* - The services noted above may require modification as a result of further court actions that might occur between the time the request for proposal is issued and the study completed. Consequently, the consultant will be required to monitor any other court finding that may affect the study and will determine how the study might be affected as a result of any subsequent court ruling. These findings will be reported to the Joint Legislative Highway Oversight Committee, immediately, and included in the consultant's final report.

STATE OF NORTH CAROLINA
NORTH CAROLINA GENERAL ASSEMBLY
STUDY OF MINORITY AND WOMEN BUSINESS PARTICIPATION IN HIGHWAY CONSTRUCTION
REQUEST FOR PROPOSALS

I. INFORMATION FOR VENDORS

C. VENDOR RESPONSIBILITIES AND QUALIFICATIONS

1. The selected consultant must plan, organize and conduct the study. Vendors submitting proposals must:

   (a) *Work Plans* - Prepare detailed work plans that describe the course of action for completing the project, explain how the project will be conducted, and elaborate upon the understanding of the project and scope of work;

   (b) *Nature of Services* - Discuss the nature of services proposed for the project, the complexities of the project and any problems anticipated;

   (c) *Organizational Chart* - Prepare an organizational chart which identifies key personnel and subcontractors that would participate on this project. Include a description of assignments and scope of work for personnel, and the scope of work which would be assigned to subcontractors;

   (d) *Subcontractor Qualifications* - Describe the qualifications of each subcontractor which the consultant intends to use; the scope of the work, number of work hours, and the percent of total proposed work hours which will be assigned to each of them. Include resumes for the subcontractor's key personnel who will be assigned to this project;

   (e) *Resumes* - Submit current, complete resumes for the vendor's project manager and key staff personnel. Include a description of their qualifications (especially those that may be uniquely qualified to work on this project); a description of their position within the vendor's firm, and length of employment with the firm. Key personnel identified in this proposal will be expected to remain assigned to the project for its duration. The firm/team should consist of members with graduate level education and experience in economic and statistical analysis, and experienced in studies dealing with race and gender discrimination.

   (f) *Work Experience* - Prepare a list of projects and work experience which is similar to the work described in this proposal or which the consultant believes would be relevant in evaluating its capability to perform the work. A description of the firm's (and subcontractors, if used) qualifications, background, MBE/WBE status, and experience that makes the firm particularly qualified for this project is necessary, as well as the firm's background and experience in research methods involving minority and women owned businesses for the past three years;

(g) *Cost Estimate* - Identify the work hours and cost estimates for the work described in the request for proposal using Attachment 2. These estimates must be supported with sufficient information to allow the issuing agency to evaluate whether the estimated level of effort and total estimated cost is reasonable;

(h) *Schedule* - Include an overall schedule of the proposed work from the date of the notice to proceed to the date work is completed;

(i) *Coordination of Efforts* - Describe the consultant's ability to effectively and conveniently perform the work locally and how the consultant plans to coordinate its efforts with the issuing agency, with the Department of Transportation, with other governmental entities, and with subcontractors, if used.

(j) *Office Addresses* - List office addresses and total number of employees for the consultant (and any subcontractors used), and the number of professional and support staff employees located at those offices. State the length of time the offices have been in existence at the locations specified.

2. *UNDERSTANDING OF GOVERNMENT OPERATIONS* - The consultant should have a thorough understanding of governmental operations and agencies. Since the results of this study will be used to establish a legally defensible program of highway construction goals for minority and women owned businesses, vendors must demonstrate clearly and succinctly that they have the necessary experience and qualifications and the proven track record to complete the project successfully, on time, and within budget.

3. *WORKING SPACE* - The North Carolina General Assembly and the North Carolina Department of Transportation will provide appropriate working space (including furniture and telephones) for the contractor from start to completion of the study. All professional staffing and computers or word-processing equipment necessary to complete the study effort must be furnished by the consultant.

STATE OF NORTH CAROLINA
NORTH CAROLINA GENERAL ASSEMBLY
STUDY OF MINORITY AND WOMEN BUSINESS PARTICIPATION IN HIGHWAY CONSTRUCTION

REQUEST FOR PROPOSALS

I. INFORMATION FOR VENDORS

D. TIME FRAME CONSIDERATIONS

Anticipated key dates associated with the project are listed in the table below:

Event	*Date*
Letters of Interest	Mailed on February 13 and March 16, 1992
Request for RFP from Vendors	Mailed on March 4 and April 6, 1992
RFP Mailed to Vendors	April 29, 1992
Preproposal Conference	May 18, 1992
Proposals Due	June 1, 1992
Interview of Finalists by JLHOC Subcommittee	June 8, 1992
Award Contract	June 22, 1992
Begin the Study	June 29, 1992
Complete the Study and Submit Final Report	December 29, 1992

STATE OF NORTH CAROLINA
NORTH CAROLINA GENERAL ASSEMBLY
STUDY OF MINORITY AND WOMEN BUSINESS PARTICIPATION IN HIGHWAY CONSTRUCTION

REQUEST FOR PROPOSALS

I. INFORMATION FOR VENDORS

E. TERMS AND CONDITIONS OF THE RESULTING CONTRACT

Following are the terms and conditions of the contract for conducting the project. Other terms or conditions may be added later.

1. *CONTRACT PERIOD* - The term of contract shall begin at its signing and shall end on or before December 29, 1992, unless extended or terminated as provided herein.

2. *TERMINATION* - Upon mutual written agreement of the Joint Legislative Highway Oversight Committee and the contractor, the contract may be terminated at any time. Failure to perform by the contractor may result in termination by the Joint Legislative Highway Oversight Committee. In addition, the Joint Legislative Highway Oversight Committee reserves the right to terminate the contract at its discretion with 10 days written notice. In the event of termination, the contractor will be paid an amount commensurate with the work completed.

3. *TRANSFER OF ASSIGNMENT OF CONTRACT* - The contract shall not be transferred or assigned to a third party.

4. *CONFIDENTIALITY OF DATA* - Contractor agrees to protect the confidentiality of any files, data or other materials provided by the Joint Legislative Highway Oversight Committee and to restrict its use to the purpose of performing this contract and not others. The contractor must comply with the provisions of Article 17 of Chapter 120 of the General Statutes regarding the confidentiality between the contractor and the General Assembly (see Attachment 4).

5. *CARE OF DATA* - Contractor shall take all steps necessary to safeguard any data, files, reports or other information from loss, destruction or erasure. Any costs or replacement expenses, or damages resulting from the loss of such data shall be borne by the contractor. Upon completion of the study, a copy of all records must be turned over to the North Carolina General Assembly.

6. *EQUAL OPPORTUNITY EMPLOYMENT STATEMENT* - The nondiscrimination clause contained in Section 202 Executive Order 11246, amended by Executive Order 11375, relative to equal employment opportunity for all persons without regard to race, color, religion, sex, age or national origin, and the implementing regulations prescribed by the secretary of labor, are incorporated herein.

The program for Employment of the Handicapped (Affirmative Action) Regulations issued by the Secretary of Labor of the United States in Title 20, Part 741, Chapter VI, Subchapter "C" of the Code of Federal Regulations, pursuant to the provisions of Executive Order 11758 and Section 503 of the Federal Rehabilitation Act of 1973 are incorporated herein.

7. *INSURANCE* - The contractor shall obtain, pay for, and keep in force Worker's Compensation Insurance, as required by the laws of North Carolina, covering all of the contractor's employees engaged in any work hereupon.

8. *PERFORMANCE BOND* - The Joint Legislative Highway Oversight Committee may require either a performance bond up to the full amount of the contract or another performance guarantee.

9. *PAYMENT* - Payment for all work will be made on a monthly basis as the project progresses within 30 days following receipt of invoices from contractor and approval of progress by the Chairmen of the Joint Legislative Highway Oversight Committee, Subcommittee on Minority and Women Business Goals Program. Payments will be tied to services performed in accordance with the work plan submitted with this RFP.

STATE OF NORTH CAROLINA
NORTH CAROLINA GENERAL ASSEMBLY
STUDY OF MINORITY AND WOMEN BUSINESS PARTICIPATION IN HIGHWAY CONSTRUCTION
REQUEST FOR PROPOSALS

II. INSTRUCTIONS FOR VENDORS

A. RFP REQUIREMENTS

Proposals for the study will be accepted from qualifying firms that are in operation at this time. Proposals must be submitted in two separate, sealed packages; one must be labeled **Technical Proposal** and the other **Cost Proposal**. Each original must be signed and dated by an official authorized to bind the firm. Two original-signature copies are required in addition to ten (10) extra copies. All proposals must be received by this Office not later than 5:00 p.m. on June 1, 1992.

The proposals must be submitted to:

North Carolina General Assembly
Joint Legislative Highway Oversight Committee
c/o Fiscal Research Division
Room 619 Legislative Office Building
300 North Salisbury Street
Raleigh, North Carolina 27603-5925

All proposals must comply with the format prescribed under the Proposal Format Section (Section II-D) of this RFP. Vendors should direct all inquiries regarding this RFP to Frederick Aikens or Richard Bostic at (919) 733-4910.

STATE OF NORTH CAROLINA
NORTH CAROLINA GENERAL ASSEMBLY
STUDY OF MINORITY AND WOMEN BUSINESS PARTICIPATION IN HIGHWAY CONSTRUCTION
REQUEST FOR PROPOSALS

II. INSTRUCTIONS FOR VENDORS

B. PREPROPOSAL CONFERENCE AND READING ROOM

1. On the date specified in the Timeframe Considerations section (Section I.D) of this RFP, a preproposal conference for all potential vendors will be conducted in Room 643 on the sixth floor of the Legislative Office Building at the address listed in the RFP Requirements section (Section II.A) of this RFP. The conference will be from 10:00 a.m. until 12 noon on May 18, 1992. Attendance at this conference is mandatory. Vendors are encouraged to be prompt and to allow time for finding suitable parking. Parking is available in the visitors section of the state parking deck on North Salisbury Street.

2. All questions concerning this RFP may be submitted in writing prior to the preproposal conference to the address in Section II.A of this document. Additional questions may be submitted at the preproposal conference. A written summary of important questions and answers will be provided by mail after the conference to all vendors attending the preproposal conference.

3. A reading room will be set up in the Legislative Office Building of the North Carolina General Assembly at 8:00 a.m. at the address shown below on May 18, 1992:

   North Carolina General Assembly
   Legislative Office Building
   300 North Salisbury Street
   Room 634
   Raleigh, North Carolina 27601-5925
   (919) 733-4910
   ATTENTION: Frederick Aikens or Richard Bostic

4. Materials and documents that offer statistical and other information on the North Carolina Department of Transportation, its authority, policies and procedures for awarding highway construction contracts, and the Department's minority and women goals program will be available for vendor review at the above address. Appointments for reviewing this material should be scheduled by calling or writing the North Carolina General Assembly at the above address or phone number.

STATE OF NORTH CAROLINA
NORTH CAROLINA GENERAL ASSEMBLY
STUDY OF MINORITY AND WOMEN BUSINESS PARTICIPATION IN HIGHWAY CONSTRUCTION
REQUEST FOR PROPOSALS

II. INSTRUCTIONS FOR VENDORS

C. GENERAL CONDITIONS FOR SUBMITTING PROPOSALS

1. *UNSOLICITED PROPOSAL CHANGES* - Any change to a proposal that is received after the closing date of this RFP, June 1, 1992 (Section I.D), and that is not specifically solicited by the state, will be rejected.

2. *DECLINE TO OFFER* - Any firm that receives a copy of the RFP but declines to make an offer is requested to send a formal "Decline to Bid" to the issuing office. Failure to respond as requested may subject the firm to removal from consideration on future requirements.

3. *COSTS FOR PROPOSAL PREPARATION* - Any costs incurred by vendors in preparing or submitting offers are the vendors' sole responsibility; the state of North Carolina will not reimburse any vendor for any costs incurred prior to award.

4. *ELABORATE PROPOSALS* - Elaborate proposals in the form of brochures or other presentations beyond those necessary to present a complete, effective proposal are not desired.

5. *ORAL EXPLANATIONS* - The Joint Legislative Highway Oversight Committee will not be bound by oral explanations or instructions given at any time during the competitive process or after award.

6. *REFERENCE TO OTHER DATA* - Only information that is received in response to this RFP will be evaluated; reference to information previously submitted will not suffice.

7. *PROPRIETARY OR OTHER "CONFIDENTIAL" INFORMATION* - Any trade secrets or other data that the vendor does not wish disclosed to other than state personnel involved in the evaluation or contract administration will be kept confidential if identified as described below:

   Each page shall be identified in boldface at the top and bottom as Confidential. Any *section* of the proposal that is to remain confidential should, in addition, be so marked in boldface *on the title page* of that section. Net cost information may not be deemed confidential.

8. *TIME FOR ACCEPTANCE* - Each proposal must state that it is a firm offer which may be accepted within a period of 180 days, although the contract is expected to be awarded prior to that time.

9. *FORM OF PROPOSAL* - Each proposal should be submitted in a form that, at the option of the Joint Legislative Highway Oversight Committee, may be incorporated verbatim into a contract.

10. *EXCEPTIONS* - Any exceptions to terms, conditions, or other requirements in any part of this RFP must be clearly pointed out in a distinct section of the appropriate Cost Proposal or Technical proposal. Otherwise, the Joint Legislative Highway Oversight Committee will consider that all items offered are in strict compliance with the RFP, and the successful vendor(s) will be responsible for compliance.

11. *ADVERTISING* - In submitting their proposals, the vendors agree not to use the results therefrom as a part of any news release or commercial advertising without prior written approval of the Joint Legislative Highway Oversight Committee.

12. *CONFIDENTIALITY OF PROPOSALS* - In submitting their proposals, the vendors agree not to discuss or otherwise reveal their technical or cost information to any other sources, government or private, until after the award of the contract. Vendors not in compliance with this provision may be disqualified, at the option of the Joint Legislative Highway Oversight Committee from contract award. Only discussions authorized by the Joint Legislative Highway Oversight Committee are exempt from this provision.

13. *RIGHT TO SUBMIT MATERIAL* - All responses, inquiries or correspondence relating to or in reference to this RFP, and all other reports, charts, displays, schedules, exhibits, and other documentation submitted by the vendors will become the property of the Joint Legislative Highway Oversight Committee.

14. *COMPETITIVE OFFER* - Pursuant to the provisions of G.S. 143-54, and under penalty of perjury, the signer of any proposal submitted in response to this RFP thereby certifies that their proposal has not been arrived at collusively or otherwise in violation of federal or North Carolina antitrust laws.

15. *VENDORS' REPRESENTATIVE* - Vendors shall submit the name, address and telephone number of the person(s) with authority to bind the firm and answer questions or provide clarification concerning the firm's proposal.

II. INSTRUCTIONS FOR VENDORS

D. PROPOSAL FORMAT

1. As described in Section II.A of this RFP, proposals for the project must be submitted in two separate sealed envelopes, one containing the **Technical Proposal** and the other the **Cost Proposal**. Requirements for each of these items are described below.

Technical Proposal Content

2. The Technical Proposal for the project shall include the following:

   (a) Statement of the vendor's understanding of the objectives of the project and responsibilities for completing the project, with a clear, straightforward explanation of how the vendor will ensure the successful, smooth performance of the project.

   (b) Statement of the vendor's methodology and planned approach, and course of action for completing the objectives of the project including organization structure, staffing assignments, work plans, with timetables, and time-sequenced events.

   (c) Statement of the specific major products to be delivered and results/ benefits to be obtained as part of the project and the timetable for each deliverable.

   (d) Resumes of the project manager and key personnel with emphasis on relevant current experience. Include and clearly indicate specialists, subcontracted organizations and their personnel.

   (e) Statement of vendor's qualifications for accomplishing all project objectives, including project management, the quality control of deliverables or expected results. A schedule showing major tasks assigned project personnel must be included in the technical proposal. This schedule should provide the following information for each major task or activity to be accomplished as part of the project:

      - Vendor person(s) responsible for the performance and/or quality assurance of the particular task or activity.
      - Qualifications (experience or training) of the person(s) to assume the responsibility for that task or activity.

(f) At least three references for applicable projects conducted in situations and/or environments similar to this work effort.

3. In summary, vendors must demonstrate clearly and succinctly that they have the necessary experience and qualifications and the proven track record to complete the project successfully, on time, and within budget. Elaborate, verbose technical proposal documentation is neither wanted nor required to establish fitness or credentials for accomplishing this work.

Cost Proposal Content

4. The cost proposal for the project shall include the following:

   (a) A statement of personnel-related costs and any other expenses or fees that must be authorized by the Joint Legislative Highway Oversight Committee for payment.

   (b) A current balance sheet, a certified financial statement or equivalent information that indicates the financial position of the firm and any subcontracting firms.

5. **The resulting contract between the Joint Legislative Highway Oversight Committee and the selected vendor will not be a time and materials type of agreement; therefore, any time and/or expense needed to complete the project successfully above those costs stated in the cost proposal must be the sole responsibility of the vendor.**

III. EVALUATION PROCESS

A. EVALUATION PROCESS EXPLANATION

1. At their option, the evaluators may request oral presentations or discussions with any or all vendors for the purpose of clarification or to amplify the material presented in any part of the proposal. However, vendors are advised that this provision is not mandatory; therefore, all proposals should be complete and concise and reflect the most favorable terms available from the bidders. Vendors may be required to provide copies of reports and other pertinent documentation they have completed for similar projects.

2. Upon completion of the technical evaluation, the cost proposals of those technical proposals deemed acceptable will be removed from safekeeping and opened. The cost offered will then become a matter of public record. Interested parties are cautioned, however, that these costs and their components are subject to further evaluation, and, therefore, may not be an exact indicator of a vendor's pricing position.

3. Proposals will be evaluated according to the criteria discussed on Page 21. The award of a contract to one vendor does not mean that the other proposals lacked merit, but with all factors considered, THE BEST SELECTED PROPOSAL WAS DEEMED TO PROVIDE THE BEST COMBINATION OF TECHNICAL AND COST VALUES TO THE STATE OF NORTH CAROLINA.

4. Vendors are cautioned that this is a Request for Proposals, not a request to contract, and the Joint Legislative Highway Oversight Committee reserves the unqualified right to reject any or all offers for any contract when such rejection is deemed to be in the best interest of the State of North Carolina.

III. EVALUATION PROCESS

B. EVALUATION CRITERIA

1. Understanding of the key objectives of the project, described in I.B. 7(a)-(k).
2. Approach to the completion of the project including methodology to be employed, work plan to be followed, concepts to be emphasized, issues to be addressed, and resources to be used.
3. Products and results expected from the project and explanation of how they will be developed as the project is completed, including the timetable for key deliverables/activities.
4. Staffing resources that will be assigned to the project including:
   (a) Reasonable composition of experience levels and areas of expertise.
   (b) use of unique resources for specific areas, organizations and disciplines involved.
   (c) Adequate time commitment of senior management and technical and business specialists.
   (d) use of subcontractor organizations or personnel as necessary to provide the experience and expertise for meeting the objectives of the project.
5. Staff experience, project management procedures and techniques, vendor quality assurance reviews, and other items that will be employed to ensure the timely delivery of superior quality products and expected results.
6. Capability, including proven track record, to ensure the successful delivery of the major expected results of the project that are described in Section I.B of this RFP.
7. Proven ability to meet the qualifications and credentials described in Section I.C of this RFP.
8. Cost.

ATTACHMENT 1

G. S. 136-28.4

§ 136-28.4. State Policy Concerning Participation by Disadvantaged Businesses in Highway Contracts.

(a) It is the policy of this State to encourage and promote participation by disadvantaged businesses in contracts let by the Department pursuant to this Chapter for the design, construction, alteration, or maintenance of State highways, roads, streets, or bridges and in the procurement of materials for these projects. All State agencies, institutions, and political subdivisions shall cooperate with the Department of Transportation and all other State agencies, institutions, and political subdivisions in efforts to encourage and promote the use of disadvantaged businesses in these contracts.

(b) A ten percent (10%) goal is established for participation by minority businesses and a five percent (5%) goal for participation by women businesses is established in contracts let by the Department of Transportation for the design, construction, alteration, or maintenance of State highways, roads, streets, or bridges and for the procurement of materials for these projects. The Department of Transportation shall endeavor to award to minority businesses at least ten percent (10%), by value, of the contracts it lets for these purposes, and shall endeavor to award to women businesses at least five percent (5%), by value, of the contracts it lets for these purposes. The Department shall adopt written procedures specifying the steps it will take to achieve these goals. The Department shall give equal opportunity for contracts it lets without regard to race, religion, color, creed, national origin, sex, age, or handicapping condition, as defined in G.S. 168A-3, to all contractors and businesses otherwise qualified.

(c) The following definitions apply in this section:

(1) "Disadvantaged business" has the same meaning as in 40 C.F.R. § 23.62.

(2) "Minority" has the same meaning as in 49 C.F.R. § 23.5 (1983, c. 692, s. 3; 1989, c. 692, s. 1.5; 1989 (Reg. Sess., 1990), c. 1066, s. 143(s).)

ATTACHMENT 2

LACY H. THORNBURG
ATTORNEY GENERAL

State of North Carolina
Department of Justice
P. O. Box 25201
RALEIGH
27611

(919) 733-3316
(919) 733-4185
FAX 733-9329

CONFIDENTIAL - PROTECTED
BY ATTORNEY-CLIENT PRIVILEGE

--MEMORANDUM--

TO: Thomas J. Harrelson, Secretary
North Carolina Department of Transportation

FROM: Grayson G. Kelley
Assistant Attorney General

DATE: August 26, 1991

SUBJECT: Dickerson Carolina, Inc. v. Thomas J. Harrelson, et al
MBE/WBE Goals Program on State-funded Projects

As you are aware Dickerson Carolina, Inc. has initiated a lawsuit against you and twenty-three other NCDOT board members and staff personnel in connection with the March 1, 1991 decision of the Board to award the contract for Project Number 6.671043 to the second low bidder, rather than to Dickerson, the low bidder. The lawsuit demands four types of relief: (1) that N.C.G.S. §136-28.4, the statute which resulted in the implementation of NCDOT's goals program, be declared unconstitutional; (2) that NCDOT's goals program be declared in violation of law; (3) that the project be suspended and awarded to Dickerson, and; (4) that Dickerson be awarded monetary damages and attorney's fees under 42 U.S.C. §1981, 1983 and 1988.

The underlying constitutional basis for Dickerson's lawsuit is the January 23, 1989, decision of the United States Supreme Court in City of

Richmond v. J. A. Croson Co., 488 U.S. 469 (1989). In Croson the Supreme Court declared unconstitutional the City of Richmond's program under which non-minority-owned prime contractors were required to set aside for minority subcontractors at least thirty per cent of the dollar amount of contracts awarded by the city. As a matter of practical application the Court ruled that states and local governments may only consider racial or gender-related factors in connection with the award of public contracts where there exists a compelling public interest in rectifying past discrimination and where specific findings have been made documenting the scope of the discrimination and the necessary remedy. The program itself must be narrowly tailored to focus on the specific problem in the specific industry and area identified by the documented findings. These requirements do not apply to programs mandated by federal law in that Congress has been held to have constitutional powers exceeding those possessed by states and local governments.

In connection with the Attorney General's representation of the State defendants in the Dickerson lawsuit we have reviewed relevant state statutes, NCDOT's goals program and decisions which have been issued by the courts since the Croson opinion. This review has raised serious concerns about the legality of NCDOT's current goals program for State-funded projects. These concerns apply equally to the position of the State defendants in the Dickerson case.

In December 1989, the co-chairmen of the Legislative Research Commission's Study Committee on Minority Business Contracts and Small Business Assistance requested from this office an opinion as to the constitutionality of several North Carolina statutes containing provisions for minority contractor

participation goals, including N.C.G.S. §136-28.4. On January 25, 1990, this office issued an official opinion that these provisions, including N.C.G.S. §136-28.4, appeared to be constitutional. It remains our opinion that N.C.G.S. §136-28.4 is constitutionally sound. The statute itself does not mandate the award of public funds to minority or women businesses and, in fact, requires NCDOT to give equal opportunity for contracts it lets without regard to race, religion, color, creed, national origin, sex, age or handicapping condition.

NCDOT's goals program, which was implemented in response to the requirements of N.C.G.S. §136-28.4, does raise serious constitutional questions. It is our understanding that under the goals program contractors are required to achieve a MBE (minority business enterprise) and WBE (women business enterprise) percentage participation goal for each construction contract awarded by the Department of Transportation. Contractors failing to achieve the specified goal must submit documentation demonstrating that a "good faith effort" was made to achieve the goal. If NCDOT's Goals Compliance Committee determines that a low bidder failing to achieve the specified goals has also failed to demonstrate a "good faith effort," a recommendation is made to the Board that the bid proposal be rejected and the contract awarded to another bidder. It was under this program that Dickerson's bid was rejected and the contract awarded to the second low bidder.

The Croson decision has resulted in a great deal of analysis, discussion and confusion as to its application to the numerous state and local programs mandating MBE and WBE participation. Numerous legal challenges to these programs have been instituted. Within the last year several court decisions have

been rendered which clarify, to varying degrees, the extent to which state and local governments may impose MBE and WBE requirements. Two primary principles are consistent in these decisions: (1) The public body imposing the requirements must have documented evidence supporting its compelling interest in remedying past discrimination, and; (2) The program itself must be "narrowly tailored" to impose the requirements only on specific industries in specific geographical locations as necessary to remedy the prior discrimination.

Three cases are of primary significance in our review of NCDOT's program. In Milwaukee County Pavers Association v. Fiedler, 922 F.2d 419 (7th Cir. 1991) the United States Court of Appeals for the Seventh Circuit upheld a ruling by a federal district court judge that Wisconsin's set-aside program in connection with highway construction was unconstitutional. This decision, which was decided January 15, 1991, held that Wisconsin's program violated the requirements of Croson because of the state's failure to compile documentary evidence that the program was necessary to rectify past discrimination against minority contractors. In Harrison and Burrowes Bridge Constructors v. Cuomo, 743 F.Supp. 977 (N.D.N.Y. 1990), a contractor challenged the goals program implemented by the State of New York in connection with highway construction. New York's program was established by law and was, in many respects, more flexible than NCDOT's program. The program was enjoined by a federal district court judge in August 1990, primarily because of the state's failure to compile a documented record of past discrimination. Although this ruling was not a final decision as to the constitutionality of the state's program, it is significant because the New York program contained a "good faith effort" exception similar

to that utilized by NCDOT. I have discussed this case with New York officials and have been advised that the program has been administratively converted to a voluntary system of minority participation.

A third decision, Coral Construction Company v. King County, 1991 WL 148314 (9th Cir. 1991), was decided on August 8, 1991. In that case the United States Court of Appeals for the Ninth Circuit rejected a county program which had been previously upheld by a lower court. Although the lower court had found that the county had compiled significant documentary evidence of past discriminatory contracting practices, the Court of Appeals held that an additional statistical foundation was necessary to justify the program. This case appears to demonstrate the strict standard of review which will be applied to documentary evidence compiled as justification for goals programs. A positive aspect of the court's ruling is language indicating that it may be acceptable to compile this evidence after enactment of the program.

At this point we have been unable to identify substantive findings of past discrimination which may have been considered by the legislature prior to the enactment of N.C.G.S. §136-28.4. We are also advised that NCDOT did not compile independent documentation prior to implementing the goals program in July 1990. For this reason alone, without consideration of other elements of the program, it is our opinion that the mandatory aspects of NCDOT's goals program are unlikely to withstand legal challenge. Both the Dickerson lawsuit and future lawsuits by other contractors denied contract awards under the goals compliance program may expose NCDOT, its Board members and employees, to significant liability for damages and attorney's fees.

In light of the foregoing concerns, we recommend that the NCDOT goals program be reviewed and an investigation be conducted to ascertain whether sufficient evidence of discrimination exists to justify continuation of the goals program in the present form. During the pendency of this review and investigation, we recommend NCDOT place a moratorium on the rejection of bids for failure to comply with goals or good faith effort requirements. Voluntary aspects of the program may remain in effect.

Please contact me in regard to any further assistance you may require in regard to this issue.

GGK:chw

ATTACHMENT 3

COSTS

1. Estimated Work Hours

Personnel Classification	*Hourly Billing Rate*	*Estimated Hours*	*Estimated Costs*

TOTAL ESTIMATED WORK HOUR COSTS **$**

2. *Reimbursable Expenses*

Reimbursable Expense	*Rate Amount*	*Total Estimated Reimbursable Expense*

TOTAL ESTIMATED REIMBURSABLE EXPENSES$

TOTAL ESTIMATED COSTS **$**

ATTACHMENT 4

G. S. 120-130

§120-130. Drafting and Information Requests to Legislative Employees

(a) A drafting request made to a legislative employee from a legislator is confidential. Neither the identity of the legislator making the request nor, except to the extent necessary to answer the request, the existence of the request may be revealed to any person who is not a legislative employee without the consent of the legislator.

(b) An information request made to a legislative employee from a legislator is confidential. Neither the identity of the legislator making the request nor, except to the extent necessary to answer the request, the existence of the request may be revealed to any person who is not a legislative employee without the consent of the legislator. Notwithstanding the preceding sentences of this subsection, the periodic publication by the Fiscal Research Division of the Legislative Services Office of a list of information requests is not prohibited, if the identity of the legislator making the request is not revealed.

(c) Any supporting documents submitted or caused to be submitted to a legislative employee by a legislator in connection with a drafting or information request are confidential. Except to the extent necessary to answer the request, neither the document nor copies of it, nor the identity of the person, firm, or association producing it, may be provided to any person who is not a legislative employee without the consent of the legislator.

(d) Drafting or information requests or supporting documents are not "public records" as defined by G.S. 132-1. (1983, c. 900, s. 1.)

MGT of America, Inc.

P.O. Box 38430 • 2425 Torreya Dr. • Tallahassee, FL 32315 • (904) 386-3191 • FAX (904) 385-4501

November 4, 1992

Valentine Burroughs, Jr.
Executive Assistant
Executive Director's Office
Department of Highways and Public
Transportation
955 Park Street
P.O. Box 191
Columbia, South Carolina 29202

Dear Mr. Burroughs:

It was a pleasure to visit with you and discuss the Department's interest in conducting a disparity study. You provided me with some valuable information and I hope I was able to do the same. I want to take this opportunity to provide further input regarding some of the key points which we discussed.

Why should the South Carolina Department of Highways and Public Transportation conduct a disparity study at this time? As long as the Department continues to operate set aside projects for minority and women-owned businesses only, it remains open to the potential of a law suit which would suspend the program and result in the payment of monetary damages. Until a disparity study has been conducted or is in the process of being conducted, the Department does not have a legal basis for the implementation of the program. Furthermore, the Department does not know if the current percentages set aside for minority- and women-owned businesses are, in the language of the Supreme Court, "supported by the facts."

Conducting a disparity study now would put the Department at the forefront of reform in South Carolina. While many of the southern states and local governmental agencies have or are currently conducting disparity studies, no governmental agency in South Carolina is currently conducting disparity study. However, as you are aware the Departments of Transportation in North Carolina, Florida, Texas and Louisiana are undertaking their own studies. Numerous municipalities in the region are conducting studies in order to refine and strengthen their efforts to promote the development and participation of minority- and women-owned businesses in procurement and construction contracting.

What was the significance of the Supreme Court's decision in the *City of Richmond v. J. A. Croson Company*? The decision by the U.S. Supreme Court in *City of Richmond v. J. A. Croson Company,* 109S.Ct. 706 (1989) has brought into question the validity of all state and local minority preference programs. The Supreme Court, in the *Croson* decision addressed the standard for reviewing Minority Business Enterprise (MBE)

programs and has given state and local governments a guide for developing and evaluating their MBE programs. This case clearly demonstrates:

(i) any MBE program based upon race can be justified only upon a showing of past discrimination by the enacting governmental organization or by others within its jurisdiction which has resulted in limiting participation by minority-owned businesses in the governmental organization's procurements or contracts

(ii) the remedy adopted must be in proportion to the effects of the past discrimination and remain in effect only as long as may be required to correct the effects of such discrimination.

It should be noted that while the *Croson* decision requires the design and implementation of a statistically valid methodology that will withstand legal challenges, disparity studies are more than just the collection and analysis of a mass of data. Disparity studies involve and effect individual citizens and businesses who seek fair treatment.

Why is MGT interested in what the Department is doing? MGT of America, Inc. is a management and research consulting firm founded seventeen years ago in Tallahassee, Florida. MGT has a national reputation for outstanding research and practical problem solving. As an aggressive and growing firm (we now have five office locations) MGT has provided our consulting services to over 800 clients in 44 states. Thus, we have a thorough understanding of the operations and environment of state and local governments.

MGT has long been involved in affirmative action and equal opportunity programs for clients. Thus, we are experienced in utilizing large, sophisticated data collection efforts to address discrimination issues and derive corrective actions. We spent several months, with assistance from our legal counsel, in designing a methodology that would satisfy the requirements of the *Croson* decision and, simultaneously, enable governments to meet their social and legal obligations to ensure fair and equal treatment of all citizens. Since the *Croson* decision, MGT has continuously refined our methodology to address *Croson* and the subsequent court decisions. As a result, MGT has conducted numerous disparity studies for state and local governments. We would like to assist the Department in initiating a disparity study and also to have the opportunity to bid on the project.

Below is a list of the entities for which we have conducted studies. It is important to note that none of our studies have been challenged or overturned.

- Florida Department of Transportation (in progress)
- North Carolina Department of Transportation (in progress)
- Consortium of the City of Sacramento, Sacramento County, Sacramento Housing and Redevelopment Agency, and the Sacramento Regional Transit District (complete)

- Birmingham-Jefferson County Transit Authority (complete)
- City of Tallahassee, Florida (complete)
- Palm Beach County, Florida (complete)
- City of West Palm Beach, Florida (complete)
- Consortium of the City of Kansas City, Missouri, the Kansas City School District, and the Kansas City Area Transit Authority (in progress)

As promised, enclosed is a copy of MGT's summary of the *Croson* decision and subsequent court decisions. I hope that it will be helpful to you in understanding the legal issues and implications on the Department. I have also enclosed copies of the Request for Proposals issued by the Florida and North Carolina Departments of Transportation.

I look forward to meeting with you again the next time I am in Columbia. I hope this information is helpful to you. If you have any additional questions, please call me at (904) 386-3191.

Sincerely,

Carolyn Staerker

Carolyn Staerker
Principal

042/burrough

File copy

Review of the "Study of Minority and Women Business Participation in Highway Construction"

January 26, 1993

A disparity study commissioned by the

North Carolina General Assembly

May 17, 1993

George R. La Noue,
Professor of Political Science
Director, Policy Sciences Graduate Program
University of Maryland Graduate School, Baltimore
and John C. Sullivan, Esq.

FROM LGC TO S.C. DOT 7-12-93

Table of Contents

I. EXECUTIVE SUMMARY

After the M/WBE [minority/women business enterprises] goals program established by the North Carolina Department of Transportation [NCDOT] was challenged in court, the North Carolina Attorney General recommended that the mandatory provisions of the program be suspended. At the same time, the Attorney General suggested an investigation to see whether there was sufficient evidence of discrimination to justify such a program. The General Assembly's sub-committee on Minority and Women's Goals selected MGT of America to do a disparity study on that subject.

What follows is a preliminary analysis of that study. Most of the analysis is based on data the study itself provides, although in some instances additional data from the Census have been obtained and used for comparative purposes. Because this analysis is largely dependent on what information the study has chosen to include and exclude about public contracting in the North Carolina highway industry, some of our conclusions may be modified if there is an opportunity to examine the raw data on which the study is based or to question its authors.

The MGT study makes some good decisions on data analysis, but contains some problems that undermine its conclusions. It reports data in disaggregated forms so that patterns can be analyzed. It properly considers the utilization of each group separately and reports prime and subcontracting data separately. The time frames for examining contract allocations are long enough to avoid the problem of distortions caused by single-year snapshots which may reflect atypical patterns. Its definition of the geographical area of the

market for NCDOT contracts as the state of North Carolina is reasonable, although in 1987, about 19% of all prime construction contracts went to out-of-state firms.

There are several crucial problems with the study's availability numbers, however, that substantially undermine its validity, and thus, any conclusion the study makes about discrimination. **First**, the study makes no definition of qualifications [bonding, licensing, experience, etc.] as *Croson* requires and thus compares only headcounts of businesses, as though they are all equally qualified and interested in public contracting. **Second**, the study depends on the census for availability, though NCDOT's list of pre-qualified contractors, licensed contractors, and approved subcontractors is probably a better measure of actual availability. **Third**, the study includes businesses even if they have no employees, although other disparity studies have conceded that such businesses are rarely competitive for public contracts. **Fourth**, the study treats all businesses regardless of their size as equally competitive for large contracts. **Fifth**, the study is overinclusive by treating as equally available for NCDOT contract dollars businesses such as painters, wallpaperers, and decorators, which function primarily in private markets along with highway contractors which are almost exclusively in the public sector. **Sixth**, by lumping together trades and heavy construction in the same availability pool, the type of firms which are most qualified for large NCDOT contracts are overwhelmed by those who are rarely appropriate or interested. **Seventh**, no analysis of the pattern of NCDOT contracts was made so that the availability pool would match spending patterns. **Eighth**, the study makes dubious assumptions in the growth of the construction industry in the period for which no census data are available.

These decisions do not have random consequences. Each has the effect of inflating the relative proportion of M/WBEs in the availability pool. Further the Census states that there is no way to determine how many of the businesses owned by women in its surveys are owned by white women. The MGT numbers must be based on estimates which the study does not explain. Finally, none of the census availability numbers MGT uses can be derived from published census data or from special tabulations provided by the Census, so there is the possibility of error.

The study does not use the kind of statistical significance tests frequently found in disparity studies. This is particularly important in centrally let contracts where only a 10% sample was used to create the utilization figures. If the margin of error for such a calculation of utilization is substantial, then in many group categories where underutilization is claimed it may be the result of too small a sample. That issue aside, underutilization in the MGT statistics occurs only if the dollar amounts are aggregated. If they are disaggregated, statistical patterns appear that make it unlikely discrimination on the basis of race or sex is the best explanation for NCDOT contracting decisions. For one thing, even in the aggregated compilations the most overutilized group is not white males, but Native Americans. It is difficult to think of a theory of discrimination that would explain that outcome and the MGT study does not try.

When the data are disaggregated, however, it is clear that non-M/WBEs are considerably larger than M/WBEs [Figure B], and are much more likely to be represented in the firms whose specialties are in fields that are appropriate for large NCDOT contracts [Figure A.] That reality has led to a situation where non M/WBEs have a comparative

advantage in competing for large contracts, while the smaller, newer M/WBEs do much better where smaller contracts are at stake [Figure C]. Indeed in smaller subcontract categories, most M/WBEs are overutilized by NCDOT, while firms owned by white males are underutilized (Figure D). This suggests that size, age, and other qualifications of firms are a much better explanation for success in bidding for NCDOT prime contracts than race or sex, while prime contractors are not treating M/WBE subs unfairly. To be really certain, a regression analysis similar to the Louisiana study would have to be performed and the MGT study has not done that. To the contrary the MGT study makes a conceptual error in the way in the way it calculated the M/WBE disparity ratios in the subcontracting categories which shows them as underutilized when the reverse is true.

Even if some underutilization should continue to be present for prime contracts after a regression analysis is completed, there remains the problem of where and how discrimination takes place in NCDOT's low bid system. The MGT study makes no suggestions, and the hearings produced nothing verified about which persons or procedures caused the alleged discrimination at NCDOT. If such discrimination actually exists, a relatively few number of people and procedures would be involved. These problems could be solved by race neutral means. Without an ability to identify the source of the discrimination, no "narrowly tailored" remedy as *Croson* requires can be fashioned.

II. PROGRAM AND STUDY HISTORY

In September 1988, the governor of North Carolina issued an executive order establishing a program to promote businesses owned by minorities, women, and the

handicapped. Two years later, the North Carolina General Assembly established the Disadvantaged Business Program, creating mandatory goals of ten percent for minority owned businesses and five percent for women owned businesses for the design, construction, and maintenance of highways, roads, and bridges for the North Carolina Department of Transportation.

On June 12, 1991, Dickerson Carolina, a local contractor, denied a contract by NCDOT despite being low bidder, filed suit against the Disadvantaged Business Program. As a result of the lawsuit, the state Attorney General recommended that the mandatory aspects of the program be suspended until the program could be formally reviewed. That lawsuit, coupled with the Supreme Court's opinion in *City of Richmond v. Croson* in 1989, led the General Assembly to commission MGT of America, a firm of 40 employees founded in 1971 and located in Tallahassee, Florida, to conduct a study "to determine if discrimination has existed and /or exists with respect to highway pre-construction and construction executed by the state of North Carolina."

MGT, which has completed disparity studies for Sacramento, Kansas City, and Tallahassee among other jurisdictions, and its consultant finished the study six months later, in January 1993. (1-1-1-4) The consultant was Research and Evaluation Associates of Chapel Hill, a firm with 85 employees, founded in 1979. While MGT is a medium sized firm experienced in this area, it is not clear which personnel actually did the study. None of the names of the researchers or their backgrounds is listed.

III. LEGAL REVIEW

The MGT study included a commendably thorough section detailing affirmative action decisions on the federal district, circuit, and Supreme Court levels, because "an understanding of the legal principles that apply to M/WBE or DBE plans is essential to program design and performance of an effective disparity study." (p. 2-1) After a fairly brief analysis of *Bakke*, *Fullilove*, *Wygant*, and *Paradise*, the study devoted seven pages to *Croson*. The study paraphrased, but does not actually quote, the central *Croson* test:

> 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. [emphasis added] *Croson* at 509.

Although the major focus of the study is seeking the statistical disparity *Croson* describes, MGT ignores the four conditions of the test that Justice O'Connor placed in it.

1. The M/WBE and non M/WBE firms have to be comparably "qualified," "willing and able." The MGT study mentions three times that the firms to be compared must be qualified [pp. 1-4, 5, 6], but then never defines or applies any concept of qualifications, with one exception. The single examination of qualifications is the study's concession that the reason for the low participation of DBEs in the state funded engineering program is that very few of them have general contracting licenses [3-40]. Had the study examined other issues of qualifications, it probably would have found other similar circumstances.

The development of employment discrimination law has long required the comparison of persons comparably qualified, where qualifications are relevant, whether the issue is hiring, promotion, or compensation. The study even says *Croson* emphatically stated

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." *Croson* at 725. [2-12]. Since the Census contains no data about the qualifications or practices of any business, using unrefined headcounts from the census, as MGT does, provides no information about the vital characteristics of businesses *Croson* says should be compared.

2. The businesses to be compared must be able to perform the same services. Companies compete for contracts only with others who offer similar services. Government agencies contract for particular services. In these situations bridge-builders do not find themselves in competition with apartment remodelers,though they may be both loosely in the construction industry. Consequently a study that puts companies with distinctively different service specialties in the same availability pool, as the MGT study does, is inconsistent with the *Croson* test.

3. The disparities must be statistically significant. Spurious statistical conclusions drawn on small or otherwise inadequate samples or inappropriate mathematical concepts are not justifications for instituting governmental racial classifications.

4. Statistics can provide only "an inference of discriminatory exclusion." They cannot necessarily conclusively prove discrimination or locate its cause or provide a basis for a narrowly tailored remedy. If underutilization is found, other explanations than discrimination should be tested before coming to the conclusion that discrimination is the cause of the disparity.

The case likely to have the greatest impact on the NCDOT Disadvantaged Business Program is *Dickerson Carolina, Inc. v. Thomas J. Harrelson.* In that case, the plaintiff not only challenged the NCDOT program, but sued NCDOT staff members individually for their official actions. In November 1991, the Wake County Superior Court found the staff protected from liability, but no ruling was made on the constitutionality of the goals. The case has been appealed to the North Carolina Court of Appeals. (2-30-31)

IV. AVAILABILITY

A. MARKETS REVIEWED

The *Croson* statistical test calls for comparisons to be made among companies "qualified," . . . "willing, and able to perform a particular service."

Unlike most disparity studies, the MGT study is limited to a single general market, highway construction. But within that market, NCDOT purchases a number of discrete, particular services. Painters do not landscape; electricians do not pave. Instead of doing a separate analysis for each of these services, or at least those where substantial amounts of money are involved, MGT grouped NCDOT purchases into three categories which combine many discrete particular services: pre-construction contracts, centrally-let contracts, and purchase orders. Centrally-let contracts are large contracts projects and represent 91.5 % of the approximately $400 million awarded annually by NCDOT for the past decade. Pre-construction contracts typically involve architecture and engineers.(4-1) Pre-construction contracts represent only 2.18% of NCDOT dollars awarded. Purchase orders amount to about 6% of NCDOT dollars. Both centrally-let and pre-construction

contracts can be either federally or state funded; the purchase orders are contracts under $300,000 and are generally too small to involve federal funds. (4-1-4-3)

The MGT study recognized,but did not solve, the problem of overinclusiveness in defining availability by considering only certain SIC codes in the Census. On p. 5-6 it lists the 12 SIC codes it included. Some of the decisions MGT made about the inclusion of these particular codes are confusing. Landscape services, 078 is inclusive of 0782 and 0783 and so it would be double counting to include them all. On the other hand, SIC 172 which MGT labels painting also includes large numbers of wallpapers and decorators. Companies in this SIC category are not equal competitors for NCDOT dollars with firms specializing in highway construction. Not even all painters are interested in or capable of completing painting projects which are part of highway construction. SIC 172 includes painters who do ship painting and white-washing, among other non-construction specialties.

More importantly, 0611, the specific SIC for highway contractors, is not listed at all. Instead MGT uses SIC code 16 encompassing all heavy construction, but in North Carolina 62% of those M/WBEs are specifically not in highway construction, so that SIC code is overinclusive as well.

The problem with using overinclusive categories is that the MGT system exaggerates the availability of M/WBEs more likely found in smaller businesses and the crafts, rather than in companies specializing in highway construction. The study recognizes the problem of overinclusiveness by citing the Ninth Circuit's criticism of a San Francisco availability analysis and then makes that same mistake in its own availability pool analysis. [2-26] The extent of this problem can be seen in Figure A on page 12.

Figure A

Firms with Employees in the SIC Codes
Used by the MGT Study (1987 data)

	Women	Blacks	Hispanics	Asians, Nat. Am.	Non-WBEs*	M/WBEs %*
SIC (172=1721) Painting, Wallpapering, Decorating	108	56	1	13	767	19%
SIC 078 Landscape	77	61	2	9	1156	11%
SIC 0782 Lawn/Garden	35	13	2	2	na	na
SIC Code 0783 Orn. Shrub/Tree	1	5	1	3	na	na
SIC (421=4210) Trucking	62	128	1	18	2350	8%
SIC 1799 Special Trade	37	12	1	3	684	7%
SIC 1791 Structural Steel	3	0	0	3	80	7%
SIC Code 1600s (Except 1611) Heavy Const.	41	14	0	4	853	7%
SIC (173=1731) Electrical	71	18	0	8	1577	6%
SIC 1794 Excav./Foundation	13	5	0	0	315	5%
SIC Code 1611 Hwy/Street Const.	**8**	**4**	**0**	**1**	**274**	**5%**
SIC (891=8911) Architects + Engineers	45	10	2	8	1380	4%
SIC 1795 Wrecking/Demolition	0	0	0	0	9	0%
Total	501	326	10	72	9445	9%

Source: Special Tabulation by the Census Bureau, based on the 1987 Surveys of Minority and Women Owned Business Enterprises by Four Digit SIC Code for North Carolina.

* These numbers include firms which are double counted because they are owned by minority women. This probably amounts to about 14 to 16 percent of the total of all M/WBEs.

First, it can be seen that in many categories that define a particular service, there are no or almost no companies owned by members of some groups. In the key category SIC 1611, highway construction, there are only 13 M/WBEs with employees, while there are 274 non-M/WBEs. On the other hand, in SIC 1721, (painting, wallpapering, and decorating) there are 178 M/WBE firms with employees and 767 non-M/WBEs with employees. In short, M/WBEs are only 5% of the highway contractors, but 19% of the painters, wallpapers and decorators. MGT's sample, however, contains three times as many painters, wallpaperers, and decorators as highway contractors. It is incorrect logically to treat these categories as equal competitors for NCDOT contract dollars.

The MGT study then makes several errors in defining markets. First, it does not aggregate its statistics in such a way that M/WBEs and non-WBEs who can perform the same particular service can be compared. It lumps all the businesses in the included SIC codes together as if they were a single market. Second, it is overinclusive by including heavy contractors (SIC 1600s) who do no highway work, and landscapers, painters, wallpaperers, and decorators who probably do little NCDOT work and possibly no public work. Third, it underestimates the central role of those in the SIC 1611 category whose specialty is highway construction. As Figure A shows, the consequence of these errors is to swamp the companies whose focus is on NCDOT contracts with companies for whom such work is peripheral or not possible at all. As a result, only 2% of all M/WBEs in the MGT sample specialize in highway and street construction. There are almost certainly many more M/WBE wall paperers and decorators included in the MGT sample than M/WBE highway contractors.

B. TIME FRAME

The study sought "to review a sample of the hard copies of all contract types over a ten year time span." (4-1) Such an expansive time span would have formed a far lengthier period than other disparity studies and is necessary to avoid distortions caused by unusual purchase patterns resulting from distinctive projects. For centrally-let construction contracts Fiscal Years 1982-1991 were used. For pre-construction contracts eight years were studied (FY 1984-1991) because contracts were available for review beginning in 1984. (4-1-4-4) For purchase orders, the period was three years (FY 1989-1991) because NCDOT districts are required to maintain three years worth of files for M/WBE participation. It is not likely that these time frames caused any distortions in the analysis.

C. GEOGRAPHICAL SCOPE

The study selected the state of North Carolina as the relevant geographical area from which NCDOT routinely obtained construction services. In making this determination, MGT staff recommended that the area selected cover at least 75 percent of total contract dollars awarded by NCDOT. While the study did not acknowledge the origin of the 75% rule, it is borrowed from anti-trust law and has been applied by many disparity studies. For all three types of contracts, the state of North Carolina formed the appropriate focus. Nevertheless dollars awarded to out-of- state firms which was more than 18% of the prime and more than 17% of the subcontract centrally let contracts, representing $677,919,621 and $66,668,187 respectively, (4-12-4-21) were not included in the study's availability and utilization analyses. There is, then, the possibility that the study's single state focus created some distortion of actual contracting results.

D. GROUPS

Six groups participated in the NCDOT program : American Indians, asians, blacks, the disabled, hispanics, and white women. Though the study did not directly explain the linkage, these groups seem to have been included because they are the ones qualifying as Disadvantaged Business Enterprises in federal DOT programs. Simply replicating groups from the federal level onto the state may be problematic, as the Supreme Court stated in *Croson*:

> The random inclusion of racial groups that, as a practical matter may never have suffered discrimination in the construction industry in Richmond, suggests that perhaps the city's purpose was not in fact to remedy past discrimination. (*Croson*, at 506.)

E. QUALIFICATION AND CAPACITY

Determining the availability of businesses for public contracting is one of the essential keys to a good disparity study. If availability is miscalculated, then all subsequent interpretations of statistics, including disparity ratios, will be in error.

Croson does not call for the comparisons of all M/WBEs to all non- M/WBEs. It is very specific in requiring the comparison of companies which are "qualified, willing, and able to perform a particular service." (*Croson*, at 509.) The MGT study, however, considers all businesses in certain SIC codes as equally available for NCDOT contracts. There is no attempt to measure whether these businesses in the Census are actually willing or able to engage in NCDOT contracts and the concept of qualifications is ignored. Thus the study has no information on bonding capacity, experience, employee size,annual revenues, licenses, equipment, or, in fact, any characteristic that would determine whether the company was a serious competitor for public contracts. Indeed the study has no information on whether any

of these companies listed in the census has ever bid or intends to bid on NCDOT contracts. In fact, many small contractors may not be financially able to bid on larger contracts since NCDOT requires a 5% bid bond or deposit for all centrally-let contracts (3-26). Over the ten year time frame covered in the study, the average centrally let contract was about $1.4 million, requiring a $70,000 bond or deposit, an amount that could well be too large for many small firms bidding on a contract they may never be awarded. Furthermore the construction industry standard is that bid preparation costs will be .5% to 2% of a contract. By that standard the bid preparation costs for the average $1,400,000 NCDOT contract will be $7,000 to $28,000 which is again a figure too high for most small firms.

The particular mission of a government agency will dictate distinctive patterns of contracts. State departments of agriculture, education, or highways, for example, will not spend their money or use contractors in the same amounts. The MGT study tries to reflect this reality by considering businesses only from certain SIC codes as described previously.

This is a necessary step but it doesn't go far enough because it considers all the businesses in these categories as equally available for the same amount of dollar contacts, when of course they are not. No attempt was made to create a formula for proportioning availability to the amount of NCDOT contract dollars available to the various SIC codes included. The MGT system counts painters and firms specializing in highway construction as equally likely to win large NCDOT contracts when in the real world that is not the case. The SIC code components of availability should match proportionally the utilization patterns of an agency, if a meaningful measure of underutilization is to be made.

Nor has the study considered interest in NCDOT contracting. Only pre-qualified prime contractors and approved subcontractors are eligible for certain categories of contracts, and only NCDOT certified firms are eligible for disadvantaged status. While M/WBEs who have not yet been approved could at some point do so, the fact they have not yet done so suggests their lack of interest or their lack of qualifications. To assume, as the study has done, that the mere availability of a firm in the census establishes its contracting interest is unjustified.

The difference in the census numbers and the NCDOT list are enormous. According to the MGT census figures, there were more that 34,230 firms available in 1992, but the NCDOT list reports only 565 pre-qualified contractors and 1234 approved subcontractors. The NCDOT lists 362 certified M/WBE firms, but the Census contains 6,635. Some of the firms on the M/WBEs' list are not in North Carolina and some are not pre-qualified or licensed, but it is certainly plausible that the NCDOT lists, if properly pruned, are a better measure of who is actually "able and willing to perform a particular service" in *Croson* terms than census data. NCDOT has information that makes comparison of the characteristics and qualification of M/WBE and non M/WBE firms possible.

This problem is exacerbated because the MGT study does not consider firm size. Other disparity studies have conceded that companies without employees are rarely effective competitors for public contracts. See for example, "The Utilization of Minority and Woman-Owned Business Enterprises by the City of New York," National Economic Research Associates, Inc., January 24, 1992, which acknowledged: "We restrict our measure [of availability] to firms with at least one employee besides the owner. Firms without

employees are often part-time businesses that would be unlikely to be in a position to perform most public sector work." (p. 56) In a study that is more comparable because it analyzed potential disparities in highway construction, the Louisiana study, the authors concluded that it was appropriate to eliminate all firms from the availability pool with fewer than five employees or annual receipts less than $50,000 because they were not likely competitors for prime contracts. (John Lunn and Huey L. Perry, "Justifying Affirmative Action: Highway Construction in Louisiana, *Industrial & Labor Relations Review*, April 1993, p. 470.)

The significance of MGT's decision to include firms with no employees and to ignore the issue of company size constitutes a major methodological flaw. While County Business Patterns, which counts only firms with employees, shows 8592 businesses in the relevant SIC codes for North Carolina in 1987, the MGT study lists 28,475.

To include companies with and without employees as equally available for NCDOT construction projects, especially the large centrally-let contracts which constitute the vast majority of dollars awarded, is not reasonable. In construction larger companies receive most of the contract dollars. Although nationally 32% of all firms listed in the highway construction census category have no employees, they did only .001% of the business in dollar terms. In 1987, only 12% of all construction companies had 5 or more employees, but they garnered 76% of all business done measured in dollars. In North Carolina, only 139 state firms actually received NCDOT centrally-let prime contracts. Those firms averaged over $20,000,000 in contracts over the decade covered. [4-14]

This same phenomena exists for firms with any kind of ownership. In 1987, in North Carolina there were 2,486 black owned construction companies but only 896 had employees. The latter firms did 78% of the business. Similarly, there were in that year, 2,823 women-owned construction businesses in North Carolina, but only 1009 had employees. The companies with employees accounted for 87% of all the revenues. Clearly the larger the company, the more likely it is to take on larger projects. The MGT study absolutely ignored that reality.

Non-M/WBEs are larger than M/WBEs. The average number of employees of non-MBE construction companies in North Carolina with employees is 10. For black-owned and women-owned construction companies, the averages are 2.8 and 5. In 1987, 147 North Carolina construction firms have 100 or more employees. These firms will be the most likely competitors for the largest contracts. A further advantage of large firms is that those firms generally have within them the capability to perform several functions even though they are categorized in a single SIC. It is not reasonable therefore to count them in the same way as tiny single purpose firms as competitors for large public contracts.

The MGT study also uses the dubious techniques of compensating for the fact that the last M/WBE census count was in 1987 to project a growth rate for these firms. The problem of old census data is a real one, but the projection technique assumes that the general climate for the construction industry was the same after 1987 as in the five years previously, and that M/WBEs grew as fast between 1987 and 1992, as between 1982 and 1987. Neither assumption is probably correct, since the construction industry generally went into a downturn in the latter period and, since there was an undercount in some MBE

categories in 1982, the 1987 figure is partly compensation for that defect as well as actual growth.

Although the MGT figures probably exaggerate the recent growth of M/WBEs, they probably are accurate in reporting that there are relatively more new M/WBEs than non-M/WBEs. According to the MGT figures [5-8], at least 65% of the M/WBEs would have had to be formed since 1982, while the comparable number of non-M/WBEs is 29%. Both numbers probably understate the growth of new businesses, since some of the 1982 businesses include in the 1992 figures are probably defunct and have been replaced by new businesses in the recent overall totals.

Finally, it is not possible to derive the number of firms owned by white women from the census, so the number MGT used must be an estimate, though no methodology is provided. Another weakness of census data is that availability of firms owned by disabled persons cannot be determined. (6-2)

The consequence of the study's failure to consider firm size can be seen in Figure B, taken from published census data. Where the MGT report finds 15.7% MBE availability in 1987 by encompassing some dubious SIC codes and firms with no employees, the census reports only 12.3%, even if the overinclusive category of all construction companies and one or more employees are included. If employee size is considered, then M/WBEs are only about 5% of availability.

Figure B

North Carolina Construction Firms With Employees (1987)

	Companies #	%	Employees #	%	Payroll (000) $	%
All	17,720	100	151,909	100	2,692,416	100
African Americans	896	5.1	2,521	1.7	31,287	1.2
Hispanics	21	0.1	29	.02	708	.03
Asians and Others	254	1.4	509	.33	8,459	.31
Women	1,009	5.7	5,187	3.4	90,567	3.4
Non-M/WBEs	15,540	87.7	143,663	94.6	2,561,395	95.1

Sources: 1987 County Business Patterns and Surveys of Minority and Women Owned Business Enterprises.

V. UTILIZATION

All 306 pre-construction contracts in FY 1984-1991 were reviewed. 233 centrally let construction contracts were studied, a 10% random sample of the ten years of contracting. (4-3-4-8) It cannot be determined how many purchase orders were examined. (4-9-4-11)

One troublesome aspect of the utilization data was the lack of ethnic and racial identification of firms, both prime and subcontractors, in all three areas of highway contracting. To identify the contracting firms, a database of minority and women was compiled from 18 M/WDBE directories, which was then forwarded to the NCDOT Civil Rights Office. The Civil Rights Office identified the firms either by reviewing their files (173 firms) or by telephoning the firm (60 firms). In both cases, the firm was self-certified. There was no mention of any attempts at verification.

Contracts going to firms that were not specifically identified as M/WBEs, were attributed to non-M/WBEs, but that is not necessarily the case. Over 90% of M/WBEs never seek certification and therefore do not show up on any government list for the purposes of a utilization count, even though they were in the census and therefore recorded by MGT as available. If they were not on some M/WBE list , the contracts they received may have wrongly been attributed as going to a non-M/WBE. A follow-up performed by examining the files or telephoning would identify firms claiming to be M/WBEs that were not, but it wouldn't identify M/WBE firms wrongfully considered non-M/WBEs. Also, it is incorrect to attribute contracts going to other governments, non-profit organizations, and stockholder corporations as non-M/WBEs. These entities should have no race or sex. For all these reasons, it is probable that the amount of contract dollars attributed to non-M/WBEs is overstated.

Even if the overcounting of M/WBEs for availability and the probable overcounting of non-M/WBES for utilization is overlooked, the disparity ratios do not establish discrimination or even consistent underutilization. Instead, the results suggest a patchwork of both under and over utilization. The disparity indices showed that in all ten years white males and in nine or ten years native Americans were overutilized as primes and subcontractors on centrally let contracts. In pre-construction, asians were underutilized some years but were frequently overutilized. Overall, they received four times as many contracts as expected in this category.

The MGT study completed disparity ratios for each group in all three types of construction contracts on both the prime and subcontract levels, but in so doing created a

major conceptual error. The disparity ratios in Chapter 5 for the three categories of subcontracting are calculated incorrectly. M/WBE subcontractors are in fact overutilized with 29% of the centrally let contracts [Ex. 4-15], 26% of the pre-construction contracts [Ex. 4-26], and 36% of the purchase order subcontract, [Ex. 4-34].

Figure C

Percentage of Total Dollars Awarded to M/WBES

By Type of State Contract

Type of Contract	M/WBE Utilization	Average Contract Size*
Centrally let contracts		
Primes	.6	1,402,978
Subcontractors	29	107,975
Pre-construction Contracts		
Primes	6	229,143
Subcontractors	26	28,188
Purchase Orders		
Primes	4	56,265
Subcontractors	36	8,447

Source: MGT study Pages 4-14, 16, 17, 19, 20, 22, 27, 34, 41, 50, 59, 62

* Contracts to North Carolina companies only.

Figure C shows two consistent patterns. First M/WBEs receive a much higher proportion of the dollars in a sub-contract role where they must negotiate usually with non- M/WBE primes, than in the prime role where they are in low bid competition before NCDOT. Second the smaller the average contract, the higher the M/WBE share.

Instead of comparing the percentage of M/WBE subcontracts to all subcontracts, the MGT study compared them as a percentage of all contracts, prime and subcontracts. That shows M/WBEs underutilized in all categories for all groups [Ex 6-2, 6-4, 6-6] when in fact that is not the case. Using the MGT approach, white males would have been underutilized as well. Perhaps the study authors knew that and that is the reason white males are left out of these exhibits, while they are included in the exhibits of prime contracts. Figure D shows the correctly calculated disparity ratios for subcontracting.

Figure D

Utilization in NCDOT

Subcontracting Categories

Contract Type	Availability Percent	Utilization Percent	Disparity Index	Outcome
Centrally-let				
American Indian	0.44	6.48	1473	Over
Asian	0.51	.025	5	Under
Black	1.73	8.00	462	Over
Hispanic	0.10	0.46	460	Over
White Women	2.84	13.10	461	Over
White Males	94.62	71.71	76	Under
Pre-Construction				
American Indian	0.65	0	0	Under
Asian	1.28	3.73	291	Over
Black	1.00	2.88	288	Over
Hispanic	0.68	01.51	222	Over
White Women	9.24	17.49	189	Over
White Males	87.68	74.38	85	Under
Purchase of Service				
American Indian	0.54	0.33	61	Under
Asian	0.63	0	0	Under
Black	8.00	14.45	178	Over
Hispanic	0.31	.00	0	Under
White Women	9.25	20.8	225	Over
White Males	81.26	64.37	79	Under

Statistics taken from the raw data in MGT Ex. 4-14 and 6-2, Ex. 4-23 and Ex. 6-4, Ex. 4-30 and Ex. 6-6.

By comparing utilization in the same contract categories, the correct percent of M/WBE utilization can be seen.

What conclusion can be drawn from such disparate results? Can discrimination explain asians receiving no purchase order subcontracts, while enjoying massive overutilization as both primes and subs in pre-construction? Why are hispanics over-utilized as centrally-let and pre-construction subs, but receive no purchase of service subcontracts? Is that discrimination or market choice on the part of firm owners? What explains the consistent overutilization of white males as primes and white women and blacks as subs? Most M/WBEs receive the fewest contract dollars in that part of the contracting system in which the low-bid allocation system permits the least discretion, while they receive the most contract dollars in their subcontracting role. That suggests firm capacities and contract size, not race and sex are the best explanations for this pattern.

VI. ANECDOTAL EVIDENCE

The anecdotal chapter of the MGT study is intended to link, as *Croson* requires, statistical underutilization with identified discrimination, because, as the study points out, the underutilization could be "the result of objective, non-biased bidding and purchasing procedures." [7-1] The anecdotal information is of three types: a random telephone survey, public hearings, and personal interviews.

The M/WBEs contacted by phone were selected from the database compiled from directories of 19 state agencies. 276 M/WBEs were called, but only 109 were actually

reached. This response rate suggests the M/WBE directories may not be very accurate. MGT attempted to contact 60 white male owned companies selected at random from four directories; 29 responded. (7-2-7-6)

Ten two-hour public hearings were sponsored by the General Assembly. The meetings, held in November 1992 around the state, were conducted by a panel of politicians, staff, and a representative from MGT or its consultant. The study does not state how many persons testified. (7-6-7-9)

Results of the telephone survey were listed by question and the text of many questions were provided, methodological steps missing in some disparity studies. However, the telephone calls, the interviews, and the public hearings all represented circumstances in which unsworn, unverified statements were reported as if factual. Since most of those testifying had a stake in preserving a race or sex preferential program, they may not have been objective in their reports. Further, most of what is claimed, difficulty with bonders, lenders, suppliers, and state inspections are problems all small businesses face.[7-41] The allegation that there is "an informal network," a sort of conspiracy theory, that half of the M/WBEs support and half deny, is far too vague to be used as evidence. [7-19]. About an equal number of M/WBEs agree and disagree with the statement that "non-minority contractors put forth an honest effort to involve minority and women owned businesses as subcontractors when bidding road construction projects"[7-21]. Whatever these attitudes, they are not very relevant to the study's statistical conclusion that M/WBEs were generally overutilized in their subcontracting role and sometimes underutilized in their prime capacity where non-M/WBEs have little direct role [Figure C].

When selections from interviews or testimony are given, the authors of the report appear to have selected comments in a very self-serving way. Only comments supporting the discrimination hypothesis are quoted. The counter views are ignored. The accounts reproduced in the study have few if any verifiable details. The ethnicity of speakers is not identified -- "a professional services MB owner" (7-28) -- is typical. Specific projects are not named. Some allegations which are obviously unsubstantiated are included : "Another MB contractor believed that there is a conspiracy to break MB/WBEs and put them out of business." (7-30) *Croson*, however, requires identified discrimination (*Croson*, at 498-99) and the anecdotal chapter has too few specifics to identify anything beyond allegations of general, societal discrimination. Specifically the anecdotes do not prove any verified information about how the NCDOT's low bid system discriminates, if it does.

VII. CONCLUSIONS

The MGT study properly recognizes that the legal basis for justifying racial classifications in public contracting is a "rigorous standard" [1-1], a "heavy burden" [2-10]. It notes that a disparity study must "rigorously follow objective criteria throughout the analytical process," must "closely observe basic research standards" and "exclude generalizations not supported by the data." [2-29]

One of the distinguishing characteristics of scientific investigation is that researchers consider alternative explanations to the phenomena being examined until they have

uncovered the best fit between theory and data. Without this step, researchers may stumble into simpleminded errors. For example, although it is true that more people die in hospitals than in automobile races, it does not follow that being in a hospital is more dangerous than racing a car. Avoiding this kind of error is particularly important in dealing with complex issues such as discrimination, which are highly controversial and which involve constitutional rights. Consequently, it is critical to examine which differences in the performance or representation of groups are best explained by discrimination and which are best explained by differences in the genetic characteristics, number, geographical location, education, income, culture, English language fluency, and the timing and character of immigration of groups, etc. Disparity studies typically ignore all other explanations except discrimination. Thus, they do not consider what social scientists call the threat to validity problem, i.e., whether there are alternative explanations to the discrimination hypothesis.

In the area of MBE utilization there are several alternative explanation or threats to validity that should be explored. The D.C. Court of Appeals mentioned some in *O'Donnell v. District of Columbia, 963 F.2d 416 [D.C., 1992]*:

1. MBEs may not have bid because "they were generally small companies incapable of taking on large projects."
2. MBEs may have been fully occupied on other projects.
3. Governmental contracts may not have been as lucrative as other contracts.
4. MBEs may not have had the expertise to perform the contracts.
5. MBEs may be bidding, but are not proportionately the low bidders.

For these reasons and others, Justice O'Connor said a pattern of statistical underutilization could create only "an inference of discrimination." By itself, underutilization does not identify the discrimination with sufficient specificity to withstand threats to the validity of the discrimination hypothesis or to create a narrowly tailored remedy. The study's anecdotal material did not establish a link between underutilization on prime contracts and NCDOT discrimination.

The problem of threats to validity has been addressed by another disparity study which focused on highway contracting in the State of Louisiana mentioned earlier. This study was conducted by an economist at Louisiana State University and a political scientist at Southern University. In the first analysis, they found that although black-owned construction firms were 10.6% of the market, they received only 5% of the prime contract dollars. On the other hand, they received 18% of the subcontract dollars. To determine whether variables other than discrimination might explain this pattern, the authors considered the variable of overall business receipts, years in business, education of owner, percent of all businesses represented by prime contracts, percent with line of credit, percent bonded, percent of firms licensed in highway, street and bridge construction, etc. A regression analysis was then run. The authors concluded that black firms obtained more state subcontract work than would be statistically predicted. Among prime contractors, black firms still received slightly fewer dollars than their predicted share, but the result was not statistically significant. The authors concluded: "Part of the reason is that prime work in highway construction often requires very large firms, and minority-owned firms tend to be smaller than the white-owned firms." [Lunn and Perry, p. 474]

Also, they found minority-and women-owned tended to work more on federal than state projects. In short, by controlling for various characteristics and qualifications of businesses, the Louisiana study subjected the discrimination hypothesis to further examination and found it not confirmed. The MGT study controlled for none of these variables and examined no other hypothesis as the *O'Donnell* case appears to require before courts will sanction the use of race conscious classifications.

None of the above threats to validity were examined by the MGT study. By not examining the types and amounts of NCDOT contracts, the study cannot draw conclusions about what the non-discriminatory proportions for M/WBEs in each category of service should be. If a specific percentage of NCDOT contracts can only be awarded to contractors who can perform a "particular service," then the availability pool must reflect that reality. When overinclusive census data are used for availability, no accurate disparity measure is possible.

Further MGT's data show that MBEs are generally newer, smaller companies, so the hypothesis that they were relatively incapable of taking on large highway construction projects is plausible enough that it should have been investigated before any conclusions about discrimination were reached. On 10-10, the study states "Because of the size of most centrally-let construction contracts, few M/WBEs are large enough to bid as primes." The study fails, however, to recognize that the reality undermines its finding of underutilization. Similarly, the possibility that MBEs lacked expertise or were not the low bidders should have been examined. At least 65% of the M/WBEs listed in the census are new companies, while the proportion of new non-M/WBEs is much lower. The study collected no data on

bidding and so does not know whether M/WBEs bid as often as non-M/WBEs or how often they were low bidders.

Moreover the study overlooks the reality that highway contractors with few exceptions must derive all their income from the public sector. While other contractors and particularly those in the trades, (painting and wallpapering, electrical, landscaping, etc.) get most of their work from the private sector. Therefore, to count these firms as equally available for large NCDOT contracts is unrealistic.

The bottom line is that the MGT study fails to identify discrimination with the particularity necessary to justify a race-conscious program and a proper analysis of its data suggests that NCDOT current contract allocation system reflects appropriate factors of size, licensing, and experience.

FILE COPY

NORTH CAROLINA GENERAL ASSEMBLY

April 29, 1992

TO: VENDORS

As Chairmen of the Joint Legislative Highway Oversight Committee, we hereby transmit a copy of a REQUEST FOR PROPOSALS (RFP) for the "Study of Minority and Women Business Participation in Highway Construction in the State of North Carolina".

Please note that a special "reading room" will be established for use by prospective vendors in connection with this project. Prospective vendors should contact Frederick Aikens or Richard Bostic (at the address shown on Page 1 of the RFP) to schedule a time to review the material.

Sincerely yours,

Senator William D. Goldston, Jr.
Chairman

Representative R. Sam Hunt, III
Chairman

STATE OF NORTH CAROLINA

NORTH CAROLINA GENERAL ASSEMBLY

STUDY OF MINORITY AND WOMEN BUSINESS PARTICIPATION IN HIGHWAY CONSTRUCTION

REQUEST FOR PROPOSALS

April 1992

STATE OF NORTH CAROLINA
NORTH CAROLINA GENERAL ASSEMBLY
STUDY OF MINORITY AND WOMEN BUSINESS PARTICIPATION IN HIGHWAY CONSTRUCTION

REQUEST FOR PROPOSALS

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REQUEST FOR PROPOSALS

TITLE: **Study of Minority and Women Business Participation in Highway Construction**

ISSUE DATE: April 29, 1992

ISSUING AGENCY: North Carolina General Assembly
Joint Legislative Highway Oversight Committee
c/o Fiscal Research Division
Legislative Office Building
300 N. Salisbury Street
Room 619
Raleigh, North Carolina 27603-5925

Sealed proposals subject to the conditions made a part of this request must be received by 5:00 p.m., June 1, 1992, to be considered.

SEND ALL PROPOSALS DIRECTLY TO THE ISSUING AGENCY ADDRESS SHOWN ABOVE.

DIRECT ALL INQUIRIES CONCERNING THIS RFP to either of the following:

Frederick Aikens
Fiscal Research Division
North Carolina General Assembly
Room 619, Legislative Office Building
Raleigh, North Carolina 27603-5925
Telephone (919) 733-4910
Facsimile (919) 733-3113

Richard Bostic
Fiscal Research Division
North Carolina General Assembly
Room 619, Legislative Office Building
Raleigh, North Carolina 27603-5925
Telephone: (919) 733-4910
Facsimile: (919) 733-3113

NOTE: A preproposal conference for all prospective offerors is scheduled on May 18, 1992 at 10:00 a.m. in Room 643, Legislative Office Building, 300 North Salisbury Street, Raleigh, North Carolina. **Attendance at this conference is mandatory. Prospective offerors are encouraged to submit written questions in advance. A written summary of all questions and answers will be mailed to all firms receiving a copy of this request for proposal.**

INTRODUCTION

A consultant is being solicited to conduct a "study of minority and women business participation in highway construction in the state of North Carolina". The study seeks to determine if discrimination has existed and/or currently exists with respect to the highway preconstruction and construction programs executed by the State of North Carolina. Furthermore, if such discrimination is documented by the study, the consultant will be required to design a legally defensible, factually based minority and women business enterprise program for consideration by the North Carolina Department of Transportation. The consultant will be expected to propose remedies, a plan of action, policy changes, and draft legislation, if necessary. The consultant's work product must include a basis for defining the scope and characteristics of such program. The study will require a detailed examination of racial and gender discrimination in the highway construction industry, the degree and extent to which past discrimination existed and continues, and the effects of such discrimination on the development and growth of minority and women highway construction business enterprises. The study must meet the criteria established in the U.S. Supreme Court's decision in City of Richmond v. J. A. Croson Company and subsequent lower court rulings.

The study must be complete and a final report submitted by December 29, 1992. The consultant must be able to provide sufficient resources and experience to the study to meet the project schedule.

I. INFORMATION FOR VENDORS

A. BACKGROUND

1. *HIGHWAY TRUST FUND* - In its 1989 session, the North Carolina General Assembly enacted House Bill 399 (Chapter 692 of the 1989 Session Laws) which established the North Carolina Highway Trust Fund. This law substantially raised the state tax on motor fuels and increased motor vehicle registration fees to pay for an expanded system of intrastate highways, urban loops, and secondary roads throughout the State of North Carolina. The law identified specific routes, improvements to those routes, and affected counties in which roads were to be built.

2. *REVENUES AND PAVING GOALS* - The Highway Trust Fund law initially envisioned generating approximately $9.2 billion in additional state revenue over a 13.5 year time period, thereby constructing 1,756.8 miles of a four-lane Intrastate Highway System, and 212 miles of urban loops around seven major cities, paving 10,000 miles of unpaved secondary roads, and providing supplemental funds to cities for improving streets. Due to lower than expected revenues, the Department of Transportation now expects the Highway Trust Fund program to extend to approximately 17 years rather than the initial 13.5 years. The law further created a distribution formula that sought to equalize funding to all regions of the state and established the Joint Legislative Highway Oversight Committee to oversee the expenditure of Highway Trust Funds.

3. *MINORITY AND WOMEN GOALS* - In anticipation of additional state revenues for highway construction exceeding $500 million per year, beginning in 1991-92, the 1989 General Assembly further included, in the Highway Trust Fund, a 10% goal for minority contractors. The 1990 Session of the General Assembly amended G.S. 136-28.4 and included a 5% goal for women. That statute states that...

> "It is the policy of this State to encourage and promote participation by disadvantaged businesses in contracts let by the Department of Transportation pursuant to this Chapter for the design, construction, alteration, or maintenance of State highways, roads, streets, or bridges and in the procurement of materials for these projects. Further, a ten percent (10%) goal is established for participation by minority businesses and a five percent (5%) goal for participation by women businesses is established in contracts let by the Department of Transportation for the design, construction, alteration, or maintenance of State highways, roads, streets, or bridges and for the procurement of materials for these projects."

These goals are separate and apart from the federal disadvantaged business goal of 10%.

4. *DEPARTMENT'S STATUTORY RESPONSIBILITIES* - The Department of Transportation, an Executive Branch Agency, statutorily responsible for the maintenance and construction of highways and bridges throughout the state, endeavored to award contracts to minorities and women in the percentages noted above. The department was further directed to adopt written procedures specifying the steps it would take to achieve these goals. (See Attachment 1 for a copy of the statute.)

5. *GOALS STEERING COMMITTEE* - In the fall of 1989, the Department of Transportation convened a multi-disciplinary Joint Minority Business Enterprise (MBE) Steering Committee composed of individuals representing various organizations and constituencies to develop rules and regulations for implementing the goals program. Organizations represented included the Carolinas Association of General Contractors, United Minority Contractors of North Carolina, Inc., North Carolina Association of Minority Businesses, Inc., and the Department of Transportation.

6. *ATTORNEY GENERAL'S OPINION* - On January 25, 1990, the Attorney General issued a legal opinion supporting the constitutionality of G.S. 136-28.4 which established the state goals program to be implemented by the North Carolina Department of Transportation.

7. *GOAL REQUIREMENTS IMPLEMENTED* - The July 1990 letting marked the beginning of specific goal requirements for minority businesses in state projects and the November, 1990 letting marked the beginning of specific and separate goals for minority and women businesses in state funded highway construction projects.

8. *DEPARTMENT OF TRANSPORTATION EFFORTS* - The department undertook a series of steps to acquaint general contractors, minority and women contractors, and the appropriate Department personnel with the goals program. These steps included:

- Providing training to field engineering staff;
- Conducting four regional seminars during 1991;
- Discussing the goals program at the annual contractor-engineer conferences held during January, 1991;
- Continuation of the Department's annual Entrepreneurial Development Program during February and March 1991 at North Carolina A&T State University; and,
- Sponsoring a seminar in 1991 to assist minority and women businesses in preparing to take the general contractors' licensing/examination.

9. *CONTRACTOR REQUIREMENTS* - Contractors were required to achieve a specific MBE and Women Business Enterprise (WBE) percentage participation goal for each construction contract awarded by the Department of Transportation, or failing to achieve the specified goal, were required to submit documentation demonstrating that a "good faith effort" was made to achieve the goal. If the department's Goals Compliance Committee determined that a low bidder failed to achieve the specified goals and failed to demonstrate a "good faith effort", a recommendation was made to the North Carolina Board of Transportation that the bid proposal be rejected and the contract awarded to the next low bidder.

10. *DICKERSON LAWSUIT* - On June 12, 1991, Dickerson Carolina, Inc. filed a lawsuit against the Department of Transportation in connection with a March 1, 1991 decision of the Board of Transportation to award the contract for Project Number 6.671043 to the second low bidder, rather than to Dickerson, the low bidder. The Goals Compliance Committee had determined that Dickerson Carolina, Inc. had not made a "good faith effort" to include minority participation in its bid on project 6.671043.

11. *PROGRAM SUSPENSION* - This lawsuit resulted in a subsequent opinion on August 26, 1991 from the Office of the Attorney General for the State of North Carolina (see Attachment 2), recommending suspension of the mandatory aspects of the goals program, pending a review and investigation to ascertain whether sufficient evidence of discrimination exists to justify continuation of the mandatory aspects of the goals program.

STATE OF NORTH CAROLINA
NORTH CAROLINA GENERAL ASSEMBLY
STUDY OF MINORITY AND WOMEN BUSINESS PARTICIPATION IN HIGHWAY CONSTRUCTION
REQUEST FOR PROPOSALS

I. INFORMATION FOR VENDORS

B. PROJECT DESCRIPTION

1. *ELIMINATION OF DISCRIMINATION* - The "Study of Minority and Women Business Participation in Highway Construction" will be conducted by the consultant selected by the Joint Legislative Highway Oversight Committee (JLHOC) Subcommittee on Minority and Women Business Goals Program in consultation with the North Carolina Department of Transportation.

   The consultant will be required to conduct a detailed examination of the extent to which racial minority and gender firms have participated in the highway construction industry and the degree and extent, if any, to which past discrimination existed and continues. The examination will identify specific ethnic groups affected, include a review of files on individual highway construction projects dating as far back as 10 years, and a review of manual card files on individual highway contractors. The consultant will also be required to plan and conduct public hearings across the state to obtain input from the public and from businesses involved in highway construction activities. Sufficient resources and expertise to complete the study must be provided in order to meet the timetable established.

2. *STATISTICAL BASED REQUIREMENTS* - It is expected that the study will establish a statistical basis to support a realistic goal which confirms (1) the current level of minority and women business participation, (2) the availability of opportunities in highway construction and related activities, and (3) the availability and capacity of minority and women-owned businesses to respond to these demands. The consultant will be required to conduct historical research on the national highway construction industry, determine the extent to which discrimination (if any) existed and continues, and determine the link (if any) between patterns of discrimination of the national highway construction industry and the highway construction industry in North Carolina. The consultant must also determine if there is a compelling governmental interest to adopt a race and gender conscious goals program to rectify the effects of past discrimination, and how the adoption of such a program might affect the State's economy.

3. *CONSISTENCY WITH CROSON* - In items 7(c) and 7(d) below, the consultant will be required to assess the extent to which sufficient evidence is available to support a minority and women goals program in highway construction, consistent with the U.S. Supreme Court's decision in City of Richmond, Virginia v. J.A. Croson Company. Therefore, the consultant must gather information on the highway construction industry in North Carolina, document the number, location, and size of majority highway construction firms doing business in this state, identify subcontracting firms used by majority highway contractors and, if possible, document how most highway construction firms got started.

4. *DOCUMENT PARTICIPATION RATES* - While the goals program noted above is applicable to the use and expenditure of State funds, only, the study seeks to document minority and women vendors' participation rates for all funds received by the Department of Transportation and awarded for activities related to the preconstruction or construction of highways. This includes the use of federal aid for highways, the North Carolina Highway Fund, and the North Carolina Highway Trust Fund, and other state, local or private funds administered by the Department of Transportation.

5. *PROJECT STATUS REPORTS* - Project status reports will be required weekly and a final report by December 29, 1992. The final report must contain proposed remedies, a plan of action, policy changes, and draft legislation, if necessary.

6. *STAFF ASSISTANCE* - The JLHOC Subcommittee on Minority and Women Goals Program, the staff of the Fiscal Research Division, and the staff of the Department of Transportation will be available to assist with certain aspects of the study. It is the responsibility of the consultant to conduct the study and compile the necessary documentation, findings and conclusions.

7. *STUDY OBJECTIVES* - The primary objectives of the study are listed below:

   (a) *Document Discrimination* - Document whether discrimination has occurred in the highway construction industry;

   (b) *Discrimination is Proven* - If discrimination is documented in North Carolina, the consultant must:

   - Document the extent to which such discrimination continues;
   - *Identify Patterns and Practices* - Identify patterns and practices of discrimination in the highway construction industry that effectively denied, and/or continue to deny, minority (by race) and women business enterprises a fair share of state highway construction dollars, and how these patterns and practices might have affected MBE/WBE development and the estimated extent of injury;
   - *Document Underutilization* - Document if under-utilization of minority (by race) and women firms exists in the highway construction program and related highway construction activities of the Department of Transportation. If so documented, is such under-utilization the result of documented racial and gender discrimination;

   (c) *Document Legal Authority* - Document that the State of North Carolina has the legal and constitutional authority to establish and implement a goals program for minorities and women. In this regard, the study must establish a legally defensible and factual basis for such a program and identify sufficient statistical, anecdotal or other evidence legally relevant to conducting an MBE/WBE program, if such a program is warranted;

   (d) *Necessity of Department of Transportation Efforts* - Determine if the method(s) employed by the Department of Transportation to implement the goals program were necessary to assure that minorities and women were afforded opportunities to participate;

(e) *Document Utilization by Ethnicity* - Document MBE/WBE utilization by source of funding, type of highway construction activity, geographic location (by highway division), and ethnicity for the period July 1, 1982 through June 30, 1992. Identify minority and women highway construction firms by race by name, location, and size of firm (number of employees, annual dollar volume of highway construction work performed), and number of projects. Identify MBE/WBE prime contractors and subcontractors and document if any were low bidders as primes or subcontractors but were not awarded the contract.

Project Utilization - If present rates of utilization are held constant, project the utilization of highway construction enterprises owned by minorities and women through the estimated life of the Highway Trust Fund to determine the proportion of highway construction business activity these firms might receive.

(f) *Show Majority Contractors* - Document MBE/WBE utilization by majority highway construction firms for the period July 1, 1982 through June 30, 1992. Data should show majority highway construction contractors by name, location, amount of highway construction funds received and number of awards by year for the fiscal years 1982-83 through 1991-92. The consultant is expected to identify by name and race, minority and women firms used by specific majority contractors on specific projects and dollar amount of the firm's subcontracting work, and whether the use of such firms was a requirement in the contract provisions;

(g) *Document Department of Transportation Contracts* - Document the categories of construction, procurement, and professional services contracts in the preconstruction and construction area, typically available from the Department of Transportation, and the dollar amount and number of awards awarded to majority firms and minority and women firms. Analyze the department's procedures for the award of contracts and identify impediments (if any) to greater participation by minority and women firms;

(h) *Availability and Capacity Studies* - Document the measure of availability of minority and women businesses in highway construction activities in the relevant geographic markets for appropriate categories of construction, procurement, and professional service contracts. Develop availability and capacity studies, and a goal-setting methodology supported by that data;

(i) *Identify Disparity* - Conduct a statistical analysis to identify the disparity between the actual availability and capacity of highway construction firms owned by minorities and women, and the availability and capacity of such firms that would reasonably be expected to exist, absent past discrimination. Recommend a methodology to determine when parity will be achieved at which time such programs instituted will no longer be required;

(j) *Neutral Techniques* - Provide evidence of past attempts by the State of North Carolina and the private sector to develop and implement race-and-gender-neutral means to increase minority and women business participation in highway construction. Identify and determine the effectiveness of

race or gender neutral techniques that might have been used to increase minority and women business participation in highway construction activities. Include efforts by the Department of Transportation to involve minority and women contractors in highway construction without mandates from the General Assembly or the federal government;

(k) *Discriminatory Laws and Practices* - Identify laws enacted by the General Assembly or policies, administrative rules, or practices implemented by the Department of Transportation that might serve to discriminate against minorities and women directly and discuss their impacts on MBEs/WBEs. Document whether the department, or the General Assembly, has been a passive participant to discrimination which may have contributed to disparity in the highway construction industry;

8. *EXPECTED RESULTS* - **As noted previously, if discrimination is documented the consultant will be expected to propose remedies, policy changes and draft legislation, if necessary. The proposed plan of action is to be narrowly tailored to include only qualified MBEs/WBEs and limited to the specific racial or ethnic groups found to have been discriminated against in the past and that continue to suffer from the effects of such discrimination.**

These proposals should be innovative, far-reaching, results-oriented and realistic in their application. In addition, the consultant's proposals should consider whether it is in the best interest of the State of North Carolina to provide for diversity in the award of contracts for highway construction and related activities.

9. *MONITOR COURT FINDINGS* - The services noted above may require modification as a result of further court actions that might occur between the time the request for proposal is issued and the study completed. Consequently, the consultant will be required to monitor any other court finding that may affect the study and will determine how the study might be affected as a result of any subsequent court ruling. These findings will be reported to the Joint Legislative Highway Oversight Committee, immediately, and included in the consultant's final report.

STATE OF NORTH CAROLINA
NORTH CAROLINA GENERAL ASSEMBLY
STUDY OF MINORITY AND WOMEN BUSINESS PARTICIPATION IN HIGHWAY CONSTRUCTION
REQUEST FOR PROPOSALS

I. INFORMATION FOR VENDORS

C. VENDOR RESPONSIBILITIES AND QUALIFICATIONS

1. The selected consultant must plan, organize and conduct the study. Vendors submitting proposals must:

   (a) *Work Plans* - Prepare detailed work plans that describe the course of action for completing the project, explain how the project will be conducted, and elaborate upon the understanding of the project and scope of work;

   (b) *Nature of Services* - Discuss the nature of services proposed for the project, the complexities of the project and any problems anticipated;

   (c) *Organizational Chart* - Prepare an organizational chart which identifies key personnel and subcontractors that would participate on this project. Include a description of assignments and scope of work for personnel, and the scope of work which would be assigned to subcontractors;

   (d) *Subcontractor Qualifications* - Describe the qualifications of each subcontractor which the consultant intends to use: the scope of the work, number of work hours, and the percent of total proposed work hours which will be assigned to each of them. Include resumes for the subcontractor's key personnel who will be assigned to this project;

   (e) *Resumes* - Submit current, complete resumes for the vendor's project manager and key staff personnel. Include a description of their qualifications (especially those that may be uniquely qualified to work on this project); a description of their position within the vendor's firm, and length of employment with the firm. Key personnel identified in this proposal will be expected to remain assigned to the project for its duration. The firm/team should consist of members with graduate level education and experience in economic and statistical analysis, and experienced in studies dealing with race and gender discrimination.

   (f) *Work Experience* - Prepare a list of projects and work experience which is similar to the work described in this proposal or which the consultant believes would be relevant in evaluating its capability to perform the work. A description of the firm's (and subcontractors, if used) qualifications, background, MBE/WBE status, and experience that makes the firm particularly qualified for this project is necessary, as well as the firm's background and experience in research methods involving minority and women owned businesses for the past three years;

(g) *Cost Estimate* - Identify the work hours and cost estimates for the work described in the request for proposal using Attachment 2. These estimates must be supported with sufficient information to allow the issuing agency to evaluate whether the estimated level of effort and total estimated cost is reasonable;

(h) *Schedule* - Include an overall schedule of the proposed work from the date of the notice to proceed to the date work is completed;

(i) *Coordination of Efforts* - Describe the consultant's ability to effectively and conveniently perform the work locally and how the consultant plans to coordinate its efforts with the issuing agency, with the Department of Transportation, with other governmental entities, and with subcontractors, if used.

(j) *Office Addresses* - List office addresses and total number of employees for the consultant (and any subcontractors used), and the number of professional and support staff employees located at those offices. State the length of time the offices have been in existence at the locations specified.

2. *UNDERSTANDING OF GOVERNMENT OPERATIONS* - The consultant should have a thorough understanding of governmental operations and agencies. Since the results of this study will be used to establish a legally defensible program of highway construction goals for minority and women owned businesses, vendors must demonstrate clearly and succinctly that they have the necessary experience and qualifications and the proven track record to complete the project successfully, on time, and within budget.

3. *WORKING SPACE* - The North Carolina General Assembly and the North Carolina Department of Transportation will provide appropriate working space (including furniture and telephones) for the contractor from start to completion of the study. All professional staffing and computers or word-processing equipment necessary to complete the study effort must be furnished by the consultant.

STATE OF NORTH CAROLINA
NORTH CAROLINA GENERAL ASSEMBLY
STUDY OF MINORITY AND WOMEN BUSINESS PARTICIPATION IN HIGHWAY CONSTRUCTION
REQUEST FOR PROPOSALS

I. INFORMATION FOR VENDORS

D. TIME FRAME CONSIDERATIONS

Anticipated key dates associated with the project are listed in the table below:

Event	*Date*
Letters of Interest	Mailed on February 13 and March 16, 1992
Request for RFP from Vendors	Mailed on March 4 and April 6, 1992
RFP Mailed to Vendors	April 29, 1992
Preproposal Conference	May 18, 1992
Proposals Due	June 1, 1992
Interview of Finalists by JLHOC Subcommittee	June 8, 1992
Award Contract	June 22, 1992
Begin the Study	June 29, 1992
Complete the Study and Submit Final Report	December 29, 1992

STATE OF NORTH CAROLINA
NORTH CAROLINA GENERAL ASSEMBLY
STUDY OF MINORITY AND WOMEN BUSINESS PARTICIPATION IN HIGHWAY CONSTRUCTION

REQUEST FOR PROPOSALS

I. INFORMATION FOR VENDORS

E. TERMS AND CONDITIONS OF THE RESULTING CONTRACT

Following are the terms and conditions of the contract for conducting the project. Other terms or conditions may be added later.

1. *CONTRACT PERIOD* - The term of contract shall begin at its signing and shall end on or before December 29, 1992, unless extended or terminated as provided herein.

2. *TERMINATION* - Upon mutual written agreement of the Joint Legislative Highway Oversight Committee and the contractor, the contract may be terminated at any time. Failure to perform by the contractor may result in termination by the Joint Legislative Highway Oversight Committee. In addition, the Joint Legislative Highway Oversight Committee reserves the right to terminate the contract at its discretion with 10 days written notice. In the event of termination, the contractor will be paid an amount commensurate with the work completed.

3. *TRANSFER OF ASSIGNMENT OF CONTRACT* - The contract shall not be transferred or assigned to a third party.

4. *CONFIDENTIALITY OF DATA* - Contractor agrees to protect the confidentiality of any files, data or other materials provided by the Joint Legislative Highway Oversight Committee and to restrict its use to the purpose of performing this contract and not others. The contractor must comply with the provisions of Article 17 of Chapter 120 of the General Statutes regarding the confidentiality between the contractor and the General Assembly (see Attachment 4).

5. *CARE OF DATA* - Contractor shall take all steps necessary to safeguard any data, files, reports or other information from loss, destruction or erasure. Any costs or replacement expenses, or damages resulting from the loss of such data shall be borne by the contractor. Upon completion of the study, a copy of all records must be turned over to the North Carolina General Assembly.

6. *EQUAL OPPORTUNITY EMPLOYMENT STATEMENT* - The nondiscrimination clause contained in Section 202 Executive Order 11246, amended by Executive Order 11375, relative to equal employment opportunity for all persons without regard to race, color, religion, sex, age or national origin, and the implementing regulations prescribed by the secretary of labor, are incorporated herein.

The program for Employment of the Handicapped (Affirmative Action) Regulations issued by the Secretary of Labor of the United States in Title 20, Part 741, Chapter VI, Subchapter "C" of the Code of Federal Regulations, pursuant to the provisions of Executive Order 11758 and Section 503 of the Federal Rehabilitation Act of 1973 are incorporated herein.

7. *INSURANCE* - The contractor shall obtain, pay for, and keep in force Worker's Compensation Insurance, as required by the laws of North Carolina, covering all of the contractor's employees engaged in any work hereupon.

8. *PERFORMANCE BOND* - The Joint Legislative Highway Oversight Committee may require either a performance bond up to the full amount of the contract or another performance guarantee.

9. *PAYMENT* - Payment for all work will be made on a monthly basis as the project progresses within 30 days following receipt of invoices from contractor and approval of progress by the Chairmen of the Joint Legislative Highway Oversight Committee, Subcommittee on Minority and Women Business Goals Program. Payments will be tied to services performed in accordance with the work plan submitted with this RFP.

STATE OF NORTH CAROLINA
NORTH CAROLINA GENERAL ASSEMBLY
STUDY OF MINORITY AND WOMEN BUSINESS PARTICIPATION IN HIGHWAY CONSTRUCTION
REQUEST FOR PROPOSALS

II. INSTRUCTIONS FOR VENDORS

A. RFP REQUIREMENTS

Proposals for the study will be accepted from qualifying firms that are in operation at this time. Proposals must be submitted in two separate, sealed packages; one must be labeled **Technical Proposal** and the other **Cost Proposal**. Each original must be signed and dated by an official authorized to bind the firm. Two original-signature copies are required in addition to ten (10) extra copies. All proposals must be received by this Office not later than 5:00 p.m. on June 1, 1992.

The proposals must be submitted to:

North Carolina General Assembly
Joint Legislative Highway Oversight Committee
c/o Fiscal Research Division
Room 619 Legislative Office Building
300 North Salisbury Street
Raleigh, North Carolina 27603-5925

All proposals must comply with the format prescribed under the Proposal Format Section (Section II-D) of this RFP. Vendors should direct all inquiries regarding this RFP to Frederick Aikens or Richard Bostic at (919) 733-4910.

STATE OF NORTH CAROLINA
NORTH CAROLINA GENERAL ASSEMBLY
STUDY OF MINORITY AND WOMEN BUSINESS PARTICIPATION IN HIGHWAY CONSTRUCTION
REQUEST FOR PROPOSALS

II. INSTRUCTIONS FOR VENDORS

B. PREPROPOSAL CONFERENCE AND READING ROOM

1. On the date specified in the Timeframe Considerations section (Section I.D) of this RFP, a preproposal conference for all potential vendors will be conducted in Room 643 on the sixth floor of the Legislative Office Building at the address listed in the RFP Requirements section (Section II.A) of this RFP. The conference will be from 10:00 a.m. until 12 noon on May 18, 1992. Attendance at this conference is mandatory. Vendors are encouraged to be prompt and to allow time for finding suitable parking. Parking is available in the visitors section of the state parking deck on North Salisbury Street.

2. All questions concerning this RFP may be submitted in writing prior to the preproposal conference to the address in Section II.A of this document. Additional questions may be submitted at the preproposal conference. A written summary of important questions and answers will be provided by mail after the conference to all vendors attending the preproposal conference.

3. A reading room will be set up in the Legislative Office Building of the North Carolina General Assembly at 8:00 a.m. at the address shown below on May 18, 1992:

   North Carolina General Assembly
   Legislative Office Building
   300 North Salisbury Street
   Room 634
   Raleigh, North Carolina 27601-5925
   (919) 733-4910
   ATTENTION: Frederick Aikens or Richard Bostic

4. Materials and documents that offer statistical and other information on the North Carolina Department of Transportation, its authority, policies and procedures for awarding highway construction contracts, and the Department's minority and women goals program will be available for vendor review at the above address. Appointments for reviewing this material should be scheduled by calling or writing the North Carolina General Assembly at the above address or phone number.

STATE OF NORTH CAROLINA
NORTH CAROLINA GENERAL ASSEMBLY
STUDY OF MINORITY AND WOMEN BUSINESS PARTICIPATION IN HIGHWAY CONSTRUCTION

REQUEST FOR PROPOSALS

II. INSTRUCTIONS FOR VENDORS

C. GENERAL CONDITIONS FOR SUBMITTING PROPOSALS

1. *UNSOLICITED PROPOSAL CHANGES* - Any change to a proposal that is received after the closing date of this RFP, June 1, 1992 (Section I.D), and that is not specifically solicited by the state, will be rejected.

2. *DECLINE TO OFFER* - Any firm that receives a copy of the RFP but declines to make an offer is requested to send a formal "Decline to Bid" to the issuing office. Failure to respond as requested may subject the firm to removal from consideration on future requirements.

3. *COSTS FOR PROPOSAL PREPARATION* - Any costs incurred by vendors in preparing or submitting offers are the vendors' sole responsibility; the state of North Carolina will not reimburse any vendor for any costs incurred prior to award.

4. *ELABORATE PROPOSALS* - Elaborate proposals in the form of brochures or other presentations beyond those necessary to present a complete, effective proposal are not desired.

5. *ORAL EXPLANATIONS* - The Joint Legislative Highway Oversight Committee will not be bound by oral explanations or instructions given at any time during the competitive process or after award.

6. *REFERENCE TO OTHER DATA* - Only information that is received in response to this RFP will be evaluated; reference to information previously submitted will not suffice.

7. *PROPRIETARY OR OTHER "CONFIDENTIAL" INFORMATION* - Any trade secrets or other data that the vendor does not wish disclosed to other than state personnel involved in the evaluation or contract administration will be kept confidential if identified as described below:

   Each page shall be identified in boldface at the top and bottom as Confidential. Any *section* of the proposal that is to remain confidential should, in addition, be so marked in boldface *on the title page* of that section. Net cost information may not be deemed confidential.

8. *TIME FOR ACCEPTANCE* - Each proposal must state that it is a firm offer which may be accepted within a period of 180 days, although the contract is expected to be awarded prior to that time.

9. *FORM OF PROPOSAL* - Each proposal should be submitted in a form that, at the option of the Joint Legislative Highway Oversight Committee, may be incorporated verbatim into a contract.

10. *EXCEPTIONS* - Any exceptions to terms, conditions, or other requirements in any part of this RFP must be clearly pointed out in a distinct section of the appropriate Cost Proposal or Technical proposal. Otherwise, the Joint Legislative Highway Oversight Committee will consider that all items offered are in strict compliance with the RFP, and the successful vendor(s) will be responsible for compliance.

11. *ADVERTISING* - In submitting their proposals, the vendors agree not to use the results therefrom as a part of any news release or commercial advertising without prior written approval of the Joint Legislative Highway Oversight Committee.

12. *CONFIDENTIALITY OF PROPOSALS* - In submitting their proposals, the vendors agree not to discuss or otherwise reveal their technical or cost information to any other sources, government or private, until after the award of the contract. Vendors not in compliance with this provision may be disqualified, at the option of the Joint Legislative Highway Oversight Committee from contract award. Only discussions authorized by the Joint Legislative Highway Oversight Committee are exempt from this provision.

13. *RIGHT TO SUBMIT MATERIAL* - All responses, inquiries or correspondence relating to or in reference to this RFP, and all other reports, charts, displays, schedules, exhibits, and other documentation submitted by the vendors will become the property of the Joint Legislative Highway Oversight Committee.

14. *COMPETITIVE OFFER* - Pursuant to the provisions of G.S. 143-54, and under penalty of perjury, the signer of any proposal submitted in response to this RFP thereby certifies that their proposal has not been arrived at collusively or otherwise in violation of federal or North Carolina antitrust laws.

15. *VENDORS' REPRESENTATIVE* - Vendors shall submit the name, address and telephone number of the person(s) with authority to bind the firm and answer questions or provide clarification concerning the firm's proposal.

II. INSTRUCTIONS FOR VENDORS

D. PROPOSAL FORMAT

1. As described in Section II.A of this RFP, proposals for the project must be submitted in two separate sealed envelopes, one containing the **Technical Proposal** and the other the **Cost Proposal**. Requirements for each of these items are described below.

Technical Proposal Content

2. The Technical Proposal for the project shall include the following:

   (a) Statement of the vendor's understanding of the objectives of the project and responsibilities for completing the project, with a clear, straightforward explanation of how the vendor will ensure the successful, smooth performance of the project.

   (b) Statement of the vendor's methodology and planned approach, and course of action for completing the objectives of the project including organization structure, staffing assignments, work plans, with timetables, and time-sequenced events.

   (c) Statement of the specific major products to be delivered and results/benefits to be obtained as part of the project and the timetable for each deliverable.

   (d) Resumes of the project manager and key personnel with emphasis on relevant current experience. Include and clearly indicate specialists, subcontracted organizations and their personnel.

   (e) Statement of vendor's qualifications for accomplishing all project objectives, including project management, the quality control of deliverables or expected results. A schedule showing major tasks assigned project personnel must be included in the technical proposal. This schedule should provide the following information for each major task or activity to be accomplished as part of the project:

      - Vendor person(s) responsible for the performance and/or quality assurance of the particular task or activity.
      - Qualifications (experience or training) of the person(s) to assume the responsibility for that task or activity.

(f) At least three references for applicable projects conducted in situations and/or environments similar to this work effort.

3. In summary, vendors must demonstrate clearly and succinctly that they have the necessary experience and qualifications and the proven track record to complete the project successfully, on time, and within budget. Elaborate, verbose technical proposal documentation is neither wanted nor required to establish fitness or credentials for accomplishing this work.

Cost Proposal Content

4. The cost proposal for the project shall include the following:

   (a) A statement of personnel-related costs and any other expenses or fees that must be authorized by the Joint Legislative Highway Oversight Committee for payment.

   (b) A current balance sheet, a certified financial statement or equivalent information that indicates the financial position of the firm and any subcontracting firms.

5. **The resulting contract between the Joint Legislative Highway Oversight Committee and the selected vendor will not be a time and materials type of agreement; therefore, any time and/or expense needed to complete the project successfully above those costs stated in the cost proposal must be the sole responsibility of the vendor.**

III. EVALUATION PROCESS

A. EVALUATION PROCESS EXPLANATION

1. At their option, the evaluators may request oral presentations or discussions with any or all vendors for the purpose of clarification or to amplify the material presented in any part of the proposal. However, vendors are advised that this provision is not mandatory; therefore, all proposals should be complete and concise and reflect the most favorable terms available from the bidders. Vendors may be required to provide copies of reports and other pertinent documentation they have completed for similar projects.

2. Upon completion of the technical evaluation, the cost proposals of those technical proposals deemed acceptable will be removed from safekeeping and opened. The cost offered will then become a matter of public record. Interested parties are cautioned, however, that these costs and their components are subject to further evaluation, and, therefore, may not be an exact indicator of a vendor's pricing position.

3. Proposals will be evaluated according to the criteria discussed on Page 21. The award of a contract to one vendor does not mean that the other proposals lacked merit, but with all factors considered, THE BEST SELECTED PROPOSAL WAS DEEMED TO PROVIDE THE BEST COMBINATION OF TECHNICAL AND COST VALUES TO THE STATE OF NORTH CAROLINA.

4. Vendors are cautioned that this is a Request for Proposals, not a request to contract, and the Joint Legislative Highway Oversight Committee reserves the unqualified right to reject any or all offers for any contract when such rejection is deemed to be in the best interest of the State of North Carolina.

III. EVALUATION PROCESS

B. EVALUATION CRITERIA

1. Understanding of the key objectives of the project, described in I.B. 7(a)-(k).
2. Approach to the completion of the project including methodology to be employed, work plan to be followed, concepts to be emphasized, issues to be addressed, and resources to be used.
3. Products and results expected from the project and explanation of how they will be developed as the project is completed, including the timetable for key deliverables/activities.
4. Staffing resources that will be assigned to the project including:
   (a) Reasonable composition of experience levels and areas of expertise.
   (b) use of unique resources for specific areas, organizations and disciplines involved.
   (c) Adequate time commitment of senior management and technical and business specialists.
   (d) use of subcontractor organizations or personnel as necessary to provide the experience and expertise for meeting the objectives of the project.
5. Staff experience, project management procedures and techniques, vendor quality assurance reviews, and other items that will be employed to ensure the timely delivery of superior quality products and expected results.
6. Capability, including proven track record, to ensure the successful delivery of the major expected results of the project that are described in Section I.B of this RFP.
7. Proven ability to meet the qualifications and credentials described in Section I.C of this RFP.
8. Cost.

ATTACHMENT 1

G. S. 136-28.4

§ 136-28.4. State Policy Concerning Participation by Disadvantaged Businesses in Highway Contracts.

(a) It is the policy of this State to encourage and promote participation by disadvantaged businesses in contracts let by the Department pursuant to this Chapter for the design, construction, alteration, or maintenance of State highways, roads, streets, or bridges and in the procurement of materials for these projects. All State agencies, institutions, and political subdivisions shall cooperate with the Department of Transportation and all other State agencies, institutions, and political subdivisions in efforts to encourage and promote the use of disadvantaged businesses in these contracts.

(b) A ten percent (10%) goal is established for participation by minority businesses and a five percent (5%) goal for participation by women businesses is established in contracts let by the Department of Transportation for the design, construction, alteration, or maintenance of State highways, roads, streets, or bridges and for the procurement of materials for these projects. The Department of Transportation shall endeavor to award to minority businesses at least ten percent (10%), by value, of the contracts it lets for these purposes, and shall endeavor to award to women businesses at least five percent (5%), by value, of the contracts it lets for these purposes. The Department shall adopt written procedures specifying the steps it will take to achieve these goals. The Department shall give equal opportunity for contracts it lets without regard to race, religion, color, creed, national origin, sex, age, or handicapping condition, as defined in G.S. 168A-3, to all contractors and businesses otherwise qualified.

(c) The following definitions apply in this section:

(1) "Disadvantaged business" has the same meaning as in 40 C.F.R. § 23.62.

(2) "Minority" has the same meaning as in 49 C.F.R. § 23.5 (1983, c. 692, s. 3; 1989, c. 692, s. 1.5; 1989 (Reg. Sess., 1990), c. 1066, s. 143(s).)

LACY H. THORNBURG
ATTORNEY GENERAL

State of North Carolina
Department of Justice
P. O. Box 25201
RALEIGH
27611

(919) 733-3316
(919) 733-4185
FAX 733-9329

CONFIDENTIAL - PROTECTED
BY ATTORNEY-CLIENT PRIVILEGE

--MEMORANDUM--

TO: Thomas J. Harrelson, Secretary
North Carolina Department of Transportation

FROM: Grayson G. Kelley III
Assistant Attorney General

DATE: August 26, 1991

SUBJECT: Dickerson Carolina, Inc. v. Thomas J. Harrelson, et al
MBE/WBE Goals Program on State-funded Projects

As you are aware Dickerson Carolina, Inc. has initiated a lawsuit against you and twenty-three other NCDOT board members and staff personnel in connection with the March 1, 1991 decision of the Board to award the contract for Project Number 6.671043 to the second low bidder, rather than to Dickerson, the low bidder. The lawsuit demands four types of relief: (1) that N.C.G.S. §136-28.4, the statute which resulted in the implementation of NCDOT's goals program, be declared unconstitutional; (2) that NCDOT's goals program be declared in violation of law; (3) that the project be suspended and awarded to Dickerson, and; (4) that Dickerson be awarded monetary damages and attorney's fees under 42 U.S.C. §1981, 1983 and 1988.

The underlying constitutional basis for Dickerson's lawsuit is the January 23, 1989, decision of the United States Supreme Court in City of

Richmond v. J. A. Croson Co., 488 U.S. 469 (1989). In Croson the Supreme Court declared unconstitutional the City of Richmond's program under which non-minority-owned prime contractors were required to set aside for minority subcontractors at least thirty per cent of the dollar amount of contracts awarded by the city. As a matter of practical application the Court ruled that states and local governments may only consider racial or gender-related factors in connection with the award of public contracts where there exists a compelling public interest in rectifying past discrimination and where specific findings have been made documenting the scope of the discrimination and the necessary remedy. The program itself must be narrowly tailored to focus on the specific problem in the specific industry and area identified by the documented findings. These requirements do not apply to programs mandated by federal law in that Congress has been held to have constitutional powers exceeding those possessed by states and local governments.

In connection with the Attorney General's representation of the State defendants in the Dickerson lawsuit we have reviewed relevant state statutes, NCDOT's goals program and decisions which have been issued by the courts since the Croson opinion. This review has raised serious concerns about the legality of NCDOT's current goals program for State-funded projects. These concerns apply equally to the position of the State defendants in the Dickerson case.

In December 1989, the co-chairmen of the Legislative Research Commission's Study Committee on Minority Business Contracts and Small Business Assistance requested from this office an opinion as to the constitutionality of several North Carolina statutes containing provisions for minority contractor

participation goals, including N.C.G.S. §136-28.4. On January 25, 1990, this office issued an official opinion that these provisions, including N.C.G.S. §136-28.4, appeared to be constitutional. It remains our opinion that N.C.G.S. §136-28.4 is constitutionally sound. The statute itself does not mandate the award of public funds to minority or women businesses and, in fact, requires NCDOT to give equal opportunity for contracts it lets without regard to race, religion, color, creed, national origin, sex, age or handicapping condition.

NCDOT's goals program, which was implemented in response to the requirements of N.C.G.S. §136-28.4, does raise serious constitutional questions. It is our understanding that under the goals program contractors are required to achieve a MBE (minority business enterprise) and WBE (women business enterprise) percentage participation goal for each construction contract awarded by the Department of Transportation. Contractors failing to achieve the specified goal must submit documentation demonstrating that a "good faith effort" was made to achieve the goal. If NCDOT's Goals Compliance Committee determines that a low bidder failing to achieve the specified goals has also failed to demonstrate a "good faith effort," a recommendation is made to the Board that the bid proposal be rejected and the contract awarded to another bidder. It was under this program that Dickerson's bid was rejected and the contract awarded to the second low bidder.

The Croson decision has resulted in a great deal of analysis, discussion and confusion as to its application to the numerous state and local programs mandating MBE and WBE participation. Numerous legal challenges to these programs have been instituted. Within the last year several court decisions have

been rendered which clarify, to varying degrees, the extent to which state and local governments may impose MBE and WBE requirements. Two primary principles are consistent in these decisions: (1) The public body imposing the requirements must have documented evidence supporting its compelling interest in remedying past discrimination, and; (2) The program itself must be "narrowly tailored" to impose the requirements only on specific industries in specific geographical locations as necessary to remedy the prior discrimination.

Three cases are of primary significance in our review of NCDOT's program. In Milwaukee County Pavers Association v. Fiedler, 922 F.2d 419 (7th Cir. 1991) the United States Court of Appeals for the Seventh Circuit upheld a ruling by a federal district court judge that Wisconsin's set-aside program in connection with highway construction was unconstitutional. This decision, which was decided January 15, 1991, held that Wisconsin's program violated the requirements of Croson because of the state's failure to compile documentary evidence that the program was necessary to rectify past discrimination against minority contractors. In Harrison and Burrowes Bridge Constructors v. Cuomo, 743 F.Supp. 977 (N.D.N.Y. 1990), a contractor challenged the goals program implemented by the State of New York in connection with highway construction. New York's program was established by law and was, in many respects, more flexible than NCDOT's program. The program was enjoined by a federal district court judge in August 1990, primarily because of the state's failure to compile a documented record of past discrimination. Although this ruling was not a final decision as to the constitutionality of the state's program, it is significant because the New York program contained a "good faith effort" exception similar

to that utilized by NCDOT. I have discussed this case with New York officials and have been advised that the program has been administratively converted to a voluntary system of minority participation.

A third decision, Coral Construction Company v. King County, 1991 WL 148314 (9th Cir. 1991), was decided on August 8, 1991. In that case the United States Court of Appeals for the Ninth Circuit rejected a county program which had been previously upheld by a lower court. Although the lower court had found that the county had compiled significant documentary evidence of past discriminatory contracting practices, the Court of Appeals held that an additional statistical foundation was necessary to justify the program. This case appears to demonstrate the strict standard of review which will be applied to documentary evidence compiled as justification for goals programs. A positive aspect of the court's ruling is language indicating that it may be acceptable to compile this evidence after enactment of the program.

At this point we have been unable to identify substantive findings of past discrimination which may have been considered by the legislature prior to the enactment of N.C.G.S. §136-28.4. We are also advised that NCDOT did not compile independent documentation prior to implementing the goals program in July 1990. For this reason alone, without consideration of other elements of the program, it is our opinion that the mandatory aspects of NCDOT's goals program are unlikely to withstand legal challenge. Both the Dickerson lawsuit and future lawsuits by other contractors denied contract awards under the goals compliance program may expose NCDOT, its Board members and employees, to significant liability for damages and attorney's fees.

In light of the foregoing concerns, we recommend that the NCDOT goals program be reviewed and an investigation be conducted to ascertain whether sufficient evidence of discrimination exists to justify continuation of the goals program in the present form. During the pendency of this review and investigation, we recommend NCDOT place a moratorium on the rejection of bids for failure to comply with goals or good faith effort requirements. Voluntary aspects of the program may remain in effect.

Please contact me in regard to any further assistance you may require in regard to this issue.

GGK:chw

ATTACHMENT 3

COSTS

1. Estimated Work Hours

Personnel Classification	*Hourly Billing Rate*	*Estimated Hours*	*Estimated Costs*

TOTAL ESTIMATED WORK HOUR COSTS **$**

2. *Reimbursable Expenses*

Reimbursable Expense	*Rate Amount*	*Total Estimated Reimbursable Expense*

TOTAL ESTIMATED REIMBURSABLE EXPENSES$

TOTAL ESTIMATED COSTS **$**

G. S. 120-130

§120-130. Drafting and Information Requests to Legislative Employees

(a) A drafting request made to a legislative employee from a legislator is confidential. Neither the identity of the legislator making the request nor, except to the extent necessary to answer the request, the existence of the request may be revealed to any person who is not a legislative employee without the consent of the legislator.

(b) An information request made to a legislative employee from a legislator is confidential. Neither the identity of the legislator making the request nor, except to the extent necessary to answer the request, the existence of the request may be revealed to any person who is not a legislative employee without the consent of the legislator. Notwithstanding the preceding sentences of this subsection, the periodic publication by the Fiscal Research Division of the Legislative Services Office of a list of information requests is not prohibited, if the identity of the legislator making the request is not revealed.

(c) Any supporting documents submitted or caused to be submitted to a legislative employee by a legislator in connection with a drafting or information request are confidential. Except to the extent necessary to answer the request, neither the document nor copies of it, nor the identity of the person, firm, or association producing it, may be provided to any person who is not a legislative employee without the consent of the legislator.

(d) Drafting or information requests or supporting documents are not "public records" as defined by G.S. 132-1. (1983, c. 900, s. 1.)

1.0 Request For Proposal

1.1 Invitation

The State of Florida Department of Transportation requests written proposals from qualified firms to perform a disparity study for the minority groups as defined in Sections 334.004(2) and 339.0805(5), Florida Statutes, providing evidence to support or contradict the need of these minority groups for special assistance in the Florida Department of Transportation Highway Construction Contracts and other related economic development programs.

For the purpose of this document, the term "proposer" means the prime Consultant acting for itself and those individuals, partnerships, firms, or corporations comprising the proposer's team by joint venture or subcontract. The term "proposal" means the complete response of the proposer to the request or invitation for proposals, including properly completed forms and supporting documentation.

1.2 Project Identification

The following project identification number has been assigned:
RFP-DOT-91/92-9002

1.3 Contracting Agency

The contracting agency is the State of Florida Department of Transportation, hereinafter called the "Department".

1.4 Pre-Proposal Meeting

Bidder's Conference

1.4.1 General

The Department will convene a meeting of recipients of this Request for Proposal (RFP) on October 3, 1991 at 10:00 A.M.. The meeting will be held at the Department's Haydon Burns Building Auditorium, Tallahassee, Florida.

1.4.2 Purpose

The purpose of the meeting will be for the Department to respond to questions from the RFP recipients and to clarify contractual requirements in an open forum. In addition, recommendations by the recipients concerning the contents, requirements, scope of services, etc., contained in this RFP will be discussed. Any changes and/or resulting addenda to the RFP will be the sole prerogative of the Department.

1.5 Verbal Instructions

NO NEGOTIATIONS, DECISIONS, OR ACTIONS SHALL BE INITIATED OR EXECUTED BY A PROPOSER AS A RESULT OF ANY VERBAL DISCUSSIONS WITH A STATE EMPLOYEE. ONLY THOSE COMMUNICATIONS WHICH ARE IN WRITING

FROM THE DEPARTMENT MAY BE CONSIDERED AS A DULY AUTHORIZED EXPRESSION ON BEHALF OF THE DEPARTMENT. The Department will forward to all proposers in receipt of the Request for Proposal, written responses of the Department to a proposer's question.

Also, only written communications from proposers, which are signed by persons who are authorized to contractually bind the proposers, will be recognized by the State as duly authorized expressions on behalf of the proposers.

Any technical questions arising from this Request for Proposal must be forwarded to the person and address indicated below:

Mrs. Juanita Moore
Minority Programs Office
605 Suwannee Street, MS #65
Tallahassee, Florida 32399-0450
Telephone: (904) 487-3145

1.6 Qualifications for Consultant Services

1.6.1 General

The Department will determine whether the proposer is qualified to perform the services being contracted based upon the Consultant demonstrating in its proposal satisfactory experience and capability in the work area. The proposer shall include the necessary experienced personnel and facilities to support the activities associated with this contract.

1.6.2 Qualifications of Key Personnel

Those individuals who will be directly involved in the project must have demonstrated experience in the areas delineated in the scope of work. Individuals whose qualifications are presented will be committed to the project for its duration unless otherwise excepted by the Contract Manager.

1.6.3 Authorizations and Licenses

The Consultant must be authorized to do business in the State of Florida. Such authorization and/or licenses should be obtained by the proposal due date and time, but in any case, will be required prior to award of the contract. For corporate authorization, contact:

Florida Department of State
Division of Corporations
The Capitol Building
Tallahassee, Florida 32399
(904) 487-6052

1.6.4 Review of Facilities

After the proposal due date and prior to contract award, the Department reserves the right to perform or have performed, an on-site review of the proposer's facilities. This review will serve to verify data and representations submitted by the Proposer and to determine whether the proposer has an adequate, qualified, and experienced staff, and can provide overall management facilities. The review will also serve to verify whether the Proposer has financial capability adequate to meet the contract requirements.

In the event the Department determines that the size or nature of the proposer's facilities or the number of experienced personnel (including technical staff) are not reasonably adequate to ensure satisfactory contract performance, the Department has the right to reject the proposal.

1.7 Department Reservations and Responsiveness of Proposals

1.7.1 General

The Department reserves the right to accept or reject any or all proposals received and reserves the right to make an award without further discussion of the proposals submitted. Therefore, the proposals should be submitted initially in the most favorable manner. It is understood that the proposal will become a part of the official file on this matter without obligation to the Department.

1.7.2 Responsiveness of Proposals

All proposals must be in writing. A responsive proposal is an offer to perform the scope of services called for in this Request for Proposal. Proposals found to be non-responsive proposals shall not be considered. Proposals may be rejected if found to be irregular or not in conformance with the requirements and instructions herein contained. A proposal may be found to be irregular or non-responsive by reasons, including, but not limited to, failure to utilize or complete prescribed forms, conditional proposals, incomplete proposals, indefinite or ambiguous proposals, improper or undated signatures.

1.7.3 Multiple Proposals

Proposals may be rejected if more than one proposal is received from an individual, firm, partnership, or corporation, or combination thereof, under the same or different names. Such duplicate interest may cause the rejection of all proposals in which such proposer has participated.

1.7.4 Other Conditions

Other conditions which may cause rejection of proposals include evidence of collusion among proposers, obvious lack of experience or expertise to perform the required work, or failure to perform or meet financial obligations on previous contracts, or in the event an individual, firm, partnership, or corporation is on the United States Comptroller General's List of Ineligible Contractors for Federally Financed or Assisted Projects.

Proposals will be rejected if not delivered or received on or before the date and time specified as the due date for submission.

1.7.5 Waivers

The Department may waive minor informalities or irregularities in proposals received where such is merely a matter of form and not substance, and the correction or waiver of which is not prejudicial to other proposers. Minor irregularities are defined as those that will not have an adverse effect on the Department's interest and will not affect the price of the Proposals by giving a proposer an advantage or benefit not enjoyed by other proposers.

1.8 Liability Insurance

[X] No liability insurance required.

[ ] The Contractor shall carry and keep in force during the period of this Agreement a general liability insurance policy or policies with a company or companies authorized to do business in Florida, affording public liability insurance with combined bodily injury limits of at least $_____ per person and $_____ each occurrence, and property damage insurance of at least $_____ each occurrence, for the services to be rendered in accordance with this Agreement.

[ ] The Contractor shall have and maintain during the period of this Agreement, a professional liability insurance policy or policies or submittal of proof of membership of the Professional Liability Risk Management Trust Fund, or an irrevocable letter of credit established pursuant to chapter 675 and section 337.106, Florida Statutes, with a company or companies authorized to do business in the State of Florida, affording professional liability coverage for the professional services to be rendered in accordance with this Agreement in such the amount of $_____. The Contractor shall maintain professional liability coverage for a minimum of three years after completion of the services rendered herein.

1.9 Contractual Obligations

The general terms and conditions of any agreement between the Department and the selected proposer will be guided by State procedures.

Each individual, partnership, firm or corporation that is part of the proposer's team, either by joint venture, or subcontract, will be subject to, and comply with, the contractual requirements.

The basic form of Agreement shall be the State of Florida Department of Transportation's Standard Consultant Agreement, attached hereto as Attachment 2.

1.10 Addenda

The Department will inform in writing all recipients of the RFP of any addenda to the RFP. All addenda will be acknowledged by the proposer when submitting a proposal.

1.11 Costs Incurred in Responding

This request for proposal does not commit the Department or any other public agency to pay any costs incurred by an individual firm, partnership, or corporation in the submission of proposals or to make necessary studies or designs for the preparation thereof, nor to procure or contract for any articles or services.

1.12 Cancellation Privileges

The performance by the Department, of any of its obligations under this Request for Proposal and subsequent agreement, shall be subject to and contingent upon the availability of monies lawfully appropriated for such purposes. If the Department deems at any time during the term of this agreement that monies lawfully applicable to this agreement shall not be available for the remainder of this term, or that for cause the agreement shall be cancelled, the Department shall notify the Consultant in writing, whereupon the obligations of the parties herein shall end within thirty (30) days upon giving of such notice and this agreement shall be considered cancelled by mutual consent.

1.13 Proposal Submission

1.13.1 General

By submitting a proposal, the propcser represents that he understands and accepts the terms and conditions to be met and the character, quality and scope of services to be provided.

All proposals and associated forms will be signed and dated in ink by a duly authorized representative of the proposer.

1.13.2 Time and Place

Six (6) copies of the proposal will be submitted to:

Mr. Terry J. Cappellini, Manager
Contractual Services Office
Florida Department of Transportation
605 Suwannee Street - Mail Station 20
Tallahassee, Florida 32399-0465

Proposals will be received until 2:30 PM, local time, on October 17, 1991. Proposals received after that time and date will not be accepted and will be returned to the sender. Proposers must submit all proposals in the format specified in the Section entitled "Proposal Format Instructions" in this Request for Proposal.

1.13.3 Modification, Resubmittal and Withdrawal

Proposers may modify previously submitted proposals at any time prior to the proposal due date. Requests for modification of a submitted proposal shall be in writing and shall be signed in the same manner as the proposal. Upon receipt and acceptance of such a request, the entire proposal will be returned to the proposer and not considered unless resubmitted by the due date and time.

1.14 Proposal Opening

The Proposals will be opened by the Department's Contractual Services Office personnel at 605 Suwannee Street, Tallahassee, Florida, on October 17, 1991 at 2:30 PM. All proposal openings are open to the public.

1.15 Proposal Format Instruction

1.15.1 General Information

This section contains instructions that describe the required format for the proposal. All proposals submitted shall contain two parts and be marked as follows:

Part I Technical Proposal Number RFP-DOT-91/92-9002
(Separate Package)

Part II Cost Proposal Number RFP-DOT-91/92-9002
(Separate Package)

1.15.2 Technical Proposal (Part I) (6 copies) (Do not include cost information in Part I.)

The Proposer must submit six (6) copies of the technical proposal which are to be divided into the sections described below. Since the Department will expect all

technical proposals to be in this format, failure of the Proposer to follow this outline may result in the rejection of the proposal.

1. EXECUTIVE SUMMARY

The Executive Summary is to be written in nontechnical language to summarize the proposer's overall capabilities and approaches for accomplishing the services specified herein. The proposer is encouraged to limit the summary to no more than ten (10) pages.

2. PROPOSER'S MANAGEMENT PLAN

The Proposer shall provide a management plan which explains the approach, capabilities, and means to be used to administer and manage the work.

a. Administration and Management

Proposer should include a description of the organizational structure and management established and the methodology to be used to control costs, services reliability and to maintain schedules; as well as the means of coordination and communication between the organization and the Department.

b. Identification of Key Personnel

Provide the names of key personnel, by name, on Proposer's team, as well as a resume for each individual assigned. A description of the functions and responsibilities of each key person relative to the task to be performed is required. The approximate percent of time to be devoted exclusively for this project and to the assigned tasks also must be indicated.

3. PROPOSER'S TECHNICAL PLAN

a. Technical Approach

This section should explain the approach, capabilities, and means to be used in accomplishing the tasks in the Scope of Services, and where significant development difficulties may be anticipated and resolved. Any other specific techniques to be used should also be addressed in detail.

b. Facility Capabilities

A description and location of the proposer's

facilities as they currently exist and as they will be employed for the purpose of this work must be identified.

4. WORK PLAN

The Proposer shall provide a Work Plan (Form "F") which sets forth on an average the estimated man-hours for each skill classification of the proposer that will be utilized to perform the work required.

1.15.3 Price Proposal (Part II) (6 copies)

The price proposal information is to be submitted in a separate sealed package marked "Price Proposal Number RFP-DOT-91/92-9002". The Price Proposal information shall be submitted on the forms provided in the Request for Proposal. (Form "C" - Estimate of Work Effort and Fee)

1.15.4 Presenting the Proposal

The proposal shall be limited to a page size of eight and one-half by eleven inches (8½" x 11"). Foldout pages may be used, where appropriate, but should not exceed five (5) percent of the total number of pages comprising the proposal. Type size shall not be less than typewriter "elite". The proposals must be indexed and all pages sequentially numbered. Bindings and covers will be at the proposer's discretion.

Unnecessarily elaborate special brochures, art work, expensive paper and expensive visual and other presentation aids are neither necessary nor desired.

It is recognized that existing financial reports, documents, or brochures, such as those that delineate the proposer's general capabilities and past experience, may not comply with the prescribed format. It is not the intent to have these documents reformatted and they will be acceptable in their existing form.

1.15.5 Certified Minority Business Enterprise (CMBE) Participation

The Proposer shall address CMBE participation by either themselves or subcontractors.

The Department will add 10 points to the scores of Certified Minority Business Enterprises (CMBE) proposing as the prime consultant on this project.

The Department will add up to 10 points to the scores of firms utilizing Certified MBE's as subcontractors for services or commodities as follows:

50% and above of total project dollars - 10 points
40% - 49.9% of total project dollars - 8 points
30% - 39.9% of total project dollars - 6 points
20% - 29.9% of total project dollars - 4 points
10% - 19.9% of total project dollars - 2 points
0 - 9.9% of total project dollars - 0 points

Complete and attach the MBE Preference Points Certification Form (Form "D") in the Price Proposal if CMBE preference points are to be considered.

1.16 Proposal Evaluation

1.16.1 Evaluation Process:

A Selection Committee, hereinafter referred to as the "Committee", will be established to review and evaluate each proposal submitted in response to this Request for Proposal (RFP). The Committee will be comprised of at least three persons with background, experience, and/or professional credentials in the service area.

The Contractual Services Office will distribute to each member of the Committee a copy of each technical proposal. The committee members will independently base their evaluation of each proposal on the same criteria in order to assure that values are uniformly established. The Committee will evaluate each technical proposal on its own merit without comparison to proposals submitted by other firms and individuals. The Committee will assign points, utilizing the technical evaluation criteria identified herein and complete a technical summary.

The Contractual Services Office (CSO) will review the price proposals, conduct evaluation and prepare a summary of its price evaluation. Once the CSO has completed the review of the price proposals, the CSO will distribute to the Committee, a copy of each price proposal, along with a copy of the price proposal evaluation summary. The Committee will review this information and assign points based on price evaluation criteria identified herein.

During the process of evaluation, the Committee will conduct examinations of proposals for responsiveness to requirements of the RFP. Those determined to be non-responsive will be automatically rejected.

The Committee shall make a determination of the responsibility level of each Proposer. Proposals that are determined to have been submitted by non-responsible Proposers will be so marked.

1.16.2 Criteria for Evaluation

Technical Proposal

Technical evaluation is the process of reviewing the Proposer's Executive Summary, Management Plan, Technical Plan and Work Plan (as detailed in Section 1.15.2 Technical Proposal) for understanding of project, qualifications, technical approach and capabilities, to assure a quality product.

Price Proposal

A. Price evaluation is the review of the potential provider's cost elements to determine their appropriateness and reasonableness. Price analysis includes review of:

1. Need for categories of personnel proposed.
2. Are "reasonable and necessary" rates of pay proposed for the specific individual who will perform the work?
3. Is the indirect cost rate appropriate and is the base to which it is applied appropriate?
4. Are other cost listed "reasonable and necessary"?

B. Price evaluation is the process of examining a prospective price without evaluation of the separate cost elements and proposed profit of the potential provider. Price analysis is conducted through the comparison of price quotations submitted.

1.16.3 Point Distribution (Weighted Values)

The following point system is established for scoring the proposals:

	Point Value
1. Management Plan	30
2. Technical Plan	30
3. Work Plan	20
4. Price	20
Total Maximum Points	100

1.17 Posting of Proposal Tabulation

The proposal Tabulation will be posted with the Department of Transportation's Clerk of Agency Proceedings, Legal Operations, Room 562, Haydon Burns Building, Tallahassee, Florida 32399-0450, on October 24, 1991 and will remain posted for a period of seventy-

two (72) hours. Any proposer who feels he is adversely affected by the Department's recommended award must file with the Department of Transportation, Clerk of Agency Proceedings, 605 Suwannee Street, Tallahassee, Florida:

1. A written notice of protest within seventy-two (72) hours after posting of the proposal tabulations, and

2. A formal written protest by petition in compliance with Section 120.53 (5), Florida Statutes, within ten (10) days after the date on which the preliminary notice of protest is filed.

   Failure to file a protest within the time prescribed in Section 120.53(5), Florida Statutes, shall constitute a waiver of proceedings under Chapter 120, Florida Statutes. Either failure to file a notice of protest or failure to file a petition shall constitute such waiver.

   If the Department is unable to post as defined above, the Department will notify all proposer's by express mail and/or telephone.

1.18 Award of the Contract

The Department intends to award the contract to the responsible and responsive proposer whose proposal is determined to be the most advantageous to the Department.

1.19 Drug - Free Workplace Programs

Whenever two or more bids which are equal with respect to price, quality and service are received for the procurement of commodities or services, a bid received from a business that certifies that it has implemented a drug-free workplace program in accordance with Section 287.087, Florida Statutes, shall be given preference in the award process. Attach the Drug-Free Workplace Certification Form (Form "E") in the Technical Proposal (if applicable).

1.20 Contract Execution

The Department and the successful proposer will enter into a contract establishing the obligations of both parties.

1.21 Attachments

Attachment 1: Scope of Services

Attachment 2: Standard Consultant Agreement and Exhibit "B", Method of Compensation (for information only)

1.22 Forms

The Proposer must complete the following forms and submit as part of the Proposal package as described below. Any Proposal in which

these forms are not used or in which these forms are improperly executed will be considered non-responsive and the proposal will be subject to rejection.

Technical Proposal Package

Form "A": RFP Contractual Services Acknowledgement Form (GOLD COLORED FORM)

Form "B": Public Entity Crimes, Section 287.133(3)(a), F.S.

Form "E": Drug-Free Workplace Certification Form (if applicable)

Form "F": Estimate of Manhour Effort

Price Proposal Package

Form "C": Price Proposal Form

Form "D": MBE Preference Points Certification Form (if applicable)

121.1101 through 121.1108; 121.1201 through 121.1205 and 121.1401 through 121.1405. The table column labeled "SIC" refers to the Standard Industrial Classification (SIC) codes as published by the U.S. Government respectively in the current version of the "Standard Industrial Classification Manual", Office of Management and Budget, Executive Office of the President. The "Standard Industrial Classification Manual" is intended to cover the entire field of economic activities. It classifies and defines activities by industry categories and is the source used by SBA as a guide in defining industries for size standards. (It is available for sale from the U.S. Government Printing Office [1] and is in the reference room of most libraries.) The number of employees or annual receipts indicates the maximum allowed for a concern (including its affiliates) to be considered small.

SIZE STANDARDS BY SIC INDUSTRY

SIC (* = New SIC Code in 1987, Not Used in 1972)	Description (N.E.C. = Not Elsewhere Classified)	Size standards in number of employees or millions of dollars
For all industries not specifically listed in this table, except for those in Divisions I and J of the SIC System, the size standard is $3.5 million in annual receipts.		
DIVISION A—AGRICULTURE		
Major Group 01—Agricultural Production—Crops		
0111–0191		[2] $0.5
Major Group 02—Agricultural Production—Livestock and Animal Specialties		
0211	Beef Cattle Feedlots (Custom).	$1.0
0212–0231	Livestock and Animal Specialties, Except 0211 and 0252	$0.5
0252	Chicken Eggs	$1.0
Major Group 07—Agricultural Services		
All SICs		$3.5
Major Group 08—Forestry		
All SICs		$3.5
Major Group 09—Fishing, Hunting, and Trapping		
All SICs		$2.0
DIVISION B—MINING		
Major Group 10—Metal Mining		
1011	Iron Ores	500
1021	Copper Ores	500
1031	Lead and Zinc Ores	500
1041	Gold Ores	500
1044	Silver Ores	500
1061	Ferroalloy Ores, Except Vanadium	500
1081	Metal Mining Services	$3.5
1094	Uranium-Radium-Vanadium Ores	500
1099	Miscellaneous Metal Ores, N.E.C.	500
Major Group 12—Coal Mining		
1221*	Bituminous Coal and Lignite Surface Mining	500
1222*	Bituminous Coal Underground Mining	500
1231*	Anthracite Mining	500
1241*	Coal Mining Services	$3.5
Major Group 13—Oil and Gas Extraction		
1311	Crude Petroleum and Natural Gas	500
1321	Natural Gas Liquids	500
1381	Drilling Oil and Gas Wells	500
1382	Oil and Gas Field Exploration Services	$3.5
1389	Oil and Gas Field Services, N.E.C.	$3.5
Major Group 14—Mining and Quarrying of Nonmetallic Minerals, Except Fuels		
1411	Dimension Stone	500
1422	Crushed and Broken Limestone	500
1423	Crushed and Broken Granite	500
1429	Crushed and Broken Stone, N.E.C.	500
1442	Construction Sand and Gravel	500
1446	Industrial Sand	500
1455	Kaolin and Ball Clay	500
1459	Clay, Ceramic, and Refractory Minerals, N.E.C.	500
1474	Potash, Soda, and Borate Minerals	500
1475	Phosphate Rock	500
1479	Chemical and Fertilizer Mineral Mining, N.E.C.	500
1481	Nonmetallic Minerals Services, Except Fuels	$3.5
1499	Miscellaneous Nonmetallic Minerals, Except Fuels	500
DIVISION C—CONSTRUCTION		
Major Group 15—Building Construction—General Contractors and Operative Builders		
1521	General Contractors—Single-Family Houses	$17.0
1522	General Contractors—Residential Buildings, Other Than Single-Family	$17.0
1531	Operative Builders	$17.0
1541	General Contractors—Industrial Buildings and Warehouses	$17.0
1542	General Contractors—Nonresidential Buildings, Other Than Industrial Buildings and Warehouses	$17.0
Major Group 16—Heavy Construction Other Than Building Construction—Contractors		
1611	Highway and Street Construction, Except Elevated Highways	$17.0
1622	Bridge, Tunnel, and Elevated Highway Construction	$17.0
1623	Water, Sewer, Pipeline, and Communications and Power Line Construction	$17.0
1629	Heavy Construction, Except Dredging, N.E.C.	$17.0
1629	Dredging and Surface Cleanup Activities	$13.5 [3]
Major Group 17—Construction—Special Trade Contractors		
1711	Plumbing, Heating, and Air-Conditioning	$7.0
1721	Painting and Paper Hanging	$7.0
1731	Electrical Work	$7.0
1741	Masonry, Stone Setting, and Other Stone Work	$7.0
1742	Plastering, Drywall, Acoustical and Insulation Work	$7.0
1743	Terrazzo, Tile, Marble, and Mosaic Work	$7.0
1751	Carpentry Work	$7.0
1752	Floor Laying and Other Floor Work, N.E.C.	$7.0
1761	Roofing, Siding, and Sheet Metal Work	$7.0
1771	Concrete Work	$7.0
1781	Water Well Drilling	$7.0
1791	Structural Steel Erection	$7.0
1793	Glass and Glazing Work	$7.0
1794	Excavation Work	$7.0
1795	Wrecking and Demolition Work	$7.0
1796	Installation or Erection of Building Equipment, N.E.C.	$7.0
1799	Special Trade Contractors, N.E.C.	$7.0
	Base Housing Maintenance [4]	$7.0
DIVISION D—MANUFACTURING [5]		
Major Group 20—Food and Kindred Products		
2011	Meat Packing Plants	500
2013	Sausages and Other Prepared Meat Products	500

[1] Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.