

City of Charlotte Disparity Study 2022

Executive Summary



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About the Study Team

Colette Holt & Associates (“CHA”) is a national law and consulting firm specializing in issues related to Minority, Women and Disadvantaged Business Enterprise programs, business diversity initiatives, and affirmative action issues. The firm has conducted court-approved disparity studies and designed court-approved programs for over 30 years, including for numerous governments. CHA also provides training, monitoring and investigative services across the country to agencies and businesses. CHA is led by Colette Holt, J.D., the founding principal of Colette Holt & Associates and a nationally recognized attorney and expert. Ms. Holt is also a frequent expert witness, and a media author, on these issues. In addition to Ms. Holt, the firm consists of Steven C. Pitts, Ph. D., who serves as the team’s economist and statistician; Ilene Grossman, B.S., Project Administrator; Glenn Sullivan, B.S., Director of Technology; Victoria Farrell, MBA, Director Qualitative Data Collection; and Joanne Lubart, J.D., Associate Counsel.

Paradigm 360° Consulting, LLC (SBE) specializes in authentic community engagement in corporate, government, and non-profit sectors. The firm assisted CHA with anecdotal data collection and community engagement.

Apex Business Group LLC (MBE) assists small businesses, corporations, and other entities to expand their reach. Their services include marketing, advertising, consulting, and creating and coordinating outreach programs in the Charlotte area. The firm assisted CHA with anecdotal data collection and community engagement.

Viridian Marketing (WBE) focuses on creative development and branding strategies. The firm worked with CHA to develop a dedicated study website and create social media strategies for community engagement and outreach.

Acknowledgments

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I. EXECUTIVE SUMMARY

Colette Holt & Associates (“CHA”) was retained by the City of Charlotte (“City”) to perform a disparity study examining its Minority-owned Business Enterprise (“MBE”) and Woman-owned Business Enterprise (“WBE”, collectively, “M/WBE”) Program. In this Study, we determined the City’s utilization of M/WBEs during fiscal years 2015 through 2020; the availability of these firms as a percentage of all firms in the City’s geographic and industry market areas; and any disparities between the City’s utilization of M/WBEs and M/WBE availability for City contacts. We further analyzed disparities in the Charlotte Metropolitan Area and the wider North Carolina economy, where race-conscious or gender-conscious procurement programs are uncommon, to evaluate whether barriers continue to impede opportunities for minorities and women when remedial intervention is not imposed. We also gathered qualitative data about the experiences of M/WBEs in obtaining City contracts and associated subcontracts. Based on these findings, we evaluated the M/WBE Program for conformance with constitutional standards and national best practices.

The methodology for this Study embodies the constitutional principles of *City of Richmond v. J.A. Croson Co.*,¹ Fourth Circuit Court of Appeals case law, and best practices for designing race- and gender-conscious programs. The CHA approach has been specifically upheld by the federal courts. It is also the approach developed by Ms. Holt for the National Academy of Sciences that is now the recommended standard for designing legally defensible disparity studies.

A. Summary of Strict Constitutional Standards Applicable to the City of Charlotte’s M/WBE Program

To be effective, enforceable, and legally defensible, a race-conscious program for public sector contracts must meet the judicial test of constitutional “strict scrutiny”. Strict scrutiny is the highest level of judicial review. The City of Charlotte must meet this test to ensure any race-conscious and gender-conscious program is in legal compliance.

Strict scrutiny analysis has two prongs:

1. The government must establish its “compelling interest” in remediating race discrimination by current “strong evidence” of the persistence of discrimination. Such evidence may consist of the entity’s “passive participation” in a system of racial exclusion.

1. 488 U.S. 469 (1989).

2. Any remedies adopted must be “narrowly tailored” to that discrimination; the program must be directed at the types and depth of discrimination identified.²

The compelling governmental interest prong has been met through two types of proof:

1. Statistical evidence of the underutilization of M/WBEs by the agency and/or throughout the agency’s geographic and industry market area compared to their availability in the market area.
2. Anecdotal evidence of race-based or gender-based barriers to the full and fair participation of M/WBEs in the market area and in seeking contracts with the agency. Anecdotal data can consist of interviews, surveys, public hearings, academic literature, judicial decisions, legislative reports, and other information.

The narrow tailoring prong has been met by satisfying five factors to ensure that the remedy “fits” the evidence:

1. The necessity of relief;
2. The efficacy of race-neutral remedies at overcoming identified discrimination;
3. The flexibility and duration of the relief, including the availability of waiver provisions;
4. The relationship of numerical goals to the relevant market; and
5. The impact of the relief on the rights of third parties.

The Disadvantaged Business Enterprise (“DBE”) program for United States Department of Transportation funded contracts has been evaluated under a similar framework. The program regulations were first revised in 1999 to meet the new test imposed by the US. Supreme Court in *Adarand Constructors, Inc. v. Peña*.³

Most federal courts, including the Fourth Circuit, have subjected preferences for WBEs to “intermediate scrutiny”.⁴ Gender-based classifications must be supported by an “exceedingly persuasive justification” and be “substantially related to the objective”.⁵ The quantum of evidence necessary to satisfy intermediate scrutiny is less than that required to satisfy strict scrutiny. However, appellate courts have applied strict scrutiny to the gender-based presumption of social disadvantage in reviewing the constitutionality of the DBE program or held that the results would be the same under strict scrutiny.

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

3. 515 U.S. 200 (1995).

4. *H.B. Rowe*, 615 F. 3d 233, 242 (4th Cir. 2010).

5. *Cf. United States v. Virginia*, 518 U.S. 515, 532 n.6 (1996).

Proof of the negative effects of economic factors on M/WBEs and the unequal treatment of such firms by actors critical to their success will meet strict scrutiny. Studies have been conducted to gather the statistical and anecdotal evidence necessary to support the use of race-conscious and gender-conscious measures to combat discrimination. These are commonly referred to as “disparity studies” because they analyze any disparities between the opportunities and experiences of minority-owned and woman-owned firms and their actual utilization compared to White male-owned businesses. Specific evidence of discrimination or its absence may be direct or circumstantial and should include economic factors and opportunities in the private sector affecting the success of M/WBEs. High quality studies also examine the elements of the agency’s program to determine whether it is sufficiently narrowly tailored.

B. The City of Charlotte’s Minority-owned and Woman-owned Business Program

1. Governing Statutes, Policy and Objectives

In 1993, the City of Charlotte adopted a program to remedy discrimination and encourage the growth of local businesses. The overall program encompasses both race-neutral and race-conscience elements and is designed to promote economic development and to enhance participation by small businesses, minorities and women in City contracts.⁶

A disparity study conducted in 2017 led to the adoption of the current Charlotte Business INclusion (“CBI”) Program. The CBI Program Policy sets forth program coverage, requirements, policy and procedures. This Policy was most recently amended in 2020.

2. CBI Program Administration

The Charlotte City Manager, the CBI Program Manager, City department directors and the City Attorney’s Office collectively administer the CBI Program. The Program Manager manages the CBI Program Office and the daily operations of the Program. The CBI Office is staffed with 10 employees, inclusive of the Program Manager. The Program Manager has the authority to adopt rules, guidelines and processes to implement the Program. This authority extends to establishing, recommending, and monitoring MWSBE contracting goals and commitments; overseeing CBI policy and procedural compliance; conducting

6. The Small Business Enterprise (“SBE”) Program is authorized by North Carolina General Assembly S.B. 1336 and Section 8.88 of the Charlotte City Charter. The Minority and Woman Business Participation Program is governed by North Carolina General Statutes 143-128.2, 143-128.1, 143-128.4 and 143-13.

outreach, training and advocacy to encourage participation in contracting opportunities; and developing partnerships and initiatives to foster economic development of small businesses; tracking and reporting of CBI Program data and results to measure the success of the CBI Program; and issuing reports that identify key achievements and challenges of the Program.

3. CBI Program Eligibility Standards and Certification

The Program provides for two classes of firms for eligibility: M/WBEs; and Small Business Enterprises (“SBEs”). M/WBE firms must be certified with the State of North Carolina’s Historically Underutilized Business (“HUB”) Office. MBEs must be at least 51% owned by one or more persons who are, African American/Black, Hispanic, Asian, or Native American/American Indian. WBEs must be at least 51% owned by one or more persons who are female.

The City of Charlotte has defined its own criteria for SBE eligibility. A firm must be a for-profit enterprise, authorized to do business in the State of North Carolina; meet the SBE size eligibility of less than 25% of the applicable size standards set by the Small Business Administration at 13 C.F.R. § 121.201; have a personal net worth under \$750,000, excluding \$500,000 of equity in a primary residence; demonstrate that at least 51% of the legal and equitable interest in the business enterprise is owned and controlled by eligible owners who acquired the interest in the firm with their own financial or equivalent resources; and hold a professional business license for each type of business in which it is seeking certification.

M/WBEs and SBEs are also required to demonstrate a Significant Business Presence in the Charlotte Consolidated Statistical Area (“CSA”). The City applies the “totality of the circumstances test”, that takes into consideration a number of factors, including but not limited to, whether the business enterprise is headquartered in the Charlotte CSA, the number of full-time employees, the location of managerial or decision-making personnel, mail delivery locations, lease agreements and the percentage of income or revenue derived from work in the Charlotte CSA.

4. CBI Goal Setting Policies and Procedures

The CBI Policy requires the Program Manager to establish a systematic methodology for setting SBE and M/WBE goals. Factors to be considered are contract size, availability of subcontracting opportunities, other data as applicable, and for M/WBE goals, whether they are warranted to remedy the effects of past discrimination.

Based on the 2017 Disparity Study, the City has set an overall, annual, aspirational M/WBE goal of 20.9%. Goals are set on contracts for construction; archi-

itecture, engineering and surveying; professional services; other services; and goods and commodities.

The annual goal is applied only to construction contracts of \$500,000 and under, and service and commodities contracts of \$100,000 and under (referred to as informal contracts). M/WBE goals are only set for those categories of firms that have experienced documented discrimination. According to the 2017 Disparity Study, these groups are African Americans, Hispanics and Native Americans. For construction contracts under \$200,000, the user departments are required to use race-neutral outreach measures to encourage participation of MWSBEs as prime contractors. Exempt Contracts are excluded from goal setting.

SBE and/or M/WBE subcontracting goals are established when subcontracting opportunities have been identified and when there are M/W/SBEs available to perform the work. M/WBE subcontracting goals are limited to African American-owned, Hispanic-owned and Native American-owned firms.

Departments must obtain a Project Goal Waiver from the CBI Office for construction projects of \$200,000 or greater and for architecture, engineering and surveying contracts of \$100,000 or greater that do not have subcontracting opportunities. The Department CBI Liaison develops the weighted average subcontracting goals using a detailed estimation of the scopes of work to be performed, available SBEs and African American, Hispanic and Native American MBEs listed in the City's vendor database, and a review of historical data of actual results on past similar project scopes.

5. Counting Participation Towards Contract Goals

To be counted towards the contract goal, the bidder's proposed subcontractor must hold a valid certification with the City as of the proposal due date, perform a Commercially Useful Function ("CUF"), perform within the areas(s) for which it is certified or substantiate that the subcontractor has performed similar work in the past and meet the goal category for the project.

Work that an M/W/SBE performs with its own workforces can be counted toward the goal on construction contracts under \$500,000 and on service contracts under \$200,000.

6. Pre-Award Contract Procedures

Bidders with the intent to self-perform 100% of the work on construction contracts with an M/W/SBE goal can submit an affidavit stating that the bidder does not customarily subcontract this type of project and has the capability to perform all elements of the work with its own forces. In these cases, the bidder

is not required to submit evidence of Good Faith Efforts (“GFEs”). Should the City determine that the bidder is not licensed to perform or will not be performing all of the work on the contract, the City may reject the bid for non-compliance. Proposers can self-perform on a service contract if they can certify in their proposal that they are licensed, qualified and able to perform all aspects of the contract without subcontracting or have a valid business reason for self-performing all the work.

A Utilization Plan, documenting the subcontractors and suppliers the bidder intends to use to meet the contract goal, and a GFE Affidavit, documenting GFEs undertaken by the bidder if the contract goal was not fully met, are due with the bid. Failure to include a properly completed Plan or Affidavit is grounds for rejecting the bid.

GFEs must be documented for each subcontracting goal that is not fully met. Failure to demonstrate acceptable GFEs is grounds for rejection of the bid. The City has established a point system to determine acceptable GFEs. Bidders must earn a minimum of 50 out of 145 GFE points that are calculated separately for each unmet subcontracting goal. All GFEs must be completed prior to bid opening, but supporting documentation is due within the time frame specified by the City or, absent a specified time, within three business days after a request from the City.

7. Post Contract Award Procedures

The CBI Office is responsible for reviewing all contracts, including whether the committed subcontracting goals are being met; the contractor has improperly terminated, replaced or reduced the work of an M/W/SBE; the contractor is complying with contract amendments, renewals or additions to scope; and whether M/W/SBEs are performing a CUF.

The City installed the B2Gnow InclusionCLT contract compliance and certification system in 2019. This system streamlines and automates the City’s Program data gathering, tracking, reporting and vendor management. The system enables close monitoring, tracking and reporting of compliance with M/W/SBE and DBE commitments. Prime vendors are required to report payments made to all subcontractors and suppliers. Subcontractors are then required to review and confirm the accuracy of the payment amount. Failure to provide payment reports within the specified time period results in sanctions and withholding payment.

The CBI Policy imposes on all contractors an affirmative, ongoing obligation to meet or exceed the committed contract goals over the life of the contract. Contractors can be deemed to be in violation and in breach of contract if the

City determines that the contractor will not meet the subcontracting goal and the reasons for not meeting goal are within the contractor's control.

A contractor may lose the ability to obtain goal credit towards the subcontracting goal when there is a change in an M/W/SBE's certification status after bid submission if the M/W/SBE's certification is terminated because it is determined to be an affiliate of the contractor or because of false or fraudulent claims about which the contractor was aware.

Dollars paid to an SBE whose certification expires or who graduates from eligibility under the CBI Policy will be counted towards the contract goal.

The North Carolina General Statutes require prime contractors to pay subcontractors for completed work within seven days of receipt of the final or periodic payment received by the prime contractor. If this commitment is not met, the prime contractor is required to pay the subcontractor interest of one percent per month on the unpaid balance starting on the eighth day. This requirement applies to all MWSBE subcontracts unless the prime contractor and subcontractor have entered into a quick pay agreement.

8. CBI Program Violations, Investigations and Sanctions

A violation of the CBI Program by a contractor can constitute a material breach of contract. The CBI Policy provides for remedies that include the termination or suspension of the contract for default; withholding all payments due on the contract until the violation has been resolved and a mutually agreeable resolution has been reached; and assessing liquidated damages.

9. Vendor Outreach

The City and the CBI Program use multiple approaches to encourage small business participation in procurement opportunities. The City regularly holds pre-bid conferences to provide information about the bidding process to small businesses. The City also sponsors several supportive services programs:

- Advance Your Business Tuition Assistance Program provides certified firms with up to \$300 of support towards classes taken at the Small Business Center at Central Piedmont Community College.
- Professional Association Sponsorship provides certified businesses \$100 toward the first-year membership in a local association or chamber of commerce. The sponsorship is provided to facilitate networking and promote joint ventures.

The City and the CBI Program work with other government agencies, non-profit organizations, academic institutions and chambers of commerce to pro-

vide assistance to increase small business capacity and advance business skills. The CBI Program partners with local minority advocacy groups such as the Metrolina Minority Contractors Association, the Hispanic Contractors Association of the Carolinas and the Latin American Chamber of Commerce to perform outreach and provide technical support to small and minority-owned and woman-owned businesses.

From 2016 through 2020, the City sponsored or participated in over 33 outreach events. These ranged from Town Halls sponsored by City Council members to the NBA All Star MWSBE Meet & Greet to the Black Enterprise Entrepreneur Summit.

10. CBI Staff Training

CBI Program staff attend the annual B2Gnow User Training Conference and the American Contract Compliance Association's annual National Training Institute.

11. Experiences with the CBI Program

To explore the experiences of businesses seeking opportunities on City contracts, we solicited input from 93 individuals and sought their suggestions for changes. We also collected written comments from 490 businesses about their experiences with Charlotte's program through an electronic survey. The following are summaries of the issues discussed during the interviews and in the survey comments.

a. Experiences with CBI Program's Policies and Procedures: Business Owner Interviews

- Most M/WBEs reported that the CBI Program has benefited their firm. Contract goals were viewed as necessary to ensure equal access to City contracting opportunities.
- Most prime vendors stated they have been able to meet MWSBE goals on City contracts.
- Some scopes were more difficult than others to obtain qualified M/WBE subcontractors.
- Engineering firms seemed to face more challenges finding qualified firms.
- Task order contracts, which by design do not provide definite scopes at the time of contract award, were especially problematic.

- Some bidders complained that certified firms were sometimes listed in more industry codes than they were qualified to perform.
- The requirement that the certified firm be based in the Charlotte Statistical Area increased the difficulty of meeting goals.
- Some large contractors reported that using a more flexible procurement method, such as design-build contracts, would help to increase opportunities for M/WBEs.
- Several participants had been able to successfully submit documentation of their GFEs to meet the contract goals.
- However, when there was a change in scope, even at the City's behest, the prime contractor was still required to meet the goal.
- Many owners stated that small firms and M/WBEs would benefit from more technical assistance and supportive services.
- Some more experienced firm representatives suggested more offerings for mature firms.
- A mentor-protégé program was another approach to increasing the capabilities of M/WBEs recommended by both M/WBEs and large non-M/WBEs.

b. Experiences with the CBI Program: Business Owner Survey Responses

i. Overall Experiences with CBI Program and Requirements

- Minority and woman respondents strongly supported the program. Many stated the program was essential to obtaining business.
- Many M/WBE respondents praised the program for providing more exposure and access to both prime contracting and subcontracting opportunities.
- Several respondents complimented the program and their experiences working with the City.
- Several minority and woman respondents suggested that the City should publicize the CBI Program to qualified firms to encourage participation.
- While most respondents supported the program, many also found the certification process challenging to navigate, paperwork intensive and cumbersome.
- Some Black woman respondents noted that WBE certification criteria should be expanded to include minority women.

ii. Access to City Contracting Opportunities

- Several M/WBE firms suggested that local preference requirements should be expanded to include additional North Carolina counties.
- Some respondents stated that the City and prime contractors repeatedly use the same firms.
- A few respondents thought the City could do more to open up contracting opportunities for small firms.
- Minority and woman respondents suggested that the City offer smaller projects or should “unbundle” contracts.
- Some M/WBE respondents requested more opportunities to perform as prime contractors.
- Many M/WBEs requested more technical support and training to respond to contract solicitations and RFPs.
- Several M/WBE respondents viewed greater access to City Staff as a way to assist them.

iii. CBI Program Compliance

- M/WBE respondents suggested more oversight is required to ensure prime contractors comply with program requirements.
- Several M/WBE contractors noted the effectiveness of verifying contractor payments to ensure prime contractor compliance.

iv. CBI Program Outreach

- Many M/WBE respondents were unaware of bidding opportunities and requested more outreach.
- Respondents were particularly interested in additional support to facilitate relationship building between subcontractors/subconsultants and prime contractors/consultants.

v. Experiences with Business Support Services

- Firms that participated in supportive services generally found them helpful.
- Some M/WBE firms who had participated in joint ventures and mentor protégé programs reported good outcomes from these partnerships.
- Mentor-protégé programs, partnerships and Joint Ventures were seen as important approaches to help minority-owned and woman-owned businesses.

- Some respondents suggested supportive services programs could offer more comprehensive instruction and training to help develop concrete skills, techniques and strategies.
- Assistance with obtaining capital, bonding and insurance was cited by many M/WBE respondents as critical to increasing their capacity to take on more business.
- Several respondents noted that Black firms are in particular need of assistance in obtaining capital and access to financial resources.

C. Contract Data Analyses of the City of Charlotte’s Contracts

We analyzed contract data for 2015 through 2020 for the City of Charlotte’s contracts. The Initial Contract Data File contained 3,218. Because of the large number of contracts, CHA constructed a stratified random sample of 1,056 contracts.⁷

In order to conduct the analysis of the sample of contracts, we constructed all the fields necessary for our analysis where they were missing in the City’s contract records (*e.g.*, industry type; zip codes; six-digit North American Industry Classification System (“NAICS”) codes of prime contractors and subcontractors; and M/WBE subcontractor information, including payments, race, gender; etc.). Tables 1-1 and 1-2 provide data on the Final Contract Data File (“FCDF”).

Table 1-1: Final Contract Data File

Contract Type	Total Contracts	Share of Total Contracts
Prime Contracts	751	40.5%
Subcontracts	1,105	59.5%
TOTAL	1,856	100.0%

Source: CHA analysis of City of Charlotte data

7. The sample was constructed by first stratifying the contract universe into its four industries components: Construction, Goods, Professional Services, and Services. With each component, we derived a random sample where distribution of contracts within that component across range of contract dollars approximated that distribution within the component universe. To achieve this, we separated the universe into thirds with one third containing the contracts with the lowest contract dollars values, one third containing contracts with the highest contract dollars values, and a middle third containing the rest. If, in the universe the third with the highest contract dollars captured 90% of all of the contract dollars in that component, then in the sample, the third with the highest contract dollars captured approximately 90% of all of the contract dollars.

Table 1-2: Final Contract Data File Net Dollar Value

Business Type	Total Contract Dollars	Share of Total Contract Dollars
Prime Contracts	\$1,344,064,359	80.6%
Subcontracts	\$322,929,868	19.4%
TOTAL	\$1,666,994,227	100.0%

Source: CHA analysis of City of Charlotte data

The FCDF, which establishes the City’s product market, consists of 161 NAICS codes, with a total contract dollar value of \$1,666,994,227.

As described in Chapter II, prior to the analysis of the City’s utilization of M/WBEs, courts have required agencies to determine the geographic market within which they operate. To determine the geographic market area, we applied the standard of identifying the firm locations that account for at least 75% of contract and sub-contract dollar payments in the FCDF.⁸ Firm location was determined by zip code and aggregated into counties as the geographic unit. We explored a geographic market consisting of the 13 counties constituting the Charlotte CSA; when those geographic parameters were imposed upon the FCDF, the resulting contract dollars accounted for just 58.6% of the FCDF. Analyzing this subset of the FCDF would not paint a proper picture of the City’s procurement activity. We next explored a geographic market consisting of the State of North Carolina and York County in South Carolina. Firms within these parameters accounted for 74.0% of the FCDF. As this approximated the standard, we decided to use North Carolina and York County as the geographic market.⁹

Using North Carolina and York County as the geographic market, Table 1-3 presents summary data on the City’s utilization of M/WBEs, measured in percentage of contract dollars.

**Table 1-3: Distribution of Contract Dollars by Race and Gender
(share of total dollars)**

NAICS	Black	Hispanic	Asian	Native American	MBE	White Women	MBE/WBE	Non-MBE/WBE	Total
TOTAL	2.4%	0.9%	1.9%	1.1%	6.3%	5.8%	12.1%	87.9%	100.0%

Source: CHA analysis of the City of Charlotte data

8. J. Wainwright and C. Holt, *Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program*, National Academies of Sciences, Engineering, and Medicine, 2010 (“*National Disparity Study Guidelines*”), at p. 29.
9. Beyond York, two other counties in South Carolina are in the Charlotte CSA. However, no firms receiving contracts were located in Chester County and the one firm in Lancaster County that received a contract accounted for only 0.0016% of the FCDF.

Using the modified “custom census” approach to estimating availability and the further assignment of race and gender using the FCDF, the Master M/WBE/HUB Directory and other sources, we determined the unweighted availability of M/WBEs in the City’s market area. Table 1-4 presents these data. For further explanation of the role of unweighted and weighted availability and how these are calculated, please see Appendix D.¹⁰

Table 1-4: Aggregated Unweighted M/WBE Availability

Black	Hispanic	Asian	Native American	MBE	White Women	M/WBE	Non-M/WBE	Total
2.0%	0.3%	0.2%	0.2%	2.6%	4.3	7.1%	92.9%	100.0%

Source: CHA analysis of the City of Charlotte data

We next determined the aggregated availability of M/WBEs, weighted by the City’s spending in its geographic and industry markets. Table 1-5 presents these results. The overall, weighted M/WBE availability result can be used by the City to determine its overall, annual aspirational goal.

Table 1-5: Aggregated Weighted M/WBE Availability

Black	Hispanic	Asian	Native American	MBE	White Women	M/WBE	Non-M/WBE	Total
3.8%	0.9%	0.4%	0.8%	5.9%	7.2%	13.1%	86.9%	100.0%

Source: CHA analysis of the City of Charlotte data; Hoovers; CHA Master Directory

We next calculated disparity ratios for total M/WBE utilization compared to the total weighted availability of M/WBEs, measured in dollars paid.

A *disparity ratio* is the relationship between the utilization and weighted availability, determined above. Mathematically, this is represented by:

$$DR = U/WA$$

Where DR is the disparity ratio; U is utilization rate; and WA is the weighted availability.

The courts have held that disparity results must be analyzed to determine whether the results are “significant”. There are two distinct methods to measure a result’s significance. First, a “large” or “substantively significant” disparity is commonly defined by courts as utilization that is equal to or less than 80% of the availability measure. A substantively significant disparity supports the inference that the

10. The USDOT “Tips for Goal Setting” urges recipients to weight their headcount of firms by dollars spent. See Tips for Goal-Setting in the Disadvantaged Business Enterprise Program, <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>.

result may be caused by the disparate impacts of discrimination.¹¹ Second, statistically significant disparity means that an outcome is unlikely to have occurred as the result of random chance alone. The greater the statistical significance, the smaller the probability that it resulted from random chance alone.¹² A more in-depth discussion of statistical significance is provided in Chapter IV and Appendix C. Table 1-6 presents the calculated disparity ratios for each demographic group. The disparity ratio for Blacks is substantively significant.

Table 1-6: Disparity Ratios by Demographic Group

	Black	Hispanic	Asian	Native American	MBE	White Woman	M/WBE	Non-M/WBE
Disparity Ratio	61.9%‡	100.8%	521.5%	135.8%	106.1%	80.5%	92.0%	101.2%

Source: CHA analysis of the City of Charlotte data

‡ Indicates substantive significance

Upon request from the City, CHA replicated the above analysis after disaggregating the NAICS codes into four industries:

- Construction
- Goods
- Professional Services
- Services

For each of these industries, we present the distribution of contract dollars by race and gender; the unweighted M/WBE availability for City contracts; the aggregated weighted availability for City contracts; and disparity ratios by demographic group. These results are provided in Appendix E.

Overall, we found that, compared to non-M/WBEs, minority-owned and woman-owned firms were concentrated in a different subset of industries. Further, in some industries, only a few M/WBEs received contracts in contrast to non-M/WBEs. This suggests that although the City’s Program has been quite successful in creating opportunities for minority-owned and woman-owned firms, these benefits have not been spread evenly across all groups or subindustries. We find the

11. See U.S. Equal Employment Opportunity Commission regulation, 29 C.F.R. §1607.4(D) (“A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.”).

12. A chi-square test – examining if the utilization rate was different from the weighted availability – was used to determine the statistical significance of the disparity ratio.

data as a whole support the conclusion that M/WBE firms have not reached parity in all aspects of the City's contracting activities compared to non-M/WBE firms.

It is standard CHA practice to explore any M/WBE disparity ratio that exceeds 100%. This is to ensure that an abnormal pattern of M/WBE concentration does not account for disparity ratios greater than 100%, thereby leading to the unwarranted conclusion that race-conscious or gender-conscious remedies are no longer needed to redress discrimination against a particular socially disadvantaged group. It is possible that a group's disparity ratio that is larger than 100% might be the result of the success of a few firms and not indicative of the experiences of the broad set of firms in that group.

In addition, contract dollars received by M/WBEs may be concentrated in a few NAICS codes and this concentration pattern may differ from that of non-M/WBEs. For instance, in a world where all firms— regardless of race and gender— enjoyed current positioning in the marketplace, one would expect that each demographic group would receive similar shares of their total contract dollars for the same NAICS codes. In other words, if hypothetically, Hispanic firms received 25% of all of their contract dollars from NAICS Code 123456, then we would expect that non-M/WBEs would receive approximately 25% of all of their contract dollars from NAICS Code 123456. To explore this question, Table 1-7 presents an overview of the top three NAICS codes where M/WBEs received contract dollars and compares these results to the results for non-M/WBEs in those same NAICS codes. This overview allows us to see if parity exists. (More detail is presented in Chapter IV.) Panel A in the Table presents the three NAICS codes where Black firms received their largest amount of contract dollars. For instance, Black firms received 38.7% of all of their contract dollars from NAICS code 484220 (Specialized Freight (except Used Goods) Trucking, Local). If there were parity, non-M/WBEs would receive approximately 38.7% of all of their contract dollars from this code and the ratio of the Black share to the non-M/WBE share would approximate 1:1. In reality, while this code provides 38.7% of all Black contract dollars on City contracts, it provides just 0.1% of non-M/WBE contract dollars. The resulting ratio is 263.3:1. Overall, the three NAICS codes which contributed the most contract dollars to Black firms contributed 56.7% to all contract dollars for Black firms. In contrast, these three codes contributed just 3.0% to all contract dollars to non-M/WBE firms. The subsequent ratio of 18.7:1 means that Black firms receive 18.7 times as many of their contract dollars from these three codes compare to non-M/WBEs. This pattern of disproportionality is true for each M/WBE group as presented in Panels B through Panel E. Overall, the level of disproportionality in individual NAICS codes ranges from 0.2 times for Asian firms in NAICS code 237310 to 263.3 times for Black firms in NAICS code 484220. Moving from an examination of individual codes to the three leading codes, the level of disproportionality ranges from 1.5 for White women firms to 18.7 for Black firms.¹³

Table 1-7: Comparing the Share of All Spending Received by Each M/WBE Group in the Groups’ Three Leading NAICS Codes to The Share of All Spending Received by non-M/WBEs in those NAICS Codes¹⁴

NAICS	NAICS Code Description	NAICS Code Share of M/WBE Group Spending	NAICS Code Share of Non-M/WBE Spending	Ratio of M/WBE Share to Non-M/WBE Share
Panel A: NAICS Code Share of All Spending - Black Compared to Non-M/WBE				
484220	Specialized Freight (except Used Goods) Trucking, Local	38.7%	0.1%	263.3
238210	Electrical Contractors and Other Wiring Installation Contractors	9.6%	2.4%	4.0
561730	Landscaping Services	8.4%	0.5%	18.1
Total 3-code Share of Total Group Dollars		56.7%	3.0%	18.7
Panel B: NAICS Code Share of All Spending - Hispanic Compared to Non-M/WBE				
237310	Highway, Street, and Bridge Construction	27.7%	21.1%	1.3
238120	Structural Steel and Precast Concrete Contractors	25.5%	0.3%	94.8
238210	Electrical Contractors and Other Wiring Installation Contractors	18.7%	2.4%	7.7
Total 3-code Share of Total Group Dollars		71.9%	23.8%	3.0
Panel C: NAICS Code Share of All Spending: Asian Compared to Non-M/WBE				
237990	Other Heavy and Civil Engineering Construction	65.0%	4.5%	14.5
541519	Other Computer Related Services	25.4%	0.0%	-----
237310	Highway, Street, and Bridge Construction	4.4%	21.1%	0.2
Total 3-code Share of Total Group Dollars		94.9%	25.6%	3.7
Panel D: NAICS Code Share of All Spending - Native American Compared to Non-M/WBE				
237110	Water and Sewer Line and Related Structures Construction	44.3%	14.7%	3.0

13. Because non-M/WBEs received no contracts in NAICS code 541519, a ratio could not be calculated comparing Asian firms to non-M/WBEs.

NAICS	NAICS Code Description	NAICS Code Share of M/WBE Group Spending	NAICS Code Share of Non-M/WBE Spending	Ratio of M/WBE Share to Non-M/WBE Share
238910	Site Preparation Contractors	26.4%	3.5%	7.6
484220	Specialized Freight (except Used Goods) Trucking, Local	6.8%	0.1%	46.5
Total 3-code Share of Total Group Dollars		77.5%	18.4%	4.2
Panel E: NAICS Code Share of All Spending - White Women Compared to Non-M/WBE				
237110	Water and Sewer Line and Related Structures Construction	27.3%	14.7%	1.9
237310	Highway, Street, and Bridge Construction	22.5%	21.1%	1.1
236210	Industrial Building Construction	8.4%	3.3%	2.6
Total 3-code Share of Total Group Dollars		58.3%	39.1%	1.5

Source: CHA analysis of City of Charlotte data

D. Analysis of Disparities in the City of Charlotte Area Economy

Evidence of the experiences of minority- and woman-owned firms outside of race-conscious or gender-conscious procurement programs is relevant and probative of the likely results of the City adopting a race-neutral program, because contracting diversity programs are rarely imposed outside of specific government agencies. To examine the outcomes throughout the City of Charlotte area economy, we explored two Census Bureau datasets and the government and academic literature relevant to how discrimination in the City’s market and throughout the wider economy affects the ability of minorities and women to fairly and fully engage in the City’s prime contract and subcontract opportunities.

We analyzed the following data and literature:

- Data for the State of North Carolina from the Census Bureau’s American Community Survey from 2015 through 2019. This rich data set establishes with greater certainty any causal links between race, gender and economic outcomes. We employed a multiple regression statistical technique to examine the rates at which minorities and women form firms. In general, we

14. Figures have been rounded for readability in the Tables.

found that even after considering potential mitigating factors, business formation rates by Blacks, Hispanics and White women are lower compared to White males. The data indicate that non-Whites and White women receive lower wages and Blacks and White women receive lower business earnings after controlling for possible explanatory factors. These analyses support the conclusion that barriers to business success do affect non-White and White woman entrepreneurs.

- Industry Data from the Census Bureau’s 2017 Annual Business Survey from 2017. This dataset indicated large disparities between M/WBE firms and non-M/WBE firms when examining the sales of all firms, the sales of employer firms (firms that employ at least one worker), and the payroll of employer firms.
- Surveys and literature on barriers to access to commercial credit and the development of human capital further reports that minorities continue to face constraints on their entrepreneurial success based on race. These constraints negatively impact the ability of firms to form, to grow, and to succeed. These results support the conclusions drawn from the anecdotal interviews and analysis of the City’s contract data that M/WBEs face obstacles to achieving success on contracts outside of M/WBE programs.

All three types of evidence have been found by the courts to be relevant and probative of whether a government will be a passive participant in overall marketplace discrimination without some type of affirmative intervention. This evidence supports the conclusion that the City should continue to use race-conscious contract goals to ensure a level playing field for all firms.

E. Qualitative Evidence of Race and Gender Barriers in the City of Charlotte’s Market

In addition to quantitative data, anecdotal evidence of firms’ marketplace experiences is relevant to evaluating whether the effects of current or past discrimination continue to impede opportunities for M/WBEs such that race-conscious contract goals are needed to ensure equal opportunities to compete for City prime contracts. To explore this type of anecdotal evidence, we received input from 93 participants in small group business owner interviews. We also obtained written comments from 490 businesses that participated in an electronic survey.

Consistent with other evidence reported in this Study, the business owner interviews, and the survey results strongly suggest that minorities and women continue to suffer widespread discriminatory barriers to full and fair access to contracts and associated subcontracts in the City of Charlotte’s market area.

1. Business Owner Interviews

Many minority and woman business owners reported that while some progress has been made in integrating their firms into public and private sector contracting activities through race-conscious and gender-conscious contracting programs, significant barriers remain.

The following are brief summaries of the most common views expressed by numerous participants.

- Many minority and woman interview participants reported that they still encounter biases, stereotypes and negative assumptions about their qualifications and competency. Several owners reported that being certified as an M/WBE often carries a stigma.
- Some M/WBEs found it difficult to penetrate the industry networks necessary for entrepreneurial success.
- Some minority owners had suffered blatantly hostile environments on the basis of race.
- Several women, especially in construction, had experienced sexist attitudes and behaviors.
- Professional opportunities were sometimes explicitly denied because of gender.

2. Electronic Business Owner Survey

Results from the electronic survey were similar to those of the interviews.

- A little under one third (31.2%) reported that they still experience barriers to contracting opportunities based on their race and/or gender.
- Almost one quarter (24.4%) said their competency was questioned because of their race or gender.
- Fourteen percent indicated they had experienced job-related sexual or racial harassment or stereotyping.
- Discrimination from suppliers or subcontractors because of their race and/or gender was experienced by 19.8% of the respondents.
- Almost one third (30.5%) of M/WBE respondents reported that they did not have equal access to the same information as non-certified firms in their industry.
- Almost one quarter (23.4%) of M/WBE respondents indicated that they do not have access to informal and formal networking information.

- Among M/WBEs, 7.9% reported challenges in their efforts to obtain bonding. In comparison, only one percent of non-M/WBEs reported difficulty with obtaining bonding.
- Over one third (35.5%) of M/WBEs reported experiencing barriers in their efforts to obtain financing and loans. In comparison, only 14.6% of non-minority firms reported such difficulties.
- Among M/WBEs, 6.3% reported experiencing barriers to obtaining insurance. Only one percent of non-M/WBEs reported such difficulties.
- Over 65% (65.2%) of M/WBEs reported that they are not solicited for City or government projects with M/WBE goals.
- Over 65% (65.7%) of M/WBEs also reported that they are not solicited for private projects and projects without goals.
- A majority of M/WBEs (55.9%) reported that their firm's contract size was either well or slightly below the amount they are qualified to perform.
- More than three quarters (80.4%) of minority and female respondents reported that they could take on up to 75% more work if it were offered. Almost six percent (5.8%) could take on up to 100% more work, and almost nine percent (8.9%) reported they could more than double their amount of work.

Responses to the survey's open-ended questions described these experiences in further detail. The following is a summary of the most common written responses received.

- Many minorities reported that fair opportunities to compete for contracts were not available because of systemic racial barriers.
- Many minority business owners related instances of overt racism, demeaning comments and harassment.
- Minority respondents were often subject to stereotypical assumptions and attitudes on the basis of race. Many reported their credentials and competency are routinely questioned.
- Some respondents noted that it can be difficult, if not impossible, to know whether they had been subjected to discrimination.
- Some minority respondents noted their experiences with discriminatory behavior had improved.
- Woman respondents reported experiencing sexist attitudes about their competency, skill and professionalism. Some women reported encountering sexist behaviors and stereotypical attitudes about their role

and authority. Outright sexual harassment remains a challenge for some women.

- Many minority and woman business owners felt excluded from formal and informal networks necessary for building relationships and for success. Some reported that they were not receiving the same information as non-certified firms. Access to decision-makers was seen as a challenge.
- Some felt that government agency staff were unavailable to assist with networking.
- Some M/WBE firms reported that being small and new put them at a disadvantage.
- Many minority and woman respondents felt that prime bidders often use them only to meet race-conscious or gender-conscious procurement goals.
- Many M/WBEs reported discriminatory barriers when trying to obtain financing and bonding that have reduced their capacity to grow and compete on an equal basis.
- Some minority and woman respondents reported being charged higher pricing for materials based on their race, ethnicity and gender. Then, they are often under pressure to reduce their pricing relative to their White male counterparts.

F. Recommendations for Enhancements to The City of Charlotte’s Business Inclusion Program

The quantitative and qualitative data in this Study provide a thorough examination of the evidence regarding the experiences of M/WBEs in the City of Charlotte’s geographic and industry markets. As required by strict constitutional scrutiny, we analyzed evidence of the District’s utilization of M/WBEs as a percentage of all firms as measured by dollars spent, as well as M/WBEs’ experiences in obtaining contracts in the public and private sectors. We gathered statistical and anecdotal data to provide the City with the evidence necessary to determine whether there is a strong basis in evidence for the continued use of race-conscious and gender-conscious goals for its CBI Program for HUBs, and if so, how to narrowly tailor its Program.

Through the CBI Office, the City of Charlotte has implemented an aggressive program. Setting goals, conducting outreach, and enforcing policy requirements have resulted in a few M/WBEs reaching parity in City contracting. However, evidence

beyond the City's achievements strongly suggests these results reflect the effect of the CBI program.

Outside of City and other local government contracts, M/WBEs face large disparities in opportunities for public sector and private sector work in the Charlotte area markets. The results of the anecdotal data analyses further support the inference that utilization is the result of contract goals; in the absence of affirmative efforts, minority and woman businesses receive little work, remain subject to biases and are often shut out of business opportunities.

The quantitative and qualitative findings support the conclusion that the current effects of past discrimination and ongoing bias would be barriers to City work in the absence of race-conscious and gender-conscious remedies.

Based upon these results, we make the following recommendations. We recognize that many of our recommendations, both race-neutral and gender-neutral and race-conscious and gender-conscious, will require more staff and technical resources to be devoted to the Program. It will also be important to have refresher training on the Program and any new elements for City staff with contracting or procurement responsibilities. Similar information should also be provided to other senior City leadership, elected officials and the public.

1. Augment Race-Neutral and Gender-Neutral Measures

The courts require that governments use race-neutral and gender-neutral approaches to the maximum feasible extent to address identified discrimination. This is a critical element of narrowly tailoring the Program, so that the burden on non-M/WBEs is no more than necessary to achieve the City's remedial purposes. Increased participation by M/WBEs through race-neutral measures will also reduce the need to set M/WBE contract goals. We therefore suggest the following enhancements of Charlotte's current efforts, based on the business owner interviews and survey responses, input of City staff, and national best practices for contracting affirmative action programs.

a. Develop a Long Term Procurement Forecast

We recommend that the City expand its current procurement forecast to not only include an annual forecast, but also anticipated capital improvement projects for the next five years. A comprehensive and transparent site that provides information on upcoming bid opportunities is one race-neutral and gender-neutral measure that will assist all firms to access information.

b. Extend the Quick Pay Program

The City currently offers a Quick Pay option as part of the consideration of GFEs for a bidder that does not meet the contract goal at the time of bid submission. The prime vendor commits to paying participating M/W/SBEs within 20 days after the contractor confirms that the M/W/SBE has properly performed the subcontracted work. To the extent permitted by law, we suggest that this option be extended to firms that meet the goals and across all industries. The incentive to the prime vendor will need to be a commitment for faster payment by the City to the prime vendor, perhaps within 21 days of submission of the prime's approved invoice.

c. Expand Supportive Services Offerings

The City currently offers several programs and events for vendor training. Many firms reported these were helpful in increasing their capabilities and overall business skills. However, vendors and City staff requested additional support in the following areas.

- Classes on estimating bids and preparing paperwork.
- More sophisticated and advanced offerings for mature M/WBEs.
- Loan programs to assist small firms to obtain needed funding to perform on City contracts. There are many models, including linked deposit programs and revolving loan funds, that can help to fulfill these needs.
- A robust technical assistance, capital access and bonding support program for construction firms.

2. Continue to Implement Narrowly Tailored Race- and Gender-Conscious Measures

a. Use the Study to Set the Overall, Annual Aspirational HUB Goal

The City's Program has been successful in opening up opportunities for minority-owned and woman firms on its contracts. As reported in Chapter IV, M/WBEs in the aggregate have reached parity on City contracts. When we examined whether firms were concentrated within an industry or between industries on the basis of race or gender, however, a picture emerged of unequal outcomes for M/WBEs compared to non-M/WBEs.

Further, as documented in Chapter V, when examining outcomes in the wider economy using Census Bureau data, it is clear that M/WBEs do not yet enjoy full and fair opportunities to compete for construction and con-

struction-related services contracts. The results of numerous small business credit surveys also reveal that M/WBEs, especially Black-owned firms, suffer significant barriers to business financing. There are also race-based barriers to the development of the human capital necessary for entrepreneurial success.

Our interviews with individual business owners and the results of our survey further buttress the conclusion that race and sex discrimination remain persistent barriers to equal contracting opportunities. Many minority and female owners reported that they still encounter barriers based on their race and/or gender and that without affirmative intervention to increase opportunities through contract goals, they will continue to be denied full and fair chances to compete.

In our judgment, the City's utilization of M/WBEs is primarily the result of the operations of its CBI Program, not the remediation of discrimination outside of contracting affirmative action programs. Without the use of goals, Charlotte may become a "passive participant" in the market failure of discrimination.

We therefore recommend that the City continue to use narrowly tailored race-conscious and gender-conscious measures. These should include using the weighted availability estimates to set its overall, annual aspirational HUB goal.

b. Use the Study to Set MBE and WBE Contract Goals

In addition to setting overall, annual targets, the City should use the Study's detailed unweighted availability estimates as the starting point for contract specific goals for MBE and WBE participation. As discussed in Chapter II of this Report, an agency's constitutional responsibility is to ensure that goals are narrowly tailored to the specifics of the project. The aspirational goal may be referenced in a solicitation that does not include contract goals so long as it is clear that there is no requirement for any specific action by the bidder and the participation of M/WBEs is not a factor in contract award.

The narrowly tailored contract goal setting methodology involves four steps, regardless of the industry scopes of work of the project:

- Weight the estimated dollar value of the scopes of the contract by six-digit NAICS codes, as determined during the process of creating the solicitation.
- Determine the unweighted availability of M/WBEs in those scopes, as estimated in the Disparity Study.

- Calculate a weighted goal based upon the scopes and the availability of at least three available firms in each scope.
- Adjust the resulting percentage based on current market conditions and progress towards the annual goal.

Where there is a significant change order issued by the City, the contract goal should be evaluated to determine the change's impact on goal attainment. If an M/WBE's scope is reduced such that the original contract goal will not be met, the contractor should be required to make GFEs to add participation if possible. If an M/WBE's scope is increased, the M/WBE must be used for the increased amount if it is able to perform.

Written procedures spelling out the steps should be drafted and disseminated.

This constitutionally mandated approach may result in goals that are higher or lower than the annual goals, including no goals where there are insufficient subcontracting opportunities (as is often the case with supply contracts) or an insufficient number of available firms.

We recommend that SBE firms that are not also certified as MBEs or WBEs not be counted for credit towards meeting the MBE or WBE contract goals. The purpose of the Program and the use of narrowly tailored contract goals is to remedy identified discrimination on the basis of race or gender. Minority-owned or woman-owned firms that are only SBE certified should be encouraged to apply for certification through the State of North Carolina's HUB program.

For alternative delivery methods such as design-build contracts, the City should follow the guidance from the U.S. Department of Transportation on how best to incorporate M/WBE program elements into these phased contracts.¹⁵

We further urge the City to bid some contracts without goals that it determines have significant opportunities for M/WBE participation. These control contracts can illuminate whether certified firms are used or even solicited in the absence of goals. The development of some "unremediated markets" data, as held by the courts, will be probative of whether the Program remains needed to ensure that the playing field remains level for minorities and women.

15. https://www.fhwa.dot.gov/civilrights/programs/dbe_acm_handbook_20180820.pdf; see also 49.C.F.R. §26.53(e) ("In a "design-build" or "turnkey" contracting situation, in which the recipient lets a master contract to a contractor, who in turn lets subsequent subcontracts for the work of the project, a recipient may establish a goal for the project. The master contractor then establishes contract goals, as appropriate, for the subcontracts it lets.").

c. Clarify and Update CBI Program Administration Policies and Procedures

While the current Program has produced admirable results, there are some revisions that can strengthen the City's efforts. In general, we urge the City to model its provisions after the regulations for the DBE program for US Department of Transportation.¹⁶ These regulations have become the "gold standard" and best practices for race-conscious or gender-conscious procurement programs and have been upheld by every federal court that has considered a challenge. They have been amended several times since their adoption in 1999 and represent the best national thinking on legally defensible and administratively successful program implementation. Further, as discussed in Chapter II of this Report, courts have looked to the DBE regulations in evaluating whether a local agency's program is constitutional.

- Expand the pool of firms eligible for certification and to be counted towards contract goals to include firms located anywhere in the State of North Carolina and York County, South Carolina. This will align the eligibility standards with the City's market area, as found by the Study's analysis. The City might add that firms with a "significant local business presence" in the Charlotte market, perhaps documented by the receipt of at least three contracts within the last three years, also be eligible to apply for City certification.
- Permit a firm owned by minority females to be certified as both an MBE and a WBE. Such a firm could be counted towards either goal by the prime bidder but could not be double counted or have its dollars split between the two goals on a particular contract. This will expand opportunities for M/WBEs while providing flexibility for bidders. This will require a change in state law.
- Recognize firms for M/WBE status using NAICS codes (developed by the Census Bureau), not National Institute of Government Purchasing ("NIGP") codes. NIGP codes are extremely granular, which makes the process of conducting outreach to meet goals very burdensome to prime bidders. NAICS codes will allow prime vendors to more easily search for firms and reduce the certification burden on both applicants and the City. Switching to NAICS codes will also align the City's processes and lists with the data in this Report.
- Count the self-performance of certified prime vendor MBEs and WBEs towards the contract goal for which they qualify. While the City's documents describe the contract goals as "subcontracting goals", in practice the goals properly apply to the entire amount of the contract

16. 49 C.F.R. Part 26.

value, not just to those dollars expected to be spent with subcontractors. Prohibiting prime M/WBEs from counting their own participation forecloses the only race-conscious remedy an agency can provide to prime contractors to reduce the race-based and gender-based barriers to their obtaining work. There is little doubt that it is even more difficult for M/WBEs to move into the prime role than to obtain subcontracts (as amply documented in this Report and other disparity studies). Therefore, forcing M/WBEs that can perform as prime vendors to subcontract what they would otherwise self-perform not only leaves them at the mercy of the marketplace that is infected with discrimination and with no benefit from participating in the program, but also would increase their costs of performing City work.

- Only count work to be performed in those industry codes in which the MBE or WBE is certified. Not only does this help to ensure integrity in the implementation of the program by foreclosing “front” companies and pass throughs at bid time and supporting evaluation of firms’ CUF during performance, but it also creates clear standards that all parties must follow.
- Revise the standards for evaluating a bidder’s GFEs to meet contract goals.
- Adopt flexible remedies for Program violations. The current structure of specified fines for particular violations may be overly rigid under the strict scrutiny standard. We suggest that infractions or contract breaches be considered on a case-by-case basis to ensure that the civil penalty is not overly burdensome under the *Croson* standard.

d. Adopt a Mentor-Protégé Program

There was broad support among M/WBEs, large prime vendors and City staff for a mentor-protégé program to increase M/WBEs’ capabilities and foster relationships. While many mentor-protégé programs across the country focus on construction (perhaps in part because of the longer history of programs in this sector), technology sectors and professional services should also be included. We suggest modeling a new initiative after the successful programs approved by the U.S. Department of Transportation. These programs provide support for M/WBEs while incentivizing the mentor to provide the types of assistance targeted to the protégé to produce identified and achievable goals.¹⁷ Program elements must be clearly

17. See 49 C.F.R. Part 26, Appendix D, “Mentor-Protégé Guidelines”.

spelled out so as not to impinge on the independence of the certified firm or raise concerns about whether it is performing a CUF.

e. Develop Performance Measures for Program Success

The City should develop quantitative and qualitative performance measures for M/WBEs and the overall success of the Program to evaluate its effectiveness in reducing the systemic barriers identified in this Report. In addition to meeting the overall, annual goals, possible benchmarks might be:

- The number of bids or proposals, the industry and the dollar amount of the awards and the goal shortfall, where the bidder was unable to meet the goal and submitted GFEs to do so.
- The number, dollar amount and the industry code of bids or proposals rejected as non-responsive for failure to make GFEs to meet the goal.
- The number, industry and dollar amount of M/WBE substitutions during contract performance.
- Increased bidding by certified firms as prime vendors.
- Increased prime contract awards to certified firms.
- Increased M/WBE bonding limits, size of jobs, profitability, complexity of work, etc.
- Increased variety in the industries in which minority-owned and woman-owned firms are awarded prime contracts and subcontracts.

In addition, departments could receive an annual or even quarterly “scorecard” on their progress towards meeting the overall, annual aspirational City goal. Such a scorecard would have to take account of the fact that different departments procure different goods and services so that the result is tailored to the specifics of each department’s contracting activities.

Development and tracking of new metrics may require additional software.

f. Continue to Conduct Regular CBI Program Reviews

The City adopted a sunset date for the current Ordinance, and we suggest this approach be continued. Data should be reviewed approximately every five to six years, to evaluate whether race-based and gender-based barriers have been reduced such that affirmative efforts are no longer needed. If such measures are necessary, then the City must ensure that they remain narrowly tailored.