

INTRODUCTION

Purpose of the Prince George's County Disparity Study

In March 2005, Prince George's County Government (Prince George's County) commissioned D.J. Miller & Associates, Inc. (DJMA) to conduct a disparity study (the Study) to determine whether there was a compelling governmental interest to utilize race/gender-conscious remedies as established in the U.S. Supreme Court case, *Richmond v. Croson*. This Study further responds to the ensuing need to establish a factual predicate consistent with the requirements of *Croson* that determines the foundation for narrow tailoring a program targeting minority and female business enterprises (MFBEs). In conducting this disparity study, which covered the period FY 1994 through FY 2004 (July 1, 1993 - June 30, 2004), DJMA collected and developed evidence regarding the nature and extent of discrimination against MFBEs, if any, and other experiences that created barriers to equitable participation with Prince George's County. The Prince George's County Disparity Study updates the study entitled "An Examination of Prince George's County's Minority Business Program" performed in February 1991.

D.J. Miller & Associates, Inc. Background and Experience

D.J. Miller & Associates, Inc. is an 18-year old management consulting firm. Since our inception, D.J. Miller & Associates, Inc. has been involved in designing MFBE policies, implementing program initiatives, evaluating the economic impact of minority and female business development, providing technical assistance to federal, state and local MFBE programs, and conducting factual predicates required by the *Richmond v. Croson* decision. We are the leader in the field of availability and disparity studies, having worked with 80 public entities nationwide over our firm's history. We have performed analysis for cities, counties, hospitals, school districts, utilities, airports and transit

agencies, housing authorities, state governments and federal agencies. Counties that we have performed studies for include Orange County, FL; Pima County, AR; and Shelby County, TN. Our first disparity study was performed for Hillsborough County prior to the *Croson* decision. Upon legal challenge, our methodologies were found to have correctly anticipated the direction of the Supreme Court in *Croson*. Since our first analysis, DJMA has remained at the forefront in providing innovative disparity analysis to our clients.

Croson Framework

In *Richmond v. Croson*, the U.S. Supreme Court established a two-pronged test: (1) that a governmental entity had to show a compelling governmental interest to utilize race/gender-conscious remedies and (2) that any such remedies must be narrowly tailored. A factual predicate or disparity study is utilized to show whether there is a compelling governmental interest. Narrow tailoring is the crucial element in crafting appropriate *Croson* remedies.

Courts, for failure of local jurisdictions to narrowly tailor their remedies, have struck down many MFBE programs. Once a factual predicate has been established, post-*Croson* case law presents several broad guidelines for crafting recommendations for MFBE programs by a public entity, based on the factual predicate findings:

- Race/gender-conscious MFBE programs should be instituted only after, or in conjunction with, race/gender-neutral programs.
- MFBE programs should have a sunset provision, as well as provisions for regular review.
- MFBE programs should have graduation provisions for the MFBEs themselves.
- Rigid numerical quotas run a greater risk of being overturned by judicial review than flexible goals.
- Race/gender-conscious goals, if any, should be tied to MFBE availability and to addressing identified discrimination.
- MFBE programs should limit their impact on the rights and operations of third parties.

- MFBE programs should be limited in scope to only the group(s) that has suffered from discrimination in the jurisdiction enacting the program.

Focusing on the Fourth Circuit in which the County is located, the district court reviewed a program similar to Prince George's County's in *Concrete General, Inc. v. Washington Suburban Sanitary Commission*. There, the court frowned upon the utilization of restrictive bidding as a drastic measure employed prior to the utilization of other tools. As such, Prince George's County should review the contents of this Disparity Study carefully to determine whether its current practices of restrictive bidding, mandatory subcontracting goals and bonus points meet the standards outlined in *Richmond v. Croson*.

Conclusions

From a showing of statistically significant underutilization (disparity), an inference of discrimination can be drawn. DJMA found statistically significant underutilization in MFBE participation in Prince George's County's contracting activity in the Washington-Baltimore, DC-MD-VA-WV CMSA in several areas. For African Americans, statistically significant underutilization was found in the areas of construction, general procurement, nonprofessional services and professional services; for Asian Americans in the areas of construction¹, general procurement, nonprofessional services and professional services; for Hispanic Americans in the areas of professional services and nonprofessional services; for Native Americans in professional services²; and for Women in the areas of construction³, only based on DPW&T and DER, nonprofessional services, professional services, and general procurement.

DJMA sought to determine those factors that have contributed to the statistically significant disparity. DJMA concludes that Prince George's County's procurement processes and practices have impacted the ability of MFBEs to do business with the

¹ Based on data from DPW&T and DER.

² Populations too small in construction to define statistical measures.

³ Based on data from DPW&T and DER.

County. DJMA found that the County Executive and Director of the Office of Central Services have expressed a strong commitment to greater MFBE participation. Efforts have been made to change the cultural environment within the Office of Central Services and other agencies with procurement authority. Further, MFBEs have been utilized in nontraditional procurement areas, such as auditing and automobile dealerships, and the Office of Central Services and the Minority Business Development Division have implemented new outreach policies and practices.

Despite these efforts, the commitment from the County Executive and Director of the Office of Central Services has not been adopted Countywide. Sensitivity to MFBE participation is increasing, due to the consistent efforts of current leadership to make MFBE participation a priority. However, these efforts should be translated into clear directives, policies, procedures and job responsibilities so that employees with buying authority can be held accountable for their efforts to include MFBEs in Prince George's County's purchasing and contracting opportunities. Further, MBDD has not exercised to the fullest extent its authority to act as an advocate for MFBEs within Prince George's County's procurement processes.

While internal processes and practices have impacted MFBE participation, external factors have also played a role. In analyzing survey data gathered on the characteristics of MFBEs and White male-owned firms available to do business with Prince George's County, DJMA concluded that capacity was not a significant factor in explaining differences in levels of utilization between MFBEs and White males. Even so, MFBEs continued to have problems securing contracts at similar levels. The anecdotal evidence suggested reasons that impact all small businesses, such as slow pay and limited project sizing; but some reasons were peculiar to MFBEs, such as the inability to obtain loans at the same rate as White males and the concern that White male-owned firms will not do business with MFBEs unless it is a requirement by Prince George's County and other public sector agencies.

These conclusions are buttressed by the race neutral conclusions, which reveal that even though there are a significant number of programs designed to assist minority and

female business owners, these programs have not been able to overcome the disparities in contracting. The private sector analysis suggests that MFBEs continue to receive contracts at a greater rate with public sector agencies with race/gender-conscious programs, such as Prince George's County. MFBE participation in the private sector was significantly less than participation with Prince George's County, seemingly giving some credence to the anecdotal comment that White males will utilize MFBEs only when required. The credit analysis in the private sector analysis also seems to support the anecdotal comments regarding the inability to obtain financing and bonding at the same rates and terms as White males.

These results suggest that Prince George's County has a basis for a narrowly tailored MFBE program. However, Prince George's County should consider incorporating and expanding its race/gender-neutral goal programs. By so doing, Prince George's County will be positioned to transition to a race/gender-neutral environment in the event that:

- (1) Prince George's County adopts a new MFBE program, with an established sunset date; and,
- (2) Prince George's County's response to the findings and recommendations of this report leads to, in the next few years, the significant reduction or elimination of disparity in contracting across all procurement categories.

Prince George's County sits in the same legal jurisdiction as *Crosby*. In this landmark case, the U.S. Supreme Court assumed that strict scrutiny was needed to guard against one political majority, regardless of race or gender, favoring its own race or gender, over another group and using their political position to direct contracts accordingly. Unfortunately, the U.S. Supreme Court did not take into consideration the deep-rooted negative racial socialization of our society. In a county with a large concentration of affluent and educated minorities, MFBE participation in Prince George's County's contract opportunities continues to be an issue.

Overview of Methodology and Structure of the Report

In order to develop the findings and conclusions of this report, D.J. Miller & Associates, Inc. utilizes a methodology consisting of both qualitative and quantitative analysis in conducting our disparity study analysis. The Disparity Study is organized into ten chapters and four appendices.

Chapter I, Introduction, includes the discussion of the structure of the report and the contents of each chapter. Further, it provides a detailed discussion of the statistical methods used in the Prince George's County Disparity Study; for determining availability and utilization of MFBEs, and in calculating disparity. The Chapter begins with a brief review of important concepts: (a) the relevant market; (b) definition of businesses' readiness, willingness, ability, and capacity and how they affect measurements of availability; (c) measures of utilization and disparity; and (d) statistical significance. The critically important task of data collection is reviewed here, with a summary of data sources relied upon for relevant market, availability and utilization determinations.

Chapter II, Legal Framework, presents a discussion of the *Croson* decision and its progeny, along with the Fourth Circuit's review of race/gender-conscious programs.

Chapter III, Statistical Analysis of MFBE Availability, presents data on MFBE availability in the Washington-Baltimore, DC-MD-VA-WV CMSA ("consolidated metropolitan statistical area") for Prince George's County. These measures are presented for both Ready, Willing, and Able (RWA) and Census availability. Emphasis is placed on RWA calculations derived from bidders, vendors and awardees in that order of importance. Census numbers are presented as an upper bound of MFBE availability.

Chapter IV, Statistical Analysis of MFBE Utilization, presents data on the utilization of minority-, female- and White male-owned businesses in Prince George's County's contract awards, accounts payable and purchase order data. Utilization histories, although often requiring much time and effort to compile, are nonetheless "real" values that engender little conceptual controversy.

Chapter V, Statistical Analysis of MFBE Disparity in Payments and Contracting, presents disparity ratios, which are a comparison of the availability measures in Chapter III and the utilization measures in Chapter IV.

Chapter VI, Procurement Analysis, reviews Prince George's County's Purchasing and MFBE procedures, policies and practices and their effect on MFBE participation. The objective of this chapter is to determine if rules of purchasing present any barriers to the participation of MFBEs as suppliers, contractors and vendors to Prince George's County. This analysis should reveal whether Prince George's County's own conduct has had any effect on disparity, independent of any passive participation by Prince George's County in private sector discrimination.

Chapter VII, Anecdotal Analysis, includes a description of data collected and synopsis of comments made by minority, female and White male business owners interviewed. The interviews sought to determine the personal experiences of those interviewed in doing business within their industry or with Prince George's County.

Chapter VIII, Private Sector Analysis, includes U.S. Bureau of Census Self-Employment and Apprenticeship data, local Reed Construction data, building permits data from Prince George's County, Census Equal Employment Opportunity (EEO) data and the results of a mail survey distributed to minority, female and White male business owners.

Chapter IX, Race-Neutral Alternatives, analyzes race/gender-neutral programs to determine if they stimulate the utilization of MFBEs without reliance upon characteristics of race, ethnicity or gender.

Chapter X, Conclusions and Recommendations, presents program recommendations and conclusions that flow from the findings presented in the report. These recommendations range from race/gender-conscious initiatives for Prince George's County to substantive suggestions that pertain to the configuration of future MFBE policy and program design.

Further, the following appendices are included:

Appendix A, Statistical Tables, which contains additional tables that provide more detail on relevant market, availability and utilization.

Appendix B consists of the survey instrument.

Appendix C consists of a comparative analysis between this disparity study and the 1991 Examination of Prince George's County MBE Program.

Lastly, Appendix D contains the Glossary of Terms.

The findings in each of the report's chapters are interdependent. Taken as a whole, the study presents a comprehensive picture concerning minority and female business involvement in public and private sector business opportunities. After reviewing the study and any other relevant evidence, Prince George's County must determine whether to adopt the findings of the study or to adopt other findings regarding the existence of discrimination and whether any such discrimination should be remedied through race/gender-neutral means, or through race/gender-conscious means, or both. Any such policies or programs attempting to remedy that discrimination must be narrowly tailored.

FINDINGS

Below is a discussion of the findings of the Disparity Study, which are presented in summary fashion.

Quantitative Findings

DJMA's findings have been divided into quantitative and qualitative findings. The quantitative findings provide the results of the statistical analysis, which includes the relevant market analysis, availability analysis, utilization analysis and disparity analysis. The qualitative analysis covers the procurement analysis, anecdotal analysis, private sector analysis and race neutral analysis.

Statistical Analysis of MFBE Availability

The first major task of this statistical analysis was the determination of MFBE availability (A), the denominator of the disparity ratio, U/A.⁴ There are two components in calculating availability: (1) determining the relevant market and (2) developing availability measures.

Relevant Market

The analysis led to the conclusion that the relevant market be defined as the Washington-Baltimore, DC-MD-VA-WV CMSA for all procurement types. The preponderance of market activity based on calculations of market share and vendors by geographical region and procurement type suggests a more expansive relevant market, particularly for general procurement area. However, practical and legal implications suggest that any efforts by Prince George's County to address MFBE participation in its contracting opportunities should not be broader than the CMSA region.

Availability

While availability estimates are supported by data from a variety of sources, data from Prince George's County and the U.S. Census Bureau is presented and relied upon here for Ready, Willing and Able (RWA) Availability estimates. Estimates for MBEs and FBEs are presented here, while detail for each racial group is presented in detail in Chapter III, Statistical Analysis of MFBE Availability. DJMA's reliance is on ranges rather than point estimates for robustness and flexibility in policy making. From DJMA's practice, experience and understanding of available data, we typically place credence on RWA estimates derived from bidders, vendors and awardees in that order of importance. Census numbers are presented as an upper bound of MFBE availability. Capacity is measured based on a DJMA administered survey and Census data.

⁴ "U" is the actual MFBE percentage utilization measure for the respective MFBE categories, based on payments, POs, and awards by Prince George's County. "A" is the measure of availability of MFBE firms to do business with Prince George's County, based on Vendor listings, Census data, and Prince George's County's Bidders.

In construction, availability estimates are based on vendors and bidder data. Since the bidder data is not complete⁵, DJMA also presents awardee availability. Based on the RWA availability estimates for construction, MFBE availability percentage ranges from 36.73 percent to 62 percent, with MBEs showing a range of 29.65 to 54.49 percent. For FBEs, the RWA availability proportions range from approximately 1.9 to 8 percent. For the CMSA, 12.35 percent of all construction contractors enumerated by the 1997 Census SMOBE/SWOB were MBEs; FBEs represented 8.47 percent.

In the other procurement categories, emphasis is placed on the vendor estimates, followed by estimates based on bidders.

In general procurement, the RWA availability range was 15 to 30 percent for MBEs, 7.8 to 9.2 percent for FBEs. In comparison, Census availability was 22.39 percent for MBEs and 17.09 percent for FBEs.

In nonprofessional services, the RWA range was 12.7 to 46.9 percent for MBEs and 4.4 to 9.5 percent for FBEs. Based on Census, the percentages for MBEs and FBEs are 17.77 percent and 20.78 percent respectively.

For professional services based on RWA estimates, the percentage of MBEs ranged from 14 to 48.9 percent and FBEs from 4 to 10.29 percent. Census measures indicate 5.78 percent for MBEs and 14.29 percent for FBEs in the CMSA relevant market area.

Capacity

An important element in estimating MFBE availability is MFBE capacity. The report found inconsistent evidence of MFBE capacity.

- From the survey results, the difference in capacity among MFBEs and White male-owned firms was observed in start-up monies and gross receipts, where White male-

⁵ Bidder data is incomplete for multiple reasons. Prince George's County does not maintain bidder data in construction for more than seven years, whereas the study period covers a 10 year period. Not all projects awarded by DPW&T and DER contained bid tabulations. OCS bidder data, as it relates to construction, does not have bid tabulation sheets for all projects bid.

owned firms showed higher capacity than MFBEs. With respect to full-time employees, years of experience, owner's education or owner's age (proxy for experience), there is little difference among MFBEs and White male-owned firms.

- Based on SMOBE/SWOB, both MBEs and FBEs have much smaller average revenues than their White male counterparts, especially in the categories of general, professional, and nonprofessional procurement. In the case of construction, both MBEs and FBEs have at least half the average annual revenues of White male-owned firms.
- Based on average purchase order size, Hispanic-American-owned firms have a higher capacity than White male-owned firms in construction; all other MBEs have about 80 percent or less of the capacity of White male-owned firms. For general procurement, all MBEs and FBEs have a greater than 80 percent capacity to White male-owned firms. In contrast, in nonprofessional services, based on average POs, all MBEs and FBEs have less than 75 percent of the capacity of White male-owned firms. All MBEs and FBEs, except African-American-owned firms, have less than 70 percent of the capacity of White male-owned firms.

Statistical Analysis of MFBE Utilization

The second major task of this statistical analysis was the determination of MFBE utilization (U), the numerator of the disparity ratio, U/A. Presented here are measures of utilization for each category of procurement and by MFBE status.

Construction

Contract Awards in Construction

For all firms regardless of their location, Prince George's County awarded \$362 million in construction contracts for FY 1996-2004. For the same period, Prince George's County awarded a total of \$286.18 million in construction contracts to firms located within the CMSA. Of this amount, about \$99.75 million (34.86 percent) was awarded to MBEs. FBEs received about \$3.89 million (1.36 percent), bringing the total for MFBEs to about \$103.65 million or 36.22 percent. FBEs received no contract awards for the period FY 1996-1999. Among the MBEs, Hispanic-American-owned firms received the majority of

the dollars.

Purchase Order (PO) Awards in Construction

Within the CMSA, Prince George's County awarded about \$154.2 million in construction POs over the study period, which accounts for over 89 percent of all awards in construction. Prince George's County issued 53.08 percent with MBEs and 2.31 percent with FBEs. The majority of these disbursements were in the last five-year period, FY 2000-2004. Hispanic-American-owned firms received the majority of the MBE dollars in construction.

General Procurement Utilization

Purchase Orders in General Procurement

Within the CMSA, Prince George's County awarded about \$86.7 million in POs in general procurement out of a total of over \$181 million for the 1994-2004 period. Prince George's County spent 13 percent of the CMSA total with MBEs and 8 percent of the total with FBEs in the period FY 1994-2004.

Contract Awards in General Procurement

Within the relevant market, Prince George's County awarded \$23.7 million in general procurement contracts for FY 1997-2004. Of this, 99.6 percent of the dollars were paid to White male-owned firms, with the remaining 0.4 percent of the dollars going to African-American-owned firms in FY 1997 and FY 2003. No dollars were evident for other MFBE groups, based on this database.

Nonprofessional Services Utilization

Purchase Orders in Nonprofessional Services

A total of \$171 million or 85 percent of the total was awarded in nonprofessional services POs for the study period to firms located within the CMSA. Of this amount, 14.04 percent was awarded to MBEs and 2.44 percent went to FBEs.

Contract Awards in Nonprofessional Services

A total of \$96.5 million was awarded by Prince George's County in nonprofessional service contracts for FY 1996-2004⁶. MBEs received 38.1 percent and FBEs 5.5 percent of the total CMSA awards.

Professional Services Utilization

Purchase Orders in Professional Services

Prince George's County awarded approximately \$168.4 million in POs in professional services to firms located in the CMSA. MBEs received \$61.8 million (36.71 percent), while FBEs received \$5.2 million (3.11 percent) out of these CMSA disbursements.

Contract Awards in Professional Services

Based on the Administrative Review Committee (ARC) data, a total of \$79.38 million was awarded by Prince George's County in professional service contracts for FY 1996-2004. Of the total \$79.2 million contract awards, White male-owned firms received 67 percent, while African-American-owned firms received 24.07 percent. FBEs received 1.16 percent of the total contract awards for the period, while other MBE groups received no more than 6 percent of the awards.

⁶ Nonprofessional services data comes from the Administrative Review Committee contract log. The Administrative Review Committee commenced its tracking function in 1996.

Overall, in the analysis of MFBE utilization, based on POs, direct payments and contract awards, in professional services, there is only small percentage utilization of FBEs. However, MBE utilization seems to be larger in the range of 34-56 percent. Of the databases reviewed, the OCS contract award data is the only exception, with low MBE and FBE utilization.

General procurement appears to have the exact opposite picture with low MBE utilization with ARC contracts and purchase order data and higher MBE utilization with OCS contract award data. Nonprofessional services show a relatively consistent pattern using contracts and purchase order databases with MBE utilization in the range of 16 to 38 percent and FBEs in the range of 2.5 to 11.5 percent. Professional services utilization of MBEs is in the range of 30 to 36 percent, with ARC contracts and purchase order databases, but zero with OCS contract award data. In the case of FBEs in professional services, their utilization does not exceed 3.2 percent.

Statistical Analysis of MFBE Disparity in Payments and Contracting

The purpose of the disparity analysis is to determine differences between availability and utilization of MFBEs. The most accepted method is to calculate disparity ratios (percentage utilization divided by percentage availability) by procurement category, year, and MFBE status.

Statistical and Practical Significance of Disparity Ratios

When calculating disparity ratios, the immediate question is whether differences between the numerical estimates and one (denoting “parity”) are statistically significant. Most, if not all, of the disparity ratios calculated for this report were significantly different from one. This result could be impacted by the number of observations in the data.⁷

⁷ Statistical significance is affected by scale. Thus, MFBE disparity ratios of 0.8 or 0.98 both could be consistent with a White male disparity ratio of 1.01, and both could be statistically significant, depending on the number of potential transactions.

Another important consideration is the extent to which statistically significant differences can be taken seriously—i.e., what is the “practical significance” of the results? For instance, a disparity ratio for MFBEs of 0.95 is not necessarily a practically significant basis for a race/gender-conscious program.

Construction Disparities

In construction, FBEs are significantly underutilized, while MBEs are overutilized. The latter result is only due to the Hispanic-American-owned firms that are overutilized, while all other groups are significantly underutilized or not utilized, as in the case of Native American-owned firms. Using ARC contracts data, White male-owned firms are overutilized with bidder or vendor availability.

General Procurement Disparities

In the area of general procurement, with purchase order utilization and all availability measures, MBEs are significantly underutilized. FBEs are also significantly underutilized with vendor availability, while White male-owned firms are significantly overutilized based on purchase orders and ARC contract data, with vendor availability.

Nonprofessional Services Disparities

In the area of nonprofessional services, there is significant underutilization of FBEs and MBEs based on both Purchase Order and ARC contracts data. White male-owned firms are significantly overutilized using purchase order and ARC data to measure utilization with any measure of availability.

Professional Services Disparities

In professional services, MBEs and FBEs are significantly underutilized based upon purchase order utilization data and vendor availability. Using vendors to measure availability, all utilization measures indicate significant overutilization of White male-owned firms.

Qualitative Findings

Qualitative findings provide insight into the causes of any disparity found in the statistical analysis. These analyses are important in determining whether the disparity, if any, is due to discrimination or some other reason, such as procurement barriers impacting all small firms.

Procurement Analysis

In reviewing Prince George's County's procurement systems, DJMA performed a two-pronged analysis: (1) a review of Prince George's County's procurement policies, procedures, and practices (including current activities extended to MFBEs seeking to do business with Prince George's County), and (2) a review of the impact of Prince George's County's procurement structure and procurement policies, procedures and practices on the ability of MFBEs to do business with Prince George's County.

Based upon interviews conducted, DJMA found that the commitment to MFBE participation had not been fully embraced by all Prince George's County employees with buying authority. Many of these employees did not see the achievement of MFBE participation as a part of their job requirements. Furthermore, the Minority Business Development Division (MBDD) and MFBE requirements have not been fully integrated into the day-to-day purchasing and contracting functions. As such, employees with buying authority and MBDD have not yet optimized inclusion of MFBEs in Prince George's County purchasing and contract opportunities.

Anecdotal Comments from the Marketplace

As part of the disparity study process, DJMA sought to explore the experiences of business owners attempting to do business with Prince George's County and other public and private organizations in the Washington-Baltimore, DC-MD-VA-WV CMSA. The anecdotal data were gathered through a series of one-on-one interviews and telephone interviews designed by DJMA. As part of this research, DJMA interviewed White male, minority and female business owners. The one-on-one interviews allowed

DJMA the opportunity to probe further to determine if these business owners encountered any racial or gender discrimination in their community and, specifically, with Prince George's County.

After analyzing the anecdotal evidence collected from 29 interviews of business representatives in the Washington-Baltimore, DC-MD-VA-WV CMSA, DJMA considers the following topics to constitute possible barriers to minority and female business owners as they attempt to transact business with Prince George's County:

- Slow payment;
- Lack of accessibility and customer service on the part of Prince George's County's procurement staff;
- Problems securing financing, bonding and fair prices from suppliers;
- Perception that Prince George's County does business with a small pool of firms repetitively;
- Need for a stronger MFBE program that provides more than the basic services of general outreach and certification;
- Limited project sizing or efforts to make contracts feasible for smaller firms; and,
- Concern that White male-owned firms will not do business with MFBEs unless it is a requirement by Prince George's County.

Analysis of Private Sector Disparities

This chapter focuses on private sector participation by MFBEs and the level to which local governments may influence general economic conditions in private markets and passively discriminate by either awarding contracts to prime contractors that have actively discriminated against minority- and female-owned business enterprises or conducted business with organizations and institutions that are known to have discriminated against MFBEs or passively conducted business in a manner that may potentially facilitate or continue a practice that effectively excludes MFBEs.

In the Washington-Baltimore, DC-MD-VA CMSA, the CMSA population has almost doubled (an increase of 93 percent), from FY 1990 to FY 2000, while Prince George's

County only had a very modest increase in population (of 9.9 percent). By FY 2000, Prince George's County had over 75 percent minorities in the population, with African-Americans remaining the dominant minority group at 62 percent.

The results of Census Public Use Microdata Samples (PUMS) data on self-employment, showed that, in the Washington - Baltimore, DC-MD-VA-WV CMSA area, the choice of self-employment increases with more college education and higher property values owned. Moreover, females and younger age groups (less than 45 years of age) appear to choose self-employment more than males and persons of older age (over 45 years of age). The data also indicates that minorities are more likely to be self-employed in the Washington-Baltimore, DC-MD-VA CMSA, but this likelihood of minorities over White males is not very significant. DJMA also notes from the PUMS data that the level of self-employment income increases with higher equity (proxied by property value) and age and is higher for White males than for minorities and lower for females than males.

The Master MFBE Certification list shows 687 MFBEs in construction, 117 in general procurement, 1,089 in nonprofessional services and 1,981 in professional services among those firms that were identifiable.⁸ In contrast, based on Reed building permits data for construction, which includes public and private sector contracts, there were 56 MFBE primes and 44 subcontractors.

The results of the survey indicate a pattern that may imply that the private sector is providing more opportunities for MFBEs to bid than Prince George's County at the prime contractor level. However, Prince George's County is providing more opportunities at the subcontractor level to MFBEs than is the private sector.

DJMA reviewed Reed Construction data, which is a construction market data resource that tracks private and public sector construction activity in a particular locale by project and location. The number of bids recorded for each of the projects tracked in the Reed building permits data for the period FY 2000-2004 for the CMSA indicates that of a total of 15,872 bids for which project-owners could be identified, there were 2,393 (15.08

⁸ Master Certification List includes City of Baltimore, Howard County, MDOT, Prince George's County and WMATA MFBE Certified vendors lists.

percent) MFBEs. The corresponding MFBE bid activity for Prince George's County was 180 (31.75 percent). According to the Reed building permits records of bidders on Washington - Baltimore, DC-MD-VA-WV CMSA, there were 47 FBEs (1.39 percent) and 230 MBEs (6.78 percent). Of the MBEs, African-Americans make up the largest group (47.8 percent), followed by Asian-Americans (25.2 percent) and Hispanic-Americans (21.3 percent).

An analysis of general contractors that appeared on various projects in Washington - Baltimore, DC-MD-VA-WV CMSA for 2000-2004 and were tracked by the Reed building permits data indicate that for the period as a whole, MBE general contractors accounted for 81 awards (5.03 percent) and FBEs were awarded 19 projects (1.18 percent). Prince George's County accounted for 54 awards, with MBEs receiving 14 awards (25.93 percent) and FBEs receiving 2 awards (3.70 percent).

Data is very limited on subcontractor data in Reed building permits. Based on that which is available, within the CMSA, MBEs received 71 (3.53 percent) subcontracts, FBEs received 15 subcontracts (0.75 percent), and the remaining 1,924 subcontracts (95.67 percent) went to White males. Of the 86 subcontractor awards by Prince George's County, MBEs received 8 subcontracts (9.30 percent) and the remaining 78 subcontracts (90.70 percent) awards went to White males. Subcontractor awards by private sector owners indicate MFBEs accounting for 12 (1.63 percent) and White males receiving 726 (98.37 percent) of these awards.

As evidenced in Prince George's County building permits data, architects on private sector projects were issued a total of 3,350 permits; MFBEs received 2.1 percent of the total permits issued. On Prince George's County projects, a total of 19.6 percent of a total of 51 architecture permits were issued to MFBEs.

A total of 16,012 permits were issued to general contractors on projects that are private; MFBEs received 105 permits or 0.66 percent of the total permits issued. On Prince George's County projects, MFBEs received 6 permits, constituting 2.6 percent.

Consideration of Race-Neutral Alternatives

This chapter investigates the effectiveness of race/gender-neutral programs in the Prince George's County Area. The U.S. Supreme Court in *Croson* made it clear that the second prong of the "strict scrutiny" test demands that any remedial action be "narrowly tailored" to address past or present discrimination. A program should be instituted either after or in conjunction with race-neutral means of increasing minority business participation. Based on our findings, there are a significant number of race-neutral programs targeted to assisting and supporting MFBEs. And many organizations continue to rely on goal-based programs to ensure MFBE participation in their organization's procurement opportunities. Though race-neutral programs within the Prince George's County CMSA have made some progress in improving MFBE management skills, access to capital, and greater exposure to the larger business community, MFBEs still face difficulty in gaining access to public and private sector contracting opportunities. Given this result, race-neutral programs providing management, finance and technical assistance do not appear to sufficiently address issues faced by MFBEs in the Prince George's County CMSA, which hamper their ability to obtain contracts in the private and public sector.

RECOMMENDATIONS

In light of the above conclusions, DJMA is providing the following recommendations to Prince George's County. The recommendations contain both race/gender-neutral and race/gender-conscious elements. The recommendations are grouped under the following categories:

1. Changes in Purchasing Procedures and Practices
2. Enhancements to the Minority Business Enterprise Program
3. Nondiscrimination Policy
4. Goal-setting Recommendations

These recommendations consist of a listing of pertinent options from which Prince George's County may select in narrow tailoring its efforts to the findings of this report. The options combine agency-specific and best practices recommendations. Prince George's County can adopt those recommendations that are considered most

appropriate in terms of cost, political climate, community environment and organizational feasibility.

Upon selection of recommendations that Prince George's County desires to implement, Prince George's County will be positioned to customize its current Minority Business Enterprise Program.

1. Changes in Purchasing Procedures and Practices

These measures are designed to address the underlying systemic factors that contributed to the disparity in contracting. DJMA is providing Prince George's County with purchasing and MFBE recommendations that will allow Prince George's County the ability to determine specifically how it will adjust its purchasing system and processes. The following recommendations address purchasing policies, procedures and practices that can be adjusted in order to allow Prince George's County to effectively include MFBEs in its contracting opportunities in a race/gender-neutral environment.

A. Development of a One-Stop Shopping Scheme

Prince George's County has a wide array of resources and a vast amount of opportunities available to vendors interested in doing business in and with Prince George's County. However, the agencies and departments that are responsible for these resources and opportunities operate independently of one another. As such, there is very limited inter-agency and inter-departmental cooperation and communication in a manner that maximizes Prince George's County's offerings to potential vendors and other members of the business community. A One-Stop Shopping scheme would allow vendors to access Prince George's County opportunities and any management, technical and financial assistance necessary to support vendors ready and willing to do business with Prince George's County, but not yet able.

For Prince George's County, the One-Stop Shopping scheme allows for easier implementation of the objectives for economic and business development, along with MFBE and Prince George's County firm participation requirements, as established by

the County Executive. By operating under the same umbrella, the agencies and departments are better positioned to work together as a team for the betterment of Prince George's County.

The agencies and organizations that are recommended as part of the One-Stop Shopping scheme are Prince George's County Office of Central Services, Prince George's County Economic Development Corporation, Prince George's County Redevelopment Authority, Prince George's County Minority Business Development Division and Prince George's County Human Relations Commission. Prince George's County should consider the integration of the purchasing functions of the DPW&T and the DER into the One-Stop Shopping scheme in order to ensure that all areas of opportunity are included.

B. Integration of MFBE Objectives into the Purchasing Process

There are several adjustments that Prince George's County can make to ensure that employees with buying authority are held fully accountable for increasing the level of business that they do with MFBEs, including:

- 1) The establishment of clear mission, goals and objectives, the communication of such throughout the organization and the community and appropriate oversight of their implementation.
- 2) Establishment of MFBE spending goals for employees with buying authority, based on the commodities for which they are responsible;
- 3) Tracking of purchasing activity by employees with buying authority, level of business done with MFBEs, number of awards to individual vendors (by purchasing unit and/or employees with buying authority), and dollar value of awards to individual vendors (by purchasing unit and/or employees with buying authority).
- 4) Establishment of evaluation mechanisms for senior management and employees with buying authority to measure their effectiveness in achieving the goals and objectives of Prince George's County's MBE program.

- 5) Training which will enhance the achievement of Prince George's County's MFBE objectives by creating responsibility for the program among all employees involved in buying.
- 6) Greater integration of MBDD into the purchasing process. Goal setting for pre-qualification and bidding and innovative techniques that facilitate MFBE participation, such as matchmaking, should be planned and jointly executed by OCS, MBDD and any other departments or independent agencies with buying authority. Prince George's County's purchasing committees, including PAGs and CRC, present a strong structure for supporting the inclusion of MFBEs at all phases of bidding and contract.
- 7) Sharing of responsibility for monitoring compliance with contractors' MFBE commitments, so that the monitoring responsibility is not limited to the MBDD.

B. Adjustments to the PAG and CRC to Support Increased MFBE Inclusion

These purchasing committees are responsible for the review, selection and oversight of Prince George's County's bid opportunities and the vendors with which Prince George's County does business. As such, they are a useful tool in promoting MFBE participation. The following measures should be considered in enhancing the effectiveness of these committees, as it relates to MFBE participation:

- MBDD should be more aggressive in its advocacy for MFBEs;
- The CRC is and should continue to be responsible for determining whether there are ready, willing and able MFBEs who could potentially provide the good or services been solicited;
- MFBE participation is and should continue to be an evaluation consideration by all committee members on the PAG, at both the prime and subcontractor level; and,

- The PAG should only consider bids and proposals where a good faith effort determination has been made regarding MFBE participation by prime contractors.

C. Database Management

Database management is critical to tracking the performance of the purchasing function and the participation of MFBEs with Prince George's County. It is also critical to measuring the performance of the individual County officials in carrying out their purchasing and MFBE responsibilities. At all times, the County Executive should have access to details of the purchasing function, including:

- Past purchasing activity by commodity type and individual contract type;
- Projected purchasing opportunity by commodity type and forecasted individual contracts;
- MFBE participation rates by dollar volume; and,
- Individual employees with buying authority and contract administrator's reports.

Accurate MFBE participation reports are fundamental in determining actual MFBE participation, in assessing the effectiveness of vendor outreach, and in determining program areas in need of improvement. To facilitate tracking of pre- and post- award purchasing activity, the purchasing database management system should interface with the OCS, the MBDD, the Finance Department, the User Departments with delegated buying authority, and any central information system or department.

2. ENHANCING THE MINORITY BUSINESS ENTERPRISE PROGRAM

Whether Prince George's County employs race/gender-conscious or race/gender-neutral means to achieving MFBE participation, DJMA suggests that Prince George's County consider focusing its priorities in the following areas:

A. Focusing Minority Business Enterprise Program Operations: Matchmaking and Monitoring

Matchmaking is fundamental to a successful race/gender-neutral minority business program. Central to matchmaking is advance notice of the universe of upcoming contracting opportunities. MBDD, OCS and any other departments or independent agencies with buying authority then work with MFBEs, White male prime contractors (including Construction Managers), and Prince George's County buyers and others involved in the purchasing process to facilitate involvement of MFBEs on *specific* Prince George's County projects at the prime and/or subcontractor level. As such, the role of matchmaking will need to take on some level of significance. Matchmaking differs from outreach, which serves as more of a networking function.

B. Adjusting the Current MBE Program to Comply with the Tenets of *Croson*

As outlined in Chapter II, Legal Analysis, *Croson* has established several requirements for race/gender-conscious programs. Below is a discussion of the adjustments that Prince George's County should consider in order to be in compliance with the tenets of *Croson*:

- Prince George's County should aggressively pursue MFBE participation through its committee structure. The committees should be provided with information on MFBE availability on the particular contract under review in order to determine the level of effort required to attempt to obtain MFBE participation. Aggressive matchmaking, good faith efforts and effective sourcing techniques to ensure a diverse vendor availability pool should be utilized as quickly and strongly as restrictive bidding and other mandatory participation techniques.
- Prince George's County should establish a sunset date for its program. Further, the sunset plan should be implemented over time in order to provide Prince George's County with the opportunity to transition both its staff and its vendors from race/gender-conscious techniques to race/gender-neutral techniques.
- Prince George's County should establish graduation provisions for its MFBEs.

- While Prince George's County does not utilize quotas, it does utilize race/gender-conscious techniques that may not meet the flexible, aspirational nature of goals required by the courts. Restrictive bidding was found to be unconstitutional in the *Washington Suburban Sanitation* case. Further, mandatory subcontracting goals and automatic bonus points for MBE participation are akin to the lack of flexibility frowned upon by *Croson*, *Gratz* and *Grutter*. Given that Prince George's County is predominantly minority in terms of county population and political leadership, it should be particularly sensitive to the facts of *Croson* that led to the U.S. Supreme Court's ruling.
- Prince George's County should develop a more formalized process for determining the availability of MFBEs for particular projects and establish goals accordingly.
- The County Attorney should review the restrictive bidding and mandatory subcontracting requirements to determine whether they are overly intrusive on the rights of White contractors.
- Prince George's County's race/gender-conscious efforts should extend to those race/gender groups showing disparity in a particular procurement category. As the disparity is corrected, race/gender-conscious activity should be reduced or eliminated.

C. Sunset Plan

Once Prince George's County establishes a Sunset date, a Sunset Plan should be implemented. A Sunset Plan facilitates the maintenance and increase of MFBE participation levels in a race/gender-neutral environment. The Sunset Plan should contain program elements that must be achieved to create a race/gender-neutral environment, as well as evaluation mechanisms to determine whether race/gender-conscious programs should continue to be relied upon or reinstated in certain areas.

3. NONDISCRIMINATION POLICY

DJMA recommends that Prince George's County implement a Nondiscrimination Policy. Procedures should be developed which impose penalties on Prince George's County employees and prime contractors for practices that involve disparate treatment and disparate impact on minority and female contractors. Critically important to enforcement of nondiscrimination policies is active investigation to determine whether discrimination is occurring, as opposed to a passive process, which depends on the filing of a complaint.

It is noteworthy that strong nondiscrimination programs engender significant support from proponents and opponents of race/gender-conscious programs. In fact, the Southeastern Legal Foundation, which has initiated litigation against several public sector MFBE Programs, proposed a strong nondiscrimination plan as part of suggested race-neutral alternatives. The key to the success of this mechanism, however, is *implementation*.

4. GOAL-SETTING PROGRAM RECOMMENDATIONS

The actual setting of MFBE goals is a policy decision that requires action by Prince George's County. Prince George's County can establish overall MFBE policy goals that then may be used by employees with buying authority. MBDD and OCS can then develop an action plan that specifies procedure, program and goal improvements that will be made and the timeline allocated for those tasks.

It is important to note that the establishment of goals does not equate to race/gender-conscious activity. Instead, the means utilized to achieve the established goals determines whether Prince George's County is engaging in race/gender-conscious or race/gender-neutral purchasing activity. The goal simply establishes a target level of MFBE participation desired by Prince George's County.

As such, DJMA recommends that Prince George's County continue to utilize goals or targets in all purchasing categories. The existence of established goals is an effective

mechanism for establishing objectives for Prince George's County and in achieving the desired outcome, when effectively implemented.

In certain categories and for certain groups, race/gender-conscious means are supportable activities toward the achievement of established goals, based on the findings of statistically significant disparity. Those include:

Construction	Professional Services	Nonprofessional Services	General Procurement
<ul style="list-style-type: none"> • African-Americans • Asian-Americans¹ • Native Americans² • Females 	<ul style="list-style-type: none"> • Asian-Americans • African-Americans • Hispanic-Americans • Native-Americans • Females 	<ul style="list-style-type: none"> • Asian-Americans • African-Americans • Hispanic-Americans • Females 	<ul style="list-style-type: none"> • Asian-Americans • African-Americans • Females

¹ The statistical findings were not consistent in showing significant underutilization for Asian-American-owned firms; however, these firms were underutilized in most of the years in multiple disparity calculations. As such, Prince George's County may desire to have either a shortened period of race/gender-conscious goals or to achieve participation through race/gender-neutral means.

² For Native American-owned firms in Construction, the populations were too small to define. This may indicate a need for aggressive outreach in order to increase both availability and utilization.

As significant disparity is eliminated in the above categories, the utilization of race/gender-neutral means in attaining the established goals should be increased. However, in all instances where race/gender-neutral means are utilized, if significant disparity re-emerges, then race/gender-conscious techniques can be utilized on a *non-permanent* basis to correct identified disparities.

Race/gender-neutral means should be utilized primarily for the following:

Construction	Nonprofessional Services	General Procurement
<ul style="list-style-type: none"> • Hispanic-Americans 	<ul style="list-style-type: none"> • Native-Americans¹ 	<ul style="list-style-type: none"> • Hispanic-Americans • Native-Americans¹

¹ For Native American-owned firms in Nonprofessional services and General Procurement, the populations were too small to define. This may indicate a need for aggressive outreach in order to increase both availability and utilization.

Goals established by Prince George's County should be tied to availability.

Race-Neutral Means to Achieve Goals/Targets

Prince George's County should first exhaust all race/gender-neutral means to achieve any established target, goal or benchmark. Race/gender-neutral means include (1) purchasing adjustments, (2) prohibition of discrimination in purchasing, and (3) matchmaking. These elements are discussed in detail earlier in this chapter.

Race/Gender-Conscious Tools

Race/gender-conscious contract goals should be subject to a variety of limitations:

- Race/gender-conscious goals, where allowable at Prince George's County, should not be applied to every contract across all purchasing types.
- Race/gender-conscious goals should generally be "good faith efforts" subject to waivers.
- Race/gender-conscious goals should be reviewed by OCS and MBDD to ensure that such goals do not disproportionately fall on one class of White male contractors or subcontractors. For example, awarding of all painting subcontracts to minority firms would impose an undue burden on White male painting subcontractors.
- Race/gender-conscious goals (in purchasing) for subcontracting should apply to both White male and MFBE prime contractors.
- Firms eligible to benefit from race/gender-conscious goals at Prince George's County should be small and subject to graduation provisions.
- Prince George's County's race/gender-conscious elements should be subject to annual review and sunset provisions.

SUMMARY

D.J. Miller & Associates, Inc. found that Prince George's County purchasing activities suggest that MFBEs continue to have some difficulties obtaining significant contracts with Prince George's County. In submitting specific findings within the Prince George's County Disparity Study, DJMA formulated recommendations that allow Prince George's County to rely upon race/gender-conscious means when necessary to address

entrenched disparities, while also addressing MFBE participation through race/gender-neutral efforts. Our economic and statistical utilization analyses could serve as part of the policy and procedure-making decisions needed to ensure enhanced MFBE participation in Prince George's County's purchasing processes.