



May 10, 2007

Ms. Deborah Lusk-Barnes
Manager, Contract Compliance and Employment Services
Office of the City Administrator
Contract Compliance and Employment Services Division
250 Frank Ogawa Plaza, Suite 3341
Oakland, CA 94612

Subject: City of Oakland and Redevelopment Agency, Fairness in Purchasing and Contracting Disparity Study - Volume I

Dear Ms. Barnes:

Enclosed please find Volume I of the Fairness in Purchasing and Contracting Disparity Study Report and an Executive Summary dated May 2007. The Volume I report contains the following 10 chapters: Legal Analysis Chapter, Contracting and Procurement Chapter, M/WBE Legislative History Chapter, Prime Contractor Utilization Chapter, Subcontractor Utilization Chapter, Market Area Analysis Chapter, Availability Analysis Chapter, Prime Contractor Disparity Analysis Chapter, Subcontractor Disparity Analysis Chapter, and Anecdotal Analysis Chapter.

Please contact me if you have any questions.

Sincerely,

Eleanor Ramsey

Eleanor Mason Ramsey, Ph.D.
President

cc: Lynn Reddrick, Senior Project Manager

City of Oakland and Redevelopment Agency

Fairness in Purchasing and Contracting Disparity Study

Volume I

Executive Summary

**Submitted to:
City of Oakland and
Redevelopment Agency**

**Submitted by:
Mason Tillman Associates, Ltd.**



MASON TILLMAN
ASSOCIATES, LTD

May 2007

ACKNOWLEDGMENT

In September 2005, the City of Oakland and Redevelopment Agency (City) commissioned a Fairness in Purchasing and Contracting Disparity Study. Mason Tillman Associates, Ltd., of Oakland, California was selected by the City Council to perform the Study.

The purpose of the City's Fairness in Purchasing and Contracting Disparity Study was to determine if the City was actively or passively discriminating against minority and woman-owned business enterprises (M/WBEs). The Study was mandated by Section 808 (b) of the City Charter, which required the City to conduct such a disparity study. The prime utilization analysis included four industries: construction, architecture and engineering, professional services, and goods and other services. Contracts awarded between July 1, 2002 and June 30, 2005 were studied.

Morrison and Foerster, LLP, Watson Enterprises, Carl Chan, Melano and Associates, Jungle Communications, Law Offices of Paul Elizondo, and Christopher Edley, Jr. Esq., Dean of Boalt Hall School of Law, University of California assisted Mason Tillman in the performance of the Study. The subcontractor team performed legal analysis, data collection activities, design and translation services, and outreach to the business community.

The Study could not have been conducted without the cooperation of the local chambers of commerce and business organizations, and the many Oakland business owners who demonstrated their commitment to the Study by participating in interviews and community meetings. In addition, the City's staff played a critical role in assisting with the data collection by making available City personnel, contract records, and documents needed to perform the Study. The extraordinary effort of the City and the business community should be applauded.

Deborah Lusk-Barnes, Manager, Contract Compliance and Employment Services provided overall leadership and guidance for the Study. Ms. Barnes' staff facilitated Mason Tillman's effort to secure the needed resources to complete the Study.

Table of Contents

| | |
|--|------------|
| CHAPTER 1: EXECUTIVE SUMMARY | 1-1 |
| I. OVERVIEW | 1-1 |
| A. Study Purpose | 1-1 |
| B. Legal Requirements | 1-1 |
| C. Study Team | 1-2 |
| D. Overview of Current L/SLBE Program | 1-2 |
| E. Industries Studied | 1-2 |
| F. Contract Data Sources | 1-3 |
| G. Contract Thresholds | 1-4 |
| II. METHODOLOGY AND STRUCTURE | 1-5 |
| A. Methodology | 1-5 |
| B. Organization of the Report | 1-6 |
| III. NOTABLE FINDINGS | 1-7 |
| A. Prime Contractor Utilization Analysis | 1-7 |
| B. Disparity Analysis Methodology | 1-7 |
| C. Contract Size Analysis | 1-8 |
| D. Statistical Findings | 1-9 |
| IV. ANECDOTAL FINDINGS | 1-11 |



List of Tables

| | | |
|------------|---|------|
| Table 1.01 | Contract Thresholds for the City | 1-5 |
| Table 1.02 | Summary of Disparity Findings for Formal Contracts | 1-9 |
| Table 1.03 | Summary of Disparity Findings for Informal Contracts | 1-10 |
| Table 1.04 | Summary of Subcontract Disparity Findings | 1-11 |
| Table 1.05 | Summary of Findings Concerning Current Barriers Against Ethnic/Gender Groups | 1-13 |





1

EXECUTIVE SUMMARY

I. OVERVIEW

A. Study Purpose

The purpose of the City of Oakland and Redevelopment Agency (City) Fairness in Purchasing and Contracting Disparity Study was to determine if the City was actively or passively discriminating against minority and woman-owned business enterprises (M/WBEs). The Study was mandated by Section 808 (b) of the City Charter, which required the City to conduct such a disparity study. The prime utilization analysis included four industries: construction, architecture and engineering, professional services, and goods and other services. Prime contracts awarded between July 1, 2002 and June 30, 2005 were studied.

B. Legal Requirements

Since the U.S. Supreme Court's 1989 ruling in *City of Richmond v. J. A. Croson Co.* (*Croson*),¹ local governments have been concerned about the legal validity of minority and woman-owned business enterprise programs. The *Croson* decision and subsequent lower court rulings imposed new standards on how local governments can utilize contracting programs to increase the participation of MBEs. The new standards provide that a factual basis must be established before enacting race-based remedies to promote business with MBEs. A disparity study is the method to establish the required factual predicate.

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



C. Study Team

Mason Tillman Associates, Ltd., a public policy consulting firm based in Oakland, California, was selected to perform the Disparity Study. Morrison and Foerster, LLP, Watson Enterprises, Carl Chan, Melano and Associates, Jungle Communications, Law Offices of Paul Elizondo, and Christopher Edley, Jr. Esq., Dean of Boalt Hall School of Law, University of California assisted Mason Tillman in the performance of the Study. The subcontractor team performed legal analysis, data collection activities, design and translation services, and outreach to the business community.

D. Overview of Current L/SLBE Program

The City has a Local and Small Local Business Enterprise (L/SLBE) program governing the procurement of goods and services. The City has had a Program since 1979. The L/SLBE Program has served as a proxy to continue to address the underutilization of certain ethnic and gender groups. The L/SLBE Program was enacted to increase Oakland-based business participation in City contracting and development projects, strengthen Oakland's economic base, and develop Oakland-based businesses through joint ventures and mentor-protégé relationships.

E. Industries Studied

The Disparity Study included a statistical analysis and evaluation of construction, architecture and engineering, professional services, and goods and other services prime contracts and subcontracts awarded in the four industries.

Construction is defined as public work for new construction, remodeling, renovation, maintenance, demolition and repair of any public structure or building, and other public improvements. **Architecture and Engineering** is defined as architecture, engineering, research planning, development, design, alteration or repair of real property, surveying and mapping, comprehensive planning, and other professional services of an architectural and engineering nature. **Professional Services** are defined as consulting, personnel, professional, and technical services. **Goods and Other Services** are defined as supplies, equipment, and non-professional services.



F. Contract Data Sources

1. Prime Contracts

The prime utilization analysis included contracts, purchase orders, and direct purchases awarded by the City during the study period. Contracts, purchase orders, and direct purchases will hereafter be referred to as contracts.

The prime contractor data for the City of Oakland and for the Community and Economic Development Agency (CEDA) was extracted by the City's Purchasing Division from their Oracle-based centralized financial system. The data included the list of purchase orders and a list of payments. There were a large number of payments that did not refer to any purchase order. Some of these payments were direct purchases and others were actually issued against a contract or a purchase order. To avoid over-counting the number of awards made to each vendor, these payments were aggregated by vendor and by fiscal year.

The data for Oakland Base Reuse Authority (OBRA) is not tracked in the City's centralized financial system. This data was manually compiled by OBRA's staff from hard-copy documents.

Payments made to housing developers by CEDA were excluded from the present analysis. CEDA provides loans to not-for-profit developers that cover only a portion of each affordable housing construction project. Although the dollars paid to developers were excluded from the prime contractor analysis, these projects are included in the subcontractor utilization analysis portion of the report.

Mason Tillman cleaned and compiled the provided data and requested corrections for what appeared to be missing or incorrect information. The contracts were then classified into four industry categories defined earlier in this chapter: Construction, Architecture and Engineering, Professional Services, and Goods and Other Services using the object codes provided with the payment data. However, the object codes did not accurately describe the type of work performed by each particular contractor. For example, vendors that were paid in relation to a heavy construction project may include construction suppliers, equipment maintenance contractors, professional engineers, and government agencies. Mason Tillman had to review most of the records one by one to determine the correct industry category for each vendor. Mason Tillman excluded from this analysis expenditures to not-for-profit organizations, government agencies, and banks, as well as expenditures for rental space, subscriptions, and seminars.



2. Subcontracts

Extensive efforts were undertaken to obtain subcontractor records for the City's construction, architecture and engineering, and professional services contracts. Goods and other services contracts traditionally do not include significant subcontracting activity and they were not included in the analysis.

Two sources, City project files and prime contractor and subcontractor expenditure surveys, were used to reconstruct all construction, architecture and engineering, and professional services prime contracts valued at \$100,000 or more. Mason Tillman visited the City's Contract Compliance Division, Public Works Department, Community and Economic Development Agency, and Oakland Base Reuse Authority to reconstruct subcontractor data from various documents found in the project files. The documents include but are not limited to contract documents, contract compliance status reports, subcontractor affidavit for final payment, contractor utilization plan, and prevailing wage documents. The second source was prime contractors who were surveyed by Mason Tillman to determine their subcontractors. The prime contractors were asked to provide the name, award, and payment amounts for each subcontractor. Subcontractors were then surveyed to verify the payments that were received from the prime contractors.

City staff from all agencies described above provided indispensable assistance throughout this process. In addition to providing access to their records, they encouraged the prime contractors and subcontractors to respond to each survey. City staff also assisted in locating subcontractor contact information and payment data which Mason Tillman was not able to locate.

G. Contract Thresholds

The procurement of construction, architecture and engineering, professional services, and goods and other services are subject to different solicitation requirements, depending on the value of the purchase. Informal contracts are small purchases that did not require advertising. There was a maximum threshold of \$50,000 for construction and goods and other services contracts and a maximum threshold of \$15,000 for architecture and engineering and professional services contracts.

Formal contracts are the advertised solicitations above the informal threshold for each industry. Formal contracts have no maximum size threshold. However, the analysis of formal contracts was capped at \$500,000 to ensure that the contracts examined in the disparity analysis were within the capacity level of available M/WBEs.



The following table describes the thresholds used in the analysis of City contracts.

Table 1.01 Contract Thresholds for the City

| Industry | Type of Contract | | |
|------------------------------|-------------------------------------|---|--|
| | Informal Prime Contract | Formal Prime Contract | Subcontract |
| Construction | Contracts valued \$50,000 and under | Contracts valued between \$50,000 and \$500,000 | Prime contracts valued at \$50,000 or more |
| Architecture and Engineering | Contracts valued \$15,000 and under | Contracts valued between \$15,000 and \$500,000 | Prime contracts valued at \$50,000 or more |
| Professional Services | Contracts valued \$15,000 and under | Contracts valued between \$15,000 and \$500,000 | Prime contracts valued at \$50,000 or more |
| Goods and Other Services | Contracts valued \$50,000 and under | Contracts valued between \$50,000 and \$500,000 | Not included |

II. METHODOLOGY AND STRUCTURE

A. Methodology

The review of *Croson* and related case law provided the legal framework for conducting the disparity study. A legal review was the **first step** in the disparity study. Case law sets the standard for the methodology employed in a disparity study. **Step two** was to collect utilization records and determine the extent to which the City had used minority, woman-owned, and other businesses to secure its needed goods and services. Utilization records were also used to determine the geographical area in which companies that had received City contracts were located. In **step three**, the City’s market area was identified. Once the market area was defined, the **fourth step**, the availability analysis, identified businesses willing and able to provide services needed by the City. In the **fifth step**, the utilization and availability analyses were used to determine whether there was a statistically significant underutilization within the five industries. In **step six**, the anecdotal analysis, the contemporary experiences of business

**Disparity Study:
Critical Components**

- 1. Legal Framework**
- 2. Utilization Analysis**
- 3. Market Area Analysis**
- 4. Availability Analysis**
- 5. Disparity Analysis**
- 6. Anecdotal Analysis**
- 7. Race Neutral Assessment**
- 8. Recommendations**



owners in the City's market area were collected. In **step seven**, the City's race-neutral efforts were reviewed to determine their scope and effectiveness in including M/WBEs in its contracting. Finally, in **step eight**, the statistical and anecdotal analyses were reviewed and recommendations were written to enhance the City's efforts in contracting with M/WBEs in its market area.

B. Organization of the Report

The Disparity Study findings are issued in two volumes, comprising 12 chapters. The contents of the two volumes are briefly described below:

Volume One: Disparity Study Report

- Chapter 1: Legal Analysis presents the legal cases applicable to business affirmative action programs and the methodology based on those cases required for the Disparity Study
- Chapter 2: Contracting and Procurement Analysis provides an overview of the City's procurement and contracting policies and procedures
- Chapter 3: History of M/W/L/SLBE Legislation and DBE Regulations presents a legislative history of the City's M/WBE Program, the legislative history governing the introduction of the City's L/SLBE Program, and the City's implementation of the DBE Program
- Chapter 4: Prime Contractor Utilization Analysis presents the distribution of prime contracts by industry, ethnicity, and gender
- Chapter 5: Subcontractor Utilization Analysis presents the distribution of subcontracts by industry, ethnicity, and gender
- Chapter 6: Market Area Analysis presents the legal basis for geographical market area determination and defines the City's market area
- Chapter 7: Availability Analysis presents the distribution of available businesses in the City's market area
- Chapter 8: Prime Contractor Disparity Analysis presents prime contractor utilization compared to prime contractor availability by industry, ethnicity, and gender and determines whether the comparison is statistically significant



- Chapter 9: Subcontractor Disparity Analysis presents subcontractor utilization compared to subcontractor availability by industry, ethnicity and gender and determines whether the comparison is statistically significant
- Chapter 10: Anecdotal Analysis presents the business community's experiences and perceptions of barriers encountered in contracting or attempting to contract with the Authority and the City

Volume Two: Recommendations and Not-For-Profit Analysis

- Chapter 1: Recommendations presents the City's L/SLBE Program and provides strategies to enhance its effectiveness.
- Chapter 2: Not-For-Profit Analysis presents an analysis of the City's use of not-for-profit organizations.

III. NOTABLE FINDINGS

A. Prime Contractor Utilization Analysis

The City's prime contractor utilization analysis examined the \$244,205,430 expended on the 24,956 contracts awarded between July 1, 2002 to June 30, 2005. The \$244,205,430 expended included \$77,252,468 for construction, \$21,976,119 for architecture and engineering, \$37,112,084 for professional services, and \$107,864,759 for goods and other services. A total of 24,956 contracts were analyzed, which included 608 for construction, 424 for architecture and engineering, 1,101 for professional services, and 22,823 for goods and other services.

The 24,956 contracts were awarded disproportionately to the 5,018 utilized vendors. The City awarded 60 percent of the contract dollars to less than 2 percent of the 5,018 utilized vendors. Of the 5,018 utilized vendors, 88 vendors received 60 percent or \$146,953,160 of the total expenditures while the remaining 4,930 vendors received 40 percent or \$97,252,270 of the total expenditures.

B. Disparity Analysis Methodology

The objective of the disparity analysis is to determine if M/WBEs were underutilized at a statistically significant level on City contracts. Under a fair and equitable system of awarding contracts, the proportion of contract dollars awarded to M/WBEs should be



approximate to the proportion of available M/WBEs in the relevant market area.² If a disparity exists between these proportions, a statistical test can determine the probability that the disparity is due to chance. If there is a very low probability that the disparity is due to chance,³ the finding is considered statistically significant, and according to *Croson*, an inference of discrimination can be made. This analysis should be applied to M/WBEs by both race and gender.

To determine if the underutilization of M/WBEs can be explained by their possible lack of capacity, the Study has restricted the analysis to contract sizes that are within reach of companies in the availability pool. An analysis of contracts restricted to two dollar thresholds provided in the report illustrated that capacity was not a major factor that produced disparity.

C. Contract Size Analysis

A prime contract disparity analysis was performed on construction, architecture and engineering, professional services, and goods and other services contracts awarded between July 1, 2002 and June 30, 2005.

The majority of the City's contracts were small with 95.63 percent less than \$25,000 and 98.56 percent less than \$100,000. The fact that the majority of the City's contracts were small suggests that the capacity needed to perform most of the contracts awarded during the study period was minimal. Furthermore, there is evidence that certain willing firms also had the capacity to perform contracts in excess of \$500,000.

A threshold of \$500,000 was set for the prime contract disparity analysis to ensure that willing firms had the capacity to perform contracts included in the analysis. The prime contract disparity findings in the four industries under consideration are summarized in the sections below.

² Availability is defined as willing and able firms. The methodology for determining willing and able firms is detailed in Chapter 7 of Volume One.

³ When conducting statistical tests, a confidence level must be established as a gauge for the level of certainty that an observed occurrence is not due to chance. It is important to note that a 100 percent confidence level, or a level of absolute certainty, can never be obtained in statistics. A 95 percent confidence level is considered by the courts to be an acceptable level in determining whether an inference of discrimination can be made. Thus, the data analyzed here was done within the 95 percent confidence level.



D. Statistical Findings

Formal Prime Contract Disparity: There was a statistically significant underutilization of M/WBEs in formal prime contracts in construction and professional services.

Table 1.02 Summary of Disparity Findings for Formal Contracts

| Ethnicity and Gender | Construction | Architecture and Engineering | Professional Services | Goods and Other Services |
|---|---------------------|-------------------------------------|------------------------------|---------------------------------|
| African Americans | Yes | No | Yes | No |
| Asian Americans | No | No | Yes | No |
| Hispanic Americans | No | No | No | Yes |
| Native Americans | --- | --- | --- | --- |
| Minority Business Enterprises | Yes | Yes | Yes | No |
| Women Business Enterprises | Yes | No | Yes | No |
| Minority and Women Business Enterprises | Yes | No | Yes | No |

Yes = Statistically significant disparity was found
 No = Statistically significant disparity was not found
 --- = There were insufficient records to determine statistical disparity



Informal Contract Disparity: A summary of the disparity identified in the award of informal contracts is presented in Table 1.03. The dollar threshold for informal contracts varies by industry. There was a statistically significant underutilization of M/WBEs in informal prime contracts in each industry.

Table 1.03 Summary of Disparity Findings for Informal Contracts

| Ethnicity and Gender | Construction | Architecture and Engineering | Professional Services | Goods and Other Services |
|---|---------------------|-------------------------------------|------------------------------|---------------------------------|
| African Americans | Yes | No | Yes | No |
| Asian Americans | No | Yes | Yes | No |
| Hispanic Americans | Yes | Yes | No | Yes |
| Native Americans | --- | --- | --- | --- |
| Minority Business Enterprises | Yes | Yes | Yes | Yes |
| Women Business Enterprises | No | No | No | No |
| Minority and Women Business Enterprises | Yes | No | Yes | No |

Yes = Statistically significant disparity was found
 No = Statistically significant disparity was not found
 --- = There were insufficient records to determine statistical disparity



Subcontract Disparity: A summary of the disparity findings at the subcontractor level is presented below in Table 1.04. Disparity was analyzed for construction, architecture and engineering, and professional services subcontracts. Goods and other services contracts traditionally do not include significant subcontracting activity; therefore, they were not included in the analysis.

As shown in Table 1.04 below, there was a statistically significant underutilization of African Americans, Asian Americans, Hispanic Americans, Minority Business Enterprises, and Minority and Women Business Enterprises in construction subcontracts.

Table 1.04 Summary of Subcontract Disparity Findings

| Ethnicity and Gender | Construction | Architecture and Engineering | Professional Services |
|---|---------------------|-------------------------------------|------------------------------|
| African Americans | Yes | No | No |
| Asian Americans | Yes | No | No |
| Hispanic Americans | Yes | No | No |
| Native Americans | --- | --- | --- |
| Minority Business Enterprises | Yes | No | No |
| Women Business Enterprises | No | No | No |
| Minority and Women Business Enterprises | Yes | No | No |

Yes = Statistically significant disparity was found

No = Statistically significant disparity was not found

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

IV. ANECDOTAL FINDINGS

In *Croson*, the United States Supreme Court specified the use of anecdotal testimony as a means to determine whether remedial race-conscious relief may be justified in a particular market area.⁴ The Court stated that “evidence of a pattern of individual discriminatory acts

⁴ *Croson*, 488 U.S. at 509.



can, if supported by appropriate statistical proofs, lend support to a [local entity's] determination that broader remedial relief [be] justified.”⁵

Fifty business owners in the City of Oakland were interviewed about their experiences during the July 1, 2002 to June 30, 2005 study period. Included were businesses in all four industries included in the Disparity Study. Members of all ethnic groups, except for Native Americans, were interviewed. The anecdotes provide accounts of both active and passive forms of discrimination, as well as businesses' experience with barriers from City officials and the business community.

It should also be noted that many business owners described the City's L/SLBE Program as valuable and a major factor in keeping their businesses solvent. Additionally, the City staff received commendations from interviewees concerning their assistance to M/WBEs.

The following is a brief summary of the anecdotal findings:

- The interviewees reported incidences of racial prejudice encountered when working for the City and within the City.
- Sexist and unfair treatment toward woman-owned business owners were reported by several interviewees. Some female business owners believed that they have to overcome hurdles that their male counterparts are not subjected to because of their gender.
- Many minorities and women find it challenging to crack the closed social and professional “good old boys” network, which they believe deliver a disproportionate number of contracts to a select few Caucasian Male contractors.
- In order to be placed on the public and private bidding lists, contractors must constantly follow up with inquiries, and even then, they often do not receive notice of bid opportunities. Several interviewees reported that there is a problem getting bid information from the City.
- Many interviewees reported that the City failed to pay them in a timely manner.
- A majority of the interviewees believed the City's L/SLBE program is valuable and is needed for small, female and minority businesses.

Table 1.05 below presents a summary of the barriers reported by minority and women-owned businesses in contracting with the City.

⁵ *Id.*



Table 1.05 Summary of Findings Concerning Current Barriers Against Ethnic/Gender Groups

| Type of Evidence | Minority Business Enterprises | Caucasian Female Business Enterprises |
|---|-------------------------------|---------------------------------------|
| BUSINESS BARRIERS | | |
| Discrimination Based on Race | X | |
| Discrimination Based on Gender | X | X |
| BARRIERS CREATED BY THE CONTRACTOR COMMUNITY | | |
| Difficulty Breaking into Contracting Networks | X | X |
| Good Old Boys Network | X | X |
| DIFFICULTIES IN BID PROCESS | | |
| Difficulty Obtaining Bid Information | X | X |
| Inadequate Lead Time | X | X |
| Supplier Problems | X | X |
| FINANCIAL BARRIERS | | |
| Difficulty Obtaining Financing or Credit | X | X |
| Late Payment by the City | X | |



Table 1.05 Summary of Findings Concerning Current Barriers Against Ethnic/Gender Groups

| Type of Evidence | Minority Business Enterprises | Caucasian Female Business Enterprises |
|--|-------------------------------|---------------------------------------|
| Late Payment by Prime Contractors | X | X |
| CERTIFICATION ISSUES | | |
| Paperwork Issues or Problems with Certification Procedures | X | X |

