

**A STUDY OF MINORITY AND WOMEN-
OWNED BUSINESS PARTICIPATION IN THE
SOUTH CAROLINA DEPARTMENT
OF TRANSPORTATION'S CONSTRUCTION
CONTRACTS**

FINAL REPORT

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EXECUTIVE SUMMARY

EXECUTIVE SUMMARY

The Executive Summary presents a synopsis of the methodology, findings, and recommendations resulting from the "Study of Minority and Women-Owned Business Participation in the South Carolina Department of Transportation's Construction Contracts." This "*Croson* Decision Disparity Study" was mandated by the 1993-94 South Carolina General Assembly as part of the Annual Appropriations Act. The major objective of the study was 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 and bridge preconstruction and construction, and building construction and renovation and the number of such contractors engaged by the Department or contractors working for the Department." The methodology for the study was designed to conform to the requirements of the U.S. Supreme Court.

The South Carolina Department of Transportation (SCDOT), through a competitive bid process, contracted with MGT of America, Inc. (MGT) to conduct a detailed, comprehensive "*Croson* Decision Disparity Study" of the SCDOT's contracting, as well as of subcontracting by prime contractors on contracts, from 1980 through 1993.

In preparing the report, MGT conducted a thoroughly detailed and comprehensive analysis which included:

- determination of the available, qualified minority and women-owned contractors willing and able to perform SCDOT contracts;
- a rigorous review of the SCDOT's records and contract files to determine actual utilization of minority and women-owned contractors;
- an in-depth analysis of the SCDOT's contracting and Disadvantaged Business Enterprise (DBE) policies, procedures, and practices;
- analysis of public testimony provided by DBEs and non-DBEs at public hearings in each of the seven SCDOT districts;

- analysis of personal interviews with SCDOT staff, DBEs, prime contractors, business leaders and selected key informants presently and previously involved with the DBE program;
- analysis of a mail survey of DBE and non-DBE vendors; and
- a legal review of *Croson* and other pertinent cases.

The above disparity study methodologies were expanded to include:

- specific identification of a list of available firms by name, address, and types of services;
- statistical analyses of the range of causes of disparity, including such factors as firm size, age, and bonding capacity, as well as race/gender factors;
- identification of specific problems which affect both minority-owned and women-owned business enterprises and other firms in their attempts to obtain SCDOT contracts and subcontracts;
- identification of narrowly tailored race-based and gender-based remedies to correct specific problems.

We are confident that our findings, conclusions, and recommendations are based upon a rigorous methodology and a full understanding of the research requirements established by the SCDOT. We are also fully aware of the importance and implications of this study for the South Carolina General Assembly, the SCDOT and its contractors and subcontractors, and the citizens of South Carolina. Because of the study's importance, the findings and recommendations in this report address issues ranging from macro to micro in nature and significance. Where appropriate, we have noted the limits of our review and stated our recommendations within the context of these constraints.

Study Objectives

This study was designed and conducted to meet the objectives outlined in the SCDOT Request for Proposals. The major objective was to "determine if a significant statistical disparity exists between the number of available qualified minority and white women-owned contractors willing and able to perform highway and bridge preconstruction and construction, and building construction and renovation and the number of such contractors engaged by the Department or contractors working for the Department."

The study addressed the following issues within the context of the review standards established by the *Croson* decision.

- Does the governmental body have the authority to establish the MBE plan?
- Were there adequate findings to ensure that the plan was remedying past discrimination?
- Did the plan extend only as far as necessary to remedy the past discrimination?

To address the above issues and to accomplish specified objectives, the study was designed to conform to the four major requirements set forth in the *Croson* decision.

1. **Strict Scrutiny Standard of Review** - A majority of the Justices on the Supreme Court agreed that DBE plans which rely upon race-based remedies are subject to a strict scrutiny standard of review. Thus, the basis for a DBE plan and the proposed remedies must be factual, and the link between its scope and that factual basis must be demonstrated. The study supporting the plan must be well structured, carefully performed, closely analyzed, and judiciously executed to ensure that the recommended plan will be sustained.
2. **Identifiable Discrimination Directly or Indirectly Related to the Governmental Organization Contracts** - The City of Richmond attempted to rely on general findings of societal discrimination to support the need for its DBE plan. The Court did not accept this evidence. The Court required specific proof of the nature and extent

of the discrimination against minority-owned businesses within Richmond's local jurisdiction to support imposition of a local race-based remedy. The required study must evaluate who is or has been qualified to perform government contracts, who is and was selected to do the work, and the disparity between the two. The knowledge and experience to properly conduct valid statistical comparisons are essential to meeting this mandate imposed by the Supreme Court.

3. **The Need to Evaluate Non-Racial Based Remedies** - Even without a finding of local discrimination, the governmental organization could adopt a series of modifications to its contracting and purchasing procedures which would encourage participation by minority groups without regard to race. In addition, in *Croson* the Court requires that the enacting governmental organization evaluate non-racial solutions before it may adopt a more stringent measure such as a set-aside plan based upon race.
4. **The Solution Must Be in Proportion to the Problem** - Not only must the problem be defined on the local level, the Court has required that the solution be based upon the nature and extent of the local problem identified. Based upon this standard of review, any remedial plan must be carefully tailored to remedy the effects of past discrimination in the governmental organization's jurisdiction and must be in place only for the amount of time required to reverse the effects of such discrimination.

Our reviews and analyses were conducted according to the above guidelines and review standards.

Methodology

A detailed and comprehensive methodology was designed by MGT for conducting the disparity study for SCDOT based on the requirements set forth in *Croson* and related cases. The study covers a 14-year period, January 1, 1980, through December 31, 1993.

Construction Categories - Separate DBE utilization, availability, and disparity analyses were conducted for each of the following business categories:

- Highway and Bridge Preconstruction
- Highway and Bridge Construction

- **Building Construction and Renovation**

Market Area - For each construction category, the market area was defined as the geographic areas (the state of South Carolina and individual out-of-state counties) from which the SCDOT purchased 75 percent or more of the related services. Expenditures in each construction category were summarized over the 14 years analyzed.

Data Collection - The construction project files were assessed to determine the type and format of data available. MGT then designed a data collection plan that manually reviewed all construction project files for the 14-year study. In the case of building renovations contracts, which were voluminous and had been arrived at via purchase orders, we limited ourselves to the data available since automation was implemented. Thus our renovation figures cover just the five-year period of January 1, 1989 through December 31, 1983.

Utilization - For each of the 14 years studied, MGT calculated the percent of contracting and subcontracting expenditures awarded to each DBE classification within the market area for each construction category. Expenditures to firms outside the relevant market area were excluded from the analyses. In calculating the percent of DBE subcontracting dollars for each construction category, we used subcontracts awarded to DBEs located within the prime contractor's market area.

Availability - The analyses for availability required a complex methodology. We began with U.S. Bureau of Census data, which gave us the total number of DBEs and white male firms in each county of the SCDOT's market area. Since census data for DBEs were available only for 1982 and 1987, we extrapolated straight-line growth rates to estimate the numbers of firms in other years.

Disparity - For each race/gender group within each construction category, the percentage of firms available was compared with the percentage of firms utilized. A

disparity index was calculated, indicating the ratio of percentage utilization to percentage availability times 100. The disparity index is always positive. The smallest value, 0.00, shows no utilization; a number under 100 indicates underutilization, while a number over 100 shows overutilization, and a disparity index of exactly 100 indicates parity. Any disparity index value below 80 reflects a substantial level of disparity and demonstrates adverse or disparity impact.

Anecdotal - Three methods were utilized for collecting anecdotal information from individuals representing DBEs and non-DBEs: a mail survey, public hearings, and personal interviews. The anecdotal information included facts, opinions, and perceptions about barriers and obstacles faced by minority and women-owned firms.

Surveys were mailed to 1,756 DBEs and non-DBEs. The survey population was drawn from the Master Vendor Database of available construction related contractors. Two hundred and eighty-five (285) firms responded to the survey, a response rate of 16.04 percent.

Seven public hearings were conducted in each of the SCDOT's Engineering Districts by MGT and SCDOT personnel. Owners of DBEs and non-DBEs were invited to provide oral or written testimony regarding their experiences in attempting to do business with the SCDOT, with public agencies, or with contractors in South Carolina. The public hearings were announced through notices in local newspapers, public service announcements on local radio stations, phone calls, and presentations to professional and community organizations. In addition, public hearing notices were mailed to all businesses listed in the Master Vendor Database. Testimony was received from 27 of the 84 attendees.

Personal interviews were held with 55 DBE and non-DBE owners. To identify and select individuals for interviews, two methods were utilized: 1) a stratified random

sample was taken from the Master Vendor Database; and 2) key leaders in professional and community organizations were contacted to identify possible business owners to interview.

Policies, procedures, and practices for contracting of construction related services and the DBE program were reviewed extensively. Interviews were held with SCDOT key administrators and staff to develop an understanding of the working of the policies and procedures in relation to the DBE program. Additional interviews were held with individuals from external organizations (e.g., minority contractors) who have firsthand knowledge of the practices and procedures of the SCDOT. The collected information was then analyzed to determine the impact upon the utilization of DBEs and the consistency of SCDOT practices with the policies and procedures.

Findings

DBE Findings

- The SCDOT competitively bid and contracted with a total of 534 firms during the 14-year study period, 1980 to 1993. These 534 firms received 3,612 contracts totalling \$2,942,528,502.91. Of these funds, only \$57,687,691.00 (1.96%) went to DBEs as prime contractors and \$136,797,505.00 (4.65%) went to DBE firms as subcontractors, although DBEs represented 13 percent to 17 percent of the firms available in the marketplace during this time period (Exhibit ES-1).
- The SCDOT awarded a total of 109 Highway and Bridge Preconstruction contracts to 49 firms during the study period. These contracts totalled \$170,639,162.19, of which DBEs received no dollars (0.00%) as prime contractors and \$292,847.00 (.20%) as subcontractors.
- The SCDOT awarded 3,097 Highway and Bridge Construction contracts to 238 prime contractors during the 14-year study period. Of the \$2,744,172,996.63 spent, DBEs received \$57,270,268.87 (2.61%) as prime contractors and \$135,705,720.40 (6.17%) as subcontractors.

**EXHIBIT ES-1
TOTAL CONTRACT DOLLARS EXPENDED BY SCDOT, 1980-1993**

Construction Category	No. of Unique Firms	No. of Contracts	Dollars
Highway and Bridge Preconstruction	49	109	\$170,639,162.19
Highway and Bridge Construction	238	3,097	\$2,744,172,996.63
Building Construction and Renovation	247	406	\$27,716,344.09
TOTAL	534	3,612	\$2,942,528,502.91

Source: Derived from SCDOT records.

**EXHIBIT ES-2
PRIME CONTRACT DOLLARS AWARDED TO DBE AND NON-DBE FIRMS
BY CONTRACT CATEGORY, SCDOT 1980-1993**

Contract Category		Black	Hispanic	Asian and Native American	White Women	White Men	Total
Highway and Bridge Preconstruction	Total Dollars	\$0	\$0	\$0	\$0	\$145,588,381	\$145,588,381
	% of Total	0.00%	0.00%	0.00%	0.00%	100.00%	
Highway and Bridge Construction	Total Dollars	\$39,725,743	\$0	\$0	\$17,544,525	\$2,142,718,521	\$2,199,988,789
	% of Total	1.81%	0.00%	0.00%	0.80%	97.40%	
Building Construction and Renovation	Total Dollars	\$414,423	\$0	\$0	\$3,000	\$26,386,620	\$26,804,043
	% of Total	1.55%	0.00%	0.00%	0.01%	98.44%	
Total	Total Dollars	\$40,140,166	\$0	\$0	\$17,547,525	\$2,314,693,522	\$2,372,381,213
	% of Total	1.69%	0.00%	0.00%	0.74%	97.57%	100.00%

Source: Derived from SCDOT records.

**EXHIBIT ES-3
SUBCONTRACTOR DOLLARS AWARDED TO DBE FIRMS
BY DBE CLASSIFICATION, 1980-1993**

Construction Category		Black	Hispanic	Asian and Native American	White Women	Total
Highway and Bridge Preconstruction	Total Dollars	\$253,890	\$0	\$0	\$38,957	\$292,847
	% of Total ^{a/}	0.17%	0.00%	0.00%	0.03%	0.21%
Highway and Bridge Construction	Total Dollars	\$69,236,050	\$3,275,675	\$25,777,772	\$37,416,224	\$135,705,721
	% of Total ^{a/}	3.15%	0.15%	0.17%	1.70%	99.20%
Building Construction and Renovation	Total Dollars	\$698,001	\$0	\$36,511	\$64,425	\$798,937
	% of Total ^{a/}	2.60%	0.00%	0.14%	0.24%	0.58%
Total	Total Dollars	\$70,187,941	\$3,275,675	\$25,814,283	\$37,519,606	\$136,797,505
	% of Total ^{a/}	2.96%	0.14%	1.09%	1.58%	100.00%

Source: Derived from SCDOT records.

^{a/}Expressed as percent of total prime contract dollars shown in Exhibit ES-2.

**EXHIBIT ES-4
COMPARISON OF DBE FIRMS AS PERCENTAGE OF TOTAL AVAILABLE FIRMS
TO PERCENTAGE OF SCDOT CONTRACT DOLLARS AWARDED TO DBE FIRMS,
1980-1993**

Construction Category	DBE Firms as % of Total Available Firms	% of Contract Dollars Awarded to DBE Firms
Highway and Bridge Preconstruction	13.45%	.39%
Highway and Bridge Construction	16.98%	8.78%
Building Construction and Renovation	17.90%	4.72%

Source: Derived from SCDOT records.

- Of the 406 Building Construction and Renovation contracts awarded by the SCDOT, 247 prime contractors received \$27,716,344.09. DBEs received \$417,423.00 (1.56%) as prime contractors and \$798,936.78 (2.98%) as subcontractors.

Historical Review

- According to reports issued by the Governor's Office and Legislative Audit Council, the SCDOT DBE program experienced major problems during the 1979 to 1991 time period. Those reports produced, among others, the following major findings:
 - A report of the procurement dollars of all State agencies issued by the Legislative Audit Council (LAC) in 1985 concluded there was a lack of minority participation based upon the finding that in 1983-84 minority-owned firms received only .01 percent of the State's contract dollars for goods, services, and building renovations and construction.
 - A 1991 LAC report on DBE program operations from FY 86-87 through FY 89-90, concluded that both oversight and recordkeeping of the SCDOT DBE program needed improvement in order to meet program outcomes. The LAC report questioned whether procedures were in place to monitor timeliness of payments from contractors to DBEs and that contrary to State law, the SCDOT had awarded construction contracts with DBE goals to companies which did not use certified DBE contractors. The report also pointed out that the SCDOT did not require written contracts between contractors and hauling subcontractors, which in the view of LAC, provided less protection to hauling subcontractors.
 - Findings from the 1991 report indicated that it was impossible to determine from SCDOT records whether \$91 million committed to DBE subcontractors during a four-year period was actually paid to DBE subcontractors. The inability to verify DBE payments also made it impossible to determine if the SCDOT had met the goal of expending 10 percent of all project funds with DBE firms.
 - The report also concluded SCDOT was in violation of federal guidelines by allowing material costs from furnish and haul agreements to count towards the DBE goal, even though the materials were not purchased from minority sources.
 - A review by the Governor's Office of Small and Minority Business Assistance (OSMBA) in 1986 of DBE participation for fiscal years 1981-82, 1982-83, and 1983-84 revealed

minimal participation of minority and women-owned businesses. Participation rates were less than one percent.

- The same review found evidence of DBEs acting as "fronts" and that non-DBEs had actually performed work on some DBE contracts instead of DBEs.
- Several investigations by OSMBA found evidence of patterns of discrimination which limited the participation of minority and women-owned businesses.
- In response to the documented low utilization of DBE firms and allegations of discrimination, significant changes have been made in both state and SCDOT policies and practices over the last 14 years.
 - In 1981, the South Carolina Consolidated Procurement Code was revised in response to concerns about the exclusion of small and minority businesses from the procurement activities of state agencies. The revisions were based upon findings outlined in a 1979 report entitled Report of the Joint Legislative Committee to Study the Problems of Small Business. The report concluded that new and/or minority businesses were excluded from the State's procurement process.

With regard to minority businesses, Article 21 of the revised Procurement Code gave prime contractors a tax credit equal to four percent of the payments to minority subcontractors on State contracts, established the Office of Small and Minority Business Assistance, and directed chief procurement officers to provide staff to assist minority businesses with State procurement procedures.

- In 1984, a more formal certification process was established and implemented by the Department to comply with federal requirements.
- In 1986, the SCDOT created a DBE/WBE Advisory Task Force to develop recommendations for strengthening compliance monitoring, establishing stronger linkages between the Department and DBEs and minimizing barriers to participation.

In response to recommendations from the Task Force and other entities, the SCDOT took steps to strengthen the DBE program by revising policies and procedures and strengthening monitoring and compliance. For example, the SCDOT increased scrutiny of firms applying for certification,

decertified several firms suspected of acting as a "front," provided "good faith efforts" training to contractors, strengthened the verification process for payments to DBEs by requiring the DBEs signature on quarterly report forms, developed a computerized tracking system to record DBE payments, and developed a plan to respond to Task Force recommendations, including appointment of an Executive Assistant for Minority Affairs who reported directly to the Executive Director.

- Also in 1986, the State Appropriations Act included a provision to spend 10 percent of State construction dollars with small and disadvantaged businesses. In 1987, new language was added to the 10 percent proviso which required 10 percent of total state highway funds for construction contracts be spent with DBE/WBE firms and gave SCDOT the option of using goals or set-asides. The 10 percent goal was equally divided between DBE and WBE firms. The SCDOT was also authorized to waive or guarantee bonding requirements for set-aside contracts less than \$250,000.
- In response to a 1991 Legislative Audit Council Report, the SCDOT strengthened penalties against prime contractors for substituting DBE subcontractors without prior approval and made other changes to strengthen program administration and operations.

Policies, Procedures and Practices

- The current bonding requirements for participating in SCDOT contracts are more often an impediment to DBE firms than to non-DBE firms. In our survey of contractors, 26 percent of Black firms and 14 percent of WBEs indicated that bonding requirements prevented them from receiving a SCDOT prime contract, as opposed to only 8 percent of non-DBEs who made this response. Similarly, while 20 percent of Black firms reported that bonding requirements kept them from working for the SCDOT or as subcontractors, only 3 percent of non-DBEs reported bonding to be a problem.
- Since a contracting firm's capacity rating determines the maximum contract on which it may bid, the current practice of issuing large contracts prevents most DBE firms from bidding on SCDOT projects as prime contractors and relegates them to subcontractor status. Since 1980, only 2.45 percent of the Department's prime contract dollars have gone to DBE firms. The average contract dollar amount awarded over the 14 years of the study period to non-DBE firms is \$850,000 versus \$250,000 to DBE firms.

- The current prequalification requirements, which classify and rate firms on the basis of "a verified showing of experience, net liquid assets, responsibility, record, and available equipment," prevent many DBE firms from becoming eligible to bid on SCDOT work. According to our survey, DBE firms are young (thus less experienced) and smaller (thus less well capitalized) than non-DBE firms. They have fewer licenses, fewer employees, and lower bonding capacity. Furthermore, they reported their average largest prior contract to be under \$500,000, as opposed to the average largest prior contract of non-DBE firms of more than \$500,000.
- The state set-aside program which designates that 10 percent of the contracts be set-aside for DBE firms has limited the dollar participation of DBEs in state contracting. Although DBEs have received over 15 percent of the state contracts awarded (60 of 391 contracts), they have received only 4 percent of the dollars (\$9,351,630.36 of \$194,970,863.13).

Note: This analysis is based on special tabulation of state highway and bridge construction contracts and awarded dollars.

- The current payment tracking system is not being used to monitor compliance of prime to sub payments on an ongoing basis. Hence, some subs are not paid on time, contributing to their cash flow problems. In our survey, 26 percent of Black subcontractors and 9 percent of white female subcontractors cited inadequate capital as a reason for not doing more work for the SCDOT. Only three percent of non-DBE subcontractors reported a similar problem.
- The Director of Compliance as Liaison Officer does not report directly to the Executive Director as prescribed in 49 CFR 23.45(b).

Anecdotal Findings

- DBEs still face significant constraints and barriers in performing contracts for the SCDOT. Lack of financing, the inability to meet bonding requirements, prime contractor practices, and ineffectiveness of the DBE program were cited as major barriers throughout the collection of anecdotal evidence.
- Anecdotal evidence revealed that DBEs felt they were treated differently and in some cases unfairly in comparison to non-DBEs. Factors cited included:
 - perceptions that DBEs were evaluated by different criteria and/or higher standards when seeking loans, bonding, insurance, and performing SCDOT contracts;
 - perceptions that DBEs had less access to financing, bonding, and competitive prices for supplies, equipment, and materials;

- perceptions that DBEs were more likely to encounter deceptive business practices and favoritism.
- Perceptions and comments revealed varying opinions about the impact and effectiveness of the SCDOT DBE program. Some non-DBEs felt the program should be dismantled because it was unneeded, required too much paperwork, and increased their costs. Other non-DBEs were more favorable but felt significant improvements were needed. There were strong perceptions among DBEs that the program had been ineffective with regard to stimulating the growth and development of DBEs and some questioned the commitment of the SCDOT. Factors cited included:
 - perceptions that DBEs were disadvantaged by the relationships between prime contractors and SCDOT district staff. For example, many DBEs felt the relationships resulted in favoritism and preferences toward prime contractors in resolving disputes related to change orders and other aspects related to contracting;
 - perceptions that the SCDOT has knowingly tolerated fraud and abuse relative to DBE contracting;
 - perceptions that the SCDOT has failed to certify legitimate DBEs but knowingly certified fraudulent firms;
 - perceptions that the SCDOT has been nonresponsive to the needs of most DBEs;
 - perceptions that only a few "favored" DBEs get contracts.
- There is ample evidence in the perceptions and comments from DBEs that some longstanding problems and complaints related to DBE participation have not been fully resolved. Several factors were cited:
 - perceptions that prime contractors continue to control the SCDOT in the various districts and are allowed to abuse the program;
 - perceptions that sanctions against abuses are either nonexistent, unevenly enforced or weakly enforced;
 - perceptions that DBEs still do not get a fair share of SCDOT contracts;
 - perceptions that DBEs operate in a hostile environment created by some prime contractors and SCDOT staff in some

districts and that the SCDOT, as an agency, has passively allowed this environment to exist;

- perceptions that DBEs lack basic business management skills, are under-capitalized, and unable to grow and develop in today's competitive marketplace because of discriminatory practices in the market place.
- Based upon our analysis of anecdotal information, we conclude that DBEs have, over the years, faced significant constraints and barriers in performing contracts for the SCDOT. In spite of major efforts by SCDOT, many of the problems and issues identified throughout the program's history are still perceived as major problems by the participants in the program.

Race-Neutral and Gender-Neutral Programs

- Although a number of race and gender neutral programs are available for small business development and business development assistance, small and minority businesses continue to have limited access to growth opportunities and to equitable opportunities for full participation and utilization within the state system.
- Even though race and gender-neutral programs exist in South Carolina, they have not been sufficient to address the problems faced by DBEs in obtaining SCDOT contracts. This is demonstrated by comparing the findings of the Highway and Bridge Preconstruction contracts and the Highway and Bridge Construction contracts.

The highway and bridge preconstruction contracts were excluded from any form of a DBE program during the study period. Only race and gender-neutral programs were available to highway and bridge preconstruction contractors. The statistical analyses of preconstruction contracts reflects no utilization of DBE firms. All (100%) prime contracts were awarded to white men-owned firms. When subcontracts are included, only 0.21% of all preconstruction contract dollars were paid to DBEs (0.18% to Black-owned firms and 0.03% to white women-owned firms).

The highway and bridge construction contracts on the other hand were included in some form of a goals program during the study period, primarily the federal DBE program. The DBE program was a race and gender preference program. This program required that Highway and Bridge construction projects have an annual DBE goal of 10%. The statistical analyses show that DBEs were awarded 8.78% of Highway and Bridge construction contracts as either primes or subcontractors. DBEs were awarded 2.61% of the prime contract dollars and 6.17% of the subcontractor dollars.

Thus, over the 14 years of the study period, only when a DBE program has been in place, as with the Highway and Bridge Construction contracts, has the SCDOT contracted significant dollar amounts to DBE firms.

Recommendations

This section presents a summary of our recommended changes in the SCDOT's DBE program based on the findings presented in Chapter 4.0, *Historical Evidence*; Chapter 5.0, *Analysis of DBE Policies, Procedures, and Practices*; Chapter 6.0 *DBE Findings*; and Chapter 7.0, *Anecdotal Evidence*. The recommendations are presented in two general categories:

- Recommendations which address the availability and utilization of DBEs in the construction areas, as identified in Chapter 6.0.
- Those recommendations which address major issues of policy, operations, and organization raised in Chapters 4.0, 5.0, and 7.0 of the Final Report.

Our general policy recommendations to the SCDOT reflect our analyses of the effects of SCDOT policies and practices on DBEs. They assume that:

- constraints and barriers can be minimized by providing necessary resources to monitor and enforce existing SCDOT policies and procedures;
- constraints and barriers can be minimized by increasing key users' accessibility to, knowledge of, and application of policies and procedures; and
- constraints and barriers can be minimized by sensitivity training of key staff and adoption of a customer service orientation.

DBE Program Recommendations

The disparity findings in Chapter 6.0 show substantial underutilization of DBEs in preconstruction contracts for highway and bridge, highway and bridge construction, and building construction and renovation. Our findings clearly document the need for a race- and gender-based program.

Exhibits ES-5, ES-6, and ES-7 show the projected availability and recommended goals for highway and bridge preconstruction, highway and bridge construction, and building construction and renovation. Each exhibit shows the projected availability for

**EXHIBIT ES-5
PROJECTED AVAILABILITY AND RECOMMENDED GOALS
HIGHWAY AND BRIDGE PRECONSTRUCTION**

	Blacks	Women	Native American/Asian/ Hispanic	Combined DBE
Projected Availability	3.35%	9.15%	2.01%	
Recommended Goals - State Program	2%-4%	6%-10%	2.00%	
Recommended Goal - Federal Program				10%-15%

**EXHIBIT ES-6
PROJECTED AVAILABILITY AND RECOMMENDED GOALS
HIGHWAY AND BRIDGE CONSTRUCTION**

	Blacks	Women	Native American/Asian/ Hispanic	Combined DBE
Projected Availability	10.98%	9.70%	0.67%	
Recommended Goals - State Program	5%-11%	6%-10%	1.00%	
Recommended Goal - Federal Program				10%-21%

**EXHIBIT ES-7
PROJECTED AVAILABILITY AND RECOMMENDED GOALS
BUILDING CONSTRUCTION AND RENOVATION**

	Blacks	Women	Native American/Asian/ Hispanic	Combined DBE
Projected Availability	13.93%	7.29%	0.72%	
Recommended Goals - State Program	6%-14%	3%-8%	1.00%	
Recommended Goal - Federal Program				10%-22%

each DBE classification, the recommended goals for each DBE classification for the state program, and the combined DBE goal for the federal DBE program. The goals for the state DBE program are presented as a range. The SCDOT should use the lower number as a minimum goal. The program should be evaluated annually and the goal gradually increased to meet availability.

The SCDOT should consider several factors in establishing goals for the various DBE classifications:

- The estimated availability of each DBE classification as projected in Exhibits ES-5, ES-6, and ES-7;
- The expected or anticipated growth in number and capacity of each DBE classification each year;
- The projected type and number of contracting opportunities for next year;
- The utilization of each DBE class for the current year; and
- The extent to which recommendations related to program enforcement, monitoring, and supportive services will be implemented.

To eliminate the underutilization described in the disparity findings in Chapter 6.0, the SCDOT should adopt an aggressive program which emphasizes the utilization, growth, and development of minority businesses. These areas are critical because they should ultimately result in graduation from the program, which in the long run will stimulate the creation and growth of new minority firms. In attempting to increase the utilization, growth, and development of DBEs, the SCDOT should recognize the following factors:

- The need to address the barriers and constraints outlined in this report;
- The need for a strong, well staffed compliance monitoring function for the DBE program; and

- The need for an effective Supportive Services Program which meets the needs of a majority of DBEs.

The SCDOT should attempt to increase overall goals and utilization of DBEs each year, consistent with growth in availability. Goals for subsequent years should be increased for each DBE classification to stimulate economic growth and shorten the life of the state DBE program. The SCDOT should provide adequate assistance to growing and emerging DBEs to increase their chances for long-term success. The overall goals for each DBEs classification in each business category should provide the basis for the establishment of individual project goals for state-funded project. On federally-funded projects, the DBE qualifications set by federal regulations should be followed, but SCDOT has sufficient evidence to increase the federal DBE goals from 10% up to 22%.

To assist the SCDOT in establishing its DBE goals, Exhibits ES-2, ES-3, and ES-5 provide:

- the projected availability for each DBE category;
- the recommended goals for the state program for each DBE category; and
- the recommended goals for the federal DBE program.

Availability was projected for 1995 based on 1982 and 1987 actual data (the most recent two years of available data) from the Census Bureau for both DBE and white men firms. Because future projections tend to progressively lose their reliability as the number of years are extended beyond the most recent actual data year, and because our 1996 availability estimates are nine years beyond our last actual data point, we highly recommend that the SCDOT update its DBE availability data (Exhibits 6-11 through 6-13) as soon as the U.S. Census releases the results of its 1992 surveys of minority and women-owned businesses. MGT will notify the SCDOT of its availability.

We believe that the goals recommended in this section, coupled with other recommendations, particularly those related to monitoring and enforcement, will be critical in eliminating longstanding patterns of underutilization.

Policy, Operations, and Organization Recommendations

Major recommendations are divided into five sections that address specific programs or divisions of the SCDOT. They include the following:

Good Faith Efforts

- Good faith efforts should be closely monitored and evaluated. A series of steps which must be followed to demonstrate good faith should be developed to strengthen existing requirements.
 - Primes should demonstrate that they allow enough time for DBEs to respond to bid opportunities.
 - Primes should demonstrate that they contact only those DBEs which provide the services needed for the contract.
 - Primes should demonstrate that they advertise for bids from DBEs in general circulation newspapers in the districts where the work will be performed.
- To ensure that good faith efforts are made, a quarterly report should be developed, by the Office of Compliance, which summarizes all contracts on which a good faith effort was used to justify not meeting DBE goals. The report should identify where good faith efforts were rejected and why, and where good faith efforts were accepted and the justification.
 - Where monitoring of SCDOT projects with respect to utilization of DBEs indicates failure to accomplish DBE goals, the Office of Compliance must develop and implement appropriate corrective actions.
 - Annually, DBEs which have bid on contracts during the fiscal year should be provided with a two- or three- page summary of changes in contracting policies and procedures.

The Supportive Services Program

- The SCDOT's Supportive Services Program should be re-evaluated and strengthened. A needs assessment should be done within the next year to better determine the supportive services needs of

DBEs, following which, a supportive services strategic plan should be developed, implemented, and closely monitored.

- The Supportive Services Program should annually survey a sample of DBEs about the attitude and helpfulness of the SCDOT staff.
- The Supportive Services Program should also provide DBEs with access to and information about the SCDOT's contracting system, contracting policies and procedures, and key players.
- The SCDOT should develop criteria and standards by which to measure the progress and economic impact of the training and development programs for DBEs.

Certification

- To make the appeal process meaningful, initial certification decisions should be made by someone other than the Director of the agency. Currently, the Director both approves initial certification, and signs off on any appeal decisions involving the same firms.
- As part of the certification package, the SCDOT should include the names, telephone numbers, and functions of key department personnel involved in the DBE program and contracting decisions. A one-page diagram which flow-charts the major steps in the contracting and consultant selection process should also be included.
- The certification pool of the state program should be expanded to include D/M/WBEs certified by the Governor's SMBA Office.
- Outreach efforts should be expanded to increase the number of certified DBEs.

DBE Program

- Introduce legislation to change the State Set-Aside Program to a Goals/Set-Aside Program.
- Include Highway and Bridge Preconstruction contracts in the federal DBE program.
- Require the Building Engineer to maintain and track prime and subcontractor utilization on Construction and Renovation contracts.
- Provide a semi-annual report to the SCDOT Commission summarizing DBE utilization as prime and subcontractors in the state and federal DBE programs.

Administration of the Department's DBE Program

- A single office in SCDOT should be assigned the responsibility for managing the Department's DBE program. That office should:
 - manage all investigative functions and responsibilities;
 - monitor and enforce the Department's DBE policies and procedures and DBE program requirements;
 - recommend appropriate sanctions.
- The Department should develop a stronger system for reporting and monitoring payments to DBEs.
- The Department should conduct on-site monitoring and observation to ensure actual use of DBE subcontractors by prime contractors as provided in the bid and contract. A minimum of two on-site visits should be conducted with the first occurring within three weeks of project start-up.
- The SCDOT should develop a centralized complaint system, located in the Office of Compliance, to log, track, and resolve disputes of DBEs. The complaints should be analyzed regularly to identify patterns.

It is also strongly recommended that the SCDOT develop a schedule with goals and dates, to implement the recommendations in a timely manner.

1.0 INTRODUCTION

1.0 INTRODUCTION

This report contains the findings and recommendations of the "Study of Minority and Women-Owned Business Participation in the South Carolina Department of Transportation's Construction Contracts." The study was authorized by the 1993-94 South Carolina General Assembly and was conducted by MGT of America, Inc. (MGT) between October 1994 and March 1995.

The South Carolina Department of Transportation (SCDOT), through a competitive bid process, contracted with MGT to conduct a detailed, comprehensive "Croson Decision Disparity Study" of the SCDOT's contracting for highway and bridge preconstruction, highway and bridge construction, and building construction and renovation, as well as of subcontracting by prime contractors on contracts, from 1980 through 1993. The ultimate goal of the study was to determine if a significant statistical disparity existed between the percentages of available, qualified minority-owned and white women-owned contractors in the industry and the percentages of contract dollars awarded to such firms by the SCDOT.

In preparing the report, MGT conducted a thoroughly detailed and comprehensive set of analyses which included:

- a rigorous review of the SCDOT's records and contract files;
- an in-depth analysis of SCDOT's contracting and Disadvantaged Business Enterprise (DBE) policies, procedures, and practices;
- public testimony provided by DBEs and non-DBEs at public hearings in each of the seven SCDOT districts;
- personal interviews with SCDOT staff, DBEs, prime contractors, business leaders and selected key informants presently and previously involved with the DBE program;
- a mail survey of DBE and non-DBE vendors; and

- a legal review of *Croson* and other pertinent cases.

The above disparity methodologies were expanded to include:

- specific identification of a list of available firms by name, address and types of services;
- statistical analyses of the range of causes of disparity including such factors as firm size, age, and bonding capacity, as well as race/gender factors;
- identification of specific problems which affect both minority-owned and white women-owned business enterprises and other firms in their attempts to obtain SCDOT contracts and subcontracts;
- identification of those race-neutral and gender-neutral remedies for each identified problem; and
- identification of narrowly tailored race-based and gender-based remedies to correct specific problems.

We are confident that our findings, conclusions, and recommendations are based upon a rigorous methodology and a full understanding of the research requirements established by the SCDOT. We are also fully aware of the importance and implications of this study for the South Carolina General Assembly, the SCDOT and its contractors and subcontractors, and the citizens of South Carolina. Because of the study's importance, the findings and recommendations in this report address issues ranging from macro to micro in nature and significance. Where appropriate, we have noted the limits of our review and stated our recommendations within the context of these constraints.

1.1 Study Objectives

This study was designed and conducted to meet the objectives outlined in the SCDOT Request for Proposals. The major objective was to "determine if a significant statistical disparity exists between the number of available qualified minority and white

women-owned contractors willing and able to perform highway and bridge preconstruction and construction, building construction and renovation and the number of such contractors engaged by the Department or contractors working for the Department."

In meeting this objective, the study adhered to the following review standards established by the *Croson* decision.

- Does the governmental body have the authority to establish the MBE plan?
- Were there adequate findings to ensure that the plan was remedying past discrimination?
- Did the plan extend only as far as necessary to remedy the past discrimination?

To address the above issues and to accomplish specified objectives, the study was designed to conform to the four major requirements set forth in the *Croson* decision.

1. **Strict Scrutiny Standard of Review** - A majority of the Justices on the Supreme Court agreed that DBE plans which rely upon race-based remedies are subject to a strict scrutiny standard of review. Thus, the basis for a DBE plan and the proposed remedies must be factual, and the link between its scope and that factual basis must be demonstrated. The study supporting the plan must be well structured, carefully performed, closely analyzed, and judiciously executed to ensure that the recommended plan will be sustained.
2. **Identifiable Discrimination Directly or Indirectly Related to the Governmental Organization Contracts** - The City of Richmond attempted to rely on general findings of societal discrimination to support the need for its DBE plan. The Court did not accept this evidence. The Court required specific proof of the nature and extent of the discrimination against minority-owned businesses within Richmond's local jurisdiction to support imposition of a local race-based remedy. The required study must evaluate who is or has been qualified to perform government contracts, who is and was selected to do the work, and the disparity between the two. The knowledge and experience to properly conduct valid statistical comparisons are essential to meeting this mandate imposed by the Supreme Court.

3. **The Need to Evaluate Non-Racial Based Remedies** - Even without a finding of local discrimination, the governmental organization could adopt a series of modifications to its contracting and purchasing procedures which would encourage participation by minority groups without regard to race. In addition, in *Croson* the Court requires that the enacting governmental organization evaluate non-racial solutions before it may adopt a more stringent measure such as a set-aside plan based upon race.
4. **The Solution Must Be in Proportion to the Problem** - Not only must the problem be defined on the local level, the Court has required that the solution be based upon the nature and extent of the local problem identified. Based upon this standard of review, the plan must be carefully tailored to remedy the effects of past discrimination in the governmental organization's jurisdiction and must be in place only for the amount of time required to reverse the effects of such discrimination.

In completing the study, our reviews and analyses were conducted within the context of the above guidelines and review standards.

1.2 Scope of the Study

The focus of the study was on the SCDOT's contracting and subcontracting practices, to determine if these practices were discriminatory, and if so, to define the corrective actions appropriate to remedy any prior or current discrimination. The study focus was sharpened by a very detailed and complex set of research requirements which go significantly beyond the requirements of most disparity studies. In conducting the study, MGT was charged, by the SCDOT Request for Proposals, with the following:

- Providing 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;
- Identifying, collecting, analyzing, and documenting any evidence of discrimination on the basis of race and/or gender in SCDOT contracting for highway and bridge preconstruction and construction and building construction and renovation, or in subcontracting by its prime contractors from 1980 to 1993;

- Uncovering evidence of discrimination by utilizing the following methods:
 - examining SCDOT contracting procedures, policies, and practices in the award of contracts and the approval of subcontractors, as well as the procedures, policies, and practices of SCDOT prime contractors in awarding subcontracts;
 - documenting evidence that such procedures, policies, or practices have had the effect of discriminating against contractors on the basis of race and gender or of race-related or gender-related factors;
 - collecting and analyzing existing documents and records concerning the efforts of minority-owned and white women-owned contractors to obtain contracts from the SCDOT and SCDOT contractors during the years 1980 to 1993; and
 - conducting public hearings and interviews and documenting any evidence that SCDOT or its contractors engaged in discriminatory patterns or practices.
- Determining, by conducting an availability analysis, a utilization analysis, and a disparity analysis, whether there is a statistical disparity between the number of available qualified minority-owned and white women-owned contractors willing and able to perform highway and bridge preconstruction construction, building construction and renovation and the number of contractors actually engaged by the SCDOT or by contractors working for the SCDOT, during the years 1980 to 1993;
- Conducting an availability analysis with the following elements:
 - determining the relevant market area and defining available, qualified minority-owned and white women-owned contractors willing and able to perform highway and bridge preconstruction, construction, building construction and renovation;
 - identifying and consulting available sources of information on minority-owned and white women-owned businesses in the relevant market areas for the years 1980 to 1993; and
 - identifying "available, qualified, willing and able" firms by name, ethnic group, and/or gender, principal business location, and type of work performed.
- Conducting a utilization analysis with the following elements:

- examining a sample of SCDOT contract files for highway and bridge preconstruction and construction, building construction, and building renovation for the period 1980 through 1993 to determine the utilization of minority-owned and white women-owned contractors by the SCDOT and its contractors during those years;
 - identifying all categories and subcategories of work available for direct contracting by the SCDOT in the general areas of highway preconstruction, highway construction, bridge construction, building construction, and building renovation;
 - identifying contractors used in each construction category and documenting the number and dollar amount of contracts awarded to minority-owned and white women-owned firms and the amount awarded to majority firms; and
 - identifying 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.
- Identifying all categories of work available for subcontracting on SCDOT contracts in the general areas of highway construction, highway preconstruction, building construction and building renovation.
 - Identifying for each category of subcontracting work the number and dollar amount of subcontracts made with minority-owned firms, including how often the use of minority-owned and white women-owned firms was a requirement of the contract and how often minority-owned and white women-owned firms were used when not required in the contract.
 - Identifying the subcontracting firms used by name, ethnic group, gender, geographic location, number and dollar value of subcontracts obtained, and category of work performed.
 - Conducting a disparity analysis with the following elements:
 - identifying any disparity between the available, qualified, willing and able minority-owned and white women-owned firms and the utilization of those firms by the SCDOT and its contractors.
 - identifying any disparity in at least the following categories for each year of the study:
 - a) state-funded contracts (set-aside and non set-aside)

- 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 white women-owned firms are prime contractors (note where contract was set-aside)
 - j) where minority and white women-owned firms are subcontractors
 - k) any other categories deemed necessary by the consultant to meet the objectives of the study or case law.
- determining whether any disparity found is statistically significant and explaining why any disparity found is statistically significant or insignificant.
- Documenting the extent to which any disparity found can be linked to patterns or practices of race-based or gender-based discrimination, identified in the analysis of historical and anecdotal data, by SCDOT and/or its prime contractors.
 - Documenting to what extent any disparity found is a result of other factors not related to discrimination.
 - Identifying and documenting the extent to which state and federal requirements for the use of minority-owned and white women-owned contractors have impacted any disparity or lack of disparity found.
 - Determining whether evidence exists of the SCDOT's use of race-neutral and gender-neutral techniques to increase minority-owned and white women-owned business participation in SCDOT contracts, including evidence of the effectiveness of these techniques, and determining whether any disparity found can be eliminated or significantly reduced through the use of race-neutral or gender-neutral techniques.
 - Identifying narrowly tailored, race-based and gender-based remedies, if necessary.

In recognition that sufficient data might not exist to respond to all of the requested analyses, the SCDOT RFP stated that efforts to obtain needed data should be fully documented.

1.3 Technical Approach

The design and implementation of the study was guided by the research requirements outlined in the SCDOT's Request for Proposals as summarized above. In meeting the requirements of each element identified previously in the scope of work, we took the following six major steps:

1. Explain the evidentiary basis required for a race and gender-based remedial program
2. Collect and analyze the historical and anecdotal data
3. Perform a statistical evaluation
4. Cross-analyze anecdotal, historical, and statistical data
5. Evaluate race-neutral and gender-neutral techniques
6. Identify narrowly tailored race-based and gender-based remedies

A carefully designed work plan incorporating these steps was used in conducting the study and preparing our recommendations. Our final work plan consisted of the following 15 major work tasks:

1. Finalize work plan
2. Prepare a detailed document which explains the evidentiary basis required for a race and gender remedial program
3. Establish a categorical structure
4. Review purchasing, contracting, and DBE policies, procedures, and practices
5. Determine the number of contracts/subcontracts and expenditures by category and relevant market area

6. Determine the availability of qualified firms
7. Analyze the utilization and availability data for disparity
8. Analyze the statistical explanations of disparity
9. Analyze the historical evidence concerning the efforts of DBE contractors to obtain SCDOT contracts and subcontracts during the years 1980-1993
10. Conduct telephone surveys of stratified samples of available firms to gather needed firm data and anecdotal information
11. Conduct private interviews with a sample of contractors and subcontractors
12. Conduct public hearings
13. Evaluate the effectiveness of race-neutral and gender-neutral techniques
14. Identify narrowly tailored race-based and gender-based remedies, if necessary
15. Develop an implementation plan

Each major work task required the completion of several subtasks and numerous task related activities. Progress reports were submitted to the SCDOT's Project Officer, and interim meetings were held with SCDOT representatives, who provided oversight to the study.

A variety of procedures was used to collect and analyze the data for the study.

The procedures included:

- archival research;
- legal review of evidentiary requirements for disparity studies;
- review and analysis of contracts and vendor lists;
- review and analysis of contracting policies and procedures;
- review and analysis of documents, reports, statutes, regulations, studies, news articles, and manuals;

- review and analysis of utilization and availability data; and
- review and analysis of anecdotal data collected through a mail survey, public hearings, and private interviews.

The results of our analyses, analytical techniques, study findings, and recommendations are discussed in Chapters 2 through 9 of this final report.

1.4 Organization of the Report

This final report provides a detailed description of our findings and recommendations. The study is both descriptive and analytical in nature.

Report chapters are designed to give the reader a comprehensive overview of SCDOT's DBE program and the efforts of DBE contractors to obtain SCDOT contracts and subcontracts during the years of 1980 to 1993. In addition to this introductory chapter, this report contains the following chapters:

- Chapter 2.0 summarizes the *Croson* case and other relevant case law affecting DBE programs.
- Chapter 3.0 presents the methodology for the analyses used in conducting the various portions of the disparity study.
- Chapter 4.0 presents a historical review of the DBE program.
- Chapter 5.0 presents the analyses and findings on purchasing, contracting, and DBE policies, procedures, and practices.
- Chapter 6.0 presents the analyses and findings on DBE utilization, availability, and disparity.
- Chapter 7.0 presents the analyses and findings on anecdotal data.
- Chapter 8.0 presents the analysis of race-neutral and gender-neutral programs.
- Chapter 9.0 presents the project team's conclusions and recommendations.

2.0 LEGAL REVIEW

2.0 LEGAL REVIEW

An understanding of the legal principles that apply to affirmative action programs in government procurement is essential to the design of any program and the performance of an effective disparity study to justify enactment of the program. Accordingly, MGT submits this summary of the applicable legal standards. This section includes a brief historical review of relevant Supreme Court decisions, analysis of the Supreme Court decision in *City of Richmond v. J.A. Croson Company*, review of pertinent decisions of the courts that have analyzed and applied the *Croson* decision, and explanation of the current state of the law.

2.1 Affirmative Action Programs in Public Contracting

The purpose of affirmative action programs in public contracting is to address the effects of discrimination, primarily by eliminating the barriers which have impeded the participation of minority, women, and disadvantaged contractors, subcontractors, or suppliers in public projects and procurement.

The programs are mandated by federal, state or local governmental legislation, and reflect a variety of approaches. Set-aside programs mandate that a certain percentage of contract dollars be earmarked for targeted firms, usually through a "sheltered market" where only targeted firms may bid. Preference programs provide that targeted firms will be given a "preference" over other firms, which means they will be awarded the contract if their bid is not more than a specified percentage above the bids of other firms. Goals programs require contractors to award a specified percentage of their subcontracts to targeted firms. Programs generally provide that requirements

may be waived if certain conditions are met; for example, if no competitive bids are received from targeted firms.

Programs are designed to benefit a variety of groups: racial or ethnic minority-owned businesses (MBEs); women-owned businesses (WBEs); and businesses owned by handicapped persons (HBEs).

2.2 The Equal Protection Clause

Despite the remedial intentions of all these programs, they are each based upon a classification which is intended to benefit the targeted group but which may also impact the rights of non-targeted groups. As a result, programs which are based upon a classification conflict with constitutional protections against discrimination.

The Fourteenth Amendment of the Constitution contains the "Equal Protection Clause," which provides that no state may deny equal protection of the laws to any person within its jurisdiction. This obligation extends to all governmental subdivisions, including counties and municipalities.

The Equal Protection Clause applies to the states, and thus does not govern federal government programs. However, a prohibition against discrimination at the federal level is imposed by the "Due Process Clause" of the Fifth Amendment, which provides that no person may be deprived of life, liberty or property by the federal government without due process of law.

2.3 Standard of Review

The courts determine what factors are sufficient to justify governmental action (such as enactment of legislation) which discriminates by favoring one group or class over others. Whether adequate justification for enactment of a discriminatory program

exists has come to be called the "standard of review." The standard of review varies depending on the group or classification targeted by the program.

MBE programs which are based upon a racial or ethnic classification are subject to "strict scrutiny," the highest level of constitutional review. This requires that the government demonstrate a "compelling interest" in the purpose of the program, and that the program be "narrowly tailored" to accomplish that purpose.

WBE programs, based upon a gender classification, are subject to "intermediate scrutiny," which requires the government to demonstrate an "important" governmental objective in the program, and that the program bear a "substantial relation" to accomplishing that purpose.

HBE programs, classifying on the basis of handicap/disability, are subject to "rational" review, which requires only that the program be "rationally related" to a "legitimate" government purpose.

Congressionally legislated programs are known as "disadvantaged business enterprise" (DBE) programs and are subject to a "deferential" standard of review requiring that the classification is a "valid means" to meet the program's objective.

2.4 Review of Remedial Programs in Pre-Croson Decisions

Although the standard of review is now generally well established, a majority of the U.S. Supreme Court had not decided how the Equal Protection Clause of the Fourteenth Amendment applied to remedial affirmative action programs prior to the decision in *Croson*. Prior to *Croson*, the Supreme Court struggled with the question of the appropriateness and validity of government sponsored race-conscious affirmative action programs where the purpose was to reverse the effects of past unlawful discrimination. The result was a plethora of inconsistent standards suggested by

members of the Court for reviewing affirmative action programs based upon racial classifications.

For example, in *University of California Regents v. Bakke*, 438 U.S. 265 (1978), involving a challenge to the special admissions program favoring certain minority groups at the state medical school, four members of the Court (Brennan, White, Marshall, and Blackmun) favored application of a less rigorous "intermediate" standard of review, requiring that the classification of groups for different treatment by the State must serve important governmental objectives and must be substantially related to achievement of those objectives." 438 U.S. at 359. These justices recognized that strict scrutiny (requiring that any distinction must be justified by a compelling government purpose, and that the program must be narrowly tailored to effectuate that purpose) was proper in nearly all instances of racial distinctions by the state, but believed a less exacting standard of review was appropriate where the goal of the state's race-conscious program was to eliminate the vestiges of past discrimination. In contrast, Justice Powell in his separate concurring opinion concluded that "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination" and refused to recognize an exception for a "benign" purpose. *Id.* at 291. The plurality opinion (Stevens, Burger, Stewart, and Rehnquist) maintained that a racial distinction was simply not at issue in the case.

In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), which involved a challenge to the Public Works Employment Act of 1977 enacted by Congress authorizing a 10% set-aside for minority business enterprises (MBEs), the Court again disagreed on the proper standard of review. The Court concluded that the legislation was within Congress' broad remedial powers and that the MBE provision of the 1977 Act, on its face, did not violate the Constitution (in this case, the equal protection component of the Due Process

Clause of the Fifth Amendment, since the legislation was enacted by Congress). Justices Marshall, Brennan, and Blackmun, applying the same intermediate scrutiny advocated in *Bakke*, concluded that the 10% set-aside was constitutional because it served important governmental objectives and was substantially related to achievement of these objectives. Chief Justice Burger, joined by Justices White and Powell, specifically declined to adopt any standard of review.

In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the Supreme Court reviewed a race-based layoff program which had been reached by agreement between the school board and the local teacher's union. A plurality of the Court applied strict scrutiny and concluded that the layoff provision was unconstitutional. Justice Powell, joined by Chief Justice Burger and Justices Rehnquist and O'Connor, concluded that any racial classification must be justified by a compelling state purpose, and the means chosen by the state to effectuate that purpose must be narrowly tailored (which is the application of strict scrutiny). In the dissenting opinion, Justices Marshall, Brennan, and Blackmun favored the application of the intermediate standard of review. These dissenting justices believed that a reviewing court had the discretion to consider the particular circumstances of the provision at issue. Justice Stevens' dissenting opinion recommended that the Court analyze whether the board's action advanced the public interest and, if so, give consideration to "whether that public interest, and the manner in which it is pursued, justifies any adverse effects on the disadvantaged group." *Id.* at 313.

In *United States v. Paradise*, 480 U.S. 149 (1987), the Supreme Court determined that a court order requiring the Alabama Department of Public Safety to promote one black trooper for each white trooper promoted was constitutional. The court articulated the following factors in analyzing the appropriateness of a race-conscious remedy:

- the necessity for the relief;
- 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;
 - whether the relief imposed an unacceptable burden on the rights of third parties.

Id. at 171. Although strict scrutiny was in effect applied, the plurality (Justice Brennan, joined by Justices Marshall, Blackmun, and Powell) refused to require this level of analysis:

Although 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 a 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 . . .

Id. at 166-67. Justice Stevens, concurring, stated that strict scrutiny was not appropriate where a district court remedied governmental discrimination, and instead advocated a "broad and flexible" remedial authority. *Id.* at 190. Justice O'Connor, joined by Justices Rehnquist and Scalia, concluded that the court order failed to remedy the effects of past discrimination, and thus the use of racial preferences was not justified. *Id.* at 197.

In applying these decisions to a constitutional review of MBE programs, the lower federal courts subsequently developed a three-prong test for evaluating MBE plans:

- whether the governmental entity had the authority to establish the M/WBE plan;
- whether there were adequate findings to support the conclusion that the plan was designed to remedy past discrimination rather than to advance one racial group at the expense of another;
- whether the plan extended only as far as was necessary to remedy the effects of past discrimination.

South Florida Chapter of Associated General Contractors of America v. Metropolitan Dade County, 723 F.2d 846, 851-52 (11th Cir. 1984), *cert. denied*, 469 U.S. 871, 105 S. Ct. 220 (1984).

This state of uncertainty as to the proper scrutiny to apply persisted until the Supreme Court decided *City of Richmond v. J.A. Croson Company* in 1989.

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

The Supreme Court decision in *City of Richmond v. J.A. Croson Company*, 448 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), did not explicitly overrule these prior cases. The majority opinion did, however, address the issue of the standard for judicial review of MBE programs. The standard applied was the strict scrutiny standard, the most stringent of constitutional review. The Court required that the government demonstrate a "compelling interest" in the remedial purpose of the MBE program, and that the program itself be "narrowly tailored" to meet the remedial goal; otherwise, the MBE program would constitute unconstitutional discrimination. 109 S.Ct. at 727-28.

2.5.1 Facts and Holding

Croson dealt with the constitutionality of a City of Richmond ordinance which required that prime contractors awarded city construction contracts subcontract at least 30% of the dollar amount of the contract to one or more MBEs. The 30% set-aside did not apply to minority-owned prime contractors. The plan defined an MBE as "a business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members." *Id.* at 713. "Minority group members" were defined as "citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.* The plan did not establish any geographic limit for eligibility. Therefore, an

otherwise qualified MBE from anywhere in the United States could benefit from the 30% set-aside. The plan included a waiver provision requiring the prime contractor to show "that every feasible attempt has been made to comply" and demonstrate "that sufficient, relevant, qualified Minority Business Enterprises . . . are unavailable or unwilling to participate in the contract to enable meeting the 30% MBE goal." *Id.* The plan was professed to be remedial in nature, and was enacted "for the purpose of promoting wider participation by minority business enterprises in the construction of public projects." *Id.*

The plan was adopted on April 11, 1983 by the Richmond City Council after a public hearing in which five citizens spoke in favor of the ordinance and two opposed. The council further relied upon a study which indicated that "while the general population of Richmond was 50% black, only .67% of the city's prime construction contracts had been awarded to minority businesses in the 5-year period from 1978 to 1983." *Id.* at 714. It was also established that a variety of contractor associations had little or no minority business membership. In addition, the council relied upon the statements by a council member that "the general conduct of the construction industry in this area, and the state, and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread." *Id.* No direct evidence of race discrimination on the part of the city in its contracting activities or evidence that the city's prime contractors had discriminated against minority-owned subcontractors was presented.

On September 6, 1983, the City of Richmond invited bids to supply and install plumbing fixtures at the city jail. The J.A. Croson Company, a non-minority-owned mechanical plumbing and heating company, bid on the project. Project specifications required fixtures from one of two manufacturers. The cost of fixtures amounted to 75%

of the total contract price. To meet the 30% MBE requirement, Croson decided to subcontract with an MBE to supply the fixtures. Croson contacted five or six MBEs that were potential suppliers of the fixtures, but only one local MBE (Continental) expressed an interest. However, Continental did not submit a bid to Croson until after the sealed bids were opened on October 13, 1983. Continental's bid was 7% above the market price for the fixtures. Croson applied for and was denied a waiver of the MBE requirement. Croson offered two alternatives to the city: either waive the 30% set-aside or raise the overall contract price. The city denied both, and instead rebid the project and awarded the project to another contractor. Shortly thereafter, Croson sued Richmond arguing that the ordinance was unconstitutional. Both the district court and Fourth Circuit Court of Appeals upheld the plan. Croson sought *certiorari* from the U.S. Supreme Court. The Supreme Court vacated the opinion of the Court of Appeals, and remanded the case for further consideration in light of *Wygant*.

On remand, the divided Court of Appeals struck down the Richmond set-aside program. Based on *Wygant*, the majority opinion held that "to show that a plan is justified by a compelling governmental interest, a municipality that wishes to employ a racial preference cannot rest on broad-brush assumptions of historical discrimination." *Croson* at 716. The appellate court explained that "findings of societal discrimination will not suffice; the findings must concern 'prior discrimination by the governmental unit involved.'" *Id.* at 716-717. The Richmond City Council had heard and relied on anecdotal testimony of past discrimination given at a public hearing and statistics comparing the percentage of the Richmond minority population to the percentage of prime contracts awarded to minority firms. There were, however, no findings of discrimination specifically by the City of Richmond, so the city failed to demonstrate a compelling interest in rectifying discrimination using race-based methods.

The Court of Appeals further held that even if the city had demonstrated a compelling interest in the use of a race-based quota, the 30% set-aside was not narrowly tailored to accomplish a remedial purpose. The 30% figure was chosen arbitrarily and not tied to the number of minority subcontractors in Richmond or any other relevant number. *Id.* at 717.

On rehearing the case, the Supreme Court determined that the Richmond program was unconstitutional. It rejected the Fourth Circuit's reasoning, however, noting that it had misread *Wygant*. The Supreme Court explained that *Wygant* "addressed the constitutionality of the use of racial quotas" by the government, which was justified by a showing of prior discrimination by the same governmental unit (the school board). *Id.* at 720. Relying upon *Wygant*, Justice O'Connor made it clear "that a state or local subdivision (if delegated the authority from the State), has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction," which differs from remediation of governmental discrimination addressed in *Wygant*. (Emphasis added.) *Id.* at 720-21.

2.5.2 Emphasis on Remedy for Past Discrimination

In determining that a local government may remedy the effects of private discrimination within its own jurisdiction, the Supreme Court established that the purpose of race-based affirmative action programs must be to provide a remedy for actual past local discrimination.

As a matter of state law, the City of Richmond had legislative authority over its procurement policies, and could use its spending powers to remedy private discrimination, if it identified that discrimination with the particularity required by the

Fourteenth Amendment. This did not mean, however, that the city could rely upon generalized assertions of discrimination.

Instead the city had to show at a minimum "that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry" to justify affirmative steps to remedy the discrimination. *Id.* at 717. This meant that states "may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, public or private, with some specificity." *Id.* at 727. Thus a race-conscious remedial program may be, but is not required to be, justified by a showing that the enacting government's contracting policies were discriminatory. Instead, it is sufficient that the government exacerbated private discrimination by simply being a market participant in a local industry which practiced discrimination.

The Supreme Court further established that "it is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from tax contributions of all citizens, do not serve to finance the evil of private prejudice." *Id.* at 720.

2.5.3 Strict Scrutiny Standard of Review Applied

By ruling that the enacting government must demonstrate a compelling interest in a race-based program, the Supreme Court firmly established that strict scrutiny is the proper level of review of the constitutionality of racial distinctions. Strict scrutiny was the highest level of constitutional review and required that the government demonstrate a compelling interest in the purpose of the program, and further that the program itself be structured as narrowly as possible to effectuate that purpose. This requirement that the program be "narrowly tailored" meant that the racial distinctions incorporated in the

program must be absolutely necessary in order to ensure the program's success, and that such distinctions did not extend any further than necessary, so that third parties who had not participated in discrimination were not unduly burdened.

2.5.4 Application of Strict Scrutiny to the Facts of Croson

The Supreme Court found the City of Richmond had failed to demonstrate a compelling governmental interest justifying the plan, since the factual predicate supporting the plan did not establish the type of identified past discrimination in the city's construction industry that would justify race-based relief. Richmond erred on three counts:

- it relied on generalizations about societal discrimination;
- it failed to make the proper comparisons to justify its case;
- it failed to identify systematic discrimination with sufficient specificity.

Id. at 723-728. Richmond compared general population statistics to prime construction contracts awarded to MBEs. The Court considered this comparative approach misplaced, since "the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake subcontracting work in public construction" (because the Richmond program targeted minority subcontractors). *Id.* at 725. In addition, generalized assertions of discrimination in the construction industry and congressional findings of nationwide discrimination in the industry were considered to have very limited probative value. The Court concluded that none of the facts cited by the city or relied on by the district court, singularly or together, provided a basis for a *prima facie* case of local discrimination. A generalized assertion of past discrimination in the entire construction industry could not justify the use of a racial quota, since it failed to provide the legislative body with

any guidance in determining the precise scope of the local injury it sought to remedy and its duration.

Furthermore, the Court found that the plan was not narrowly tailored because it:

- entitled a successful Black, Hispanic, or Oriental entrepreneur from anywhere in the country to an "absolute preference over other citizens based solely on their race" without any link to identified discrimination in any way;
- randomly included racial groups where there was absolutely no evidence of past discrimination against that group. *Id.* at 728-29.

The Richmond record also failed to demonstrate that any consideration was given to the use of race-neutral means to increase minority business participation in city contracting. The Court cited *Paradise*, which said, "In determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies." *Croson* at 728. The Court also felt that many of the barriers relied upon by the city to justify its preference program appeared to have race-neutral causes (e.g., lack of capital or inability to meet bonding requirements) which could be addressed by race-neutral remedies such as city financing for small firms. Because the city did not consider the use of race-neutral means to increase minority business participation in city contracting prior to instituting a race-based quota, and the 30% quota was not realistically justified by any evidence of past discrimination, the Court determined that the plan was outright racial balancing, rather than an attempt to remedy past local discrimination and was therefore unconstitutional.

2.5.5 Impact of Croson on Remedial Programs

The decision by the U.S. Supreme Court in *Croson* did not completely bar the implementation of race-conscious programs designed to eradicate embedded patterns

of discrimination in certain industries. What it plainly did was to place a heavy burden on the locality to prove that the program was strictly remedial.

Full development of the type of evidence necessary to justify race-conscious remedial programs was left to the lower courts. However, the *Croson* opinion explained that, in order to demonstrate a compelling government interest in a race-conscious plan, the evidentiary record relied upon:

- must determine whether there is a gross statistical disparity between the percentage of qualified minority businesses in the relevant market area available to participate in the entity's contracts and purchases as compared with the actual participation by minority-owned businesses in the governmental entity's contracts and procurement. "Where gross statistical disparities can be shown, they alone may in a proper case constitute *prima facie* proof of a pattern or practice of local discrimination." *Id.* at 725.
- must demonstrate that the governmental entity by its contracts or procurement practices discriminated against minority businesses, or demonstrate that the governmental entity had passively participated in patterns of discrimination between prime contractors and minority subcontractors. *Id.* at 720.
- must provide specific incidents of discrimination related to the contracts or purchasing system of the governmental entity or industry within its jurisdiction rather than reliance upon general societal discrimination. *Id.* at 719-724.
- cannot extrapolate from the experience of discrimination in one jurisdiction and apply it to another jurisdiction. *Id.* at 727.
- may demonstrate evidence of discrimination with a finding of disparity between the number of local MBEs qualified for membership in trade associations as compared with the actual local MBE membership within such associations. *Id.* at 726.

2.6 The Croson Burden of Proof Applied in Post-Croson Decisions

Immediately following *Croson*, the vulnerability of MBE programs across the country became evident. A commentator who studied the initial effect of *Croson* concluded that some jurisdictions interpreted the decision to mean that "set-asides are

no longer legally acceptable and therefore should be abolished," while other jurisdictions began suspending or modifying their programs by reducing goals or allowing only "voluntary" approaches. *Judicial Versus Legislative Charting of National Economic Policy: Plotting A Democratic Course For Minority Entrepreneurs*, 24 Loy. L.A.L. Rev. 655 (1991).

2.6.1 Disparity Study Requirements

In its *Croson* opinion, the Supreme Court held: "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's prime contractors, an inference of discriminatory exclusion could arise." *Id.* at 730.

As the lower courts applied the mandates of this decision, it became apparent that it was extremely difficult for race-based programs to survive judicial scrutiny, and many programs were declared unconstitutional. Subsequent decisions have clarified the type of information which must be included in a successful disparity study to justify enactment of the program, giving some substance to the Supreme Court's requirement that disparity must be "significant," and that the minority contractors included in comparisons must be "qualified" as well as "willing and able to perform a particular service."

2.6.1.1 Proof of Disparity

In *Contractors Ass'n of Eastern Pennsylvania v. City of Philadelphia*, 735 F.Supp. 1274 (E.D. Pa. 1990), the district court determined that the city's ordinance establishing a 15% minority business enterprise goal and 10% female-owned business enterprise

goal was unconstitutional because sufficient proof of local discrimination had not been presented. A recital in the ordinance that it was remedial was accorded little weight. As in Richmond, several witnesses who testified before the city council in support of the ordinance presented personal opinions that discrimination in the construction industry existed in the city, the state, and the nation. Portions of testimony documented incidents where identified MBEs felt they had been excluded from contracting opportunities on the basis of race. Although anecdotal evidence represented pertinent evidence under *Croson*, the district court nevertheless contended that "enactment of the ordinance was based on statistical evidence of the type deemed impermissible by the Supreme Court in *Croson*." *Id.* at 1296. Philadelphia, like Richmond, relied on statistics demonstrating a disparity between the number of prime contracts awarded to minority firms and the minority population of Philadelphia. This comparison did not meet the standard set in *Croson*, which 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." 109 S.Ct. at 725. In addition, the city failed to examine the level of minority participation in subcontracting. Lacking this analysis, the city could not accurately determine expenditures to MBEs. The district court also pointed out that the government must demonstrate that the exclusion was systematic, rather than sporadic or isolated. As a result, the court stated that "the race and ethnicity-based set-asides in the Ordinance suffer from the same evidentiary defects as the Richmond Plan." 735 F.Supp. at 1310.

The decision was appealed and subsequently remanded to the district court, where a summary judgment was again granted in favor of the contractors challenging the MBE program. The City of Philadelphia appealed, and the Third Circuit Court of Appeals reversed, ruling that the City had presented sufficient evidence of discrimination

to withstand summary judgment. *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 (3rd Cir. 1993).

The Third Circuit opinion cited a line of cases in which disparity indices were relied upon as highly probative evidence of discrimination, particularly because they ensured consideration of the "relevant statistical pool" of minority contractors, as required by *Croson*. The disparity index is a comparison of the percentage of contract dollars awarded to M/WBE firms as compared with the percentage of M/WBE firms available in the relevant market area.

Data for each minority group granted a preference under the program were examined separately. Because no evidence indicated that any firms were owned by Native Americans at the time the program was initially enacted, there could be no evidence of past local discrimination against Native American firms, and thus a preference in their favor was unconstitutional. Evidence with regard to the Hispanic and Asian-American firms did not rise to the required level of "significant statistical disparity" simply because a sufficiently large pool of such firms did not exist, and no anecdotal evidence of discrimination against them was presented.

However, the evidence presented regarding Black-owned firms was sufficient to demonstrate a compelling government interest in remedying past discrimination. The statistical evidence considered by the court consisted of a study conducted by an economic consultant which demonstrated "the disproportionately low share of public and private construction contracts awarded to minority-owned businesses in Philadelphia," using statistics for the three years immediately before enactment of the program. *Id.* at 1003. In addition, anecdotal evidence given before the City Council, in the form of testimony from minority contractors recounting personal experiences of discrimination, was considered. Although anecdotal evidence was relevant under *Croson*, and

therefore considered in this case, it could not generally be sufficient unless combined with relevant statistical evidence.

A few years before the Third Circuit issued its ruling on the Philadelphia plan, an MBE program was reviewed in *Cone Corp. v. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990)¹, cert. denied, 498 U.S. 983 (1990), and determined to be within the limits set by *Croson* and therefore constitutional.

The Eleventh Circuit dissected the Hillsborough program and compared it piece by piece to the Richmond program. The court stated that "Hillsborough County's MBE law is materially different from the Richmond plan, mainly because the Hillsborough County law was enacted as a result of statistics tabulated during the six years that the [precursor] MBE program was in effect." *Id.* at 914. The Eleventh Circuit emphasized the following differences between the Hillsborough and Richmond programs:

- Unlike Richmond, Hillsborough County decided to implement its law based on statistics indicating that there was discrimination specifically in the construction business commissioned by the county, not just in the construction industry in general.
- Hillsborough documented the disparity between the percentage of MBE contractors in the area and the percentage of county contracts awarded to those MBE contractors. Richmond on the other hand did not know how many MBE contractors in the relevant market were qualified to undertake work on public projects. In addition, Richmond relied on the disparity between the number of prime contracts awarded to MBE contractors and the total minority population of the city.
- Hillsborough determined the percentage of county construction dollars going to MBE contractors compared to the total percentage of county construction dollars spent. In contrast, Richmond did not know what percentage of total city construction dollars MBE contractors received as subcontractors on city contracts.

¹ This opinion was subsequently reversed on the ground that plaintiffs lacked standing to sue. 983 F.2d 197 (1993). Reversal was not based on a misreading of *Croson*. Consequently, the case may still be relied on as precedent.

- Hillsborough provided evidence that MBE contractors made numerous complaints to the county regarding direct experiences of discrimination by prime contractors and suppliers. In contrast, Richmond based its decision to implement the plan in part on the fact that a city official felt that there was discrimination in the construction industry in the area and the state. Richmond did not provide any direct evidence of racial discrimination on the part of the city or any evidence that the city's prime contractors had discriminated against MBE subcontractors. *Id.* at 914-15.

The statistics from the studies undertaken by the county provided a *prima facie* case of discrimination sufficient to clear the summary judgment hurdle. In short, the evidentiary facts supported the county's compelling governmental interest in remedying the effects of past discrimination. The court explained that at a minimum, "any plan must have more than an amorphous claim that there has been discrimination in a particular industry. Where plans establish quotas, the quotas must be tied to some injury suffered by the minority to be benefitted." *Id.* at 913-14.

Two years later, the Ninth Circuit Court of Appeals determined that a county set-aside program was justified by sufficient statistical data in *Coral Construction Company v. King County*, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 875, *rehearing denied*, 112 S.Ct. 1307 (1992). The court explained that ". . . a set-aside program is valid only if actual, identifiable discrimination has occurred within the local industry affected by the program . . ." and if, in addition, ". . . the governmental actor enacting the set-aside program must have somehow perpetuated the discrimination to be remedied by the program." *Id.* at 916. The opinion clarified the type of governmental discrimination necessary to satisfy *Croson*: "*Croson* does not require a showing of active discrimination by the enacting agency; passive participation, such as the infusion of tax dollars into a discriminatory industry, suffices." *Id.* at 922.

A 1993 decision by the United States District Court of Colorado provided additional insight into the information which must be provided in a disparity study to

satisfy *Croson*. In *Concrete Works of Colorado, Inc. v. The City and County of Denver, Colorado*, 823 F.Supp. 821 (D. Colo. 1993), the evidence relied upon to establish discrimination consisted of federal studies, specific anecdotal reports of discrimination, independent analysis focusing on contracting procedures, testimony at city council hearings, census data, and statistical evidence. The court concluded that *Croson* does not "require a municipality affirmatively to *prove* discrimination with such a degree of statistical certainty that no statistician could disagree;" instead the court required only that findings provide a "strong basis in evidence for its conclusion that remedial action was necessary." *Id.* at 840.

In *Associated General Contractors v. New Haven*, 791 F.Supp. 941, 948 (D. Conn. 1992), the court stated that evidence which does not "rise to the level of showing a systemic pattern of discrimination to the exclusion of any other explanation" is insufficient to justify an affirmative action program.

The North Carolina Court of Appeals reviewed a constitutional challenge to the state's MBE program in *Dickerson Carolina, Inc. v. Thomas L. Harrelson*, ____ N.C. App. ____, 443 S.E.2d 127 (1994). Without specifically reviewing the quality of the evidence presented, the court explained that the Legislature had modified the state's MBE program in reliance upon their finding, following a comprehensive study, of historical discrimination in the highway construction industry. Because the plaintiff did not allege that the modified program was unconstitutional, that issue was simply not before the court.

From the opinions interpreting *Croson*, the following methodology for a *prima facie* showing of discrimination has emerged: where a significant disparity is shown from a comparison of the percentage of available minority firms in the local market and the percentage of contracts they receive, an inference of a discriminatory intent arises.

Concrete Works, 823 F.Supp. at 839. The most probative evidence is data showing that minority firms received a disproportionately low share of contracts given their representation in the total industry. *Contractors Ass'n*, 6 F.3d at 1004.

The court in *Contractors Ass'n* explained (with regard to construction contractors, which were the targeted group in the program under review) that a critical component of a disparity index consists of a comparison between "the percentage of minority contractor participation in City contracts" and "the percentage of minority contractor availability or composition in the population of Philadelphia area construction firms." *Id.* at 1005.

Once disparity has been shown, the government need not explain why the disparity exists, because the parties challenging the remedial program then have the burden of demonstrating the unconstitutionality of the program. *Id.*

Various methodologies of statistical analysis may be employed to demonstrate disparity. Several formulas – including standard deviation calculation, chi-square and multiple regression analyses – were explained in detail in *The Aftermath of Croson: A Blueprint for a Constitutionally Permissible Minority Set-Aside Program*, 53 Ohio State Law Journal 555 (1992). In interpreting data, methodologies must be developed to account for non-discriminatory variables and to demonstrate the severity of the discrimination. *Id.* at 579-81.

Croson required a showing of "significant" or "gross" statistical disparity but few opinions have attempted a definition. A "significant statistical disparity" was defined in *Concrete Works*, with regard to a utilization/capacity ratio, as a difference greater than "two or more standard deviations." 823 F.Supp. at 838. In reaching this conclusion, the opinion relied on the Ohio State Law Journal article referenced above, which explained that ". . . as a general rule, if there are more than three standard deviations for the

binomial distribution between the amount of contract dollars that minority firms should be expected to receive and the actual amount of contract dollars they received, then the disparity is a result of something other than the expected fluctuation due to normal bias." 53 Ohio St.L.J. at 578.

2.6.1.2 Proof of Availability (Definition of the terms "available," "qualified," "able," and "willing")

Statistical comparisons to prove the existence of disparity must be based upon the number of available contractors or, where the program benefits subcontractors, the number of available subcontractors. The concept of availability includes both geographic location and the firm's qualifications to furnish the labor, services or materials required for a specific type of project.

According to several court decisions, the availability of an MBE or WBE is measured on an industry-by-industry basis rather than specific tasks within a particular industry. *Coral Construction Company v. King County*, 941 F.2d 910, 916 (9th Cir. 1991); *O'Donnell Construction Co. v. District of Columbia*, 762 F.Supp. 354,365 n.13 (D.D.C. 1991). For example, the Ninth Circuit Court of Appeals in *Coral Construction Company v. King County*, 941 F.2d 910 (9th Cir. 1991), stated:

The Croson Court identified several factors suggesting the existence of a compelling governmental interest. First, a set-aside program is valid only if actual, identifiable discrimination has occurred within the local industry affected by the program.

(Emphasis supplied). *Id.* at 916.

The only reported decision which has directly addressed the need to study sub-classifications within a particular industry is the decision by the United States District Court for the District of Columbia in *O'Donnell Construction Co. v. District of Columbia*, 762 F.Supp. 354 (D.D.C. 1991). In that decision, the district court expressly rejected

the contractor's contention that the District of Columbia disparity study was invalid because it failed to analyze the statistical disparities in road building and bridge building separately. In footnote 13 on page 365 of the opinion, the district court stated, in relevant part, as follows:

The *Croson* opinion does not specifically address whether state and local legislatures must break down the various categories of construction work and establish a record of discriminatory exclusion within each such area. Rather, the *Croson* Court considered whether there was sufficient evidence of discrimination in the Richmond construction industry as a whole. Accordingly, this Court will adopt the analysis utilized by the Supreme Court and examine the construction industry at issue here as a whole.

Although the Circuit Court of Appeals reversed the lower court decision in the *O'Donnell* case, the reversal was based on other grounds. The Circuit Court of Appeals did not overrule the portion of the district court opinion relative to the need to study subparts of industries.

In the decision of *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 (3rd Cir. 1993), the court observed as follows:

In both *Cone* and *AGC of California*, where the courts refused to strike down the ordinances, the city and county presented the type of statistics *Croson* indicated were most probative – data showing minority contractors received a disproportionately low share of contracts given their representation in the total contractor population.

(Emphasis supplied). *Contractors Ass'n* at 1004.

The *Contractors Association of Eastern Pennsylvania v. City of Philadelphia* case also cites the decision of the United States District Court for the District of Colorado in *Concrete Works of Colorado v. City and County of Denver*, 823 F.Supp. 821 (D.Colo. 1993), where the Court stated utilization is calculated by comparing the ratio of industry contracts received by MBEs relative to the total number of contracts in the industry.

Based on these decisions, the availability of M/WBE firms should be measured on an industry basis. In order for a firm to be included in the availability pool, the firm

must be engaged in the business of furnishing the services or materials required for the particular project industry being studied.

Some commentators have suggested that the capacity of each firm and their willingness to perform public works must be established before a firm can be included in the availability pool. This contention is not supported by the case law.

On a statistical basis, the concept of capacity is difficult to measure on a particular firm. At least one federal district court has ruled that it is unnecessary (and perhaps impossible) to identify and differentiate based on the capacity of individual firms included in the statistical part of the study. *Concrete Works of Colorado*. The district court pointed out that the size of a firm is not determinative of the capacity of the firm. In rejecting the argument that specific evidence of capacity is necessary, the court stated:

Finally, Concrete Works can cite no authority for its assertion that it amorphous, ambiguous conception of capacity is required. No court to date has required a firm's "ability" to handle work. (citations omitted).

Id. at 839.

The concept of a firm being "willing" to perform public works has not been an element of availability required by the courts. For purposes of determining whether there is a gross statistical utilization disparity within an industry the study may, but is not required to, measure the willingness of firms to perform public works projects.

2.6.1.3 Geographic Limits

To provide valid statistical comparison, businesses must not only be available, but they must also operate within the geographic limits of the enacting government's jurisdiction. This geographic limitation was set out in *Croson*: "The predicate required for a race-conscious program is the existence of a systematic pattern of race-based exclusion in city construction." 48 U.S. at 509. For disparity study purposes, the focus

is not on a firm's location, but instead on the area where the business participates. Since a jurisdiction's interest is limited to remedying the affects of discrimination within its own jurisdiction -- and any broader intent would be a constitutionally-prohibited attempt to address general societal discrimination -- a disparity study to justify a remedial program must demonstrate discrimination in the local business community.

Thus, as explained in *Contractors Ass'n*, the relevant statistical pool to demonstrate the existence of local discrimination must be the number of qualified minority contractors which were available to perform the contract and which operated locally. Where the program benefitted subcontractors, the relevant statistic was likewise the number of qualified minority subcontractors which operated locally.

Evidence of discrimination against businesses located outside the enacting jurisdiction may be relevant, but only if it demonstrates the existence of discrimination within the enacting jurisdiction. In *Coral Construction*, the court criticized reliance upon information compiled by jurisdictions other than King County to establish the existence of past discrimination within King County. Evidence from jurisdictions within or coterminous with the political boundaries of King County had probative value since firms in those areas were likely to participate in King County, but evidence from more distant areas was largely irrelevant because contractors in those areas would not be likely to seek business in King County. The court recommended that "the enacting jurisdiction should limit its factual inquiry to the presence of discrimination within its own boundaries" in order to guard against the risk that the study contained information that was overbroad.

Nevertheless, in *Concrete Works of Colorado*, evidence of discrimination outside the enacting jurisdiction was considered probative. Evidence of discrimination against firms located in areas immediately adjacent to the jurisdictional boundary supported a

finding of local discrimination. Specific studies of discrimination in a second adjacent area were ruled irrelevant, however, because they duplicated evidence already presented in the first study.

2.6.1.4 Post-Implementation Studies

Sometimes evidence of discrimination which was not available at the time the program was implemented becomes available at the time a program is under judicial review. Courts have determined that consideration of post-implementation studies as evidence of prior discrimination is proper. Although "a municipality must have *some* concrete evidence of discrimination in a particular industry before it may adopt a remedial program," all evidence presented to the court should be considered, whether gathered before or after enactment of the program. *Coral Construction*, 941 F.2d at 920. This need for action is because a municipality "might well be remiss" if it failed to act in response to evidence of "its own culpability in fostering or furthering race discrimination." *Id.* at 920-21. The court in *Coral Construction* thus established the rule that "a plan will not be invalidated *solely* because the record at time of enactment did not measure up to constitutional standards." *Id.* at 921. This reasoning was followed by the court in *Concrete Works*.

In *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 60 (2d Cir. 1992), the court stated:

The law is plain that the constitutional sufficiency of a state's proffered reasons necessitating an affirmative action plan should be assessed on whatever evidence is presented, whether prior to or subsequent to the programs' enactment.

This conclusion was favorably cited with approval by the North Carolina Court of Appeals in *Dickerson Carolina v. Harrelson*, although not relied upon since the constitutionality of the program was not at issue.

2.6.1.5 Weight Given to Evidence of Discrimination

Not all evidence of discrimination will be weighed equally by the courts. For example, statistical evidence demonstrating past local government discrimination is preferred to anecdotal evidence, which tends to be subjective. Anecdotal evidence merely establishes individual incidents of discrimination. It is valuable, however, to corroborate discriminatory explanations for demonstrated disparity.

Even statistical evidence, however, is given weight according to how clearly it demonstrates discrimination. For example, in *Concrete Works*, the court criticized Denver's interpretation of some of the evidence relied upon to prove discrimination. Information indicating that minority-owned firms were generally small was not clearly evidence of discrimination, since small size could also be due to non-discriminatory reasons, such as being relatively new in the industry, or experiencing difficulty in obtaining capital, credit, insurance, and bonds.

Cumulative evidence may be sufficient to prove disparity arising from discrimination, even where one piece of that evidence by itself would not be dispositive. For example, the data successfully relied upon in *Concrete Works* included, in part, a study of city contracting procedures, a report of minority firms' participation in city and federally funded projects, census data comparing minority firm size, receipts and rate of formation to that of all local construction firms, anecdotal evidence gathered at public hearings, and a disparity study which established a statistical disparity between minority firm capacity and utilization. 833 F.Supp. at 831-34.

In general, data which were statistically flawed, lacked specificity, used an overly small sample size, and covered only a single year's contracts were flawed and could not be sufficient to establish the required factual predicate. *Id.* at 831. In addition, statistical data which had race-neutral explanations (such as number of employees, rate of formation, bonding capacity) could contribute to a finding of disparity but was, of itself, not dispositive.

2.6.1.6 Admissability of Scientific Expert Testimony

Testimony regarding the results of disparity studies is based upon statistics-gathering techniques and an analysis of the resulting data. Such testimony falls into the category of "scientific expert testimony." The admissability of scientific expert testimony in the federal courts was recently modified by the U.S. Supreme Court. An understanding of this modification is critical to the development of a disparity study which can withstand judicial review.

In 1993, the Supreme Court rendered its decision in *Daubert v. Merrell Dow Pharmaceuticals*, 113 S.Ct. 2786, which modified the factors to be considered by federal courts in determining whether testimony by scientific experts is admissible.

Before the ruling in *Daubert*, the admissibility of expert testimony was defined by the "general acceptance" standard set in 1923 by *Frye v. United States*, 293 F. 1013 (App. D.C. 1923). The *Frye* standard required that any analysis which provided the basis for expert testimony have sufficient recognition and acceptance among authorities in the field to justify admission of the testimony. Thus, under the *Frye* test, a judge deciding the admissibility of expert testimony was only required to determine whether that testimony was based on principles that were "generally accepted" in the scientific community.

In the *Daubert* opinion, the Supreme Court rejected the *Frye* test, recognizing that it was superseded by the adoption of the Federal Rules of Evidence in 1975. Specifically, Rule 702 provided that expert testimony, including opinion testimony, was admissible if it assisted the trier of fact in either understanding evidence or determining a fact in issue. The Supreme Court explained that neither the text of Rule 702 nor its drafting history required the "general acceptance" standard, which was the exclusive test asserted in *Frye*.

Nevertheless, under the Rules of Evidence, to be admissible, scientific testimony must be not only relevant but also reliable. "In short, the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability." 113 S.Ct. at 2795. This required the trial judge to make a preliminary assessment of whether the reasoning or methodology underlying the testimony was scientifically valid and whether that reasoning or methodology properly could be applied to the facts in issue.

The court set out four factors to be considered in determining if methodology was scientifically valid:

1. Whether the expert's theory or technique has been tested;
2. Whether the expert's theory or technique has been subject to peer review and publication;
3. What is the test or technique's rate of error;
4. Whether the theory or technique has been generally accepted in the scientific community.

Thus, "general acceptance" bears on the reliability assessment but is now merely a factor in determining reliability rather than the essential inquiry.

Two results may flow from this new standard: evidence which was not "generally accepted" in the scientific community, previously excluded under *Frye*, may be

admissible under *Daubert*; and evidence previously admissible under the *Frye* "generally accepted" standard may be barred by *Daubert* because it cannot pass the new "scientific validity" test.

To date there have been relatively few decisions clarifying the standard set out in *Daubert*, but it is clear that the courts now must carefully scrutinize the methodology underlying scientific evidence before admitting it.

In *Cantrell v. GAF Corp.*, 999 F.2d 1077 (6th Cir. 1993), the court explained that, in making the scientific validity assessment, the trial court may consider the degree of its acceptance in the scientific community, but consideration of this factor was not required.

In *United States v. Martinez*, 3 F.2d 1191, 1197-98 (8th Cir. 1993), in which the court reviewed the admissibility of the creation of DNA profiles, the court stated that methodology could be reliable only if protocols were properly applied. Evidence would be excluded if its reliability was negated by the improper performance of techniques. The court also explained that "judicial notice of reliability of the technique does not mean that expert testimony regarding it is automatically admissible." This finding meant that the Court must review not only information-gathering techniques, but the analysis of that information as well.

In *Frymire-Brinati v. KPMG Peat Marwick*, 2 F.3d 183 (7th Cir. 1993), the court reviewed the admissibility of testimony by an accounting expert. The expert failed to employ principles in his analysis which experts in the field considered essential. Because the trial judge failed to assess whether the methodology was scientifically valid, the trial court erred in admitting the testimony.

The Fourth Circuit analyzed the admissibility of a chemist's explanation of gas chromatographic analysis of drugs, a new technique, in *United States v. Bynum*, 3 F.3d

769 (4th Cir. 1993). The Fourth Circuit explained that "an opinion that defies testing, however defensible or deeply held, is not scientific." Nevertheless the chemist's testimony was admissible, because the following indicia of reliability were present: the government had explained the hypothesis underlying the technique; the government had listed publications where the technique had been subject to peer review; and the government had provided citation to authority that the technique was generally accepted in the scientific community.

It is clear from the *Daubert* opinion and its application by the lower courts that the barriers for admitting evidence which lack "general acceptance" have been relaxed. It is also clear that the party seeking to present expert testimony -- such as an analysis of the results of a disparity study -- must be prepared to demonstrate to the court that the methodology applied in gathering the data was scientifically valid, and further that the methodology applied in analyzing the data was scientifically valid.

2.6.2 Narrowly Tailored Programs

Once a government has demonstrated a compelling interest in a race-based program by presenting evidence of past local discrimination, the government must then demonstrate that the program is narrowly tailored. Four requirements were set out in *Contractors Ass'n*:

1. Race-neutral measures had to be considered before implementation of the program;
2. Some basis for the goal in the program had to exist;
3. Flexibility had to be provided, such as a provision for waiver of requirements in the event qualified minority contractors were unavailable;
4. The program had to apply only to minority businesses which operated locally, although it could include those based outside the

locality as long as they did business within the locality. 6 F.3d at 1008.

The court in *Contractors Ass'n* concluded that the Philadelphia program included targeting mechanisms which satisfied each of the four requirements of narrow tailoring. Affidavits from local community leaders provided evidence of race-neutral precursors. The program provided for exemptions where an insufficient number of minority businesses existed to ensure adequate competition, as well as the ability of a contractor to request a waiver if a good faith effort was demonstrated. The program targeted local businesses. The goal was based on sufficient statistical evidence, even though it did not correspond precisely to the percentage of available minority contractors, and realistically reflected the possibility of waivers.

In *Cone Corp.*, the court compared the Hillsborough plan to the Richmond plan rejected in *Croson*, and determined that the Hillsborough plan was narrowly tailored. The Hillsborough plan differed from the Richmond plan on several counts. First, Hillsborough initiated incremental race-neutral measures prior to instituting race-conscious measures:

- Hillsborough tried for six years, from 1982 to 1988, to implement a voluntary MBE program whereby contractors would voluntarily list their minority subcontractors. This action was intended to increase awareness and accountability regarding MBEs.
- In 1984, the county discovered that in spite of the voluntary program, minorities and women were receiving a disproportionately small percentage of the county's construction business. The county determined that without some affirmative legal obligation placed on contractors, the voluntary program would fail to ensure MBE participation in county contracting projects.
- The 1988 Resolution called for measures such as:
 - arranging adequate time for submission of bids;
 - breaking large projects into several smaller projects to facilitate small business participation;

- holding seminars or workshops to acquaint MBEs with county procurement activities;
- providing contracting opportunities for professional services;
- penalizing bidders who violated the intent of the MBE program or federal and state laws prohibiting discriminatory preference in contracting;
- establishing an annual goal of 25% MBE participation in county construction, with 20% of the participation coming from economically disadvantaged MBEs.

In contrast, in the Richmond plan:

- did not consider the use of any race-neutral means to increase MBE participation before it instituted its race-conscious MBE plan;
- Richmond's 30% participation goal was not linked to any supporting evidence that suggested MBE's seeking construction work under the plan had experienced any kind of racial discrimination.

In addition to the implementation of race-neutral measures, Hillsborough's program was narrowly tailored because:

- Hillsborough's MBE 25% goal was flexible and not rigid like Richmond's 30% goal.
- The 25% goal did not apply to every individual project.
- Goals were set for projects based on the number of qualified MBE subcontractors available for each task intended to be awarded to a subcontractor.
- If there were not at least three qualified MBE subcontractors available for the task to be subcontracted, no goal was set in that area.
- No goal could exceed 50% MBE participation.
- At any time prior to advertisement of the project, the goals could be waived.
- A low bidder who did not meet the plan goals still could obtain a contract simply by demonstrating a good faith effort to find MBE contractors.
- Even absent such good faith efforts, the contractor may still receive the contract if the next lowest bid is either \$100,000 or 15% higher than the non-responsive bidder.

- Unlike Richmond's 30% set-aside which applied equally to African-Americans, Hispanics, Indians, Eskimos, and Asians, the Hillsborough plan broke its 25% MBE participation goal down by minority groups, targeting African-Americans, Hispanics, women, and others. Others constituted 1% of the overall goal.
- The Hillsborough plan targeted those MBEs most likely to have been discriminated against - those MBEs disadvantaged in terms of size, volume of business, and number of employees, the premise being that large and successful MBEs were likely to have overcome the effects of discrimination, while smaller, struggling businesses still suffered discrimination's ill effects. 908 F.2d at 916-17.

The Eleventh Circuit concluded that "even a cursory comparison of the Hillsborough County law and the Richmond plan demonstrates that the two are vastly different in critical areas" and that it is "difficult to understand how the district court could, without any kind of articulated comparative analysis, conclude that the Hillsborough County law is unconstitutional under *Croson*." *Id.* at 917. The message was clear that the district courts must carefully and individually consider the merits of each plan to determine if it is narrowly tailored.

2.6.2.1 Race-Neutral Measures

Croson required that race-neutral measures be evaluated as alternatives to implementation of race-conscious programs. Training and financial assistance programs and waiver of bonding requirements are typical race-neutral measures which base eligibility upon firm size or revenue rather than racial classification.

The King County program under review in *Coral Construction* implemented race-neutral measures in the program (i.e., training sessions for small businesses and information on accessing small business assistance programs). Although these race-neutral measures were included in the race-conscious program itself, rather than considering them as alternatives to the program, the Court of Appeals found that the

burden of considering race-neutral alternatives had been fulfilled. A governmental agency could institute a goals program either after, or in conjunction with, race-neutral measures. Further, the court held that "while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative." 941 F.2d at 923.

2.6.2.2 Basis for Goal

Although *Croson* allows a government to remedy the effects of identified discrimination, the form of the remedy must correspond to the identified discrimination. Thus, program goals which are arbitrary figures or appear to be an attempt at outright racial balancing cannot pass constitutional review. In *Associated General Contractors of California v. San Francisco*, 748 F.Supp. 1443 (N.D. Cal. 1990), *aff'd*, 950 F.2d 1401 (9th Cir. 1991), the court approved a 5% bidding preference which, they concluded, provided a modest "competitive plus" to offset the disadvantage created by discriminatory practices and nothing more, and properly corresponded to MBE eligibility figures.

2.6.2.3 Flexibility

Flexibility in program provisions circumscribes the remedy to avoid undue burdens on non-minority firms. Flexibility is generally found in provisions for waiver of bid preferences or goals under defined circumstances, limitation of program duration, or setting flexible case-by-case goals which take into account availability of qualified MBEs. For example, in *Coral Construction*, the fixed 5% preference allotted to MBEs was not unduly rigid because the program included waiver provisions, which allowed contractors to apply for a waiver of the preference requirement where qualified minority

subcontractors were unavailable or provided an unacceptably high bid, and the prescribed subcontractor participation was determined individually for each contract. 941 F.2d at 924.

2.6.2.4 Limitations of Remedy

Croson entitled a government to rectify the effects of identified discrimination within its jurisdiction, but limited the scope of the remedial program to the boundaries of the enacting jurisdiction. 109 S.Ct. at 719-20. This did not mean that only local businesses could qualify for remedial programs. As with evidence of local discrimination, the focus is on business participation, not business location, so that remedial programs may include any non-local minority firms which operate within the boundaries of the enacting jurisdiction. This limitation is necessary to avoid unduly burdening residents of the jurisdiction who are covered by the program but have not engaged in discriminatory activity. *Coral Construction*, 941 F.2d at 917.

In *Concrete Works*, the court concluded that this prong of narrow tailoring was satisfied where the race-conscious program applied only to contracts awarded by the city and county for work within its jurisdiction by local contractors, and the program provided that non-local minority firms could become eligible if they attested to city-sponsored discrimination or showed that they had attempted to work in the city or county prior to the period during which the existence of discrimination was inferred by the disparity study. 823 F.Supp. at 844.

In general, "any plan that extends race-conscious remedies beyond territorial boundaries must be based on very specific findings that actions the [enacting entity] has taken in the past have visited racial discrimination on such individuals." *Id.* at 836.

Qualification for remedial programs may, however, be restricted to resident firms. Where this occurs, the evidence of discrimination to support such a program may be appropriately limited to firms located within the jurisdictional boundaries. *Associated General Contractors*, 950 F.2d at 1401.

Despite meeting race-neutral alternative and flexibility factors, the King County program reviewed in *Coral Construction* was not narrowly tailored because the program was not limited in geographic scope to the boundaries of the enacting jurisdiction, as required by *Croson*, and the program was therefore unconstitutional. The program's definition of minority business included MBEs that had no prior contact with King County, since the program allowed an MBE to qualify for preferential treatment under the program with a showing that it had been discriminated against in the particular geographic area in which it operated (which may or may not be within the County's jurisdictional limits). This raised the specter that the real focus of the program was the eradication of society-wide discrimination, which was beyond the power of the enacting government.

In *Associated General Contractors*, the court declined to read language in *Croson* (which implied that only actual past victims of discrimination could qualify for relief) as "limiting any remedy to individuals personally proven to have suffered prior discrimination . . ." 748 F.Supp. at 1455. Nevertheless, eligible firms must fall within the classification which has suffered the effects of identified discrimination. Thus, where evidence of discrimination against Blacks exists, but not against Asians, for example, Asians may not be included in the remedial program. *Contractors Ass'n*, 6 F.3d at 1003-05. In *Associated General Contractors*, the remedial program excluded specific categories of firms (i.e., Hispanic computer system firms and Black medical service

firms) where no evidence of discrimination against these specific groups was found. 748 F.Supp. at 454.

2.6.3 Renewal of Programs

Successful MBE programs represent a new frontier in the application of *Croson* standards. Where statistical studies no longer demonstrate the existence of disparity, one explanation is that previous set-aside programs were successful in curing the effects of past discrimination; another explanation is that discrimination against MBEs simply no longer occurs in the geographic area for reasons unrelated to the MBE program. The issue then arises: where relevant statistical disparity is lacking, may a set-aside program nevertheless be re-enacted, if other evidence of discrimination exists? This issue was considered in *Associated General Contractors v. New Haven*, where the city enacting the MBE ordinance argued that the success of their program eliminated the statistical disparity relied upon in *Croson*, but that ongoing remedial action was nevertheless necessary to ensure continued participation by MBEs. The court concluded that, "Where . . . statistics do not really indicate whether discrimination exists, it would be unreasonable to hold that the city is barred from enacting a race or gender-conscious statute if there is other evidence of discrimination." 791 F.Supp. at 947 (emphasis added). Evidence that a reasonable level of minority participation would not continue without re-enactment of the program was required. The court suggested that statistics showing minority bids for private contracts were lowest but nonetheless rejected would establish the existence of discrimination and the need for an ongoing set-aside program. However, anecdotal evidence of labor union animus and problems in training, bonding, and insurance, as well as individual incidents of misconduct toward

minority or female construction workers, did not reflect discrimination in the awarding of construction contracts and would not justify re-enactment of set-aside programs.

2.6.4 Goals-Only Programs

In what appears to be a trend spawned by concerns that no existing program was sufficient under *Croson*, and concerns that disparity studies would be expensive and time consuming, several government entities have passed preferential programs which purport to prevent future discrimination, rather than remedy past discrimination. These programs set voluntary goals rather than quotas, and merely require "good faith efforts" by bidders and contractors to include minority business participation. These programs have been subject to inconsistent standards of review by the lower courts. For example, in *Feriozzi Co. v. Atlantic City*, 266 N.J. Super. 124, 628 A.2d 821, 829 (1993), the court stated that no empirical data establishing prior discrimination was required to justify a goals-only program and that strict scrutiny did not apply. However, in *F. Buddie Contracting Co. v. City of Elyria, Ohio*, 773 F.Supp. 1018 (N.D. Ohio 1991), the court struck the city's goals-only program because no evidence was produced indicating that discrimination presently existed, and stated that "defendants must make a finding based upon material factual evidence that past and/or present discrimination exists."

2.6.5 Race-Neutral Programs

Race-neutral programs are designed to assist struggling enterprises by offering, for example, government-sponsored training, funding, and insurance. Qualification for participation in such programs is often defined in terms of the size or income of the business. Thus race-neutral programs do not create racial distinctions, and are therefore not vulnerable to review for violation of the Equal Protection Clause.

Where race-neutral measures are combined with race-based measures, the program must be justified under typical strict scrutiny to the extent that it is based upon a racial distinction. The race-neutral measures would be considered favorably by the reviewing court when determining if the program is narrowly tailored.

2.6.6 Gender-based Programs for Women Business Enterprises (WBE)

The U.S. Supreme Court has never determined the level of scrutiny which should be applied to programs which give preferential treatment to women and women-owned businesses. In other contexts, however, the Supreme Court has ruled that gender classifications are subject only to "intermediate" scrutiny, rather than the strict scrutiny which is applied to racial classifications.

Intermediate scrutiny requires the governmental entity to demonstrate an important governmental objective and a means that bears a fair and substantial relation to achieving that objective; otherwise the law will be unconstitutional. The test requires an "exceedingly persuasive justification" for classifications based on gender, no matter which gender is favored. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). Unlike the narrow tailoring required for racial classifications, the test does not require that gender-based statutes be "drawn as precisely as [they] might have been" in order to be substantially related to the governmental objective. *Associated General Contractors of California*, 813 F.2d at 942.

The lower courts have applied this intermediate review to WBE programs. In *Associated General Contractors of California*, the Ninth Circuit determined that "exceedingly persuasive justification" for a WBE program exists only if:

- members of the gender benefitted by the classification actually suffer a disadvantage related to the classification;

- the classification does not reflect or reinforce archaic and stereotyped notions of the roles and abilities of women.

Id. at 940.

It is clear that some degree of discrimination must be demonstrated in a specific industry before a gender-specific remedy may be enacted. The courts have differed, however, on whether evidence of discrimination by the government enacting the WBE program is required. In *Coral Construction*, the Ninth Circuit ruled that intermediate scrutiny does not require a showing of governmental involvement, either active or passive, in the discrimination it seeks to remedy. 941 F.2d at 932. In contrast, the court in *Michigan Road Builders Ass'n Inc. v. Milliken* struck a WBE preference program because the state failed to present evidence, other than general assertions, that the state had discriminated against women in contract procurement. 834 F.2d 583, 595 (6th Cir. 1987). In *Contractors Ass'n*, the court acknowledged these conflicting approaches and determined that the intermediate scrutiny standard required the enacting government to present "probative evidence" in support of its WBE program. 6 F.3d at 1010. In that case, the court determined that some of the evidence merely reflected the participation of women in city contracting generally, rather than in the construction industry itself. The evidence consisted of statistics which lacked a disparity index, one affidavit presenting anecdotal evidence, and one witness at a hearing. This evidence of discrimination was considered insufficient to justify the gender preference program. Similarly, in 1993, the U.S. District Court for the Western District of Michigan ruled a WBE program unconstitutional because the record lacked any evidence that the city enacting the program had discriminated against women. *Arrow Office Supply Co. v. City of Detroit*, 826 F.Supp. 1072 (E.D. Mich. 1993).

A WBE program might be subject to a stricter standard if combined with a race-based program. In *Concrete Works of Colorado*, the court determined that, because strict scrutiny is the most stringent level of review possible, it should be applied to all components of an ordinance containing race and gender classifications. 823 F. Supp. at 829. Likewise, in *New Haven*, the district court simultaneously applied strict scrutiny to the MBE and WBE programs. 791 F.Supp. at 947-48. In contrast, the Third Circuit severed the programs and subjected the MBE and WBE preferences to separate levels of review. *Contractors Ass'n*, 6 F.3d at 1009. This severed approach, applying strict scrutiny to the MBE component and intermediate scrutiny to the WBE component, was also followed in *Coral Construction*, 941 F.2d. at 931 and *Michigan Road Builders*, 834 F.2d at 595.

2.6.7 Federal Disadvantaged Business Enterprise (DBE) Programs

DBE programs are federally mandated and federally funded, and are subject to a more deferential standard of review than classifications enacted by state and local governments. This less rigorous standard is because Congress was granted a comprehensive remedial power to enforce equal protection guarantees by the enforcement clause of the Fourteenth Amendment. *Croson*, 109 S.Ct. at 718. State and local governments do not share Congress' comprehensive constitutional power.

Fullilove (reviewing a federal government program), rather than *Croson* (reviewing a local government program), sets out the proper standard by which the constitutionality of a congressionally mandated set-aside program is to be reviewed. The proper review of a federal affirmative action statute determines, first, whether the objectives of the legislation are within the power of Congress; and, second, whether the classification used is a valid means for Congress to accomplish its objectives within the constraints

of the equal protection component of the Due Process Clause of the Fifth Amendment. Because Congress has been given broad powers by the Constitution to identify and redress the effects of society-wide discrimination, Congress is not required to make specific findings of discrimination to justify its affirmative action programs. *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547, 565, *rehearing denied*, 111 S.Ct. 15 (1990).

Where a state or local government has implemented a DBE program, under authorization of a federal statute, the appropriate review to determine whether the local program violates the equal protection clause is to ask whether the local ordinance exceeded the federal grant of authority. As long as the local program "closely tracks" the federal program, and the federal program itself is constitutionally valid, it is lawful. *Harrison & Burrowes Bridge Constructors v. Cuomo*, 981 F.2d at 57. Thus a local preference program which is within the federal grant of authority need not rely upon a showing of local discrimination.

However, any implementation by a local government beyond the bounds of a federal program must be justified by specific findings of identifiable local discrimination. *Milwaukee County Pavers Ass'n v. Fiedler*, 731 F.Supp. 1395, 1414 (W.D.Wis. 1990), *aff'd*, 922 F.2d 419 (7th Cir. 1991). In addition, any goal which exceeds federal authorization must be narrowly tailored. *O'Donnell Const. Co. v. District of Columbia*, 815 F.Supp. 473, 483 (D.D.C. 1992). To the extent a local program exceeds its federal authorization (for example, in terms of the effective dates for the program or its goal), it is subject to strict scrutiny. *Id.* at 482.

In *Harrison & Burrowes*, the court reviewed New York's set-aside program for state highway construction projects enacted pursuant to federal funding legislation. The state program provided a 17% set-aside goal, while the federal act required a goal of "10% or more." The court determined that the state program's goal was within the

bounds of federal authority and did not need to be justified by findings of past discrimination. 981 F.2d at 57-58.

The District of Columbia enacted a DBE program with a 37% goal under authorization of a federal act requiring that "at least 10%" of funds be awarded to disadvantaged firms. The district court reviewing the constitutionality of the program determined that the 37% goal was outside the bounds of federal authority because the local government did not follow the proper steps mandated by the federal act to set the program's goal. *O'Donnell*, 815 F.Supp. at 482.

In *H.K. Porter Company, Inc. V. Metropolitan Dade County*, 975 F.2d 762 (11th Cir. 1992),² the court reviewed the award of a federal construction contract which was funded in part by a federal grant and in part by a county program which required a 5% set-aside. The federal enabling statute did not include any express percentage set-aside requirement. Instead, the federal statute simply required affirmative action to prevent discrimination under the Act, and state or local governments were expected to determine the appropriate affirmative action policy. The court concluded that, in effect, the county set-aside program was "neither approved nor mandated by Congress." Because the county program had not been based upon any findings of earlier discrimination, it therefore could not be a "tailored effort to remedy past discrimination" and was unconstitutional. *Id.* at 767.

2.7 Summary

As demonstrated in the previous sections, a number of important federal court decisions, including both the U.S. Supreme Court *Croson* decision and its progeny in

² This opinion was vacated pursuant to a settlement agreement in 998 F.2d 892 (11th Cir. 1993).

the lower courts, have provided substantial guidance on the factors to be considered and the principles to be applied in determining the legal validity of affirmative M/W/DBE contracting programs. Of particular importance here is the discussion, in those cases summarized above, of appropriate criteria for determining whether governmental entities adequately demonstrated the predicate for affirmative remedial programs through proper gathering, review, and analysis of statistical data on qualified local minority/women/-handicapped businesses.

To provide the required justification for a remedial program which imposes classifications, a disparity study must demonstrate the required level of local discrimination against the group which will benefit from the program. In particular, statistical evidence of discrimination should be based upon businesses which are qualified to perform the work, and which operate within the enacting jurisdiction. In addition, the program itself must be designed so that it meets the required level of flexibility, geographic limitation, justification for the program goal, and the consideration of race-neutral alternatives.

Croson and its progeny have made it more difficult for affirmative action programs in public contracting and procurement to survive constitutional scrutiny. With proper planning and research, however, it can be done.

3.0 METHODOLOGY

3.0 METHODOLOGY

This chapter describes the methodology used in conducting the South Carolina Department of Transportation Disparity Study and addresses the following items:

- Historical Analysis
- Policies, Procedures and Practices Analysis
- Market Area Analysis
- Utilization Analysis
- Availability Analysis
- Disparity Analysis
- Statistical Analysis
- Anecdotal Analysis

In addition to these methodologies, the Definition of Terms is presented in Section 3.9.

3.1 Historical Analysis

A historical review was conducted of efforts made to include DBEs in the SCDOT contracting process. Data were identified and collected both through interviews with individuals involved in the South Carolina DBE program and through detailed reviews of related studies, hearings, correspondence, periodic reports, and legislative bills.

3.1.1 Interviews

A total of 34 interviews were held with individuals knowledgeable about the state's DBE programs in order to discuss the development of DBEs and their contracting opportunities with the State of South Carolina in general and with the Department of

Transportation in particular. The interviews were conducted in December 1994 and January 1995.

The interviews used a series of open-ended questions to allow each individual to provide as much detail as possible. Each person interviewed was asked to provide documentation to support or supplement the statements made.

3.1.2 Review of Documents

A total of 55 documents were reviewed and summarized. The summaries are presented in Appendix E and organized in the following format:

- Source of Evidence
- Date of Evidence
- Nature of Efforts
- Reason for Efforts
- Problems Encountered
- Results of Efforts

3.2 Analysis of the Policies, Procedures and Practices

The analysis of SCDOT's construction contracting (highway and bridge preconstruction, building construction and renovation) and DBE policies and procedures involved the following steps:

- Collection, organization, and review of SCDOT contracting and DBE policies and procedures in effect during the calendar years of 1980 through 1993.
- Identification of all South Carolina statutes, regulations, and policies for the SCDOT DBE program (including those designed to implement federal programs) over the period 1980 to 1993.

- Interviews with key staff and directors in the Central Office in order to develop an understanding of the policies and procedures and how they work in relation to the DBE program.
- Interviews with members of the DBE Advisory Committee and the DBE/AGC/DOT Committee in order to develop an understanding of the policies and procedures and how they work in relation to the DBE program.
- Collection, organization, and review of audits, a public hearing conducted by the Legislative Black Caucus, articles and other materials that pertain to the issue of DBE involvement in SCDOT's contracting process and the DBE program.
- Identification of ways that the policies and procedures impact DBEs as determined by information collected from the Central Office; personal interviews, audits, a public hearing conducted by the Legislative Black Caucus, and other articles pertinent to the issue of DBE involvement in SCDOT contracting and DBE programs.
- Follow-up contacts with Central Office staff to further document and verify policies, procedures, and practices.
- Evaluation of the ways current policies and procedures impact the utilization of DBEs.

A list of data collected for the review of policies, procedures, and practices is provided in Appendix F. The results of this analysis are presented in Chapter 5, *Review of Contracting and DBE Policies, Procedures, and Practices*.

3.3 Construction Categories

Separate DBE utilization, availability, and disparity analyses were conducted for the following three construction categories:

- Preconstruction: Highway and Bridge
- Highway and Bridge Construction
- Building Construction and Renovation

A fourth set of analyses was conducted using highway and bridge construction contracts awarded that were federally funded only. The results of this review are detailed in Appendix J.

3.4 DBE Classifications

For analytical purposes, DBEs were divided into classifications of Black, Hispanic, Asian American, Native American, and white women. The definitions for the DBE classifications were:

- **Black:** U.S. citizen/lawfully admitted permanent resident having origins in any of the Black racial groups of Africa.
- **Hispanic:** U.S. citizen/lawfully admitted permanent resident of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race.
- **Asian/Pacific Islander:** U.S. citizen/lawfully admitted permanent resident whose origins are Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific, the Northern Marianas, India, Pakistan, Bangladesh, Sri Lanka, Sikkim, Burma, and Bhutan.
- **Native American:** U.S. citizen/lawfully admitted permanent resident who are American Indians, Eskimos, Aleuts, or native Hawaiians.
- **White women:** U.S. citizens/lawfully admitted permanent residents who are white women.

For the purpose of this study, Asian/Pacific Islander and Native American DBE classifications were combined in the availability and disparity analyses.

3.5 Market Area Analysis

The geographical unit of analysis for conducting the disparity analyses was the state of South Carolina plus any out-of-state counties from which the SCDOT had contracted with firms for significant amounts of work.

The use of the entire state of South Carolina as the geographical unit for market area analysis was based upon (1) the fact that this is a state-level study and (2) the availability of any firm in South Carolina to bid on SCDOT work provided the firm offered the required services.

The use of counties as geographical units of analysis for out-of-state firms was based upon the following considerations:

- the courts have accepted counties as a standard geographical unit of analysis in conducting equal employment opportunity and disparity analyses;¹
- county boundaries are externally determined and, hence, are free from any researcher bias that might result from any arbitrary determinations of boundaries of geographical units of analysis;
- census and other federal and state data are routinely collected and reported by county.

All data concerning the SCDOT's contracting dollar awards/payments were summarized for the state of South Carolina as a whole and by county for out-of-state firms according to the location of the vendor. All data concerning the availability of vendors were similarly summarized.

3.5.1 Relevant Market Area

For purposes of the study, we defined the relevant market area in each construction category as the set of counties in the U.S. from which the SCDOT purchased at least 75% of its construction-related services.

The 75% rule for market areas is the one generally used in antitrust cases. In another relevant case, the court accepted less than 100% of data when it was

¹See, e.g., *Clark v. Chrysler Corp.* 673 F.2d 921 (7th Cir. 1982). The unit of analysis was county.

reasonable to assume that the missing data would not significantly change the results of the analyses.²

The dollars awarded or paid in each construction category by county for the 14 years were summarized in descending order of magnitude. Award amounts were used for highway and bridge construction and building construction and renovation analyses; however, paid dollars were used for the analysis for highway and bridge preconstruction contracts, because of the high number of open-ended contracts. Counties were added to the market area until 75% of the dollars were included. The data were captured as:

- number of contracts
- percent of contracts
- number of unique firms
- percent of total firms
- dollars
- percent of total dollars.

The dollars awarded or paid were examined at the prime contract level to determine the relevant market area. Separate relevant market areas for subcontracts were not established. Subcontract dollars were analyzed for those subcontractors whose prime contractors' dollars were determined to be in the relevant market areas. The results of the relevant market area for each construction category are shown in Chapter 6, *DBE Findings*.

²See, e.g., *James C. Jones v. the New York City Human Resources Administration*, 528 F.2d (2nd Cir.).

3.6 Utilization Analysis

3.6.1 Collection of Contract Data

Prior to beginning any collection of data from the Department's historical records, we accessed the types and formats of data records. A series of meetings were held with the managers of the following offices:

- Bridge Construction
- Building Engineer
- Grants and Contracts
- Preconstruction
- Construction
- Maintenance
- Procurement Services
- Traffic Engineering
- Compliance
- Contracts Administration
- Data Processing
- Accounting
- Building Maintenance
- Supply and Equipment

From these meetings, we determined that automated data either were not available or, when available, were incomplete. Hence, we determined that a review of all hard copy contract files would be required. The SCDOT was not able to provide a comprehensive list of all contracts issued during the 14-year study period of January 1, 1980, through December 31, 1993. Therefore, we acquired a copy of the contract-letting log from the Contract Administrator's Office. The log contained a list of project file numbers, types

of contracts, and winning contractors' names. This log was entered into a database file to develop a tracking log. A list of contracts was developed and distributed. Each of the related offices reported that the contract files were either in its office or located at the "Blockhouse" on Shop Road. The following is a summary of the offices included in the data collection process and the condition of the files reviewed.

Bridge Construction - The bridge construction contracts were kept in the Office of Bridge Construction. Sufficient information for this study was not contained in the office's contract files. Bridge construction projects were often awarded in the same contract with highway construction projects. Thus, contract information was often not included in bridge files if it was thought that the highway construction office was keeping a project file. However, the OBC did maintain a comprehensive card catalog system to keep all basic information on each project, and the card catalog system did contain sufficient information for this study. Hence, we were able to abstract data from the card files and verify the data against the project files.

Building Engineer - The building engineer's office contained project files from as far back as 1942. Hence, we could access all files needed for the 14 years of this study. The files contained all of the data needed on each project and prime contractor except data on subcontractors. Historically, the SCDOT has not required that subcontract data be maintained on building contracts. However, we did find that some of the files contained a list of subcontractors intended for use on the contract.

In order to determine the number of subcontractors (DBE and non-DBE) utilized on building construction contracts, we sent a letter to each construction project prime contractor (38) in the market area, requesting from the contractor the names of any subcontractor utilized, the type of service provided, and the DBE identification. If a prime contractor did not respond to the survey, we called to request the information by phone or fax. Nineteen prime contractors responded - a 50% response rate. The department was not required to collect sufficient data on subcontractors to support this analysis, and had not done so.

Contracts and Grants - The Office of Contracts and Grants was established in 1986 and contained preconstruction contracts from 1986 forward. It treated each original contract or addendum as an individual contract. For our analysis, the addenda were added to the original contracts for a total dollar amount. The office maintained records that contained sufficient data for prime and subcontractors analyses for the study.

The Office of Contracts and Grants was able to supplement data on projects awarded prior to 1986 by the Office of Preconstruction.

Preconstruction - From 1980 to 1986, all preconstruction contracts were maintained by the project engineer. The data needed for our analyses were not always included in the project files. However, the records from the Office of Contracts and Grants was able to supplement the data collected from the Office of Preconstruction.

Construction - The Office of the Director of Construction maintains an extensive card catalog and project filing systems. An index card is kept for every project let by the SCDOT that has highway construction participation. This includes those let by the Office of Construction, as well as those let by the Office of Bridge Construction and the Maintenance Office. The project files, in combination with the card catalog, contained the necessary information on the contract, the prime contractor, and the DBE participation of the subcontractors.

Maintenance - The majority of the Maintenance Office project files contained sufficient data on the prime contractor and subcontractors. If any data were not available, they were identified and collected through the files contained in Contracts Administration or Construction.

Procurement Services - Building renovation services were awarded by the Procurement Office through purchase orders. The purchasing records were not automated until July 1, 1988. The only way to obtain the names of contractors with whom the SCDOT contracted before that date is by manually examining each procurement file in storage. Approximately 22,000 files were generated each year; therefore, a review of 165,000 files would have been necessary for the period of January 1, 1980 - July 1, 1988.

Accordingly, because the records available electronically would provide an accurate view of the building renovation contracting practices and would not undermine the integrity of the study as a whole, the data analysis period was modified to January 1, 1989 - December 31, 1993.

The SCDOT identified four object codes (0217, 0711, 0714, and 0716) that were used in purchasing services for building renovation contracts let through the procurement office. The Office of Procurement Services provided a list for each object code which contained the purchase orders by number, issue date, contractor's name and payment amount. MGT collected the rest of the data through the electronic database in Office of Procurement Services.

Traffic Engineering - The Office of Traffic Engineering was not required to maintain its project files at the level of detail necessary for the level of analysis. All data elements that were available were collected. Additional research and data collection through the offices of Contract Administration and Construction provided the additional data needed.

All utilization data were collected during October and November 1994 and January 1995 from SCDOT contract files and were organized into three categories:

- Contract Data
- Prime Contractor Data
- Subcontractor Data

The following list of data fields was collected, where available, for each contract:

<u>Contract Data</u>	<u>Prime Contractor Data</u>	<u>Subcontractor Data</u>
▪ primary file number	▪ name	▪ name
▪ contract number	▪ address	▪ address
▪ contract type	▪ DBE	▪ DBE
▪ federal project number	▪ phone number	▪ type of service
▪ state project number	▪ contact person	▪ contract amount
▪ DBE goal	▪ type of service	▪ percentage of contract dollars
▪ state set aside		
▪ award date		
▪ award amount		
▪ final amount		
▪ project description		

Preconstruction: Highway and Bridge - During the 14-year period of 1980 to 1993, the SCDOT Office of Preconstruction and Office of Contracts and Grants awarded a total of 109 preconstruction contracts excluding contracts issued with educational institutions and not competitively bid.

Highway and Bridge Construction - As indicated earlier, during the period of 1980 through 1993, SCDOT awarded 3,097 highway and bridge construction contracts. Our project team reviewed and extracted data from the contract files, including both new and maintenance contracts. The contracts were provided by the following SCDOT offices: Construction, Maintenance, Traffic Engineering, and Bridge Construction. After data cleanup, which included deletion of duplicate records, a total of 2,739 files were used for analysis.

Building Construction and Renovation - The construction category of building construction and renovation contains the data collected from the offices of Building Engineer and Procurement. Information from each contract was extracted, recorded on a data sheet, and entered into the appropriate database for further analysis. Data clean-up and review for the SCDOT resulted in a complete contract database of 406 useable contract records (see Exhibits 3-1 and 3-2).

**EXHIBIT 3-1
DATA COLLECTED AND ANALYZED
PRIME CONTRACTORS**

	Preconstruction: Highway and Bridge	Highway and Bridge Construction	Building Construction and Renovation
Data Collected	396	3,579	410
Data Used	109	3,097	406

**EXHIBIT 3-2
DATA COLLECTED AND ANALYZED
SUBCONTRACTORS**

	Preconstruction: Highway and Bridge	Highway and Bridge Construction	Building Construction and Renovation
Data Collected	118	8,362	70
Data Used	70	6,619	170

A listing of all contracts by construction category is provided in Appendices A, B, and C. The contracts are arranged in date order; subcontracts, if any, follow the list of prime contracts for each of the fiscal years. All contracts are included in these listings, regardless of whether the prime contractor was inside or outside the relevant market area. Note that not all the contracts listed in the appendices have their data included in the utilization since the utilization analysis of the contracts is based only on contracts in the relevant market area. Utilization analyses are presented in Chapter 6, *DBE Findings*.

3.6.2 Calculations of Utilization by Percent of Contracts by Dollar Amounts by DBE Classification

Utilizing the collected data, we calculated the percent of contract and subcontract dollar amounts within the market area that was awarded/paid to each DBE group per calendar year. We then calculated the percent of contract (and subcontract) dollar amounts awarded/paid to each DBE classification for each construction category. The total dollars awarded/paid for each year included contracts to firms within the relevant market area (75% or more of all contract dollars); all dollars to firms outside the relevant market area (25% or less of the contract dollars) were excluded from the analyses. Subcontracts awarded to DBEs located within the prime contractor's relevant market area were used in calculating the percent of DBE subcontracting by construction category.

3.7 Availability Analysis

Our availability analysis used two different methodologies. The first methodology was based on utilizing U.S. Census data published through the *County Business Patterns* and *Survey of Women-Owned Businesses* and *Survey of Minority-Owned Businesses* to identify the numbers of available firms by DBE and non-DBE category and construction category.

The second methodology was based upon the creation of a Master Vendor Database to identify the numbers of available DBEs and non-DBEs by DBE category and construction category. The two different methodologies are discussed below.

3.7.1 Census Data Methodology

Utilizing the Census database methodology, we determined the number of firms by DBE classification and construction category in the SCDOT's relevant market areas from the following U.S. Bureau of the Census documents:

- *Survey of Minority-Owned Businesses (SMOBE)*
 - *SMOBE* contains the number of DBEs by county, by DBE ethnic classification, by gender, and by standard industrial classification (SIC) code.
 - The *SMOBE* survey is conducted every five years. The last two complete surveys were conducted in 1982 and 1987.
- *Survey of White Women-Owned Businesses (SWOBE)*
 - *SWOBE* contains a list of all white women-owned firms by county, and by SIC code.
 - The *SWOBE* survey is conducted on the same time schedule as the *SMOBE* survey (above).
- *County Business Patterns*
 - *County Business Patterns* contains the total number of business establishments by state, by county, and by SIC code.
 - *County Business Patterns* is published annually. The latest available *County Business Patterns* data are for 1989.

To obtain more detailed data than were available in published reports, we requested and received from the Census Bureau a special automated database which contained the number of firms by SIC code in each minority and white women classification for each county in the United States.

In determining the number of firms in each of the construction categories, we were careful to include only those types of firms which provide the same types of goods and services which had been included in each of the three construction categories as described in Exhibit 3-3. The number of DBE and non-DBEs in each county in the relevant market areas for each construction category were derived as follows:

EXHIBIT 3-3

**CONSTRUCTION CATEGORIES AND STANDARD INDUSTRIAL CODES (SIC)
USED FOR CONSTRUCTION CONTRACTS**

Preconstruction: Highway and Bridge

- Engineering, Architectural, and Surveying Services (871)
- Landscaping and Horticultural Services (078)

Highway and Bridge Construction

- Highway and Street Construction, Except Elevated Highways (161)
- Heavy Construction, Except Highway and Street Construction (162)
- Painting and Paper Hanging (172)
- Electrical Work (173)
- Concrete Work (177)
- Miscellaneous Special Trade Contractors (179)

Building Construction & Renovation

- General Building Contractors - Non-residential Buildings (154)
- Painting and Paper Hanging (172)
- Plumbing, Heating and Air-Conditioning (171)
- Electrical Work (173)
- Masonry, Stonework, Tile Setting, and Plastering (174)
- Carpentry and Floor Work (175)
- Roofing, Siding, and Sheet Metal Work (176)
- Concrete Work (177)
- Miscellaneous Special Trade Contractors (179)

Note: The numbers in parentheses indicate the SIC for the type of service.

- The numbers of DBEs by ethnic/gender classification were taken from the *SMOBE* and *SWOBE* reports, special tabulations requested from the Census Bureau, and *County Business Patterns*. The numbers of non-DBEs were derived by subtracting the sum of all DBEs from the total firms in the special tabulation.

As indicated above, the last two editions of *SMOBE* and *SWOBE* reported data only for 1982 and 1987, leaving us with the problem of determining the numbers of DBE and non-DBEs for all other years. We calculated a straight-line growth as follows:

- Estimate the number of DBEs and non-DBEs by construction category for each county in the relevant market area for each year analyzed, based on straight-line growth.
- Determine the average annual growth rate of DBES and non-DBES by construction category from 1982 to 1987 based on Census data.

- Calculate the total increase/decrease in firms by classification from 1982 to 1987.
- Divide by five to find the average growth/decline.
- Multiply the average growth/decline rate for each classification by the number of firms available for that classification in 1987, the base year, to obtain the number of firms to add to/subtract from each year.
- To obtain a straight-line (non-compound) growth, add the derived number of firms to the number of firms in the base year to obtain 1988 figures, then add that same derived number of firms to 1988 to obtain 1989 figures and so on until you have calculated the number of available firms for 1993.

3.7.2 Master Vendor Database Methodology

Our second methodology for determining the number of available firms by category is based upon the development of a master vendor database (MVD) of potential contractors. We established a MVD by contacting 115 public and private entities in South Carolina (Exhibit 3-4) and prime contractors doing business with the SCDOT and requesting that they send us copies of their 1993 vendor files and/or DBE files of firms that perform work similar to that which is contracted out by the SCDOT.

Because of slow response rates, by the middle of January 1994 we had identified only 1,756 DBE and non-DBE companies in South Carolina which provided the types of services contracted by the SCDOT. We continued to follow up on our requests for the names of vendors; and by the end of February 1995, we had identified a total of 5,302 individual firms available to provide relevant services to the SCDOT. As shown in Appendix D1, a total of 28 agencies responded to our requests for vendor files.

The numbers of firms in our master vendor database by race/gender category were estimated via two different methodologies as follows:

EXHIBIT 3-4

DATA SOURCES FOR THE
MASTER VENDOR DATABASE

<p>Abbeville County Government Aiken County Government American Institute of Architects, SC Anderson County Government Asphalt Pavement Association Association of General Contractors Association of Ready-Mixed Concrete of Carolinas Bamberg County Government Barnwell County Government Beaufort County Government Berkeley-Charleston-Dorchester Council of Governments Berkeley County Government Calhoun County Government Carolina Association of Minority Suppliers Development Council Carolina Chapter of Electrical Contractors Central Midlands Regional Planning Council Charleston Chamber of Commerce Charleston County Government Charleston Minority Business Development Center Charleston Urban League Cherokee County Government Chester County Government Chesterfield County Government City of Abbeville City of Anderson City of Barnwell City of Chesnee City of Florence City of Belton City of Cayce City of Bishopville City of Greenville City of Irmo City of Columbia City of Charleston Clarendon County Government Colleton County Government Columbia Business Network Association Columbia Housing Authority Columbia Minority Business Development Center Columbia Urban League/Nations Bank</p>	<p>Concrete Masonry Association of the Carolinas Concrete Pipe Association of South Carolina Consulting Engineers of South Carolina Darlington County Government Dillion County Government Dorchester County Government Economic Development & Technical Assistance Center - Benedict College Edgefield County Government Enterprise Development Corporation Fairfield County Government Florence Chamber of Commerce Florence County Government Georgetown County Government Greenville Chamber of Commerce Greenville County Government Greenville Minority Business Development Center Greenville Urban League Greenwood Chamber of Commerce Greenwood County Government Hampton County Government Horry County Government Jasper County Government Kershaw County Government Lancaster County Government Laurens County Government Lee County Government Lexington County Government Low Country Council of Government Lower Savannah Council of Governments Marion County Government Marlboro County Government McCormick County Government NAACP Community Resource Center National Federation of Independent Businesses Newberry County Government Oconee County Government Orangeburg Chamber of Commerce Orangeburg County Government Pickens County Government Richland County Government Rural Minority Business Development Center</p>
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EXHIBIT 3-4 (Continued)

DATA SOURCES FOR THE
MASTER VENDOR DATABASE

<p>Saluda County Government Small Business Administration 8(a) Construction Firms Small Business Development Centers - State Office Small Business Entrepreneur Institute, Nations Bank South Carolina Appalachian Council of Governments South Carolina Association of Certified White Women Contractors South Carolina Brick Association South Carolina Chamber of Commerce South Carolina Commission on White Women South Carolina Department of Commerce South Carolina Department of Labor, Licensing & Regulation South Carolina Department of Transportation DBE Directory South Carolina Department of Transportation Prime Contractors List South Carolina Economic Development Association South Carolina Governor's Office of Minority & Small Business Assistance South Carolina Minority Contractors Association</p>	<p>South Carolina Society of Professional Engineers South Carolina State Budget & Control Board, Materials Management South Carolina State Housing & Development Authority Spartanburg County Government Sumpter County Government Town of Allendale Town of Duncan Town of Fairfax Town of Fort Mill Town of Bethune Town of Blacksburg Transportation Policy and Research Council Union County Government Upper Savannah Council of Governments Waccamaw Regional Planning & Development Williamsburg County Government York County Government</p>
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1. Through telephone calls and specific data on some vendor files, we were able to identify the race/gender of 1,397 of the 5,302 firms.
2. To obtain estimated proportions of the race/gender category, we surveyed a sample of 250 of the remaining 3,905 firms. We then applied the proportions in each race/gender category derived from the sample to the total 3,905 firms.

To obtain the proportions in each race/gender category for all 5,302 firms in the master vendor file, we added the results of the above two procedures.

3.7.3 Methodology Used in the Study

Our original intent had been to use the results of the analysis of the master vendor file (which was collected for 1993) to proportionally adjust prior year Census data concerning the proportions of available firms in each race/gender and construction

category. Upon completion of the two procedures, however, we found significant differences between the two sets of data as shown in Exhibit 3-5.

EXHIBIT 3-5

COMPARISONS OF THE PERCENTAGES OF TOTAL AVAILABLE FIRMS BY RACE/GENDER CATEGORY ESTIMATED FROM CENSUS DATA AND FROM MASTER VENDOR FILE DATA, 1993

Source of Data	Race/Gender Category					
	Black	Hispanic	Asian & Native American	White Women	White Men	Total
Master Vendor File Estimates	19.46	.73	3.38	8.49	67.94	100%
Census Data Estimates	10.92	.35	.38	7.75	80.60	100%

After extensive review, we determined that the Census data provided us with the more accurate estimates of the percentage distribution of available firms by race/gender category and construction category. This determination was reached for the following reasons:

1. Our master vendor file was based upon data obtained from other organizations as identified in Exhibit 3-4 and Appendix D1. We did not have access to individual firm records as did the Bureau of Census.
2. The Census data were based on information on firms that were actively in business and filed tax returns in the survey year with at least \$500 in receipts. The Internal Revenue Service provided the Census Bureau with records of these firms, including the Social Security Numbers (SSNs) of owners, partners, and shareholders; and SIC codes which identify the principal industrial activity of the firm. The use of income tax returns indicated that the firm was bona fide and active in the market.

The Census then worked with the Social Security Administration (SSA) to identify the race of firm owners. The Census easily identified those firms owned by Blacks by the race codes on Social Security applications. Because most firm owners had received

SSNs when the only race categories used by the SSA were White, Black, or Other, the Census compared owner names with lists of Hispanic and Asian surnames and conducted extensive surveys to identify firms owned by persons with Hispanic and other minority ancestry. Response to the survey was required by law, eliminating the non-response problems encountered by most surveys.

3.7.4 Availability Weighting of Firms in Each Geographical Unit of Market Area

One of the major issues in conducting disparity analyses is the determination of the number of firms which are available to bid on contracts. We must ask:

- "Is the percentage of the total number of firms in a location (e.g., outside the state of South Carolina) available to perform on SCDOT contracts the same as the percentage of available firms in South Carolina?"

The logical answer to the question is "No." The percentage of South Carolina firms available to bid on SCDOT contracts is much higher than the percentage of firms from counties in other states.

To account for the lower percentage availability of out-of-state firms, we utilized a mathematical weighting consisting of the percentage of SCDOT contracts awarded/paid to firms in each out-of-state county over the years analyzed.³ The appropriate weights for each county were determined as part of the market area analyses. The selection of an out-of-state county to be included in the market area was based on the percentage of dollars accounted for by firms in each out-of-state county. However, the availability weight was based on the percentage of firms from each county doing business with the agency. The number of firms from a given out-of-state county that were awarded/paid contract dollars, divided by the total number of firms

³See, e.g., *Clark v. Chrysler Corp.* at 92-928. Weights very similar to those which we used were accepted by the court to determine the availability of minority workers in Chrysler's relevant market area for hiring employees.

awarded/paid contract dollars by the agency, is equal to the percentage of firms for that county. Using the percentage of firms, not percentage of dollars, prevents a single firm with a large dollar value contract from skewing the market area toward an out-of-state county with only a few interested firms.

The out-of-state weighting was accomplished as follows:

- Weight the number of DBEs and non-DBES in each county outside the State of South Carolina in the relevant market area by the percentage of firms in that county by construction category for each year analyzed.

One hundred percent of the businesses identified as South Carolina firms were included in the analysis. Availability weighting was used only for the preconstruction analysis for counties outside of South Carolina, since none of the other contract categories utilized significant numbers of out-of-state firms. Availability of firms by construction category is detailed in Chapter 6, *DBE Findings*.

3.7.5 High-Low Estimates of Availability

As explained earlier in Section 3.7.1, census data regarding the availability of firms were available only for 1987. Straightline interpolations were used to estimate the numbers of available firms for all other years. **The reader should clearly understand that while the straightline estimation technique provides our "best estimates" of the numbers of available firms, the actual numbers most likely are within a range of our "best estimates"**. Thus, it is useful to think of the estimates as mid-points with low versus high estimated values. In this particular situation, a normal approximation to the Poisson distribution offers a method to calculate intervals where the mean is equal to λ , the variance is equal to λ , and the standard deviation is equal to the square root of λ .

Using the method of approximation, low - high ranges for the estimated numbers of available firms can be calculated as follows:

$$\text{Estimated number of firms} \pm 2\sqrt{\text{Estimated number of firms}}$$

If the estimated number of firms is 25, the standard deviation would be $\sqrt{25} = 5.00$, and the approximate low to high estimated range of available contractors would be 25 ± 10 (15.00 to 35.00)

Any reader desiring to estimate the likely ranges of the number of available firms should use the above formula.

3.8 Disparity Analyses

After collecting and editing all of the necessary availability and utilization data, we proceeded to conduct the disparity analyses. A disparity analysis involves calculating a disparity index for each race/gender group for each construction category for each of the 14 years. The disparity index is defined as follows:

$$\text{Disparity Index} = \frac{\text{percent of contract dollars}}{\text{percent of firms}} \times 100$$

The disparity index provides a quick and easy way of communicating the level of disparity. A disparity index is always positive; the smallest value, 0.00, shows no utilization. **Any disparity index value under 100 indicates underutilization relative to availability.** A disparity index over 100 indicates overutilization.

The rule of thumb established by the Equal Employment Opportunity Commission (EEOC) in the employment discrimination context is that a disparity ratio below 80 (shown as the midpoint column in Exhibits 6-14 through 6-24) indicates a substantial

level of disparity, demonstrating adverse or disparate impact. The EEOC adopted the "eighty percent rule" in the Uniform Guidelines on Employee Selection Procedures. The guidelines provide that a selection rate that is less than 80% of the selection rate of the group with the highest rate will generally be regarded as evidence of adverse impact. 29 CFR s.1607.4D (1981). The Supreme Court accepted the use of the 80% rule in *Connecticut v. Teal*, 457 U.S. 440 (1982). In *Teal* and other affirmative action cases, the terms "adverse impact," "disparate impact," and "discriminatory impact" are used interchangeably. The *Teal* case used the term "significant" only once and did not specifically define it. The disparity findings are presented in Chapter 6, *DBE Findings*.

3.9 Statistical Analysis

The request for proposals (RFP) issued by the SCDOT for this project directed that attempts be made to determine those parts of any disparity found that could be attributed to discrimination and those parts that were due to other factors such as firm size, bonding capacity, age, etc. In response to this directive, we conducted extensive statistical correlation analysis in an attempt to determine the statistical relationships between the amount of revenue that firms had received from the SCDOT and factors such as DBE status, age of firm, bonding capacity, and number of employees.

The source of data for the statistical analyses was a mail survey (described later in this chapter). The survey produced 285 completed responses, of which there were 70 from Black-owned firms, 44 from White Women firms, 13 from other DBE firms, and 158 from non-DBE firms.

The initial statistical analyses were based upon the following linear regression model.

$$\text{SCDOT Rev.} = K + B_4 (\text{MBE status}) + B_5 (\text{number of employees}) \\ + B_6 (\text{age of firm in years}) + B_7 (\text{bonding capacity})$$

where SCDOT Rev. = amount of revenue received by firm from SCDOT

K = Constant Terms

B_i = regression coefficient for i th variable

Bonding capacity had to be dropped from the analyses because of a lack of a sufficient number of responses on that survey question.

A description of the analytical results from the statistical analyses is presented in Appendix K.

3.10 Sources and Methods of Gathering Anecdotal Information

Anecdotal information was collected from individuals representing DBEs and non-DBEs, utilizing the following three methods of collecting anecdotal information:

1. Personal Interviews
2. Public Hearings
3. Mail Surveys

The processes we followed are described in the following paragraphs. A detailed summary of the information reviewed is provided in Chapter 7, *Anecdotal Evidence*.

3.10.1 Personal Interviews

Face-to-face personal interviews were conducted using a prepared interview guide, to obtain information from DBEs and non-DBEs about contracting and purchasing experiences. The interview guides (Appendix G) included questions regarding the following five areas:

1. General information about the business.
2. Questions specific to contracting with the SCDOT.

3. Questions about the DBE Programs.
4. General questions about the business climate.
5. Questions about business size and gross revenues, age of the owner, and closing remarks.

Using the guide, an interview consisted of open-ended questions and took approximately one hour to complete.

All interviewers had received training and a briefing from MGT staff on how to conduct a face-to-face interview. The training and briefing covered the following:

- Personal Interviews
 - purpose and objectives
 - selection of interviewees
 - use of the interview data
- Conducting the Interviews
 - interviewer packets
 - scheduling interviews
 - conducting interviews
- Interviewer Responsibilities
 - number of interviews
 - time frame for completion
 - reporting requirements

Several methods were used to select individuals to be interviewed:

- We randomly selected firms from our master vendor file by generating a list of 100 firms by choosing every X number record.
- We contacted key leaders in community organizations and businesses.
- We attended specific group meetings to inform individuals about the study to solicit participation.
- We used referral forms received after public notices.

Also, during our interviews, we asked for names and phone numbers of others we might contact for possible interviews. Through random sampling and networking, representatives of DBE and non-DBEs were contacted for possible interviews.

A total of 54 interviews were conducted. Forty-three interviews were conducted with representatives of DBEs and 11 with non-DBEs.

3.10.2 Public Hearings

Seven public hearings were conducted by MGT with assistance from the SCDOT. DBEs and non-DBE business owners were invited to provide oral or written testimony regarding their experiences in attempting to do business with the SCDOT and/or private businesses in the State of South Carolina. The public hearings were held in January and February 1995 in each of the SCDOT's seven engineering districts, according to the following schedule (Exhibit 3-6).

The public hearings were announced to the community through a letter to DBE and non-DBEs, public service announcements, advertising in local newspapers, personal phone calls, and contacts with private and public interest groups.

**EXHIBIT 3-6
SCHEDULE OF PUBLIC HEARINGS**

DATE	DISTRICT	LOCATION
1/11	1	Columbia - Allen University
1/17	2	Greenwood - Piedmont Tech. College
1/18	3	Greenville - County Adm. Building
1/24	4	Chester - County Memorial Building
1/26	5	Florence - Florence/Darlington Tech.
1/31	6	Charleston - Trident Tech. College
2/27	7	Orangeburg - SC State University

The hearings were conducted by a committee comprised of representatives of the SCDOT and MGT staff. Each hearing was chaired by MGT staff, and each was recorded and transcribed by a certified court reporter. During the seven public hearings, 84 persons registered their attendance, and 27 testified.

3.10.3 Mail Surveys

A written survey instrument was mailed on January 13, 1995, to a sample of 1,756 DBE and non-DBE businesses listed in our Master Vendor Database. The survey instrument had 49 questions which inquired about the characteristics of each business and its experiences in seeking both SCDOT and other public agency contracts (A copy of the survey with responses is shown in Appendix H). Of the 1,756 surveys mailed, 259 were satisfactorily completed and returned, for a return rate of 14.74%. An additional 26 surveys were completed by telephone, resulting in 285 completed surveys. Fourteen additional surveys were received after the completion of the analysis and were not included.

3.11 Definition of Terms

Key definitions included in the study are as follows:

Available: A firm is available if it is located in the relevant market area of the government conducting the disparity study and is qualified to perform work in the industry that is the subject of the disparity study.

Qualified: A firm is qualified if it is actively engaged in a business within the industry being studied, either as a prime contractor or as a subcontractor.

Willing to Perform: A firm is willing to perform work for the government conducting the disparity study if the firm has in the past obtained work in the industry being studied.

Able to Perform: A firm is able to perform work if the firm has obtained or can obtain the labor, services, and materials necessary to perform specific services in the industry being studied. Any firm which has previously performed work in the industry is considered able to perform more work in the industry.

Minority-Owned: A firm is minority-owned if at least 51 percent of the firm is owned by one or more persons that are all in a single class (e.g., Hispanic, Black) of the minority classes being studied.

White Women-Owned: A firm is white women-owned if at least 51 percent of the firm is owned by one or more white women.

Type of Work Performed: For purposes of a disparity study, the type of work performed includes all substantial services used by the industry being studied, both as prime contractors and as subcontractors.

Location: The location of a firm is the physical site (or sites) at which the firm maintains a place of business.

Relevant Market Area: The relevant market area consists of the set of all counties in the U.S. from which collectively a governmental entity purchased at least 75% of the construction related services for the subject construction category.

Disadvantaged: Socially and economically disadvantaged individuals are those citizens of the United States (or lawfully admitted permanent residents) who are: Black Americans; Hispanic Americans; Native Americans; Asian-Pacific Americans; Asian-Indian Americans; white women; or other individuals found by the Small Business Administration to be socially and economically disadvantaged.

**4.0 HISTORY AND
BACKGROUND**

4.0 HISTORY AND BACKGROUND

The review of historical evidence is critical to understanding the environment which has influenced the development and implementation of the SCDOT's program. Hence, as required by the SCDOT's Request for Proposals, we present here a summation of the historical evidence concerning the efforts of DBEs to obtain SCDOT contracts and subcontracts:

The historical evidence was collected from two sources:

- Interviews with selected key informants including legislators, legislative staff, agency staff, and private sector individuals; and
- Review of archival data, agency documents, studies, hearings, newspaper articles, correspondence, reports, and legislative bills.

The South Carolina Department of Transportation (SCDOT) administers two separate DBE programs, one for federal aid projects, and the other for projects funded with state dollars (state matching funds on federal aid projects are counted towards the state set-aside goal of 10 percent). The following subsections outline the significant events which have affected the Department's DBE program development and the participation of minority and women-owned businesses in the program.

4.1 The Early Years (1976-1990)

Early Federal Mandates

The issue of minority business enterprise participation in economic development and economic growth became a national concern as a result of the civil rights movement of the 1950s and 1960s. In response to the urging of Black political leaders, the Office of Minority Business Enterprise was established in 1969 to facilitate the strengthening and expansion of the minority business enterprise program. To

strengthen the national effort, President Nixon on October 13, 1971, issued Executive Order 11625, which required federal executive agencies to develop comprehensive plans and programs to encourage minority business participation. In addition, Executive Order 11625 clarified the authority of the Secretary of Commerce in the federal government's endeavor to ensure the opportunity for full participation by minority business enterprises in the free enterprise system. The executive order ordered the Secretary of Commerce to:

1. Coordinate the plans, programs, and operations of the federal Government which affect or may contribute to the establishment, preservation, and strengthening of minority business enterprise.
2. Promote the mobilization of activities and resources of State and local governments, businesses and trade associations, universities, foundations, professional organizations, and volunteers and other groups towards the growth of minority business enterprises, and facilitate the coordination of the efforts of these groups with those of federal departments and agencies.
3. Establish a center for the development, collection, summarization, and dissemination of information that will be helpful to persons and organizations throughout the Nation in undertaking or promoting the establishment and successful operation of minority business enterprise.
4. Within the confines of the law, provide financial assistance to public and private organizations so that they may render technical and management assistance to minority business enterprises, and defray all or part of the costs of pilot or demonstration projects conducted by public or private agencies or organizations which are designed to overcome the special problems of minority business enterprises or otherwise to further the purposes of the executive order.¹

On August 28, 1975, the Federal Highway Administration (FHWA) issued its Order 4700.1, establishing the agency's affirmative action policy to provide minority businesses with the maximum opportunity to participate in the Federal-aid highway construction

¹U.S. President. "Prescribing Additional Arrangements for Developing and Coordinating a National Program for Minority Business Enterprise," Executive Order 11625 (October 13, 1971). Title 3 - The President 1971-1975 Compilation. pp. 616-17.

program. The instructions set forth in Order 4700.1 represented FHWA's first extensive attempt to foster a national program to develop plans and program goals, establish performance monitoring and reporting systems, and evaluate results. The Order was followed by an implementing regulation, under Title 23 Code of Federal Regulations (CFR), Part 230, on October 22, 1975. The regulation provided guidance and direction to State highway agencies (SHA) in their efforts to fulfill the federally mandated minority business program. Major key elements in the regulation were:

1. A minority business enterprise (MBE) was defined as a business which is at least 50% owned by minority group members or, in the case of publicly owned businesses, a business in which at least 51% of the stock is owned by minority group members. Minority group members are Negroes, Spanish-speaking American persons, American Orientals, American Indians, American Eskimos, and American Aleuts.
2. SHAs were required to take affirmative action to increase the participation of minority business firms in federal-aided highway construction.
3. Prime contractors were required to specify their intentions to subcontract a portion of the work, and if so, to take affirmative action to seek and consider MBEs as potential subcontractors and to document such affirmative action measures to solicit MBE participation. Failure to provide appropriate documentation of affirmative action or submission of a false certification of minority affirmative action would render the bid nonresponsive.
4. SHAs were required to include minority affirmative action clauses in their contracts.

In November 1975, FHWA issued a directive to state highway agencies and prime contractors to expand opportunities for minority firms. FHWA outlined the following in Section 8, Transmittal 164:

- a) *review and evaluate the state highway agencies' pre-qualification and licensing requirements for Federal-aid highway construction contractors to assure that unreasonably complex, costly or difficult requirements are not utilized. State highway agencies are encouraged not to require pre-qualification or licensing based on qualifications for any subcontractors on Federal-aid construction*

work or for prime contractors on Federal-aid contracts with an estimated dollar value lower than \$100,000. The elimination of the requirements for pre-qualification noted herein is not intended to encourage awarding of work to firms whose comparable experience record indicates an inadequate capability to reasonably perform the anticipated work. The intent is to encourage removal of formal pre-qualification restrictions that are unduly restrictive and arbitrary concerning financial limitations and procedural requirements.

- b) *in a cooperative effort with ODBE funded organizations, provide training seminars or other assistance to minority firms that wish to become pre-qualified, licensed or otherwise to become eligible for performing Federal-aid work.*
- c) *institute affirmative action to increase the participation of minority business firms by: seeking out, identifying and compiling a list of minority business firms that wish to participate in the Federal-aid highway construction program and distribute the list to all prime contractors taking out contract proposals on Federal-aid projects. The minority firms identified and listed should be reasonably capable of performing the type of work for which they wish to be considered.*

In response, the South Carolina Department of Highways and Public Transportation's (SCDHPT's) Chief Commissioner established a DBE Program and delegated responsibility for carrying out its daily administrative functions to the Personnel Division. The initial program required a commitment on the part of the SCDHPT to put forth maximum effort to increase minority participation in the Federal-aid highway program. The SCDHPT's primary responsibilities were:

- to identify minority contractors to participate in construction related activities of the SCDHPT; and
- to encourage prime contractors to utilize services of minority subcontractors on federal aid projects.

The SCDHPT developed and issued *Minority Business Firms in Federal Aid Highway Construction Activities*, dated November 17, 1976. This one-page document was furnished to contractors along with a list of prospective minority subcontractors. The document outlined several requirements for SCDHPT prime contractors:

- Certify intent to subcontract a portion of the work;

- Document the results of contacts with potential minority business subcontractors to determine interest, capability, and cost for subcontracting;
- Provide information to potential minority subcontractors concerning portions of the work proposed by the prime contractor for subletting;
- In requesting permission to sublet, submit a letter to the Engineer certifying actions to seek out and consider minority businesses as potential subcontractors; and
- Designate a liaison officer to administer the contractor's minority business enterprise program within 10 days after contract award.

The SCDHPT's Chief Commissioner appointed the Civil Rights Specialist in the Office of Personnel to act as the liaison officer. The MBE Program was under direct supervision of the Assistant Director of Personnel from 1977 to 1985. The day-to-day functions of the program were carried out by the Civil Rights Specialist, who reported directly to the Assistant Personnel Director.

Early DBE Involvement

Twenty-three (23) minority contractors were identified during the first year of the program. The list of certified MBE firms was included as part of the proposal package, and contractors were required to put forth a "good faith effort" to select from that list MBEs to do subcontract work on SCDHPT federal-aid highway projects.

In 1977, approximately 28 minority firms indicated an interest in performing work as subcontractors. By 1978, the number had decreased to 23. Information was not available for our research team to determine which of these firms, if any, were actually utilized in the early stages of the program. Only three of the original firms were still in business in 1993.

Early Goals Established

In 1978, the SCDHPT began to establish goals based on the overall dollar expenditures on highway construction. The 1978 goal of \$1,000,000 was reduced in 1979 and 1980 to \$500,000. Unsurprisingly, minority business participation decreased from 1978 to 1980.

MBE Certification

The initial MBE certification process was very simple and lacked checks and balances to combat fraudulent claims. The Support Services contractor identified potential MBEs and also certified them. Desk audits rather than on-site visits were conducted to verify eligibility of applicants. Few controls, if any, existed to prevent and/or investigate fraud or deceit in obtaining the certification. There was no process in place to verify the accuracy and legitimacy of the information provided by the potential DBE vendor on the DBE certification application. Initially, certification was conducted by an outside consultant rather than the SCDHPT staff.

Supportive Services

After initial program implementation, during the first three years (1977-1980), SCDHPT retained the services of a private management consulting firm to facilitate increased involvement of MBEs in performing highway work. Under this contractual arrangement, technical assistance was provided to MBEs throughout the State, and assistance was provided to encourage MBEs to become certified with the SCDHPT.

Early State Action: Joint Legislative Committee Report and the State Reorganization Commission Report

Concurrent with national attempts to foster greater minority business participation in federal-aid projects, the State of South Carolina was addressing issues related to small and minority businesses residing in the State. Subcontractors and other workers

were filing complaints with the State legislature regarding pay and other issues. Complaints filed with the Governor's Office led to a study by a Joint Legislative Committee appointed in 1978 of problems confronted by small businesses. Its findings were issued in a report to the Governor and General Assembly on March 15, 1979. The Committee's report to the Joint Legislative Committee stated that "By far the most numerous complaints at each hearing were related to 'bad checks' and concomitant collection problems."² The next major area of concern focused on bureaucratic "red tape," the abundance of required paper work, and the amount of different inspections from different state agencies.

In addition, as a result of the complaints brought to it, the Committee concluded that small businesses, including minority businesses, had been excluded from the State's procurement process, not by design but through the specifying of particular brands. This practice excluded from competition those small businesses that did not have particular items available from their sources of supply. The Committee recommended that the General Services Administration investigate the problem and implement a procurement design that would continue to provide quality products but also would open the door to new and/or minority small businesses.³

At the same time, a Reorganization Commission was conducting a study of the state purchasing system. The Reorganization Commission report resulted in a revised procurement code, the South Carolina Consolidated Procurement Code (Code), which was enacted into law in 1981. The Code consisted of 21 separate articles that

²South Carolina, Journal of the Senate. "Report of the Joint Legislative Committee to Study the Problems of Small Business," by Senator J. Verne Smith, Chairman. March 16, 1979, p. 565.

³Ibid., pp. 565-7.

consolidated all of South Carolina's procurement mandates. Article 21 of the Consolidated Procurement Code was devoted mainly to the issue of minority business development through inclusion in the state procurement system. The preamble or policy statement to Article 21, *Subarticle 3, Assistance to Minority Business*, acknowledged the plight of minority businesses and their exclusion from participation in business opportunities in South Carolina and concluded that it was in the best interest of the State to assist minority businesses to develop fully.⁴ In Article 21 of the Code, the General Assembly confirmed that discrimination had occurred against minority businesses. Article 21 made the following provisions:

- Directed the chief procurement officers to provide appropriate staff to assist minority businesses with the state procurement procedures;
- Required chief procurement officers to maintain source lists of minority business firms detailing their products and services and make the lists available to agency purchasing personnel.
- Required chief procurement officers to include and identify minority businesses on the state's bidders' list and to ensure minority solicitation on an equal basis with non-minority firms.
- Required chief procurement officers to work with other appropriate state offices and minority groups in conducting seminars to assist minority business owners in learning how to do business with the State.⁵

Other key elements of the law included:

- As an incentive, the law provided a tax credit to prime contractors equal to 4% of the payments to minority subcontractors on state contracts, not to exceed \$25,000 annually. A firm was eligible to claim a tax credit for a period of five years from the date the first income tax was claimed.

⁴Article 21: Assistance to Minority Businesses. "Statement of Policy." Section 11-35-5210 (1).

⁵*Ibid.*, Section 11-35-5220.

- Required the Board to promulgate regulations designating which procurement contracts were appropriate for negotiation with certified South Carolina-based minority firms. The criteria to be used for designations were defined by section 11-35-5230.
- Established the Office of Small and Minority Business Assistance (OSMBA) to assist the Tax Commission in carrying out the intent of the law.
- Required each agency to develop a Minority Business Enterprise (MBE) Utilization Plan.

Early Efforts by the State of South Carolina to Involve Small Minority Businesses

During the late 1970s and early 1980s, the SCDHPT established linkages with several agencies involved in small and minority business development and expanded its own efforts to increase minority business participation. Significant events during this period included:

- Implementation of the Department's supportive services program in 1977 as a component of the federal DBE program;
- Establishment of the Office of Small and Minority Business Assistance (OSMBA) in the Governor's Office in 1979;
- Establishment of the Small Business Development Center Consortium by joint resolution in 1979;
- A report by the Joint Committee on Small Business to the Governor and General Assembly in 1979; and
- Enactment of the New Consolidated Procurement Code in 1981.

SCDHPT Exemption from the Consolidated Procurement Code

The SCDHPT sought and obtained exemption from the State Procurement Code for construction purposes in 1981. The Department was permitted to implement the federal rules and regulations to carry out provisions of the Code.

Changes to the Federal DBE Program: 1980 - 1984

To assist recipients of federal assistance in strengthening the DBE Program and increasing DBE participation, the U.S. DOT on March 31, 1980, promulgated regulations, Title 49 CFR Part 23, for a uniform MBE program by which firms owned and controlled by minorities and women could participate in contracts let by recipients of U.S. DOT financial assistance. The key elements of the regulations were:

1. defining MBE program elements that had to be implemented by recipients as a condition of Federal assistance;
2. requiring program implementation by the recipients;
3. permitting contract goals to be set by recipients; and
4. requiring certification of the eligibility of participating firms by recipients.

These regulations superseded all existing Minority Business Enterprise regulations. As a result, a system of certification was developed and firms were certified in accordance with standards set by the regulations.

On June 19, 1980, in response to US DOT regulations, the SCDHPT Commission unanimously passed a motion authorizing the Department to set uniform policies and procedures for dealing with MBE activities in the Construction Program. However, in 1981, a non-minority contractor sued SCDHPT and US DOT, alleging that he had lost \$850,000 in state contracts because of SCDHPT's MBE program. In response to this suit, SCDHPT filed suit against the U.S. DOT in an effort to remove federal regulations designed to aid minorities.⁶ SCDHPT was seeking a permanent injunction to stop enforcement of the MBE program.⁷ According to a newspaper article, "Highway

⁶The State. "Highway Department Sues Over Minority Business Regulations." October 28, 1981.

⁷Ibid.

Department Sues Over Minority Business Regulations," the SCDHPT's position in the suit was that "the federal regulations are unconstitutional and that the regulations are resulting in higher construction costs on public road-building projects."⁸ The suit was eventually dropped.

The MBE regulations allowed SCDHPT to establish its own goals for ethnic minority firms and women-owned firms based on what the Department considered reasonable and attainable. The overall goal for annual contract amounts for the SCDHPT was set at two percent in 1981 and 1982, with a goal of 1.85 percent for ethnic minorities and a goal of 0.15 percent for women-owned firms.

As the functions of the MBE Program began to take form, the staff associated with the program increased from one to three persons - an Assistant Personnel Director, an EEO Representative (formerly Civil Rights Specialists) and a clerk. The listing of certified minority contractors was included as part of the proposal package, and contractors were required to put forth a "good faith effort" to select from that list of MBEs to do subcontract work on SCDHPT federally aided highway projects.

In 1982, Congress passed the Surface Transportation Assistance Act (STAA), which was signed into law on January 6, 1983. Section 105(f) changed the eligibility criteria from "minority" to "disadvantaged" and imposed a 10 percent goal for ethnic minorities. The term "disadvantaged business enterprise (DBE)" became the name for DOT's program. In response, the SCDHPT established a 10 percent goal for ethnic minorities (MBEs) and a 1 percent goal for WBEs. From interviews with some key informants it appears that the prevailing opinion held by SCDHPT officials, including the

⁸Ibid.

State Highway Engineer, was that there was no way to meet the 10 percent goal because there were not enough DBEs.

1984 Legislative Changes

In 1984, the South Carolina Legislature included a provision in the general appropriations budget that encouraged the SCDHPT to implement the provisions included in the STAA, specifically section 105(f). This budget provision was renewed during subsequent years.

A more formal process for certifying minority and women-owned businesses was established and implemented in 1984. The SCDHPT developed contract "special provisions" (SP) that followed requirements included in 49 CFR 23, the federal regulations for the DBE Program. These special provisions referred to contractor obligations and policies and procedures for administering the DBE program. The first SP were effective on September 20, 1984. One stated that it should be interpreted liberally to achieve the goals required by the STAA of 1982. The SP identified the sanctions that could be applied to a contractor failing to meet the goals or failing to make good faith efforts to meet the goals prior to or after award. Failure could result in one or more of the following sanctions;

1. Forfeiture of the bid bond;
2. Disqualification from bidding pursuant to SCDHPT Regulation 63-310(b);
3. The withholding of monthly progress payments;
4. Declaring the contractor in default pursuant to Section 108.10 of the Standard Specifications, and termination of the contract; and
5. The assessment of liquidated damages in the amount of the difference in the stated goals of the contract and the actual payments made to the certified DBE or WBE.

Failure by the contractor to meet this goal or furnish the necessary good faith documentation did not negate the Department's right to award and execute the contract.

1984-85 Complaints Registered with OSMBA

A document prepared by a key informant in August 1986, detailing important events from March 1983 through March 1986, indicates that starting in November of 1984 and continuing through February 1985, OSMBA received numerous verbal complaints from DBE/WBE contractors about how the DBE Program was being implemented. A sampling of these verbal complaints was recorded by OSMBA:

1. DBEs receiving large contracts are not capable of performing them and are acting as "fronts," and non-DBEs are actually performing the work on the contracts.
2. Prime contractors are refusing to accept bids from DBEs which are capable of performing the work.
3. DBEs are told what prices to quote or their bids will not be accepted.
4. DBEs are being named in contract documents without their knowledge.
5. Ownership and control of DBE/WBE firms is being questioned.
6. The dollar amount being reported by the SCDHPT does not realistically reflect what is actually going to DBE/WBE firms (authorizations vs. commitments vs. actual payments).
7. DBE/WBE firms are being named as subcontractors in areas of work in which they have no capabilities.⁹

According to the same informant as above, these complaints had previously been shared with the SCDHPT by the DBE/WBE firms; however, the DBE/WBE firms had little faith that the SCDHPT would take any action. In response to the complaints

⁹Governor's Office of Small and Minority Business Assistance, "South Carolina Department of Highways and Public Transportation Historical Review: The Surface Transportation Assistance Act - Section 105(f)," August 5, 1986. p. 2.

brought to their attention, OSMBA requested that the SCDHPT start reviewing all contracts to see if the allegations were true.¹⁰

OSMBA Conducts its Own Investigation

During March and April 1985, OSMBA decided to conduct its own study concerning the allegations made by DBE/WBE firms. According to the document prepared by OSMBA, this decision was motivated by "the past history of the Department in dealing with problems in this program and present conversations which indicate the Department is not going to conduct a study."¹¹ The study reviewed non-STAA expenditures and STAA expenditures. OSMBA used the following outline to conduct its study:

1. Identify DBE/WBE firms which were questionable;
2. Identify all subcontractors over a one year period;
3. Try to determine ownership and control;
4. Determine capabilities of DBE/WBE firms alleged to be "fronts",
5. Compare geographical location of alleged "fronts" and geographical location of projects;
6. Look for patterns of relationships between alleged "fronts" and prime contractors; and
7. Review commitments of DBE/WBE firms.¹²

OSMBA gathered some of the data directly from the DBE/WBE community, the SCDHPT, and records in OSMBA's office. According to the document prepared by OSMBA in 1986, the SCDHPT was not cooperative during the investigation. Firms that

¹⁰Ibid.

¹¹Ibid.

¹²Ibid., p. 3.

were alleged to be "fronts" were earmarked (flagged) to be closely reviewed. OSMBA's investigation suggested that very serious problems might exist in the program. The historical review prepared by OSMBA states that the analysis revealed the following:

- Fifteen "flagged" Black-owned firms represented 69% of the total expenditures to Black owned firms. Forty-five Black firms actually participated in the program during the year under review.
- Two "flagged" Native American owned firms represented 65% of the total expenditures to Native American owned firms. Six Native American firms actually participated in the program during the year under study.
- Three "flagged" women-owned firms represented 70% of the total expenditures to women-owned firms. Thirteen WBEs actually participated in the program during the year under study.¹³

The preliminary results were presented to the SCDHPT for follow-up and corrective action. A meeting was held between the SCDHPT's Chief Commissioner, the Executive Commissioner to the Governor, the Director of OSMBA, and others on April 25, 1985. The report was reviewed and the Chief Commissioner was requested to distribute copies to Legal and to the Division of Engineering for review and follow-up.

Other Allegations Brought to the Attention of OSMBA

Allegations continued to surface that prime contractors were using "fronts" and/or DBE/WBE firms lacking the capacity to perform the work and that prime contractors were refusing to use DBE/WBEs capable of performing the work. One documented incident involved a Black-owned construction firm certified by the SCDHPT (hereafter referred to as Black-owned Company A). The document prepared by OSMBA detailing the chronology of events in the incident (Case Study A) revealed the following:

¹³Ibid.

Case Study A

- Black-owned Company A was a landscaping company which had been flagged by OSMBA during its preliminary investigation of SCDHPT's DBE. On November 22, 1985 Company A telephoned OSMBA requesting assistance in obtaining a subcontract on a road construction project. Black-owned Company B, a certified DBE, had already been named as subcontractor on the project and had the capabilities to perform the work. Black-owned Company A had discussions with the prime contractor, and the prime contractor was alleged to have indicated to Company A that it wanted to substitute Company A for Company B. Company A stated to OSMBA that the prime contractor had required that if he was substituted as the DBE subcontractor he would have to use the trucks and resources of a non-minority trucking firm, alleged to be owned by the prime. Based on the facts, OSMBA decided not to support Company A and instead supported Company B.
- On November 29, 1985, Black-owned Company B wrote the prime contractor requesting a meeting to discuss the rumor that Black-owned Company A was going to replace Black-owned Company B on the contract.
- On December 5, 1985, the prime contractor wrote Black-owned Company B stating that he intended to replace him with another DBE and requesting that Company B not object to the replacement request.
- On December 18, 1985, OSMBA wrote to SCDHPT on behalf of Black-owned Company B and remarked that this incident (request for replacement) was not isolated but reflected a much deeper problem in the program of capable firms being listed then deleted or DBEs with limited capabilities being listed and non-DBEs performing the work. Copies of the letter were sent to the Regional Director of FHWA, the president of the prime construction company, the SCDHPT Compliance Officer, and others. The Department was requested to give this problem immediate attention because it was creating the false impression of a positive impact in the DBE/WBE program.
- On December 19, 1985, the SCDHPT Director of Construction wrote to OSMBA stating that the Department had not received a request from the prime contractor for a deletion or substitution of DBE; but, if it did, the Department would have to comply with contract provisions and would be reasonable and deliberate in its decision.
- On January 8, 1986, the prime contractor wrote a letter to OSMBA stating that it had recently been advised by SCDHPT that some DBEs were being operated in a manner that was counter-productive

to the program, and it would welcome an investigation and thought OSMBA was the entity to conduct this investigation.¹⁴

Another allegation involved a DBE (hereafter referred to as DBE A) subcontractor that was listed on projects but was allegedly not performing the work, which was actually being performed by a non-minority firm. A non-minority firm A was the prime contractor, a non-minority firm B was subcontractor on the project, and DBE A was a subcontractor to non-minority firm B. OSMBA cites the incident (Case Study B) as follows:

Case Study B

- On January 7, 1986, Black-owned Company A wrote a letter to the SCDHPT stating that DBE A had been listed as a subcontractor on projects 32.823, 32.703.2, 32.784, 32.786, 32.786.2, and 32.791 in Lexington County but was not performing the work, and that a non-minority firm was actually performing the work. DBE A has been named by non-minority firm B in the contract so that the goal will be met.
- On February 6, 1986, the SCDHPT sent a letter to the prime contractor, non-minority firm A, requesting that it advise non-minority firm B that SCDHPT wanted to review its books on the projects cited by Black-owned Company A. OSMBA noted its belief that DBE A was deleted from a project then named in the next bid letting as a subcontractor on a larger project.¹⁵

A third incident identified by OSMBA involved a certified DBE subcontractor alleged to have lacked the capacity to perform the work. According to the source document, OSMBA wrote a letter on March 6, 1986 to the SCDHPT Chief Commissioner requesting that the SCDHPT enforce its "Special Provisions" on projects 40.180A, 40.180A.1, 40.180A.2, and 40.180A.3. OSMBA had been notified by SCDHPT personnel that the Department planned to award or had already awarded the above

¹⁴Ibid., pp 4-5.

¹⁵Ibid.

named projects. These were some of the projects named in allegations by DBEs in January and February 1986, where the Department was requested to review and investigate the projects because a DBE had been named as subcontractor and did not have the capabilities of performing the work. The letter from OSMBA stated that the named DBE did not have the capabilities to perform the work and had not attempted to subcontract or joint-venture with another DBE which did have the capabilities. The letter from OSMBA referred the SCDHPT to its own Special Provisions, which stated -- "If a certified DBE or WBE Subcontractor subcontracts a portion of the work to a non-DBE, the dollar value of the work subcontracted will not count towards meeting the goal"; and Obligation "If the Prime Contractor does not meet the goal after the award of the contract, sanctions may be enforced." OSMBA noted that after the letter was written, the DBE acquired some new trucks.¹⁶

Between December 1985 and February 1986, the South Carolina Minority Contractor's Association (MCA) sent several letters to the SCDHPT citing incidents of abuse in the program and requesting that the Department hold an immediate investigation, halt projects in progress, and case awarding projects until an investigation had been completed.¹⁷

DBE/WBE Advisory Task Force - 1986

According to sources obtained from a key informant, the SCDHPT held a meeting in March 1986 with representatives from OSMBA and the DBE community to discuss the allegations made by the Minority Contractors Association and other DBEs about

¹⁶Ibid., p. 6.

¹⁷Interview with the former Director of the OSMBA on February 7, 1995, and based the document "South Carolina Department of Highways and Public Transportation Historical Review: The Surface Transportation Assistance Act-Section 105(f)," prepared by OSMBA on August 5, 1986.

abuses in the DBE program. The SCDHPT's Chief Commissioner determined that another DBE/WBE Advisory Committee should be established to look at the program and develop ways to improve it. The DBEs and OSMBA officials present at the meeting requested the SCDHPT to investigate the allegations immediately. Also present was a member of the press (WISTV).¹⁸

A DBE/WBE Advisory Task Force was formed consisting of representatives from the SCDHPT, OSMBA, the DBE/WBE community, FHWA, and the AGC. Recommendations were made and a subcommittee was formed to review allegations and compile a report for full Committee. The Task Force Subcommittee (Subcommittee) presented its draft report, *Report to the DBE/WBE Advisory Task Force*, on March 19, 1986.

The report acknowledged that "there have been many reports, both verbal and written, of abuses in this program,"¹⁹ the abuses range from "DBE/WBE firms with limited capabilities being named as subcontractors for large contracts to DBE/WBE firms being named as subcontractors and not performing the work."²⁰ The report acknowledged that the SCDHPT was aware of the problems and abuses in the program and made a series of recommendations to strengthen the program and eliminate the problems. The Subcommittee reiterated the intent of the program pursuant to section 105 (f) of the STAA as a "process to develop disadvantaged and women owned businesses and to assist them in becoming a part of the mainstream of the economic

¹⁸Ibid., p.5.

¹⁹Task Force Subcommittee. Report to the DBE/WBE Advisory Task Force, March 19, 1986. p.3.

²⁰Ibid.

system,"²¹ and emphasized the point that "If the intent of a program is not understood, the goals of the program will never be realized."²² The report stated:

This program was not designed to only give contracting opportunities to DBE/WBEs, but to also provide assistance to DBE/WBEs to expand, provide jobs and become a partner with the state. If this program had been viewed from the first as an opportunity and not an additional burden on the Department and Prime Contractors, the program would already be successful. The Department of Highways and Public Transportation has the responsibility for control and oversight of this program, and has the additional responsibility for identifying the objectives and setting the "wider vision" goals.²³

The report identified external as well as internal problems and issues needing immediate attention from the SCDHPT. External recommendations dealt with communication between the SCDHPT, DBE/WBEs, and prime contractors. The internal recommendations were divided into the following three categories:

1. Lack of compliance monitoring of projects;
2. Unwillingness or inability of the Department to assume an active meaningful role; and
3. Identification of capabilities or limitations of DBE/WBE firms, and assignment of responsibility for this program within the Department.

Compliance Monitoring

To strengthen the process for monitoring projects, the report recommended that the SCDHPT do the following:

- Issue instructions to personnel monitoring construction projects to look for certain irregularities while the project is in process;
- Provide training to field personnel on what to look for and what to do if irregularities are noted;

²¹Ibid., p.2.

²²Ibid.

²³Ibid.

- Analyze prime contractor's track records on DBE/WBE utilization;
- Have field engineers interview DBE/WBE firms when they come onto the project;
- Provide field engineers with a copy of the form submitted by the contractor at bid time which will outline what the DBE/WBE subcontractor is committed to perform on the project;
- If a deletion of a DBE/WBE firm is requested, have the field engineer review the problem with both the contractors and the DBE/WBE firm prior to the request going to the Department. There should be an attempt to resolve any problems at this level first. The field engineer will then be able to provide the Department's Central Office with more information, should these problems not be resolved; and
- Enforce the Department's Special Provisions and Instructions to Bidders if irregularities occur.²⁴

Involvement by the Department

The report acknowledged that there had been much internal discussion about the Department's role in the DBE program, sometimes reflecting a lack of understanding of the problems of DBE/WBEs and the prime contractors. To assist the Department in improving its image and becoming more definitive about its role in the DBE program, the Task Force Subcommittee made a number of recommendations:

- The Department should define the objectives of the DBE program to its personnel and to the DBE/WBE and prime contractor community.
- The Department should assist in putting together a committee of DBE/WBEs and prime contractors to discuss problems and implement a better form of communication. This committee could take recommendations to the Department to avoid future problems.
- The Department should define each division's area of responsibility, so that problems do not end up with the Commissioners, the Chief Commissioner, and the federal government.

²⁴Ibid., p.3.

- The Department should draft letters to both the prime contractors and DBE/WBE subcontractors outlining exactly what is expected of them in participating in the DBE program.
- There should be some form of program review, to identify past successes and failures and to determine what future actions need to be taken. The Department should have some method of measuring the progress of the DBE program. This would entail setting up objectives and making determinations on how to reach them. This program review should look at ways to improve and expand in order to reach objectives.
- The Department should consider reviewing contracts prior to bid to determine what areas lend themselves to subcontracting. If the Department finds that DBE/WBE participation or expertise is limited or overextended in one area, opportunities should be identified in other areas.
- The Department should consider designating some projects for DBE/WBE participation only.
- The Department should start setting goals on state funded projects.²⁵

Identification of DBE/WBE Firms and Areas of Responsibility

The report acknowledged that there was a problem in identifying the capabilities of DBE/WBE firms for prime contractors and a problem in communication between the prime and the DBE or WBE. The Task Force Subcommittee made the following recommendations to the SCDHPT to eliminate some of these problems:

- Develop a directory of certified DBEs and WBEs which outlines what type of service they provide, the equipment they have and can access for performing contracts, their number of employees, etc. This directory should be put together within a short time frame, distributed to all interested parties on a one time basis, and updated monthly.
- Internal procedures should be established to formalize the complaint, deletion and certification procedures so each area of the Department's involvement is addressed.

²⁵Ibid., p.5.

- WBEs and DBEs should be prequalified and given a dollar amount assigned to determine capabilities. This would be a cumulative amount of commitments, not a limit for each project. When the DBE or WBE reaches its assigned dollar limit, it would be banned from bidding on other projects until current work was completed.
- Provisions should be made to allow the DBE or WBE to raise (or lower) this dollar limit by application to the Office of Compliance. The Office of Compliance would determine how to assign dollar amount capabilities and would notify all prospective bidders when this dollar amount was reached.
- The Department should establish an investigative process which assigns levels of inquiry, for example:
 - a. routine -- project personnel
 - b. intermediate -- central office
 - c. complex -- team to include central office, impartial designee and legal counsel
 - d. criminal -- refer to State Attorney General, State Law Enforcement Division, OIG, Federal Bureau of Investigation, etc., as appropriate.
- The Department should assign more personnel to the Office of Compliance.²⁶

Communication

The report identified communication as the most serious external problem. The

Task Force Subcommittee stated:

The Department, Disadvantaged Businesses, Women-owned Businesses and contractors seem to have a problem working together or even communicating positively about this program. The level of communication and substance of communication can and should be raised to a higher level than presently exists.²⁷

The Task Force Subcommittee requested that the SCDHPT take the lead role in developing more positive communications with the contracting community and presented the following three recommendations:

²⁶Ibid., p.6.

²⁷Ibid., p.11.

- The Department should consider assigning or hiring a DBE/WBE/Contractor Liaison Officer. This individual would act as the catalyst to opening the lines of communication and keep them open between the Department and the business community. This individual could also act as negotiator when problems arise, could provide input to the Department on how this program is developing in other states, new ideas from other states and serve as an impartial party to discussions.
- The Department could hold training seminars on how to bid, how to read plans or any other subject which needs to be addressed.
- The Department could hold informal sessions with the DBE/WBEs and the contractors to transfer information.²⁸

Special Provisions and Instructions to Bidders

The Task Force Subcommittee made recommendations, designed to improve the Special Provisions and Instructions to Bidders, dealing with reporting requirements, deletion criteria, definition of what participation counts toward the goal, etc. The recommended changes to the existing Special Provisions, dated November 26, 1984, are summarized below. Recommended changes to Special Provisions were as follows:

- Added the statement: "Failure to find replacement DBE/WBE because the price is not the price of the original bid is not in itself evidence of good faith."
- Identified what activities will be considered "commercially useful functions" by adding: "The furnishing of structural steel, reinforcing steel, and the furnishing of asphalt mixes will not be considered a commercially useful function unless the DBE or WBE performs the steel fabrication or furnishes the asphalt mix from his or her plant. In the determination of whether elements of work are commercially useful functions, the Department will ascertain if it is a normal acceptable industry practice."

²⁸Ibid.

- Clarified which hauling will be allowed to be counted toward meeting the goal. The recommendation added the following language: "In the area of hauling when a DBE or WBE hauler uses leased vehicles (with drivers not an employee of the DBE or WBE) from a non-DBE or non-WBE, the dollar value of the hauling will not count toward meeting the goal."
- Involved the Resident Construction Engineer in the reporting process by requiring that quarterly reports be submitted to the Resident Construction Engineer by the 15th of the month following the completion of each quarter.³⁰

The recommended changes to the Instructions to Bidders were as follows:

- Require more detailed information from the prime contractor concerning DBE/WBE subcontractor information. The following information must be provided:
 - Each DBE or WBE subcontractor (listed separately);
 - The specific item of work to be performed or materials to be supplied by each DBE or WBE (listed separately);
 - The quantity of each item of work to be performed or material to be supplied, the unit price and dollar amount that each DBE/WBE will receive, and the total dollar amount of each item or work to be performed or material to be supplied by each DBE/WBE firm;
 - The percent and total dollar amount of each item of work to be performed or material to be supplied that is to be credited towards the DBE/WBE goal;
 - The total prime contractor bid amount; and
 - The percent of the total contract bid amount committed to each DBE/WBE.
- The prime contractor is responsible for maintaining an updated directory of certified DBE/WBEs. Deletions, additions, and corrections will be made available to proposed bidders along with the short advertisement. Any certified DBE/WBE firms listed in the advertisement prior to the day proposals are opened may be utilized, but DBE/WBE firms deleted from the short advertisement prior to the day bid proposals are opened cannot be utilized.

³⁰ibid., p.14.

- The prime contractor is advised that the certified DBE/WBE directory pertains only to DBE/WBE certification and not to qualifications.³¹

The report also contained an addendum which outlined recommendations from the Associated General Contractors. The recommendations were as follows:

Internal Recommendations

- Monitoring -- Investigate allegations and if none are found, notify the public.
- Department Involvement -- Work with various groups or individuals to establish a capital fund assistance program for DBE/WBEs.

External Recommendations

- AGC willing to assist the Department in providing training courses.

Special Provisions

- Remove rigid penalties for noncompliance and change the program from one of compliance at any cost to one of affirmative action.
- List as affirmative action only those actions that will provide DBE/WBEs with opportunities to submit competitive quotes.
- If the bidder performs the acts of affirmative action and does not meet the stated goals, the contract should be awarded.

Instructions to Bidders

- Revise DBE/WBE contract form to state that the listed DBE/WBE firms have either been contacted or are willing to perform the work listed.
- Allow seven (7) days after bid opening for bidders to finalize subcontracts with DBE/WBEs.³²

³¹Ibid., p.15.

³²Ibid., p.addendum.

The State 10 Percent Construction Funds Requirement and the Implementation of STAA

In 1986, the State Appropriation Act 1986/87, under Act No. 540, required the SCDHPT to expend 10 percent of funds contracted for construction purposes with small business concerns owned and controlled by economically and socially disadvantaged individuals as defined in section 11-35-5010 of the 1976 Code or owned and controlled by women. In addition, the SCDHPT was required to certify eligible small businesses. The SCDHPT was permitted to waive the 10 percent provision on a contract when no small businesses were available to perform the work and no contractor could be excluded from consideration for contract award, if the prime contractor filed an affidavit with sufficient proof that there was no small business located in South Carolina that could satisfactorily perform any of the construction work required under the contract. The Legislature directed the SCDHPT to comply with section 105(f) of the STAA of 1982 and to effectuate and ensure compliance through the promulgation of regulations and input from OSMBA.

On July 15, 1986, OSMBA met with the SCDHPT to discuss the implementation of the 10 percent budget proviso. A summary of that meeting is presented below:

1. The SCDHPT decided to implement the provision by setting aside certain contracts for bidding by DBEs and WBEs only.
2. The SCDHPT decided to set goals only on projects exceeding \$400,000. The Department reasoned that setting goals on smaller projects would be difficult to manage due to their large number.
3. Only pre-qualified contractors would be permitted to bid on set-aside contracts.
4. The successful bidder on a set-side contract must perform a minimum of 30 percent of the work in order to be considered performing a commercially useful function.
5. It was noted that as of the date of the discussion, there were two DBEs prequalified and three or four WBEs.

6. The first set-aside would be in the September letting.³³

A second meeting with OSMBA and SCDHPT was held on the same day, at the request of a concerned senator, to discuss the implementation of the law. The meeting centered on the following concerns of the senator:

1. The method the SCDHPT planned to use in implementing the program.
2. The suggestion that the SCDHPT take a positive leadership role in implementing the project in order to build the best public relations, both inside and outside the General Assembly.
3. The need to hold a meeting to inform the minority and women contractors concerning the implementation of the project.³⁴

OSMBA emphasized to the SCDHPT that it should strive for a balance between WBE and DBE utilization. If WBEs were used disproportionately more than DBEs, that would frustrate the intent of the legislators.³⁵

OSMBA expressed concerns that the implementation of the State DBE/WBE program and Section 105(f) of STAA were not going as well as expected. A memorandum from the Director of OSMBA, to the SCDHPT's Executive Director, dated December 4, 1986, vehemently disagreed with the declaration of SCDHPT's Legal Department's that -- "It is the department's policy to minimize the impact of Section 105(f) of the Surface Transportation Assistance Act (STAA) on the traditional highway construction procurement process, while carrying out the intent of Congress."³⁶ According to OSMBA, the "minimum impact" policy espoused by Legal:

³³John W. Gadson, Sr. to File, August 6, 1986.

³⁴Ibid.

³⁵Ibid.

³⁶John W. Gadson, Sr. to Joseph Rideoutte, December 4, 1986. p. 2.

- Conflicts with commitments the Department made to the Governor for his transmittal to the Small Business Committee of the U.S. Congress during a Congressional hearing in September 1984, concerning South Carolina's implementation of Section 105(f) of the STAA.
- Fails to support the Department's communication with the Legislative Black Caucus and other legislators who support the minority business procurement program.
- Disagrees with the law's interpretation by OSMBA and others who work in the compliance area.
- Is inconsistent with the goals and objectives which officials at the SCDHPT have conveyed to OSMBA and legislators in joint discussions concerning the DBE/WBE Program.

The memorandum lists several actions by SCDHPT's Legal, Engineering, and Construction Divisions that demonstrate and reinforce the "minimum impact policy."

They are as follows:

- The Department's decision to join the plaintiff in a law suit in the early 1980s to prevent the U.S. DOT from implementing the DBE/WBE program.³⁷
- During the Senate debate on the 1986-87 Budget Proviso requiring 10% expenditure of construction funds with DBE/WBEs key department officials said to Mr. Gadson, MBEs, and Legislators that the Department did not oppose the proviso, while other key officials at the Department were conveying strong opposition to the provision.
- "The incident involving a minority contractor from the Row Country...in which [the SCDHPT's Legal Division] found nothing wrong when a prime listed him in his bid as the required DBE firm, won the bid, and the prime shopped his prices and switched to another firm he knew was not equipped to perform the work

³⁷SCDHPT filed suit in federal court in September 1981 against the U.S. DOT in an effort to get federal regulations designed to aid minorities dropped. The action sought a permanent injunction against enforcement of federal regulations. The suit was prompted by an earlier suit filed by W.M. Mixon Co. Richard D. Bybee, Assistant South Carolina Attorney General, counsel to SCDHPT, said in the suit that the federal regulations are unconstitutional and that the regulations are resulting in higher construction costs on public road-building projects. The State. "Highway Department Sues Over Minority Business Regulations." October 28, 1981.

independently. The listed DBE complained to the Department, and the Department made a decision to support the prime contractor's action. The Department then revised its position after South Carolina's Office of the FHWA and the U.S. DOT disagreed with SCDHPT's decision to support the prime in shopping bid prices of named DBE firms. The Regional FHWA further directed the Department to immediately change its bid documents, so this activity could not happen again. However, SCDHPT did not revise its bid documents for five or six months."

- "There seems to be a tendency for the Department to tolerate arrangements in which primes and large subcontractors affect arrangements in which unreasonable amounts of the payments slated for minority firms accrue back to the non-minority primes and subcontractors. There are incidents in which the actual work is performed by non-minority firms, many times involving subcontractors with a special relationship to the prime contractor or the prime's own personnel and equipment. To most objective people, these arrangements would be a clear violation of the goals of the DBE program. Specific cases can be extracted from the Department's own construction and compliance files. There are a handful of primes and subcontractors whose names are constantly mentioned in front-like arrangements. This information may also be extracted from your files."
- "In recent meetings, the DBE Advisory Committee moved to address some of these problem situations by recommending decertification [of] the DBE/WBE or the legitimate DBE/WBE firms acting in "contract front" operations. Your Legal Department has ordered at least one back on the list. Such firms are clearly not under the actual control of minorities or women, or they have allowed their firms to repeatedly enter into "contract front" arrangements. In some of these cases over eighty to ninety percent (80% to 90%) of the dollars intended for the minority firm have accrued back to non-minority firms. (Minimum impact at its best)."
- "The Legal Department is now questioning the authority of the Compliance Office and the Disadvantaged Business Enterprise Advisory Committee to remove such front companies or front-like arrangements from the Department's official DBE/WBE list; even though that is the process by which a firm is placed on the list. The only firms that would be removed are the non-functioning firms or those that have violated the objectives and goals of the program. The legal Department has argued the issue of due process and seems to have the perception that the Committee or Compliance Office will not give the front companies or companies acting as contract fronts due process. (Again Minimum Impact)."

- "The Department recently decided to implement the 10% budget provision, by using a set-aside process. This approach of implementation was done at the urging of the South Carolina Branch of the Associated General Contractors. It is the Department's policy to contract only with prequalified firms (Primes). The Department chose to follow this policy in implementing this provision even though there were only two (2) prequalified minority firms in existence at the time the Department adopted this approach. In the September letting, less than \$50,000 of more than \$1,000,000 in the set-aside went to wholly owned minority firms."
- "The DBEs, our office and others requested and got approval from the Department to waive the bid bond on the set-aside projects (bid bonds are not required by legislation). The Department waived the bid bond requirement in the September letting, but the same Department Officials that waived the bid bond requirement in the September letting did not see fit to waive it in October, therefore rejecting the single (one) minority bid because the firm did not submit a bid bond. Indeed, the Department's "Minimum Impact Policy" was again applied."

OSMBA advised SCDHPT's Executive Director that:

- This program cannot succeed when it is the Department's stated policy to have a minimum impact on the traditional method of highway construction procurement.
- "If this Minimum Impact Policy is to change, then a clear directive must be given by you and the Commission to dismantle the existing operating methods and principles within the daily routine of the Department. . ."
- Finally, "the dollar value of the data presently being collected and maintained. . . does not reflect the real impact of the DBE/WBE Program (the data includes contract front money)."

SCDHPT's Response and Actions Taken

In response to the many allegations and concerns expressed by OSMBA and the report from the Task Force Subcommittee, the SCDHPT took the following actions:

- Increased investigations of alleged "fronts," taking action where evidence of "fronts" could be established:
 - On August 19, 1986, suspended Black-owned Company A, the Black-owned landscaping and hauling Company in Case Study A, from bidding on projects as a DBE for sixty (60) days, and the company's name was removed from the

directory of certified DBEs/WBEs for the months of September and October 1986 and thereafter until such time as the company develops an acceptable business plan and reapplies for DBE certified status. In March 1987, the certification status of Black-owned Company A was restored, but restricted to landscaping.³⁸

- On August 13, 1987, decertified a Black-owned hauling and construction firm for acting as a "front." The non-minority owner of the firm was disproportionately responsible for the operations of the firm, and the firm was not in fact controlled by the minority shareholder.³⁹
- Increased scrutiny of firms applying for certification in an effort to eliminate fronts.
- Strengthened the verification process for payments to DBEs by requiring the DBE's signature on quarterly report forms or a copy of the canceled check.
- Began developing a computerized tracking system to record payments made to DBEs on a project by project basis.
- Provided "good faith efforts" training to prime contractors at the annual joint meeting held by the SCDHPT, AGC, and FHWA. Contractors asked questions and Department representatives (from the Offices of Construction and Compliance) answered.
- Revised Special Provisions to incorporate the recommendations of the DBE/WBE Advisory Task Force. (Revised May 7, 1986).⁴⁰
- In April 1987, the SCDHPT developed a plan to respond to some of the concerns identified by the Subcommittee and to improve coordination and program implementation. The plan included the appointment of a Executive Assistant for Minority Affairs who reported directly to the Executive Director. The primary responsibilities for this position were to enhance and improve the Department's relationship with the minority community across South

³⁸B. F. Byrd to Frank Neely. August 19, 1986. Office of Compliance, SCDOT, files; and B. F. Byrd to Frank Neely. March 5, 1987. Office of Compliance, SCDOT, files.

³⁹SCDHPT Administrative Proceeding on SCDHPT Amended Notice of Intention to Revoke Certificate as a Disadvantaged Enterprise, Recommended Order. July 30, 1987; and Richard D. Bybee to File, August 13, 1987.

⁴⁰SCDHPT. Special Provisions, Revised May 7, 1986.

Carolina. The Executive Assistant for Minority Affairs position was created in July 1987 and filled in January 1988.⁴¹

- The role and authority of the Office of Compliance were reviewed.⁴²

General Climate of the Period

The general climate in the first decade or so of the DBE/WBE program (1976 - 1987) was strained and combative. The general intent of the enabling legislation, STAA of 1982 and STURAA of 1987 was often missed. The legislative intent of STAA of 1982 and STURAA of 1987 was to promote increased participation of ethnic minority and women-owned firms in Federal-aid projects as well as to contribute to their growth and economic development and eventual self-sufficiency. However, many, though not all, officials at the SCDHPT gave the impression that they considered the program burdensome and a give-away to minorities. The "minimum impact policy" did nothing to reform their attitude. At the same time, the minority-owned business community, the women-owned business community, and the majority-owned business community remained polarized against each other.

4.2 Years of Transition (1989-1990)

1988 Legislative Black Caucus Public Hearing

In 1988, the South Carolina Legislative Black Caucus, Economic Development Task Force, held a public hearing to review concerns expressed that minority contractors who were participating in the federal and State programs were rapidly

⁴¹South Carolina Legislative Audit Council, A Limited-Scope Review of the SC Department of Highways and Public Transportation Minority Goals Program (May 1991). p.22; and Linda McDonald to Gerald I. Jackson, May 3, 1995.

⁴²Linda McDonald to Gerald L. Jackson. May 3, 1995.

declining in numbers, financial strength, and growth and development. Allegations against the Department and prime contractors were made at the hearing by minority contractors. Minority contractors reported being harassed by prime contractors and having unreasonable demands placed on them and if and when they failed to perform under these conditions, were replaced by non-DBEs, who were sometimes paid more for the same work.⁴³ Many of the DBE firms testifying at the hearing described themselves as being worse off financially after participating in the state set-aside program. Minority contractors testified about not being paid for work completed, which sometimes placed their financial standing in jeopardy or worse.⁴⁴ One DBE testified to not having performed on a job on which the prime listed him as a subcontractor.⁴⁵ Another DBE testified that after becoming prequalified to participate in the state set-aside program, he found it was difficult to acquire subcontract work.⁴⁶ One DBE testified to being harassed and subjected to racial slurs from highway inspectors.⁴⁷

Allegations of Abuses in the DBE Program Surface in Court Case (1989-1993)

The allegations of abuse in the DBE program were brought to the forefront in the civil lawsuit brought by a Black-owned Trucking Company (hereafter referred to as Plaintiff A) in 1989 against a large non-minority road construction company prime contractor (hereafter referred to as Defendant A). The civil lawsuit brought against

⁴³South Carolina Legislative Black Caucus. Barriers to Full Minority Participation in the South Carolina Department of Highways and Public Transportation's Set-aside Program. October 12, 1988. p.71.

⁴⁴Ibid., p.64 and p.72.

⁴⁵Ibid., pp.78-81

⁴⁶Ibid., p.8.

⁴⁷Ibid., pp.12-15.

Defendant A by Plaintiff A involved a DBE Trucking Company being listed as a DBE subcontractor on a \$3 million project. The DBE bid with the anticipation and understanding that he would be used to do all of the hauling for the project which amounted to \$600,000. Instead, the prime contractor wanted to give the DBE subcontractor a \$300,000 piece of the job and hire additional DBEs. The prime contractor assured the DBE that his company would get \$300,000 worth of work, but later guaranteed only \$100,000 when other truckers had been hired in order for the project to go forward.⁴⁸ Even though the jury awarded Plaintiff A only \$75,000 in breach-of-contract damages against Defendant A rather than the approximate \$4.8 million in damages sought and did not find Defendant A guilty of fraud, racial discrimination, racketeering, conspiracy, and unfair trade practices, the importance of the trial is the testimony given by DBEs concerning minority road contracts. The case put a focus on minority road contracts and the testimony given by DBE fronts and DBE firms acting as "pass throughs" for non-DBE firms substantiated many of the allegations of abuses in the DBE program identified by DBEs to OSMBA in 1984 and 1985.

Testimony by a DBE Front

The president of one DBE firm testified that "he did not endorse the checks" totaling approximately \$1 million "written to his company" by Defendant A and deposited in the account of a non-DBE trucking company (non-DBE Company A) from 1983 to 1986."⁴⁹ The DBE said that Defendant A "listed his company as the minority subcontractor on more than a dozen projects," even though the DBE received only a

⁴⁸The State. "Officials link action against contractor to suit outcome." February 18, 1993.

⁴⁹The Greenville News. "Minority executive testifies he didn't receive Sloan checks." Wednesday, February 3, 1993.

5% cut from the work performed almost exclusively by non-DBE Company A.⁵⁰ The president of the DBE firm testified that Highway Department officials began in 1985 to question whether his company was fulfilling a *commercially useful function* as a DBE subcontractor on Defendant A's contracts. He testified that the non-DBE firm then began providing him with the necessary trucks, drivers, gas, oil, and maintenance in exchange for 95% of the hauling contracts. He further testified that "when he began insisting that his company do more of the hauling work," he was cut off by Defendant A and ultimately decertified as a minority-owned business by the Highway Department⁵¹ and later "filed for bankruptcy and went out of business."⁵² The DBE president testified that Defendant A wanted to find a guy with one or two trucks, and the rest of the work would be done by non-DBE Company A.⁵³ Under cross examination by Defendant A's attorney, the DBE president testified that his firm initially benefitted from the arrangement with non-DBE Company A.⁵⁴ The DBE president also testified that after the Highway Department began asking why the DBE firm was not handling some of the work it was supposed to be doing, the DBE president was told by Defendant A that his services would no longer be needed.⁵⁵ The DBE lamented during his testimony that, "Anytime a small minority business is put in the position where it loses its cash flow for a short period of time, it's devastating" and added later, "These

⁵⁰ *ibid.*

⁵¹ *ibid.*

⁵² The State. "Contractors build case in lawsuit." 1993.

⁵³ *ibid.*

⁵⁴ The Greenville News. "Minority executive testifies he didn't receive Sloan checks." February 3, 1993.

⁵⁵ The State. "Contractors build case in lawsuit." 1993.

people had no mercy."⁵⁶ The DBE President testified that Defendant A chose to hire another certified DBE to truck materials for the \$15 million to \$20 million I-85 job in the mid-1980s.⁵⁷ The certified DBE hired by Defendant A (hereafter referred to as DBE B) was a front who was decertified by the Highway Department in 1987.

Testimony by a DBE acting as a "Pass Through" for Non-DBEs

DBE B admitted in court that he wrote more than \$1 million in checks to non-minority Company A for project work in the upstate I-85 job.⁵⁸ DBE B testified to giving non-DBE Company A all but \$1 per hour for each truck non-DBE Company A provided to help his company with hauling on the I-85 project.⁵⁹ Plaintiff A brought out at the trial that when DBE B's three trucks hauled materials themselves, they received the standard rate of \$33.50 per hour.⁶⁰ DBE B acknowledged in court that "he diverted some \$400,000 intended for minority contractors to a white-owned trucking firm after the two companies negotiated."⁶¹ State inspectors found only two DBE B trucks at the I-85 project in July 1986, as well as evidence that DBE B decals had been placed on trucks owned by non-DBE Company A.⁶² In 1987, an investigator with the Office of Compliance wrote in a memo to the Director of Compliance that he also found DBE B stickers placed on trucks owned by non-DBE Company A. His report to the Highway

⁵⁶Ibid.

⁵⁷Ibid.

⁵⁸The State. "Trial," February 6, 1993.

⁵⁹Ibid.

⁶⁰Ibid.

⁶¹Ibid.

⁶²Ibid.,

Department suggested more investigation.⁶³ The investigator also wrote in October 1987 that non-DBE Company A, instead of DBE B, appeared to be doing most of the work on a highway job in Chester County.⁶⁴ The investigator recommended in a memo to the Director of Compliance that non-DBE Company A's work not be counted as payment under the minority hiring program.⁶⁵ By subcontracting a firm like DBE B's, Defendant A was able to meet the required 10% DBE goal on the project.

Testimony by another DBE Set-up to be a "Pass Through" for Non-DBEs

During the trial, another Black business owner, DBE C, testified that "he was hired to replace a black firm that was better equipped to handle trucking work on a road project in Lexington County."⁶⁶ DBE C testified that he had only two trucks, but was assured by Defendant A that he could obtain two extra trucks from a white-owned firm, non-DBE company B.⁶⁷ DBE C replaced another Black-owned company, DBE D, on the road construction project.⁶⁸ DBE C also testified that "As the job progressed, I never received the trucks," ... That's when I began to get leery of what I was doing."⁶⁹ He testified to telling Defendant A that he didn't want to get into anything that was not legit.⁷⁰

⁶³The State. "Inspectors found minority hiring violations, jury told." February 4, 1993.

⁶⁴Ibid.

⁶⁵Ibid.

⁶⁶The State. "Inspectors found minority hiring violations, jury told," February 4, 1993.

⁶⁷Ibid.

⁶⁸Ibid.

⁶⁹Ibid.

⁷⁰Ibid.

The DBE President, DBE B and DBE C, all testified that they had fewer than four trucks apiece to do major hauling jobs for Defendant A, which forced them to hire larger white-owned trucking companies to complete the work.⁷¹ Both the DBE president and DBE B were decertified by the SCDHPT.⁷²

Penalties Applied to the Prime Contractor

Defendant A is reported to have received the second highest number of State Highway Department contracts, 157, between 1981 and 1990. According to SCDHPT records, since 1981 Defendant A had been awarded \$123.3 million in highway contracts.⁷³ The Office of Compliance's investigation into the dispute as to whether the three minority-owned businesses performed a useful commercial function on the prime contractor's projects resulted in \$10,000 in liquidated damages being withheld from payments to the prime contractor.

A federal jury awarded the DBE trucking company owner \$75,000 in breach-of-contract damages against the prime contractor. The DBE was disappointed with the verdict, stating "The end result was in the plaintiff's favor, but it's only a token, an insult."⁷⁴ The award will not cover his legal fees, which are estimated to be more than \$100,000⁷⁵ and fell far short of a settlement he said he was offered.⁷⁶

⁷¹The State. "Trial," February 6, 1993.

⁷²The depositions of DBEs testifying at the trial furnished to the plaintiff's attorney were reviewed by a member of the consulting team conducting the Disparity Study for the SCDOT. The facts reported by the newspapers covering the trial correlate with the facts provided by the witnesses in their depositions.

⁷³The State. "Trial," February 6, 1993.

⁷⁴The State. "'Token' jury award angers businessman." March 4, 1993.

⁷⁵The State News. "Federal jury awards \$75,000 to minority firm." March 4, 1993.

⁷⁶The State. "'Token' jury award angers businessman." March 4, 1993.

In addition to the above penalties, the SCDHPT placed a \$140,000 sanction against the prime contractor for not using the DBE trucking company on the road project. The Highway Department never approved the prime contractor's replacement of the DBE. The Highway Department and the prime contractor finally resolved the sanctions pursuant to a settlement agreement. The settlement agreement provided that in lieu of the \$140,000 sanctions, the prime contractor would provide \$330,000 of subcontract work to certified DBE's over the ensuing two years. The \$330,000 in subcontract work would be over and above the amount of work the prime contractor was required to otherwise subcontract with DBE's pursuant to contract goals. Failure to subcontract \$330,000 worth of work would subject the prime contractor to monetary sanctions to the extent of the failure.

In the transition years, 1988-1990, it would appear that the Department's efforts on behalf of minority involvement became much more proactive; however, this shift had not yet been effectively communicated to the contracting industry or the public. That would soon change.

4.3 Recent History (1991-1994)

1991 Legislative Audit Council Report

The integrity and image of the SCDOT were under heavy fire as a result of federal and state level investigations into the management and contracting practices of the Department. On February 20, 1990, two members of the South Carolina Senate requested the Legislative Audit Council (LAC) to initiate a management audit of the SCDOT's DBE Program, as a result of the concerns noted during the public hearing sponsored by the Legislative Black Caucus. The LAC completed its study in May 1991 and presented a briefing report, *A Limited-Scope Review of the SCDHPT Minority Goals*

Program, to the General Assembly. The LAC reviewed operations of the DBE Program from FY 1986/87 through FY 1989/90. Agency records reported that approximately \$91 million was committed to DBE/WBE subcontractors during the review period. A total of 139 DBE/WBEs were listed as certified by the SCDOT in January 1987 and 147 and 111 DBE/WBEs in January 1990 and 1991, respectively. The study by the LAC was limited to three issues which were of primary concern to the senators. The audit focused on the following three questions:

- To what extent has the Department monitored the DBE/WBE program to ensure that the program goals are met?
- Do Department certification procedures include adequate controls to ensure that qualified, bona fide (DBE/WBE) firms are certified to perform work on highway projects?
- What factors exist that negatively impact the operation of the DBE/WBE program?

Overall, the LAC had problems with the completeness and accuracy of records for the DBE program and found that they could not rely on SCDHPT reports. In addition, FHWA had never performed a compliance review of the DBE program. Major LAC preliminary findings and respective recommendations presented were as follows:

Finding 1: The department has not developed procedures to monitor the timeliness of payments from contractors to DBE/WBE subcontractors, which may affect their ability to stay in business.

Recommendations: The department should ensure that contractors pay their subcontractors and material suppliers in a timely manner as specified in §29-6-30 of the South Carolina Code of Laws.

Finding 2: There was no way to verify that the amount committed to DBE/WBE subcontractors was actually paid to them based on SCDHPT records.

Recommendations:

1. The department should develop an internal reporting system to enable management to review the status of DBE/WBE goal participation.

2. The department should implement procedures to ensure that quarterly DBE/WBE reports are received in a timely manner.
3. The department should implement procedures to follow-up on quarterly DBE/WBE reports which are incomplete and/or inaccurate.

Finding 3: The department does not require written contracts between contractors and hauling subcontracts, while other trades involved in highway projects are required to have written agreements to apply work towards DBE/WBE participation goals.

Recommendations:

1. The department should require written agreements between contractors and all DBE/WBE subcontractors including hauling firms.
2. The General Assembly may wish to amend §12-27-1320 of the South Carolina Code of Laws to require written agreements between contractors and subcontractors as a condition of counting applicable highway construction work towards the state DBE/WBE participation requirements.

Finding 4: The department, in violation of FHWA guidelines, has allowed material costs to count towards the DBE/WBE goal, even though the materials were furnished from non-DBEs.

Recommendations:

1. The department should amend the special provisions relative to material costs to conform with 49 CFR, section 23.47 (F)(2).
2. The cost of materials purchased from non-DBE/WBE suppliers for "furnish and haul" arrangements should not be counted towards the federal and state DBE/WBE participation.
3. The department should modify the DBE/WBE quarterly report form to separately show the cost of materials and delivery charges.
4. The General Assembly may wish to consider amending §12-27-1320 of the South Carolina Code of Laws to disallow materials purchased from non-DBE/WBE suppliers to count as state DBE/WBE participation on "furnish and haul" arrangements.

Finding 5: The department has allowed uncertified firms to participate as DBE/WBE firms on state-funded projects.

Recommendation: The department should comply with §12-27-1320(b) of the South Carolina Code of Laws, which provides that only certified firms

are to be accepted for DBE/WBE participation on designated set-aside or goals building construction projects.

Finding 6: Two DBE firms that were decertified in their home state were still certified in South Carolina.

Recommendation: The Office of Compliance should consider developing a reciprocity agreement with other states to ensure that information on the certification of firms in other states is transmitted to the Office of Compliance in a timely manner.

Finding 7: There is a lack of coordination between the Office of Compliance and the Office of Construction in the administration and operation of the DBE program. As a result, the enforcement and monitoring of the program is hindered.

Recommendations:

1. The SCDHPT should develop written policies and procedures which specify the responsibilities of the Office of Compliance and the Office of Construction concerning the DBE/WBE program.
2. The SCDHPT should promulgate regulations for the state DBE/WBE program as required by §12-27-1320 of the South Carolina Code of Laws and the Administrative Procedures Act.

Finding 8: The departmental units, the Office of Compliance and the Office of Construction, responsible for investigating complaints concerning the DBE program, do not have a formal process for handling complaints.

Recommendation:

1. The Office of Compliance should develop formal procedures to follow when complaints are filed. These procedure should include the maintenance of a standard complaint form, log, and complaint files. These records should include: complainant, nature of complaint, date of complaint, action taken, and follow-up.
2. Staff of the Office of Compliance should be assigned to investigate complaints concerning the DBE/WBE program. In investigating complaints, compliance staff should, as necessary, confer with other appropriate department staff.

Finding 9: In the course of the review, LAC noted an issue for further study involving the focus of the state-funded DBE/WBE program. The emphasis of this program changed from the achievement of DBE/WBE participation requirements through work performed by DBE/WBE *subcontractors* to achievement through work performed by DBE/WBE *contractors*.

Recommendation: 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).

The 9th Finding and Recommendation touch on a major area of possible controversy within and among the agencies responsible for MBE program implementation & compliance. That is, in changing the focus from subcontracting of DBEs to Prime Contracting, the Legislature implicitly accepted the proposition that minority firms needed to be proactively developed. Such an approach is clearly in conflict with a passive or "minimum impact" approach. It is not clear that the SCDOT has fully embraced this change of approach.

1992 Compliance Review Committee Report

Fifteen months after the LAC issued its report to the General Assembly, August 1992, the Compliance Review Committee (CRC) for the SCDHPT's Minority Goals Program completed its study to determine the level to which the SCDHPT had complied with LAC audit report recommendations. The Compliance Review Committee found that the SCDHPT had taken substantial and positive actions to correct the problem areas identified in the audit. The findings showed that the SCDHPT had completed compliance in some areas, partially completed compliance in some areas, and planned compliance in other areas. The findings (Exhibit 4-1) were as follows:

Findings by the CRC are summarized as follows:

1. **Timeliness of Payments to Subcontractors**

The SCDHPT disagreed with the LAC finding and recommendation. In addition, the SCDHPT contended and CRC concurred, that a system designed to monitor the timeliness of payments to subcontractors would be an excessive workload for the Department and require additional personnel. The CRC determined that sufficient means of addressing complaints against prime contractors already exists. However, CRC contended that the SCDHPT should be prohibited from contracting with prime contractors who have a substantiated history (shown by court cases and disputes filed with

**EXHIBIT 4-1
FINDINGS OF THE COMPLIANCE REVIEW COMMITTEE**

	Level of Compliance
Timeliness of payments to subcontractors	Non-compliance (conflict)
Replacement of DBE/WBE subcontractors	In compliance
Out-of-state companies	Partial compliance
Hauling agreements	In compliance
Materials Costs	In compliance
Complete and accurate records	Planned compliance
Use of certified DBE/WBEs	Planned compliance
Responsibilities of the Office of Compliance/Office Construction	In compliance
Promulgation of regulations	In compliance
Effect of set-side program	Planned compliance

bonding companies) of making late payments to their subcontractors.

2. Replacement of DBE/WBE Subcontractors

The SCDHPT has modified the provisions of its federal aid contracts to provide stronger penalties for contractors who replace DBE/WBE subcontractors without prior approval by the SCDHPT. In addition, the SCDHPT has developed a formal system for receiving, recording, and investigating complaints concerning the DBE/WBE program.

3. Out-of-State Companies

The SCDHPT has partially complied with LAC's recommendation. The SCDHPT has developed procedures for routinely requesting information regarding an out-of-state firm's certification status in its home state; however, the procedures have not been implemented. CRC recommended that the SCDHPT immediately modify its procedures to require that an out-of-state firm that seeks certification or recertification as a DBE/WBE in South Carolina be required to supply, as part of its application, a letter from the

DBE/WBE certifying agency in its home state certifying that, at the time of application, the firm is certified by that agency as a DBE/WBE and that there is no current investigation into the firm's status. CRC recommended that these modifications be incorporated into the governing regulations of the DBE/WBE program. Further, CRC recommended that the SCDHPT, on a monthly basis, request other southeastern states to provide a list of firms which they have decertified. Lastly, CRC recommended that in January 1993 the Auditing Division of SCDHPT review the procedures for certifying out-of-state firms and forward a copy of the report to the Senate Transportation Committee and the House Education and Public Works Committee no later than February 15, 1993.

4. Hauling Agreements

SCDHPT has modified the provisions of its contracts to require prime contractors to submit copies of signed subcontracts when they request approval to employ a DBE/WBE subcontractor or a hauling firm on a federal aid project.

5. Material Costs

The SCDHPT has modified the provisions of its contracts for projects which receive federal aid. The modification disallows the counting of material costs on furnish and haul agreements, purchased from non-DBE/WBE suppliers or manufacturers, towards the project's DBE/WBE goals.

6. Complete and Accurate Records

The SCDHPT has planned to comply with LAC's recommendation. The SCDHPT has developed a computer based reporting system which will assist management in reviewing the status of DBE/WBE goal participation by automating the task of maintaining records of both Federal aid and State set-aside projects. In addition, the SCDHPT has developed procedures to assure the accuracy of the data entered into the system. Lastly, CRC recommended that in January 1993 the Auditing Division of SCDHPT review the implementation of the Project Compliance Tracking System and forward a copy of the report to the Senate Transportation Committee and the House Education and Public Works Committee no later than February 15, 1993.

7. Use of Certified DBE/WBEs

The SCDHPT plans to comply with LAC's recommendation. The SCDHPT is modifying its contracts to provide that both DBE/WBE contractors and subcontractors must maintain certification for the

entire duration of their contracts. Also, the SCDHPT removed firms whose certification had expired from the list of certified DBE/WBEs, and has developed procedures for routinely removing firms when their certification expires. CRC was not able to verify that the procedures have been systematically implemented because the new procedures were dated July 1, 1992. The CRC recommended that the Auditing Division of the SCDHPT review the DBE/WBE certification procedures of the Office of Compliance and forward a copy of the report to the Senate Transportation Committee and the House Education and Public Works Committee no later than February 15, 1993.

8. Responsibilities of the Office of Compliance and the Office of Construction

The SCDHPT has developed procedures which define the responsibilities of the Office of Construction and the Office of Compliance with reference to the DBE/WBE program. The procedures specify which aspects of the DBE/WBE program are administered by each office and provide for each office to investigate complaints within its area of responsibility. In addition, SCDHPT policy requires all offices involved with the DBE/WBE program to have systems to investigate complaints related to the DBE/WBE program. Both offices have staff assigned to investigate all complaints.

9. Promulgation of Regulations

SCDHPT has issued regulations governing the State's DBE/WBE program in compliance with the requirements of §12-27-1320 of the South Carolina Code of Laws.

10. Effects of the Set-Aside Program

The SCDHPT plans to conduct a study of the effects of the change in emphasis of the DBE/WBE program from one which emphasizes DBE/WBE participation as subcontractors to one which emphasizes DBE/WBE participation as prime contractors. CRC recommended that the General Assembly include a proviso in the FY 1993/94 General Appropriation Act requiring the SCDHPT to conduct a study of the effects of the change in emphasis of the DBE/WBE program and to report the results of the study to the Senate Transportation Committee and the House Education and Public Works committee by December 1993.

1993 SCDHPT's Auditing Division Response to the Compliance Review Committee Report

The Compliance Review Committee for the SCDHPT's DBE/WBE program conducted in August 1992 recommended that the SCDHPT Auditing Division perform reviews of three specific areas of the DBE/WBE program. The areas recommended for review were:

- Certification of out-of-state companies;
- DBE/WBE certification procedures; and
- Implementation of the Project Compliance Tracking System.

The Auditing Division of the SCDHPT conducted its review to determine the status of the three problem areas. Its findings are as follows:

Out-of-State Companies

- SCDHPT is requiring verification of home state certification for all out-of-state firms prior to certification or recertification.
- Information pertaining to decertified firms has been requested but not monthly as recommended. SCDHPT plans to request this information annually or semi-annually.

Project Compliance Tracking System

- The accuracy of the information on Project Compliance Tracking System is not yet acceptable.
- Data entry is not totally complete or performed in a timely manner.
- Routinely generated reports should be helpful if utilized.
- The Office of Compliance has made a substantial effort to follow up on payment information.

Recertification Procedures

- Proper recertification procedures are being followed.
- Firms are being recertified annually.

- Firms failing to submit recertification information in a timely manner are being removed from the DBE Directory.

The results of the Internal Auditing Division's investigation were not well received by all. The Chairman of the Education & Public Works Committee, in his March 23, 1993, correspondence to the Executive Director stated;

I have received and reviewed the Department of Highways and Public Transportation's March 1993 internal audit of the Minority Goals Program. I am highly disappointed that the review shows 22 months after the release of the Legislative Audit Council's May 1991 audit that the Highway Department still has not fully corrected the problems with the Minority Goals Program. The internal audit clearly shows that the Highway Department still has not adequately corrected the problems with the project compliance Tracking System and the certification of out-of-state firms.

First, the audit explicitly states that the Project Compliance Tracking System is not functioning. Given the necessity of proper information management to ensure that minority construction firms are paid timely and are actually given work to do, both the Legislative Audit Council and the Compliance Review Committee found that such a system is a necessity. With regards to obtaining information from other states on firms decertified, the Committee recommended that the Department request information on decertified firms monthly. Otherwise, if this information was received only at the time of annual recertification, it would be possible for an out-of-state firm to be certified in South Carolina for up to 11 months after being decertified in his home state. Requesting information annually, as the highway department now proposes, would add little to the information obtained at the time of firms' recertification and is not in compliance with the Compliance Review Committee's Recommendation.

... at our February meeting, you assured me that the internal audit would find the Highway Department in complete compliance. Moreover, you stated that, in order to ensure that the system was fully functional by March 15, you would transfer any additional resources necessary to successfully implement the project. I am disappointed that, once again, the Highway Department has failed to carry through on a simple commitment made to the General Assembly. Therefore, I must insist that the Highway Department provide, by March 30, 1993, a detailed work plan explaining how the Department will achieve complete compliance with the

*recommendations of the Compliance review Committee for the Highway Department Minority Goals Program.*⁷⁷

Minority Affairs Committee Meeting - 1993

The SCDHPT continued efforts to improve the image and operation of the DBE programs. The Commission Chairman of the Minority Affairs Committee and representatives of the various units involved in the operation and management of the DBE program met with different groups during the months of December 1992 and January 1993 to receive complaints and recommendations regarding the DBE program.

The six groups were:

1. SCDHPT employees with key roles in the administration of the DBE programs;
2. Members of the DBE community;
3. Representatives from the AGC;
4. Members of the WBE community;
5. Representatives of the DBE service providers; and
6. The SCDHPT's supportive services contractor.

Based on the comments received from these group meetings, the SCDHPT developed a DBE Program Plan with goals and objectives. In addition, the SCDHPT compiled a list of recommendations for improving the DBE program.

Furthermore, in the last few years the Department has initiated and continued a number of programs and practices designed to assist DBEs. These include:

- On February 13, 1991, conducted a full day training workshop for the Department's Resident Construction Engineers to familiarize the

⁷⁷The Chairman of the Education and Public Works Committee to the Executive Director of SCDHPT, March 23, 1993. The Department of Highways and Public Transportation's Compliance with the Legislative Audit Council's Report: "a Limited-Scope Review of the South Carolina Department of Highways and Public Transportation Minority Goals Program".

Resident Engineers with DBE program requirements and to address problems of communication and cultural diversity.

- Began a closer monitoring and enforcement of prime contractors adherence to Special Provisions.
- Established a DBE/AGC/DOT Committee to review results of monthly lettings and discuss any issues or problems brought to attention of members of the Committee.
- Developed a DBE Engineering Assistance Program in 1990 designed specifically to assist DBE/WBE contractors awarded a set-aside project since July 1, 1990.
- Designated lead engineers in each district in December 1991 in compliance with §12-27-1320 of the South Carolina Code of Laws.
- Since 1989, the Department contracted with South Carolina State University, to conduct an annual three-day Entrepreneurial Development Institute Program (EDIP) to enhance development of DBE/WBE firms. Instruction is provided in selected technical areas.
- Provided funding assistance annually to pre-qualified DBEs to obtain CPA services since 1992.
- Providing notice of approved credit courses for continuing education opportunities for DBEs. The Office of Compliance sends this publication to all DBEs participating in the State Set-Aside program.
- Sponsoring quarterly meetings for DBEs participating in Set-Aside program to afford DBEs the opportunity to ask questions and obtain information from SCDHPT representatives regarding the Set-Aside Program.
- Contracting with outside consultant to conduct a business development and construction management program designed to assist DBE/WBE firms in pre-qualifying for participation in the State Set-Aside Program. This contract targets technical management assistance for DBEs and is in addition to the ongoing Supportive Services contract.
- Developing plans for a financing program to assist DBEs in obtaining loans to enable them to bid on state transportation construction projects. (1990)

4.4 Findings

The history of the SCDOT (formerly SCDHPT) with respect to DBE involvement in Departmental bid letting and contracting is one of evolution. Between 1979 and 1987, this process of evolution was on a rather slow track, and, as the testimony and legal filings adduced in the preceding pages show, there were a myriad of problems with SCDOT's DBE program. The issues documented in this chapter have played a significant role in shaping the SCDOT's efforts related to DBE participation. For example:

- According to reports issued by the Governor's Office and Legislative Audit Council, the SCDOT DBE program experienced major problems during the 1979 to 1991 time period. Those reports produced, among others, the following major findings:
 - A report of the procurement dollars of all State agencies issued by the Legislative Audit Council (LAC) in 1985 concluded there was a lack of minority participation based upon the finding that in 1983-84 minority-owned firms received only .01 percent of the State's contract dollars for goods, services, and building renovations and construction.
 - A 1991 LAC report on DBE program operations from FY 86-87 through FY 89-90, concluded that both oversight and recordkeeping of the SCDOT DBE program needed improvement in order to meet program outcomes. The LAC report questioned whether procedures were in place to monitor timeliness of payments from contractors to DBEs and that contrary to State law, the SCDOT had awarded construction contracts with DBE goals to companies which did not use certified DBE contractors. The report also pointed out that the SCDOT did not require written contracts between contractors and hauling subcontractors, which in the view of LAC, provided less protection to hauling subcontractors.
 - Findings from the 1991 report indicated that it was impossible to determine from SCDOT records whether \$91 million committed to DBE subcontractors during a four-year period was actually paid to DBE subcontractors. The inability to verify DBE payments also made it impossible to determine if the SCDOT had met the goal of expending 10 percent of all project funds with DBE firms.

- The report also concluded SCDOT was in violation of federal guidelines by allowing material costs from furnish and haul agreements to count towards the DBE goal, even though the materials were not purchased from minority sources.
 - A review by the Governor's Office of Small and Minority Business Assistance (OSMBA) in 1986 of DBE participation for fiscal years 1981-82, 1982-83, and 1983-84 revealed minimal participation of minority and women-owned businesses. Participation rates were less than one percent.
 - The same review found evidence of DBEs acting as "fronts" and that non-DBEs had actually performed work on some DBE contracts instead of DBEs.
 - Several investigations by OSMBA found evidence of patterns of discrimination which limited the participation of minority and women-owned businesses.
- In response to the documented low utilization of DBE firms and allegations of discrimination, significant changes have been made in both state and SCDOT policies and practices over the last 14 years.
- In 1981, the South Carolina Consolidated Procurement Code was revised in response to concerns about the exclusion of small and minority businesses from the procurement activities of state agencies. The revisions were based upon findings outlined in a 1979 report entitled Report of the Joint Legislative Committee to Study the Problems of Small Business. The report concluded that new and/or minority businesses were excluded from the State's procurement process.
- With regard to minority businesses, Article 21 of the revised Procurement Code gave prime contractors a tax credit equal to four percent of the payments to minority subcontractors on State contracts, established the Office of Small and Minority Business Assistance, and directed chief procurement officers to provide staff to assist minority businesses with State procurement procedures.
- In 1984, a more formal certification process was established and implemented by the Department to comply with federal requirements.
 - In 1986, the SCDOT created a DBE/WBE Advisory Task Force to develop recommendations for strengthening compliance monitoring, establishing stronger linkages

between the Department and DBEs and minimizing barriers to participation.

In response to recommendations from the Task Force and other entities, the SCDOT took steps to strengthen the DBE program by revising policies and procedures and strengthening monitoring and compliance. For example, the SCDOT increased scrutiny of firms applying for certification, decertified several firms suspected of acting as a "front," provided "good faith efforts" training to contractors, strengthened the verification process for payments to DBEs by requiring the DBEs signature on quarterly report forms, developed a computerized tracking system to record DBE payments, and developed a plan to respond to Task Force recommendations, including appointment of an Executive Assistant for Minority Affairs who reported directly to the Executive Director.

- Also in 1986, the State Appropriations Act included a provision to spend 10 percent of State construction dollars with small and disadvantaged businesses. In 1987, new language was added to the 10 percent proviso which required 10 percent of total state highway funds for construction contracts be spent with DBE/WBE firms and gave SCDOT the option of using goals or set-asides. The 10 percent goal was equally divided between DBE and WBE firms. The SCDOT was also authorized to waive or guarantee bonding requirements for set-aside contracts less than \$250,000.
- In response to a 1991 Legislative Audit Council Report, the SCDOT strengthened penalties against prime contractors for substituting DBE subcontractors without prior approval and made other changes to strengthen program administration and operations.

The image and perception of the SCDOT in general and the DBE program in particular has improved significantly since program inception in the 1970's. While some of the problems identified at hearings, in investigative reports, and through external and internal audits continue to exist, many have been successfully diminished or completely eradicated.

**5.0 REVIEW OF CONTRACTING
AND DISADVANTAGED
BUSINESS ENTERPRISE (DBE)
POLICIES, PROCEDURES AND
PRACTICES**

5.0 REVIEW OF CONTRACTING AND DISADVANTAGED BUSINESS ENTERPRISE (DBE) POLICIES, PROCEDURES AND PRACTICES

This chapter describes the results of our review of the SCDOT's construction contracting (highway and bridge preconstruction and construction, building construction and renovation) and DBE¹ policies and procedures.

The first section of this chapter describes the federal legislation, federal regulations, and other guidelines from the Federal Highway Administration (FHWA) pertaining to the implementation of the DBE program relative to federal aid projects. The second section describes the South Carolina statutes, regulations, and policies for the SCDOT DBE program relative to state funded projects. The third section describes the SCDOT's construction contracting and DBE policies and procedures. The fourth section describes the operations of the Office of Compliance. The fifth and final section briefly summarizes our evaluation of the impact of current policies and procedures on DBEs. A list of documents collected is provided in Appendix F.

5.1 Federal Statutes and Executive Orders

The DBE Program administered by the SCDOT for federal aid highway projects is the outgrowth of Title VI of the Civil Rights Act of 1964 (Act).² Part 21, Nondiscrimination in Federally-Assisted Programs of the Department of Transportation, effectuates the provisions of Title VI to the end that a recipient of financial federal

¹The term disadvantaged business enterprise (DBE) for the purposes of this analysis refers to socially and economically disadvantaged ethnic minority-owned businesses and socially and economically disadvantaged women-owned businesses.

²42 USCS §§2000d et seq.

assistance may not discriminate on the basis of race, color, or national origin in its selection and retention of contractors, including without limitation, those whose services are retained for, or related to, construction, planning, research, highway safety, engineering, property management, and fee contracts and other commitments related to the acquisition of right-of-way. It also mandates compliance with all requirements by all recipients of federal assistance.

Several executive orders written in the 1970s provided the national thrust and initial structure to the DBE Program. Executive Order 11625, signed on October 13, 1971, directs the Department of Commerce to provide technical and financial assistance to promote minority business enterprises (MBEs), and requires federal agencies to develop comprehensive plans and programs for encouraging MBE participation in subcontracts on federal and federal assisted activities. The intent of this order was to clarify the authority of the Secretary of Commerce relative to:

- Implementing Federal policy in support of the MBE program;
- Providing additional technical and management assistance to disadvantaged businesses;
- Assisting in demonstration projects; and
- Coordinating the participation of all Federal departments and agencies in an increased minority enterprise effort.

This order applied only to ethnic minorities; women were not included. Agencies were required to develop monitoring and reporting processes to ensure that established goals were met. The Office of Minority Business Enterprises in the Department of Commerce, established in 1969, was responsible for the administration of the requirements.

Executive Order 12138, signed on May 18, 1979, focused on creating a national women's business enterprise policy and prescribing arrangements for developing,

coordinating, and implementing a national program for women business enterprises (WBEs). This order required each federal agency to issue regulations in support of WBEs. Those agencies receiving federal assistance had to adopt an affirmative action policy prohibiting discrimination against WBEs on the basis of sex.

During the early 1980s, recipients of federal aid through the U.S. Department of Transportation (U.S. DOT) programs were required to establish goals for MBE participation. The implementing regulations promulgated by the U.S. DOT on March 31, 1980, required recipients to set annual goals that were practical and related to the potential availability of MBEs in desired areas of expertise. A minority business enterprise (MBE) was defined as:

A small business concern, as defined by section 3 of the Small Business Act and relevant implementing regulations, which is owned and controlled by one or more ethnic minorities (Black, Hispanic, Portuguese, Asian American, American Indian and Alaskan Native U.S. citizens or lawfully permanent residents) or women.

Owned and controlled meant a business:

- (a) Which is at least 51% owned by one or more minorities or women or, in the case of a publicly owned business, at least 51% of the stock is owned by one or more minorities or women; and
- (b) Whose management and daily business operations are controlled by one or more such individuals.

The term for the affected firms, *minority business enterprises*, was later changed to *disadvantaged business enterprises*, in recognition of a change in ownership eligibility. Disadvantaged refers to "socially and economically disadvantaged individuals" defined as citizens of the United States (or lawfully admitted permanent residents) who are:

- **Black Americans**, which includes persons having origins in any of the Black racial groups of Africa;

- **Hispanic Americans**, which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
- **Native Americans**, which includes persons who are American Indians, Eskimos, Aleuts, or native Hawaiians;
- **Asian-Pacific Americans**, which includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific, and the Northern Marianas;
- **Asian-Indian Americans**, which includes persons whose origins are from India, Pakistan, and Bangladesh;
- **Women**, regardless of race, ethnicity, or origin (added in 1987 due to STURAA);
- **Other**, individuals found to be socially and economically disadvantaged by the Small Business Administration (SBA) pursuant to Section 8(a) of the Small Business Act.

Recipients of federal assistance were required to make a presumption that Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Asian-Indian Americans, and women are socially and economically disadvantaged. Recipients were also required to determine, on a case-by-case basis, that individuals who are not in the aforementioned groups are socially and economically disadvantaged. On this basis, for example, disabled Vietnam veterans, Appalachian white males, Hasidic Jews, or any other individuals who are able to demonstrate to the recipient that they are socially and economically disadvantaged may be treated as eligible to own and control a disadvantaged business, on the same basis as a member of one of the presumptive groups. These individuals could not be determined to be socially and economically disadvantaged solely on the basis of their group membership.³

³U.S. Department of Transportation, Code of Federal Regulations, Title 49, Part 23, Subpart D, Section 23.62 Definitions and Appendix A to Subpart D(10-1-94 Edition).

Similar to the case for minority business enterprises, disadvantaged business enterprises were required to be at least 51 percent owned by one or more disadvantaged individuals, and the firm's management and daily business operations controlled by one or more of the disadvantaged individuals who own it. That is, the business owners themselves must control the operations of the business. Absentee ownership, or titular ownership by an individual who does not actively control the business, is not consistent with eligibility as a disadvantaged business under the regulation.⁴ In addition, no business which fails to qualify under the standards as a small business concern, including a firm certified by SBA under the 8(a) program, can be certified as a disadvantaged business, even though it is owned and controlled by socially and economically disadvantaged individuals.⁵

During the 1980s, two statutes were enacted by the U.S. Congress that specifically dealt with the U.S. Department of Transportation's (U.S. DOT) Disadvantaged Business Enterprise Program for federally assisted highway and transit projects and significantly impacted the program. The statutes are the *Surface Transportation Assistance Act of 1982 (STAA)* and the *Surface Transportation and Uniform Relocation Assistance Act of 1987 (P.L.97-424)* provided clear statutory authority for the MBE program at U.S. DOT. In Section 105 (f) it states:

Except to the extent the Secretary determines otherwise, not less than 10 percent of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by Section 8(d) of the Small Business Act (15 U.S.C. section 637 (d)) and relevant subcontracting regulations promulgated pursuant thereto.

⁴Ibid.

⁵Ibid.

STAA established a program participation goal of 10 percent, and defined eligible participants as those who were socially and economically disadvantaged according to Section 8(d) of the Small Business Act. Under STAA, women were not required to be included in the STAA program and could not be counted toward the 10 percent participation goal. However, they were still eligible for participation under voluntary language established in Title 49 CFR Part 23 in 1980. The wording of STAA also changed the terminology for the program for the Federal Highway Administration (FHWA is part of U.S. DOT) from "minority" to "disadvantaged."

In the Surface Transportation and Uniform Relocation Assistance Act (STURAA) of 1987, (P.L.100-203 to 100-242), women were included in the definition of disadvantaged and were incorporated in the 10 percent participation requirement. Under STURAA, separate goals for women and minorities were no longer allowed. STURAA used the Small Business Administration (SBA) definition of eligibility but changed the three-year average annual gross receipts size standard limitation (maximum size to be considered a small business) from \$12 million to \$14 million for the purpose of helping small minority businesses become self-sufficient before graduating from the program. Firms were still subject to applicable lower limits on business size established by SBA in 13 CFR Part 121. For example, the small business size standard for specialty contractors is \$7 million; and for engineering (other than military engineering), architectural, and surveying firms it is \$2.5 million. States were required to certify DBEs using minimum uniform criteria established by U.S. DOT. At a minimum, these criteria must include on-site visits, personal interviews, licenses, analysis of stock ownership, listing of equipment, analysis of bonding capacity, listing of work completed, resumes of principal owners, financial capacity, and type of work

preferred. In addition, each year states must survey certified firms and prepare a list of the firms and their locations.

The Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991 (P.L. 102-240), passed by Congress on December 18, 1991, is a continuation of the DBE program established under STURAA of 1987. ISTEA requires that after the annual listing of DBEs is compiled, U.S. DOT must be provided "the percentage of such concerns which are controlled by women, by socially and economically disadvantaged individuals (other than women), and by individuals who are women and are also otherwise socially and economically disadvantaged individuals."⁶ The statute also requires that a study of the DBE Program be conducted and that the results of the study be reported within 12 months of enactment of the Act. In addition, ISTEA increased the three-year average annual gross receipts size standard limitation for small businesses to \$15,370,000.

5.1.1 U.S. DOT Regulations and Guidance

During the 1970s, when the impetus for establishing DBE Programs came from executive orders, U.S. DOT issued several orders and regulations dealing with the issue. For example, on August 28, 1975, FHWA issued Order 4700.1 that contained an affirmative action policy for providing minority businesses with the maximum practical opportunity to participate in the federal-aid highway construction program. This guidance represented the first effort to develop a nationwide program with plans and goals, performance monitoring and reporting systems, and program evaluation. Implementing regulations issued on October 22, 1975, defined an MBE as a business at least 50 percent owned by minority group members or, in the case of publicly owned

⁶(Section 1003(b)(3)).

businesses, with at least 51 percent of the stock owned by minority group members, and required state highway agencies to take affirmative action to increase minority business participation. The clause "business owned by at least 50 percent minority group membership" was later changed to "business owned by at least 51 percent minority group membership."

On March 6, 1978, U.S. DOT issued Order 4000.7A containing the administrative framework for U.S. DOT's model administration of MBE programs. This order introduced the term "good faith effort," included women in the definition of MBE, and introduced an 11-point affirmative action program that recipients were to adopt. According to the order, "It is the policy of the Department of Transportation to encourage and increase the participation of businesses owned and controlled by minorities, including women, (MBEs) in contracts and projects funded by the Department."⁷ This policy was necessary, it continued, because "economically and socially disadvantaged individuals, including minorities and women, have traditionally been underrepresented as owners and managers of businesses in this country."⁸ The federal government used its procurement authority and financial assistance programs to state and local governments as a vehicle to assist minorities and women overcome traditional underrepresentation in the business community. The *Policy* states that "The executive and legislative branches of the federal government have long recognized the need to promote the development of businesses owned by the economically and socially disadvantaged to achieve the goal of equal opportunity."⁹

⁷U.S. Department of Transportation, Order DOT 4000.7A, March 6, 1978, p.1.

⁸Ibid.

⁹Ibid.

On March 31, 1980, U.S. DOT issued regulations under Title 49, CFR Part 23, which superseded all former regulations and orders. These regulations provide the structure for the current unified program for the participation of firms owned and controlled by minorities and women in contracts let by recipients of financial aid from U.S. DOT. Recipients are required to establish MBE participation goals for their overall programs and specific programs. As first written, the regulations contained a conclusive presumption that if one bidder met the MBE goal and offered a reasonable price, all bidders not meeting the goal had failed to exert sufficient reasonable efforts and were thus ineligible to receive the contract. This "conclusive presumption" provision was rescinded by a final rule published on April 27, 1981, and replaced by a provision requiring contractors to make a "good faith effort."

The Federal regulations for implementing STAA were issued on July 21, 1983. The major issue addressed in these regulations was U.S. DOT's interpretation of congressional intent in setting a goal of not less than 10 percent DBE participation and the newly defined eligibility criteria. According to the SBA eligibility criteria, members of certain groups are conclusively presumed to be socially and economically disadvantaged regardless of actual circumstances. In contrast, U.S. DOT criteria allow a challenge to the inclusion of groups as "disadvantaged." Consequently, U.S. DOT's regulations require recipients to establish a procedure for such challenges.

On August 26, 1987, the FHWA Administrator sent a memorandum to the states requiring them to establish by October 1, 1987, a single DBE goal for both women and ethnic minorities, with respect to federal-aid contracts.

Regulations were issued on October 21, 1987, to reflect the STURAA statutory requirements. In addition, people of Portuguese heritage were included in the definition of "Hispanic." Also, the allowances for crediting participation of material suppliers and

regular dealers were increased from 20 percent to 60 percent.¹⁰ In 1992, the U.S. Department of Transportation revised its regulations pertaining to Subpart D, the implementing section 106(c) of STURAA of 1987. The most recent edition of federal regulations for the DBE Program, 49 CFR 23, were issued on October 1, 1994.

5.1.2 Federal Requirements for the DBE Program

This section describes the federal regulations for the components of state DBE programs, eligibility standards, non-compliance, and supportive services. Relevant sections of the federal-aid Project Agreement Form and the form for federal-aid construction contract also are discussed.

Required Components of State DBE Programs

According to federal regulations (49 CFR 23.45), state DBE programs are required to have the following components:

- A policy statement which conveys a commitment to use DBEs as much as possible in all facets of contracting.
- A liaison officer who reports directly to the Chief Executive Officer must be designated. The program must have sufficient staff to operate. The authority, responsibility, and duties of all staff must be defined.
- Procedures for guaranteeing that DBEs are given an equitable opportunity to compete for contracts and subcontracts must be developed. States must use affirmative action techniques for facilitating DBEs in contracting, including:

¹⁰A regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials or supplies required for the performance of the contract are bought, kept in stock, and regularly sold to the public in the usual hours of business. To be a regular dealer, the firm must engage in, as its principal business, and in its own name, the purchase and sale of the products in question. A regular dealer in such bulk items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock, if it owns or operates distribution equipment. Brokers and packagers shall not be regarded as manufacturers or regular dealers.

- Arranging solicitations, time for the presentation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation of MBEs*;
- Providing assistance to MBEs in overcoming barriers such as the inability to obtain bonding, financing, or technical assistance;
- Carrying out information and communications programs on contracting procedures and specific contracting opportunities in a timely manner, with such programs being bilingual where appropriate (Section 23.45(c)).

* Note: MBE, rather than DBE, is used throughout most of the regulations, but the definition of MBE includes both women and minorities.

- The states are to determine the types of services provided by banks owned and controlled by women or minorities and to promote their use.
- Each year each state must prepare a DBE directory with the names and addresses of DBEs with capabilities relevant to general contracting requirements and to particular solicitations.
- The states must use the minimum uniform certification criteria to determine the eligibility of DBEs. The following steps must be taken to determine eligibility:
 - Perform an on-site visit to the offices of the firm and to any job sites on which the firm is working at the time of the eligibility investigation;
 - Obtain the resumes or work histories of the principal owners of the firm and personally interview these individuals;
 - Analyze the ownership of stock in the firm, if it is a corporation;
 - Analyze the bonding and financial capacity of the firm;
 - Determine the work history of the firm, including contracts it has received and work it has completed;
 - Obtain or compile a list of equipment owned or available to the firm and the licenses of the firm and its key personnel to perform the work it seeks to do as part of the DBE program;
 - Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program. (Section 23.45(f)(3))

Certification of eligibility made by other states may be accepted. States must require contractors to make a good faith effort to replace a DBE that cannot perform successfully with another DBE.

- States must establish percentage goals for the dollar amount of work awarded to DBEs.¹¹ The goals must be based on the availability of DBEs in the desired areas of expertise. Two types of goals must be developed:
 - overall goals for the entire DBE program, either for a specified period of time or for a specific project; and
 - contract goals on each specific prime contract with subcontracting possibilities.

A description of the methodology for arriving at the goals must be sent to U.S. DOT. The state must publish a notice announcing the overall goals and simultaneously submit them to U.S. DOT. The proposed goals must be made available for public inspection for 30 days and comments on them are to be accepted for 45 days from the date of the notice. Overall goals must be based on the projected number and types of contracts, availability of DBEs, and past results of DBE participation. At least annually, the overall goals must be reviewed by analyzing projected versus actual DBE participation during the previous year.

Note: Proposed annual goals of less than 10% must be approved by the FHWA Administrator; other annual goals are approved by the Regional Administrator. States that do not meet their overall approved goals must submit an explanation of why they were unable to do so.

- States must make sure that good faith efforts to meet DBE goals are made by bidders. Within the bid submission or a subsequent submission before contract award, the successful bidder must include the names and addresses of participating DBEs, a description of the work each firm will perform, and the dollar amount of participation by each firm. As a condition for contract award, successful bidders must meet the DBE contract goal or show that they have used good faith efforts to do so.

Recipients may consider the following list of efforts:

- Whether the contractor attended any pre-solicitation or pre-bid meetings that were scheduled by the recipient to inform MBEs of contracting and subcontracting opportunities;

¹¹Prior to STURAA, recipients having to comply with Subpart D, 49 CFR 23, had to establish overall and contract goals for firms owned and controlled by minorities and firms owned and controlled by women, respectively.

- Whether the contractor advertised in general circulation, trade association, and minority-focus media concerning the subcontracting opportunities;
 - Whether the contractor provided written notice to a reasonable number of specific MBEs that their interest in the contract was being solicited, in sufficient time to allow the MBEs to participate effectively;
 - Whether the contractor followed up initial solicitations of interest by contacting MBEs to determine with certainty whether the MBEs were interested;
 - Whether the contractor selected portions of the work to be performed by MBEs in order to increase the likelihood of meeting the MBE goals (including, where appropriate, breaking down contracts into economically feasible units to facilitate MBE participation);
 - Whether the contractor provided interested MBEs with adequate information about the plans, specifications, and requirements of the contract;
 - Whether the contractor negotiated in good faith with interested MBEs, not rejecting MBEs as unqualified without sound reasons based on a thorough investigation of their capabilities;
 - Whether the contractor made efforts to assist interested MBEs in obtaining bonding, lines of credit, or insurance required by the recipient or contractor; and
 - Whether the contractor effectively used the services of available minority community organizations; minority contractors' groups; local, state and federal minority business assistance offices; and other organizations that provide assistance in the recruitment and placement of MBEs.
- States must describe how compliance with applicable DBE requirements will be required of subrecipients, contractors, and subcontractors. According to the *DBE Program Administration Participant's Manual* (1990, pp. 32-33):
- The State's program should include procedures for ensuring compliance with DBE program requirements, including the type of programs covered, conditions for subgrants, applicable contract specifications and special provisions and enforcement mechanisms for sanctions to be applied to program violations.

Remedies/sanctions available to the State to address DBE program violations should be specified in the State's DBE program and contract bid provisions such as:

1. Provide written notice to all parties involved in violations;
 2. Deny or limit (as appropriate) credit towards the DBE project goal;
 3. Require replacement of non-performing DBEs or good faith efforts to meet the DBE goal on remaining work;
 4. Deny approval of substitute subcontracts;
 5. Withhold progress payments;
 6. Withhold payments in an amount equal to the unmet portion of the DBE project goal;
 7. Recover an amount equal to the unmet project goal;
 8. Terminate the contract;
 9. Debar the contractor(s) involved;
 10. Reduce the contractor's pre-qualification limit.
- States must establish procedures for implementing DBE set-asides, if set-asides are determined to be necessary to meet DBE goals and if they are allowed under state and local law. DBE set-asides may only be used if there are at least three DBEs capable of meeting contract requirements that would allow competition. Each contract may be reviewed for the possibility of set-asides; subdivision of the contract for that purpose may also be considered.

Eligibility Standards

Eligibility standards for DBE Programs appear in Section 23.53 of the DBE regulations. They require that:

- Bona fide membership in a minority group should be based on an individual's claim to be a member of that group and be so regarded by that particular community;

- DBEs must be independent businesses; that is, "the ownership and control by minorities or women shall be real, substantial, and continuing and shall go beyond the pro forma ownership of the firm as reflected in its ownership documents" (Section 23.53(a)(2));
- The owners have the power to make day-to-day and major decisions on matters of management, policy, and operations;
- All securities which constitute ownership and/or control of a corporation must be held directly by minorities or women;
- "The contribution of capital or expertise by the minority or women owners to acquire their interests in the firm shall be real and substantial." (Section 23.53(a)(6)).

Non-Compliance

Sanction provisions listed in Subpart D, 49 CFR 23 and 23 CFR 1.36 may be applied in the following situations:

- Failure of the recipient to have an approved DBE program;
- Failure of the recipient to have an approved overall annual goal;
- Recipient refusal to take the action ordered to remedy its failure to meet its overall annual goal.

Enforcement proceedings may be initiated if a state fails to conciliate a non-compliance finding. These proceedings are provided in 49 CFR 21.13, Nondiscrimination in Federally-Assisted Programs of the Department of Transportation—Effectuation of Title VI of the Civil Rights Act of 1964.

Supportive Services for DBEs

Based on the availability of federal funds, the state highway administration must develop procedures for establishing, conducting, and administering training and assistance programs that will increase the total number of DBEs and assist in their growth and ultimate self-sufficiency. States are encouraged, but not required, to provide matching funds. Regulations for supportive services appear at 23 CFR 230, Subpart B.

According to Section 230.204, state highway agencies must give preferences to providing the following types of services:

- Services relating to identification, pre-qualification, and certification assistance, with emphasis on increasing the total number of legitimate minority business enterprises participating in the federal-aid highway program;
- Services in connection with estimating, bidding, and technical assistance designed to develop and improve the capabilities of minority businesses and assist them in achieving proficiency in the technical skills involved in highway construction;
- Services designed to develop and improve the immediate and long-term business management, record keeping, and financial accounting capabilities;
- Services to assist minority business enterprises to become eligible for and to obtain bonding and financial assistance;
- Services related to verification procedures to ensure that only bona fide minority business enterprises are certified as eligible for participation in the federal-aid highway program;
- Follow-up services which contribute to ascertaining the outcome of training and assistance being performed; and
- Other services which contribute to long-term development, increased opportunities, and eventual self-sufficiency of minority business enterprises.

Project Agreement

For each federal-aid highway project, a Federal-Aid Project Agreement (Form PR-2) must be signed by FHWA and the state/local agency. The agreement contains 20 provisions; Provision 17 addresses minority business enterprises (MBEs):

- a. The State highway agency hereby agrees to the following statements and agrees that these statements shall be included in all subsequent agreements between the recipient and any subrecipient and in all subsequent DOT-assisted contracts between recipients or sub-recipients and any contractor:

- (1) **"Policy.** It is the policy of the Department of Transportation that minority business enterprises (MBE's), as they are defined in 49 CFR Part 23 [for the purpose of 49 CFR Part

23, Subpart D, MBEs refer to disadvantaged business enterprises (DBEs); for the purposes of other subparts of Part 23, MBEs include women business enterprises (WBEs)], shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with Federal funds under this agreement. Consequently, all applicable requirements of 49 CFR Part 23 apply to this agreement."

(2) "**Obligation.** The recipient or its contractor agrees to ensure that MBE's, as defined in 49 CFR Part 23, have the maximum opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with Federal funds provided under this agreement. In this regard, all recipients or contractors shall take all necessary and reasonable steps in accordance with the applicable section of 49 CFR Part 23 to ensure that MBE's have the maximum opportunity to compete for and perform contracts. Recipients and their contractors shall not discriminate on the basis of race, color, national origin, handicap, religion, age, or sex, as provided in Federal and State law, in the award and performance of DOT-assisted contracts."

b. If, as a condition of assistance, the recipient has submitted and the Department has approved an MBE affirmative action program which the recipient agrees to carry out, this program is incorporated into this financial assistance agreement by reference. This program shall be treated as a legal obligation and failure to carry out its terms shall be treated as a violation of this financial assistance agreement. Upon notification to the recipient of its failure to carry out the approved program, the Department shall impose such sanctions as are noted in 49 CFR Part 23, Subparts D or E, which sanctions may include termination of the agreement or other measures that may affect the ability of the recipient to obtain future DOT financial assistance.

Contract Requirements

Every federal-aid construction contract and subcontract must contain standard Form FHWA-1273, "Required Contract Provisions, Federal-Aid Construction Contracts." The contract requirements for compliance with the DBE program are contained in Section II(5) of the form. Contractors must agree to do what is necessary to ensure that DBEs have equal opportunity to participate in the performance of federal-aid contracts. Failure to do so is considered a breach of contract and may result in the contract's

termination. For the purpose of determining compliance with these regulations, a contractor must make available access to its books, records, accounts, other sources of information, and its facilities.

According to the *DBE Program Administration Participant's Manual* (1990), the contract should also reflect the policies and conditions of compliance of the specific state's DBE program. The contract should include the state's DBE policy, the contract DBE goal, activities creditable towards the goal, conditions of DBE participation, good faith effort provisions, and compliance procedures. Also, it should contain a description of how sanctions will be initiated, applied, and settled if program requirements are not met.

5.2 State Statutes and Regulations

South Carolina during the early 1970s was among the lowest states in economic growth. To effectuate change towards economic development, the State began initiating a series of measures to improve its economic development. Prior to 1979, South Carolina did not have any programs in place to assist small or minority businesses. The first non-racial state initiative of South Carolina to assist minority businesses was the establishment of the Small Business Development Center Consortium (SBDCC) by joint resolution in 1979. The Centers' main objective was to provide technical assistance to individuals aspiring to start a business, or to existing small businesses having problems and to mature businesses wishing to expand or to add new product lines. In addition, the Centers located at 16 sites around the state, provided a series of educational and management technical assistance seminars.

The SBDCC also noted that during the early 1970s there were no minority contractors which declared themselves to be highway contractors. The minority

construction contractors were either in vertical construction or did not exist because there was no market for minorities in highway construction. There were minorities who worked as employees on highway contracts but not as prime or subcontractors. There were minorities in the masonry business as cement or brick layers; however, none were involved in highway construction.

When the market began to open as a result of goals set by the SCDHPT (now known as the South Carolina Department of Transportation or SCDOT) on federal aid projects, these minorities shifted over into horizontal construction. However, many of the new minority businesses failed. Even though doors were technically open, minorities in South Carolina were not participating in government procurement activities, apparently in part because in the mid-1970s bonding was required to build any structure with an estimated cost of \$30,000 or more.

The complaints of minority and small firms to South Carolina policy-makers, the legislature and the Governor's Office brought results. On May 17, 1978, the South Carolina General Assembly by concurrent resolution H. 3594 created the Joint Legislative Committee to study the problems of small businesses in the state.

The Committee's report, entitled *Report of the Joint Legislative Committee to Study the Problems of Small Business*, was presented to the Governor and the General Assembly on March 16, 1979. It recognized that new and/or minority small businesses were excluded from the State's procurement process. The Committee refrained from issuing recommendations in this area, because the Reorganization Commission was in the process of conducting a study on the improvement of the State Purchasing System. The Committee therefore recommended that the General Services Administration investigate this problem.

The State of South Carolina's Reorganization Commission was instrumental in the State's enacting a model procurement code based on findings of the American Bar Association's (ABA) national office in Washington, DC. The ABA had a federal grant to help the states revamp and upgrade their procurement codes. After numerous hearings, with the assistance of the ABA, a model procurement code took shape. The South Carolina Consolidated Procurement Code (Code) was enacted into law in 1981. Its 21 separate articles consolidated all of the South Carolina procurement mandates. Article 21 of the Consolidated Procurement Code was devoted mainly to the issue of minority business development through inclusion in the state procurement system.

The inclusion of Article 21 was in part a response to the recommendation by the Joint Legislative Committee as well as the State Reorganization Commission's efforts to develop a comprehensive code. The preamble or policy statement to Article 21, *Subarticle 3, Assistance to Minority Business*, acknowledged the plight of minority businesses and their exclusion from participation in business opportunities in South Carolina and concluded that it was in the best interest of the State to assist minority businesses to develop fully. It stated:

The South Carolina General Assembly declares 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. The General Assembly believes that it is in the state's best interest to assist minority-owned businesses to develop fully as a part of the state's policies and programs which are designed to promote balanced economic and community growth throughout the State.

The General Assembly, therefore, wishes to ensure that those businesses owned and operated by minorities are afforded the opportunity to fully participate in the overall procurement process of the State. The General Assembly, therefore, takes this leadership role in setting procedures that will result in awarding contracts and subcontracts to minority business firms in order to enhance minority capital ownership, overall state economic development and reduce dependency on the part of minorities.

Section 11-35-5210 of Subarticle 3, Article 21, the Consolidated Procurement Code, made the following provisions:

- Directed the chief procurement officers to provide appropriate staff to assist minority businesses with the state procurement procedures;
- Required chief procurement officers to maintain source lists of minority business firms detailing their products and services and make the lists available to agency purchasing personnel.
- Required chief procurement officers to include and identify minority businesses on the State's bidders' lists and to ensure minority solicitation on an equal basis with non-minority firms.
- Required chief procurement officers to work with other appropriate State offices and minority groups in conducting seminars to assist minority business owners in learning how to do business with the State.

In addition, Article 21 provided prime contractors a tax credit equal to 4 percent of the payments to minority subcontractors on state contracts. The minority subcontracts had to be certified by the Office of Small and Minority Business Assistance (OSMBA). The tax credit was limited to a maximum of \$25,000 annually. A firm was eligible to claim a tax credit for a period of five years from the date the first income tax credit was claimed and had to provide evidence of work performed by minority subcontractors on a form and in a manner prescribed by the Tax Commission at the time of filing.

Section 11-35-5010, of Article 21, defined a "minority person" as a United States citizen who is economically and socially disadvantaged. "Socially disadvantaged individuals" meant those individuals who:

have been subject to racial or ethnic prejudice or cultural bias because of their identification as members of a certain group, without regard to their individual qualities. Such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans (including American Indians, Eskimos, Aleuts and Native Hawaiians), Asian Pacific Americans and other minorities as designated by the board or designated agency.

"Economically disadvantaged individuals" meant those socially disadvantaged individuals whose:

ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.

Article 21 defined an "economically disadvantaged small business" as any small business concern which:

- Is at least 51% owned by one or more U.S. citizens determined to be socially and economically disadvantaged.
- In the case of a corporation, 51% of all classes of voting stock must be owned by an individual or individuals determined to be socially and economically disadvantaged.
- In the case of a partnership, 51% of the partnership interest must be owned by an individual or individuals determined to be socially and economically disadvantaged. Such individuals must be involved in the daily management and operations of the business.

Section 11-35-5270, Subarticle 3, Article 21, established the Office of Small and Minority Business Assistance (OSMBA) to assist the Tax Commission in carrying out the intent of the article. The responsibilities of OSMBA were as follows:

- Assist the chief procurement officers and governmental bodies in developing policies and procedures which will facilitated awarding contracts to small and minority firms;
- Assist the chief procurement officers in aiding small and minority-owned firms and community-based businesses in developing organizations to provide technical assistance to minority firms;
- Assist with the procurement and management training for small and minority firm owners;
- Assist in the identification of responsive small and minority firms;
- Receive and process application to be registered as a minority firm;
- May revoke the certification of any firm which has been found to have engaged in any of the following:
 - (a) fraud or deceit in obtaining the certification;

- (b) furnishing of substantially inaccurate or incomplete information concerning ownership or financial status;
 - (c) failure to report changes which affect the requirements for certification;
 - (d) gross negligence, incompetence, financial irresponsibility or misconduct in the practice of his business; or
 - (e) willful violation of any provision of this article.
- May reissue a certificate of eligibility after a one year period, provided acceptable evidence has been presented to the Commission that the conditions which caused the revocation have been corrected.

Section 11-35-5240 required each agency to develop a Minority Business Enterprise (MBE) Utilization Plan. The MBE Utilization Plan was to include:

- The name of the governmental body;
- A policy statement expressing a commitment by the governmental body to use MBEs in all aspects of procurement;
- The name of the coordinator responsible for monitoring the MBE Utilization Plan;
- Goals that include a reasonable percentage of each governmental body's total procurement directed toward minority vendors;
- Solicitation of qualified minority vendors, from a current list supplied by the Division of General Services, in each commodity category for which minority vendors are qualified.
- Procedures to be used when it is necessary to divide total project requirements into smaller tasks which will permit increased MBE participation.
- Procedures to be used when the governmental body subcontracts the scope of service to another governmental body; the responsible governmental body may set goals for the subcontractors in accordance with the MBE goal and the responsible governmental body may allow the subcontractor to present a MBE Utilization Plan detailing its procedure to obtain minority business enterprise participation.

The MBE Utilization plans were to be submitted to OSMBA for approval by July 30, annually. In addition, progress reports were to be submitted to OSMBA within ten days after the end of each fiscal quarter. The progress reports were to identify:

- Number of minority firms solicited;
- Number of minority bids received; and
- Dollar amount of minority bids awarded.

The Code also addressed some financial concerns to assist minority firms. Section 11-35-5250 provided for progress payments and letters of credit for minority firms. The chief procurement officers were permitted to make special provisions for progress payments, and letters of credit, to assist minority businesses to carry out the terms of a state contract pursuant to regulations promulgated by the Board. Additionally, when a certified minority business received a contract with the State, the appropriate chief procurement officer was to provide a letter, upon request, stating the dollar value and duration of the contract, and other information about the contract that might be used by the MBE in negotiating lines of credit with lending institutions. Section 11-35-5260 required each governmental body to report annually in writing to the Board the number and dollar value of contracts awarded to eligible minority businesses during the preceding fiscal year.

The South Carolina Department of Highways and Public Transportation (SCDHPT), mandated to follow the federal procurement guidelines, sought and obtained highway construction exemption from the State Consolidated Procurement Code. Building construction and all other goods, services, and equipment purchases were not exempted.

The OSMBA completed several studies and presented them to members of the Legislative Black Caucus and the leadership of the SCDHPT concerning the low

participation of minorities in the Highway Department procurement system. These studies documented the participation of minorities based on data supplied to OSMBA and data collected from the SCDHPT. Data from one of those studies are presented in Exhibit 5-1. The study examined the utilization of minority and women-owned business enterprises in SCDHPT contracting opportunities for FY 1983/84. The data revealed very limited participation by MBEs and WBEs. Minority and women-owned firms did not receive any expenditures from the \$163,022,710 expended for building construction, right-of-way and land acquisition, and highway and road improvements.

**EXHIBIT 5-1
MBE/WBE PARTICIPATION IN SCDHPT PROCUREMENT
FY 1983/84**

Object Code	Description	Total \$ Amount	MBE \$ Amount	WBE \$ Amount
0201 - 0299	Professional services and services	\$50,020,529	\$8,510 (0.02%)	\$17,517 (0.04%)
0301 - 0399	Supplies	\$32,506,556	\$3,339 (0.01%)	\$226,920 (0.70%)
0601 - 0635	Equipment	\$8,235,879	\$0	\$0
0711	Construction buildings	\$941,044	\$0	\$0
0730	Right of way & land acquisition	\$12,046,388	\$0	\$0
0731	Highway & road improvements	\$150,035,278	\$0	\$0

Data on nonfederal assistance submitted to OSMBA by SCDHPT. Report received from John W. Gadson.

In 1984, the South Carolina Legislature included a provision in the SCDHPT's general appropriations budget which urged the Department *to comply with Section 105(f) of the Federal Surface Transportation Assistance Act of 1982 (STAA-1982)* and authorized and directed the Department *to effectuate and assure such compliance through contract documents and such rules and regulations as may be necessary,*

*seeking input from the Governor's Office (Office of Small and Minority Business Assistance) in the promulgation of such rules and regulations.*¹²

The Legislative Audit Council (LAC), the legislative auditing arm of the State, was requested in the spring of 1985 to obtain information concerning the SCDHPT's implementation of Article 21 (Assistance to Minority Businesses) of the State Procurement Code. The LAC completed its report on April 16, 1985. During its investigation the LAC reviewed the various reports conducted by OSMBA and made its own review of the data and reported that "they also find the lack of minority participation in the Highway procurement process in an equitable way."¹³ The LAC found "in 1983/84 that minority-owned firms received only a mere .01 percent of the state's contract dollars for goods, services, and building renovations and construction."¹⁴

Procurement data submitted by State agencies to OSMBA depicted an increase in minority and women business participation in State procurement during the period FY 1978/79 through FY 1984/85, as shown in Exhibit 5-2.

In spite of the increases, however, the dollars awarded to MBEs and WBEs between FY 1978/79 and FY 1984/85 represent a small fraction (approximately 1.8 percent) of the State's total procurement dollars during that period.¹⁵

¹²Acts and Joint Resolutions, State of South Carolina, Regular Session, 1984, 2d Part.

¹³Memorandum from the Director of SBDC, South Carolina State College, to the Chairman of the Legislative Black Caucus Economic Development Committee, April 19, 1989. The Director of OSMBA provided assistance when the Legislative Audit Council conducted its investigation of the SCDHPT in 1985.

¹⁴Acts and Joint Resolutions, State of South Carolina, regular session, 1988, 2d Part.

¹⁵OSMBA, "Report to the Joint Legislative Committee on Small Business for Fiscal Year 84-85."

**EXHIBIT 5-2
MBE/WBE PARTICIPATION IN STATE PROCUREMENT
FY 1978/79 through FY 1984/85**

Fiscal Year	MBE Dollar Amount	WBE Dollar Amount
1978/79	\$50,000	Not available
1979/80	\$1,200,000	Not available
1980/81	\$3,100,000	Not available
1981/82	\$5,100,000	Not available
1982/83	\$6,800,000	\$1,600,000
1983/84	\$23,000,000	\$3,700,000
1984/85	\$5,000,000	\$5,400,000

Data from *Report to the Joint Legislative Committee on Small Business* for FY 1984/85.

In 1986, the State Appropriation Act 1986/87, under Act No. 540, required the SCDHPT to expend 10 percent of funds contracted for construction purposes with small business concerns owned and controlled by economically and socially disadvantaged individuals as defined in section 11-35-5010 of the 1976 Code or owned and controlled by disadvantaged women. In addition, the SCDHPT was required to certify eligible small businesses. The SCDHPT was permitted to waive the 10 percent provision on a contract when no small businesses were available to perform the work; and no contractor could be excluded from consideration for contract award if the prime contractor filed an affidavit with sufficient proof that there was no small business located in South Carolina that could satisfactorily perform any of the construction work required under the contract.

A year later, in 1987, the South Carolina Legislature added new language to its 10 percent proviso. Under the State Appropriation Act of 1987/88, No. 170, Acts of 1987, the following provisions were included:

- **Goals/Set-Asides:** Ten percent of total state source highway funds expended in a fiscal year on construction contracts must be expended with DBE/WBE firms. The SCDHPT had the option to use goals or set-asides, provided that goals be used only on projects exceeding \$500,000. No cap was set for set-asides.
- **5% DBE Goal/5% WBE Goal:** The ten percent goal was equally divided between DBE and WBE firms. The law specified that five percent of expenditures be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals (DBEs) as defined in *Public Law 95-507* and five percent with firms owned and controlled by disadvantaged females (WBEs). (The term *disadvantaged females* is not defined in Public Law 95-507, nor is it defined in State law.)
- **Certification:** The SCDHPT was still required to certify eligible firms and give at least 30 days' notice to certified firms of contracts to be let. No firm could be certified if it had previously been certified as a DBE or WBE for purposes of federal or state source highway construction contracts set-asides for more than five years. The limitation was designed to broaden participation in the program.
- **Bond Waiver:** To facilitate the implementation of the program, the Department was authorized to waive or guarantee bonding requirements for a contract let pursuant to the set-aside provision with an estimated construction costs not exceeding \$250,000. In the event a DBE or WBE is awarded a contract without bonding and defaults on the contract, the contractor is automatically ineligible for any further Department nonbonded set-aside contracts for a minimum period of two years from the date of notice.
- **Local Preference:** In the awarding of contracts pursuant to the DBE program, 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 2 1/2 percent.
- **Technical and Support Services:** The Department must make available technical and support services for DBEs and WBEs the same percentage of state source highway construction funds as is provided for in federal highway construction funds, not to exceed \$100,000.

- **Unmet Goal Provision:** If there are no certified DBE or WBE firms available to perform a contract, the Department shall verify, record, and maintain verification in Department records. To the extent that a goal or set-aside for a particular category cannot be met, the unused portion of a goal or set-aside must be added to the goal or set-aside of the other category if the appropriate category firm is available.

- **State Procurement Requirements Relative to Federal Contracts:** Procurement and contracts made pursuant to Section 106(c) of the Federal Surface Transportation Assistance Act of 1987 (STAA-1987)¹⁶ are subject to the provisions of sections 11-35-1210(2), 11-35-1220, and 11-35-1230 of the South Carolina Consolidated Procurement Code.¹⁷

The budget proviso requiring 10 percent expenditures with DBEs and WBEs, which was written into the budget appropriation act of 1987, became law by Act 197 of 1987, under Section 12-27-1320 of the 1976 Code. The law contained the same provisions established in the budget proviso of 1987 in addition to a premium provision requiring the contractor awarded work for which the State guarantees bond to pay the State an amount equal to the premium of the bond had it been purchased from a surety company.

¹⁶Although the law reads *Section 106(c) of the Federal Surface Transportation Assistance Act of 1987 (STAA-1987)*, the correct citation is Section 106(c) of the Federal Surface Transportation and Uniform Relocation Assistance Act of 1987.

¹⁷Section 11-35-1210(2) refers to the certification and review authority of the Division of General Services (DGS) to review the governmental body's internal procurement operations relative to compliance with the provisions of the code and regulations concerning competitive procurement methods. Section 11-35-1220 refers to the collection of data concerning public procurement. The DGS is required to prepare statistical data concerning procurement, use and disposition of all supplies, services and construction. All using agencies are required to furnish reports required by the DGS to carry out this function. Section 11-35-1230 refers to the auditing and fiscal reporting functions. The DGS through consultation with chief procurement officers is responsible for developing written plans for the auditing of state procurement. The Comptroller General in consultation with the Legislative Audit Council is responsible for operation and maintenance of the automated quarterly fiscal reporting procedures established under Section 1-1-930. All agencies, departments and institutions of state government are required to report to the Comptroller General the information required under Section 1-1-940.

In 1989, Section 12-27-1320 of the 1976 Code was amended by Section 45B, Part II, Act 189 of 1989. The law was predicated on specific finding of historic patterns of discrimination against minorities and women and discriminatory barriers. The preamble to amended Section 12-27-1320 reads 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 Center Consortium as a nonracially oriented technical assistance entity. Also in 1979, the Joint Legislative Committee on Small Business, created in 1978, reported that firms owned by minority persons "have been historically restricted from full participation in our free enterprise system to a degree disproportionate to other businesses"; and

Whereas, in 1981, the State enacted a consolidated procurement code and, pursuant to numerous hearings which took place under the direction of the State Reorganization Commission and the review of the American Bar Association, enacted Section 11-35-5210(1) which again confirmed a finding by the General Assembly that discrimination had resulted in a lack of participation by minorities in the state procurement system. In reference to these findings, state procurement officers were directed to initiate certain programs to include and involve minorities in the procurement system; and

Whereas, several recent studies by the Office of Small and Minority Business Assistance reveal that a pattern of discrimination against, and minimal participation of, minority and female-owned businesses in the state's procurement system still exists. The data for fiscal years 1981/82, 1982/83, and 1983/84 show participation rates for minority-owned firms at less than 1%; and

Whereas, the South Carolina Legislative Audit Council found in 1983/84 that minority-owned firms received only a mere .01% of the state's contract dollars for goods, services, and building renovations and construction. A public hearing on October 12, 1988, revealed a continuing lack of participation in the awarding of contracts despite a proviso in the 1988 General Appropriations Act (Section 126.25); and

Whereas, the state's finding of a pattern of race and gender discrimination over a ten-year period, despite numerous attempts to create more equitable patterns, is evidence that additional legislative action is necessary to cure and resolve this long and historical problem in our State; and

Whereas, the purpose of this legislation is to remedy historic patterns of discrimination against minorities and women in the awarding of state contracts. It is intended that these provisions be applied until future findings conclude that the historical barriers to participation of minorities and women have been eliminated.

The amended Section 12-27-1320 of the 1976 Code provided for the same provisions enacted in 1987 with the following changes:

- Increased the ceiling on projects in which goals could apply from exceeding \$500,000 to exceeding \$750,000;
- Omitted any reference to Public Law 95-507;
- Changed economically disadvantaged individuals (DBEs) to economically disadvantaged ethnic minorities (MBEs);
- Required the Department to prequalify eligible firms for set-asides;
- Increased the time period a firm may participate in the state set-aside from five years to nine years;
- Provided language for disallowing the prequalifying of firms:

No firm can be prequalified when more than 25% interest is owned by a member or a spouse of a member, stockholder, or partner that has owned any interest in a firm, corporation, or partnership that has been certified or participated in the set-aside awards for more than nine years. Additionally, no person may own stock or any other interest in a firm, corporation, or partnership if that person owns more than 25% interest in another firm, corporation, or partnership already certified or participating in the awarding of state contracts pursuant to set-asides or when the person owns more than 25% in a firm, corporation, or partnership that has previously participated in the highway construction set-asides for more than nine years.

- Required the Department to promulgate and implement regulations to administer the provisions of the law; and
- Added a severable clause: 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, shall have no effect on the constitutionality, validity, and enforceability of the other parts and provisions of this section which are considered severable.

The DBE/WBE state law pertaining to the SCDHPT was amended again in 1990.

The amended Section 12-27-1320 was replaced by Section 28B, Part II, Act 612 of 1990. The new law made major changes to the existing law and became effective July 1, 1990. Changes and additions were as follows:

- **Set-aside Program:** The goals portion of the program was eliminated and the set-aside program retained.
- **Specified areas of highway construction expenditures covered:** Ten percent of total state source highway funds expended in a fiscal year on highway, bridge, and building construction, and building renovation contracts must be expended through direct contracts with estimated values of \$250,000 or less with MBEs and WBEs, with MBEs receiving 5% and WBEs 5%.
- **Set-aside project limit:** The \$250,000 value limits may be raised in the discretion of the department as MBEs/WBEs are able to provide bondability.
- **Location and Availability:** In designating projects to be set aside, the Department must take into consideration the location and availability of MBE or WBE firms in the State.
- **Graduation/Time limits:** 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 \$3,000,000 in highway contracts for four consecutive years while certified as a WBE or MBE.
- **Recertification:** Firms performing less than \$3,000,000 in highway contracts for four consecutive years may be recertified for additional five-year periods based upon recertification reviews.
- **Advertisement:** The Department must advertise a number of highway construction projects at each regularly scheduled highway letting to be bid exclusively by MBEs and WBEs.

- **Lowest Responsive Bidder:** Projects must be awarded to the lowest responsive and responsible bidder that is within 10% of the official engineer's estimate. If the lowest responsive bid exceeds the engineer's estimate by more than 10%, 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 10% 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 10% 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.
- **Bond Waiver/Liability:** The Department must 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. Claims resulting in monetary settlements shall render the MBE/WBE 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.
- **Guidelines:** The Department must establish written rules to be used in the selection and design of projects awarded under set-asides. Those guidelines shall outline the types of projects best suited for set-asides and other related criteria.
- **Lines of Credit:** When a MBE or WBE receives a contract, the Department must 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.
- **MBE/WBE Annual Report:** The Department is required to issue an annual report listing all contracts awarded pursuant to the state set-asides program and the federal aid projects program.
- **Thirty Percent Work Requirement:** Any MBE or WBE awarded a set-aside contract must perform at least 30% of the work with his own forces. If 30% of the work is performed by the MBE's own forces, the total amount of the contract is counted towards the MBE/WBE set-asides. However, if less than 30% of the work is performed by the MBE's or WBE's own forces, then only that portion performed by the MBE/WBE is counted toward the set-asides.

- **Technical Assistance:** The Department must make available technical assistance for MBEs and WBEs for not less than \$300,000. Any of these funds may be awarded to small consulting firms owned and controlled by MBEs or WBEs and may be counted toward the set-asides. The selected firm must be South Carolina based and experienced in assisting with the development of minority firms. The technical assistance must include written and oral instructions on competitive bidding, management techniques, and general business operations. Certified firms must receive at least 20 hours of continuing education a year in order to remain certified.
- **Department Technical Assistance:** The Department must implement a system that will designate a lead engineer to work with MBE/WBEs. The Department must also endeavor to utilize the expertise of established highway, bridge and building contractors when providing technical and support services.
- **Non-set-aside Projects:** Contracts awarded to certified MBEs or WBEs through the normal bid process may be counted toward the set-asides.
- **Rules and regulations:** Within 120 days of the effective date of this law, the Department must promulgate and implement regulations to administer the provisions of the law.

The certification requirements, bond waiver, unmet goals, local preference provisions remained unchanged.

The law was amended by Section 38, Part II, Act 164 of 1993. The amendment added that C-fund revenues be covered by the law and required counties to ensure 10 percent of expenditures of C-funds in a fiscal year and building renovation be expended with MBE/WBEs, with each receiving five percent of such expenditures. Section 12-27-400, the "C-funded law," governs the expenditure of revenues generated from the additional 2.66 cent gas tax. Since counties receive a portion of these revenues, the Legislature included counties in the provision to ensure that they utilized at least 10 percent of the funds received from the C-fund in accordance with Section 12-27-1320. The SCDOT has no say in how the counties spend their portion of revenues generated

by the gas tax. Enforcement of Section 12-27-1320 by counties relative to revenues generated from Section 12-27-400 is solely the responsibility of each individual county.

The SCDOT promulgated regulations for the State set-aside program in October 1991. The regulations, codified at 25A S.C. Code Ann Regs. 63-700 et seq. (supp. 1993), became law on June 26, 1992.

5.3 Procurement and Contracting Process

The responsibility for the SCDOT's contracting of highway and bridge preconstruction and construction and building construction and renovation is divided among various Divisions within the agency. In addition, the policies and procedures that govern and direct the procurement process vary and depend upon the type of project and contract. The procurement process for the SCDOT is centralized. In order to provide clarity and facilitate a better understanding of the intricate processes at work in procuring goods and services for the SCDOT, the description of the procurement process is subdivided as follows:

- 5.3.1 Professional Consultant Services for Projects Within the Highway Right of Way
- 5.3.2 Highway and Bridge Construction Contracting
- 5.3.3 Building Construction and Remodeling
- 5.3.4 Goods, Services, and Equipment Other than Highway Right of Way

5.3.1 Professional Consultant Services for Projects within the Highway Right of Way

The SCDOT's selection of professional consultants for federally-funded projects within the highway right of way is governed by Public Law 92-582, commonly referred to as the "Brooks Act." The SCDOT's selection of professional consultants for State-

funded construction or maintenance of bridges, highways, and roads is exempt from the South Carolina Consolidated Procurement Code. The SCDOT's *Engineering Policies and Procedures, No. R-1 - Consultants*, dated January 1, 1995, describes the method employed by the SCDOT in the acquisition and administration of qualified professional consultant services in the areas of architectural and/or engineering for projects within, or to be constructed within, the highway right of way. The procedures are promulgated pursuant to Federal Highway Administration rules and regulations and the South Carolina Consolidated Procurement Code.

Selection Process for Professional Consultant Services

The selection process for professional services is initiated by the Director of Engineering (DOE). The DOE will initiate and complete a SCDOT Package Letter A, Form No. 1, *Request for Professional Services (Request)* and submit it to the Contract Program Manager (Manager).

Review and Approval

- The Manager will review the *Request for Professional Services* for completeness. An incomplete *Request* will be returned to the DOE to be completed. A complete *Request* is forwarded by the Manager to the Deputy Director of the Division of Construction Engineering and Planning (Deputy Director) for approval. The Deputy Director is the administrative head of the Division of Construction Engineering and Planning (Division) and is appointed by the Director, the chief administrator of SCDOT employed by the Commission.
- The Deputy Director will return the *Request* to the Manager for further action.
- The Manager submits a written notification to the DOE of the Deputy Director's approval, disapproval, and/or comments requiring further action by the DOE.
- Upon receipt of the approved *Request* from the Deputy Director, the Manager reviews the *Request* for additional information and then completes a SCDOT Package Letter B, Form No. 20, *Professional Services Selection Process*.

Selection Committee

- The Manager requests from the DOE a list of recommended voting members to serve on the Selection Committee. The Manager will attach the DOE's list to SCDOT Form No. 21, *Professional Services Selection Process - Selection Committee Appointment* and submit the form to the Deputy Director, Director, and Deputy Director of Finance and Administration for Selection Committee member appointments. The Selection Committee's responsibility is to recommend in rank order the consulting firms to the Deputy Director for approval.
- The Selection Committee consists of a minimum of six members appointed as follows:
 - Director - appoints one (1) voting member and one (1) non-voting member from any area of the SCDOT.
 - Deputy Director - appoints Chairman plus a minimum of two (2) additional voting members from the Division of Construction Engineering and Planning.
 - Deputy Director of Finance and Administration - appoints one (1) non-voting member from outside the Division.
 - Non-voting members may ask questions of the consultants and offer opinion to the Committee Chairman (Chairman). Non-voting members will certify that the selection procedures have been followed prior to submittal of the recommendation to the Deputy Director.
 - The Manager serves as an ex-officio non-voting member of the Selection Committee.
 - In the event the Committee is comprised of only three (3) voting members, the Director may select, in addition to his voting member, one (1) non-voting member as a representative of both the Director and Deputy Director of Finance and Administration.
- The Chairman will arrange the date, time, and place of the first meeting to:
 - Discuss and become familiar with the Preliminary Scope of Services (*Request for Professional Services, Form No. 3*);
 - Determine the type of project;
 - Determine the method of selection;

- Establish the selection criteria; and
- Develop the announcement.

Determine Type of Project

There are three types of projects:

- Class I Project - a project whose scope of services, parameters, and requirements are well defined. A lump sum agreement is generally considered.
- Class II Project - a project for which the SCDOT is unable to provide a sufficient defined scope of service, parameters, and requirements. A cost plus fixed fee with contract maximum agreement is generally considered.
- Class III Project - a project whose scope of services, parameters and requirements allow for costs to be accumulated into one unit. An approved unit cost payment method is generally considered. Typical services provided under a Class III Project are geotechnical and aerial photography services.

Selection Criteria

- The selection criteria used to evaluate and rank consulting firms include:
 - The ability and relevant expertise of professional personnel;
 - Recent, current, and projected work loads of the firms;
 - The volume of work previously awarded to the firm by the SCDOT; and
 - Past performance on similar projects.

Past performance is a very important criterion in the selection process. Special attention is given to cost overruns, completing work on schedule, level of performance, quality of work, etc., for those previously contracted by the SCDOT.

The Committee may also consider the firm's geographic location in relation to the project, financial, accounting and insurance data, and other matters which may be deemed relevant. The relative importance (weight) of each factor is determined by the Selection Committee.

Advertisement

- A description of the proposed project and required services is developed by the Selection Committee and published in the *South Carolina Business Opportunities* (SCBO). The announcement provides a brief description of the work and method of payment, and identifies any significant selection criteria and their relative weight.
- The announcement requests interested persons/firms to submit the following information:
 - A resume of qualifications;
 - The dollar value of SCDOT projects in the two years prior to the announcement date;
 - Submission of Federal Standard Form (SF) 254 (*Architect-Engineer and related Service Questionnaire for specific Project*); and
 - Any additional pertinent information.

The announcement will advise of any modified or special selection procedures and will identify a SCDOT contact person.

In addition to SCBO, announcements may be advertised in other professional publications and/or direct mailing.

- The Manager will arrange for the publication of the announcement.

Methods of Selection

- There are four (4) methods of selection utilized by the SCDOT for consultant services.
 1. **Standard** - the Standard method of selection requires an announcement. The announcement will identify the due date for receipt of letters of interest and any other requested information. The number of firms responding will be short listed and interviewed. The firms interviewed will be ranked. The recommended rank ordering of consulting firms for negotiation purposes will be submitted to the Deputy Director for approval.
 2. **Modified A** - the Modified A method of selection requires the announcement. The announcement will identify a contact person to obtain a written scope of services, the general services to be performed by the selected consultant, and a due date for receipt of letters of interest and additional

requested information. All information received will be reviewed and either an order of negotiation recommendation will be presented to the Deputy Director, or the Selection Committee with concurrence from the Deputy Director may first request additional information or an interview with a select number of firms.

In cases where the Deputy Director agrees that the consultant's studies and work effort are well documented, the Selection Committee may select a consultant without interviews. In these cases, the announcement will state that interviews may not be required.

3. **Modified B** - the Modified B selection method requires an announcement of the project. The announcement will identify the general services to be performed and notify interested consultants that a meeting will be held at a specified date, time and place to discuss the specific requirements for the project and to answer any questions (*Scoping Meeting*). The scoping meeting will be conducted by the chairman of the Selection Committee. Failure to attend the scoping meeting will not disqualify the consultant from responding to the announcement and being considered by the Selection Committee. No questions or individual discussions will be entertained after the scoping meeting. This does not preclude the Manager's release of general selection procedural information. The announcement will also identify the specified date and time for receipt of letters of interest and additional requested information and leave open the option for interviews or a request for consultants to provide additional information.

All information received will be reviewed and either an order of negotiation recommendation will be presented to the Deputy Director; or the Selection Committee, with concurrence from the Deputy Director may first request additional information or an interview with a select number of firms prior to preparing an order of negotiation to present to the Deputy Director.

4. **Special Selections** - there are three (3) types of Special Selections.

(a) *Public Institutions of Higher Learning and other State and Federal Agencies*

In those Deputy Director-approved cases where the quality, schedule, and cost of a project will not be

compromised, the SCDOT may select a State or federal agency through direct negotiation.

(b) *Emergency*

In situations where an emergency condition exists which creates a threat to public health, welfare, or safety and which precludes normal procurement methods, the selection procedure used must ensure that the consultant services are procured in time to meet the emergency. Procurements made on an emergency basis must be in writing, stating the basis of the emergency procurement and of the selection of the particular consultant. Approval by the Director and, if federal funds are involved, by the Federal Highway Administration (FHWA), is required.

(c) *Direct Negotiations*

The SCDOT may employ consultants by direct negotiations when the costs of consultant services do not exceed \$25,000. Direct negotiation contracts are for total services and do not allow for any contract modifications.

A sole source procurement is not permissible unless there is only a single available consultant. In cases of reasonable doubt, competition is to be solicited. Any request restricting selection to one particular consultant must be accompanied by an explanation as to why no other will be suitable or acceptable to meet the need. Approval of the Director and, if federal funds are involved, the FHWA, is required.

Review Process

- The Chairman of the Selection Committee will record the name, date and time of all consultants' letters of interests received on SCDOT Form No. 25, *Summary of Responding Firms*. The chairman will review all submittals for compliance with the announcement, and any areas of non-compliance will be recorded in the comment section of Form No. 25 for discussion with the Selection Committee. Any late letters of interest will be returned to the consultant with appropriate notification by the Chairman.
- The Chairman will furnish all members of the Selection Committee with a copy of SCDOT Form No. 25, a copy of the Committee-approved selection criteria, an appropriate evaluation form, copies of the letters of interest and other submittal information requested in

the announcement, and the date, time, and place of the second scheduled Committee meeting.

At the second meeting, the Committee will discuss the firms responding to the announcement. The firms will be evaluated, graded based on agreed-upon criteria, and ranked in order of qualifications. The Committee will recommend to the Deputy Director for approval, a number of firms to be short-listed for submittal of additional information or interview on SCDOT Form 27, *Oral Interview or Additional Information Evaluation*, or final recommendation of firms rank ordered for negotiation purposes on SCDOT Form 28, *Final Recommendation*, accompanied by SCDOT Form 26, *Initial Evaluation*.

Once the SCDOT Form 27 is approved, the Chairman will notify all consultants responding to the announcement of their status. Those firms to be interviewed will be notified of the date, time, and place, and form and schedule of the interview.

- In the event additional information is needed, the Chairman will advise the consultants in writing and inform them of the information to be submitted and the due date. The Chairman will notify Committee members of the date, time, and place of the third Committee meeting. The Chairman will furnish Committee members with a copy of the previously Committee-approved selection criteria and appropriate evaluation form, along with the additional information. The purpose of the third meeting will be to interview and/or discuss, evaluate, and grade the consultants on the information received. The Chairman will record and certify the results of the Committee's recommendation on SCDOT Form 27. The Committee's recommendation will be recorded on SCDOT Form 28 and submitted to the Deputy Director for approval.
- Non-voting members will complete SCDOT Form No. 29, *Certification of Non-Voting Members*. The form is used to note any exceptions to the selection process. The Manager is responsible for notifying the Deputy Director of any exceptions and resolving any exceptions with the Deputy Director and non-voting members. The Manager will notify the Chairman in writing of any exception and the resolution.
- The Deputy Director may modify the initial or final recommendations of the Committee provided the Director approves the modifications.
- The Deputy Director will notify the Manager by returning an approved SCDOT Form 28 containing the approved order for negotiation. The Manager will notify the Chairman of the approved order of negotiations and inform him that the services of the Selection Committee are complete. Once the Chairman has notified

all firms of their status in writing, his responsibilities as Chairman are complete.

- The Manager will inform the Director of Engineering of the order of negotiation as approved by the Deputy Director and affirm that the Chairman of the Selection Committee has notified all firms of their status.

Negotiations

- The negotiation process begins upon the receipt of SCDOT Form No. 28 by the Director of Engineering from the Manager. The Chairman of the Selection Committee will inform the selected consultant and all other consultants of the Deputy Director's approval to begin negotiations.
- The Project Manager, the person designated by the Director of Engineering to be responsible for the day-to-day monitoring of the project, will furnish the selected consultant with copies of the following data and forms:
 - Standard Agreement for Consultant Services (SACS) including Attachment C, *Estimate of Engineering Fee*.
 - Scope of Services (SOS)
 - Manpower Requirements (MR)
 - Project Schedule (PS)
 - Cost Estimate (CE)
- Negotiations are conducted by a team composed of the Director of Engineering, the Manager, and the Project Manager. The negotiation team is responsible for negotiating the scope, schedule, man-hours, job classifications, hourly rates, direct non-salary costs, and fixed fee (profit). Resources used in the negotiations will include but not be limited to the scope of services, the cost estimates, and the audit opinion issued as a result of the pre-award audit.

5.3.2 Highway and Bridge Construction Contracting

The process for the SCDOT to procure contractors for highway and bridge construction is guided by the rules and procedures set forth in the *South Carolina State*

Highway Department Standard Specifications for Highway Construction, 1986 edition (The Red Book). All contracts are awarded through the competitive sealed bidding process. The following discussion outlines the process utilized by the SCDOT in awarding highway and bridge construction projects and contracts.

Prequalifications

Before a prospective bidder can be considered for any construction contract with the SCDOT, the bidder must be prequalified to do the work in question pursuant to Section 57-5-1650, S.C. Code of 1976. This law went into effect on January 1, 1960. Each prequalified contractor is given a classification designed to indicate the *kind* and *quantity* of work which the contractor is eligible to be awarded based on prior experience and the equipment available to perform that particular type of work. The types of classifications are as follows:

- **Paving Contractors** - may be awarded projects that include paving, grading, and minor drainage structures;
- **Grading Contractors** - may be awarded projects that include grading and minor drainage structures;
- **Bituminous Surfacing Contractors** - may be awarded projects that include bituminous surfacing, grading, and minor drainage structures;
- **Bridge Contractors** - may be awarded projects that consist of bridges and other similar structures;
- **Seeding and Grassing Contractors; Hydraulic Embankment Contractors; Jetty or Groin Contractors; Sign Contractors; and General Contractors** - may be awarded projects that embrace any of the foregoing classifications.

In addition, each contractor is rated on his/her financial standing, a *capacity rating*. The capacity rating is based on the net liquid assets shown in the contractor's annual financial statement. The net liquid assets in the contractor's financial statement are equal to 15 percent of the contractor's bidding capacity. Hence, the net liquid asset

figure is multiplied by 6.667 to determine the contractor's bidding capacity per contract. The net liquid assets may also include verified financial institution lines of credit. The capacity rating identifies the largest single contract on which the contractor will be allowed to bid. There is no limit placed on the number of contracts the bidder may bid at this capacity rate as long as the contractor's performance is satisfactory.

A contractor prequalifying for the first time is limited to the largest single similar contract satisfactorily completed for another state, federal agency, or South Carolina state agency or municipal government, if the net liquid assets in the financial statement support this capacity. If a contractor who is qualifying for the first time has not completed any public project, he/she will be limited to a maximum of \$500,000 capacity rating per job until the contractor has satisfactorily completed a contract for the SCDOT. Once the contractor has satisfactorily completed a contract for the SCDOT, he/she will be limited in bidding capacity only by the net liquid assets in his/her financial statement.

Prospective bidders qualifying for the first time must file for certification at least 7 days in advance of any letting at which a proposal is to be submitted. However, bidders do not have to prequalify for rest area and welcome center maintenance. Upon receipt of satisfactory evidence regarding the applicant's financial responsibility and experience, a Contractor's Certificate will be issued by the SCDOT. A contractor is not permitted to exceed his/her bidding capacity under any circumstances.

Licensing

Chapter 7, Title 56, Code of Laws of South Carolina, 1962 as amended, prohibits the SCDOT from awarding a contract to a contractor who has not been properly licensed by the S.C. Licensing Board for Contractors (SCLBC). A contractor must obtain a General Contractor's License and a Bidder's License from the SCLBC before

a contract is awarded to him/her. Such licenses cannot be a prerequisite to the submission of a proposal.

Competitive Sealed Bidding Process

IFB Approval

The competitive sealed bidding phase of the project begins with the Director of the Department of Transportation's approval of the announcement inviting bids, Invitation for Bids (IFB). All construction contracts are advertised for two consecutive weeks in *The State* newspaper beginning at least five weeks prior to the bid opening. Announcements are handled by Contracts Administration at the SCDOT.

Advertisement

The official notice publicly announcing the IFB is published approximately five weeks before the bid letting. There are two ways in which the SCDOT publishes its IFBs through a short ad published in *The State*, and through a long ad, "Notice to Contractors," which is mailed to subscribers for two dollars a month. The long ad is the official notice. The contents of the short ad and the long ad are presented below:

Short Ad Contents

The following information is contained in the short ad:

- Time, date, and place of bid opening;
- Title of project and project number;
- Description and location of project;
- Cost of plans (*Note: The cost of plans varies depending upon their size.*);
- Cost of proposals (*Note: The cost of proposals is a fixed fee of \$15.00*);¹⁸

¹⁸The proposal forms will show the location and description of the proposed work, the approximate estimates of the various quantities of work to be performed or materials to be furnished, the amount of the proposed guaranty, the number of calendar days or date on which the work is to be completed, and the date, time, and place of opening of proposals. The form will also include any special provisions or requirements not contained in the plans or Standard Specifications. All papers bound with or attached

- Cost of bid diskette;
- Type of job;
- Requirement for proposal guaranty;¹⁹
- Requirements for performance bond and/or labor and material payment bond to be provided if a contract is awarded;
- Requirement that the contractor be licensed;
- Requirement that the contractor be prequalified;
- Special provisions covering DBE/WBE requirements (*Note: This applies only to federal aid projects*);
- Special provisions required of the contractor pursuant to state and/or federal laws;
- Method to be used to evaluate proposals for award;²⁰
- Indicates whether there will be a pre-bid conference held for a particular project; if so, the date, time, and location and whether it is mandatory or not mandatory (*Note: The ad, short and long, is published approximately three weeks before the pre-bid conference*); and
- Any other pertinent information.

to the proposal form are considered a part thereof and must not be detached or altered.

¹⁹Proposal Guaranty - No proposal will be considered unless accompanied by a proposal guaranty of the specified character, and in an amount not less than the amount indicated in the proposal form, and made payable to the SCDOT. The proposal guaranty requires a bid bond in the amount of 5 percent of the total bid, written by a surety satisfactory to the SCDOT, properly executed on SCDOT Form 674 (to be furnished by the SCDOT in each proposal form).

²⁰SCDOT uses two methods to evaluate bid proposals for award. The standard or normal method determines the total bid based on "the total dollar amount for all work to be performed under the contract." The second method employed for determining the total bid is known as the A+B Bidding. This method is used on priority or fast track projects. The total bid is equal to $A + (B \times dc)$ where:

- A is the total dollar amount for all work to be performed under the contract (contract quantities and unit prices);
- B is the time in calendar days bid not to exceed the maximum number of calendar days specified (contract time amount); and
- dc is the daily cost as stipulated.

The $A + (B \times dc)$ formula is used only to determine the lowest total bid; the total amount of the contract is based upon the "A" portion of the bid. The bid proposal submitted is evaluated for award on the basis of the total bid as determined by the formula.

Long Ad Contents

The following information is contained in the long ad:

- Time, date and place of bid opening;
- Title of project and project number;
- A list of all bid items in the job;
- List of all projects;
- Cost of plans (*Note: The cost of plans vary depending upon the size.*);
- Cost of proposals (*Note: The cost of proposals is a fixed fee of \$15.00*);
- Cost of bid diskette;
- Complete description of work and location of project;
- Requirement for proposal guaranty;
- Requirements for performance bond and/or labor and material payment bond to be provided if a contract is awarded;
- Requirement that the contractor be licensed;
- Requirement that the contractor be prequalified;
- Special provisions covering DBE/WBE requirements (*Note: This applies only to federal aid projects*);
- Special provisions required of the contractor pursuant to state and/or federal laws;
- Indicates whether there will be a pre-bid conference held for a particular project; if so, the date, time, and location and whether it is mandatory or not mandatory;
- Method to be used to evaluate proposals for award; and
- Any other pertinent information.

Pre-bid Conference

The pre-bid conference or on-site visits provide bidders with important information related to the project, contract provisions, special provisions, and other instructions to assist the prospective bidder in preparing a responsive bid. Mandatory pre-bid conferences are required only when the project is very large, complex, or unusual in nature. Only prospective bidders represented at the mandatory pre-bid conference are eligible to bid on the project. The construction documents (plans and specifications) should be discussed in enough detail to ensure that all prospective bidders understand the scope of the project.

Bid Postponement

The SCDOT has the authority to postpone any bid prior to bid opening, even the day of the bid opening, as long as the bids have not been opened. The decision to postpone a bid opening is authorized by the Deputy Director. If the bid letting is postponed, Contracts Administration will notify all contractors that have pulled plans and specifications on those jobs. Postponement notification is made by fax or certified mail, depending on the time available.

Bid Opening

Bids²¹ are opened publicly at the precise time designated in the IFB in the presence of one or more witnesses. Each bid that is received prior to the opening hour is opened individually. When only one bid is received, the bid is opened and considered. Bids received after the opening hour are returned unopened. Proposals are evaluated for award on the basis of the method prescribed in the standard specifications (Red) book.

Bid Irregularities

The individual bid contract will specify those conditions under which a bid proposal will be considered irregular and may be rejected, and those other conditions under which a bid proposal will be considered irregular and shall be rejected.

Withdrawal of Proposal

A bidder is allowed to withdraw or revise a proposal after it has been received by the SCDOT, without any sanction leveled against him, provided the request for

²¹The submission of a bid is considered prima facie evidence that the bidder has examined carefully the site of the proposed work, the proposal, plans, specifications, supplemental specifications, special provisions and contract forms before submitting a proposal and is satisfied as to the conditions to be encountered in performing the work and as to the requirements of the plans, specifications, special provisions, and contract.

withdrawal or revision is in writing or by telegram signed by an officer of the company and is in the hands of the official indicated in the advertisement before the time and date set for the opening of bids.

Award of Contract

The award of contract, if it is awarded, is made to the lowest responsible and qualified bidder whose proposal complies with all the requirements. The award of the contract is required to be made within 30 calendar days after the opening of proposals unless otherwise specified in the special provisions. The successful bidder is notified by letter that he/she has been awarded the contract. An award is not made until all information required by the SCDOT has been received from the bidder.

The contract must be signed by the successful bidder and returned, together with satisfactory contract bonds, to the Contracts Administrator within 20 calendar days after the contract is mailed for execution. No contract can be considered effective until it has been fully executed by all parties. Failure to execute the contract and file acceptable bonds within 20 calendar days after the contract is mailed for execution will be just cause for the annulment of the award and the forfeiture of the proposal guaranty. However, extensions are provided when a contractor has valid reasons for not complying with the 20-day requirement. If the award is annulled, the proposal guaranty becomes the property of the SCDOT, not as a penalty but as liquidated damages.

5.3.3 Building Construction and Remodeling

The process for the SCDOT to procure contractors to construct buildings or renovate existing buildings is guided by the rules and procedures set forth in Chapter 6.0, *Competitive Sealed Bidding*, of the *Manual for Planning and Execution of State Prominent Improvement*. The legal authority for competitive sealed bidding originated

from the policies of the South Carolina Consolidated Procurement Code (Code). The chief procurement officer is the State Engineer, hereinafter referred to as the OSE.

Specific sections of the Code that govern competitive sealed bidding are as follows:

- Section 11-35-1520 - requiring that contracts amounting to \$25,000 or more be awarded by competitive sealed bidding except as otherwise provided in S.C. Law Section 11-35-1510.
- Section 11-35-1825 - permitting prequalification of construction bidders for unique construction in accordance with the State Engineer's Office (OSE) criteria and procedures.
- Section 11-35-3020 - requiring that all state construction contracts be awarded by competitive sealed bidding, except as otherwise provided in the code.
- Section 11-35-3030 - requiring bid security for competitive sealed bid state construction contracts in excess of \$100,000.
- Section 11-35-3030 - requiring performance bond and payment bond from contractors on state construction contracts exceeding \$100,000.
- Section 11-35-3310 - permitting indefinite delivery contracts for construction pursuant to section 11-35-3020 (Construction Services Procurement Procedures) and Section 11-35-1550 (Small Purchases).

It is the policy of the SCDOT that (a) all construction contracts be procured in strict accordance with the S.C. Consolidated Procurement Code and Regulations, and (b) construction contracts of \$25,000 and over be procured by competitive sealed bidding, except as permitted for sole source procurement. Professional services for construction shall not be procured by competitive sealed bidding. Construction contracts under \$25,000 may be procured as "small purchases."

Chapter 6.0, Subsection 6.3, defines a "construction contract" as a contract for the process of building, altering, repairing, remodeling, improving, or demolishing any public structure or building or other public improvements of any kind of any public real property

and excludes from the definition routine repair (less than \$25,000), routine maintenance, and routine operation.

The SCDOT may prequalify bidders only for projects where the construction is unique in nature as determined by the OSE. The prequalification procedure shall be under the supervision of the OSE. Only those bidders who are prequalified through the OSE prequalification procedure may submit bids for projects requiring prequalification of contractors. The determination of which bidders are prequalified, and therefore entitled to bid, is not protestable under S.C. Law Section 11-35-4210 or any other provision of the Code. Although this process is available to the SCDOT, it has never been used by the Department.

Competitive Sealed Bidding Process

Competitive Sealed Bidding Within Agency Certification

OSE Approval of IFB

The competitive sealed bidding phase of a project begins with the OSE's approval of the SE-310, Invitation for Construction Bids (IFB). All construction contracts over \$25,000 and small purchases from \$10,001 to \$25,000 are required to be advertised in the *South Carolina Business Opportunities* (SCBO), and additional advertisement is permitted and executed via the Dodge and AGC plan rooms. Advertisement is done by the OSE of the Budget Control Board. The advertisement in the SCBO is the IFB.

IFB Contents

The IFB includes, at a minimum, the following information:

- Requirements for bid security;
- Requirements for performance bond and labor and materials payment bond to be provided if a contract is awarded;
- Requirement that the contractor be licensed;

- Statement that an aggrieved bidder in connection with the solicitation may protest in accordance with Section 11-35-4210 of the Code;
- Title of project and project number;
- Description and location of project;
- Requirements for a pre-bid conference and/or site visit: indicating whether the pre-bid conference is "mandatory," "non-mandatory," or "not applicable"; date, time, and exact location. (*Note: The OSE normally requires a minimum of 14 days from the date of advertisement to the date of a mandatory pre-bid conference. The OSE recommends a minimum of 7 days from the date of advertisement to date of a non-mandatory pre-bid conference and a minimum of 12 days from the date of any type of pre-bid conference to the date for receipt of bids*);
- Bid date, time and exact location;
- Bidding documents locations and deposit (*Note: The amount of deposit required is based on the actual cost of printing. Any deposit over \$30 is refundable to those actually submitting bids and returning the bidding documents in good condition within 10 days after the bid opening.*)
- Name, address, and phone number of the Department's Architect/Engineer (A/E);
- Department's name, address, and phone number; and
- Any special information.

Pre-bid Conference

The pre-bid conferences or on-site visits provide prospective bidders with important information related to the project, contract provisions, special provisions, and other instructions to assist them in preparing responsive bids. Mandatory pre-bid conferences are only required when the project is extremely large, complex, or unusual. Only prospective bidders represented at the mandatory pre-bid conference are eligible to bid on the project. If only one bidder is present, then the pre-bid conference is canceled and a new pre-bid conference is scheduled by an addendum. The

construction documents (plans and specifications) are discussed in enough detail to insure that all prospective bidders understand the scope of the project. Valuable information discussed at the pre-bid conference may include:

- Directing attention to form SE-310 (IFB) and the fine print which specifies key documents to be submitted (i.e., bid security not less than 5% of basic bid, bonds required, compliance with state laws.)
- Directing attention to bid time, date, and place on form SE-310.
- Directing attention to AIA Document A701, *Instruction to Bidders*, Article 3.3.2. Request for substitutions must be submitted at least 10 days prior to bid date or as stipulated by the Department's A/E. Approval of substitutions are published in an addendum for use by all bidders.
- Directing attention to Article 9, Supplementary Instructions, which emphasize the following:
 - (a) Subparagraph 4.2.11, requirements for bid security;
 - (b) Paragraph 6.2 and subparagraph 9.2.11 regarding drug-free workplace; and
 - (c) Subparagraph 7.1.1, listing qualifications for a surety company.
- Discussion of items which affect the bidding procedure.
- Directing attention to form SE-330, *Standard Bid Form*, which emphasizes the following:
 - Acknowledge all addenda;
 - Base bid is to be in both words and figures;
 - Alternates are to be bid as requested;
 - Unit prices are to be established by the contractor;
 - Minimum bid holding time;
 - Schedule for completion and liquidated damages;
 - Reading aloud to bidders, the *Listing of Subcontractors* statement at the top of page BF-2;

- Alternate subcontractors listed on page BF-2A may be used for both the alternate and base bid work if the alternate is accepted;
 - Indicate that the Department may require a questionnaire to be filled out by the low bidder to determine responsibility; and
 - All bids should be signed and include Federal identification number and all licenses as requested to avoid delay in award.
- Reviewing paragraph 5.2.5 regarding substitutions of subcontractors with bidders.
 - Emphasizing the following:
 - (a) Late bids will be rejected as unresponsive;
 - (b) Bids without a bid security, if bid security is required, will be rejected as unresponsive; and
 - (c) qualified bids will be rejected as unresponsive.
 - Permitting bidders to ask any questions about the project.

Bid Postponement

The SCDOT has the authority to postpone any bid by addendum at any time prior to bid opening. An addendum postponing bid opening may be issued for the following reasons:

1. Causes beyond the control of the bidders (e.g., flood, fire, accident, weather conditions);
2. Emergency or unanticipated events that interrupt normal government operations;
3. Inadequate or ambiguous specifications cited in the IFB;
4. Revised specifications;
5. Failure of the IFB to provide for consideration of all factors of cost to the State; and
6. For other reasons, when postponement is clearly in the best interest of the State (e.g., no bidders).

Bid Opening

Bids are opened publicly at the precise time designated in the IFB in the presence of one or more witnesses. When only one bid is received, the bid will be opened and considered. Each bid that is not rejected will be opened individually. Rejected bids will be returned to bidder unread. The following information is to be read aloud and recorded on a bid tabulation:

1. Compliance with the bid security, if bid security required;
2. Acknowledgment of all addenda;
3. Base bid amount;
4. Alternate(s) bid amount(s);
5. Names of all subcontractors.

At the conclusion of the reading of the bids, the following information should be announced:

1. The date and location of posting the SE-370, *Notice of Intent to Award*;
2. A copy of the SE-370 will be mailed to all bidders submitting a bid;
3. A copy of the certified bid tabulation will be mailed to all bidders within 10 days of the bid opening;
4. On the 16th day after the posting of the notice of intent to award a contract, if no protest has been filed, the SCDOT may enter into a contract with the bidder named in the notice in accordance with the provisions of the S.C. Procurement Code and of the bid solicited; and
5. Thank all bidders.

Bid Irregularities

Subsection 6.17 of Chapter 6.0 identifies the following as bid irregularities which are subject to bid rejection.

- Late bid;

- Omission of bid security when bid security is required;
- Submission of a bid bond without a Power of Attorney;
- Bids that do not acknowledge all addenda;
- Failure to list subcontractors as required by law;
- Showing any modification(s) or exception(s) qualifying the bid;
- Failure to attend a mandatory pre-bid conference or site visit;
- Failure to bid an alternative; and
- Faxing a bid directly to the Department.

Bid Withdrawal or Correction

Prior to the time of the bid opening, any bidder may correct or withdraw his/her bid without any sanctions levied against the bidder. After bids are opened, they are irrevocable for the period specified in the contract document. No changes can be made to a bid after bids have been opened. After the bids are opened, a bidder or offerer is permitted to make a request in writing to the Chief Engineer or the procurement officer to either correct or withdraw a bid. Each written request must document the fact that the bidder's or offerer's mistake is clearly an error that will cause him/her substantial loss. A bidder will not be permitted to correct a bid mistake after the bid opening that would cause the bidder to have the low bid unless the mistake, in the judgment of the procurement officer, is clearly evident from examining the bid document – for example, extension of unit prices or errors in addition.

Negotiations After Unsuccessful Competitive Sealed Bidding

Negotiations by the SCDOT with the lowest responsible and responsive bidder after unsuccessful competitive sealed bidding is permitted in either of the following situations:

- When all of the following conditions have been met:

- Bids received pursuant to an IFB exceed available funds or were not independently reached in open competition;
 - The Chief Engineer or his designee determines in writing that time or other circumstances will not permit the delay required to resolicit competitive sealed bids; and
 - The lowest bid does not exceed available funds by an amount greater than 5% of the construction budget established for that portion of work.
- The SCDOT changes the scope of work to reduce the cost to be within the established construction budget.

Return of Bid Security

The SCDOT is required to return bid securities to bidders within 10 days after the date of the bid opening, except for the three lowest responsive and responsible bidders. Upon award of a contract, the bid securities of the three lowest bidders will be returned.

Conclusion of the Competitive Sealed Bidding Process

The SCDOT must submit the following documentation to the OSE for review and approval before it can award a contract:

- SE-380, *Request for Authority to Execute a Construction Contract*;
- SE-330, *Standard Bid Form* of low bidder;
- Bid Security of low bidder with Power of Attorney if bid security required;
- Certified bid tabulation;
- SE-370, *Notice of Intent to Award*;
- AIA Document A101, *Standard Form of Agreement between Owner and Contractor*, signed by contractor only;
- Performance Bond with Power of Attorney if bond required;
- Labor and Material Payment Bond with Power of Attorney if bond required;
- Certificate of Insurance from Contractor; and
- Certificate of insurance from Owner.

After the required waiting period, the OSE will review and return the approved copy of the SE-380 to the SCDOT.

After the SCDOT receives the approved SE-380, the SCDOT may then issue the SE-390, *Notice to Proceed*. The SCDOT should sign and deliver one copy of the

Agreement Between Owner and Contractor to the contractor with the SE-390 and that same day send a copy of the SE-390 to the OSE. The date for project commencement is established in the SE-390 and will be used for determining the date of substantial completion and liquidated damages. In addition, the SCDOT is required to send one copy of its property insurance to the contractor.

Professional Services Procurements

Professional services procurement for building construction is guided by Chapter 4 of the *Manual for Planning and Execution of State Prominent Improvements (Manual)*. Professional services, as used in Chapter 4, considers consultants related only to construction and includes the following:

- Architects, engineers, construction managers, and land surveyors;
- Planners, landscape architects, interior designers, asbestos consultants, roofing consultants, hydrologists, geologists, aerial photographers, environmentalists and other specialists; and
- Testing specialists who provide testing and balancing, air monitoring, soil testing, asbestos monitoring, materials testing, etc.

The authority for the procurement of professional services comes from the following sections of the Code.

- Section 11-35-2910 – defining architect-engineer and land surveying services as professional services.
- Section 11-35-3210(1) -- requiring that architect-engineer, construction management, and land surveying services be procured as prescribed in Section 11-35-3220 (Procurement Procedures), except as authorized by Section 11-35-1560 (Sole Source Procurement), 11-35-1570 (Emergency Procurement) and 11-35-3230 (Exception for Small Architect-Engineer and Land Surveying Services Contracts).
- Section 11-35-3220(5) -- requiring that the agency selection committee evaluate each of the persons or firms interviewed in view of their:
 - Past performance;

- Ability of professional personnel;
 - Willingness to meet time and budget requirements;
 - Location;
 - Recent, current, and projected work loads of the firm;
 - Creativity and insight related to the project; and
 - Related experience on similar projects.
- Section 11-35-3310 – allowing indefinite delivery contracts to be awarded on an as-needed basis for construction-related professional services pursuant to Sections 11-35-3220 and 11-35-3230.

There are two methods for selecting and/or procuring construction-related professional services. Projects with professional service fees of \$18,000 or less, excluding reimbursables, are procured as *Small Contracts* in accordance with Section 11-35-3230 of the Code. The selection and/or procuring of construction-related professional services for projects with fees exceeding \$18,000 are governed by Section 11-35-3220.

Selection Process for Professional Services with Fees Exceeding \$18,000

Solicitation of OSE Approval

The SCDOT is required to submit forms SE-210 and SE-220 to the OSE for approval to select and/or procure construction-related professional services when estimated fees exceed \$18,000.

Selection Committee

The SCDOT is required to establish a selection committee for the selection of architects, engineers, and land surveying services. The following procedure described the current policy; however, it is not the procedure the SCDOT uses. The policy is currently being revised. The Selection Committee is comprised of five to seven members appointed by the head of the using agency. The State Engineer recommends the following composition for the agency Selection Committee:

- Agency head or his designee (Chairman, Permanent Member);

- Board member or commissioner of the agency;
- End user of the project (Dean, Director, etc.);
- Director of agency engineering/planning;
- Director of agency physical plant; and
- Outside agency expert.

If the position recommended is not available within the agency, an alternate with a comparable position from outside the agency is selected. The State Engineer, or his designee, is invited to sit as a non-voting member on the Selection Committee and will assist as needed to ensure that the selection is made in accordance with the S.C. Consolidated Procurement Code.

Invitation for Professional Services

The Selection Committee is responsible for:

- Developing a description of the proposed project;
- Enumerating all required professional services for that project; and
- Preparing a formal invitation for persons or firms to submit information.

Advertisements

All invitations for professional services with fees over \$18,000 are required to be advertised in the *South Carolina Business Opportunities* (SCBO). Advertisements are submitted to the OSE for approval on form SE-210 before being advertised in the SCBO. SE-210 forms received by the OSE no later than noon on Thursday will, if approved by the State Engineer, normally appear in SCBO the following Monday. SE-210 forms received by the OSE no later than noon on Tuesday will, if approved by the State Engineer, normally appear in SCBO the following Thursday. Allowed time for

responses to the invitation by interested persons or firms cannot be less than 15 days after publication of the invitation.

Selection Process

The Selection Committee performs the following functions in the selection process:

- Evaluates all firms that respond to the invitation for professional services, and selects firms for interviews. Selection is based on review of all submitted materials and all information available prior to interviews. A minimum of five persons or firms must be interviewed. If fewer than five persons or firms respond, all respondents must be interviewed.
- Evaluates interviewees based on the following criteria:
 - Past performance;
 - Ability of professional personnel;
 - Willingness to meet time and budget requirements;
 - Location;
 - Recent, current, and projected work loads;
 - Creativity and insight related to the project; and
 - Related experience on similar projects.
- Prepares a written report listing the names of all persons or firms that responded to the advertisement and giving the committee's reasons for selecting those to be interviewed.
- Notifies the OSE in writing of the date and time interviews are to be held.
- Conducts interviews with selected persons/firms.
- Prepares a written report listing the names of all persons/firms interviewed. The report includes the Committee's ranking order of the persons/firms most qualified and supporting data. The report is prepared on form SE-217, *Agency Selection Committee Summary*, and includes each committee member's form SE-215, *Architect-Engineer Evaluation*.

Approval Process/Contract Negotiations

- After the Selection Committee has ranked the selected persons/firms and it is determined that the ranking order is final, written notification of the selection and ranking order is immediately sent to all persons or firms that responded to the invitation for information. Simultaneously, the agency will submit a copy of the final ranking report to the OSE.

- The SCDOT will negotiate a contract with the most qualified person or firm at a compensation which is fair and reasonable to the State. If a contract cannot be negotiated with the most qualified person/firm, then all negotiations with that entity is formally terminated in writing and cannot be resumed. Negotiations are started with the next person or firm on the ranking report, following the same procedures, until a contract is negotiated. At no time will negotiations include more than one firm.
- The Executive Director of the SCDOT or his designee submits the following to the OSE for review:
 - Form SE-220, *Professional Services Selection Approval Request*.
 - The Selection Committee's written report, listing the names of persons/firms that responded to the invitation for information and the reasons for selecting those persons/firms to be interviewed.
 - Form SE-217, *Agency Selection Committee Summary*, and supporting data and form SE-215, *Architect-Engineer Evaluation*, from each committee member.
 - A report justifying any negotiated fee in excess of the OSE recommended basic fee.
 - A copy of the tentative contract signed by the person or firm offering professional services.
- The OSE has 10 days to review the data submitted. If the OSE approves the proposal, the OSE will immediately notify the SCDOT and the selected person/firm of the award in writing and thereby authorize the SCDOT to execute a contract with the selected person/firm.
- In the event the OSE disagrees with a proposal, it may contest it by submitting the matter to the Budget Control Board for decision. In addition, the OSE must notify the SCDOT in writing of its intention to contest the ranking, and the reasons. The Board will hear the contest at its next regularly scheduled meeting subsequent to notification to the SCDOT. If the Board rules in support of the OSE, the SCDOT must submit the name of another person or firm to the OSE for consideration. If the Board rules in support of the SCDOT, the Department shall be notified in writing and thereby authorized to execute a contract with the selected person or firm.

Amendments to Professional Services Agreement

The procedures for amending professional services agreements are as follows:

- The agency must submit form SE-260, *Professional Services Agreement Request*, to the OSE for approval prior to authorizing the work related to the amendment when the amendment exceeds the agency's construction certification amount.
- If the amendment is less than the agency's construction certification amount, the SCDOT submits form SE-260 for acknowledgment.
- The agency should negotiate fees for a change in scope, using good procurement practices in keeping with the terms of the original agreement.

Selection Process for Small Contracts for Professional Services

Small contracts for professional services are defined as total fees of \$18,000 or less, excluding reimbursables. Authorized reimbursables include expenses incurred for long-distance phone calls, postage, reproduction of documents for bidding and construction, authorized travel, and actual charges paid by the A/E for permits securing approval from authorities having jurisdiction over the project. The SCDOT must submit all requests for selection approval of small contracts for professional services to the OSE on form SE-230. The SCDOT must certify the following on the SE-230:

- That direct negotiation and selection was based on:
 1. The nature of the project;
 2. The location of the consultant services within a reasonable distance;
 3. The capability of the consultant to produce the required services within a reasonable time;
 4. Past performance; and
 5. Ability to meet project budget requirements.
- That during the 24 months immediately preceding the date of the SE-230, the SCDOT has not paid fees to the person or firm selected for small contracts in excess of \$54,000, excluding reimbursables.

The SCDOT must attach to the SE-230 a tentative contract signed by the person or firm offering professional services. The SCDOT cannot sign the contract nor authorize work to begin until the SE-230 is approved by the State Engineer.

Amendments to small contracts for professional services agreements are permitted in accordance with the following:

- The agency must submit form SE-260, *Professional Services Agreement Request*, to the OSE for approval prior to authorizing the work related to the amendment when the amendment causes the total fee of a "Small Contract" to exceed \$18,000, regardless of the amendment amount. All subsequent amendments to that contract must be submitted to the OSE for approval.
- If the amendment is less than the agency's construction certification amount, form SE-260 is submitted for acknowledgment.
- The agency should negotiate fees for a change in scope, using good procurement practices in keeping with the terms of the original agreement.

Emergency Procurement of Professional Services

Section 11-35-3210 permits construction-related professional services to be procured in an emergency in accordance with Section 11-35-1570, *Emergency Procurement*. Emergency procurements may be made only when there exists an immediate threat to public health, welfare, critical economy and efficiency, or safety under emergency situations.

Professional services procured during an emergency must be limited to those services necessary to meet the emergency and must be authorized by the head of the purchasing agency or his/her designee, who must report all emergency procurements for construction-related professional services to the OSE on form MMO #103, *Justification for Emergency Procurement*. A written determination on the basis for the emergency and for the selection of the particular contractor must be included in the contract file.

Indefinite Delivery Contracts (IDC) for Professional Services

Indefinite delivery contracts (IDCs) are defined as contracts for professional services that are procured on an as-needed basis with limitations on fees and time.

IDC with Total Fees of \$18,000 and Over

- A/Es are selected as previously described in this chapter under *Selection Process for Professional Services with Fees Exceeding \$18,000*.
- Total fees for each IDC must not exceed \$200,000, excluding reimbursables. The fee for an individual project must not exceed \$100,000, excluding reimbursables.
- Time limitations for each IDC must not exceed two years.
- Requests for approval of each IDC must be submitted to the OSE on form SE-220. If more than one person or firm is selected and approved to offer the same type of professional service based on the Invitation for Professional Services, the agency must submit a SE-220 for each person or firm selected.
- The OSE must approve the A/E selection for each IDC and must approve a draft contract prior to the agency executing a final agreement with the A/E, and prior to the agency authorizing the A/E to do work.
- After approval of the IDC by the State Engineer, the agency can execute contracts and authorize the A/E to do work without further approval from the State Engineer. All contracts are negotiated within the recommended fee guidelines.

IDC Procured as "Small Contracts"

A/Es are selected as previously described in *Selection Process for Small Contracts for Professional Services*.

- Total fees for each IDC must not exceed \$18,000, excluding reimbursables. Total fees paid to each person or firm must not exceed \$54,000 in the preceding 24 months.
- Time limitations for each IDC must not exceed two years.
- Requests for approval for each IDC must be submitted to the OSE on form SE-230.

- The OSE must approve the A/E selection for each IDC and must approve a draft contract prior to the agency executing a final agreement with the A/E, and prior to the agency authorizing the A/E to do work.
- After approval of the IDC by the State Engineer, the agency can execute contracts and authorize the A/E to do work without further approval from the State Engineer. All contracts should be negotiated within the recommended fee guidelines.

5.4 Office of Compliance

In January 1985, the responsibility for administering the DBE program was moved from the Division of Personnel to the Division of Construction with the creation of the Office of Compliance. The Director of Compliance reported directly to the State Highway Engineer until 1989, when the Office of Compliance received autonomy, with the Director of Compliance reporting directly to the Executive Director. Also, in 1988, the Special Assistant to Minority Affairs was created to coordinate the functions between the Division of Construction, the Office of Compliance, and the public, regarding DBE/WBE issues. Effective March 1995, as a result of the internal reorganization of the SCDOT, the Director of Compliance reports to the special Executive Assistant to the Director. The Director of Compliance has been delegated responsibilities for Civil Rights activities relative to Title VI, DBE, and external EEO Contract Compliance. The Director is responsible for the supervision of personnel in the Office of Compliance and serves as the DBE Liaison Officer.

Duties and Responsibilities

The duties and responsibilities of the Director of the Office of Compliance (DOC) are outlined in the *Disadvantaged Business Enterprise Program Manual, 1995*. The DOC is responsible for:

- Developing, managing, and implementing the DBE program on a day-to-day basis.
- Carrying out technical assistance activities for DBEs and the Department personnel involved in implementing the DBE/WBE Plan.
- Supervising the investigation of alleged abuses occurring on project sites during construction.
- Disseminating information on available business opportunities so that DBEs/WBEs are provided an equitable opportunity to bid on projects through mechanisms such as:
 - ensuring statewide advertisement of projects to be let in the news media at least 30 days prior to receiving bids. Advertisements are to include the location and a brief description of the work involved.
 - mailing to all qualified contractors and/or certified DBEs/WBEs, at least 20 days prior to receiving bids, a listing of quantities and description of the project including location and type of construction.
 - making proposals available through the Contract Administrator's Office, or by receiving orders for proposals by mail at any time after the advertisement is published until and including the Monday preceding the bid letting on Tuesday (two Tuesdays before the third Thursday of each month).
 - providing for a listing of available certified disadvantaged contractors to be included in each proposal made available by the Contract Administrator.
 - providing by mail information relative to availability of bonding institutions, technical assistance, and available financing.
- Developing a DBE/WBE Directory and:
 - ensuring that the certification application process is administered in accordance with 49 CFR, Part 23, amended.
 - rendering final determinations on certification requests.
- Maintaining records and furnishing necessary reports.
- Developing a directory of South Carolina banks owned and controlled by disadvantaged persons or women.

- Coordinating with appropriate Department units in carrying out the DBE program.
- Reviewing and approving the DBE Affirmative Action Program of subrecipients, contractors, and subcontractors.
- Updating the list of DBEs/WBEs annually, including the address, location, and work specialty of each firm.

Based on the interviews conducted with OC staff, and analysis of data pertaining to the functioning of the OC, it is very possible that the current level of reporting is insufficient to protect the interests of lightly capitalized subcontractors. For example, changes and deletions of DBE subcontractors on a federal aid project are continually happening during the life of the contract. The only way to conduct an accurate evaluation of a project is through the unreceived payment report. However, the number of steps required to obtain needed data to adequately track all DBE subcontractors on a project, including second and third tier subs, prohibits doing a unreceived payment report while maintaining the daily workload. As the consultant's survey of businesses indicates (see Exhibit 7-1 in Chapter 7.0), a significant percentage of DBEs are subject to cash flow problems, which late payments from primes will aggravate.

DBE Directory

The Office of Compliance is responsible for developing and making available a directory of certified DBEs to aid in the identification of DBEs/WBEs with the capabilities relevant to general contract items and to particular solicitations. This process was first initiated during 1975 in response to the issuance of transmittal 164 which implements 23 U.S.C. 315. As of March 1994, the DBE Directory lists 154 firms, including their

areas of specialty.²² The DBE Directory is included in each proposal for projects to be let for contract award.

Certification Process

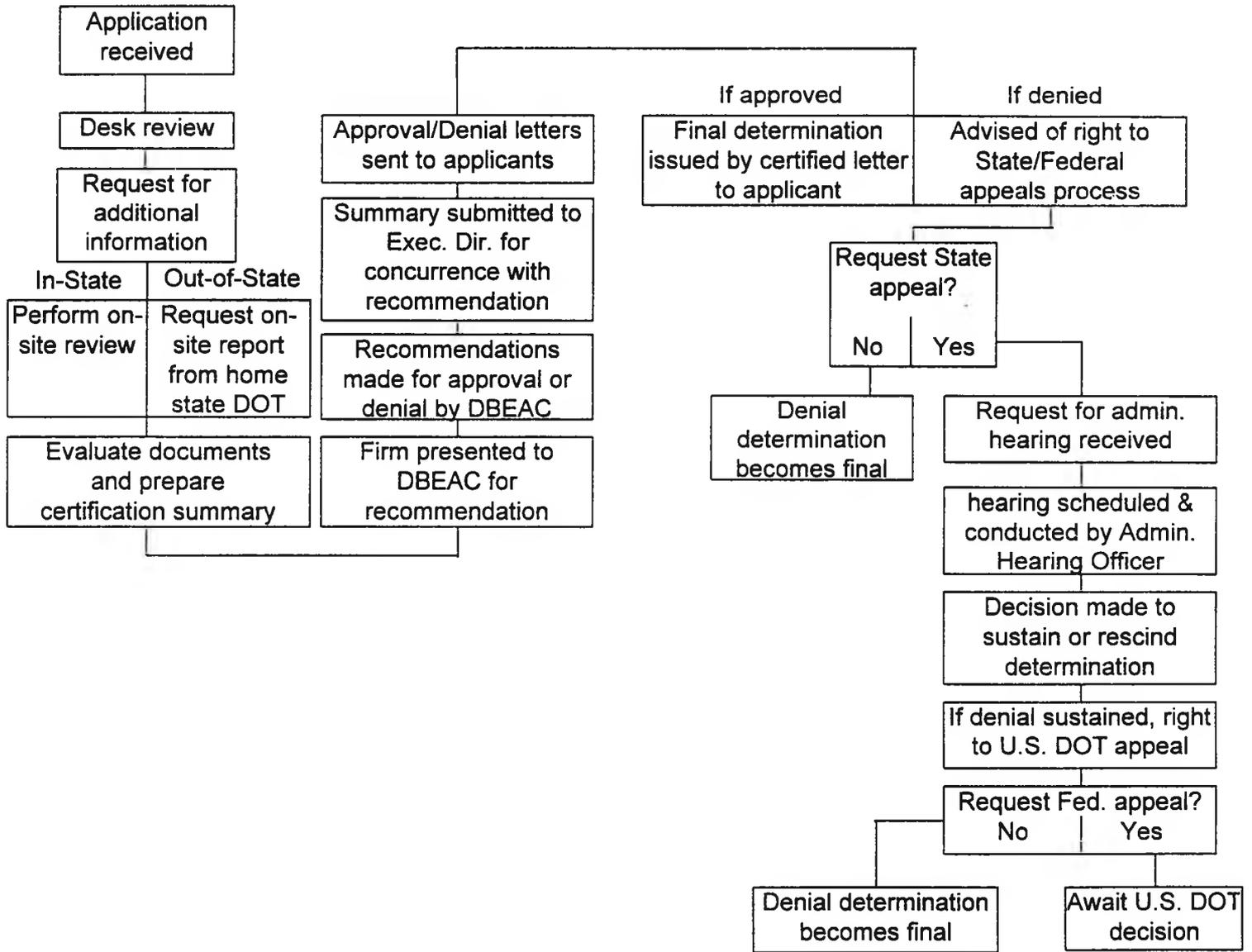
The Office of Compliance (OC) is responsible for ensuring that the DBE program benefits only firms owned and controlled by disadvantaged individuals. The *Disadvantaged Business Enterprise Program Manual, 1995 (Manual)* specifies that the OC is responsible for ensuring that the certification application process is administered in accordance with 49 CFR, Part 23 and for rendering final determinations on certification requests. Up until 1989, the OC did render final determinations on certification requests. However, since 1989, the role of the OC in the certification process has been strictly one of reviewing applications and passing on recommendations of the Disadvantaged Business Enterprise Advisory Committee (DBEAC) to the Executive Director.²³ The OC no longer performs the role or has the authority to *render final determinations on certification requests* as specified in the *Manual*. At present, the steps involved in the certification process (presented in Exhibit 5-3) are as follows:

- Step 1: The OC provides each firm requesting DBE/WBE certification status a Certification Eligibility Application, including an Affidavit and a request for additional information.

²²South Carolina Department of Transportation, *Disadvantaged Business Enterprise Program Manual, 1995*. p.19. The Manual is up-dated annually.

²³The DBEAC (Committee) was created in 1987. The members are appointed by the Executive Director and its Chairman is elected by the Committee. The Committee consists of representatives from the Construction Division, the Governor's Office of Small and Minority Business Assistance (OSMBA) and the public sector. The Director of Compliance and a Department attorney serve in an advisory capacity to the Committee. Prior to 1989, the Director of Compliance was the Chairman of the DBEAC.

**EXHIBIT 5-3
DISADVANTAGED BUSINESS ENTERPRISE
CERTIFICATION APPLICATION PROCESS**



Step 2: The certification affidavit and supporting documentation provided by the applicant is evaluated by the OC in accordance with the certification eligibility requirements of 49 CFR, Part 23, as amended and a file is assembled and signed in on the Certification Request Log sheet.

If the information provided by the applicant is incomplete, the applicant is notified by a "letter of intent" to close the file in 15 days from the date of the letter unless the required documentation is received at the OC. The letter must be signed by the DOC. In the event the request is met within the 15 days, the application is processed as usual. Upon receipt of all pertinent information, the OC schedules a meeting for each firm's request for certification to be reviewed by DBEAC. All information must be received no later than 21 calendar days prior to the date of the DBEAC meeting.

If the applicant fails to respond within the specified time frame, the application process is discontinued and the file is closed. A letter of confirmation, signed by the DOC, is mailed to the applicant stating the following:

- Advising that the file has been closed;
- Explaining why the file was closed;
- Explaining how to re-open the original file, if desired; and
- Explaining how to reapply, if desired.

Step 3. If the applicant does not meet the established criteria, the OC prepares a memorandum to that effect to the Chairman/DBEAC detailing the area(s) in which the applicant fails to meet SCDOT certification requirements. In most cases, the OC will conduct an on-site review and interview the principal(s) of the business to discuss the supporting documentation and to gather additional data concerning the business operation and the role of individuals in the business enterprise. The OC prepares an investigative memorandum of the findings for submission to the Chairman/DBEAC. In addition, the OC will also present an oral summary to the DBEAC at a regularly scheduled meeting.

If the application is complete and all investigations complete, a memorandum detailing the evaluation findings is prepared for submission to the

Chairman/DBEAC. The applicant is notified of the time, date and place of the scheduled meeting and invited to attend.

- Step 4: It is the responsibility of OC to introduce the applicant to the DBEAC. The OC will provide each DBEAC member with a written summary on each firm on the agenda prior to the meeting, so that the members can be prepared to make a recommendation on the day of the meeting. A brief oral summary of facts is presented by a OC staff member. The DBEAC reviews application, supporting documentation and evaluations submitted by the OC. If the Chairman does not concur with the results of the evaluation by OC, he has the discretion to direct that additional action be taken on the application for a thorough review and analysis and a full investigation (including an audit). If additional information is needed by the DBEAC, the firm is re-presented to the DBEAC after the additional information is received by the OC. In the instance where applicant fails to meet the basic criteria for certification, the Chairman will prepare a recommendation along with a memorandum clearly setting forth the areas of non-conformity for submittal to the Executive Director for concurrence/non-concurrence with the recommendation. If the request for certification is approved, the Chairman prepares a recommendation for submittal to the Executive Director. The DOC provides a summary of the DBEAC meeting including recommendations and DBEAC memoranda to the Executive Director.
- Step 5: The final certification determination is made by the Executive Director. The Executive Director either approves or disapproves the recommendation of the DBEAC.²⁴
- Step 6: The applicant is notified in writing via certified mail of the final determination made by the SCDOT within 21

²⁴Once the recommendation by the DBEAC (DBEAC Meeting Summary Report) is submitted to the Executive Director for action, there is no formal specified time within which he must make his approval or disapproval. The time between submittal of recommendations to the Executive Director and action taken by him can be long or short depending on the issues surrounding the case. The Executive Director can overturn the recommendation to deny certification by the DBEAC.

calendar days after the date of presentation to the DBEAC.

If the applicant is denied certification, he/she may:

- Request a hearing²⁵ in accordance with provisions of the SC Code of Resolution 63-704(H) & (I), (J) & (K).
- Appeal to U.S. DOT within 180 days of receipt of the letter of denial if the applicant feels the firm was wrongly denied certification and that no error in interpretation has been made.
- Accept the final determination made by SCDOT. Firms denied certification may reapply for certification after one year from the date of the letter of denial.

Step 7: The decision by the federal appeal process is final.

Allegations of Politicization

The SCDOT is charged with the responsibility of ensuring that the DBE Program benefits only firms owned and controlled by disadvantaged individuals. In the view of some, however, changes in the certification process since 1989 have allowed it to become embroiled in the political process. In 1989, with passage of the State set-aside/goals DBE program into law by the General Assembly, DBEs were granted a five percent participation goal and WBEs another five percent participation goal. Also at this time, there was an effort to strengthen the enforcement of STURAA of 1987. So there was a lot at stake, and women were presumed to be socially and economically disadvantaged.

Up until 1989, the DOC was Chairman of the DBEAC as prescribed in the *Rules of Operation* developed during its inception. The section *Membership and Term of*

²⁵The hearing process regarding denial of certification became effective when the regulations for the SCDOT DBE State set-aside program were adopted by the Department on December 19, 1991 and became effective on June 26, 1992. Prior to SCDOT promulgating regulations for the State set-aside, there was no appeals process.

Service of the Disadvantaged Business Enterprise Advisory Committee: Rules of Operation states as follows: "The DBEAC will be composed of the Director, Office of Compliance, as Chairman, construction and/or contracting officers from within SCDHPT, representatives from minority and/or women business associations, representative(s) from the Governor's Office and representatives from the public."²⁶ While the Executive Director had the authority to appoint and remove committee members, "In all instances, however, the DBEAC Chairmanship will be the Director of Compliance Programs."²⁷ However, in 1989 the rules were changed and the DOC was removed as Chairman by the Executive Director. Instead, the Chairman was selected by the DBEAC. Since that time, the role of the Executive Director has increased and the role of the DBEAC has decreased in final determination of certification. A DBEAC member very familiar with the DBEAC since its inception describes the impact of the politicization of the process as follows:

We had this Executive Director for the first since my involvement with the Committee, gosh the Committee has to go back to 1987, from his desk, not understanding 49 CFR at all, because it is not something that an Executive Director would get involved in, actually look at a recommendation that the Committee had made and determine that we had made the wrong decision in a case and overturn the recommendation. That actually set the precedent for a number of what the Department likes to call "gray area firms" to come in. If the Committee had not made the determination that the Department felt like it wanted, then the Executive Director having the final say, would overturn our recommendation.

So, what happened then, was that the Legislature enacted the set-aside for minority businesses. And it also said that the Department would promulgate regulations to administer the program. As a result, the Department put into its regulations that it would have an automatic appeals process for any firm that was not certified. This firm would not bring in any new information or would not go into a hearing examiner's room and say

²⁶SCDHPT, Disadvantaged Business Enterprise Advisory Committee: Rules of Operation. p. 22. (undated).

²⁷Ibid., p. 23.

that they misunderstood this information or they did not fairly evaluate this information. They were automatically granted an appeal. Which primarily said that "if the Committee wouldn't certify me, I'll go through the appeals process and I'll get a hearing examiner that has absolutely less knowledge and less experience in certification than that Committee does and I'll appeal to his sympathy." And so it's a sympathetic hearing that we're going to now. In addition to the Executive Director making overturns, now we've got a hearing examiner. So if a female would go in and cry and say that "My family business is going down the tubes now because this Committee won't allow my husband who was formerly involved in the business to continue to work" for her. "Now that I've taken over. I'm in charge of every thing." Although "I was a housewife 15 years prior to this, or for the last 15 years." All of a sudden "I'm a business head. I'm the one who can run this business and bring it back." The Committee just did not understand that. It has bought some sympathy and we have had a number of our cases overturned as a result. And even in cases where the hearing examiner may have seen things the same as the Committee, then it gets an opportunity to go back to the Director again for another final blessing. Again, there has been an overturn or two there.

However, it is by no means clear that the current process actually favors any particular minority. Analysis of the SCDOT's DBE Update Reports to FHWA for FY 1991/92 through FY 1993/94 indicate that the percentage of denials for certification of DBEs was far less than that of WBEs – three percent for DBEs and 20 percent for WBEs in FY 1991/92; five percent for DBEs and 15 percent for WBEs in FY 1992/93; and two percent for DBEs and seven percent for WBEs in FY 1993/94. However, the analysis of certification approvals for that same period indicate that the percentage of *approvals* for DBEs was also less than that of WBEs, except for FY 1991/92 – 13 percent for DBEs and six percent for WBEs in FY 1991/92; 20 percent for DBEs and 23 percent for WBEs in FY 1992/93; 21 percent for DBEs and 24 percent for WBEs in FY 1993/94. The DBE report for FY 1987/88 through FY 1989/90 provided the total number of firms certified without any detailed data, making further analysis impossible. The DBE/WBE Update for FY 1990/91 did not contain the total number of certification requests for DBEs and WBEs separately, and therefore a comparative analysis by percentages was not possible. There were twice as many WBEs denied certification

in FY 1990/91 than DBEs, 16 versus 7, respectively. The narrative in the report indicates a continued increase in the number of DBE applications and an increase in the number of certification denials that fiscal year. We conclude that the available evidence does not support allegations of favoritism, and that the current appears to produce reasonably evenhanded results.

Recertification Process

In order to remain certified in the SCDOT DBE program, certified firms must go through the process of recertification prior to their first anniversary date or one (1) year after previous certification. It is the firm's responsibility to express interest in recertification and not necessarily wait to hear from the OC. The steps involved in the process for recertification are as follows:

- Step 1: The OC provides the certified firm written notification within 45 to 60 days prior to expiration, giving the expiration date of current certification, and requesting the pertinent information required for recertification.
- Step 2: If additional information is needed, the OC will make the request either in writing or by telephone. If there are any changes in management, ownership, or operation of the firm since the last certification, the firm must complete a new Eligibility Certification Application form indicating only those areas where changes apply. An Affidavit must be completed and provided with the updated form. If an updated form is not necessary, a new Affidavit must be signed and notarized and returned to the OC.
- Step 3: Once all requested information is received by the OC, the firm is re-presented to the DBEAC and the normal procedures for proposed recommendations and final determinations are followed. The OC may inform other contractors with past business relationships with the firm requesting recertification of the recertification meeting with the DBEAC and ask for their comments relating to the firm.

Over the past three fiscal years, FY 1991/92 through FY 1993/94, the number of DBEs and WBEs requesting recertification has remained constant, averaging 59 for DBEs and 34 for WBEs, with a 98 percent approval rate for DBEs and a 99 percent approval rate for WBEs.

Decertification Process

In instances where decertification actions on firms becomes necessary, the OC will conduct a preliminary investigation to determine if there are grounds to substantiate allegations of wrongdoing or abuse of program requirements. Examples that might require investigating include:

- Reckless disregard of program guidelines.
- Attempts to mislead the SCDOT relative to the commercial usefulness of functions performed or purported to be performed by certified firms.
- Failure to cooperate in providing information necessary to conduct complete and thorough compliance reviews.
- Providing false information on the certification/recertification application or any other related document.
- Participating in acts of conspiracy, fraud and/or deception in regards to any activities relating to the Department's program.
- Changes in the business entity to the extent that the business is no longer owned and controlled by eligible person(s) as required under the regulations, and the SCDOT has not been notified accordingly.
- The firm's failure to submit a new affidavit and/or related documents as required for recertification, or fails to permit inquiries of bonding companies, banking institutions, credit agencies, contractors, and clients to ascertain the firm's certification eligibility;
- A business that is not financially responsible; and
- A firm that is no longer an ongoing business entity.

The steps in the process for decertification are as follows:

- Step 1: A preliminary investigation is conducted by the OC when questions of impropriety or the need to decertify arise.
- Step 2: The findings of the preliminary investigation are presented to the DBEAC. If the irregularities are verified, decertification action is sought, pursuant to 25A S.C. Code Ann. Regs. 63-706 (Supp. 1993).
- Step 3: The Department informs the firm in writing by Certified Mail, or hand delivery, of the facts which warrants decertification and/or revocation. The written Notice also informs the firm of its right to request an administrative hearing (pursuant to the State Administrative Procedures Act), and states that the decertification and/or revocation will become final if no written request for a hearing is filed with the Office of Compliance within 15 days of the firm's receipt of the Notice.
- Step 4: If the firm fails to respond to the Notice within 15 days, the decertification and/or revocation is made final. If the firm does respond within 15 days and requests a hearing, the hearing is conducted by a three-member panel or hearing officer appointed by the Executive Director. The panel or hearing officer reveals findings of fact and conclusions of law and forwards them to the Executive Director, along with the record and a recommendation.
- Step 5: The Executive Director reviews the record and makes the final agency decision.

During the decertification process, the firm's certification remains intact until the process is completed and the firm is properly notified by the SCDOT. Decertified firms may reapply for certification one year after the date on which the final determination was rendered. Firms reapplying must complete a new DBE Eligibility Certification packet and submit all requested documentation.

5.4.1 Technical Assistance

Both the federal and State DBE programs require that technical assistance be provided to certified DBE and WBE firms. The technical assistance provided to DBEs dates back to the inception of the program in 1977. The SCDHPT contracted with a consultant to provide supportive services to certified DBE/WBEs in the areas of management, estimating, and accounting with the specific purpose of strengthening the business development of the certified firms and their potential growth. The same types of technical assistance have been provided by private consultants since program inception except for a short period between 1987-1990, when the assistance was provided in house.

In addition to the supportive services contract, the SCDOT contracts with the Small Business Development Center to conduct the SCDOT's Entrepreneurial Development Institute Program (EDIP). The EDIP is designed to enhance the development of DBEs by complementing the SCDOT's other programs that impact the growth and success of certified women- and minority-owned businesses in South Carolina; that improve the capacity development of these business enterprises; that address other problems encountered by women and minorities in the highway construction industry; and that support, in general, the SCDOT's development program.

Effectiveness

Interviews with the consultants contracted by the SCDOT suggest that the programs, though providing a needed service, have not succeeded in accomplishing the goals of the DBE program.

The focus of the supportive services does not include mandatory training. Only the set-aside program requires mandatory continuing education. The training provided through EDIP and the supportive services provided through the Supportive Services

contract do not provide work for the DBEs/WBEs in the program. There are different groups at different levels in the DBE programs. The technical assistance provided in the DBE programs needs to focus on the needs of the various groups in the program. The supportive services program that currently exists is developed as though there is only one group of contractors and all are at the same level of development. There is no diversity in the approach. Comments by the supportive services consultant speak directly to the issue:

It is time for supportive service to make a change, but supportive services cannot do anything unless we recognize that for every business key things are needed, contracts, work, financing, management and technical assistance skills. What we have here is a very lopsided entity. We have even found the banks to soften up and are willing to put up money. We haven't seen any change from the highway department's perspective. That to me has chilled the minority contractors more than anything going.

The issue of training needs more investigation. The issue is not just what type of training; but includes the question – "When is it best to provide training to get the maximum return on the investment?". Interviews with the consultant for the EDIP component suggests that timing is an issue and the type of training offered is the other issue. He stated:

Supportive Services tried to put on training every month, on weekends in the past. They have gone into...they've had them in Charleston and Columbia and it is quite difficult to get the contractor's there. They have been disappointed a thousand times and they brought in accountants, they've brought in all kinds of people in these training workshops. And that having been done over the years and all the supportive services have training sessions in them. It has dwindled to being a frustrating process to get any feeling that anybody is going to show. So the one day thing, once a month didn't work very well or they had some problems. There are other ways maybe but at least that we tried. The EDI was another way of looking at it rather than try to do every month was concentrated once or twice a year. They started off with once a year and it's a pretty good chore to pull people in there and keep them for four or five days as well. Um we have discussed many times to do it more than one time during the year and actually it's up to us, whether we want to try it once, several ... we can have two or three days at a time or whatever it is and spread it. ... the question we have learned is most training in South Carolina needs to be done in the

winter months, when it's cold. ... that's the time, is the best year of the time for your training, during January and February; ... You wait to March, April, April for sure is too late, March is getting too late. People are getting ready to start pavement again and therefore you're out of the time frame. So training is an issue. We need training. We need good training. I think the challenge on us now is to improve our training to the point that folks would want to come who need to come. ... but we got to do something and I think that's what we're trying to do with our program now is to try to upgrade what it is.

The new financial program, the Transportation Contract Financing Program (TCFP), has just been initiated and is too new to evaluate. TCFP was two years in the making. Since, financing and cash flow can make or break a small business, the new financing efforts may alleviate some of the financial pressures faced by DBEs.

5.5 Summary of Findings

As the length of this chapter itself attests, the procurement policies and procedures governing the activities of the SCDOT are numerous and complex and have been made more so by the demands of DBE inclusion.

- The current bonding requirements for participating in SCDOT contracts are more often an impediment to DBE firms than to non-DBE firms. In our survey of contractors, 26 percent of Black firms and 14 percent of WBEs indicated that bonding requirements prevented them from receiving a SCDOT prime contract, as opposed to only 8 percent of non-DBEs who made this response. Similarly, while 20 percent of Black firms reported that bonding requirements kept them from working for the SCDOT or as subcontractors, only 3 percent of non-DBEs reported bonding to be a problem.
- Since a contracting firm's capacity rating determines the maximum contract on which it may bid, the current practice of issuing large contracts prevents most DBE firms from bidding on SCDOT projects as prime contractors and relegates them to subcontractor status. Since 1980, only 2.45 percent of the Department's prime contract dollars have gone to DBE firms. The average contract dollar amount awarded over the 14 years of the study period to non-DBE firms is \$850,000 versus \$250,000 to DBE firms.

- The current prequalification requirements, which classify and rate firms on the basis of "a verified showing of experience, net liquid assets, responsibility, record, and available equipment," prevent many DBE firms from becoming eligible to bid on SCDOT work. According to our survey, DBE firms are young (thus less experienced) and smaller (thus less well capitalized) than non-DBE firms. They have fewer licenses, fewer employees, and lower bonding capacity. Furthermore, they reported their average largest prior contract to be under \$500,000, as opposed to the average largest prior contract of non-DBE firms of more than \$500,000.
- The state set-aside program which designates that 10 percent of the contracts be set-aside for DBE firms has limited the dollar participation of DBEs in state contracting. Although DBEs have received over 15 percent of the state contracts awarded (60 of 391 contracts), they have received only 4 percent of the dollars (\$9,351,630.36 of \$194,970,863.13).

Note: This analysis is based on a special tabulation of state highway and bridge construction contracts and awarded dollars.

- The current payment tracking system is not being used to monitor compliance of prime to sub payments on an ongoing basis. Hence, some subs are not paid on time, contributing to their cash flow problems. In our survey, 26 percent of Black subcontractors and 9 percent of white female subcontractors cited inadequate capital as a reason for not doing more work for the SCDOT. Only three percent of non-DBE subcontractors reported a similar problem.
- The Director of Compliance as Liaison Officer does not report directly to the Executive Director as prescribed in 49 CFR 23.45(b).

6.0 DBE FINDINGS

6.0 DBE FINDINGS

During the 14-year study period, 1980 to 1993, the SCDOT used the competitive bidding process to contract with a total of 534 firms. These 534 firms received 3,612 contracts totalling \$2,942,528,502.91. The SCDOT allocated these dollars as shown in Exhibit 6-1 below.

EXHIBIT 6-1
TOTAL DOLLARS EXPENDED BY SCDOT
1980 through 1993

Construction Category	Number of Individual Firms	Number of Contracts	Dollars
Highway and Bridge Preconstruction	49	109	\$170,639,162.19
Highway and Bridge Construction	238	3,097	\$2,744,172,996.63
Building Construction and Renovation	247	406	\$27,716,344.09
TOTAL	534	3,612	\$2,942,528,502.91

To determine if, and to what extent, disparity existed in the contracting practices of the South Carolina Department of Transportation, the data were taken through several levels of analyses, as described earlier in Chapter 3, *Methodology*. In summary, the methodology consisted of: (1) determining which counties would constitute the relevant market areas for the three construction categories being reviewed; (2) determining the utilization of DBE and non-DBE businesses for the three construction categories in terms of both dollars and number of contracts; (3) comparing results of the utilization analyses with the availability of minority and women-owned firms in each market area to determine levels of disparity between availability and actual utilization.

As explained earlier in Chapter 3, the unit of analysis for the market area determination was the county; however, all South Carolina counties were combined as

a single unit, since SCDOT contracts with firms from all over the state. The counties constituting the market area were selected from all U.S. counties from which SCDOT contracted construction related services. The relevant market area was defined as the state of South Carolina plus those counties from outside of the state which, together with the state of South Carolina, represented at least 75 percent of the total contract dollars.

Market area analyses were conducted only on prime contractor information. Once the relevant market area was determined, the analyses of subcontractor data were performed on contracts that were associated with primes in that market area.

A disparity study must then examine the DBE utilization within the relevant market area determined in the first step of the analysis. For the purposes of this study MGT developed separate utilization analyses for prime contractors and subcontractors in each of the three construction categories. Subcontractor information was analyzed and presented as a percentage of the total dollars that were let to prime contractors by DBE category.

The next step, determining the availability of DBEs that are both willing and able to perform construction or preconstruction services for the SCDOT, is crucial to the analysis of disparity. These figures are used for comparison with utilization levels in order to determine disparity. Availability of DBEs is measured as the percentage they comprise of the total firms in the relevant market area.

MGT based the availability information on *SMOBE* and *SWOBE* data, *County Business Patterns* data, and special tabulations from the Census Bureau, as described in Chapter 3, *Methodology*, page 3-13. For purposes of this study, numbers for counties outside South Carolina were weighted to estimate the number of firms; South Carolina data were not weighted.

Finally, to determine the disparity findings for each DBE group within a specific construction category, MGT compared the utilization of each DBE group by type of construction with its availability within the relevant market area. The disparity index was calculated to measure the level of disparity for the three categories of construction services. A DBE group is considered underutilized if the disparity index is less than 100, and overutilized if the index is greater than 100. An index of exactly 100 indicates parity between utilization and availability. Any index under 80 is considered substantial underutilization. The disparity analysis was conducted to determine whether underutilization exists for any of the minority-owned or women-owned firms in each of the construction categories.

The findings from these analyses are presented in this chapter. (An additional analysis was conducted for highway and bridge construction contracts that are funded by federal dollars only. These findings are shown in Appendix J.)

6.1 Highway and Bridge Preconstruction

The SCDOT awarded a total of 109 highway and bridge preconstruction contracts to 49 firms during the study period. These contracts totalled \$170,639,162.19, of which DBEs received no dollars (0.00%) as prime contractors and \$292,847.38 (0.20%) as subcontractors.

As shown in Exhibit 6-2, firms located in the state of South Carolina, combined with three out-of state counties, captured 85.32% of the total preconstruction dollars paid to prime contractors, thereby defining the relevant market area. The 27 firms in the defined relevant market area (of the total of 49 individual firms) received 69 of the 109 contracts awarded throughout the 14-year period.

In conducting the analyses for preconstruction, MGT used dollars paid rather than dollar amount of contracts awarded as the unit of measure because of the volume of open ended contracts that are awarded in this area. Exhibit 6-3 presents the dollar amounts and percentages of total dollars paid to the four minority categories and to white males. Finding is described below:

- DBE firms within the relevant market area were not utilized by SCDOT as prime contractors on preconstruction projects at any time during the 14-year study period. However, SCDOT did contract during this time period with one Hispanic firm and one woman-owned firm that were not located within the relevant market area.

Exhibit 6-4 shows the utilization of DBE subcontractors on preconstruction contracts. Of the \$145,588,380.58 paid to prime contractors, 0.20%, or \$292,847.38, was paid to DBE subcontractors. The findings are as follows:

- Hispanic, Asian, and Native American-owned firms were not hired as subcontractors on preconstruction projects at any time from January 1, 1980, through December 31, 1993.
- Women-owned firms were utilized only in 1987, when they received \$38,957.38. A single contract was given to one firm and represents 1.05% of the total dollars paid to prime contractors in 1987, or 0.03% of total preconstruction dollars for all 14 years.

EXHIBIT 6-2

RELEVANT MARKET AREA DETERMINATION
BY DOLLAR AMOUNT BY COUNTY
FOR CALENDAR YEARS 1980 THROUGH 1993

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

HIGHWAY AND BRIDGE PRECONSTRUCTION

COUNTY	# OF CONTRACTS	% OF CONTRACTS	# OF INDIVIDUAL FIRMS	% OF FIRMS	DOLLARS 1/	% OF DOLLARS	CUMULATIVE % 2/
ALL COUNTIES IN SOUTH CAROLINA	50	45.87%	17	34.89%	\$70,016,239.15	41.03%	41.03%
FULTON (GA)	8	7.34%	4	8.16%	\$33,591,140.95	19.89%	60.72%
FAIRFAX (VA)	2	1.83%	1	2.04%	\$23,276,407.00	13.64%	74.36%
WAKE (NC)	9	8.26%	5	10.20%	\$18,704,593.48	10.96%	85.32% 3/
MECKLENBURG (NC)	8	7.34%	2	4.08%	\$8,608,190.25	5.04%	90.36%
DADE (FL)	10	9.17%	2	4.08%	\$6,237,031.71	3.66%	94.02%
HINDS (MS)	2	1.83%	1	2.04%	\$2,298,086.00	1.35%	95.37%
DE KALB (GA)	5	4.59%	3	6.12%	\$2,240,222.41	1.31%	96.68%
HENRICO (VA)	1	0.92%	1	2.04%	\$1,973,873.95	1.16%	97.84%
CANADIAN FIRM	1	0.92%	1	2.04%	\$1,021,947.41	0.60%	98.43%
SAINT LOUIS (CITY) (MO)	1	0.92%	1	2.04%	\$594,938.00	0.35%	98.78%
JEFFERSON (KY)	1	0.92%	1	2.04%	\$570,479.21	0.33%	99.12%
NUECES (TX)	2	1.83%	1	2.04%	\$439,671.06	0.26%	99.38%
MADISON (AL)	1	0.92%	1	2.04%	\$338,804.97	0.20%	99.57%
HENNEPIN (MN)	1	0.92%	1	2.04%	\$213,994.76	0.13%	99.70%
LARIMER (CO)	1	0.92%	1	2.04%	\$163,886.00	0.10%	99.80%
YORK (VA)	1	0.92%	1	2.04%	\$148,440.00	0.09%	99.88%
ESSEX (NJ)	1	0.92%	1	2.04%	\$83,000.00	0.05%	99.93%
GWINNETT (GA)	1	0.92%	1	2.04%	\$83,000.00	0.05%	99.98%
JOHNSTON (NC)	1	0.92%	1	2.04%	\$26,339.06	0.02%	99.99%
TRAVIS (TX)	1	0.92%	1	2.04%	\$5,455.00	0.00%	100.00%
DAVIDSON (TN)	1	0.92%	1	2.04%	\$3,421.82	0.00%	100.00%
TOTAL	109	100.00%	49	100.00%	\$170,639,162.19	100.00%	100.00%

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1/ Dollars represent final amounts paid on preconstruction contracts.

2/ Cumulative total of % of dollars in market area.

3/ Counties above the line are included in the relevant market area.

EXHIBIT 6-3

UTILIZATION OF PRIME CONTRACTOR FIRMS BY DBE CLASSIFICATION
 WITHIN THE RELEVANT MARKET AREA
 FOR CALENDAR YEARS 1980 THROUGH 1993

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION DISPARITY STUDY
 HIGHWAY AND BRIDGE PRECONSTRUCTION

CALENDAR YEAR	BLACK		HISPANIC		ASIAN & NATIVE AMERICAN		WOMEN (WHITE ONLY)		WHITE MEN		TOTAL	
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%
1980	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$77,580.00	100.00%	\$77,580.00	100.00%
1981	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%
1982	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$19,758,313.64	100.00%	\$19,758,313.64	100.00%
1983	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$273,128.10	100.00%	\$273,128.10	100.00%
1984	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$19,461,775.31	100.00%	\$19,461,775.31	100.00%
1985	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$476,064.05	100.00%	\$476,064.05	100.00%
1986	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$35,988,291.12	100.00%	\$35,988,291.12	100.00%
1987	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$3,704,703.74	100.00%	\$3,704,703.74	100.00%
1988	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$711,388.00	100.00%	\$711,388.00	100.00%
1989	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$9,468,013.65	100.00%	\$9,468,013.65	100.00%
1990	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$10,126,167.88	100.00%	\$10,126,167.88	100.00%
1991	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$5,918,788.57	100.00%	\$5,918,788.57	100.00%
1992	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$15,258,867.98	100.00%	\$15,258,867.98	100.00%
1993	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$24,365,298.54	100.00%	\$24,365,298.54	100.00%
TOTAL	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$145,588,380.58	100.00%	\$145,588,380.58	100.00%

EXHIBIT 6-4

UTILIZATION OF **SUBCONTRACTOR** FIRMS BY DBE CLASSIFICATION
 WITHIN THE RELEVANT MARKET AREA 1/
 FOR CALENDAR YEARS 1980 THROUGH 1993

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION DISPARITY STUDY
HIGHWAY AND BRIDGE PRECONSTRUCTION

CALENDAR YEAR	BLACK		HISPANIC		ASIAN & NATIVE AMERICAN		WOMEN (WHITE ONLY)		TOTAL PRIME DOLLARS 2/	
	\$	%	\$	%	\$	%	\$	%	\$	%
1980	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$77,580.00	0.00%
1981	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%
1982	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$19,758,313.64	0.00%
1983	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$273,128.10	0.00%
1984	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$19,461,775.31	0.00%
1985	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$476,064.05	0.00%
1986	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$35,988,291.12	0.00%
1987	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$38,957.38	1.05%	\$3,704,703.74	1.05%
1988	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$711,388.00	0.00%
1989	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$9,468,013.65	0.00%
1990	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$10,126,167.88	0.00%
1991	\$253,890.00	4.29%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$5,918,788.57	4.29%
1992	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$15,258,867.98	0.00%
1993	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$24,365,298.54	0.00%
TOTAL	\$253,890.00	0.17%	\$0.00	0.00%	\$0.00	0.00%	\$38,957.38	0.03%	\$145,588,380.58	0.20%

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1/ Only those subcontracts associated with prime contractors located within the relevant market area are included in the analysis.

2/ Percentages represent percent of total prime contractor dollars paid to subcontractors.

- Black owned-firms were paid \$253,890.00 in 1991 for a single contract let to one firm. For the sum of the 14-year period Black-owned firms received 0.17% of total dollars paid to preconstruction prime contractors.

The total number and estimated weighted number of preconstruction firms in the SCDOT relevant market area for 1980 through 1993 by DBE classification are summarized in Exhibit 6-5. The findings are presented below.

- White men-owned firms comprised the largest percentage of available firms in all of the relevant years. Their availability ranged from a low of 82.34% in 1980 to a high of 87.53% in 1993, showing a consistent increase each year.
- Women-owned firms showed the highest availability among DBEs. Their greatest availability was in 1980 at 9.75%, but they experienced a decrease in each subsequent year.

Exhibits 6-6 through 6-9 show the disparity findings for each DBE classification for the SCDOT's payments on highway and bridge preconstruction contracts to prime contractors and on award amounts to subcontractors. A review of Exhibit 6-6 reveals the following for prime contractors:

- The SCDOT did not award any preconstruction contracts in 1981.
- DBE firms were not utilized at any time during the 14 years; therefore, the disparity indices reflect substantial underutilization across the years.
- White men-owned firms show overutilization in 13 of the 14 years reviewed, with disparity indices exceeding 100.00 in each of these years. In the one year that shows no utilization, preconstruction dollars were not paid to any firms. The summary for the years produces a disparity index of 115.54, showing overutilization for the study period.

Exhibit 6-8 and 6-9 present the findings for highway and bridge preconstruction subcontractors.

EXHIBIT 6-5

AVAILABILITY OF PRECONSTRUCTION FIRMS BY DBE CLASSIFICATION

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

WITHIN THE RELEVANT MARKET AREA 1/
CALENDAR YEARS 1980 THROUGH 1993

YEAR 6/	BLACK 2/		HISPANIC 2/		ASIAN AND NATIVE AMERICAN 2/		WOMEN 3/		WHITE MEN 4/		TOTAL FIRMS 5/
	#	%	#	%	#	%	#	%	#	%	#
	1980	112	7.14%	6	0.36%	7	0.42%	153	9.75%	1,293	82.34%
1981	124	6.28%	7	0.36%	9	0.46%	181	9.18%	1,647	83.71%	1,968
1982	135	5.72%	9	0.37%	12	0.49%	208	8.81%	2,002	84.61%	2,366
1983	147	5.31%	10	0.37%	14	0.51%	236	8.54%	2,356	85.26%	2,764
1984	158	5.01%	12	0.37%	17	0.53%	264	8.35%	2,711	85.74%	3,162
1985	170	4.78%	13	0.37%	19	0.54%	292	8.19%	3,066	86.12%	3,560
1986	182	4.59%	15	0.37%	22	0.55%	319	8.07%	3,420	86.42%	3,958
1987	193	4.44%	16	0.38%	24	0.56%	347	7.97%	3,775	86.66%	4,356
1988	205	4.31%	18	0.38%	27	0.57%	375	7.88%	4,129	86.87%	4,753
1989	216	4.20%	19	0.38%	29	0.57%	402	7.81%	4,484	87.04%	5,151
1990	228	4.11%	21	0.38%	32	0.58%	430	7.75%	4,838	87.19%	5,549
1991	240	4.03%	22	0.38%	35	0.58%	458	7.70%	5,193	87.32%	5,947
1992	251	3.96%	24	0.38%	37	0.58%	486	7.65%	5,547	87.43%	6,345
1993	263	3.90%	26	0.38%	40	0.59%	513	7.61%	5,902	87.53%	6,743

NOTE: Details may not add to Total Firms due to rounding.

SOURCES OF DATA: Bureau of the Census

- o Survey of Minority Owned Businesses (SMOBE) - 1982 & 1987 (Blacks, Hispanic, Asian Americans, American Indians and Other Minorities)
- o Survey of Minority Owned Businesses (SMOBE) - 1982 & 1987

- 1/ Calculated by multiplying the number of available firms in each county in the relevant market area, excluding South Carolina, to its pre-assigned weight and adding the product(s) to the total number of available firms in South Carolina. Pre-assigned weights by county were:
Fulton, GA 20.52%
Fairfax, VA 14.10%
Wake, NC 9.20%
- 2/ Minority Men and Women firms are included in their respective minority classifications.
- 3/ The number of 'Women' firms was estimated by subtracting the number of minority women from the census count of total women firms. According to national statistics, 'Black Women' firms comprise 48.08% of Black preconstruction firms, 'Hispanic Women' firms comprise 35.72% of Hispanic preconstruction firms, and 'Other Minority Women' firms comprise 36.17% of other minority preconstruction firms.
- 4/ 'Total Firms' derived from Bureau of Census and County Business Patterns. Because the state of South Carolina made up the relevant market area, no weighting was applied.
- 5/ The 'off-census year' figures indicating the availability of firms are estimates. Intervals indicating low to high ranges for the estimated numbers of available firms can be calculated as follows:

$$\text{Estimated number of firms} \pm 2 \sqrt{\text{Estimated number firms}}$$

If the estimated number of firms is 25, the standard deviation would be $\sqrt{25} = 5$, and the approximate low to high estimated range of available firms would equal 25 ± 10 (15 to 35). See the methods section for additional information.

06/29/95

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**EXHIBIT 6-6
DISPARITY ANALYSIS FOR PRIME CONTRACTORS
HIGHWAY AND BRIDGE PRECONSTRUCTION**

FOR CALENDAR YEARS 1980 THROUGH 1993

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

DBE CLASSIFICATION	% OF CONTRACT DOLLARS PAID 1/	% OF AVAILABLE FIRMS 2/	DISPARITY INDEX 3/		DISPARATE IMPACT OF UTILIZATION 4/
			RANGE	MIDPOINT	
CALENDAR YEAR 1980					
BLACK	0.00%	7.14%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.36%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.42%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	9.75%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	100.00%	82.34%	111.89 - 131.00	121.45	OVERUTILIZATION
CALENDAR YEAR 1981					
BLACK	0.00%	6.28%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.36%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.46%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	9.18%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	0.00%	83.71%	0.00 - 0.00	0.00	UNDERUTILIZATION
CALENDAR YEAR 1982					
BLACK	0.00%	5.72%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.37%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.49%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	8.81%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	100.00%	84.61%	110.72 - 125.66	118.19	OVERUTILIZATION
CALENDAR YEAR 1983					
BLACK	0.00%	5.31%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.37%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.51%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	8.54%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	100.00%	85.26%	110.45 - 124.12	117.29	OVERUTILIZATION
CALENDAR YEAR 1984					
BLACK	0.00%	5.01%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.37%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.53%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	8.35%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	100.00%	85.74%	110.30 - 122.97	116.63	OVERUTILIZATION
CALENDAR YEAR 1985					
BLACK	0.00%	4.78%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.37%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.54%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	8.19%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	100.00%	86.12%	110.19 - 122.05	116.12	OVERUTILIZATION
CALENDAR YEAR 1986					
BLACK	0.00%	4.59%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.37%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.55%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	8.07%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	100.00%	86.42%	110.12 - 121.31	115.71	OVERUTILIZATION

EXHIBIT 6-6 (CONTINUED)
DISPARITY ANALYSIS FOR PRIME CONTRACTORS
HIGHWAY AND BRIDGE PRECONSTRUCTION

FOR CALENDAR YEARS 1980 THROUGH 1993

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

DBE CLASSIFICATION	% OF CONTRACT DOLLARS PAID 1/	% OF AVAILABLE FIRMS 2/	DISPARITY INDEX 3/		DISPARATE IMPACT OF UTILIZATION 4/
			RANGE	MIDPOINT	
CALENDAR YEAR 1987					
BLACK	0.00%	4.44%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.38%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.56%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	7.97%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	100.00%	86.66%	110.08 - 120.71	115.39	OVERUTILIZATION
CALENDAR YEAR 1988					
BLACK	0.00%	4.31%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.38%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.57%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	7.88%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	100.00%	86.87%	110.05 - 120.18	115.11	OVERUTILIZATION
CALENDAR YEAR 1989					
BLACK	0.00%	4.20%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.38%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.57%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	7.81%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	100.00%	87.04%	110.04 - 119.74	114.89	OVERUTILIZATION
CALENDAR YEAR 1990					
BLACK	0.00%	4.11%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.38%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.58%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	7.75%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	100.00%	87.19%	110.03 - 119.36	114.69	OVERUTILIZATION
CALENDAR YEAR 1991					
BLACK	0.00%	4.03%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.38%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.58%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	7.70%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	100.00%	87.32%	110.03 - 119.02	114.52	OVERUTILIZATION
CALENDAR YEAR 1992					
BLACK	0.00%	3.96%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.38%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.58%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	7.65%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	100.00%	87.43%	110.03 - 118.72	114.38	OVERUTILIZATION
CALENDAR YEAR 1993					
BLACK	0.00%	3.90%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.38%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.59%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	7.61%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	100.00%	87.53%	110.04 - 118.45	114.25	OVERUTILIZATION
ALL YEARS 1980-1993					
BLACK	0.00%	4.51%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.37%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.56%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	8.01%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	100.00%	86.55%	110.09 - 120.99	115.54	OVERUTILIZATION

6/28/95

PREDISP2.XLS

1/ Percent of preconstruction related contract dollars paid to firms.

2/ Percent of available firms.

3/ The midpoint is the ratio of % utilization to % availability times 100.

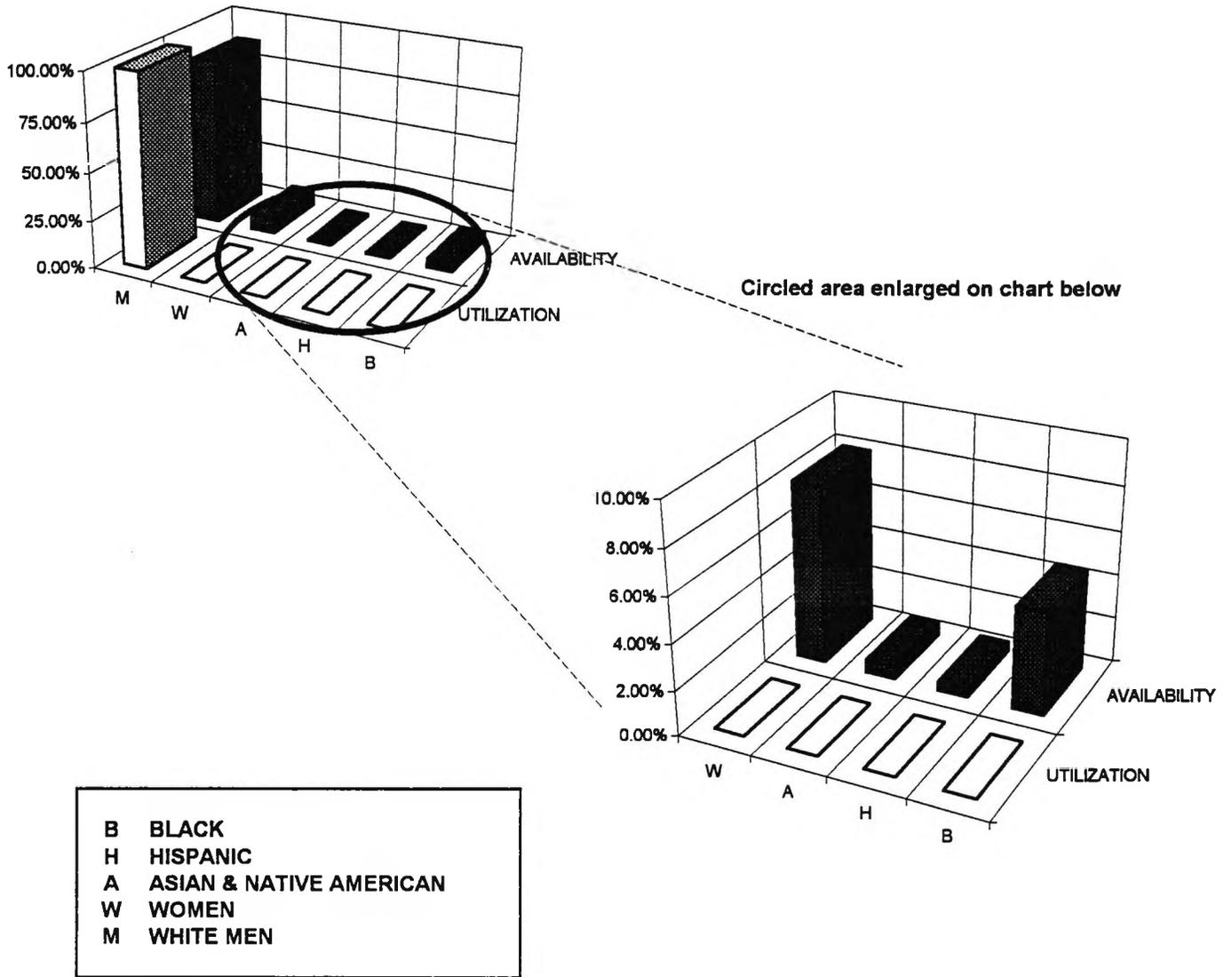
4/ A disparity index below 80.00 shows substantial level of disparity.

EXHIBIT 6-7

UTILIZATION VS. AVAILABILITY
CALENDAR YEARS 1980 THROUGH 1993

HIGHWAY AND BRIDGE PRECONSTRUCTION
FOR PRIME CONTRACTORS

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION



**EXHIBIT 6-8
DISPARITY ANALYSIS FOR SUBCONTRACTORS
HIGHWAY AND BRIDGE PRECONSTRUCTION**

FOR CALENDAR YEARS 1980 THROUGH 1993

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

DBE CLASSIFICATION	% OF CONTRACT DOLLARS PAID 1/	% OF AVAILABLE FIRMS 2/	DISPARITY INDEX 3/		DISPARATE IMPACT OF UTILIZATION 4/
			RANGE	MIDPOINT	
CALENDAR YEAR 1980					
BLACK	0.00%	7.14%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.36%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.42%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	9.75%	0.00 - 0.00	0.00	UNDERUTILIZATION
CALENDAR YEAR 1981					
BLACK	0.00%	6.28%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.36%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.46%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	9.18%	0.00 - 0.00	0.00	UNDERUTILIZATION
CALENDAR YEAR 1982					
BLACK	0.00%	5.72%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.37%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.49%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	8.81%	0.00 - 0.00	0.00	UNDERUTILIZATION
CALENDAR YEAR 1983					
BLACK	0.00%	5.31%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.37%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.51%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	8.54%	0.00 - 0.00	0.00	UNDERUTILIZATION
CALENDAR YEAR 1984					
BLACK	0.00%	5.01%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.37%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.53%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	8.35%	0.00 - 0.00	0.00	UNDERUTILIZATION
CALENDAR YEAR 1985					
BLACK	0.00%	4.78%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.37%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.54%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	8.19%	0.00 - 0.00	0.00	UNDERUTILIZATION
CALENDAR YEAR 1986					
BLACK	0.00%	4.59%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.37%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.55%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	8.07%	0.00 - 0.00	0.00	UNDERUTILIZATION

**EXHIBIT 6-8 (CONTINUED)
DISPARITY ANALYSIS FOR SUBCONTRACTORS
HIGHWAY AND BRIDGE PRECONSTRUCTION**

FOR CALENDAR YEARS 1980 THROUGH 1993

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

DBE CLASSIFICATION	% OF CONTRACT DOLLARS PAID 1/	% OF AVAILABLE FIRMS 2/	DISPARITY INDEX 3/		DISPARATE IMPACT OF UTILIZATION 4/
			RANGE	MIDPOINT	
CALENDAR YEAR 1987					
BLACK	0.00%	4.44%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.38%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.56%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	1.05%	7.97%	11.70 - 14.65	13.17	UNDERUTILIZATION
CALENDAR YEAR 1988					
BLACK	0.00%	4.31%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.38%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.57%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	7.88%	0.00 - 0.00	0.00	UNDERUTILIZATION
CALENDAR YEAR 1989					
BLACK	0.00%	4.20%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.38%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.57%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	7.81%	0.00 - 0.00	0.00	UNDERUTILIZATION
CALENDAR YEAR 1990					
BLACK	0.00%	4.11%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.38%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.58%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	7.75%	0.00 - 0.00	0.00	UNDERUTILIZATION
CALENDAR YEAR 1991					
BLACK	4.29%	4.03%	92.39 - 120.51	106.45	INCONCLUSIVE
HISPANIC	0.00%	0.38%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.58%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	7.70%	0.00 - 0.00	0.00	UNDERUTILIZATION
CALENDAR YEAR 1992					
BLACK	0.00%	3.96%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.38%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.58%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	7.65%	0.00 - 0.00	0.00	UNDERUTILIZATION
CALENDAR YEAR 1993					
BLACK	0.00%	3.90%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.38%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.59%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	7.61%	0.00 - 0.00	0.00	UNDERUTILIZATION
ALL YEARS 1980-1993					
BLACK	0.36%	4.51%	6.79 - 9.18	7.98	UNDERUTILIZATION
HISPANIC	0.00%	0.37%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.56%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.03%	8.01%	0.33 - 0.42	0.37	UNDERUTILIZATION

6/6/95

PRESDIS2.XLS

1/ Percent of preconstruction related contract dollars paid to firms.

2/ Percent of available firms.

3/ The midpoint is the ratio of % utilization to % availability times 100.

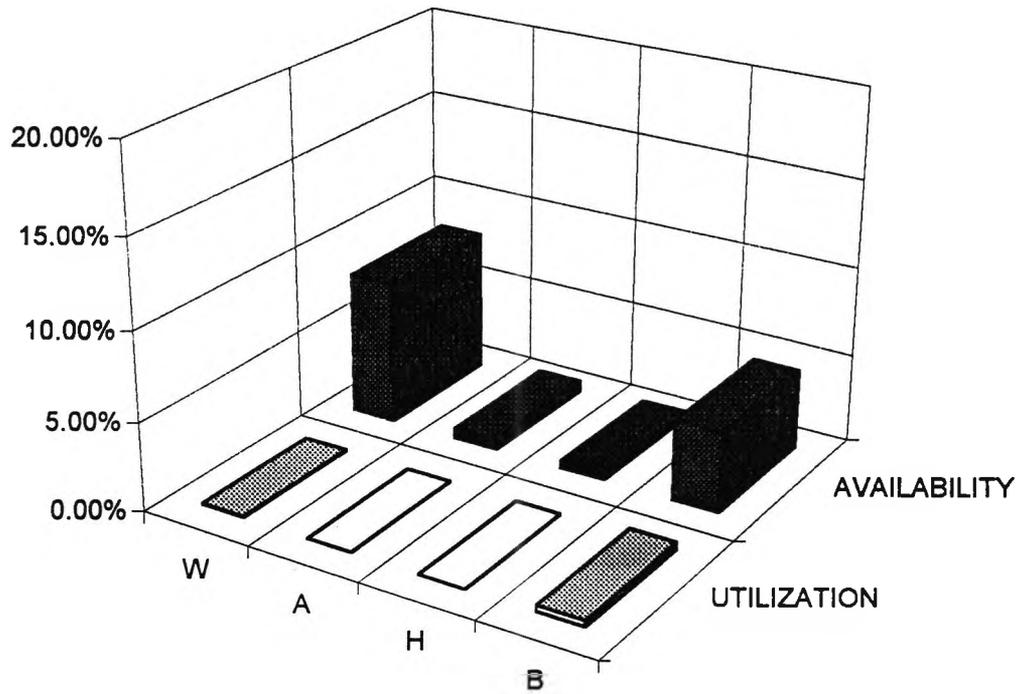
4/ A disparity index below 80.00 shows substantial level of disparity.

EXHIBIT 6-9

UTILIZATION VS. AVAILABILITY
CALENDAR YEARS 1980 THROUGH 1993

HIGHWAY AND BRIDGE PRECONSTRUCTION
FOR SUBCONTRACTORS

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION



B BLACK
H HISPANIC
A ASIAN & NATIVE AMERICAN
W WOMEN

- Black-owned firms were the only minority group utilized at any time during the study period for preconstruction subcontracts, and the award represents one contract to a single firm in 1991. Black-owned firms show substantial underutilization, with a disparity index of 7.98 for the sum of the years despite the overutilization for 1991.
- Hispanic, Asian and Native American-owned firms all reflect substantial underutilization with disparity indices of 0.00 for each year in the period.

6.2 Highway and Bridge Construction

The SCDOT awarded 3,097 highway and bridge construction contracts to 238 prime contractors during the 14-year study period. Of the \$2,744,172,996.63 spent, DBEs received \$57,270,268.87 (2.61%) as prime contractors and \$135,705,720.40 (6.17%) as subcontractors.

The total market area, shown in Exhibit 6-10, included several counties throughout the United States; however, the relevant market area (by our 75% rule) was restricted to the state of South Carolina, which alone accounted for 80.17% of the total contract dollars. Within South Carolina, 2,739 contracts were given to 152 individual firms.

The SCDOT expended the most dollars in the area of highway and bridge construction for a total of \$2,199,988,790.30 for the 14-year period. Exhibit 6-11 reflects the utilization of prime contractors for this time period. The findings are summarized below:

- Black-owned firms represented 1.81% of the total dollars awarded by SCDOT to prime contractors for highway and bridge construction contracts. Black-owned firms received their largest percentage of contracts in 1987, when they secured \$10,342,112.12, or 4.29% of the total dollars awarded for the year.

EXHIBIT 6-10

RELEVANT MARKET AREA DETERMINATION
BY DOLLAR AMOUNT BY COUNTY
FOR CALENDAR YEARS 1980 THROUGH 1993

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

HIGHWAY AND BRIDGE CONSTRUCTION

COUNTY	# OF CONTRACTS	% OF CONTRACTS	# OF INDIVIDUAL FIRMS	% OF FIRMS	DOLLARS	% OF OF DOLLARS	CUMULATIVE %
ALL COUNTIES IN SOUTH CAROLINA	2,739	88.44%	152	63.87%	\$2,199,988,790.00	80.17%	80.17%
MECKLENBURG (NC)	71	2.29%	6	2.52%	\$168,028,873.90	6.12%	86.29%
HENNEPIN (MN)	2	0.06%	2	0.84%	\$98,409,611.85	3.59%	89.88%
CALDWELL (NC)	1	0.03%	1	0.42%	\$35,776,465.90	1.30%	91.18%
JACKSON (MO)	1	0.03%	1	0.42%	\$35,002,683.75	1.28%	92.46%
JEFFERSON (LA)	1	0.03%	1	0.42%	\$32,112,048.05	1.17%	93.63%
UNION (NC)	64	2.07%	6	2.52%	\$25,706,561.17	0.94%	94.56%
ALAMANCE (NC)	10	0.32%	1	0.42%	\$20,710,824.32	0.75%	95.32%
BUNCOMBE (NC)	10	0.32%	3	1.26%	\$15,008,310.39	0.55%	95.87%
FULTON (GA)	14	0.45%	4	1.68%	\$12,839,886.18	0.47%	96.33%
RICHMOND (GA)	14	0.45%	5	2.10%	\$12,658,969.27	0.46%	96.80%
RICHMOND (NC)	21	0.68%	2	0.84%	\$8,618,374.93	0.31%	97.11%
MUSCOGEE (GA)	13	0.42%	2	0.84%	\$8,060,296.68	0.29%	97.40%
CHATHAM (GA)	2	0.06%	2	0.84%	\$7,772,148.97	0.28%	97.69%
LEE (AL)	2	0.06%	1	0.42%	\$6,751,453.37	0.25%	97.93%
GASTON (NC)	23	0.74%	3	1.26%	\$6,161,529.52	0.22%	98.16%
BOURBON (KY)	9	0.29%	1	0.42%	\$5,291,653.02	0.19%	98.35%
WILSON (NC)	1	0.03%	1	0.42%	\$4,832,890.61	0.18%	98.53%
FORSYTH (NC)	10	0.32%	1	0.42%	\$4,817,647.86	0.18%	98.70%
WASHINGTON (DC)	6	0.19%	3	1.26%	\$3,569,745.98	0.13%	98.83%
RUTHERFORD (NC)	3	0.10%	1	0.42%	\$3,417,413.76	0.12%	98.96%
ROWAN (NC)	3	0.10%	1	0.42%	\$2,348,223.22	0.09%	99.04%
HURON (OH)	7	0.23%	2	0.84%	\$2,321,223.70	0.08%	99.13%
TRAVIS (TX)	4	0.13%	1	0.42%	\$2,183,503.93	0.08%	99.21%
MC DUFFIE (GA)	2	0.06%	1	0.42%	\$2,159,008.18	0.08%	99.28%
POLK (NC)	5	0.16%	1	0.42%	\$1,893,144.64	0.07%	99.35%
KNOX (TN)	7	0.23%	1	0.42%	\$1,624,087.27	0.06%	99.41%
GALVESTON (TX)	2	0.06%	1	0.42%	\$1,412,566.35	0.05%	99.46%
CHARLES (MD)	4	0.13%	1	0.42%	\$1,313,509.60	0.05%	99.51%
ESSEX (NJ)	1	0.03%	1	0.42%	\$1,282,875.00	0.05%	99.56%
ROCKINGHAM (NC)	4	0.13%	2	0.84%	\$1,268,843.36	0.05%	99.61%
HILLSBOROUGH (FL)	4	0.13%	1	0.42%	\$899,572.44	0.03%	99.64%
CLEVELAND (NC)	4	0.13%	1	0.42%	\$883,212.95	0.03%	99.67%
GLYNN (GA)	2	0.06%	1	0.42%	\$881,809.00	0.03%	99.70%
HENRY (OH)	1	0.03%	1	0.42%	\$808,752.00	0.03%	99.73%
INGHAM (MI)	2	0.06%	1	0.42%	\$714,705.00	0.03%	99.76%

EXHIBIT 6-10 (CONTINUED)

RELEVANT MARKET AREA DETERMINATION
BY DOLLAR AMOUNT BY COUNTY
FOR CALENDAR YEARS 1980 THROUGH 1993

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

HIGHWAY AND BRIDGE CONSTRUCTION

COUNTY	# OF CONTRACTS	% OF CONTRACTS	# OF INDIVIDUAL FIRMS	% OF FIRMS	DOLLARS	% OF OF DOLLARS	CUMULATIVE % ^{1/}
MONTGOMERY (AL)	2	0.08%	1	0.42%	\$528,002.17	0.02%	99.78%
CLAY (NC)	2	0.06%	1	0.42%	\$522,519.74	0.02%	99.80%
HALL (GA)	1	0.03%	1	0.42%	\$515,073.49	0.02%	99.82%
GEAUGA (OH)	2	0.06%	1	0.42%	\$476,532.58	0.02%	99.83%
FAUQUIER (VA)	1	0.03%	1	0.42%	\$444,282.31	0.02%	99.85%
CATAWBA (NC)	2	0.06%	1	0.42%	\$428,131.99	0.02%	99.86%
BATH (KY)	1	0.03%	1	0.42%	\$396,876.07	0.01%	99.88%
MECKLENBURG (VA)	1	0.03%	1	0.42%	\$374,877.00	0.01%	99.89%
BURLINGTON (NJ)	1	0.03%	1	0.42%	\$343,255.44	0.01%	99.90%
MERCER (NJ)	1	0.03%	1	0.42%	\$295,634.28	0.01%	99.92%
MACON (NC)	2	0.06%	1	0.42%	\$278,012.28	0.01%	99.93%
HARTFORD (CT)	1	0.03%	1	0.42%	\$269,361.54	0.01%	99.94%
CLAY (MN)	2	0.06%	2	0.84%	\$266,205.65	0.01%	99.95%
CLAYTON (GA)	1	0.03%	1	0.42%	\$249,641.23	0.01%	99.95%
SANDUSKY (OH)	1	0.03%	1	0.42%	\$243,484.35	0.01%	99.96%
CASS (ND)	1	0.03%	1	0.42%	\$243,348.46	0.01%	99.97%
CUMBERLAND (NC)	1	0.03%	1	0.42%	\$189,329.94	0.01%	99.98%
GUILFORD (NC)	1	0.03%	1	0.42%	\$180,731.40	0.01%	99.99%
DAUPHIN (PA)	2	0.06%	1	0.42%	\$179,550.00	0.01%	99.99%
PROVIDENCE (RI)	1	0.03%	1	0.42%	\$139,282.20	0.01%	100.00%
WARREN (OH)	1	0.03%	1	0.42%	\$77,848.39	0.00%	100.00%
TOTAL	3,097	100.00%	238	100.00%	\$2,744,172,998.63	100.00%	

6/27/95

FINAL_MK.XLS

1/ Cumulative total of % of dollars in market area.

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

EXHIBIT 6-11

UTILIZATION OF PRIME CONTRACTOR FIRMS BY DBE CLASSIFICATION
 WITHIN THE RELEVANT MARKET AREA
 FOR CALENDAR YEARS 1980 THROUGH 1993

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION DISPARITY STUDY
 HIGHWAY AND BRIDGE CONSTRUCTION

CALENDAR YEAR	BLACK		HISPANIC		ASIAN & NATIVE AMERICAN		WOMEN (WHITE ONLY)		WHITE MEN		TOTAL	
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%
1980	\$257,017.54	0.37%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$68,882,324.63	99.63%	\$69,139,342.17	100.00%
1981	\$1,057,003.20	1.01%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$103,423,385.20	98.99%	\$104,480,388.40	100.00%
1982	\$1,384,440.84	1.36%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$100,067,237.10	98.64%	\$101,451,677.94	100.00%
1983	\$3,439,539.51	2.78%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$120,468,968.20	97.22%	\$123,908,507.71	100.00%
1984	\$1,945,825.49	1.38%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$139,436,827.60	98.62%	\$141,382,653.09	100.00%
1985	\$3,509,548.07	2.41%	\$0.00	0.00%	\$0.00	0.00%	\$979,919.07	0.67%	\$140,923,085.50	96.91%	\$145,412,552.64	100.00%
1986	\$6,976,971.72	3.34%	\$0.00	0.00%	\$0.00	0.00%	\$1,128,730.56	0.54%	\$200,582,267.40	96.12%	\$208,687,969.68	100.00%
1987	\$10,342,112.12	4.29%	\$0.00	0.00%	\$0.00	0.00%	\$2,970,066.93	1.23%	\$227,820,670.50	94.48%	\$241,132,849.55	100.00%
1988	\$1,537,159.59	0.73%	\$0.00	0.00%	\$0.00	0.00%	\$1,015,164.86	0.48%	\$207,157,546.50	98.78%	\$209,709,870.95	100.00%
1989	\$1,098,785.35	0.85%	\$0.00	0.00%	\$0.00	0.00%	\$910,944.84	0.70%	\$127,724,606.20	98.45%	\$129,734,336.39	100.00%
1990	\$2,389,771.43	1.32%	\$0.00	0.00%	\$0.00	0.00%	\$2,040,318.54	1.13%	\$176,118,235.10	97.55%	\$180,548,325.07	100.00%
1991	\$1,919,215.75	1.15%	\$0.00	0.00%	\$0.00	0.00%	\$2,423,684.27	1.46%	\$161,892,915.00	97.39%	\$166,235,815.02	100.00%
1992	\$1,741,216.97	0.81%	\$0.00	0.00%	\$0.00	0.00%	\$2,830,114.86	1.32%	\$210,176,629.70	97.87%	\$214,747,961.53	100.00%
1993	\$2,127,135.84	1.30%	\$0.00	0.00%	\$0.00	0.00%	\$3,245,581.52	1.99%	\$158,043,822.80	96.71%	\$163,416,540.16	100.00%
TOTAL	\$39,725,743.42	1.81%	\$0.00	0.00%	\$0.00	0.00%	\$17,544,525.45	0.80%	\$2,142,718,521.43	97.40%	\$2,199,988,790.30	100.00%

- Firms owned by Hispanics, Asians, and Native Americans received no highway or bridge construction contract dollars as prime contractors during the period.
- Firms owned by women were utilized in nine of the 14 years for total receipts of \$17,544,525.45, or 0.80% of the total dollars awarded to prime contractors for this type of work. In 1993 they received their highest utilization level of \$3,245,581.52, or 1.99% of the contract dollars awarded for that year.
- Firms owned by white men received \$2,142,718,521.43 or 97.40% of all prime contract dollars awarded for bridge and highway construction work during the 14-year period.

Exhibit 6-12 presents the dollar amounts and percentages of prime dollars awarded to DBE subcontractors for highway and bridge construction projects. DBE subcontractors received \$135,705,720.30, or 6.17% of the dollars awarded to prime contractors. The findings for this category are listed in the following paragraphs:

- Black-owned firms received a total of \$69,236,049.61 or 3.15% of prime dollars for the 14-year period. They received the largest share of the subcontractor dollars awarded among the DBE firms.
- Hispanic-owned firms were utilized in 12 of the 14 years. Their highest level of utilization was in 1993, when they received \$987,442.85, or 0.60% of the total prime dollars. Over the 14 years their utilization was at 0.15% of the prime contract dollars awarded to DBE subcontractors.
- Asian-owned and Native American-owned firms had varying levels of utilization of total prime dollars from a low in 1991 of 0.12% to a high in 1986 of 2.87%. For all the years combined, they received \$25,777,772.45 or 1.17% of total prime dollars awarded for this type of work.
- Women-owned firms had their highest level of utilization in 1989, when they received \$5,912,679.81 or 4.56% of the prime dollars. For the total 14-year period they received \$37,416,223.68, or 1.70% of the amount awarded to prime contractors.

The availability of highway and bridge construction firms is presented in Exhibit 6-13. The findings are as follows:

EXHIBIT 6-12

UTILIZATION OF SUBCONTRACTOR FIRMS BY DBE CLASSIFICATION
 WITHIN THE RELEVANT MARKET AREA 1/
 FOR CALENDAR YEARS 1980 THROUGH 1993

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION DISPARITY STUDY
 HIGHWAY AND BRIDGE CONSTRUCTION

CALENDAR YEAR	BLACK		HISPANIC		ASIAN & NATIVE AMERICAN		WOMEN (WHITE ONLY)		TOTAL PRIME DOLLARS 2/	
	\$	%	\$	%	\$	%	\$	%	\$	%
1980	\$562,066.40	0.81%	\$0.00	0.00%	\$141,000.00	0.20%	\$321,275.34	0.46%	\$69,139,342.17	1.48%
1981	\$1,775,527.79	1.70%	\$16,999.94	0.02%	\$1,339,494.00	1.28%	\$197,137.49	0.19%	\$104,480,388.40	3.19%
1982	\$1,830,627.62	1.80%	\$3,175.20	0.00%	\$371,726.88	0.37%	\$492,786.61	0.49%	\$101,451,677.94	2.66%
1983	\$4,196,162.12	3.39%	\$24,700.00	0.02%	\$1,151,943.32	0.93%	\$632,284.80	0.51%	\$123,908,507.71	4.85%
1984	\$5,556,086.03	3.93%	\$4,746.74	0.00%	\$2,071,482.32	1.47%	\$906,054.19	0.64%	\$141,382,653.09	6.04%
1985	\$4,961,844.66	3.41%	\$128,819.00	0.09%	\$2,371,916.32	1.63%	\$1,074,177.09	0.74%	\$145,412,552.64	5.87%
1986	\$4,920,037.97	2.36%	\$317,727.46	0.15%	\$5,987,240.59	2.87%	\$2,331,024.66	1.12%	\$208,687,969.68	6.50%
1987	\$7,075,159.49	2.93%	\$247,605.00	0.10%	\$3,838,160.21	1.59%	\$3,753,306.63	1.56%	\$241,132,849.55	6.19%
1988	\$14,747,578.80	7.03%	\$0.00	0.00%	\$947,546.78	0.45%	\$3,216,082.93	1.53%	\$209,709,870.95	9.02%
1989	\$2,340,438.15	1.80%	\$378,708.44	0.29%	\$2,892,576.97	2.23%	\$5,912,679.81	4.56%	\$129,734,336.39	8.88%
1990	\$7,728,493.44	4.28%	\$346,568.08	0.19%	\$521,377.09	0.29%	\$4,107,610.27	2.28%	\$180,548,325.07	7.04%
1991	\$2,797,929.12	1.68%	\$49,731.08	0.03%	\$200,256.74	0.12%	\$4,517,775.68	2.72%	\$166,235,815.02	4.55%
1992	\$4,528,250.46	2.11%	\$769,450.86	0.36%	\$2,035,117.04	0.95%	\$7,093,985.32	3.30%	\$214,747,961.53	6.72%
1993	\$6,215,847.56	3.80%	\$987,442.85	0.60%	\$1,907,934.19	1.17%	\$2,860,042.86	1.75%	\$163,416,540.16	7.33%
TOTAL	\$69,236,049.61	3.15%	\$3,275,674.65	0.15%	\$25,777,772.45	1.17%	\$37,416,223.68	1.70%	\$2,199,988,790.30	6.17%

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1/ Only those subcontracts associated with prime contractors located within the relevant market area are included in the analysis.
 2/ Percentages represent percent of total prime contractor dollars awarded to subcontractors.

EXHIBIT 6-13

AVAILABILITY OF HIGHWAY AND BRIDGE CONSTRUCTION FIRMS BY DBE CLASSIFICATION

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

WITHIN THE RELEVANT MARKET AREA
CALENDAR YEARS 1980 THROUGH 1993

YEAR 5/	BLACK 1/		HISPANIC 1/		ASIAN AND NATIVE AMERICAN 1/		WOMEN 2/		WHITE MEN 3/		TOTAL FIRMS 4/
	#	%	#	%	#	%	#	%	#	%	#
1980	184	5.21%	2	0.07%	0	0.00%	72	2.04%	3,271	92.69%	3,529
1981	247	6.20%	4	0.11%	2	0.06%	134	3.36%	3,591	90.27%	3,978
1982	310	6.99%	6	0.14%	5	0.11%	195	4.41%	3,912	88.35%	4,427
1983	372	7.64%	8	0.17%	7	0.15%	257	5.26%	4,232	86.78%	4,876
1984	435	8.18%	10	0.19%	10	0.18%	318	5.98%	4,552	85.48%	5,325
1985	498	8.63%	12	0.21%	12	0.21%	380	6.58%	4,872	84.37%	5,774
1986	561	9.02%	14	0.23%	15	0.23%	441	7.09%	5,192	83.43%	6,223
1987	624	9.35%	16	0.24%	17	0.25%	503	7.54%	5,512	82.61%	6,672
1988	687	9.65%	18	0.25%	19	0.27%	565	7.93%	5,832	81.90%	7,121
1989	750	9.90%	20	0.26%	22	0.29%	626	8.27%	6,152	81.27%	7,570
1990	813	10.13%	22	0.27%	24	0.30%	688	8.58%	6,472	80.71%	8,019
1991	876	10.34%	24	0.28%	27	0.32%	749	8.85%	6,792	80.21%	8,468
1992	938	10.52%	26	0.29%	29	0.33%	811	9.09%	7,112	79.77%	8,917
1993	1,001	10.69%	28	0.30%	32	0.34%	872	9.32%	7,433	79.36%	9,366

NOTE: Details may not add to Total Firms due to rounding.

SOURCES OF DATA: Bureau of the Census

- o Survey of Minority Owned Businesses (SMOBE) - 1982 & 1987 (Blacks, Hispanics, Asian Americans, American Indians and Other Minorities)
- o Survey of Women Owned Businesses - 1982 & 1987.

- 1/ Minority Men and Women firms are included in their respective minority classifications.
- 2/ The number of 'Women' firms was estimated by subtracting the number of minority women from the census count of total women firms. According to national statistics, 'Black Women' firms comprise 6.28% of Black construction firms, 'Hispanic Women' firms comprise 4.37% of Hispanic construction firms, and 'Other Minority Women' firms comprise 7.38% of other minority construction firms.
- 3/ Number of 'White Men' firms derived by subtracting all 'M/WBE' firms from 'Total Firms.'
- 4/ 'Total Firms' derived from Bureau of Census and County Business Patterns. Because the state of South Carolina made up the relevant market area, no weighting was applied.
- 5/ The 'off-census year' figures indicating the availability of firms are estimates. Intervals indicating low to high ranges for the estimated numbers of available firms can be calculated as follows:

$$\text{Estimated number of firms} \pm 2 \sqrt{\text{Estimated number of firms}}$$

If the estimated number of firms is 25, the standard deviation would be $\sqrt{25} = 5$, and the approximate low to high estimated range of available firms would equal 25 ± 10 (15 to 35). See the methods section for additional information.

06/29/95

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- White men-owned firms constitute the largest percentage of all highway and bridge construction firms available in the relevant market area over the 14 years. Their availability ranged from a high of 92.69% in 1980 to a low of 79.36% in 1993.
- Black-owned firms represent the most available of the DBE classifications during the study period. Their availability increased from 5.21% in 1980 to 10.69% in 1993.
- Hispanic-owned and Asian or Native American-owned firms were by far the least available of all firms, with 1993 availabilities of 0.30% and 0.34% respectively. In 1980 there were no Asian or Native American firms with which the SCDOT could contract for highway and bridge construction projects.

Exhibits 6-14 through Exhibit 6-17 present the disparity findings for total dollars awarded to highway and bridge construction prime contractors and subcontractors.

- Black-owned firms show substantial underutilization for each of the years studied, with disparity indices ranging from 7.10 in 1980 to 45.88 in 1987. The disparity index for the 14-year period of 19.70 indicates substantial underutilization.
- Hispanic and Asian/Native American firms were not utilized at any time during the years studied; therefore the 14-year index for both DBE groups is 0.00.
- Women-owned firms were substantially underutilized throughout the study period. The 14-year summary shows a disparity index of 10.93, which reflects substantial underutilization.
- White men-owned firms were overutilized in each of the 14 years studied, with disparity indices ranging from a low of 107.49 to a high of 122.69. The summary of activity for the study period for white men-owned firms produces a disparity index of 117.34, showing that they were overutilized during the study period.

Exhibits 6-16 and 6-17 present the disparity analysis for subcontractors.

- Black-owned firms were underutilized as subcontractors in each of the years, with disparity indices ranging from 15.55 to 72.85. The sum of the 14 years shows substantial underutilization for the entire period, with an index of 34.28.
- Hispanic-owned firms show a large fluctuation in disparity levels, ranging from 0.00 in 1980 to 200.00 in 1993. The 14-year summary produces an index of 65.22, which reflects substantial underutilization.

**EXHIBIT 6-14
DISPARITY ANALYSIS FOR PRIME CONTRACTORS
HIGHWAY AND BRIDGE CONSTRUCTION**

FOR CALENDAR YEARS 1980 THROUGH 1993

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

DBE CLASSIFICATION	% OF CONTRACT DOLLARS PAID 1/	% OF AVAILABLE FIRMS 2/	DISPARITY INDEX 3/		DISPARATE IMPACT OF UTILIZATION 4/
			RANGE	MIDPOINT	
CALENDAR YEAR 1980					
BLACK	0.37%	5.21%	6.03 - 8.18	7.10	UNDERUTILIZATION
HISPANIC	0.00%	0.07%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.00%	100.00 - 100.00	100.00	PARITY
WOMEN	0.00%	2.04%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	99.63%	92.69%	102.17 - 112.80	107.49	OVERUTILIZATION
CALENDAR YEAR 1981					
BLACK	1.01%	6.20%	14.15 - 18.43	16.29	UNDERUTILIZATION
HISPANIC	0.00%	0.11%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.06%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	3.36%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	98.99%	90.27%	104.48 - 114.84	109.66	OVERUTILIZATION
CALENDAR YEAR 1982					
BLACK	1.36%	6.99%	17.16 - 21.75	19.46	UNDERUTILIZATION
HISPANIC	0.00%	0.14%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.11%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	4.41%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	98.64%	88.35%	106.60 - 116.70	111.65	OVERUTILIZATION
CALENDAR YEAR 1983					
BLACK	2.78%	7.64%	32.45 - 40.32	36.39	UNDERUTILIZATION
HISPANIC	0.00%	0.17%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.15%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	5.26%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	97.22%	86.78%	107.16 - 116.90	112.03	OVERUTILIZATION
CALENDAR YEAR 1984					
BLACK	1.38%	8.18%	15.18 - 18.56	16.87	UNDERUTILIZATION
HISPANIC	0.00%	0.19%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.18%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	5.98%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	98.62%	85.48%	110.54 - 120.21	115.37	OVERUTILIZATION
CALENDAR YEAR 1985					
BLACK	2.41%	8.63%	25.30 - 30.55	27.93	UNDERUTILIZATION
HISPANIC	0.00%	0.21%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.21%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.67%	6.58%	9.10 - 11.27	10.18	UNDERUTILIZATION
WHITE MEN	96.91%	84.37%	110.21 - 119.52	114.86	OVERUTILIZATION
CALENDAR YEAR 1986					
BLACK	3.34%	9.02%	33.74 - 40.32	37.03	UNDERUTILIZATION
HISPANIC	0.00%	0.23%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.23%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.54%	7.09%	6.86 - 8.37	7.62	UNDERUTILIZATION
WHITE MEN	96.12%	83.43%	110.69 - 119.73	115.21	OVERUTILIZATION

EXHIBIT 6-14 (CONTINUED)
DISPARITY ANALYSIS FOR PRIME CONTRACTORS
HIGHWAY AND BRIDGE CONSTRUCTION

FOR CALENDAR YEARS 1980 THROUGH 1993

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

DBE CLASSIFICATION	% OF CONTRACT DOLLARS 1/	% OF AVAILABLE FIRMS 2/	DISPARITY INDEX 3/		DISPARATE IMPACT OF UTILIZATION 4/
			RANGE	MIDPOINT	
CALENDAR YEAR 1987					
BLACK	4.29%	9.35%	42.01 - 49.76	45.88	UNDERUTILIZATION
HISPANIC	0.00%	0.24%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.25%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	1.23%	7.54%	14.79 - 17.83	16.31	UNDERUTILIZATION
WHITE MEN	94.48%	82.61%	110.01 - 118.73	114.37	OVERUTILIZATION
CALENDAR YEAR 1988					
BLACK	0.73%	9.65%	6.95 - 8.18	7.56	UNDERUTILIZATION
HISPANIC	0.00%	0.25%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.27%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.48%	7.93%	5.52 - 6.59	6.05	UNDERUTILIZATION
WHITE MEN	98.78%	81.90%	116.14 - 125.08	120.61	OVERUTILIZATION
CALENDAR YEAR 1989					
BLACK	0.85%	9.90%	7.92 - 9.25	8.59	UNDERUTILIZATION
HISPANIC	0.00%	0.26%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.29%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.70%	8.27%	7.75 - 9.17	8.46	UNDERUTILIZATION
WHITE MEN	98.45%	81.27%	116.77 - 125.51	121.14	OVERUTILIZATION
CALENDAR YEAR 1990					
BLACK	1.32%	10.13%	12.06 - 14.00	13.03	UNDERUTILIZATION
HISPANIC	0.00%	0.27%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.30%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	1.13%	8.58%	12.11 - 14.23	13.17	UNDERUTILIZATION
WHITE MEN	97.55%	80.71%	116.56 - 125.17	120.86	OVERUTILIZATION
CALENDAR YEAR 1991					
BLACK	1.15%	10.34%	10.32 - 11.92	11.12	UNDERUTILIZATION
HISPANIC	0.00%	0.28%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.32%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	1.46%	8.85%	15.23 - 17.77	16.50	UNDERUTILIZATION
WHITE MEN	97.39%	80.21%	117.25 - 125.59	121.42	OVERUTILIZATION
CALENDAR YEAR 1992					
BLACK	0.81%	10.52%	7.16 - 8.23	7.70	UNDERUTILIZATION
HISPANIC	0.00%	0.29%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.33%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	1.32%	9.09%	13.45 - 15.60	14.52	UNDERUTILIZATION
WHITE MEN	97.87%	79.77%	118.58 - 126.81	122.69	OVERUTILIZATION
CALENDAR YEAR 1993					
BLACK	1.30%	10.69%	11.34 - 12.98	12.16	UNDERUTILIZATION
HISPANIC	0.00%	0.30%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.34%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	1.99%	9.32%	19.82 - 22.88	21.35	UNDERUTILIZATION
WHITE MEN	96.71%	79.36%	117.86 - 125.86	121.86	OVERUTILIZATION
ALL YEARS 1980-1993					
BLACK	1.81%	9.19%	17.99 - 21.40	19.70	UNDERUTILIZATION
HISPANIC	0.00%	0.23%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.24%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.80%	7.32%	9.88 - 11.98	10.93	UNDERUTILIZATION
WHITE MEN	97.40%	83.01%	112.80 - 121.87	117.34	OVERUTILIZATION

6/26/95

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1/ Percent of highway and bridge construction related contract dollars paid to firms.

2/ Percent of available firms.

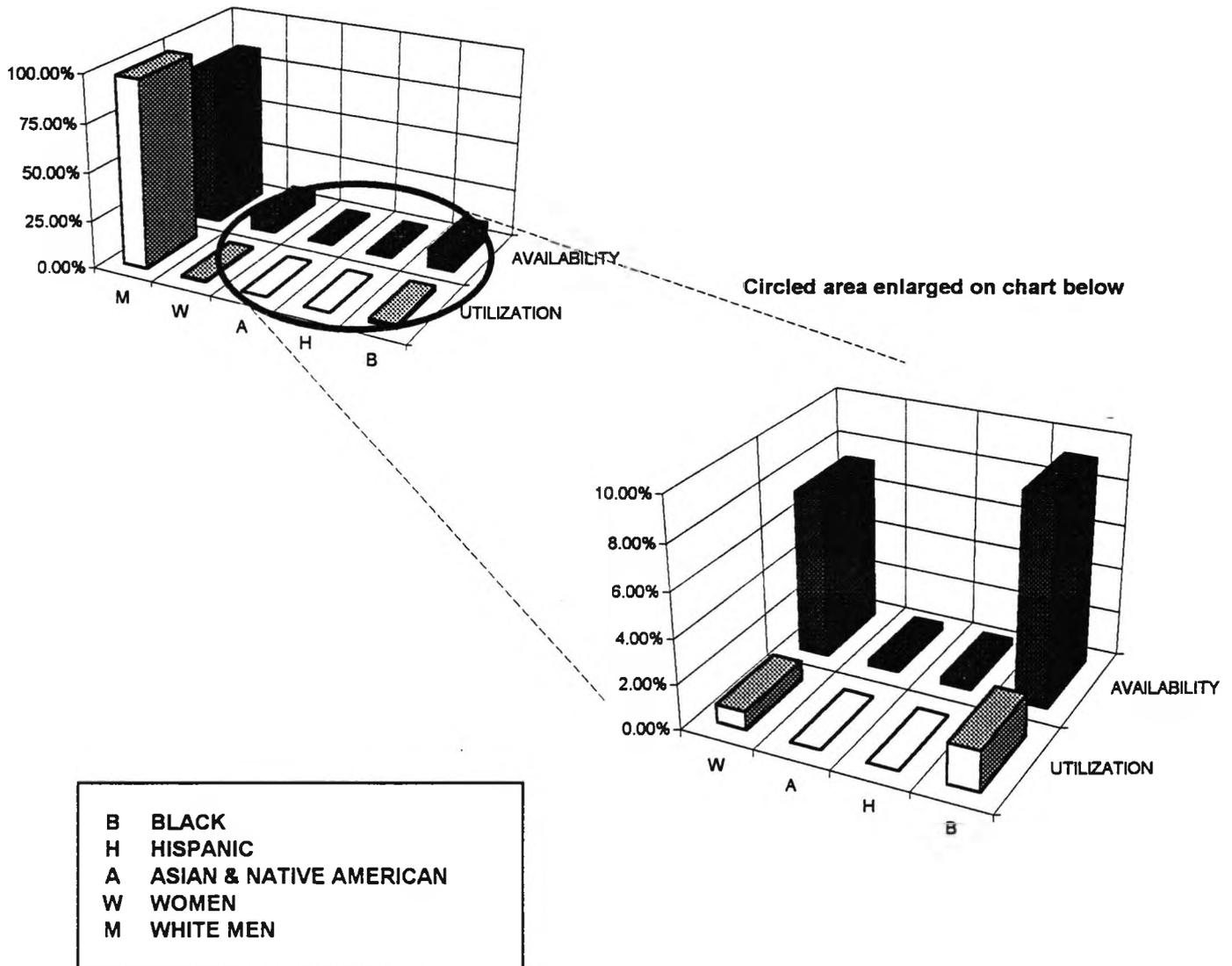
3/ The midpoint is the ratio of % utilization to % availability times 100.

4/ A disparity index below 80.00 shows substantial level of disparity.

UTILIZATION VS. AVAILABILITY
 CALENDAR YEARS 1980 THROUGH 1993

HIGHWAY AND BRIDGE CONSTRUCTION
 FOR PRIME CONTRACTORS

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION



**EXHIBIT 6-16
DISPARITY ANALYSIS FOR SUBCONTRACTORS
HIGHWAY AND BRIDGE CONSTRUCTION**

FOR CALENDAR YEARS 1980 THROUGH 1993

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

DBE CLASSIFICATION	% OF CONTRACT DOLLARS PAID 1/	% OF AVAILABLE FIRMS 2/	DISPARITY INDEX 3/		DISPARATE IMPACT OF UTILIZATION 4/
			RANGE	MIDPOINT	
CALENDAR YEAR 1980					
BLACK	0.81%	5.21%	13.19 -	17.90	15.55 UNDERUTILIZATION
HISPANIC	0.00%	0.07%	0.00 -	0.00	0.00 UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.20%	0.00%			20,000.00 OVERUTILIZATION
WOMEN	0.46%	2.04%	17.18 -	27.92	22.55 UNDERUTILIZATION
CALENDAR YEAR 1981					
BLACK	1.70%	6.20%	23.81 -	31.03	27.42 UNDERUTILIZATION
HISPANIC	0.02%	0.11%	-0.01 -	36.37	18.18 UNDERUTILIZATION
ASIAN & NATIVE AMER.	1.28%	0.06%	-884.50 -	5,151.16	2,133.33 OVERUTILIZATION
WOMEN	0.19%	3.36%	4.66 -	6.65	5.65 UNDERUTILIZATION
CALENDAR YEAR 1982					
BLACK	1.80%	6.99%	22.71 -	28.79	25.75 UNDERUTILIZATION
HISPANIC	0.00%	0.14%	0.00 -	0.00	0.00 UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.37%	0.11%	35.32 -	637.41	336.36 OVERUTILIZATION
WOMEN	0.49%	4.41%	9.48 -	12.74	11.11 UNDERUTILIZATION
CALENDAR YEAR 1983					
BLACK	3.39%	7.64%	39.57 -	49.17	44.37 UNDERUTILIZATION
HISPANIC	0.02%	0.17%	3.44 -	20.09	11.76 UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.93%	0.15%	150.94 -	1,089.06	620.00 OVERUTILIZATION
WOMEN	0.51%	5.26%	8.45 -	10.94	9.70 UNDERUTILIZATION
CALENDAR YEAR 1984					
BLACK	3.93%	8.18%	43.22 -	52.87	48.04 UNDERUTILIZATION
HISPANIC	0.00%	0.19%	0.00 -	0.00	0.00 UNDERUTILIZATION
ASIAN & NATIVE AMER.	1.47%	0.18%	299.59 -	1,333.74	816.67 OVERUTILIZATION
WOMEN	0.64%	5.98%	9.46 -	11.94	10.70 UNDERUTILIZATION
CALENDAR YEAR 1985					
BLACK	3.41%	8.63%	35.80 -	43.23	39.51 UNDERUTILIZATION
HISPANIC	0.09%	0.21%	18.08 -	67.63	42.86 UNDERUTILIZATION
ASIAN & NATIVE AMER.	1.63%	0.21%	327.51 -	1,224.88	776.19 OVERUTILIZATION
WOMEN	0.74%	6.58%	10.05 -	12.44	11.25 UNDERUTILIZATION
CALENDAR YEAR 1986					
BLACK	2.36%	9.02%	23.84 -	28.49	26.16 UNDERUTILIZATION
HISPANIC	0.15%	0.23%	30.31 -	100.12	65.22 INCONCLUSIVE
ASIAN & NATIVE AMER.	2.87%	0.23%	602.52 -	1,893.13	1,247.83 OVERUTILIZATION
WOMEN	1.12%	7.09%	14.23 -	17.36	15.80 UNDERUTILIZATION

EXHIBIT 6-16 (CONTINUED)
DISPARITY ANALYSIS FOR SUBCONTRACTORS
HIGHWAY AND BRIDGE CONSTRUCTION

FOR CALENDAR YEARS 1980 THROUGH 1993

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

DBE CLASSIFICATION	% OF CONTRACT DOLLARS PAID 1/	% OF AVAILABLE FIRMS 2/	DISPARITY INDEX 3/		DISPARATE IMPACT OF UTILIZATION 4/	
			RANGE	MIDPOINT		
CALENDAR YEAR 1987						
BLACK	2.93%	9.35%	28.69 -	33.98	31.34	UNDERUTILIZATION
HISPANIC	0.10%	0.24%	20.80 -	62.53	41.67	UNDERUTILIZATION
ASIAN & NATIVE AMER.	1.59%	0.25%	327.02 -	944.98	636.00	OVERUTILIZATION
WOMEN	1.56%	7.54%	18.76 -	22.62	20.69	UNDERUTILIZATION
CALENDAR YEAR 1988						
BLACK	7.03%	9.65%	66.97 -	78.73	72.85	UNDERUTILIZATION
HISPANIC	0.00%	0.25%	0.00 -	0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.45%	0.27%	90.07 -	243.26	166.67	INCONCLUSIVE
WOMEN	1.53%	7.93%	17.59 -	20.99	19.29	UNDERUTILIZATION
CALENDAR YEAR 1989						
BLACK	1.80%	9.90%	16.78 -	19.59	18.18	UNDERUTILIZATION
HISPANIC	0.29%	0.26%	61.58 -	161.50	111.54	INCONCLUSIVE
ASIAN & NATIVE AMER.	2.23%	0.29%	440.49 -	1,097.44	768.97	OVERUTILIZATION
WOMEN	4.56%	8.27%	50.51 -	59.77	55.14	UNDERUTILIZATION
CALENDAR YEAR 1990						
BLACK	4.28%	10.13%	39.11 -	45.39	42.25	UNDERUTILIZATION
HISPANIC	0.19%	0.27%	40.31 -	100.43	70.37	INCONCLUSIVE
ASIAN & NATIVE AMER.	0.29%	0.30%	57.13 -	136.20	96.67	INCONCLUSIVE
WOMEN	2.28%	8.58%	24.44 -	28.70	26.57	UNDERUTILIZATION
CALENDAR YEAR 1991						
BLACK	1.68%	10.34%	15.08 -	17.41	16.25	UNDERUTILIZATION
HISPANIC	0.03%	0.28%	6.33 -	15.10	10.71	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.12%	0.32%	23.04 -	51.96	37.50	UNDERUTILIZATION
WOMEN	2.72%	8.85%	28.37 -	33.10	30.73	UNDERUTILIZATION
CALENDAR YEAR 1992						
BLACK	2.11%	10.52%	18.66 -	21.45	20.06	UNDERUTILIZATION
HISPANIC	0.36%	0.29%	75.36 -	172.92	124.14	INCONCLUSIVE
ASIAN & NATIVE AMER.	0.95%	0.33%	180.75 -	395.01	287.88	OVERUTILIZATION
WOMEN	3.30%	9.09%	33.61 -	38.99	36.30	UNDERUTILIZATION
CALENDAR YEAR 1993						
BLACK	3.80%	10.69%	33.15 -	37.94	35.55	UNDERUTILIZATION
HISPANIC	0.60%	0.30%	124.26 -	275.74	200.00	OVERUTILIZATION
ASIAN & NATIVE AMER.	1.17%	0.34%	222.19 -	466.04	344.12	OVERUTILIZATION
WOMEN	1.75%	9.32%	17.43 -	20.12	18.78	UNDERUTILIZATION
ALL YEARS 1980-1993						
BLACK	3.15%	9.19%	31.31 -	37.24	34.28	UNDERUTILIZATION
HISPANIC	0.15%	0.23%	31.49 -	98.94	65.22	UNDERUTILIZATION
ASIAN & NATIVE AMER.	1.17%	0.25%	232.07 -	703.93	468.00	OVERUTILIZATION
WOMEN	1.70%	7.32%	20.99 -	25.45	23.22	UNDERUTILIZATION

6/26/95

HWYSDIS.XLS

1/ Percent of highway and bridge construction related contract dollars paid to firms.

2/ Percent of available firms.

3/ The midpoint is the ratio of % utilization to % availability times 100.

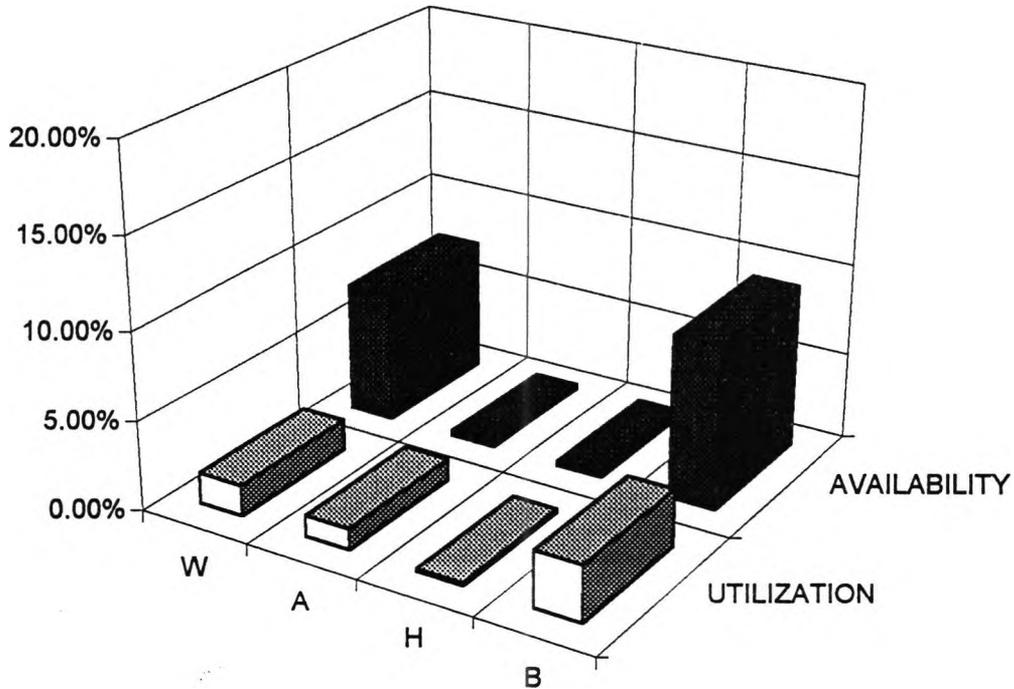
4/ A disparity index below 80.00 shows substantial level of disparity.

EXHIBIT 6-17

UTILIZATION VS. AVAILABILITY
CALENDAR YEARS 1980 THROUGH 1993

HIGHWAY AND BRIDGE CONSTRUCTION
FOR SUBCONTRACTORS

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION



B BLACK
H HISPANIC
A ASIAN & NATIVE AMERICAN
W WOMEN

- Asian and Native American-owned firms were overutilized in 12 of the 14 years of the study, with a summary index of 468.00 for the period. Of the 674 unique subcontractor firms, there were 20 Asian and Native American-owned firms with which the SCDOT contracted for highway and bridge construction during the study period. (Appendix B shows these firms).
- Women-owned firms were substantially underutilized, with disparity indices ranging from 5.65 to 55.14 for the 14 years. The summary for the study period shows a disparity index of 23.22, which indicates substantial underutilization.

6.3 Building Construction and Renovation

In the periods studied, the SCDOT awarded 406 building construction and renovation contracts totaling \$27,716,344.09. Of this amount, DBEs received \$417,423.00 (1.56%) as prime contractors and \$798,936.78 (2.98%) as subcontractors.

As explained earlier, we analyzed building construction contracts for the entire 14-year period and building renovation contracts for 1989 through 1993. This total of 406 contracts was awarded to 247 individual firms in various counties in the United States. Overwhelmingly, the relevant market area, shown in Exhibit 6-18, is the state of South Carolina representing 368 contracts, 227 firms, and 96.71% of the total dollars awarded.

Exhibit 6-19 presents the utilization results for building construction and renovation projects. The findings are discussed in the following paragraphs:

- Black-owned firms received \$414,422.80, or 1.55% of the total dollars awarded in the 14-year period by the SCDOT for building construction and renovation projects. They were utilized in four of these years, receiving their largest percentage of contracts in 1991, when they were awarded \$376,658.00, or 11.26% of the total dollars awarded.
- Hispanic-owned, Asian-owned and Native American-owned firms were not utilized at any time during the 14-year period.

EXHIBIT 6-18

RELEVANT MARKET AREA DETERMINATION
BY DOLLAR AMOUNT BY COUNTY
FOR CALENDAR YEARS 1980 THROUGH 1993

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION
BUILDING CONSTRUCTION AND RENOVATION

COUNTY	# OF CONTRACTS	% OF CONTRACTS	# OF INDIVIDUAL FIRMS	% OF FIRMS	DOLLARS 1/	% OF DOLLARS	CUMULATIVE % 2/	3/
ALL COUNTIES IN SOUTH CAROLINA	368	90.64%	227	91.90%	\$26,804,042.85	96.71%	96.71%	
UNION (NC)	4	0.99%	1	0.40%	\$453,638.00	1.64%	98.35%	
CUMBERLAND (NC)	1	0.25%	1	0.40%	\$219,450.00	0.79%	99.14%	
DALLAS (TX)	9	2.22%	1	0.40%	\$138,925.00	0.50%	99.64%	
MECKLENBURG (NC)	4	0.99%	3	1.21%	\$55,455.00	0.20%	99.84%	
FULTON (GA)	4	0.99%	1	0.40%	\$23,059.00	0.08%	99.92%	
VIRGINIA BEACH (CITY) (VA)	1	0.25%	1	0.40%	\$8,250.00	0.03%	99.95%	
JEFFERSON (AL)	1	0.25%	1	0.40%	\$3,489.00	0.01%	99.96%	
RUTHERFORD (NC)	4	0.99%	1	0.40%	\$3,258.50	0.01%	99.98%	
NORFOLK (CITY) (VA)	1	0.25%	1	0.40%	\$2,035.00	0.01%	99.98%	
ROBESON (NC)	1	0.25%	1	0.40%	\$1,200.00	0.00%	99.99%	
ALAMANCE (NC)	1	0.25%	1	0.40%	\$1,078.40	0.00%	99.99%	
HENDERSON (NC)	1	0.25%	1	0.40%	\$750.00	0.00%	99.99%	
CHATHAM (GA)	1	0.25%	1	0.40%	\$531.11	0.00%	100.00%	
LENOIR (NC)	1	0.25%	1	0.40%	\$400.00	0.00%	100.00%	
DADE (FL)	1	0.25%	1	0.40%	\$268.23	0.00%	100.00%	
RICHMOND (GA)	1	0.25%	1	0.40%	\$239.00	0.00%	100.00%	
FAIRFAX (VA)	1	0.25%	1	0.40%	\$150.00	0.00%	100.00%	
ETOWAH (AL)	1	0.25%	1	0.40%	\$125.00	0.00%	100.00%	
TOTAL	406	1	247	100.00%	\$27,716,344.09	100.00%		

6/27/95

BLD_MK.XLS

1/ Dollars represent building construction contracts for 1980-1993 and building renovation contracts for 1989-1993.

2/ Cumulative total of % of dollars in market area.

3/ Counties above the line are included in the relevant market area.

EXHIBIT 6-19

UTILIZATION OF **PRIME CONTRACTOR** FIRMS BY DBE CLASSIFICATION
 WITHIN THE RELEVANT MARKET AREA
 FOR CALENDAR YEARS 1980 THROUGH 1993

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION DISPARITY STUDY

BUILDING CONSTRUCTION AND RENOVATION

CALENDAR YEAR	BLACK		HISPANIC		ASIAN & NATIVE AMERICAN		WOMEN (WHITE ONLY)		WHITE MEN		TOTAL 1/	
	\$	%	\$	%	\$	%	\$	%	\$	%	\$	%
1980	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$507,781.90	100.00%	\$507,781.90	100.00%
1981	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$336,812.00	100.00%	\$336,812.00	100.00%
1982	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%
1983	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$362,408.43	100.00%	\$362,408.43	100.00%
1984	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$970,306.50	100.00%	\$970,306.50	100.00%
1985	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$1,748,075.70	100.00%	\$1,748,075.70	100.00%
1986	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$6,872,224.66	100.00%	\$6,872,224.66	100.00%
1987	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$1,183,353.90	100.00%	\$1,183,353.90	100.00%
1988	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$837,137.50	100.00%	\$837,137.50	100.00%
1989	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$4,360,143.69	100.00%	\$4,360,143.69	100.00%
1990	\$29,921.20	0.95%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$3,109,866.49	99.05%	\$3,139,787.69	100.00%
1991	\$376,658.00	11.26%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$2,969,031.69	88.74%	\$3,345,689.69	100.00%
1992	\$6,751.00	0.40%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$1,700,966.27	99.60%	\$1,707,717.27	100.00%
1993	\$1,092.60	0.08%	\$0.00	0.00%	\$0.00	0.00%	\$3,000.00	0.21%	\$1,428,511.32	99.71%	\$1,432,603.92	100.00%
TOTAL	\$414,422.80	1.55%	\$0.00	0.00%	\$0.00	0.00%	\$3,000.00	0.01%	\$26,386,620.05	98.44%	\$26,804,042.85	100.00%

6/27/95 BLDG_UTL.XLS

1/ Dollars represent building construction contracts for 1980 through 1993 and building renovation contracts for 1989 through 1993.

- Firms owned by women were not utilized from 1980 through 1992. In 1993 they received \$3,000.00, or 0.02% of total dollars awarded. For the sum of the years, women-owned firms received 0.01% of total contract dollars granted.
- Firms owned by white men were the sole recipients of awarded contracts from 1980 through 1989. They showed no utilization for 1982, a year when no building construction projects were undertaken. For the entire 14-year period, white men-owned firms captured \$26,386,620.05, or 98.44% of the total building construction and renovation dollars awarded.

Of the total dollars awarded to prime contractors, \$846,433.78, or 3.16%, were used to pay DBE subcontractors. The results are shown in Exhibit 6-20, and the findings are discussed below:

- Subcontractors were not awarded any building construction and renovation dollars in years 1980, 1982, 1983, 1985, 1986, 1991, and 1992.
- Black-owned firms had their highest percentage of utilization in 1988, when they secured \$84,472.30, or 10.09% of total prime dollars for that year. The sum of the years shows them earning \$745,497.92, or 2.78% of the total contract dollars.
- Hispanic firms were not utilized as subs in any of the 14 years.
- Asian-owned and Native American-owned firms were awarded dollars in 1993 only. They received \$36,511.30, or 2.55% of the year's total. This amount equates to 0.14% for the 14-year period.
- Women-owned firms were utilized in three of the seven years that dollars of this type were awarded. Cumulatively, they received \$64,424.56, or 0.24% over the entire study period. Women-owned firms obtained their highest utilization in 1993, when they were awarded \$27,294.56, or 1.91% of the total prime dollars for building construction and renovation projects.

Only firms in South Carolina were utilized for building construction and renovation contracts by the SCDOT during the period studied. The availability of these firms is presented in Exhibit 6-21, and the findings are as follows:

- White men-owned firms consistently showed the highest availability during the study period. They experienced their highest level in 1980 with 91.44% and declined steadily to 78.71% in 1993.

EXHIBIT 6-20

UTILIZATION OF SUBCONTRACTOR FIRMS BY DBE CLASSIFICATION
 WITHIN THE RELEVANT MARKET AREA 1/
 FOR CALENDAR YEARS 1980 THROUGH 1993

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION DISPARITY STUDY
 BUILDING CONSTRUCTION AND RENOVATION

CALENDAR YEAR	BLACK		HISPANIC		ASIAN & NATIVE AMERICAN		WOMEN (WHITE ONLY)		TOTAL PRIME DOLLARS 2/	
	\$	%	\$	%	\$	%	\$	%	\$	%
1980	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$507,781.90	0.00%
1981	\$52,468.50	15.58%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$336,812.00	15.58%
1982	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%
1983	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$362,408.43	0.00%
1984	\$38,261.00	3.94%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$970,306.50	3.94%
1985	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$1,746,075.70	0.00%
1986	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$6,872,224.66	0.00%
1987	\$79,795.06	6.74%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$1,183,353.90	6.74%
1988	\$84,472.30	10.09%	\$0.00	0.00%	\$0.00	0.00%	\$13,130.00	1.57%	\$837,137.50	11.66%
1989	\$260,263.00	5.97%	\$0.00	0.00%	\$0.00	0.00%	\$24,000.00	0.55%	\$4,360,143.69	6.52%
1990	\$213,078.06	6.79%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$3,139,787.69	6.79%
1991	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$3,345,689.69	0.00%
1992	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$0.00	0.00%	\$1,707,717.27	0.00%
1993	\$17,160.00	1.20%	\$0.00	0.00%	\$36,511.30	2.55%	\$27,294.56	1.91%	\$1,432,603.92	5.65%
TOTAL	\$745,497.92	2.78%	\$0.00	0.00%	\$36,511.30	0.14%	\$64,424.56	0.24%	\$26,804,042.85	3.16%

6/27/95 BL_SB_UT.XLS

1/ Only those subcontracts associated with prime contractors located within relevant market area are included in the analysis.

2/ Percentages represent percent of total prime contractor dollars awarded to subcontractors. Prime contractor dollars represent building construction contracts for 1980 through 1993 and building renovation contracts for 1989 through 1993.

EXHIBIT 6-21

AVAILABILITY OF BUILDING CONSTRUCTION AND RENOVATION FIRMS BY DBE CLASSIFICATION

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

WITHIN THE RELEVANT MARKET AREA
CALENDAR YEARS 1980 THROUGH 1993

YEAR 5/	BLACK 1/		HISPANIC 1/		ASIAN AND NATIVE AMERICAN 1/		WOMEN 2/		WHITE MEN 3/		TOTAL FIRMS 4/
	#	%	#	%	#	%	#	%	#	%	#
1980	462	6.88%	6	0.09%	0	0.00%	107	1.60%	6,142	91.44%	6,717
1981	620	8.13%	11	0.14%	4	0.06%	199	2.61%	6,791	89.06%	7,624
1982	778	9.12%	15	0.18%	9	0.10%	291	3.41%	7,439	87.19%	8,532
1983	936	9.92%	20	0.21%	14	0.14%	382	4.05%	8,088	85.68%	9,440
1984	1,094	10.57%	25	0.24%	18	0.18%	474	4.58%	8,736	84.43%	10,347
1985	1,252	11.12%	30	0.26%	23	0.20%	566	5.03%	9,385	83.39%	11,255
1986	1,410	11.59%	34	0.28%	27	0.23%	657	5.40%	10,033	82.50%	12,162
1987	1,568	12.00%	39	0.30%	32	0.24%	749	5.73%	10,682	81.73%	13,070
1988	1,726	12.35%	44	0.31%	37	0.26%	841	6.01%	11,331	81.06%	13,978
1989	1,884	12.66%	48	0.33%	41	0.28%	932	6.26%	11,979	80.48%	14,885
1990	2,042	12.93%	53	0.34%	46	0.29%	1,024	6.48%	12,628	79.96%	15,793
1991	2,200	13.17%	58	0.35%	50	0.30%	1,116	6.68%	13,276	79.50%	16,700
1992	2,358	13.39%	63	0.36%	55	0.31%	1,207	6.86%	13,925	79.08%	17,608
1993	2,516	13.59%	67	0.36%	60	0.32%	1,299	7.02%	14,573	78.71%	18,516

NOTE: Details may not add to Total Firms due to rounding.

SOURCES OF DATA: Bureau of the Census

- o Survey of Minority Owned Businesses (SMOBE) - 1982 & 1987 (Blacks, Hispanics, Asian Americans, American Indians and Other Minorities)
- o Survey of Women Owned Businesses - 1982 & 1987.

- 1/ Minority Men and Women firms are included in their respective minority classifications.
- 2/ The number of 'Women' firms was estimated by subtracting the number of minority women from the census count of total women firms. According to national statistics, 'Black Women' firms comprise 6.28% of Black construction firms, 'Hispanic Women' firms comprise 4.37% of Hispanic construction firms, and 'Other Minority Women' firms comprise 7.38% of other minority construction firms.
- 3/ Number of 'White Men' firms derived by subtracting all 'M/WBE' firms from 'Total Firms.'
- 4/ 'Total Firms' derived from Bureau of Census and County Business Patterns. Because the state of South Carolina made up the relevant market area, no weighting was applied.
- 5/ The 'off-census year' figures indicating the availability of firms are estimates. Intervals indicating low to high ranges for the estimated numbers of available firms can be calculated as follows:

$$\text{Estimated number of firms} \pm 2 \sqrt{\text{Estimated number of firms}}$$

If the estimated number of firms is 25, the standard deviation would be $\sqrt{25} = 5$, and the approximate low to high estimated range of available firms would equal 25 ± 10 (15 to 35). See the methods section for additional information.

06/28/95

AV_BC&R.WK1

- Black owned-firms increased steadily over the 14 years from 6.88% availability in 1980 to 13.59% availability in 1993. They represent the most available minority in the building construction and renovation category.
- Hispanic-owned and Asian/Native American-owned firms experienced similar growth patterns. These groups have the lowest 1993 availability, at 0.36% and 0.32%, respectively. In 1980 Asian and Native American firms were not available to contract for building construction and renovation projects.

Exhibits 6-22 through 6-25 presents the disparity analysis for the total dollars awarded to prime contractors and subcontractors for building construction and renovation projects. The following summarizes the findings:

- Black-owned firms display disparity indices of 0.00 for 10 of the 14 years studied. They were substantially underutilized in all years but 1991, when the disparity index of 85.50 reflects moderate underutilization. The sum of the years shows substantial underutilization, with an index of 13.14.
- Hispanic, Asian, and Native American-owned firms were not utilized at any time during the years studied; therefore the total of the years indicates indices of 0.00. In 1980 Asian and Native American firms show parity, because no firms were available and none were utilized.
- Women-owned firms were not utilized from 1980 to 1992. They show substantial underutilization for all years combined, with a disparity index of 0.18. In 1993 a single women-owned firm was awarded one contract, thus reflecting substantial underutilization, with an index of 2.99.
- White male-owned firms show overutilization for the summary of the 14 years, with a disparity index of 119.90.

The findings for subcontractor disparity are as follows:

- Black firms were not used in seven of the 14 years of the study, showing disparity indices of 0.00. In the years they were utilized they were substantially underutilized in all but one year, with disparity indices ranging from 8.83 to 191.64. In 1991, three black-owned firms were utilized as DBE subcontractors. The summary of the study period produces a disparity index of 23.56 for Black-owned firms, indicating they were substantially underutilized for the 14-year period.

**EXHIBIT 6-22
DISPARITY ANALYSIS FOR PRIME CONTRACTORS
BUILDING CONSTRUCTION AND RENOVATION**

FOR CALENDAR YEARS 1980 THROUGH 1993

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

DBE CLASSIFICATION	% OF CONTRACT DOLLARS PAID 1/	% OF AVAILABLE FIRMS 2/	DISPARITY INDEX 3/		DISPARATE IMPACT OF UTILIZATION 4/
			RANGE	MIDPOINT	
CALENDAR YEAR 1980					
BLACK	0.00%	6.88%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.09%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.00%	100.00 - 100.00	100.00	PARITY
WOMEN	0.00%	1.60%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	100.00%	91.44%	105.41 - 113.31	109.36	OVERUTILIZATION
CALENDAR YEAR 1981					
BLACK	0.00%	8.13%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.14%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.06%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	2.61%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	100.00%	89.06%	108.43 - 116.14	112.28	OVERUTILIZATION
CALENDAR YEAR 1982					
BLACK	0.00%	9.12%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.18%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.10%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	3.41%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	0.00%	87.19%	0.00 - 0.00	0.00	UNDERUTILIZATION
CALENDAR YEAR 1983					
BLACK	0.00%	9.92%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.21%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.14%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	4.05%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	100.00%	85.68%	113.04 - 120.38	116.71	OVERUTILIZATION
CALENDAR YEAR 1984					
BLACK	0.00%	10.57%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.24%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.18%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	4.58%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	100.00%	84.43%	114.86 - 122.03	118.44	OVERUTILIZATION
CALENDAR YEAR 1985					
BLACK	0.00%	11.12%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.26%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.20%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	5.03%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	100.00%	83.39%	116.42 - 123.42	119.92	OVERUTILIZATION
CALENDAR YEAR 1986					
BLACK	0.00%	11.59%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.28%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.23%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	5.40%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	100.00%	82.50%	117.79 - 124.63	121.21	OVERUTILIZATION

EXHIBIT 6-22 (CONTINUED)
DISPARITY ANALYSIS FOR PRIME CONTRACTORS
BUILDING CONSTRUCTION AND RENOVATION

FOR CALENDAR YEARS 1980 THROUGH 1993

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

DBE CLASSIFICATION	% OF CONTRACT DOLLARS 1/	% OF AVAILABLE FIRMS 2/	DISPARITY INDEX 3/		DISPARATE IMPACT OF UTILIZATION 4/
			RANGE	MIDPOINT	
CALENDAR YEAR 1987					
BLACK	0.00%	12.00%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.30%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.24%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	5.73%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	100.00%	81.73%	119.01 - 125.70	122.35	OVERUTILIZATION
CALENDAR YEAR 1988					
BLACK	0.00%	12.35%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.31%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.26%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	6.01%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	100.00%	81.06%	120.09 - 126.64	123.37	OVERUTILIZATION
CALENDAR YEAR 1989					
BLACK	0.00%	12.66%	0.00 - 0.00	0.00	UNDERUTILIZATION
HISPANIC	0.00%	0.33%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.28%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	6.26%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	100.00%	80.48%	121.04 - 127.47	124.25	OVERUTILIZATION
CALENDAR YEAR 1990					
BLACK	0.95%	12.93%	7.00 - 7.70	7.35	UNDERUTILIZATION
HISPANIC	0.00%	0.34%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.29%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	6.48%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	99.05%	79.96%	120.76 - 126.99	123.87	OVERUTILIZATION
CALENDAR YEAR 1991					
BLACK	11.26%	13.17%	81.56 - 89.43	85.50	UNDERUTILIZATION
HISPANIC	0.00%	0.35%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.30%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	6.68%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	88.74%	79.50%	108.88 - 114.36	111.62	OVERUTILIZATION
CALENDAR YEAR 1992					
BLACK	0.40%	13.39%	2.85 - 3.12	2.99	UNDERUTILIZATION
HISPANIC	0.00%	0.36%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.31%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.00%	6.86%	0.00 - 0.00	0.00	UNDERUTILIZATION
WHITE MEN	99.60%	79.08%	122.93 - 128.97	125.95	OVERUTILIZATION
CALENDAR YEAR 1993					
BLACK	0.08%	13.59%	0.56 - 0.61	0.59	UNDERUTILIZATION
HISPANIC	0.00%	0.36%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.32%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.21%	7.02%	2.82 - 3.16	2.99	UNDERUTILIZATION
WHITE MEN	99.71%	78.71%	123.71 - 129.65	126.68	OVERUTILIZATION
ALL YEARS 1980-1993					
BLACK	1.55%	11.80%	12.40 - 13.87	13.14	UNDERUTILIZATION
HISPANIC	0.00%	0.29%	0.00 - 0.00	0.00	UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.24%	0.00 - 0.00	0.00	UNDERUTILIZATION
WOMEN	0.01%	5.57%	0.17 - 0.19	0.18	UNDERUTILIZATION
WHITE MEN	98.44%	82.10%	116.46 - 123.34	119.90	OVERUTILIZATION

6/26/95

BDRDISP2.XLS

1/ Percent of preconstruction related contract dollars paid to firms.

2/ Percent of available firms.

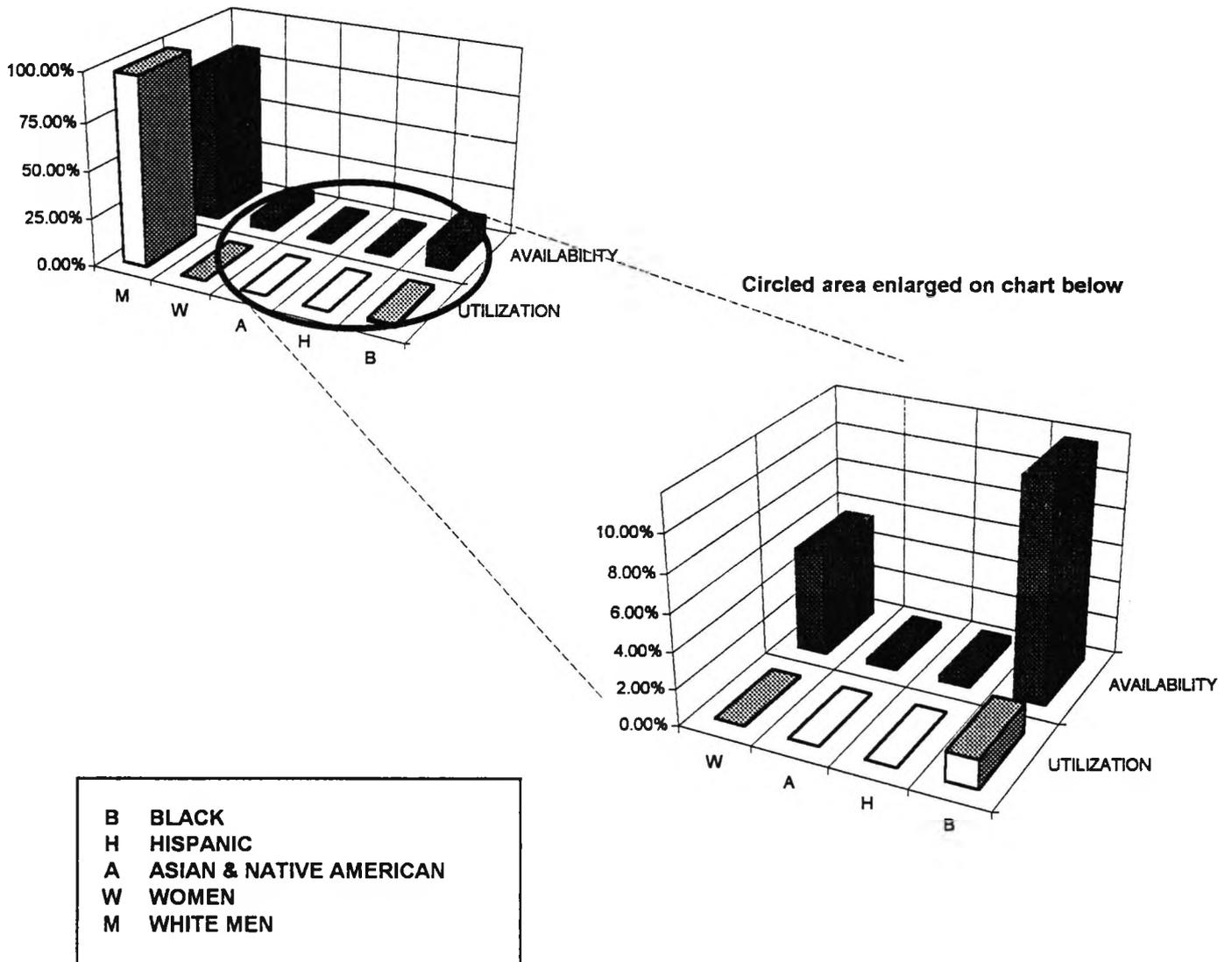
3/ The midpoint is the ratio of % utilization to % availability times 100.

4/ A disparity index below 80.00 shows a substantial level of disparity.

UTILIZATION VS. AVAILABILITY CALENDAR YEARS 1980 THROUGH 1993

BUILDING CONSTRUCTION AND RENOVATION FOR PRIME CONTRACTORS

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION



**EXHIBIT 6-24
DISPARITY ANALYSIS FOR SUBCONTRACTORS
BUILDING CONSTRUCTION AND RENOVATION**

FOR CALENDAR YEARS 1980 THROUGH 1993

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

DBE CLASSIFICATION	% OF CONTRACT DOLLARS PAID 1/	% OF AVAILABLE FIRMS 2/	DISPARITY INDEX 3/		DISPARATE IMPACT OF UTILIZATION 4/
			RANGE	MIDPOINT	
CALENDAR YEAR 1980					
BLACK	0.00%	6.88%	0.00 -	0.00	0.00 UNDERUTILIZATION
HISPANIC	0.00%	0.09%	0.00 -	0.00	0.00 UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.00%	100.00 -	100.00	100.00 PARITY
WOMEN	0.00%	1.60%	0.00 -	0.00	0.00 UNDERUTILIZATION
CALENDAR YEAR 1981					
BLACK	15.58%	8.13%	175.56 -	207.72	191.64 OVERUTILIZATION
HISPANIC	0.00%	0.14%	0.00 -	0.00	0.00 UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.06%	0.00 -	0.00	0.00 UNDERUTILIZATION
WOMEN	0.00%	2.61%	0.00 -	0.00	0.00 UNDERUTILIZATION
CALENDAR YEAR 1982					
BLACK	0.00%	9.12%	0.00 -	0.00	0.00 UNDERUTILIZATION
HISPANIC	0.00%	0.18%	0.00 -	0.00	0.00 UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.10%	0.00 -	0.00	0.00 UNDERUTILIZATION
WOMEN	0.00%	3.41%	0.00 -	0.00	0.00 UNDERUTILIZATION
CALENDAR YEAR 1983					
BLACK	0.00%	9.92%	0.00 -	0.00	0.00 UNDERUTILIZATION
HISPANIC	0.00%	0.21%	0.00 -	0.00	0.00 UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.14%	0.00 -	0.00	0.00 UNDERUTILIZATION
WOMEN	0.00%	4.05%	0.00 -	0.00	0.00 UNDERUTILIZATION
CALENDAR YEAR 1984					
BLACK	3.94%	10.57%	34.88 -	39.67	37.28 UNDERUTILIZATION
HISPANIC	0.00%	0.24%	0.00 -	0.00	0.00 UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.18%	0.00 -	0.00	0.00 UNDERUTILIZATION
WOMEN	0.00%	4.58%	0.00 -	0.00	0.00 UNDERUTILIZATION
CALENDAR YEAR 1985					
BLACK	0.00%	11.12%	0.00 -	0.00	0.00 UNDERUTILIZATION
HISPANIC	0.00%	0.26%	0.00 -	0.00	0.00 UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.23%	0.00 -	0.00	0.00 UNDERUTILIZATION
WOMEN	0.00%	5.03%	0.00 -	0.00	0.00 UNDERUTILIZATION
CALENDAR YEAR 1986					
BLACK	0.00%	11.59%	0.00 -	0.00	0.00 UNDERUTILIZATION
HISPANIC	0.00%	0.28%	0.00 -	0.00	0.00 UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.23%	0.00 -	0.00	0.00 UNDERUTILIZATION
WOMEN	0.00%	5.73%	0.00 -	0.00	0.00 UNDERUTILIZATION

EXHIBIT 6-24 (CONTINUED)
DISPARITY ANALYSIS FOR SUBCONTRACTORS
BUILDING CONSTRUCTION AND RENOVATION

FOR CALENDAR YEARS 1980 THROUGH 1993

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

DBE CLASSIFICATION	% OF CONTRACT DOLLARS PAID 1/	% OF AVAILABLE FIRMS 2/	DISPARITY INDEX 3/		DISPARATE IMPACT OF UTILIZATION 4/
			RANGE	MIDPOINT	
CALENDAR YEAR 1987					
BLACK	6.74%	12.00%	53.13 -	59.20	56.17 UNDERUTILIZATION
HISPANIC	0.00%	0.30%	0.00 -	0.00	0.00 UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.24%	0.00 -	0.00	0.00 UNDERUTILIZATION
WOMEN	0.00%	5.73%	0.00 -	0.00	0.00 UNDERUTILIZATION
CALENDAR YEAR 1988					
BLACK	10.09%	12.35%	77.48 -	85.92	81.70 UNDERUTILIZATION
HISPANIC	0.00%	0.31%	0.00 -	0.00	0.00 UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.26%	0.00 -	0.00	0.00 UNDERUTILIZATION
WOMEN	1.57%	6.01%	24.26 -	27.99	26.12 UNDERUTILIZATION
CALENDAR YEAR 1989					
BLACK	5.97%	12.66%	44.82 -	49.49	47.16 UNDERUTILIZATION
HISPANIC	0.00%	0.33%	0.00 -	0.00	0.00 UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.29%	0.00 -	0.00	0.00 UNDERUTILIZATION
WOMEN	0.55%	6.26%	8.19 -	9.38	8.79 UNDERUTILIZATION
CALENDAR YEAR 1990					
BLACK	6.79%	12.93%	50.01 -	55.02	52.51 UNDERUTILIZATION
HISPANIC	0.00%	0.34%	0.00 -	0.00	0.00 UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.29%	0.00 -	0.00	0.00 UNDERUTILIZATION
WOMEN	0.00%	6.48%	0.00 -	0.00	0.00 UNDERUTILIZATION
CALENDAR YEAR 1991					
BLACK	0.00%	13.17%	0.00 -	0.00	0.00 UNDERUTILIZATION
HISPANIC	0.00%	0.35%	0.00 -	0.00	0.00 UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.30%	0.00 -	0.00	0.00 UNDERUTILIZATION
WOMEN	0.00%	6.68%	0.00 -	0.00	0.00 UNDERUTILIZATION
CALENDAR YEAR 1992					
BLACK	0.00%	13.39%	0.00 -	0.00	0.00 UNDERUTILIZATION
HISPANIC	0.00%	0.36%	0.00 -	0.00	0.00 UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.00%	0.31%	0.00 -	0.00	0.00 UNDERUTILIZATION
WOMEN	0.00%	6.86%	0.00 -	0.00	0.00 UNDERUTILIZATION
CALENDAR YEAR 1993					
BLACK	1.20%	13.59%	8.45 -	9.21	8.83 UNDERUTILIZATION
HISPANIC	0.00%	0.36%	0.00 -	0.00	0.00 UNDERUTILIZATION
ASIAN & NATIVE AMER.	2.55%	0.32%	590.70 -	1,003.05	796.88 OVERUTILIZATION
WOMEN	1.91%	7.02%	25.63 -	28.78	27.21 UNDERUTILIZATION
ALL YEARS 1980-1993					
BLACK	2.78%	11.80%	22.25 -	24.87	23.56 UNDERUTILIZATION
HISPANIC	0.00%	0.29%	0.00 -	0.00	0.00 UNDERUTILIZATION
ASIAN & NATIVE AMER.	0.14%	0.24%	36.90 -	79.77	58.33 UNDERUTILIZATION
WOMEN	0.24%	5.57%	3.97 -	4.65	4.31 UNDERUTILIZATION

6/26/95

BDRSDIS2.XLS

1/ Percent of building construction and renovation related contract dollars paid to firms.

2/ Percent of available firms.

3/ The midpoint is the ratio of % utilization to % availability times 100.

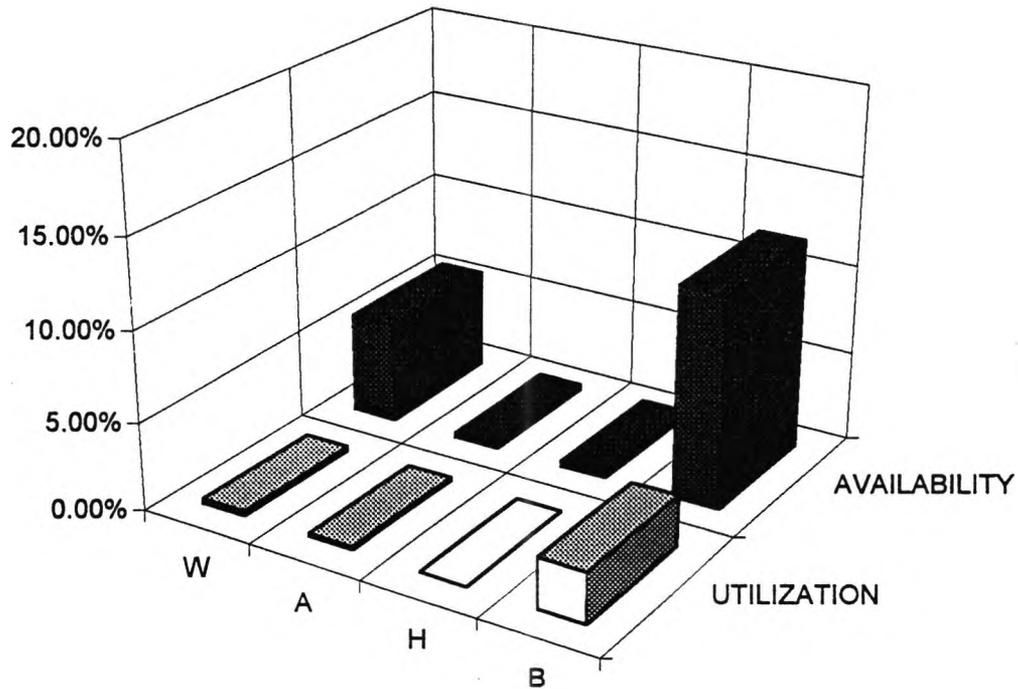
4/ A disparity index below 80.00 shows substantial level of disparity.

EXHIBIT 6-25

UTILIZATION VS. AVAILABILITY
CALENDAR YEARS 1980 THROUGH 1993

BUILDING CONSTRUCTION AND RENOVATION
FOR SUBCONTRACTORS

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION



B BLACK
H HISPANIC
A ASIAN & NATIVE AMERICAN
W WOMEN

- Hispanic firms were not utilized at any time during the years studied; therefore the total of the years indicates an index of 0.00.
- Asian and Native American firms were used in only one year of the 14-year period. In 1993, their utilization index of 796.88 reflects overutilization. However, there was one contract let to a single Native American firm in a year that shows only nine subcontracts awarded by two prime contractors.
- Women-owned firms were utilized in only three of the years of the period studied, 1988, 1989, and 1993. All three years reflect substantial underutilization, with indices of 26.12, 8.79, and 27.21 respectively. The activity summary shows a disparity index of 4.31, indicating substantial underutilization for the entire period.

6.4 Summary of Findings

- The market area for highway and bridge construction includes the State of South Carolina, Fulton County, Georgia, Fairfax County, Virginia; and Wake County, North Carolina.
- The relevant market area for both highway and bridge construction and building construction and renovation includes the state of South Carolina.
- White men-owned firms received 100% of all highway and bridge preconstruction contracts.
- DBEs received 0.20% of all highway and bridge preconstruction subcontracts.
- DBE firms received 8.78% of all highway and bridge construction contracts awarded either as a prime or as a subcontractor.
- White men-owned firms received 97.40% of all highway and bridge prime contracts.
- The majority of dollars awarded to DBEs were through highway and bridge subcontracts, through which they received (\$135,705,720.40).
- Black-owned firms received all of the \$413,330.20 awarded to DBEs for building construction and renovation prime contracts from 1980 through 1992.
- White men-owned firms were awarded 98.44% of all building construction and renovation prime contracts.

- DBEs were awarded 3.16%, or \$846,433.78, of the building construction subcontracts.
- The disparity indices of highway and bridge preconstruction prime and subcontracts reflect substantial underutilization of all DBEs for every year.
- All DBEs were substantially underutilized for highway and bridge prime contracts.
- Asian and Native American-owned firms were the only group not to show substantial underutilization as subcontractors on highway and bridge construction projects.
- Substantial underutilization of all DBEs was found in building construction and renovation prime and subcontracts.

6.5 Conclusions

A direct relationship exists between the inclusion of disadvantaged construction-related firms and the DBE program. This relationship can be measured by comparing the findings of the highway and bridge preconstruction contracts and the highway and bridge construction contracts.

The highway and bridge preconstruction contracts were excluded from any form of a DBE program during the study period. The statistical analyses of preconstruction contracts reflects no utilization of DBE firms. All prime contracts (100%) were awarded to white men-owned firms. When subcontracts are included, only 0.21% of all preconstruction contract dollars were paid to DBEs (0.18% to Black-owned firms and 0.03% to women-owned firms).

The highway and bridge construction contracts, on the other hand, were included in some form of a goals program during the study period, primarily the federal DBE program. This program required that highway and bridge construction projects have an annual DBE goal of 10%. This goal does not include maintenance resurfacing

contracts. The statistical analyses show that DBEs were awarded 8.78% of highway and bridge construction contracts as either primes or subcontractors. DBEs were awarded 2.61% of the prime contract dollars and 6.17% of the subcontractor dollars.

Only when there was a DBE program in place, as with the highway and bridge construction contracts, was there inclusion of DBE firms.

7.0 ANECDOTAL FINDINGS

7.0 ANECDOTAL EVIDENCE

In previous chapters of this report, availability and utilization of minority and women-owned businesses have been analyzed along with SCDOT contracting, policies, procedures and practices. While statistical analysis is critical for determining the statistical significance of findings, it cannot fully account for all of the factors, events, or motivations which are part of contracting decisions and practices.

We wanted to explain the findings related to utilization (Chapter 6) and those related to contracting policies, procedures, and practices (Chapters 4 and 5). Were they the result of objective non-biased contracting procedures, or were they the result of discriminatory patterns and practices? To help us find the answer, we gathered and analyzed extensive amounts of anecdotal information from a variety of sources. The courts have held that a combination of statistical evidence of disparity and anecdotal evidence of discriminatory practice can provide the level of evidence needed to show the existence of and evaluate the impact of historical discriminatory practices.

Our methodology for gathering anecdotal evidence was discussed in Chapter 3.0, *Methodology*. The subsections which follow present a comprehensive analysis of anecdotal evidence based upon:

- a mail survey of DBE and non-DBE vendors;
- public testimony provided by DBEs, non-DBE vendors, and other interested parties at public hearings in each of the seven SCDOT districts; and
- personal interviews with selected key informants, SCDOT staff, and DBE and non-DBE vendors.

7.1 Nature of Discriminatory Patterns and Practices

Our intent in this chapter is to provide a detailed analysis of anecdotal evidence directly pertinent to the SCDOT's program. However, we recognize that some of the factors which may have shaped current conditions with regard to DBE participation in SCDOT contracts span a much greater time period than the years included in this study. We also recognize that, as in other states in the South and elsewhere, race and gender based discrimination is a documented part of South Carolina's history and at one point permeated most major institutions. Within this context we must also recognize that, historically, discriminatory practices have operated to the detriment of many DBEs and have played a significant role with regard to both their availability and their utilization. An example can be found in public testimony given before the Economic Development Committee of the South Carolina Legislative Black Caucus on October 12, 1988. The following excerpts exemplify the impact of discriminatory practices and patterns on minority participation:

... the latter part of 1987 [a DBE contractor was] congratulated on a job by one of the Highway Department people who works in the Department of Compliance...He congratulated us on a project that we had won which came as a shock to us because we had not [bid] on that particular project. So we in turn started to inquire about the project to find out exactly what it was we had [bid] on and what we had won. Through our findings we found [we] were submitted by a [prime] contractor... He had listed us as plasters for a certain dollar amount on a project that he had won. We were being listed as the DBE meeting a certain goal that he had to meet. And we, in turn, contacted him to find out about the project. During the time we called him, he was not there. So about maybe two or three weeks later after that, he contacted us. He told us that he had a project that he wanted us to look at and he wanted us to make some money on it. So we talked in length with [the prime] and told him that we would need a copy of the specs and the blueprint so that we could go out on the job site and see if we could actually do the job for this particular amount. But [the prime] sent us a contract in the mail to sign in reference to the job, which we were very confused about knowing that we had never [bid] any Highway Department jobs and were not really familiar with all the different procedures; so we began to contact the Highway Department to inquire and let them know what had happened and advise us on what to do. I talked in length with a

great number of people, I have names but in the end we turned it over to a lawyer because we got very confused. And they told me that [the prime] was not obligated to us if he found another contractor because he had already met his goal even without us. So when we found out who the other contractor was, [the prime] told us that he got us confused with another [DBE] contractor...So we contacted [the other DBE] to find out if he had in fact talked with [the prime] in reference to this particular project, he said he had not spoken with him because he had done work for [the prime] in the past and he did not pay him the money that he owed him for that job; so he didn't think that he would contact him in reference to this job.

... I would like to add that the Highway Department, after our attorney discussed it with them, still allowed the contractor to go and do the work. The point is the contractor did not notify us, he falsified documents, he pulled a price out of the air and put a price in for us and all this is notarized and they know from us, that they did not contact us. The only thing we're asking for is for them to be fair. If they be fair with us, we can give them good work and good services. That's no way fair for them to allow this particular contractor, even if he is a favorable contractor. We should have been treated more justly than we were. We were just pushed aside and the last word I got was well we don't need y'all anyway... Then they turned around and mixed it up a little bit to make it look like they were trying to get [the other DBE] and [the other DBE] said the man already owed him \$2,000 and he didn't want anything to do with him. But yet and still at a time when he was out of work, he went on and took the job anyway. The problem was it was on certified documents and they allowed this man to go ahead and do the job.

... He is not even a DBE, he is not certified. He wasn't certified then and he's not certified now.¹

Another Black-owned minority firm participating in the state set-aside program provided testimony about its experiences as a prime contractor with the SCDHPT. The company stated that after prequalifying in 1986, it was difficult to acquire subcontract work:

We were prequalified in 1986, but found out that subcontract opportunities were limited for minority firms that have their own bonding and financing. We were always too high for the primes we bid with. In 1987, we provided

¹Hearing before the Economic Development Committee of the South Carolina Legislative Black Caucus, October 12, 1988. (The title of the bound proceedings is Barriers to Full Minority Participation in the South Carolina Department of Highways and Public Transportation's Set-Aside Program). pp.78-81.

the necessary data to be certified as a DBE for the State's Set Aside Program.²

The DBE was successful in securing a project in June 1987 in Charleston County, S.C. File 10.144A and File 10.165A. However, the DBE was not aware that this project had been let previously to prime contractors on the open market. Nor was the DBE made aware that there was a controversy surrounding the project because residents along Route 61 in Charleston did not want their historic trees cut down. In addition, the SCDHPT "had not obtained all the right-of-ways and was involved in a legal fight with at least one of the residents over moving items,"³ at the time the contract was awarded.

The DBE contractor described the events as follows:

When the project got underway in August of 1987, it was shut down in less than a week, while the highway department made a decision over the trees. As the Highway Department told the Charleston Post & Courier newspaper, they had three options, cancel the project, revise the drawings or perform it as is.

The contractor had no options. The Highway Department chose to revise its drawings and ordered us back to work. Although the delay took 45 days, the revised drawings did not cover many of the details that had to be performed, just as the bid items in the project included obviously unnecessary items and didn't include obviously necessary items. Since this was our first and will probably be our only project with the department and since there was no supportive services contractor from the time we were awarded the project until a year later, we were on our own in dealing with the Department. Leaving the trees had an abdominal effect on the cost of the rest of the items in the contract increasing it tremendously. The result was that as of September 30, 1988, we received \$144,049.35. The total cost at that date was \$330,102.21. The Highway Department said we mismanaged the project. What mismanagement means is that we don't know how to take \$144,000.00 and pay \$330,000.00 worth of bills with it. These costs would not have been incurred if the Highway Department had not bid items and in general, went out of their way to increase the price of construction.

²Ibid., p. #8.

³Ibid., p. #8.

In 1989, we were going to graduate from the SBA market where bond rates are 2.4% to the standard market where primes and women-owned businesses pay less than 1%. Because of the project we probably will be in a substandard market where bonding starts at 5%. That is if we're going to be able to get bonding at all.⁴

The DBE's testimony described harassment and racial slurs from highway inspectors during work on the project. The questions posed by the hearing panel and the respective responses were as follows:

Questioning by [a] Senator:

Question: Did you say the highway Department paid three times the price on a specific portion of a job to a non-minority subcontractor and not to your company? Would you explain that.

Response: *Yes sir, I'll clarify that for you. There was a choice between using stabilized aggregate base and to use binders to bring up the road to the proper elevation.*

Question: Excuse me, start again please.

Response: *To clarify, there was a choice to be made whether to use stabilized aggregate base material to bring up the road elevation to the proper surface elevation, and rather than using the SBAC which would have been cheaper for BellincCo and also cheaper for the Highway Department, they opted to pay for asphalt binders, which is approximately two feet now or will virtually be two feet in depth, rather than using what would have been much less expensive, the SABC; but in doing so, of course, the funds for paying for that, the asphalt, goes directly to the subcontractor who is non-minority.*

Question: Where did the profanities and slurs occur and by whom?

Response: *It was virtually an ongoing sort of thing whereas the inspectors would come out and in*

⁴Ibid., pp. 8-9.

their instructions would use profanity, would tell our construction crew that they shouldn't be working for BellincCo. They were going to bankrupt you. They may not get paid this coming pay period. And in certain instances it was so bad that residents that lived along the roadway came out and told the inspectors not to be saying those sorts of things.

Question: Are these Highway Department Inspectors?

Response: Yes sir.

Question: These were the same persons that said they were going to bankrupt the firm?

Response: Yes sir.

Question: On what authority?

Response: *We don't know on what authority.*

We don't know on what authority that would be. The situation was they were doing things, manipulating things, delaying the project whereas we had equipment and personnel out there that was costing us money. This job should have been completed within 82 days, it's been more than a year now and we still haven't completed this project. Right now, I'm being asked to come down there and perform additional work that will cost me but I have no way of being compensated for it, for errors that the Highway Department Inspectors have made in aligning boxes and elevation horizontal controls.

Questioning by [a] Representative:

Question: In your contract are there provisions that cover delaying the work, whose fault and compensation for the same? How does the contract state when it comes to the necessity for delaying the work, because from what you have said the work was delayed primarily by the highway department, especially on Highway 61 where there was some controversy about the trees.

Response: *Yes ma'am. There has been a major delay where the project was shut down for approximately 45 days. The Highway Department has acknowledged yes we have a claim and that they will pay us, that's been more than a year ago, but to date we haven't been compensated for any of that. That was the major delay.*

But to answer your question, that's allowed for in the specifications. The specifications talk about what you can submit as part of the claim, item for item, it doesn't tell you what the claim process is or that the attorney is also chairperson of the Claims Committee and how it will be handled or when it will be handled. In fact we were told at ultimate times well we could have handled this in the department, but since you have an attorney we have to handle this through the claims process. I don't know if there is an informal process for non-minorities and a formal process for minorities, but we're in the formal process. That's not in the specs, we've talked about what you could put in there, but how it's done, no that's not in there.

Question: So you're saying that there is also a problem with the process.

Response: *There's definitely a problem with the process.*

Questioning by [a] Senator:

Question: First of all I'd like to know the name of the inspector that did all the cussing and stuff and secondly, you said something about racial slurs. ... tell me the words he called you.

Response: *The most common, Niggers.*

Question: Niggers? I'm very familiar with that, what else?

Response: *The black birds that they call migrants.*

Question: Who was doing all this calling?

Response: *We had one particular inspector . . . he was quite belligerent. Our superintendent requested, after more than a month, and he was partly responsible for the low estimate received back in March because he just didn't measure, he said he would and he said he did, but he didn't.*

Question: Who did he call niggers?

Response: *Our crew. He referred to our personnel in that matter.⁵*

In today's environment it is unusual to encounter blatant intentional discrimination by governmental or corporate institutions against any race or gender group. Invidious discrimination occurs, if at all, in subtle ways that are often difficult to identify and prove. Granted, in many situations, current patterns of business practice have evolved from historical time periods when discrimination was openly and intentionally practiced. Hence, they may reflect discriminatory practices in ways that are often unrecognized and unintended by the institutions and individuals that perpetuate them. However, rarely do you find today the kind of evidence uncovered in the SCDOT's Contract file 10.224 in which an SCDOT employee revealed his feelings towards a DBE subcontractor. The note reads as follows:

"Do you think this is fair? No this is not fair - This is just a case of a half-assed DBE contractor splitting hairs to get more money for something he should have done to start with. This shit will not by God happen again. Our specs from now on will spell out everything - down to how many times a day they can piss! This is the first time we ever did this and our specs haven't changed."

Nevertheless, the shadow of past discrimination lingers. In conducting this study, we made every effort to gather anecdotal evidence from DBEs and non-DBEs. However, some DBEs were afraid or unwilling to provide information or public testimony

⁵Ibid., pp.12-15.

about incidents or circumstances, some of which are documented in public records. That reluctance in itself a significant contribution to anecdotal evidence. For example, one DBE said he would not attend a public hearing nor consent to an interview because he was afraid it would hurt his business. Several DBEs who did consent to interviews indicated that others were afraid to participate in the study. Another DBE stated, "I was told by a prime that I should not be going to any meetings if I wanted to keep working." Four DBEs who agreed to be interviewed prefaced the interview by stating they had been warned about providing information for this study. Each wanted assurance that their names would not be used. One stated, "I am very reluctant to do this because I am afraid it will hurt my business."

Statements about the intimidation of DBEs were encountered throughout the collection of anecdotal evidence. Among the DBEs who were willing to discuss fear, intimidation, and coercion, many indicated that these practices were not only commonplace, but a longstanding part of what they had to cope with in doing business with the SCDOT. Some alluded to a "plantation mentality" on the part of the SCDOT and prime contractors. During one public hearing one DBE complained, "SCDOT allows minorities to get in business or to go in business only to serve as an 'Uncle Tom' for the white establishment." The same DBE indicated he was told by one prime contractor that in order to do any business, "You-all have to be humble, the problem with you is that your head rears back too high." Other DBEs also recounted incidents in which they were essentially told, "Stay in your place if you want to stay in business."

Similar anecdotes were provided by DBEs in virtually each SCDOT district; DBEs spoke of the intimidating environment created by SCDOT employees and prime contractors. In many ways, these reports support and verify the complaints and allegations described earlier in Chapter 4.0. For anecdotal purposes, these comments

and perceptions are important because they depict the environment that many DBEs believe they must deal with on a regular basis. Interestingly, the presence of our interviewers may have created a little counter-intimidation. As one DBE observed, "since the disparity study all of a sudden it has been much easier to do business, the inspectors aren't giving me problems and my primes are treating me good."

7.2 Analysis of Mail Survey

To obtain further anecdotal information from both DBE and non-DBE firms, we conducted a survey of South Carolina firms (and some out-of-state firms which have registered to do business in South Carolina) which provide the types of contractual services purchased by the SCDOT. A written survey instrument containing 48 questions was mailed to 1,756 firms. (Appendix H contains a copy of the survey instrument.) Completed surveys were received from 285 firms. A summary of the survey results are presented in Exhibit 7-1. Because of the very small number of completed surveys from "other DBEs," significant reliability should not be attributed to the survey results for this group.

The survey results revealed major differences among DBEs and non-DBEs. Specific findings from the survey are as follows:

- Most DBE firms are younger than non-DBE firms. Forty-four percent of the non-DBE firms were founded before 1970 compared to only 4% of the Black and 7% of the woman-owned firms. In fact, over half of the DBE firms in all groups were founded after 1980 compared to only 29% of the non-DBE firms. (See Question 1 in Exhibit 7-1.) If, prior to 1970, Black and women-owned firms were founded at the same rate as non-DBE firms, they apparently were unable to stay in business. Whatever the limiting factors (including discrimination in the marketplace) the greater age of the non-DBE firms likely gives them significant market advantages in terms of experience, skills, size, equipment, etc. Thus, to the extent that discrimination and related factors played a role in reducing the number of DBE firms prior to 1970, the impact is still present today.

- In general, no major differences exist between DBEs and non-DBEs as to whether they bought another firm or started their own. Most started their own. (Question 2)
- Unlike firms in other groups, most Black-owned firms are sole proprietorships; the majority of the firms owned by other groups are incorporated. (Question 3)
- A higher percentage of non-DBEs (33%) than DBEs (19% - 23%) used bank loans as a source of capital to start or fund their businesses, indicating that DBEs found it more difficult to obtain bank loans. (Question 4) A higher percentage of Black owners used personal savings, while other DBE groups used both personal savings and money from friends and family.
- Almost all of the firms in our survey provided the types of services frequently purchased by the SCDOT. A smaller percentage of DBE than non-DBE firms, however, provided highway and bridge preconstruction services, perhaps reflecting the lack of market opportunity in preconstruction since this is the one area where the SCDOT has had no goals and a very low utilization of DBE firms. (Question 5)
- Approximately half of all firms in the survey reported having a professional or trade license, with some having several different types of licenses. A much higher percentage of Black-owned (53%) and women-owned (59%) firms than non-DBE-owned firms (34%) indicated they had no professional or trade license. (Question 6)
- The percentages of revenue from the public and private sectors were approximately the same for all groups (with more than 50% coming from the private sector). (Question 7)
- Almost all of the firms in our survey had performed public sector work (Question 8), and most indicated an interest in performing public sector work (over 80% for all groups except the "other DBEs") (Question 24). Approximately 90% of all firms indicated that they were willing to do business with the SCDOT. Thus, no major differences existed among the groups in terms of their willingness to perform work for the SCDOT.
- Approximately half of all groups (except other DBEs) indicated that they had sought work from the SCDOT but had been unsuccessful. (Question 10)
- A much higher percentage of the non-DBE firms (54%) than DBE firms (8%-21%) indicated that they did not know how to solicit more work from the public sector, indicating a need for more communications by the SCDOT with all firms, and especially with

non-DBE firms, about how to win contracts with the Department. (Question 10)

- A much higher percentage of DBE firms than non-DBE indicated that a lack of adequate capital and an inability to meet bonding requirements were barriers to obtaining more public sector work. (Question 10) These two barriers pose major dilemmas for both the SCDOT and the DBE firms themselves. On the one hand, the SCDOT must have assurances that the firm can and will perform the required work on time. On the other hand, the firms cannot obtain more capital and additional bonding capacity if they can't get more work.
- The bonding capacity is further illuminated by responses to Question 11, where a much higher percentage of non-DBE firms indicated the ability to acquire bonds over \$1,000,000 (36% of non-DBEs versus 10% of Black firms, 12% of woman-owned firms, and 16% of other DBE firms).
- Non-DBE firms tend to be much larger than DBE firms. Twenty percent of the non-DBE firms had over 50 employees, compared to only 3% of the Black-owned firms, 2% of the women-owned, and 8% of the other DBE firms. (Question 13) Twenty-seven percent of the non-DBE firms reported \$5,000,000 in annual revenue compared to 1% of the Black-owned firms, 7% of the women-owned firms, and 15% of the other DBE firms. None of the DBE firms reported more than \$10,000,000 in annual revenue, while 17% of the non-DBE firms did.
- More than half (55%) of the non-DBE firms indicated that they had served as a prime contractor on a SCDOT project, while much smaller percentages of DBE firms reported doing so. (Question 17) At the same time, a much higher percentage of DBE firms reported having served as a subcontractor on a SCDOT project. (Question 22)
- Most of the DBE firms reported contracts of \$500,000 or less, while most non-DBE firms reported contracts of more than \$500,000. (Question 22)
- A higher percentage of DBE firms than non-DBE firms reported barriers which prevented them from doing more work for the SCDOT. A higher percentage of Black owners than any other group reported such barriers. (Question 26) The reported barriers were:
 - lack of adequate capital
 - inability to meet bonding requirements
 - not enough prior experience
 - inadequate equipment

- not enough employees
- Only a small percentage of all firms (less than 10%) reported that a lack of time to prepare a bid was a problem. (Question 26)
- A much higher percentage of Black respondents felt that biases exist in the SCDOT in the award of contracts. Many Blacks reported feeling that the SCDOT bid evaluations are biased against small firms, minority-owned firms, and women-owned firms. Only a very small percentage of the non-DBE firms agreed. (Question 27)
- A much higher percentage of DBE than non-DBE firms felt that a "good old boy" network of contractors, subcontractors, and suppliers exists in South Carolina. (Question 28) Many in all groups (including 48% of non-DBEs) felt that this "good old boy" network had interfered with their firm's ability to win a contract.
- Over 70% of the DBE firms compared to only 13% of the non-DBE firms felt that the "good old boy" network had a greater adverse impact on minority and women-owned firms. (Question 30)
- While a vast majority of minority and women-owned firms feel that DBE firms are as competent and capable of performing as well as non-minority firms, only a few (34%) of the non-DBE firms felt that way.
- Interestingly, only a small percentage of the respondents disagreed with the statement that "minority and women-owned businesses are judged on a different set of standards. . ." (Question 32) However, most non-DBE felt that the different standards do not adversely affect minority and women-owned firms, while Black owners, in particular, felt that an adverse impact did result. (Question 33)
- Most Black owners felt that it was a common practice for prime contracts to include a minority subcontractor on a bid and then drop the subcontractor after winning the bid. Non-DBE firms generally did not agree that this practice exists. (Question 35)
- Most Black owners also felt that non-minority contractors do not put forth a good faith effort to involve minority-owned and women-owned businesses as subcontractors. (Question 36)
- Most minority and women-owned firms felt that it does not cost more to include minority and women-owned firm in a bid. Only a few of the non-DBEs agreed. (Question 37)
- The vast majority of Black owners felt that non-minority prime contractors will use minority-owned and women-owned firms as

subcontractors only if required to do so. Most non-DBE firms disagreed with this statement. (Question 38)

- Only 41% of the non-DBE respondents disagreed with the statement that "minority-owned contractors, as a rule, are not capable of performing as well on contracts as majority-owned contracts." Most DBE respondents disagreed with the statement. (Question 39)
- Twenty-five percent of the non-DBE firms reported having had bad experiences with minority-owned subcontractors. (Question 40) Only 7% of the non-DBE firms reported similar bad experiences with women-owned firms. (Question 42)
- Sixty-four percent of the Black-owned firms felt that they had encountered problems that non-minority firms did not experience in trying to do business in South Carolina. (Question 47)
- While over half of each minority group indicated that they felt they had not been discriminated against by either the SCDOT or the State of South Carolina, another approximately 20% felt they had been discriminated against. (Question 47) Thirty-six percent of the Black-owned firms felt they had been discriminated against by prime contractors. Sixty percent, however, reported no feelings of discrimination by prime contractors. (Question 48)

A summary comparison of the survey responses of DBE and non-DBE firms is presented in Exhibit 7-2.

EXHIBIT 7-1
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION
SURVEY OF BUSINESSES
JANUARY 1995

QUESTION	Total ¹	Black Firms	White Female Firms	Other DBEs ²	Non-DBEs
Respondent Location	(n=285)	(n=70)	(n=44)	(n=13)	(n=158)
Columbia, SC	34	39	30	23	34
Greenville/Charlotte, SC	28	16	34	31	32
Florence/Charleston, SC	22	27	21	8	22
Savannah/Augusta, GA	8	7	5	8	9
Other, out-of state locations	7	10	11	31	3
No response	1	1	0	0	1
1. In what year was your business established?					
1950 or earlier	11	0	5	0	19
1951-60	6	1	0	8	10
1961-70	10	3	2	15	15
1971-80	22	23	18	23	22
1981-90	42	61	55	54	29
1991-94	9	11	21	0	6
Mean Year	1975	1984	1983	1979	1968
2. Did you start this business or buy an existing business?					
Start business	86	94	82	77	84
Buy existing business	11	6	16	15	12
No response	3	0	2	8	4
3. Is your business a single owner or self employed, a partnership, or a corporation?					
Corporation	74	43	80	62	87
Single owner or self-employed	23	53	11	31	11
Partnership	3	1	5	8	2
No response	1	3	5	0	0
4. Which of the following best describes the single major source of capital used to start or fund your business?					
Personal savings	48	56	48	46	45
Bank loan	27	19	18	23	33
Friends/family	9	9	14	23	6
Business capital	5	3	5	0	7
Home equity loan	5	4	9	8	4
SBA loan	2	4	2	0	1
No response	4	6	5	0	4

¹Responses are shown in percentages and have been rounded to the nearest whole percent. Responses to some questions do not add to 100% where multiple responses were to question.

²Other DBEs consist of Native American/Alaskan Native, Hispanic, and Asian/Pacific Islander-owned firms.

EXHIBIT 7-1 (Cont'd)
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION
SURVEY OF BUSINESSES
JANUARY 1995

QUESTION	Total ¹	Black Firms	White Female Firms	Other DBEs ²	Non-DBEs
5. Which of the following categories best describes your company's predominant lines of business:	(n=285)	(n=70)	(n=44)	(n=13)	(n=158)
Highway and bridge construction	43	60	43	62	33
Building construction and renovation	28	27	34	15	29
Highway and bridge preconstruction	24	9	16	23	33
Other, unspecified	5	4	7	0	6
6. List all current professional or trade licenses that your company or individuals in your company hold. (Up to 3 responses allowed.)					
Building license	45	30	32	62	54
Architectural/engineering related	24	8	18	15	33
Special construction license	17	33	2	10	15
Highway/bridge related	4	1	2	0	6
Not applicable	18	20	32	23	12
No response	24	33	27	8	21
7. What percentage of total business revenues in 1993 came from doing business in the private sector and the public sector?					
The private sector	58	56	51	57	59
The public sector	42	44	49	43	41
8. Has your company performed work for public sector clients, either as a contractor or subcontractor, during the last 13 years?					
Yes	91	89	97	78	91
No	9	11	3	22	9
9. What statement best describes your interest in obtaining revenue from the public sector (government)?					
I <u>am</u> interested in performing public sector work.	84	83	89	69	85
I am <u>not</u> interested in performing public sector work. (SKIP TO Q 11)	13	14	11	23	13
No response	3	3	0	8	2

¹Responses are shown in percentages and have been rounded to the nearest whole percent. Responses to some questions do not add to 100% where multiple responses were to question.

²Other DBEs consist of Native American/Alaskan Native, Hispanic, and Asian/Pacific Islander-owned firms.

EXHIBIT 7-1 (Cont'd)
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION
SURVEY OF BUSINESSES
JANUARY 1995

QUESTION	Total ¹	Black Firms	White Female Firms	Other DBEs ²	Non-DBEs
10. Which of the following factors have prevented your company from doing more work for the public sector? (Multiple responses allowed.)	(n=186)	(n=45)	(n=29)	(n=6)	(n=106)
We have sought more work but have been unsuccessful.	51	49	55	17	53
We don't have sufficient capital to handle the cash flow.	16	33	14	50	8
We don't know how to solicit more work.	13	21	17	8	54
We can't meet the bonding requirements.	12	29	7	17	6
We don't have enough employees.	7	9	7	17	6
We don't have enough equipment.	5	13	3	0	2
11. What is the maximum amount of performance bonding your company can receive?	(n=285)	(n=70)	(n=44)	(n=13)	(n=158)
\$100,000 or less	2	6	0	0	1
\$100,001-\$500,000	9	10	18	15	5
\$500,001-\$1,000,000	5	0	11	0	5
\$1,000,001-\$3,000,000	7	9	5	8	8
\$3,000,001-\$5,000,000	7	0	5	0	11
Over \$5,000,000	11	1	2	8	17
Not applicable	40	53	46	46	33
No response	19	21	44	23	20
12. Has your company been refused a bond during the past 13 years?	(n=119)	(n=19)	(n=18)	(n=4)	(n=78)
Yes	22	32	17	25	21
No	75	53	83	75	78
Not applicable	3	16	0	0	0
13. How many employees (full-time and part-time combined) are currently employed at your business?	(n=285)	(n=70)	(n=44)	(n=13)	(n=158)
0	2	3	2	0	1
1 - 5	15	26	14	15	11
6 - 15	21	21	32	23	18
16 - 50	25	14	23	31	29
Over 50	12	3	2	8	20
No response	25	33	27	23	22

¹Responses are shown in percentages and have been rounded to the nearest whole percent. Responses to some questions do not add to 100% where multiple responses were to question.

²Other DBEs consist of Native American/Alaskan Native, Hispanic, and Asian/Pacific Islander-owned firms.

EXHIBIT 7-1 (Cont'd)
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION
SURVEY OF BUSINESSES
JANUARY 1995

QUESTION	Total ¹	Black Firms	White Female Firms	Other DBEs ²	Non-DBEs
14. Compared to 3 years ago, has the number of employees (full and part-time combined) in your firm increased, decreased or remained about the same? (Check only one)	(n=285)	(n=70)	(n=44)	(n=13)	(n=158)
The same	40	39	43	39	41
Increased	36	40	41	62	30
Decreased	19	14	11	0	25
Not applicable	1	0	2	0	1
No response	4	7	2	0	4
15. What category best approximates your company's gross revenues for 1993?					
Less than \$5,000	2	6	0	0	1
\$5,001 - \$50,000	4	7	5	0	2
\$50,001 - \$100,000	8	17	7	15	3
\$100,001 - \$200,000	9	17	5	0	7
\$200,001 - \$300,000	4	11	7	0	1
\$300,001 - \$400,000	6	3	14	15	4
\$400,001 - \$500,000	4	7	2	8	3
\$500,001 - \$600,000	3	3	0	0	4
\$600,001 - \$700,000	3	1	7	0	2
\$700,001 - \$800,000	3	1	7	0	2
\$800,001 - \$900,000	1	0	2	0	1
\$900,001 - \$1,000,000	4	4	2	0	4
\$1,000,001 - \$2,000,000	16	6	18	31	19
\$2,000,001 - \$3,000,000	5	1	5	8	7
\$3,000,001 - \$4,000,000	6	1	9	0	7
\$4,000,001 - \$5,000,000	3	1	0	0	4
\$5,000,001 - \$10,000,000	7	1	7	15	10
\$10,000,000 or above	9	0	0	0	17
No response	6	10	5	8	5
16. Has your company ever attempted to do business with SCDOT?					
Yes	67	74	73	46	64
No (Go to Question 20)	31	21	25	54	35
No response	2	4	2	0	1
16b. Is your company familiar with the SCDOT's purchasing or contracting process? (n=191)	(n=191)	(n=52)	(n=32)	(n=6)	(n=101)
Yes	83	90	72	83	83
No	13	6	25	17	13
No response	4	4	3	0	4

¹Responses are shown in percentages and have been rounded to the nearest whole percent. Responses to some questions do not add to 100% where multiple responses were to question.

²Other DBEs consist of Native American/Alaskan Native, Hispanic, and Asian/Pacific Islander-owned firms.

EXHIBIT 7-1 (Cont'd)
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION
SURVEY OF BUSINESSES
JANUARY 1995

QUESTION	Total ¹	Black Firms	White Female Firms	Other DBEs ²	Non-DBEs
16c. Has your company ever submitted a bid/price quote or responded to a proposal from the SCDOT?	(n=191)	(n=52)	(n=32)	(n=6)	(n=101)
Yes	88	92	88	100	86
No	7	4	9	0	8
No response	5	4	3	0	6
16d. Have you or a member of your company ever attended a pre-selection or pre-bid meeting for the SCDOT?					
Yes	64	67	50	67	67
No	30	29	47	33	26
No response	5	4	3	0	7
16e. In what year did you last do business with the SCDOT?					
1980 or earlier	3	2	0	0	3
1981-1990	7	6	6	17	7
1991	4	6	6	0	3
1992	3	2	0	0	5
1993	7	12	3	0	6
1994	26	21	9	33	34
1995	25	19	34	33	25
No response	25	33	41	17	17
Mean	1993	1993	1993	1993	1992
17. Has your firm ever performed as a prime contractor or prime consultant on any SCDOT contracts?					
Yes	40	19	31	17	55
No (Go To Question 20)	55	79	66	83	38
No response	5	2	3	0	7
18. How many times in 1993?	(n=77)	(n=10)	(n=10)	(n=1)	(n=56)
None	33	60	20	100	29
One time	16	10	0	0	20
Two times	10	0	20	0	11
Three times	7	0	10	0	7
Four times	5	0	20	0	4
Five times	1	0	0	0	2
6-10 times	4	10	10	0	2
11-15 times	9	10	0	0	11
More than 15 times	3	0	0	0	4
No response	13	10	20	0	13
Mean	4 times	4 times	3 times	0 times	4 times

¹Responses are shown in percentages and have been rounded to the nearest whole percent. Responses to some questions do not add to 100% where multiple responses were to question.

²Other DBEs consist of Native American/Alaskan Native, Hispanic, and Asian/Pacific Islander-owned firms.

EXHIBIT 7-1 (Cont'd)
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION
SURVEY OF BUSINESSES
JANUARY 1995

QUESTION	Total ¹	Black Firms	White Female Firms	Other DBEs ²	Non-DBEs
19. As a prime contractor or prime consultant for any of SCDOT projects, did you use minority-owned businesses (MBE's) or women-owned businesses (WBE's) as subcontractors?	(n=77)	(n=10)	(n=10)	(n=1)	(n=56)
Yes	62	70	70	100	58
No	16	10	20	0	16
Not applicable	20	20	10	0	22
No response	3	0	0	0	4
20. Has your company ever performed as a subcontractor on a project for the SCDOT?	(n=285)	(n=70)	(n=44)	(n=13)	(n=158)
Yes	40	43	50	31	37
No (Go To Question 24)	57	56	50	69	59
No response	3	1	0	0	4
21. How many times in 1993?	(n=115)	(n=30)	(n=22)	(n=4)	(n=59)
None	24	13	23	0	32
One time	13	17	9	25	12
Two times	13	17	9	0	14
Three times	5	7	5	0	5
Four times	4	3	0	0	5
Five times	6	3	18	0	3
6-10 times	8	10	0	25	9
11-15 times	8	3	0	0	3
More than 15 times	5	0	10	50	2
No response	19	27	19	0	51
Mean	4	3	6	20	3
22. What was the amount of the largest contract ever received from the SCDOT? [Check "Subcontractor" if a subcontract amount and check "None" if no contract was received.]					
Subcontractor	49	60	68	75	34
None	4	3	5	0	5
No response	47	37	27	25	61
Largest contract amount:					
\$100,000 or less	20	33	23	25	12
\$100,001-\$500,000	23	33	27	50	15
\$500,001-\$1,000,000	8	7	5	0	10
\$1,000,001-\$3,000,000	14	7	14	25	17
\$3,000,001-\$5,000,000	3	0	0	0	5
Over \$5,000,000	11	3	0	0	19
No response	22	17	32	0	22

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²Other DBEs consist of Native American/Alaskan Native, Hispanic, and Asian/Pacific Islander-owned firms.

EXHIBIT 7-1 (Cont'd)
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION
SURVEY OF BUSINESSES
JANUARY 1995

QUESTION	Total ¹	Black Firms	White Female Firms	Other DBEs ²	Non-DBEs
23. What percentage of your total business revenue came from the SCDOT in 1993?	(n=115)	(n=30)	(n=22)	(n=4)	(n=59)
None	24	30	27	0	20
Less than 10%	23	13	27	25	25
10% - 25%	12	10	0	25	17
26% - 50%	15	10	23	0	15
Over 50%	22	30	18	25	19
No response	5	7	5	25	3
24. What statement best describes your interest in doing business with the SCDOT? (Multiple responses allowed.)	(n=285)	(n=70)	(n=44)	(n=13)	(n=158)
Our company is willing to do business any time	90	96	93	92	87
Our company has no interest in doing business with the SCDOT	7	1	5	8	10
No response	3	3	2	0	3
25. Please indicate which (if any) of the following factors have prevented your company from receiving a SCDOT prime contract? (Multiple responses allowed.)					
Our price was too high	20	23	16	23	19
Could not meet performance bond requirements	13	26	14	0	8
Did not have adequate capital	13	33	14	15	4
Did not have adequate prior experience in area	12	17	9	0	12
Did not have adequate equipment	8	17	14	8	3
Not enough employees	7	11	9	8	4
Inadequate time to prepare bid	3	7	5	0	1
26. What factors have prevented your firm from doing more work for the SCDOT as a subcontractor? (Multiple responses allowed.)					
Our price was too high	20	26	18	0	20
Did not have adequate capital	9	26	9	0	3
Could not meet performance bond requirements	7	20	5	0	3
Did not have adequate prior experience in area	7	11	2	8	6
Did not have adequate equipment	6	16	5	15	1
Not enough employees	6	10	7	8	4
Inadequate time to prepare bid	4	9	5	0	2

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²Other DBEs consist of Native American/Alaskan Native, Hispanic, and Asian/Pacific Islander-owned firms.

EXHIBIT 7-1 (Cont'd)
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION
SURVEY OF BUSINESSES
JANUARY 1995

QUESTION	Total ¹	Black Firms	White Female Firms	Other DBEs ²	Non-DBEs
27. Do you feel any of the following factors apply to the SCDOT? (Multiple responses allowed.)	(n=285)	(n=70)	(n=44)	(n=13)	(n=158)
Bid evaluation are biased against small firms	13	24	11	15	9
Other firms given preferential treatment	11	13	7	8	11
Bid evaluations are biased against minority-owned firms	7	27	0	0	1
Contracting process biased against my firm	7	14	9	0	4
Bid evaluations are biased against women-owned firms	4	9	5	8	1
28. In the South Carolina area there is "a good-old-boy" network of contractors, subcontractors and suppliers doing business.					
Strongly Disagree (Go to Question 31)	10	3	7	15	14
Disagree (Go to Question 31)	16	7	18	8	20
Neutral (Go to Question 31)	23	19	25	23	25
Agree	21	29	27	8	17
Strongly Agree	17	34	18	23	8
No Answer/Does Not Apply	13	9	5	23	17
29. Exclusion from this "good-old-boy" network has kept my company from bidding or has interfered with our ability to contract in the public or private sector.	(n=107)	(n=44)	(n=20)	(n=4)	(n=39)
Strongly Disagree	1	0	0	0	3
Disagree	14	14	15	25	13
Neutral	13	5	20	0	21
Agree	36	36	35	50	33
Strongly Agree	25	36	20	25	15
No Answer/Does Not Apply	11	9	10	0	15
30. Although exclusion from this "good-old-boy" network adversely impacts a majority of small businesses, the adverse impact is felt the greatest among women and minority-owned businesses.					
Strongly Disagree	5	2	0	0	10
Disagree	10	0	15	0	21
Neutral	20	11	5	0	39
Agree	25	34	30	25	13
Strongly Agree	29	48	40	50	0
No Answer/Does Not Apply	11	5	10	25	18

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²Other DBEs consist of Native American/Alaskan Native, Hispanic, and Asian/Pacific Islander-owned firms.

EXHIBIT 7-1 (Cont'd)
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION
SURVEY OF BUSINESSES
JANUARY 1995

QUESTION	Total ¹	Black Firms	White Female Firms	Other DBEs ²	Non-DBEs
31. Minority and women-owned businesses are as competent and capable of performing as well as non-minority businesses on projects in the South Carolina area.	(n=285)	(n=70)	(n=44)	(n=13)	(n=158)
Strongly Disagree	6	3	0	0	10
Disagree	12	3	2	0	19
Neutral	15	3	7	23	22
Agree	36	43	48	23	30
Strongly Agree	22	49	36	46	4
No Answer/Does Not Apply	9	0	7	8	14
32. Minority and women-owned businesses are judged on a different set of standards in qualifications and performance than non-minority businesses when bidding on contracts in the South Carolina area.					
Strongly Disagree	8	0	9	23	10
Disagree	12	9	18	8	11
Neutral	23	14	36	23	23
Agree	28	37	27	15	25
Strongly Agree	18	33	2	15	16
No Answer/Does Not Apply	12	7	7	15	15
33. Double standards in qualifications and performance make it more difficult for minority and women-owned businesses to win bids and contracts in the South Carolina area.					
Strongly Disagree	19	0	9	23	30
Disagree	21	6	25	8	28
Neutral	23	20	41	23	18
Agree	13	33	14	23	3
Strongly Agree	10	30	7	0	3
No Answer/Does Not Apply	15	11	5	23	19
34. Minority and women-owned businesses in the South Carolina area are viewed by the general public as less competent than non-minority businesses.					
Strongly Disagree	5	4	9	15	4
Disagree	15	13	7	15	18
Neutral	23	13	25	15	27
Agree	32	34	36	15	30
Strongly Agree	12	26	18	23	4
No Answer/Does Not Apply	13	10	5	15	17

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²Other DBEs consist of Native American/Alaskan Native, Hispanic, and Asian/Pacific Islander-owned firms.

EXHIBIT 7-1 (Cont'd)
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION
SURVEY OF BUSINESSES
JANUARY 1995

QUESTION	Total ¹	Black Firms	White Female Firms	Other DBEs ²	Non-DBEs
35. It is a common practice for a prime contractor to include a minority subcontractor on a bid, to meet the "good faith effort" requirement, then drop that company as a subcontractor after winning the award.	(n=285)	(n=70)	(n=44)	(n=13)	(n=158)
Strongly Disagree	14	1	11	0	21
Disagree	20	11	11	23	26
Neutral	23	23	34	15	21
Agree	12	26	14	15	5
Strongly Agree	9	24	7	8	3
No Answer/Does Not Apply	23	14	23	39	25
36. The majority of non-minority prime contractors do not put forth a good faith effort to involve minority and women-owned businesses as subcontractors when bidding projects in the South Carolina area.					
Strongly Disagree	13	3	7	8	19
Disagree	23	11	23	23	29
Neutral	22	17	30	31	21
Agree	17	39	26	0	6
Strongly Agree	8	21	7	15	1
No Answer/Does Not Apply	18	9	7	23	24
37. Inclusion of minority or women-owned businesses in your bid does not increase the overall cost of the project.					
Strongly Disagree	14	4	2	0	22
Disagree	16	10	9	15	21
Neutral	15	7	9	15	20
Agree	30	49	48	39	15
Strongly Agree	9	23	9	15	3
No Answer/Does Not Apply	17	7	23	15	19
38. Majority businesses will use minority-owned or women-owned businesses as subcontractors on projects when minority or women participation is required. But, if minority or women-owned businesses participation is not required, majority businesses will use less qualified majority businesses as subcontractors instead.					
Strongly Disagree	18	0	14	0	28
Disagree	23	3	21	23	32
Neutral	16	11	14	23	18
Agree	21	53	32	23	4
Strongly Agree	11	29	18	0	1
No Answer/Does Not Apply	13	4	2	31	18

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²Other DBEs consist of Native American/Alaskan Native, Hispanic, and Asian/Pacific Islander-owned firms.

EXHIBIT 7-1 (Cont'd)
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION
SURVEY OF BUSINESSES
JANUARY 1995

QUESTION	Total ¹	Black Firms	White Female Firms	Other DBEs ²	Non-DBEs
39. Minority-owned contractors, as a rule, are not capable of performing as well on contracts as majority-owned contractors	(n=285)	(n=70)	(n=44)	(n=13)	(n=158)
Strongly Disagree	28	61	30	46	11
Disagree	27	16	32	23	30
Neutral	17	7	18	8	22
Agree	11	7	5	8	14
Strongly Agree	6	6	2	0	7
No Answer/Does Not Apply	13	3	14	15	17
40. Our firm has had bad experiences in using minority-owned firms as subcontractors.					
Strongly Disagree	11	21	7	15	6
Disagree	19	21	18	23	18
Neutral	16	11	18	8	18
Agree	11	3	11	0	15
Strongly Agree	6	1	0	0	10
No Answer/Does Not Apply	38	41	46	54	34
41. Women-owned contractors, as a rule, are not capable of performing as well on contracts as majority-owned contractors.					
Strongly Disagree	22	29	48	23	12
Disagree	33	34	25	39	35
Neutral	17	10	14	15	21
Agree	5	6	0	0	7
Strongly Agree	1	1	0	8	1
No Answer/Does Not Apply	21	20	14	15	24
42. Our firm has had bad experiences in using women-owned firms as subcontractors.					
Strongly Disagree	14	21	23	0	10
Disagree	24	24	7	46	27
Neutral	17	10	16	8	20
Agree	4	1	2	0	6
Strongly Agree	1	0	2	0	1
No Answer/Does Not Apply	40	43	50	46	36
43. Please indicate whether a male or female owns or controls at least 51% of your company.					
Male	62	91	0	85	100
Female	38	9	100	15	0

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²Other DBEs consist of Native American/Alaskan Native, Hispanic, and Asian/Pacific Islander-owned firms.

EXHIBIT 7-1 (Cont'd)
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION
SURVEY OF BUSINESSES
JANUARY 1995

QUESTION	Total	Black Firms	White Female Firms	Other DBEs	DBE Unknown
44. What is the race/origin of the owner or controlling party of this 51%? If this race/origin is of a mixed background, choose the category with which you can most closely identify.	(n=136)	(n=70)	(n=44)	(n=13)	(n=9)
African American (Black)	52	100	0	0	0
White Female	32	0	100	0	0
Native American/Alaskan Native	6	0	0	54	0
Hispanic	3	0	0	38	0
Asian/Pacific Islander	1	0	0	8	0
No response	7	0	0	0	100
45. At which of the following South Carolina agencies are you currently certified as a Minority Business Enterprise or Women Business Enterprise? (Multiple responses allowed.)					
Department of Transportation	62	74	61	39	0
Governor's Office	49	56	55	15	0
Columbia Minority Business Development Center	4	1	9	0	0
Some other organization	6	7	2	0	0
Don't know/No response	4	4	19	15	100
46. Do you feel you encounter problems that a non-minority business does not when attempting to do business in South Carolina?					
Yes	50	64	41	31	11
No	38	30	50	54	22
No response	12	6	9	15	67
47. Do you feel your company has ever been discriminated against by one of the following agencies? (Multiple responses allowed.)					
SCDOT	21	27	16	15	0
State of South Carolina	13	20	5	8	0
Some other organization	7	11	2	8	0
None	60	57	66	77	100
48. Do you feel your company has ever experienced discriminatory actions by a prime contractor used by one of the agencies listed in Q.47?					
Yes	24	36	14	8	0
No	65	60	75	85	22
No response	12	4	11	8	78

931/resp.

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²Other DBEs consist of Native American/Alaskan Native, Hispanic, and Asian/Pacific Islander-owned firms.

EXHIBIT 7-2

**GENERAL CHARACTERISTICS OF DBE
AND NON-DBE FIRMS AS REPORTED IN WRITTEN
SURVEY OF FIRMS**

	DBE FIRMS	NON-DBE FIRMS
Age	Younger	Older
Size	Smaller	Larger
Source of capital	Fewer bank loans	More bank loans
Bonding capacity	Low	High
Form of ownership	Fewer incorporated	More incorporated
Services offered	Those purchased by the SCDOT	Those purchased by the SCDOT
Licenses	Fewer	More
Barriers to more public sector work	Inadequate capital in adequate bonding capacity in adequate equipment not enough employees	Lack of knowledge of how to get more work
Annual revenue	Small	Large
Number of employees	Fewer than 15	More than 15
Interest in doing business with the SCDOT	High	High
Served as prime contractor	Low percent	High percent
Served as subcontractor	Higher percent	Lower percent
Used minority subcontractors	Higher percent	Lower percent
Largest contract	Less than \$500,000	Greater than \$500,000
Feeling that process is biased against DBE firms	Higher percent	Lower percent
Feeling that DBE firms not as competent	Lower percent	Higher percent

7.3 Analysis of Public Hearings

Public hearings were held in each of the seven SCDOT engineering districts in South Carolina. The public hearings were conducted for the purpose of receiving comments and testimony regarding the participation of minority-owned and women-owned firms in the following contracting activities:

- Highway and bridge preconstruction;
- Highway and bridge construction;
- Building construction and renovation.

Persons providing public testimony were invited to testify about their experience doing business with or attempting to do business with the SCDOT. The public hearing schedule is presented in Exhibit 7-3.

Each hearing was structured in the same format and was conducted by a panel comprised of representative(s) from MGT of America, Inc., and representative(s) from the SCDOT. Each hearing was chaired by the MGT representative. A certified court reporter recorded and transcribed each hearing. The hearings were structured as follows:

- A MGT or SCDOT representative opened the hearing, explained the purpose of the hearing, and introduced the members of the panel. The MGT representative explained how the hearing would be conducted and how the panel would receive public testimony.
- Persons wishing to testify obtained a 3 x 5 questionnaire card at registration. The prospective witness was requested to complete the card, which elicited basic information about the person's company.
- Upon completion of each witness's testimony, panel members followed up with questions.
- Speakers were called in the order in which their cards were received, and were requested to limit their comments to five minutes and to limit comments to issues related to contracting with the SCDOT.

Eighty-four (84) persons registered at the hearings and twenty seven (27) persons testified. Of the 27 persons providing testimony, 14 (51.85%) were DBEs, 11 (40.74%) were non-DBEs/organizations, and two (7.41%) were unidentified. All of the firms/organizations identified were located in South Carolina. Exhibit 7-4 shows the distribution of the demographic and service activity of the firms/organizations that provided information during the public hearings.

Of the firms presenting testimony, 18 (67%) had attempted to do business with the SCDOT. Six firms (22%) had not attempted to do business with the SCDOT. Ten of the fourteen DBEs (71%) had attempted to do business with the SCDOT.

Thirteen (48.14%) of the firms testifying were road construction contractors. Two (14.28%) of the minority businesses were architecture/engineering firms, and neither had done business with the SCDOT. There were two trucking contractors, one minority and one non-minority. Two (25%) of the eight majority businesses were bridge construction contractors. One minority welding contractor provided testimony.

EXHIBIT 7-3

**SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION
DISPARITY STUDY
PUBLIC HEARING SCHEDULE**

District	DATE	LOCATION/TIME
1	1/1/95	Allen University Auditorium 1530 Harden Street Columbia, South Carolina
2	1/17/95	Piedmont Technical College Room 102-C Conference Center Greenwood, South Carolina
3	1/18/95	Greenville County-County Square 301 University Ridge Greenville, South Carolina
4	2/2/95	Chester County Memorial Building 140 Main Street Chester, South Carolina
5	1/24/95	Florence Darlington Technical 400 Building, Room 401 Florence, South Carolina
6	1/31/95	Trident Technical College Palmer Campus Auditorium 66 Columbus Street Charleston, South Carolina
7	1/26/95	South Carolina State University Business Development Center Belcher Building Orangeburg, South Carolina

Each hearing was scheduled from 7:00 p.m. to 9:00 p.m.

EXHIBIT 7-4

DEMOGRAPHIC AND SERVICE ACTIVITY

Firms/Organizations	DBE	SCDOT Certified	Attempt Business SCDOT	Cont./ Vendor SCDOT	Service Activity
APAC Carolina Construction	NO	NOT INDICATED	YES	YES	ROAD CONSTRUCTION
Scipio Construction	YES	YES	YES	YES	ROAD CONSTRUCTION
SC Minority Contractors Association	N/A	N/A	N/A	N/A	N/A
Sandlapper Contractors	YES	YES	YES	YES	ROAD CONSTRUCTION/ TRUCKING
Carolina's Association of General Contractors	NO	N/A	N/A	N/A	ASSOCIATION/ GENERAL CONTRACTORS
Triplett-Peek, Inc.	NO	NO	YES	YES	BRIDGE CONSTRUCTION
A.B.L. Enterprises	YES	NOT INDICATED	INF. ONLY	NO	ARCHITECTURE/ ENGINEERING SERVICE
SC Conference of Branches NAACP	N/A	N/A	YES	NO	N/A
Jackson Trucking	YES	YES	YES	YES	HAULING
Columbia Minority Business Development Center	N/A	N/A	N/A	N/A	N/A
Wilson & Son Welding	YES	YES	YES	YES	WELDING
Allsteel Products Company	NO	YES	YES	YES	ROAD & BLDG CONSTRUCTION
Ashmore Bros. Inc.	NO	NO	YES	YES	ROAD CONSTRUCTION
A.T. Sistare Construction Company, Inc.	WBE	YES	YES	YES	ROAD CONSTRUCTION
Carolina Bridge Company	N/A	YES	YES	YES	BRIDGE CONSTRUCTION
Leon's Fence Company	YES	YES	YES	YES	ROAD CONSTRUCTION

EXHIBIT 7-4

DEMOGRAPHIC AND SERVICE ACTIVITY (Continued)

Firms/Organizations	DBE	SCDOT Certified	Attempt Business SCDOT	Cont./ Vendor SCDOT	Service Activity
Taylor Brothers Construction Company	YES	YES	YES	YES	ROAD CONSTR/ GRADING
J&G Contractors	YES	YES	YES	YES	ROAD CONSTRUCTION
J.F. Cleckley & Company	NO	YES	YES	YES	ROAD CONSTRUCTION
Q & Q	YES	YES	YES	YES	ROAD CONSTRUCTION
Oliver's Landscaping	YES	YES	YES	YES	ROAD CONSTRUCTION
Legislative Black Caucus	N/A	N/A	N/A	N/A	GOVERNMENTAL BODY
Bradley Cooper & Assoc.	NO	NO	NO	NO	ARCHITECTURE/ ENGINEERING & BLDG
Small Business Development Center	NO	N/A	NO	NO	BDC
Thompson Trucking	NO	NOT INDICATED	YES	YES	TRUCKING
W. Frazier Construction Company	YES	YES	YES	YES	ROAD CONSTRUCTION
Global Management Consultant	N/A	N/A	N/A	N/A	LABOR MANAGEMENT

Vigorous, well documented attempts were made to encourage attendance at the public hearings by calling businesses to remind them of the hearings and by publicizing the hearings in various media. As stated earlier, some DBEs indicated they felt intimidated about attending or testifying at the hearings. Persons who did provide testimony at the seven public hearings included DBEs, majority contractors,

representatives from trade associations, representatives from minority advocacy organizations, and one state legislator.

Opinions, perceptions, and anecdotes provided at the hearings covered a wide range of issues and concerns, including past and present SCDOT practices and comments and perceptions about DBEs and non-minority contractors. Several witnesses provided written comments in addition to oral testimony. Other witnesses agreed to provide documentation to help support their oral testimony.

To some extent, perceptions and comments about the SCDOT, the DBE program, DBE participation, and relationships between primes and DBEs tended to vary along racial lines. For example, a majority of DBEs tended to feel that patterns of discrimination within the SCDOT are longstanding and well established. Few expressed any confidence in the ability of the SCDOT or the DBE program to significantly increase minority participation. Several alluded to findings and results of previous public hearings, legislative investigations, and a variety of reports and studies as evidence to support their own allegations and concerns. Conversely, majority contractors and other non-minority witnesses cited factors other than discrimination as major barriers. For example, one witness commented that the major problem was, "the inability of the DBE program to help minority firms develop to the level of being ready, willing, and able to perform." According to this witness, discrimination is not a major issue; and he felt that quality and capability among DBEs should be more of a concern than counting the numbers. Similar comments were voiced by a number of non-minority witnesses.

In spite of the different viewpoints, there appeared to be consensus among persons providing testimony that if the DBE program was to be continued, it needed to be improved. There was also consensus that the DBE program was largely ineffective and had not played a significant role in developing DBEs.

For analysis purposes the public testimony provided at the public hearings was organized and summarized into the following:

- Issues related to SCDOT policies, procedures, and practices;
- Issues related to DBEs and the DBE Program; and
- Issues related to the practices of prime contractors.

7.3.1 Issues Related to the SCDOT

The following responses were given related to SCDOT practices, policies, procedures, and operations:

- The commitment of the SCDOT in encouraging participation was questioned. One witness responded, "There continues to be a lack of support by the Department to encourage participation by minority contractors. To date, participation is limited to the goal and nothing beyond that. If there was no requirement, there would probably be no involvement on the part of minority contractors."
- Several witnesses testified about perceptions that SCDOT officials are controlled by certain prime contractors and are very passive in policing the contractual activities of certain prime contractors.
- One DBE felt that the SCDOT was lax in enforcing its own rules and allowed prime contractors to take advantage of minority businesses. One stated, "They let contractors run the Department. The Department has on record hundreds of occasions where contractors utilize the services of a minority-owned business, or so-called business, which does not perform the work, does not have the capability to perform the work, cannot perform the work, and the majority of the money goes right back to the white male-owned business."
- One DBE questioned SCDOT operating methods. He stated, "A lot of people in the Department continue to do business the old fashioned way – under the table – cut deals, certain contractors, use certain projects." He also stated that a competitor with only two trucks has been awarded almost two million in SCDOT contracts while his firm with 22 trucks has been awarded only \$24,208 for 1994.
- Several minority and majority contractors testified that the current SCDOT program does not determine firm capability and fails to

certify enough legitimate firms to supply contractors with adequate resources to meet goals.

- Testimony was also given that the SCDOT does a poor job of enforcing the rules, monitoring the program, and documenting program results. One DBE felt that it was common knowledge among contractors that the SCDOT knowingly tolerated fraud and abuse in the program.
- In response to a question about bidding work with the SCDOT, one DBE indicated that he had difficulties in the past and no longer bid on SCDOT contracts on a regular basis.
- One witness provided a written chronology of attempts to improve DBE participation in the SCDOT and indicated that the SCDOT had exhibited a careless attitude in developing minority and female businesses.
- One witness seeking SCDOT certification, who is certified with the Department of Defense (DOD), raised concerns about the certification process. "We have recently submitted an application for certification with SCDOT and in so doing, we find its quite difficult just looking at the application, going through the motions and getting certified, compared to doing business with DOD." This same witness indicated he was told by someone at the SCDOT that the first step in participating in the SCDOT contracts was getting certified, which is not a prerequisite.
- One DBE felt that the SCDOT could improve DBE participation by simplifying the certification process and providing a mechanism to help with bonding and cash flow. He stated, "Without those two things you can't operate, and that's where most minority firms have their weaknesses, in bonding capacity and being able to fuel a job financially."
- One witness testified about the lack of responsiveness of the SCDOT. "I've tried several times to make contact concerning contracts with SCDOT, and the information hasn't been very informative. I've had problems getting accurate information I need about forms, procedures, and requirements about upcoming work."

7.3.2 Issues Related to the DBE Program

Testimony related to DBEs included the following:

- Several contractors felt that most DBEs do not fully understand their costs and as a result, perform work too cheaply. For example, one

contractor stated, "The DBEs wind up working too cheap and can't make any money because . . . I felt like there would be some higher prices paid for work performed, but its really been just the opposite . . . I've known four or five black contractors in the fence and guardrail business to go broke in the last 10 years."

- Another contractor shared similar perceptions. "DBEs do not know how to bid and they go buy three dump trucks and they think they are a trucking company and they don't know how to run a business. It's cruel and it has hurt a lot of people. I've seen some who didn't have any idea what they were quoting. We could have cleaned them out, and I dare say some of them have been because they just don't know how to figure the bid."
- Testimony was given by several witnesses that the construction business has been difficult for Blacks, and that many Black-owned construction firms have gone out of business or gone bankrupt since the DBE program was started.
- Testimony from several witnesses questioned the integrity of the DBE program. One witness alleged that only six or seven participants in the program are truly minority owned. He indicated that some DBEs felt that most DBEs are not legitimately participating in the program. One DBE questioned a DBE receiving over \$4 million in contracts after being in business for only a short time. "How can the white ladies go out and go into business and in a couple of months do this kind of business? The reason is because these white ladies are backed by their white men, so the Department just pass the bucks."
- Bonding was cited as a barrier to participation in the DBE program. "Bonding is a finance problem. Bonding companies have traditionally discriminated against minorities, and there is a need to ensure that bonding companies do not discriminate based on race."
- Some contractors also testified about positive experiences with the program. One contractor stated that since the program started he had done over 20 million dollars worth of work. "We've always met the goal on subcontracting portions of a project to a minority subcontractor. In that time we really haven't had many bad experiences."
- A highway construction firm owner questioned the quality of DBEs and the operation of the DBE program. In discussing DBEs he stated, "They're not properly prepared, they're undercapitalized, they can't get the finances, have no business skills, management skills, in many instances." He also stated, "Another problem I have with the program that's run in South Carolina, it's never been run according to the federal guidelines. The federal guidelines say you

don't have to allocate any more of the percentage than there is minority firms that can properly do the work, and I don't think that's ever been taken into consideration. I think they should do away with it matter of fact, my opinion is to do away with the whole program."

- One majority contractor testified that he felt the current program was hurting minority and majority trucking companies, because the same minority subs were being used on all the jobs. He complained that the system has been designed and operated in a way that DBEs are only competitive in the trucking industry. He stated, "we're being closed out of SCDOT jobs. We don't even send anybody up the highway department for bids anymore. I think that we're being discriminated against now. It's beyond a level playing field."
- One DBE felt the set-aside program had been helpful. "I've never had a problem with the set-aside program. I've been fortunate to have always been able to get jobs from prime contractors, and I've always gotten my money. I've always gotten paid."
- One witness testified, "Another area of concern is that SCDOT has not complied with the state law of 1990 requiring a year-end report listing all federal subcontracts awarded to DBEs by name and company and also substitution and project number." He explained that the information should be made available to dispel negative perceptions and the whole fuzziness of understanding of issues. One common complaint of the minority business community has been that contractors tend to list someone who they "know can't do the job," with the intention of replacing the sub later on. This witness stated he personally researched the issue for an entire year and found three substitutions. He testified that the facts did not support the perception.

7.3.3 Issues Related to Prime Contractors

- Several DBEs testified that prime contractors misuse the program. A DBE gave examples of attempts by contractors to use individuals who clearly could not do the work, yet were given contracts with the understanding that they were going to walk off the job.
- Some contractors testified about unfair practices. Two contractors said they were not given enough time to start a job. They were called late in the day and told to be at the job site with a full crew the following morning. If they were not able to respond in this time frame, they would be reported as a no-show, and the prime would either perform the work or hire a non-minority firm.

- Three DBEs testified that they have been routinely named in bids by prime contractors in order to meet DBE goals, but not allowed to do the actual work.
- Two DBEs testified that they were not paid prices originally quoted to the prime, prices which the prime agreed to pay.
- Several DBEs felt that bid shopping by prime contractors was a standard practice, along with primes establishing fronts by using "so-called minority or white women-owned firms."
- One DBE testified about an incident in which the prime contractor used him to meet the minority portion of the bid and was awarded the contract by the SCDOT. He indicated he was told by the prime, "We're going to use you, but we're not going to pay you what you quoted." "The price they were willing to pay me was substantially lower than the price that I quoted them originally."
- A legislator testified that since the inception of the program numerous complaints had been received from minority businesses, professionals, and community groups. He stated, "Issues were related to the inability to obtain financing, contractors named in bids by primes and not contacted to perform the work, slow or no pay, price changes, changes in subcontracts or contracts after they were awarded."

In summary, the public hearings confirmed that many DBEs felt that the DBE program is not implemented fairly. A majority of non-minority persons testifying were largely negative about the program and indicated that major changes should be made or the program should be abolished. Program requirements placed on prime contractors, increased operating costs, and poor quality among DBEs were cited as major factors in their perceptions. For many DBEs, many of the problems identified at previous hearings, investigative reports, and external and internal audits are still prevalent in the SCDOT and the DBE program. The bottom line for many DBEs is that the program has not had a positive impact on the development of minority businesses.

7.4 Analysis of Personal Interviews

Fifty-four personal interviews were conducted using a standard interview guide. Interviewers were trained and held to strict interviewing techniques. Both open-ended and closed questions were used. The interviews were used to obtain anecdotal information about the experiences of firms doing business with the SCDOT, about experiences with the DBE program, and about general business practices. The interview guide was designed to provide data in the following areas:

- demographic information;
- business operations;
- experiences with the SCDOT, including the DBE program; and
- experiences with other contractors.

Experiences similar to those described in getting persons to provide public testimony were also encountered in attempting to schedule personal interviews. Some DBEs were reluctant to be interviewed even with assurances of complete anonymity and confidentiality.

7.4.1 Demographic Information

A statistical summary of our interview results reveals the following:

- Forty-two (78%) of the firms interviewed were DBEs and 12 (22%) were majority-owned firms.
- Fifty percent of the minority-owned firms were small firms with one to five employees; 46% of majority-owned firms had more than 50 employees.
- The bonding capacity for majority contractors ranged from \$2 million to \$40 million; bonding capacity for minority firms ranged from \$100,000 to just over \$1 million.
- Insurance coverage among minority-owned firms ranged from \$100,000 to \$1 million; and five firms did not carry any insurance.

All of the majority firms had coverage, ranging from \$1 million to \$15 million.

7.4.2 Business Operations

All persons interviewed were asked questions related to obtaining financing, bonding, insurance, and competitive quotes for materials, supplies, and equipment. A majority of the persons agreed that these factors were essential to business operations.

Over half of the white business owners indicated that financing, insurance, and bonding were not difficult to obtain. With regard to obtaining competitive quotes for materials, supplies, and equipment, only two persons indicated any serious problems. Lack of capital was cited as the major reason for difficulties in obtaining financing.

DBEs cited a variety of difficulties and problems in obtaining financing and obtaining materials, supplies, and equipment. In response to questions about encountering discrimination in regard to obtaining financing, insurance, bonding, materials, supplies, and equipment, the following comments were made:

- Six DBEs indicated they had not been discriminated against in obtaining financing, bonding, insurance, supplies, or equipment. Two of the DBEs stated outright they had not experienced discrimination. Three stated they did not believe that they had been discriminated against because it was difficult to prove. With regard to competitive prices, one indicated that buying in bulk makes the greatest difference. He stated, "In America, the more you buy, naturally the better prices you get, so from that standpoint there is that type of discriminatory practice."
- In answer to the same question regarding discrimination, other DBEs responded in the following manner:
 - One DBE stated, "No question about it. I have been discriminated against. All the time, all the time. We just cannot get the bottom line to be competitive,"
 - Another DBE stated, "Very much so, but they did it smoothly, they didn't do it openly."

- One DBE indicated that he had experienced discrimination in obtaining financing and supplies and equipment. With regard to discrimination in financing he stated, "Most definitely, I went to all of the banks in the local area, Sumter area, and they wouldn't satisfy my loan, although I showed them that I did have a pending contract. I had to go up to the Minority Bank in Columbia, which is Victory Savings Bank and get a loan through that source." With regard to supplies, materials and equipment, the same DBE indicated he had to have "ready money," whereas white-owned firms were shown favoritism.
- One DBE indicated he was uncertain whether he had been discriminated against because he was Black or whether he had been discriminated against because he had filed for bankruptcy. He stated, "I could not just say these people discriminated against me because I am Black. If I didn't have bankruptcy and the same thing happened, I could say yes with no problem."
- Another DBE indicated he had more difficulties obtaining loans than bonding and financing. He stated, "With loans you have to court the banks, and banks have proven unwilling to court you." He related an incident in a meeting in which the chairman of NationsBank turned red-faced with embarrassment after he found that the commitment he made to target loans to minority firms had resulted in only one loan being made by his loan officers.
- A DBE construction firm owner indicated that on several occasions he was quoted prices 30% to 40% higher than prices quoted to white-owned firms. He also indicated he had been discriminated against with respect to bonding. "We applied for a bond on a project funded at 1.2 million dollars. We had a track record of having successfully completed a project that was two million dollars, and by bonding company standards had made a reasonable profit on the project . . . , but the bonding companies would not issue the bond."
- In response to the discrimination question, another DBE stated, "Definitely, especially as far as loans are concerned." With regard to supplies he responded, "Maybe, in as far as materials used for hauling." He stated, "I'm not sure that some of the larger haulers are getting better prices than I am because of the volume. I don't know and could not say whether it's based on discrimination because of color or discrimination because of volume."

- Another DBE stated, "I don't think bankers want to take a chance on a company like ours, especially where you've got a black man and a white female in business together. They're very skeptical."
- One DBE felt that he had difficulty obtaining a loan because he had real estate in a Black neighborhood that was to be used as collateral. "You're going to have a hard time getting that property appraised at its real value, and you lose the opportunity of getting an adequate loan even though you may have the same amount of money invested in your real estate as the guy who lives in a white neighborhood." The same DBE stated that it is a common practice for some general contractors to buy materials for subs because they can get a better price than DBEs.
- One DBE indicated he felt he had been discriminated against in obtaining bank loans. There was a difference in the review criteria based on race. "They want you to have as much as you need, which isn't the case with some whites that I know of. If you need to borrow \$10,000, they want you to have ten."

As indicated by the above comments, a majority of DBEs felt they had encountered discrimination which has negatively impacted business operations. While few thought they could prove overt, blatant discrimination on the part of lending institutions, bonding companies, or suppliers, there was no question in their minds that they had suffered from disparate treatment. As one DBE stated, "When you can get a white firm to make a call on your behalf and get a much lower price than you got quoted for the same product, you know something is wrong, but you just can't prove it." This perception was shared by most of the DBEs who felt they had been victimized by discriminatory practices.

7.4.3 Experiences with the SCDOT

Of the majority firms interviewed, all had either bid on SCDOT contracts or had performed contracts for the SCDOT. Only one firm did not have any direct experience in working with DBEs. All of the DBE firms had also bid on SCDOT contracts or had performed as subcontractors on SCDOT projects. None of the DBEs reported performing contracts as a prime contractor. All of the majority-owned firms had worked as prime contractors; two had also worked as subcontractors. The experiences with the SCDOT and the DBE program ranged from satisfactory to very unsatisfactory among both DBEs and majority-owned firms. Comments and perceptions related to the SCDOT and the DBE program are as follows:

- One majority construction-firm owner felt that the SCDOT needed to update the certification list, because the present list creates a problem for prime contractors. This individual also questioned whether the Compliance section was making the certification process too difficult for qualified firms. He stated, "I have known of a number of contractors that tried to get certified, that had a problem getting it done." He indicated that this was critical, because there were not enough DBEs to cover the demands or the amount of work available.
- An architectural-firm owner commented that he had found most SCDOT staff to be courteous and very informative even though he had not done very much work for the SCDOT.
- A majority bridge construction owner felt that the manner in which the SCDOT operates the DBE program is flawed and that the DBE goals should be eliminated. "I don't see why anybody that's been doing business for 10 or 15 years under this program needs to be under the program any more. Give others a chance; if anybody else is interested. Just do away with the program."
- Several DBEs and non-DBEs complained that the SCDOT pushes DBEs to work beyond their capacity to make the numbers look good. One majority construction contractor complained, "I got this situation right now where I have a subcontractor who is four months behind on the job and the highway department is declaring me delinquent on the contract because he is behind . . . there really needs to be some control on the amount of work they can take on."

- Eight DBEs said that inspectors in the SCDOT districts are a major problem. Several stated that they felt some inspectors were racially biased, and all complained that inspectors require unnecessary work, which costs time and money.
- A majority of DBEs indicated that they did not get the same level of information or help from the SCDOT that prime contractors got. One DBE stated, "I went down to the Department and talked with someone in the contracting department about the best way to obtain contracts, and they told me it was up to the primes. I got certified ten years or more ago, and I haven't gotten a bid yet."
- Several DBEs (7) stated they had received little or no information or assistance from the SCDOT or the DBE program. However, over 20 indicated that the DBE Officer had been accessible and they received timely information on bidding.
- Three DBEs indicated that the SCDOT and the DBE program had been ineffective in meeting the needs of the minority contractors. One stated, "The DBE program is a welfare program. Minorities get just enough work to keep them broke. We are offered junk work." Another said, "If SCDOT is serious about the program, more open, honest communication with DBEs is needed."
- Several DBEs complained that sometimes the SCDOT carried out its responsibilities in an intimidating manner. One DBE commented, "SCDOT should provide adequate training for its staff. They train their employees for two weeks and send them out to intimidate people. The Highway Department needs to back off a little and let men with 40 years experience do their work."
- One DBE complained about being discriminated against by the SCDOT because she is female. She indicated that she had made four unsuccessful attempts at certification and felt that gender was the major factor in denial of certification.
- One Asian DBE stated that he had found it very difficult working with the SCDOT and had been subjected to derogatory comments from SCDOT staff and prime contractors.
- A majority of DBEs felt that the SCDOT favored prime contractors and allowed primes to misuse the DBE program. Practices related to lax good faith efforts, removing DBEs from projects and substituting DBEs with white firms, and naming DBEs in bids but not using them were cited as examples.

As indicated, perceptions related to the SCDOT and the DBE program were very mixed. While there was little consensus about the effectiveness of the SCDOT with

regard to DBE participation, there was consensus that a number of improvements are needed. There was also consensus among DBEs that the SCDOT has not operated in their best interest, and a majority question the commitment of the SCDOT to increased DBE participation or an effective DBE program.

7.4.4 Experiences With Other Contractors

Several questions were asked about working relationships and comments and actions encountered in performing SCDOT contracts. Prime contractors were asked questions about working relationships with DBEs, and DBEs were asked questions about relationships with prime contractors.

- A majority of non-DBEs indicated they had used DBEs on SCDOT contracts for six years or more.
- Four prime contractors said their experience with DBEs ranged from poor to good. Common problems in working with DBEs included not showing up on job sites, poor performance, and inability to complete the work.
- One non-minority contractor felt that he had established a good working relationship with DBEs and had mentored several. He stated, "I've mentored some, have longstanding relationships with some and consider them to be friends as well as business associates." However, this person felt there are not enough DBEs to do the work, which keeps the firms who are available stretched out.
- One non-minority contractor felt that most of his experiences dealing with DBEs were bad. "I think there are some good contractors in the program, but there are some bad contractors, and they need to be judged accordingly."
- Several DBEs (15) felt they did not have a relationship with primes. Many felt that primes use them only because they have to and cited the fact that they do not get called about work when there is no goal involved.
- DBEs who indicated they had some type of ongoing relationship with primes characterized the relationships as ranging from very weak to very strong. A majority felt that the relationships were maintained

out of necessity and were largely driven by the goals of the DBE program.

- Fifteen DBEs indicated they had not directly experienced any negative or positive comments or actions by non-minority firms. However a majority said they had heard some negative comments secondhand. One DBE stated, "They say a lot of things behind your back that you eventually hear about. They won't talk directly to you."
- One DBE stated, "Most definitely. In fact, that's one of the major problems (negative comments/actions) that minorities have with prime contractors. When you are involved in a contract, it appears to me you are closely scrutinized. In other words, you're not there because I want you to be there, you're there because of the federal government."
- Another DBE stated, "There's too many, too many to describe, I can't remember all of them. Occasionally you get remarks like 'I have to do business with women-owned or minority firms but I prefer not to.'"
- One DBE felt his experience had been very positive. He stated, "I've been told by firms they felt very comfortable working with me and that I do good work. However, it's been my experience that when majority companies are required to have minority participation they resent that; and for the most part they will only provide the participation as required. If it's 10% they are going to do 10% and no more."
- Another DBE indicated that in general he had good relationships with most prime contractors but even so he constantly hears negative comments. He stated, "You hear it all the time - people complaining about set-asides and you hear it everywhere you go. Most majority firms do not like set-asides, because they feel like it is taking something away from them."
- One DBE indicated that most of his experience with the SCDOT and prime contractors had been positive. He stated, "I can't say I've had any negative experiences. I can't say that I've been mistreated."
- Three DBEs indicated they had directly heard racially oriented remarks while working on SCDOT contracts.
- A majority of DBEs, even those who indicated they had a good working relationship and positive experiences, felt that primes did not consider them as equals, nor were they treated as equals. Several described how non-minority subcontractors got paid on time

while they did not, and some indicated they were held to higher standards than white subcontractors on the same job.

7.5 Conclusions

Based upon anecdotal information collected through the telephone survey, seven public hearings, and personal interviews, several conclusions can be drawn. One major conclusion is that participants in the program, both minority and non-minority, lack confidence in the program and have serious reservations about the ability of the program to meet their needs. While minorities and non-minorities question the program for very different reasons and have different issues, the conclusion is the same for both groups.

Reflected in the anecdotal evidence are serious concerns about program practices, program integrity, and program effectiveness, as well as about the relationships, performance, and practices of DBEs and non-DBEs. Based upon the anecdotal evidence, it is questionable whether the program has achieved intended outcomes, particularly as it relates to eliminating barriers to participation. There is ample evidence in our findings that participation barriers are the result of longstanding practices and patterns which limit participation by "omission or commission." Key factors include:

- perceived intimidation on the part of the SCDOT and prime contractors;
- perceived reluctance on the part of the SCDOT to effectively address longstanding, well documented issues and complaints;
- perceived different treatment afforded to DBEs in comparison to non-DBEs;
- perceived unwillingness and reluctance of prime contractors to play within the "rules of the game";

- inadequate enforcement, monitoring, and implementation of policies and procedures across SCDOT districts;
- very poor performance by the SCDOT in terms of developing the capacity of minority firms, which limits availability and utilization by non-minority firms; and
- perceived insensitivity and lack of understanding of the needs of DBEs and the barriers faced by DBEs solely because of their DBE status.

Findings

- DBEs still face significant constraints and barriers in performing contracts for the SCDOT. Lack of financing, the inability to meet bonding requirements, prime contractor practices, and ineffectiveness of the DBE program were cited as major barriers throughout the collection of anecdotal evidence.
- Anecdotal evidence revealed that DBEs felt they were treated differently and in some cases unfairly in comparison to non-DBEs. Several factors were cited:
 - perceptions that DBEs were evaluated by different criteria and/or higher standards when seeking loans, bonding, insurance, and performing SCDOT contracts;
 - perceptions that DBEs had less access to financing, bonding, and competitive prices for supplies, equipment, and materials;
 - perceptions that DBEs were more likely to encounter deceptive business practices and favoritism.
- Anecdotal evidence revealed varying perceptions about the impact and effectiveness of the DBE program. Some non-DBEs felt the program should be dismantled because it was unneeded, required too much paperwork, and increased their costs. Other non-DBEs were more favorable but felt significant improvements were needed. There were strong perceptions among DBEs that the program had been ineffective with regard to stimulating the growth and development of DBEs and some questioned the commitment of the SCDOT. Several factors were cited:
 - perceptions that DBEs were disadvantaged by the relationships between prime contractors and SCDOT district staff. For example, many DBEs felt the relationships resulted in favoritism and preferences toward prime contractors in

- resolving disputes related to change orders and other aspects related to contracting;
- perceptions that the SCDOT knowingly tolerated fraud and abuse;
- perceptions that the SCDOT failed to certify legitimate DBEs but knowingly certified fraudulent firms;
- perceptions that the SCDOT had been nonresponsive to the needs of most DBEs;
- perceptions that the DBE program lacks integrity;
- perceptions that only a few "favored" DBEs get contracts.
- There were very strong perceptions that some longstanding problems and complaints related to DBE participation had not been resolved. Several factors were cited:
 - perceptions that prime contractors continue to control the SCDOT in the various districts and are allowed to abuse the program;
 - perceptions that sanctions against abuses were either nonexistent, unevenly enforced, or weakly enforced;
 - perceptions that DBEs still do not get a fair share of SCDOT contracts;
 - perceptions that DBEs operate in a hostile environment created by some prime contractors and SCDOT staff in some districts and that the SCDOT, as an agency, has passively allowed this environment to exist;
 - perceptions that DBEs lacked basic business management skills, were under-capitalized, and unable to grow and develop in today's competitive marketplace because of discriminatory practices in the marketplace.
- Based upon our analysis of anecdotal evidence it is questionable whether policies and procedures are consistently enforced or monitored.
 - There were very strong perceptions of unevenness and lack of consistency with regard to how each district operates and the degree to which policies are enforced.

- There were perceived differences among districts regarding the extent to which written policies and procedures are followed and the discretion exercised by individual staff in carrying out policies.
- Compliance review and monitoring processes were not uniform across all districts.
- Policies, procedures, and practices which do not clearly spell out contractor/subcontractor relationships and responsibilities with regard to scope of work, change orders, and payment tend to put DBEs at a severe disadvantage.
- SCDOT policies which require good faith efforts by prime contractors were described as "weak faith efforts" and largely ineffective. Throughout the collection of anecdotal evidence, DBEs and some prime contractors recounted practices which were regularly used to circumvent current policies related to good faith efforts.
- Policies, procedures, and practices related to prequalification, bonding, etc. were perceived as major barriers by DBEs and critical factors in limiting participation by DBEs as prime contractors.

Taken on the whole, the anecdotal findings suggest that many long held perceptions among DBEs and non-DBEs have not significantly changed. Both groups continue to view the DBE program with some skepticism and question its effectiveness. Many DBEs felt that problems pointed out in a variety of reports, investigations, and studies since the program's inception continue to negatively impact participation. Some non-DBEs contend that the problems confronted by DBEs are self-inflicted in that many lack the basic requirements for surviving in today's business environment. There does seem to be agreement that significant changes must be made in order to fully meet the needs of all contractors who participate in SCDOT contracting activities.

Based upon our analysis of anecdotal information, we conclude that DBEs have, over the years, faced significant constraints and barriers in performing contracts for the SCDOT. In spite of major efforts by the SCDOT, many of the problems and issues identified throughout the program's history are still perceived as major problems by the

participants in the program. We also conclude that the SCDOT must strengthen all facets of its program in order to increase the participation of minority and women-owned businesses as prime contractors or subcontractors in SCDOT contracts.

**8.0 RACE AND GENDER-
NEUTRAL PROGRAMS**

8.0 RACE AND GENDER-NEUTRAL PROGRAMS

A major component of any disparity study is the thorough examination of race-neutral and gender-neutral alternatives as a mechanism for increasing the availability and utilization of DBEs. The need to evaluate race-neutral and gender-neutral alternatives is based upon requirements to address two critical issues. The issues are:

- Can the effects of discrimination be ameliorated through non-race or non-gender based programs?
- If the appropriate remedy is a race-based or gender-based program, how should the program be structured to remedy the effects of past discrimination and stay within constitutional limits?

Both issues are critical in designing a program which meets the requirements of the *Croson* decision. Most disparity studies have concluded that a range of efforts devoted to business development will enable minority and women businesses to develop and grow. Some studies have found that a combination of efforts is most effective. Some efforts must be race- and gender-based but some should also be race- and gender-neutral. It is within this context that the services and programs provided by the SCDOT and other entities are described and evaluated in the sections below.

8.1 Race and Gender-Neutral Programs

There are a number of programs in the State of South Carolina focused on small business development without regard to race or gender. These programs provide a variety of services to new, existing and expanding businesses and have operated for a number of years. During the last decade the State has emphasized small business development as a priority for job creation and business growth in order to boost economic development throughout the state.

South Carolina's initial effort to assist in small business development was mandated by the 1979 legislation which created the Small Business Development Center Consortium. Four centers are strategically located throughout the State, including four in the SCDOT districts. The centers in SCDOT districts include Clemson University in District 3, Winthrop University in District 4, South Carolina State University in District 7, and the Frank Roddey Center in District 1. The centers were established to provide technical assistance for new and existing businesses. These services are part of a national movement funded by the Small Business Administration (SBA) subsequent to the deregulation of the SBA direct loan program.

The Jobs Economic Development Authority (JEDA) was created in 1983 by the General Assembly (Act 145 of 1983) and signed into law by the Governor on June 15, 1983. JEDA was created to retain and expand job opportunities and enlarge the tax base of the state and its local governments through meeting the financing and capital needs of the small and middle market business community. The purpose of the Authority is to develop the business and economic welfare of the State of South Carolina through loans, investments, and the promotion of the export of goods, services, commodities, and capital equipment produced within the state. Such efforts are aimed at providing maximum opportunities for the creation and retention of jobs with respect to small business as a priority for public purpose.

Small Business Administration (SBA) has also developed resource partnerships with Service Corps of Retired Executives (SCORE) and Small Business Development Centers to assist with business development.

Similarly, local Chambers of Commerce provide business development assistance to their constituents and some local development agencies also provide limited business development assistance. A number of state and local agencies/organizations publish

"how to do business" brochures that are available to all businesses. Rural Economic and Community Development Service (RECD) offers a Business and Industry Guaranteed Loan Program. Priority is given to businesses in areas where the population is 25,000 or smaller.

8.1.1 Financial Assistance

Our findings indicate that financing is the key to business growth and development for most DBEs. Adequate capitalization is vital to the cash flow of any business and more critical to small business cash flow. Lack of adequate capital is the major cause of failures among small businesses. If small businesses are to grow and become competitive in the construction industry, funds must be made available on an equitable basis.

A review of the programs available in South Carolina reveal that the majority of the programs available focus on job creation and capital financing to promote economic development through small business development. However, they have not met the needs of some small and minority businesses. For example, the Jobs Economic Development Authority Program was established to assist small businesses. Yet, it assisted few, if any, businesses targeted by its legislation. The programs are general in nature, and provide resource information and referral assistance. However, they do not provide the direct support of providing capitalization and bonding. The State of South Carolina Procurement Code requires each state agency to develop small business goals. Yet as recently as 1994, the state had not reached its goal to assist minorities and women. Therefore, DBEs have not benefitted from the financing programs as most loans are approved on the basis of cash flow and the ability to repay the lending institution. A new SCDOT financing program has been developed and

instituted as a joint venture between six local banks to assist small businesses. Only three businesses have applied for loans.

Financing available through the SBA include the programs below:

7(a) General Loan Program: Promotes growth by guarantees of up to 90 percent of amount provided by commercial lenders.

504/503 Development Company Loan Program - uses public/private partnerships to finance fixed assets.

The Small Business Investment Company (SBIC) Program - combines private capital with SBA-guaranteed funds as venture capital for start-up and growth.

The 8(a) Program - helps socially and economically disadvantaged individuals enter the economic mainstream, partly through access to federal contracts.

The Surety Bond Guarantee Program helps businesses win government construction contracts.

8.1.2 Training and Education

Several programs provide technical and management training, business assistance, and education for business start-up and business expansion. Some of these services are provided through workshops, seminars, on-site visits to businesses, training clusters, and other means.

The SBA serves as a catalyst for small business development and growth. Through the Business Initiatives, Education and Training Activity, the SBA produces a broad range of management and technical assistance publications and audio-visual materials. The SBA also provides assistance to businesses through the Small Business Development Centers.

The Economic Development and Technical Assistance Center (EDTAC) was established to provide technical assistance to small minority businesses and local units

of government in the predominately black counties of South Carolina. Funding is a cooperative effort between Benedict College in Columbia and the Economic Development Administration of the US Department of Commerce.

EDTAC provides business technical assistance in the following areas:

- business planning
- business improvement
- general management
- accounting systems
- inventory control
- marketing
- advertising
- contract bidding
- procurement opportunities
- loan packaging
- capital analysis
- export promotion

8.2 Analysis of Race and Gender-Neutral Programs

While a number of race neutral programs are available, it is important to note that not all the needs of minority businesses can be met by general programs. For example, the SBDC located at SC State University in Orangeburg, South Carolina, which was understaffed and underfinanced initially, but which has since been upgraded to a full service center, gets more loans for minorities than the other three centers. The Center located in district seven in lower South Carolina assisted only one Black client in a year. According to the 1993 Annual Report, the SBDC Consortium served 3,855 clients and sponsored 154 small business training programs. While the report does not provide a distribution of clients by center, the Consortium served 1,090 minority clients, 1,770

women, and 857 veterans. Only 4 percent of the Consortium clients are construction businesses. The Consortium clientele is 30 percent Black and about 40 percent women. This distribution is also not available by center. However, the SC State University Center is regarded as the minority center.

Generic programs generally do not tend to address specific problems of the minority business community. Additionally, minorities and women may not be cognizant of the array of services, training, and education available to assist their businesses. Interviews with some DBEs indicate that acceptance of the DBE programs is a barrier to participation. Under these conditions, women and minorities may be reluctant to seek out and apply for assistance.

Conclusion

Although a number of programs are available for small business development and business development assistance, small and minority businesses continue to have limited access to growth and equitable opportunities for full participation and utilization within the state system.

Since some programs described in this chapter could not provide any analysis of client outcomes for minority businesses, it is difficult to determine whether the objectives of the programs have been met. Information from DBEs and key persons interviewed raise questions as to whether the programs have enhanced or increased the participation of DBEs in SCDOT contracting.

9.0 *STUDY RECOMMENDATIONS*

9.0 STUDY RECOMMENDATIONS

This chapter presents our recommendations based on the findings described in Chapters 4.0 through 8.0. Within the context of the guidelines set forth in the *Croson* decision and related cases, this disparity study was designed to meet known court requirements and to address the following purposes:

- to determine whether there has been discrimination against minority and women owned business;
- to identify appropriate remedies for any such discrimination; and
- to provide evidence supporting or refuting the proposition that minority and women owned businesses need to receive special assistance in obtaining the SCDOT's contracts.

The ultimate goal of this study is to provide the South Carolina General Assembly and the SCDOT with evidence, in accordance with *Croson*, to determine whether remedial programs for race or gender discrimination are appropriate, and, if so, to what extent. In conducting this study for the SCDOT, these issues have been central to the study's design, methodology, and implementation. In completing this study, five primary areas of importance have dictated the manner in which the study has been conducted.

The five areas of primary importance are:

- utilization of DBEs by the SCDOT;
- availability of DBEs in the relevant market area;
- disparity between the utilization and availability of DBEs;
- supporting anecdotal information from DBE owners on the discrimination they face as business owners in the relevant market area;
- identification of adequate restrictions to limit remedies to prior/current discrimination within the relevant market area.

In the preceding chapters, our analyses of DBE availability and utilization, along with the anecdotal information, provide the backdrop and support for the recommendations contained in this final chapter. The sections which follow summarize our findings in Chapters 4.0 to 8.0 and our major recommendations as they relate to the above issues and other issues which evolved during the course of this study.

We caution the reader to view the recommendations contained in this chapter within the context of the entire report. In order to fully appreciate the importance of our recommendations, a thorough review of the preceding chapters is highly recommended.

9.1 Summary of Findings

Our recommendations are based on the findings presented in Chapter 4.0, *Historical Evidence*, Chapter 5.0, *Analysis of DBE Policies, Procedures and Practices*, Chapter 6.0 *DBE Findings*, and Chapter 7.0, *Anecdotal Evidence*. They are as follows:

9.1.1 *DBE Findings*

- The SCDOT competitively bid and contracted with a total of 534 firms during the 14-year study period, 1980 to 1993. These 534 firms received 3,612 contracts totalling \$2,942,528,502.91. Of these funds, only \$57,687,691.00 (1.96%) went to DBEs as prime contractors and \$136,797,505.00 (4.65%) went to DBE firms as subcontractors, although DBEs represented 13 percent to 17 percent of the firms available in the marketplace during this time period (Exhibit ES-1).
- The SCDOT awarded a total of 109 Highway and Bridge Preconstruction contracts to 49 firms during the study period. These contracts totalled \$170,639,162.19, of which DBEs received no dollars (0.00%) as prime contractors and \$292,847.00 (.20%) as subcontractors.
- The SCDOT awarded 3,097 Highway and Bridge Construction contracts to 238 prime contractors during the 14-year study period. Of the \$2,744,172,996.63 spent, DBEs received \$57,270,268.87

(2.61%) as prime contractors and \$135,705,720.40 (6.17%) as subcontractors.

- Of the 406 Building Construction and Renovation contracts awarded by the SCDOT, 247 prime contractors received \$27,716,344.09. DBEs received \$417,423.00 (1.56%) as prime contractors and \$798,936.78 (2.98%) as subcontractors.

9.1.2 Historical Review

- According to reports issued by the Governor's Office and Legislative Audit Council, the SCDOT DBE program experienced major problems during the 1979 to 1991 time period. Those reports produced, among others, the following major findings:
 - A report of the procurement dollars of all State agencies issued by the Legislative Audit Council (LAC) in 1985 concluded there was a lack of minority participation based upon the finding that in 1983-84 minority-owned firms received only .01 percent of the State's contract dollars for goods, services, and building renovations and construction.
 - A 1991 LAC report on DBE program operations from FY 86-87 through FY 89-90, concluded that both oversight and recordkeeping of the SCDOT DBE program needed improvement in order to meet program outcomes. The LAC report questioned whether procedures were in place to monitor timeliness of payments from contractors to DBEs and that contrary to State law, the SCDOT had awarded construction contracts with DBE goals to companies which did not use certified DBE contractors. The report also pointed out that the SCDOT did not require written contracts between contractors and hauling subcontractors, which in the view of LAC, provided less protection to hauling subcontractors.
 - Findings from the 1991 report indicated that it was impossible to determine from SCDOT records whether \$91 million committed to DBE subcontractors during a four-year period was actually paid to DBE subcontractors. The inability to verify DBE payments also made it impossible to determine if the SCDOT had met the goal of expending 10 percent of all project funds with DBE firms.
 - The report also concluded SCDOT was in violation of federal guidelines by allowing material costs from furnish and haul agreements to count towards the DBE goal, even though the materials were not purchased from minority sources.

- A review by the Governor's Office of Small and Minority Business Assistance (OSMBA) in 1986 of DBE participation for fiscal years 1981-82, 1982-83, and 1983-84 revealed minimal participation of minority and women-owned businesses. Participation rates were less than one percent.
 - The same review found evidence of DBEs acting as "fronts" and that non-DBEs had actually performed work on some DBE contracts instead of DBEs.
 - Several investigations by OSMBA found evidence of patterns of discrimination which limited the participation of minority and women-owned businesses.
- In response to the documented low utilization of DBE firms and allegations of discrimination, significant changes have been made in both state and SCDOT policies and practices over the last 14 years.
- In 1981, the South Carolina Consolidated Procurement Code was revised in response to concerns about the exclusion of small and minority businesses from the procurement activities of state agencies. The revisions were based upon findings outlined in a 1979 report entitled Report of the Joint Legislative Committee to Study the Problems of Small Business. The report concluded that new and/or minority businesses were excluded from the State's procurement process.

With regard to minority businesses, Article 21 of the revised Procurement Code gave prime contractors a tax credit equal to four percent of the payments to minority subcontractors on State contracts, established the Office of Small and Minority Business Assistance, and directed chief procurement officers to provide staff to assist minority businesses with State procurement procedures.

- In 1984, a more formal certification process was established and implemented by the Department to comply with federal requirements.
- In 1986, the SCDOT created a DBE/WBE Advisory Task Force to develop recommendations for strengthening compliance monitoring, establishing stronger linkages between the Department and DBEs and minimizing barriers to participation.

In response to recommendations from the Task Force and other entities, the SCDOT took steps to strengthen the DBE program by revising policies and procedures and strengthening monitoring and compliance. For example, the SCDOT increased scrutiny of firms applying for certification, decertified several firms suspected of acting as a "front," provided "good faith efforts" training to contractors, strengthened the verification process for payments to DBEs

by requiring the DBEs signature on quarterly report forms, developed a computerized tracking system to record DBE payments, and developed a plan to respond to Task Force recommendations, including appointment of an Executive Assistant for Minority Affairs who reported directly to the Executive Director.

- Also in 1986, the State Appropriations Act included a provision to spend 10 percent of State construction dollars with small and disadvantaged businesses. In 1987, new language was added to the 10 percent proviso which required 10 percent of total state highway funds for construction contracts be spent with DBE/WBE firms and gave SCDOT the option of using goals or set-asides. The 10 percent goal was equally divided between DBE and WBE firms. The SCDOT was also authorized to waive or guarantee bonding requirements for set-aside contracts less than \$250,000.
- In response to a 1991 Legislative Audit Council Report, the SCDOT strengthened penalties against prime contractors for substituting DBE subcontractors without prior approval and made other changes to strengthen program administration and operations.

9.1.3 Policies, Procedures and Practices

- The current bonding requirements for participating in SCDOT contracts are more often an impediment to DBE firms than to non-DBE firms. In our survey of contractors, 26 percent of Black firms and 14 percent of WBEs indicated that bonding requirements prevented them from receiving a SCDOT prime contract, as opposed to only 8 percent of non-DBEs who made this response. Similarly, while 20 percent of Black firms reported that bonding requirements kept them from working for the SCDOT or as subcontractors, only 3 percent of non-DBEs reported bonding to be a problem.
- Since a contracting firm's capacity rating determines the maximum contract on which it may bid, the current practice of issuing large contracts prevents most DBE firms from bidding on SCDOT projects as prime contractors and relegates them to subcontractor status. Since 1980, only 2.45 percent of the Department's prime contract dollars have gone to DBE firms. The average contract dollar amount awarded over the 14 years of the study period to non-DBE firms is \$850,000 versus \$250,000 to DBE firms.
- The current prequalification requirements, which classify and rate firms on the basis of "a verified showing of experience, net liquid assets, responsibility, record, and available equipment," prevent many DBE firms from becoming eligible to bid on SCDOT work. According to our survey, DBE firms are young (thus less experienced) and smaller (thus less well capitalized) than non-DBE

firms. They have fewer licenses, fewer employees, and lower bonding capacity. Furthermore, they reported their average largest prior contract to be under \$500,000, as opposed to the average largest prior contract of non-DBE firms of more than \$500,000.

- The state set-aside program which designates that 10 percent of the contracts be set-aside for DBE firms has limited the dollar participation of DBEs in state contracting. Although DBEs have received over 15 percent of the state contracts awarded (60 of 391 contracts), they have received only 4 percent of the dollars (\$9,351,630.36 of \$194,970,863.13).

Note: This analysis is based on a special tabulation of state highway and bridge construction contracts and awarded dollars.

- The current payment tracking system is not being used to monitor compliance of prime to sub payments on an ongoing basis. Hence, some subs are not paid on time, contributing to their cash flow problems. In our survey, 26 percent of Black subcontractors and 9 percent of white female subcontractors cited inadequate capital as a reason for not doing more work for the SCDOT. Only three percent of non-DBE subcontractors reported a similar problem.
- The Director of Compliance as Liaison Officer does not report directly to the Executive Director as prescribed in 49 CFR 23.45(b).

9.1.4 Anecdotal

- DBEs still face significant constraints and barriers in performing contracts for the SCDOT. Lack of financing, the inability to meet bonding requirements, prime contractor practices, and ineffectiveness of the DBE program were cited as major barriers throughout the collection of anecdotal evidence.
- Anecdotal evidence revealed that DBEs felt they were treated differently and in some cases unfairly in comparison to non-DBEs. Factors cited included:
 - perceptions that DBEs were evaluated by different criteria and/or higher standards when seeking loans, bonding, insurance, and performing SCDOT contracts;
 - perceptions that DBEs had less access to financing, bonding, and competitive prices for supplies, equipment, and materials;
 - perceptions that DBEs were more likely to encounter deceptive business practices and favoritism.
- Perceptions and comments revealed varying opinions about the impact and effectiveness of the SCDOT DBE program. Some non-DBEs felt the program should be dismantled because it was unneeded, required too much paperwork, and increased their costs. Other non-DBEs were more favorable but felt significant improvements were needed. There were strong perceptions among DBEs that the program had been ineffective with regard to

stimulating the growth and development of DBEs and some questioned the commitment of the SCDOT. Factors cited included:

- perceptions that DBEs were disadvantaged by the relationships between prime contractors and SCDOT district staff. For example, many DBEs felt the relationships resulted in favoritism and preferences toward prime contractors in resolving disputes related to change orders and other aspects related to contracting;
 - perceptions that the SCDOT has knowingly tolerated fraud and abuse relative to DBE contracting;
 - perceptions that the SCDOT has failed to certify legitimate DBEs but knowingly certified fraudulent firms;
 - perceptions that the SCDOT has been nonresponsive to the needs of most DBEs;
 - perceptions that only a few "favored" DBEs get contracts.
- There is ample evidence in the perceptions and comments from DBEs that some longstanding problems and complaints related to DBE participation have not been fully resolved. Several factors were cited:
 - perceptions that prime contractors continue to control the SCDOT in the various districts and are allowed to abuse the program;
 - perceptions that sanctions against abuses are either nonexistent, unevenly enforced or weakly enforced;
 - perceptions that DBEs still do not get a fair share of SCDOT contracts;
 - perceptions that DBEs operate in a hostile environment created by some prime contractors and SCDOT staff in some districts and that the SCDOT, as an agency, has passively allowed this environment to exist;
 - perceptions that DBEs lack basic business management skills, are under-capitalized, and unable to grow and develop in today's competitive marketplace because of discriminatory practices in the market place.
 - Based upon our analysis of anecdotal information, we conclude that DBEs have, over the years, faced significant constraints and barriers in performing contracts for the SCDOT. In spite of major efforts by SCDOT, many of the problems and issues identified throughout the program's history are still perceived as major problems by the participants in the program.

9.1.5 Race-Neutral and Gender-Neutral Programs

- Although a number of race and gender neutral programs are available for small business development and business development assistance, small and minority businesses continue to have limited access to growth opportunities and to equitable opportunities for full participation and utilization within the state system.
- Even though race and gender-neutral programs exist in South Carolina, they have not been sufficient to address the problems faced by DBEs in obtaining SCDOT contracts. This is demonstrated by comparing the findings of the Highway and Bridge Preconstruction contracts and the Highway and Bridge Contracts.

The highway and bridge preconstruction contracts were excluded from any form of a DBE program during the study period. Only race and gender-neutral programs were available to highway and bridge preconstruction contractors. The statistical analyses of preconstruction contracts reflects no utilization of DBE firms. All (100%) of prime contracts were awarded to white men-owned firms. When subcontracts are included, only 0.21% of all preconstruction contract dollars were paid to DBEs (0.18% to Black-owned firms and 0.03% to white women-owned firms).

The highway and bridge construction contracts on the other hand were included in some form of a goals program during the study period, primarily the federal DBE program. The DBE program was a race and gender preference program. This program required that Highway and Bridge construction projects have an annual DBE goal of 10%. The statistical analyses show that DBEs were awarded 8.77% of Highway and Bridge construction contracts as either primes or subcontractors. DBEs were awarded 3.60% of the prime contract dollars and 6.17% of the subcontractor dollars.

Thus, over the 14 years of the study period, only when a DBE program has been in place, as with the Highway and Bridge Construction contracts, has the SCDOT contracted significant dollar amounts to DBE firms.

9.2 Major Recommendations

This section presents a summary of our recommended changes in the SCDOT's DBE program based on the findings presented in Chapter 4.0, *Historical Evidence*; Chapter 5.0, *Analysis of DBE Policies, Procedures, and Practices*; Chapter 6.0 *DBE*

Findings; and Chapter 7.0, *Anecdotal Evidence*. The recommendations are presented in two general categories:

- Recommendations which address the availability and utilization of DBEs in the construction areas, as identified in Chapter 6.0.
- Those recommendations which address major issues of policy, operations, and organization raised in Chapters 4.0, 5.0, and 7.0 of the Final Report.

Our general policy recommendations to the SCDOT reflect our analyses of the effects of SCDOT policies and practices on DBEs. They assume that:

- constraints and barriers can be minimized by providing necessary resources to monitor and enforce existing SCDOT policies and procedures;
- constraints and barriers can be minimized by increasing key users' accessibility to, knowledge of, and application of policies and procedures; and
- constraints and barriers can be minimized by sensitivity training of key staff and adoption of a customer service orientation.

9.2.1 DBE Program Recommendations

The disparity findings in Chapter 6.0 show substantial underutilization of DBEs in preconstruction contracts for highway and bridge, highway and bridge construction, and building construction and renovation. Our findings clearly document the need for a race- and gender-based program.

Exhibits 9-1, 9-2, and 9-3 show the projected availability and recommended goals for highway and bridge preconstruction, highway and bridge construction, and building construction and renovation. Each exhibit shows the projected availability for each DBE classification, the recommended goals for each DBE classification for the state program, and the combined DBE goal for the federal DBE program. The goals for the state DBE program are presented as a range. The SCDOT should use the lower number as a

minimum goal. The program should be evaluated annually and the goal gradually increased to meet availability.

The SCDOT should consider several factors in establishing goals for the various DBE classifications:

- The estimated availability of each DBE classification as projected in Exhibits 9-1, 9-2 and 9-3;
- The expected or anticipated growth in number and capacity of each DBE classification each year;
- The projected type and number of contracting opportunities for next year;
- The utilization of each DBE class for the current year; and
- The extent to which recommendations related to program enforcement, monitoring, and supportive services will be implemented.

**EXHIBIT 9-1
PROJECTED AVAILABILITY AND RECOMMENDED GOALS
HIGHWAY AND BRIDGE PRECONSTRUCTION**

	Blacks	Women	Native American/Asian/ Hispanic	Combined DBE
Projected Availability	3.35%	9.15%	2.01%	
Recommended Goals - State Program	2%-4%	6%-10%	2.00%	
Recommended Goals - Federal Program				10%-15%

**EXHIBIT 9-2
PROJECTED AVAILABILITY AND RECOMMENDED GOALS
HIGHWAY AND BRIDGE CONSTRUCTION**

	Blacks	Women	Native American/Asian/ Hispanic	Combined DBE
Projected Availability	10.98%	9.70%	0.67%	
Recommended Goals - State Program	5%-11%	6%-10%	1.00%	
Recommended Goals - Federal Program				10%-21%

**EXHIBIT 9-3
PROJECTED AVAILABILITY AND RECOMMENDED GOALS
BUILDING CONSTRUCTION AND RENOVATION**

	Blacks	Women	Native American/Asian/ Hispanic	Combined DBE
Projected Availability	13.93%	7.29%	0.72%	
Recommended Goals - State Program	6%-14%	3%-8%	1.00%	
Recommended Goals - Federal Program				10%-22%

To eliminate the underutilization described in the disparity findings in Chapter 6.0, the SCDOT should adopt an aggressive program which emphasizes the utilization, growth, and development of minority businesses. These areas are critical because they should ultimately result in graduation from the program, which in the long run will stimulate the creation and growth of new minority firms. In attempting to increase the utilization, growth, and development of DBEs, the SCDOT should recognize the following factors:

- The need to address the barriers and constraints outlined in this report;
- The need for a strong, well staffed compliance monitoring function for the DBE program; and
- The need for an effective Supportive Services Program which meets the needs of a majority of DBEs.

The SCDOT should attempt to increase overall goals and utilization of DBEs each year, consistent with growth in availability. Goals for subsequent years should be increased for each DBE classification to stimulate economic growth and shorten the life of the state DBE program. The SCDOT should provide adequate assistance to growing and emerging DBEs to increase their chances for long-term success. The overall goals for each DBEs classification in each business category should provide the basis for the establishment of individual project goals for state-funded project. On federally-funded projects, the DBE qualifications set by federal regulations should be followed, but SCDOT has sufficient evidence to increase the federal DBE goals from 10% up to 22%.

To assist the SCDOT in establishing its DBE goals, Exhibits 9-1 through 9-3 provide:

- the projected availability for each DBE category;
- the recommended goals for the state program for each DBE category; and

- the recommended goals for the federal DBE program.

Availability was projected for 1995 based on 1982 and 1987 actual data (the most recent two years of available data) from the Census Bureau for both DBE and white men firms. Because future projections tend to progressively lose their reliability as the number of years are extended beyond the most recent actual data year, and because our 1996 availability estimates are nine years beyond our last actual data point, we highly recommend that the SCDOT update its DBE availability data (Exhibits 6-11 through 6-13) as soon as the U.S. Census releases the results of its 1992 surveys of minority and women-owned businesses. MGT will notify the SCDOT of its availability.

We believe that the goals recommended in this section, coupled with other recommendations, particularly those related to monitoring and enforcement, will be critical in eliminating longstanding patterns of underutilization.

9.2.2 Model DBE Program

The guidelines for a model program came from relevant court cases, including *Croson* and later cases. As discussed in the legal analysis, once a local government has demonstrated a compelling interest in remedying discrimination within the jurisdiction, it may adopt a remedial program including race-conscious measures to alleviate discrimination if race-neutral programs are also considered. In fact, once a compelling interest has been established, the government risks "constitutional culpability" if it fails to act on the evidence of discrimination. *Coral* at 920-21. Any such program must be narrowly tailored to remedy the discrimination without placing an undue burden on other enterprises. Although case law will allow a more aggressive approach to WBE programs due to their easier-to-satisfy (intermediate) standard of

review, we believe that good public policy and administrative convenience would both be served by developing a unitary set of programs for minority and women businesses.

A model DBE program with the general characteristics suggested by current court cases was developed for this study. Our recommendations for the SCDOT, which are derived from this model program, focus on the following items:

▪ **Race-Neutral Methods**

1. The SCDOT should continue the race-neutral methods already in place, with increased emphasis on effective monitoring and enforcement.
2. The SCDOT should place more emphasis on breaking large contracts into smaller contracts which DBEs can bid as primes.
3. As part of the DBE certification process, the SCDOT should provide a detailed listing of existing small business development programs and DBE programs available to assist DBEs in the market area. The Office of Compliance should work to ensure that other development programs share information on the DBE programs with clients.

▪ **Qualified DBEs**

1. Qualified DBEs should have been active in the market area. For the SCDOT, the market area is the state of South Carolina for Highway and Bridge Construction and Building Construction and Renovation. The market area for highway and bridge preconstruction is the state of South Carolina; Fulton County, Georgia; Fairfax County, Virginia; and Wake County, North Carolina. These market areas were determined based on the contracting patterns of the SCDOT.
2. Because of current court rulings, out-of-state DBEs with no previous participation in the relevant market area cannot benefit from the SCDOT's programs. DBE firms from outside the state must be able to demonstrate that they have attempted to do business in the state and are not newcomers. The firms are not required to have been awarded a contract from either government or private industry. Attempts at participation in the jurisdiction should include such activities as:
 - registering as a vendor somewhere in the state of South Carolina;

- making a sales call on an agency or prime contractor in the state of South Carolina;
 - obtaining a local business license in the state of South Carolina; and
 - submitting a bid to an agency or prime contractor in the state of South Carolina.
3. The DBE Office should vigorously investigate the status of DBE firms, especially those challenged as "fronts." Firms which change ownership to become DBEs should not be allowed to participate in the programs for three years.

■ **DBE Classifications**

1. Only DBEs from classifications which have experienced a substantial level of disparity should be eligible to participate in the DBE program of the SCDOT because of current court interpretations. No goals should be set for unaffected DBE classifications.
2. A business size standard or some measure of economic disadvantage should be implemented to direct the benefits of the DBE program to those most affected by discrimination. Use of a size standard will have little effect on the estimates of availability of DBE contractors, since our data show that almost all DBE firms in the market area are small businesses.
3. A graduation plan for DBEs in the programs should be implemented. DBE firms should not stay in the programs forever. A policy should be established that when a DBE firm no longer meets the business size standard for a small business, it should graduate from the DBE program.

■ **Goal Setting**

1. Overall annual goals for each DBE classification should be established based on the projected availability of DBE firms eligible to participate in the program for that year. A Goals Committee should recommend annual overall utilization goals for contracting at the prime and subcontracting levels. The SCDOT should adopt an aggressive program which allows for growth both in the size of existing DBE firms and in the number of DBE firms. Since some waivers and good faith efforts could reduce the overall utilization, goals should be set from 10% to 50% above availability, depending on the degree of disparity. Goals slightly above current availability would be preferable to rigid quotas. In some cases where availability is much higher than current utilization, it may be necessary to use a gradual approach of increasing DBE goals each year until parity is reached. The

overall DBE utilization goals for each business category provide a benchmark for measuring the SCDOT's achievements.

2. Each year, the overall annual goals for each DBE classification should be updated to reflect the projected DBE growth rate, utilization patterns, and contracting opportunities. DBE availability data should be updated regularly (at a minimum, every five years), especially if major changes in the marketplace occur.
3. To provide flexibility, subcontracting goals for the SCDOT on individual projects should be determined based on the availability of DBEs for the specific type of work being contemplated, including the subcontractable portions. Upcoming projects should be reviewed on a quarterly basis by a Goal Setting Committee which should include DBE Program staff and department staff. In most cases, subcontracting goals for individual projects should not exceed 40% to 50%. After close analysis, on some projects, no DBEs may be available in a very specialized field, which would result in no goal being set. For other projects, numerous DBEs may be available, leading to an individual project goal higher than the SCDOT's overall annual goal for that category. The quarterly review should also examine which contracting areas have not received adequate DBE utilization and concentrate efforts there. The DBE program should not result in DBEs' being utilized in just one type of subcontracting, such as trucking.

■ **Flexible Goals - Race- and Gender-Conscious Goals Programs**

1. Goals for projects should be set on a project by project basis by a Goals Committee. The Goals Committee should include the Directors of Compliance and Construction, with staff from the Construction Office, Office of Contracts and Grants, Bridge Construction, and Building Engineer being included when their projects are discussed.
2. Goals for projects should be broken out by the minority and gender classifications eligible for participation in each construction category.
3. Implementation of goals should be particularly directed at economically disadvantaged DBEs.
4. DBE primes should also be subject to DBE provisions for subcontractors, unless the DBE prime is performing over 50% of the work with its own forces.
5. A closely monitored and evaluated process should be implemented to ensure that white men primes make good faith efforts to obtain DBEs as subcontractors. A Good Faith Effort

Committee should review all attempts to prove a good faith effort and report quarterly on its findings to the SCDOT Commission. The specific actions required to establish a good faith effort should be spelled out in detail, including:

- advertising in major general circulation newspapers;
- advertising in newspapers directed at DBEs;
- attending the pre-bid conference;
- attending quarterly DBE forums;
- inviting DBE subcontractors to review the prime's bid specifications without charge;
- accepting sealed bids from subcontractors, without bid shopping;
- contacting only those potential DBE subs which provide the services needed for the contract, with adequate time allowed for response;
- ensuring that first tier subs actively solicit DBEs as second tier subs;
- ensuring that subs have adequate time to prepare bids; and
- mailing registered letters to solicit bids from DBEs which conduct appropriate lines of business, with adequate time allowed for response.

6. The success of prime contractors in utilization of DBE subcontractors on projects outside of SCDOT contracts, consistent with program goals, should be a factor in awarding contracts.
7. The SCDOT DBE programs should have a sunset provision to evaluate the need for continuing them.
8. When no DBEs are available to bid on a project, the Goals Committee should have the authority to waive a goal prior to advertisement.
9. Bid documents for prime contracts should include signed statements from the DBE subs that they intend to work on the project. During the project, the DBE Coordinator should be involved in approving any substitutions of DBE subs named in the bid. Sanctions should be imposed on any prime that fails to use DBEs as provided in the bid documents.

■ **Flexible Goals -- Race- and Gender-Conscious Bid-Preference Programs**

1. The SCDOT should develop a policy to provide bid preference points to majority firms which are engaged in a joint venture with minority and women firms.

2. The SCDOT should develop policies providing that contractors that fail to meet good faith requirements can be awarded the bid if the next lowest bid is significantly higher (e.g., 15%).
3. The SCDOT should develop policies establishing a percentage preference method which gives a certified DBE (or a non-DBE that will use a certified DBE) a percentage preference (e.g., 5%).

9.2.3 Policy, Operations, Organization Recommendations

Major recommendations are divided into five sections that address specific programs or divisions of the SCDOT. They include the following:

Good Faith Efforts

- Good faith efforts should be closely monitored and evaluated. A series of steps which must be followed to demonstrate good faith should be developed to strengthen existing requirements.
 - Primes should demonstrate that they allow enough time for DBEs to respond to bid opportunities.
 - Primes should demonstrate that they contact only those DBEs which provide the services needed for the contract.
 - Primes should demonstrate that they advertise for bids from DBEs in general circulation newspapers in the districts where the work will be performed.
- To ensure that good faith efforts are made, a quarterly report should be developed, by the Office of Compliance, which summarizes all contracts on which a good faith effort was used to justify not meeting DBE goals. The report should identify where good faith efforts were rejected and why, and where good faith efforts were accepted and the justification.
 - Where monitoring of SCDOT projects with respect to utilization of DBEs indicates failure to accomplish DBE goals, the Office of Compliance must develop and implement appropriate corrective actions.
 - Annually, DBEs which have bid on contracts during the fiscal year should be provided with a two- or three- page summary of changes in contracting policies and procedures.

The Supportive Services Program

- The SCDOT's Supportive Services Program should be re-evaluated and strengthened. A needs assessment should be done within the next year to better determine the supportive services needs of DBEs, following which, a supportive services strategic plan should be developed, implemented, and closely monitored.
- The Supportive Services Program should annually survey a sample of DBEs about the attitude and helpfulness of the SCDOT staff.
- The Supportive Services Program should also provide DBEs with access to and information about the SCDOT's contracting system, contracting policies and procedures, and key players.
- The SCDOT should develop criteria and standards by which to measure the progress and economic impact of the training and development programs for DBEs.

Certification

- To make the appeal process meaningful, initial certification decisions should be made by someone other than the Director of the agency. Currently, the Director both approves initial certification, and signs off on any appeal decisions involving the same firms.
- As part of the certification package, the SCDOT should include the names, telephone numbers, and functions of key department personnel involved in the DBE program and contracting decisions. A one-page diagram which flow-charts the major steps in the contracting and consultant selection process should also be included.
- The certification pool of the state program should be expanded to include D/M/WBEs certified by the Governor's SMBA Office.
- Outreach efforts should be expanded to increase the number of certified DBEs.

DBE Program

- Introduce legislation to change the State Set-Aside Program to a Goals/Set-Aside Program.
- Include Highway and Bridge Preconstruction contracts in the federal DBE program.
- Require the Building Engineer to maintain and track prime and subcontractor utilization on Construction and Renovation contracts.

- Provide a semi-annual report to the SCDOT Commission summarizing DBE utilization as prime and subcontractors in the state and federal DBE programs.

Administration of the Department's DBE Program

- A single office in SCDOT should be assigned the responsibility for managing the Department's DBE program. That office should:
 - manage all investigative functions and responsibilities;
 - monitor and enforce the Department's DBE policies and procedures and DBE program requirements;
 - recommend appropriate sanctions.
- The Department should develop a stronger system for reporting and monitoring payments to DBEs.
- The Department should conduct on-site monitoring and observation to ensure actual use of DBE subcontractors by prime contractors as provided in the bid and contract. A minimum of one on-site visit should be conducted with the first occurring within three weeks of project start-up.
- The SCDOT should develop a centralized complaint system, located in the Office of Compliance, to log, track, and resolve disputes of DBEs. The complaints should be analyzed regularly to identify patterns.

It is also strongly recommended that the SCDOT develop a schedule with goals and dates, to implement the recommendations in a timely manner.

10.0 APPENDICES

UNDER SEPARATE COVER

See Appendices - 1995