CITY ACCELERATOR

CULTURE, COLLABORATION AND CAPITAL: LEVERAGING PROCUREMENT FOR ECONOMIC EQUITY

GRIFFIN & STRONG P.C.

ATTORNEYS AND PUBLIC POLICY CONSULTANTS

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The City Accelerator, an initiative of Living Cities, the Citi Foundation and GOVERNING, works within and across cities to advance and promote the spread of promising innovations that will have a significant impact in the lives of residents. Griffin & Strong, P.C., served as the cohort lead, offering technical expertise and authoring this guide for the fourth cohort of the City Accelerator, which focused on leveraging procurement for more inclusive economic opportunities.

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Griffin & Strong, P.C. is a law and public policy consulting firm based in Atlanta, GA. For more than 25 years, GSPC has been recognized as a national leader in policy consulting and disparity research. As both a research firm and practitioner, GSPC delivers quality legal representation and consultative expertise to individual clients, small and diverse businesses, corporations, government and quasi-government entities. It is the firm's mission to promote equity and advance the economic development of the communities it serves by providing the highest quality professional services to its clients in both the public and private sectors. www.gspclaw.com

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AUTHORED BY GRIFFIN & STRONG, PC

Sterling Johnson,
Director of Public Policy, Project Manager

Rodney Strong,
Chairman, CEO and Project Executive

Michele Clark Jenkins,
Sr. Director, Consulting Group, Project Oversight

Imani Strong-Tucker,
Operations Manager and
Qualitative Research Consultant, Editor

Dr. J. Vincent Eagan,
Policy Advisor

David Maher, Partner,
Legal Analyst

Dr. B. Rom Haghighi,
Chief Statistician

Tanesha Jones,
Data Analyst

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Chicago:
Catherine Kwiatkowski, Director of Public Affairs, Chicago Department of Procurement Services (team lead); Rodney LaBeaux, Digital Director, Chicago Department of Procurement Services; Raven DeVaughn, Program Director, Chicago Anchors for a Strong Economy (CASE); Shannon Andrews, Chief Procurement Officer, Chicago Department of Procurement Services; Dionna Brookens, Chief Procurement Officer, Chicago Housing Authority; Millie Irma Lara, Assistant Procurement Officer, Chicago Department of Procurement Services; Phoebe Chen, Former Manager, CASE; Gina Oka, General Counsel, Chicago Department of Procurement Services; Monica Jimenez, Deputy Procurement Officer, City of Chicago; Jamie Rhee, Commissioner, Chicago Department of Aviation.

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- Larry Scott, Director of Contract Compliance, The City of Atlanta, Georgia
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GLOSSARY:

Some of the terminology in this guide has specific, technical meaning that may not be familiar to all readers. A glossary can be found in Appendix 1 on page 87 with definitions to provide clarity and context. Terms that can be found in the glossary will be in bolded font. Note that "minority" is only used to describe people of color where it has a particular legal meaning.

EXECUTIVE SUMMARY

City leaders are in a unique position to implement innovative practices that can transform their communities and drive better outcomes for their cities. This guide makes the case for equitable contracting as one such transformative practice and will show that a focus on the engagement of diverse contractors and vendors is beneficial not just for those entrepreneurs, but for society at large. There is already significant work being done by municipalities, building on decades of groundbreaking political leadership and innovative policy and practices, and some of these standout cities will be highlighted. These cities are leveraging the significant dollars that local governments spend on goods, services and construction – estimated at $1.5 trillion annually in the U.S. – to generate equitable economic opportunity, strengthen communities, and improve procurement options through increased competition.[1]

In addition to fulfilling the government mandate to promote equal treatment, the benefit of diversifying contractors and opening the procurement process is threefold. First, it produces a broad community impact that is both common sense and quantifiable. Spreading government spending to contractors from various communities yields stronger communities, contributes to the overall growth of the middle class and, by proxy, creates a more robust taxpayer base. Research conducted by Citi GPS shows that inequality is a drag on economic growth and "is contributing markedly to declining social trust, the erosion of social cohesion, and the fragmentation of the political process."[2]

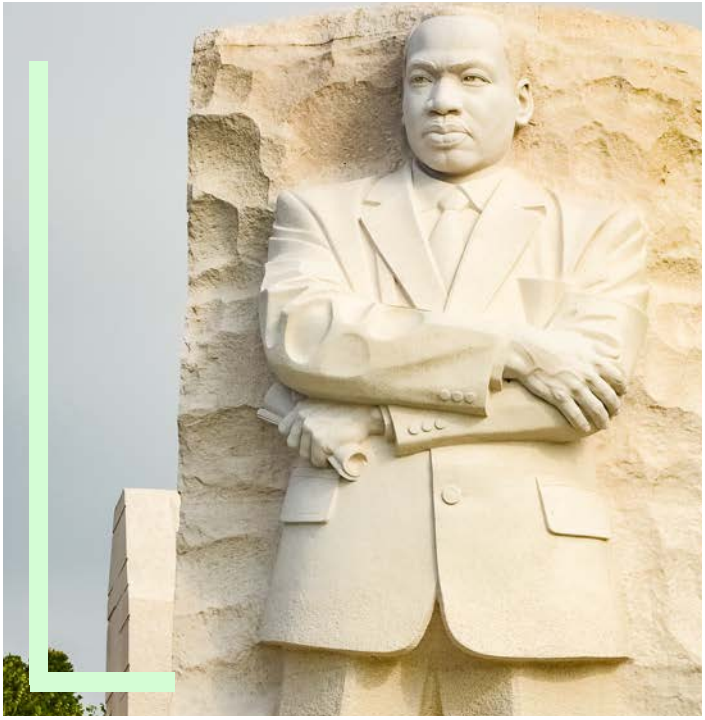
Second, inequality has a direct impact on business growth. Inclusion in contracting provides stable revenue and helps firms to gain the experience necessary to grow. Public contracting often supports the growth of businesses that not otherwise have received an opportunity. Because they are more likely to hire staff of color or from underserved communities, the growth of businesses owned by people of color helps to address the racial income and wealth gaps through both business and workforce development.

Third, by creating a barrier-free, well-defined, and transparent procurement process, governments benefit through increased competition and higher quality contractors. In addition to gaining a stronger and more positive foothold in the community through visibility and community outreach, the increased pool of qualified potential bidders breaks down contracting monopolies and boosts contractor quality and effectiveness. Equitable contracting—as policy, practice, and institutional culture—facilitates inclusive community economic growth, helps businesses owned by people of color to thrive and grow, makes the system more efficient, and attracts and assists talented new businesses to become potential partners. From a city's perspective, there is much to gain from leading equitable municipal procurement.

[1] State and Local Expenditures, Urban Institute: **click for web reference**
[2] Inequality and Prosperity in the Industrialized World: Addressing a Growing Challenge, Citi GPS: **click for web reference**

LEARNING FROM THE PAST, LEADING IN THE FUTURE

It is crucial to place this analysis in its historical context, and to note the ways in which economic disparities between diverse groups have been forged through the intentional exclusion of people of color from the economic process. This context lays the foundation for a philosophy behind equitable procurement practice: that addressing the effects of the past is necessary to improve the future. From enslavement to Jim Crow segregation, to modern policies that maintain barriers to economic opportunities for people of color, exclusionary policies have impacted every area of life for people of color in the United States. The impact of systemic exclusion and structures of oppression on the educational attainment, home ownership rates, hiring, and capital advancement of communities of color have negatively impacted the wealth, business development rates of these groups, and their contribution to the community workforce and overall community vitality.



The history of African-Americans in the United States illuminates the ripple effects of intergenerational economic exclusion. During the centuries of chattel slavery in the United States, people of African descent were sold into a life of forced labor, subjected to constant violence, separated from homes and families, and stripped of basic rights and humanities. Upon receiving their freedom, formerly enslaved persons were left to struggle for economic equality without the benefit of familial land or wealth, and against a stark backdrop of segregation, criminalization, disparate treatment, and unequal accommodations in education and the labor market. In addition, attempts at self-determination and self-sufficiency through Black capitalism were intentionally suppressed to continue the majority population's pattern of unequal economic gain.

For individuals and communities able to develop skills to build viable businesses, many were subjected to acts of terrorism by the local white community, such as the destruction of Black Wall Street in Greenwood and Tulsa, Oklahoma,[3] and the economically motivated riots in Atlanta, Georgia and Memphis, Tennessee. Efforts to suppress and discourage the advancement of African-Americans have played a major role in depressing both the economic viability of individual African American businesses and the overall vitality of the U.S. economy and African American communities. In fact, the Kellogg Foundation[4] estimates that if the racial wealth gap was eliminated, tax revenues could increase by up to $325 billion for state and local governments, and the national GDP could rise by 22 percent.

While the conversation about African American economic exclusion has remained largely separate from the historical impacts of de facto and de jure segregation in the United States in the public discourse, data is increasingly showing that these phenomena are inextricably linked.

[3] Fain, Kimberley. *The Devastation of Black Wall Street*. JSTOR Daily, July 5, 2018. **click for web reference**
[4] Turner, Ahi. "The Business Case for Racial Equity." Altarum, W.K. Kellogg The W.K. Kellogg Foundation. 24 July 2018. **click for web reference**

Government contracts have long served as a springboard for business growth for white owned businesses – including some leading US businesses – but over the past fifty years, government procurement has evolved as a critical tool in addressing our nation's history of economic exclusion by promoting diverse business formation and growth across the United States. In cities such as Atlanta, New York, and Baltimore, courageous leaders pioneered the diversification of city contracts, and the impact of these bold decisions has reverberated since the 1970s. For example, former Atlanta mayor, Maynard H. Jackson, demanded that businesses owned by people of color be included in capital development opportunities and government procurement. He insisted that developers meet a 30 percent participation requirement from **Minority Business Enterprises ("MBEs")** to move forward with the construction of Hartsfield-Jackson Atlanta International Airport, now the world's busiest airport. As a result, contracts let to businesses owned by people of color increased from less than 1 percent in 1973 to approximately 39 percent in 1978.[5] Because of this culture of equity, the City of Atlanta maintains a reputation today for its commitment to all its citizens having an "Equal Business Opportunity," a policy which has dramatically grown businesses owned by people of color and increased wealth and access in their communities.

Pioneers such as United States Representative Parren Mitchell (D-MD) paved the way for business inclusion, fighting for inclusion of MBE businesses in federal contracting opportunities. Rep. Mitchell was an original sponsor of legislation amending the Small Business Investment Act of 1958 (which later became Public Law 95-507) encouraging **utilization** of disadvantaged **subcontractors**; and his amendment to the 1982 Surface Transportation Assistance Act[6] created a 10 percent goal for small and disadvantaged businesses. This was critical to establishing what is now known as the Federal **Disadvantaged Business Enterprise ("DBE")** program. This program, now applicable to any project receiving even one dollar of federal funding in every state and locality across the United States, established an impactful precedent by ensuring that historically disadvantaged contractors are considered and included on federally-funded or subsidized projects.

Through these programs, and others that have been developed in response to the bold leadership of a few, the groundwork has been laid to continue to champion economic inclusion across the country, and new, equally bold leaders enter procurement innovation every day. These programs have helped to create gateways to wealth development for business owners of color that may have otherwise been unattainable.

Despite some legal challenges, most notably the Supreme Court's 1989 **City of Richmond v. J.A. Croson Company,** 48 U.S. 4698, 109 S.Ct 706, 102 L.Ed 2nd 854 (1989) seemed to diminish government activity in the promotion of economic equity and opportunity, pioneering city leaders forged a path that continues to be developed and followed to this day. [For more on the pivotal Croson case, see Appendix 2]. Inclusive procurement programs have continued to grow and evolve, with cities finding creative ways to lower barriers to inclusion by amending restrictive policies and processes, developing legally defensible contracting programs designed to remediate contracting disparities, and employing contract compliance tools to create and ensure a culture of accountability.

City leaders today can build on the foundation of what has been developed in the past and continue to develop new approaches to achieve better outcomes in the future. Through the strategic innovation of new program elements, municipalities across the nation can foster an internal culture that values diversity and positively impacts the inclusiveness of public contracting, while driving better results for their cities. These actions may also catalyze and strengthen similar procurement reforms among anchor institutions and the private sector.

[5] Dingle, Derek. 2009. "Maynard Jackson, the Ultimate Champion for Black Business." Black Enterprise Magazine. **click for web reference**
[6] H.R.6211 - Surface Transportation Assistance Act of 1982

THE CASE FOR EQUITABLE PROCUREMENT:

1. Growing businesses owned by people of color: A history of systemic racial discrimination in this country has resulted in persistent disparities in income, wealth, and community well-being. Addressing barriers that have prevented business owners of color from starting and growing businesses can help close these gaps, through wealth generation for owners and income for employees.

2. Driving economic activity to close the racial wealth gap: U.S. cities collectively spend $1.6 trillion annually on construction, goods, and services. If spent equitably – particularly with MBEs - the impact can improve socio-economic outcomes, leading to a stronger, more equitable community.

3. Supporting community wellness: Through equitable procurement, cities can increase the local tax base and direct tax revenue to communities in need, which can directly influence community services, community spaces, education, and workforce.

4. Improving procurement options: Breaking down barriers in government procurement processes reduces the administrative burden on all businesses submitting bids and may ultimately help reduce prices by encouraging more bidders. Further, cities benefit through increased access to diverse vendors, who bring fresh ideas, new approaches, demonstrate greater cultural competence, and may tap new talent within the community.

ACCELERATING INNOVATION IN PROCUREMENT

Recognizing the opportunity represented by more inclusive and equitable procurement, Living Cities, the Citi Foundation, and Griffin & Strong, P.C. ("GSPC") competitively selected five cities – Chicago, Charlotte, Memphis, Milwaukee, and Los Angeles – to participate in an 18-month City Accelerator cohort to support learning and innovation. Ultimately, the cities in this cohort made considerable strides in addressing common barriers related to diverse business inclusion. Their experiences and the expertise of various partners who supported their work are shared in this implementation guide to illustrate the opportunities that exists when governments seek to address diverse business inclusion with intentionality.

Cities across the country face numerous challenges to making their procurement systems truly equitable:

- Cumbersome certification and bidding processes that are not aligned across different jurisdictions and levels of government;
- An insular, risk-averse procurement culture that makes it difficult to reduce certain barriers to entry and favors contractors that have worked with the city before;
- Ineffective communication networks with MBEs who might be interested in opportunities to work with city government;
- Limited or discriminatory access to capital and capacity development needed for MBEs to expand to meet city needs;
- Inadequate data or data that is misaligned across departments or systems such as construction, information technology, and professional services;
- Systemic **underutilization** of businesses owned by people of color, particularly in certain types of contracts, such as construction, information technology and professional services; and
- Policy or legal contexts that preclude **race-conscious** approaches.

Each of the cities participating in this cohort represents a unique socio-political environment, demonstrating that it is possible to make progress in inclusive procurement regardless of a municipality's ability to implement a race-conscious program. Los Angeles, for example, is one of several cities restricted by a state Constitutional amendment (Proposition 209) from engaging in affirmative action in government procurement. Milwaukee endured a legal challenge to its previous race-conscious program, which was subsequently disbanded. Chicago, Memphis, and Charlotte do have the legal and policy support to allow race-conscious MBE contracting, with each pursuing aggressive race-conscious strategies. Despite the varying legal environments, these five cities were unified by their desire to build equity through contracting. Together, they clearly demonstrated that with strong leadership, collaboration, and creativity, there are paths to addressing both the systemic challenges and the cultural shifts needed to promote and sustain inclusive procurement.

PROMOTING ECONOMIC EQUITY THROUGH PROCUREMENT PROCESS IMPROVEMENT

To open the doors of procurement to more diverse vendors, city leaders must conduct the research necessary to assess systemic barriers and use these insights to develop goals and programs. This may be achieved first by ensuring that the city has a solid commitment to effective execution of the fundamental building blocks of inclusive contracting:

- **Assessment of MBE availability and capacity:** This often is done through the performance of a disparity study discussed in detail on p. 24 or other **availability** analysis and serves as the basis for any race-conscious programming.

- **Outreach to MBE firms:** Once MBEs who are interested in contracting with the city are identified, the city should focus on communication strategies (like contract forecasting, workshops and seminars, community newsletters and information meetings with trade groups and other diverse business organizations) to identify and engage MBE firms.

- **Certification and Verification of MBEs:** For cities with race-conscious contracting goals, it is important to verify the legitimacy of MBE firms interested in bidding on scopes of work through a robust certification and verification process. This not only prevents **non-MBE** firms from falsely representing themselves, but also provides a critical window on the needs and capacities of contractors to better assist them.

- **Procurement design and implementation:** City government staff should develop bid packages in ways that support maximum opportunities for MBE participation, either directly or through subcontractor, supplier, or teaming arrangements.

- **Monitoring during the administration of contracts:** By monitoring city contracts, the city can make **prime contractors** accountable for the commitments made in the bidding process for meaningful engagement of and payment to MBE subcontractors

These building blocks can be implemented in either a **race-neutral** or race-conscious environment in response to the demands of the legal context. There is a wealth of proven practices that can be drawn from the last fifty years of practice in procurement and compliance.

Leading and advocating for inclusive procurement requires cities to truly understand how these programs are working, what challenges remain, and how best to address systemic barriers to affirmatively engage more diverse vendors and contractors. This requires information and engagement to identify areas for improvement, including: a regular review of policies and processes (along with the culture and practice that influence implementation); substantial engagement with business owners of color; accurate data systems; and partnership with stakeholders who have different perspectives on the process.

Based on the information they gather, cities should continue to innovate and improve on the basic structure of their equitable procurement programs. This work includes technical improvements to policies and practices, but it also involves more adaptive efforts that can transform procurement systems and scale the impact of a city's efforts over time. Members of the cohort took steps to foster relationships with other public agencies, build connections between procurement and other government objectives of community economic development and neighborhood revitalization, educate stakeholders on the impact of systemic racism, and encourage cultural shifts away from the risk-averse to a creative focus on engagement and results. These efforts of innovation and active development of equitable culture had a real-time impact on the functioning and focus of government entities in the cohort and serve as an example of the improvement in process that is possible for engaged leaders.

LEADERSHIP IN ACTION

Despite very different contexts, each of the cities in the City Accelerator cohort significantly advanced their inclusive procurement efforts:

Charlotte: Charlotte's City Accelerator team took a three-part approach to the opportunity to increase the diversity of city contracting. First, through a collaboration with Interise they sought to engage and support local business owners of color through a 13-week intensive business development program called AMP UP and worked to build relationships with the NBA in advance of the 2019 NBA All Star Game. Next, the city sought to grow internal champions and promote a culture of inclusion through the formation of a Procurement Advisory & Inclusion Council ("PAIC"). Convened by the City Manager, the PAIC used the City's new disparity study to identify opportunities for policy and practice improvements. One specific innovation emerging from the process is an enterprise-wide strategic forecast with real-time access through a dynamic, interactive, cloud-based application. Finally, the Charlotte team crafted a plan to strengthen connections between MBEs and large corporations and nonprofit institutions, like universities and hospitals, that serve as anchors in the community.

Chicago: The City of Chicago used this opportunity to deepen its collaboration with sister agencies (such as the Chicago Housing Authority and Chicago Public Schools) through the Procurement Reform Task Force. A key focus was supporting the creation of a universal procurement system across multiple public entities. The City also explored and made recommendations on three other goals: 1) sharing compliance functions, potentially through a joint compliance team; 2) adjusting Chicago's risk-shifting contractual provisions to reduce the burden of insurance and bonding requirements; and 3) consolidating procurement to allow vendors in one sector to route their contracts through one public agency (e.g., all landscaping through the Parks Department).

Los Angeles: With strict legal barriers to race-conscious actions and a decentralized procurement system, Los Angeles faced an uphill battle to diversify its public procurement. Recognizing the need for strong leadership, Mayor Eric Garcetti created the role of Chief Procurement Officer to shape the values and goals of the local procurement system.

The city also offered training to the departmental contracting heads to equip them to tackle barriers for diverse vendors and contractors (e.g., by breaking up large contracts). The City also pushed to expand its number of certified diverse businesses through its Business Source Centers, launching an online certification portal. Finally, Los Angeles hosted four matchmaking events – GroWITH, BuildWITH, BuyWITH, and TeamWITH Los Angeles—to build relationships that connect contractors and vendors to new opportunities. As with the certification efforts, these live events will also be complemented by a new internal website (dubbed buyLA) where prospective contractors can better understand upcoming opportunities with the city.

Memphis: Using their recent disparity study as a roadmap, the City of Memphis has seen tremendous success in improving its contracting with MBE firms. The City has continued to follow this roadmap to discover methods of continuous improvement, including a review of internal policies and practices to identify and reduce barriers for MBEs. As a result, the City developed a prompt pay pilot program designed to increase working capital for small, diverse businesses and conducted supportive service seminars on methods by which certified City vendors may improve their back-office process to build a case for increased bonding capacity. In addition, the City of Memphis also addressed barriers created through inter-agency silos by revitalizing the Memphis-Shelby County Consortium and fostering alignment across its sister agencies in the region. The City also galvanized the region to help grow businesses owned by people of color through the 800 Initiative, a cooperative anchor strategy (involving the City of Memphis, corporate partner FedEx, StartCo, the Memphis Epicenter, and Christian Brothers University), and strengthened the ecosystem for business owners of color through a sub-to-prime program, workshops and symposia on business finances and the hidden rules of business, and the Propel diverse business accelerator.

Milwaukee: Despite having lost the legal challenge leveled against its prior race-conscious contracting program, Milwaukee was committed to finding alternate means of diversifying its vendors and contractors across all sectors. They focused on improving data collection to define systemic problems; surveyed businesses to better understand the difficulties of the current system; and engaged stakeholders and business owners regarding how the City could improve and better connect with MBE vendors. City departments were also engaged as innovators and changemakers, proposing pilots to promote inclusion strategies, rebranding the city's inclusion programs, and joining together to create a transparent city buying plan to give businesses more notice of upcoming opportunities. Finally, they provided capacity building for under-represented small businesses with a focus on professional services.

Inclusive government procurement represents the best of what is possible when government leaders embrace equity within city government. Though procurement systems can seem complex and difficult to shift, the examples from the City Accelerator cohort demonstrate that, whatever the policy context or legal constraints, where there is a will to break down barriers to inclusion, city leaders can make tangible progress. Now is the time for city leaders and their partners across the U.S. to commit to bold action to ensure maximizing the positive impact of equitable and inclusive contracting.

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IMPLEMENTATION GUIDE CONTENT

GSPC has designed this guide specifically to assist local governments to diagnose their challenges and identify solutions, drawing not only from the work of the City Accelerator cohort, but also on the history of work conducted by trailblazers throughout the country. In this guide, readers will first find a description of the City Accelerator project and its outcomes, as well the economic and social reasoning for engaging in this important work. The second section addresses the historical context of equitable procurement, and an analysis of laws and policies that impact practice in this area today. Section three provides instruction on the purpose and methods of disparity studies and their utility in contracting reform; while section four will address fundamentals of contract compliance—the field which has emerged from the pursuit of administrative measures that can increase diversity and transparency in government procurement. Sections V and VI provide solutions for effective implementation of contract compliance programs and best practices in procurement, as well as methods for process review. Finally, section seven will provide solutions for measuring outcomes and analyzing metrics of equitable practice within governments. "City Spotlights" are placed throughout the guide to highlight the innovative work undertaken by the cities in this City Accelerator cohort to address systemic barriers and make their procurement systems stronger and more equitable.

CITY SPOTLIGHT: CHARLOTTE, NC

- Population: 859,000
- Council-Manager Government
- Annual Municipal Procurement Budget for FY17-18: Approximately $490 million[7]
- Race-Conscious and Race-Neutral Program

Spurred by a 2014 joint study by Harvard University, UC Berkeley and the U.S. Treasury Department ranking Charlotte last out of the fifty largest metro areas in the United States in economic mobility, and accelerated by the police shooting of Keith Lamont Scott in September 2016, the City of Charlotte has been focused on making racial equity and economic inclusion a top priority in municipal operations. While the Charlotte business community has been growing rapidly, Minority Business Enterprises (MBEs) are underrepresented in government contracting as documented in Charlotte's 2017 Disparity Study. While the City has made significant strides in recent years, the Disparity Study still indicates systemic barriers to participation, prompting the City to do more to open up city contracting opportunities to businesses owned by people of color.

Through the City Accelerator, the Charlotte team championed internal reforms, building a structure for engagement and strategic interventions across departments, while becoming more transparent about upcoming contracting opportunities and helping more MBEs build their capacity. Ultimately, the City is focused on developing, growing, and supporting MBEs to become strong, sustainable partners and leaders within the Charlotte community.

[7] This figure reflects only spend opportunities funded with local City dollars. The City's decentralized procurement structure limits reporting to City dollars subject to the Charlotte CBI Program. All City spending, including federally funded procurements, p-card purchases, and other transactions, such as sole-source contracts and vendor-exclusive warranties, are not reflected in this figure.

In October 2017, City Manager Marcus Jones announced the creation of the Procurement Advisory & Inclusion Council (PAIC), which is comprised of City leaders across departments. The PAIC is focused on building synergistic partnerships in support of citywide procurement inclusion efforts. In addition, the PAIC is reviewing Disparity Study data and findings to make recommendations regarding Charlotte's diversity and inclusion practices and policies. City Manager Jones stated, "As wealth inequality increases and communities work to overcome racial disparities, the City of Charlotte will be a leader in providing equal access and opportunity for all businesses to grow."

One of the ways that the City can reduce barriers for MBEs is by providing easy access to information on upcoming contracting opportunities to allow businesses to selectively choose which opportunities are most promising and prepare competitive proposals. Borrowing an idea from Chicago's buying plan, Charlotte used the City Accelerator to develop an enterprise-wide digital strategic forecast of upcoming contract opportunities, delivered through a dynamic, interactive, cloud-based application. More than a master buying plan, this app will use text, alert, and chat functionality to provide real-time access to information on city procurement opportunities to equip all businesses with the information they need to successfully compete. The City also expanded its efforts to use social media to reach more diverse vendors and contractors.

Finally, building on momentum related to the upcoming NBA All Star Game, the Charlotte team launched the AMP UP program to support the growth of businesses owned by people of color. Working in collaboration with the NBA and Interise, a national technical assistance platform, Charlotte provided 17 business owners with a 13-week intensive business development program covering business development, strategic planning, financial management, accessing capital, and human resources. According to Anita Stanton, President and CEO of Miles Enterprise Solutions, AMP UP "connected me to a network of peers who exposed me to new business tools and options." As a result, she is exploring growth opportunities, such as acquiring other companies.

Looking forward, one piece of the City of Charlotte's City Accelerator project that is still under development is a plan to engage large corporations and other anchor institutions in inclusive procurement efforts.

LESSON LEARNED:

Cities committed to inclusive procurement must find ways to maintain engagement and momentum, overcoming competition for attention and scarce resources.

I.
CITY ACCELERATOR: LEVERAGING PROCUREMENT FOR INCLUSIVE ECONOMIC OPPORTUNITY

Government leaders across the country are looking to catalyze economic growth and promote inclusion and equity in their communities. According to the National League of Cities, 75 percent of mayors highlighted economic development in their 2016 State of the City address with 22 percent specifically seeking ways to better support small businesses, and 17 percent mentioning businesses owned by women and people of color. Because these aims are intertwined, equitable procurement practices represent a key weapon in the governmental arsenal for tackling economic inequalities, while improving outcomes for every segment of the community.

Cities benefit from a focus on the economic policies that disproportionately affect people of color, not only by building a stronger rapport with historically disadvantaged communities, but also by ameliorating broader social issues that can place a burden on a city's economic structure. Community development, social welfare, family stability, and educational attainment, and earning potential all benefit from increased economic equity, allowing all residents to be active participants in a thriving local economy. According to the 2016 U.S. Census Report on Income and Poverty in the United States, African American and Hispanic American families reported the highest level of poverty at 22 percent and 19.4 percent, respectively, compared to 8.8 percent for white households.[8] Data shows that those in low income communities often become victim to this cycle, with as few as 2.5 percent of African American children raised in the bottom fifth of income distribution ever rising to the top strata.[9] However, the silver lining of this bleak picture is that engaged and educated leaders have the unique opportunity to effect change in the government contracting arena and to confront barriers to participation, ensuring the equity and transparency of process. By taking affirmative and deliberate steps to identify and rectify systemic disadvantage, governments are in a singular position to develop and grow their communities.

Equitable procurement also presents direct benefits to business owners themselves, allowing them to scale and grow, and pulling more of the workforce from the taxable area. This creates a symbiotic relationship between local communities and the governments that serve them. Legacy and access have historically helped to create monopolies on opportunity in government contracting, but the destruction of these barriers provides entrant, startup, and small businesses owned by people of color to have a fighting chance.

Finally, governments themselves benefit from cleaning up procurement practices, creating transparent processes, improving relationships with all members of the community through outreach, and sourcing from diverse firms.

When it works well, a city's procurement process can encourage participation and foster the growth of diverse local vendors; these firms, in turn, produce local supply chains, boost employment of local residents, and ultimately generate local tax revenue. At the same time, it improves competition and makes possible diverse new options, improving the efficiency and effectiveness of government procurement.

Legacy and access have historically helped to create monopolies on opportunity in government contracting, but the destruction of these barriers provides entrant, startup, and small businesses owned by people of color to have a fighting chance .

[8] Semega, Jessica L. and Kayla R. Fontenot and Melissa A. Kollar. September 2017. "Income and Poverty in the United States" **click for web reference**
[9] Chetty, Hendren and Porter Jones. Stanford University, Harvard University, NBER and U.S. Census Bureau. "Race and Economic Opportunity in the United States: An Intergenerational Perspective" March 2018, **click for web reference**

THE POTENTIAL ECONOMIC IMPACT OF EQUITABLE PROCUREMENT

Though rates of business ownership have increased (US Survey of Business Owners[10]) for people of color across the country and there has been a considerable growth in the diversification of business industries, rates of MBE growth as measured by revenue and net worth has paled in comparison to non-MBE firms. Race-neutral approaches alone have not generally been effective in resolving specific discrimination against MBE firms in both the public and private sectors, though services provided by race-neutral approaches can impact on processual barriers. The continued relevance of racial discrimination, and its need for specific remedy, is evidenced by the continued legal standing on the Federal DBE program, which has been challenged and upheld numerous times. Despite this, some cities remain reluctant to pursue race-conscious remedies, worrying that they are not worth the financial and staff investment required to build or maintain them, or afraid of public backlash or litigation. Still, because governments serve their residents rather than the demands of corporate shareholders, local officials can create inclusive and equitable economic opportunities. There is also economic benefit to equity, as cities and communities often lose millions of dollars in potential revenue and community wealth through discriminatory practices in procurement. These dollars and their residual benefits, including greater local tax revenue and higher employment rates (by hiring locally and creating additional levels of economic impact) offer the potential to change communities and families for the better. In creating and encouraging MBE business growth, cities can create a culture of inclusion.

Small businesses are often lauded as the backbone of the American economy, but they are also the backbone of America's individual communities, across demographics. Multiple studies have been conducted that corroborate the positive impact of inclusive procurement on small and diverse businesses. In the 2004 report "Bridging the Gap: An Analysis of Baltimore's Minority- and Women-Owned Business Communities," Dr. Anirban Basu[11] builds the case for economic inclusion, demonstrating that the Baltimore region had 13,741 fewer MBEs than they should have and that these businesses were smaller than non-MBE businesses. The economic and social loss attributable to lower MBE availability and the smaller operating sizes of those that exist was striking:

- 30,000 fewer jobs;
- $5 billion in lost sales; and
- $132 million less in state and local tax revenues in Baltimore region.

Similarly, City Accelerator contributor Franklin M. Lee, Esq., shared the findings of the 2013 report by the City of Baltimore Mayor's Advisory Council on Minority and Women Owned Business Enterprises, "A New Day. A Better Way: Building a Strong Economy Through Economic Inclusion,"[12] which explored the economic impacts of equitable public procurement. Economic impact analysis conducted by the state of Maryland in the 2013 **fiscal year** for the State of Maryland found that the State's MBE program resulted in:

- $1.8 billion in State expenditures with MBE firms throughout Maryland;
- The creation or retention of 26,796 jobs;
- Over $100 million in direct wages and salaries;
- $88.9 million in state and local tax receipts generated by **MWBE** firms and employees; and
- A return of $1.60 of direct economic impact for every dollar in State procurement.

[10] McManus, Michael. *Minority Business Ownership: Data from the 2012 Survey of Business Owners*. U.S. Small Business Administration, Issue Brief Number 12. September 14, 2016

[11] Basu, Anirban. "Bridging the Gap: An Analysis of Baltimore's Minority- and Women-Owned Business Communities. (2004)

[12] A New Day, A Better Way: Rebuilding a Stronger Baltimore Through Economic Inclusion." Mayor's Advisory Council on Minority and Women-Owned Business Enterprises. 24 April 2013. The City of Baltimore Maryland. **click for web reference**

The impact of such programs goes well beyond their initial success with the targeted group; they also help to shrink racial wealth gaps in ways that can dramatically spur the economy. According to the Kellogg Foundation's 2018 Report, "The Business Case for Racial Equity" the combined impact of disparities in health, incarceration, and employment results in $2.7 trillion fewer dollars in economic output. Additionally, the Foundation estimates that tax revenues could increase by up to $325 billion for state and local governments, and the national GDP could rise by 22 percent, simply by addressing the racial wealth gap.

Increased equity in business development, growth, and opportunity presents several significant opportunities for community economic development. This development may occur directly, by placing dollars in the hands of historically disadvantaged business owners, or indirectly, by those business owners hiring and supporting workers from their communities and other businesses in their community. It may also spur development in an induced manner, with the money that flows through households and is spent on other goods and services. With economic empowerment also comes an improvement in education, home investment, capital access, and wealth creation, creating a new, virtuous cycle out of the old, self-defeating one.

BUSINESS GROWTH THROUGH PUBLIC CONTRACTING

Individual business growth should not be overlooked as a key element and impetus for equitable procurement. Indeed, it is the individual businesses that form the crucial building blocks of the broader economic development that many governments seek. Firms that have benefitted from procurement reform have scaled (in size and revenue) and can be found throughout the United States in every city that has implemented effective contracting or supplier diversity programs. Diverse businesses can use opportunities in sheltered market, joint venture, and many other program configurations to establish their expertise, build capital and business networks, and springboard into new categories of work that help to diversify their business and ensure its longevity.

BUSINESS CASE STUDY: AVISARE

An example of this kind of business growth as a result of inclusive procurement in government is Sky Kelley, the founder of Avisare. Ms. Kelley says of her experience building her business from the ground up:

"Running a civic tech startup is not an easy task. This is an area tech venture capitalist do not typically like to invest in because they believe government moves slowly, doesn't prioritize innovation and doesn't like working with startup companies (which is where most of the innovation happens). This pervasive feeling throughout the venture capital community makes it hard to grow a company in this space because if you don't receive venture capital-backing, you can't hire more people, build better software and survive long sales cycles.

Working with the Chief Procurement Officer of the City of LA has been the catalyst that we needed to take our business to the next level. Because of this project, we were able to compete for more contracts nationwide and at the state level, increase our staff by 40%, and obtain another $1 million in venture capital funding to continue growing the company. It gave us the proof we needed to the venture capital community that local government does want innovation. Best of all, we're excited to be working on a project that will help tens of thousands of small businesses in our County get more recognition and grow their business."

GOOD GOVERNMENT BENEFITS

In addition to the numerous benefits to the economy and the community at large, the up-front investment of research, change management, time, training, and resources that are necessary to effectively break down barriers ultimately has tangible returns for governments in the form of more competition and a wider pool of qualified vendors. It is known that with increased competition, businesses have a further incentive to set reasonable prices, complete work in a timely and efficient manner, and provide better service to their clients. When any single firm has a monopoly on contracting in an area, city leaders cannot be certain that they are getting the best that is out there. If, however, that city has designed systems that invite—rather than exclude—new entrants and reach out to other sectors of the community, it gains a broader set of options for every contract on the table. Effective procurement not only benefits the communities served by increased opportunity, but it provides governments with increased choices.

THE CITY ACCELERATOR

The City Accelerator is a joint initiative of Living Cities, the Citi Foundation and GOVERNING designed to foster municipal innovation. With this City Accelerator cohort, five cities were competitively selected to engage with each other and with technical experts from Griffin & Strong, P.C. for 18-months to fully embrace the potential of their procurement spending — the purchasing of goods, services and construction — to promote inclusive economic opportunity. The cities of Charlotte, Memphis, Los Angeles, Milwaukee, and Chicago aggressively sought to attack issues faced by cities across the country, which contribute to systemic underutilization of MBE firms and which, when left unchecked, can prevent low-income people and communities from fully engaging in a sizeable portion of the American economy. Simplifying the procurement process and broadening the pool of potential vendors can make procurement processes more competitive, innovative, and open to under-represented communities while prompting a shift to a more inclusive culture.

What GSPC has done through this cohort is provide the historical context and its relation to current conditions to illustrate the urgency for conducting this work, while reinforcing the legal underpinnings necessary for laying a foundation for successful innovation.

Griffin & Strong, PC ("GSPC") is a law and public policy consulting firm specializing in disparity research and supplier diversity for government entities and private corporations. The firm has a 27-year history of researching and implementing procurement inclusion programs for states, municipalities, and private entities across the country.

A leader in disparity research design and experts in procurement reform legislation, GSPC has worked alongside the City Accelerator cohort to assess each city's needs and assist in the development of tailored solutions over the life of the project.

Participating cities have been equipped to build champions for diversity (both internally and externally) and have been connected through their shared commitment to diversity. They have learned from one another, finding common ground in both their struggles and successes while being exposed to both national best practices and innovative approaches to address these critical issues. They have also been exposed to several subject matter specialists in various disciplines such as: contract compliance, capital access, bonding assistance, racial equity, corporate and nonprofit anchor strategies and philanthropy, to illustrate the role each one of us carries across disciplines in upholding equity in our communities.

This implementation guide is the culmination of the intensive effort and innovation of these cities, as well as the work and effort of many of the advocates who paved the way for this discussion. In seeking to communicate how governments can best embed racial equity into their contracting process, this guide will:

(1) Explore the social and legal background around inclusive procurement;

(2) Discuss how to diagnose existing challenges and lay the groundwork to support race-conscious programming where possible;

(3) Present best practices and innovative approaches to create an equitable procurement process;

(4) Outline opportunities to leverage procurement for community economic development; and

(5) Review considerations for gathering data and measuring outcomes.

Ultimately, the hope is that this guide will encourage government leaders to use the data at their disposal, apply a racial equity lens to their procurement policies and practices, and boldly initiate needed reforms. This document will provide guidance and city examples to support governments that are stepping up to this challenge of driving community economic development through collaboration and innovation.

Now is the time to rethink and improve the procurement process at the local level for stronger cities, vibrant and growing businesses owned by people of color, and effective city governments that better serve residents. As the cities highlighted in this guide illustrate, all cities can become more inclusive and equitable through a concerted effort to change culture, policy and practice within government procurement.

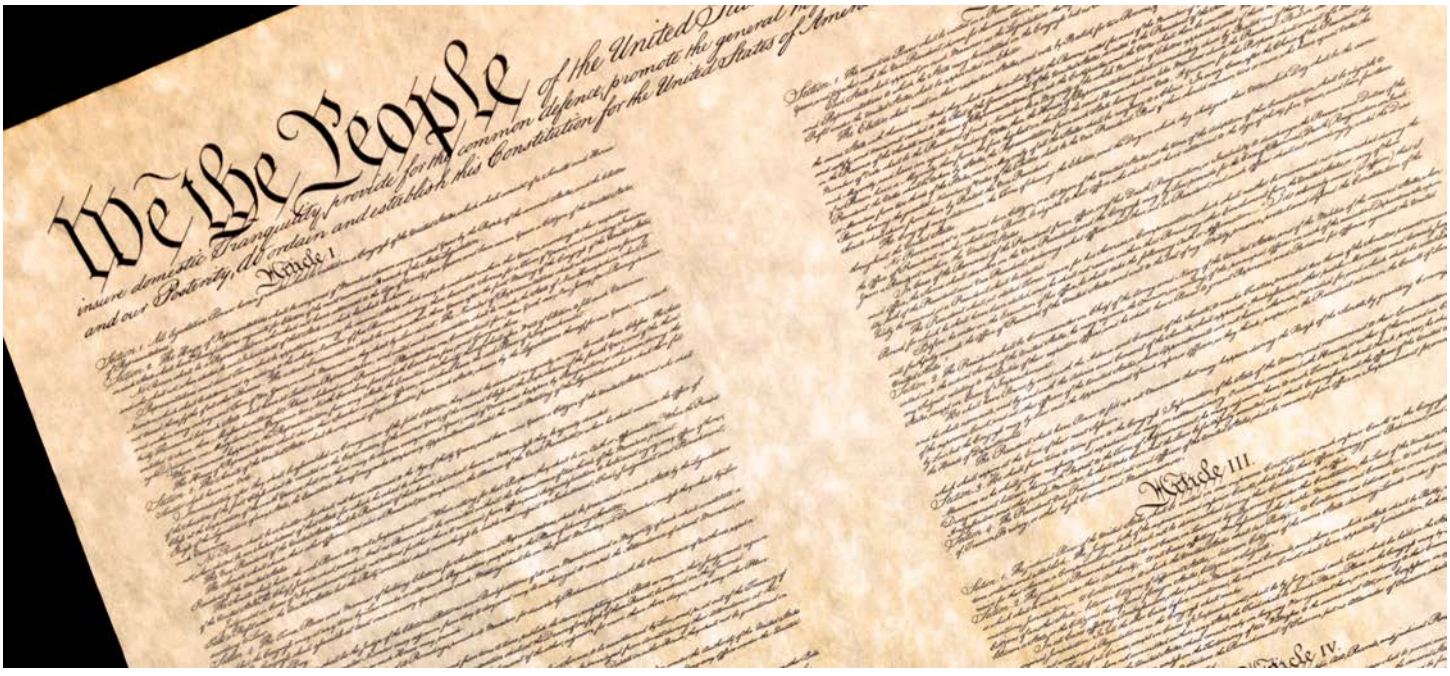
Now is the time to rethink and improve the procurement process at the local level for stronger cities, vibrant and growing businesses owned by people of color, and effective city governments that better serve residents.

II.
THE HISTORICAL & POLICY CONTEXT FOR EQUITABLE PROCUREMENT EFFORTS

It is important to remember that issues of racial equity and inclusion in public procurement do not happen in an historical, political, or social vacuum. Therefore, current efforts must be framed in the context of past legal, economic, and social challenges to form solutions that can begin to undo centuries-long legacy of active discrimination.

Governmental policy has long been a tool for disenfranchising minority groups, but it is also the most effective tool for the promotion of equity. As noted by Brion Oaks, Chief Equity Officer for the City of Austin, Texas, to the City Accelerator cohort: "Governments used policy to create inequality, so governments must also use policy to create equity." It can be seen from the timeline below that an arduous legal path was forged by African Americans to emerge from enslavement to citizens with full rights and liberties under the law.

First was Dred Scott v. Sanford, 60 U.S. 393 (1856), which denied the citizenship rights of African Americans; followed by the 13th and 14th amendments, which ended slavery and affirmed the right of citizenship by birth; the eventual overturning of "separate but equal" in Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) and the passing of Civil Rights laws in voting and housing. These laws laid the foundation for the modern era of economic equity and inclusion and are important legacies for those interested in equitable procurement. Though these laws and cases were in response to the circumstances of African Americans at the turn of the 20th century and beyond, diverse hiring requirements (the Philadelphia Plan) and "disadvantaged" business programs continue to benefit diverse communities and immigrant groups as well. In more recent years, case law has further defined the limits and boundaries of municipal and state efforts at inclusion, providing guidelines for the creation of programs that can be upheld constitutionally. For this reason, Croson and its progeny are particularly important for those seeking to develop government programs to address inequality in the marketplace. For more on the history of Civil Rights law in the United States, please see Appendix 2.



A SYSTEM BUILT ON DISENFRANCHISEMENT

1857	*Dred Scott v. John Sandford :* Supreme Court determination that African Americans were not citizens.
1865	13th Amendment of the U.S. Constitution ends slavery
1868	14th Amendment of the U.S. Constitution overrules *Dred Scott* and makes African Americans citizens
1896	*Plessy v. Ferguson* upholds segregation and establishes doctrine of "separate but equal"
1954	*Brown v. Board of Education* declares "separate but equal" doctrine unconstitutional
1964	Civil Rights Act
1965	Voting Rights Act
1965	President Johnson signs Executive Order 11246 establishing non-discrimination in hiring and employment
1968	Fair Housing Act, Dr. King's assassination and end of the classic Civil Rights Era
1969	The Philadelphia Plan sets mandatory goals for federal government contractors to hire people of color
1979	*Fullivlove v. Klutznick* affirms the federal Disadvantaged Business Enterprise (DBE) program
1982	Surface Transportation Assistance Act sets a goal for DBE participation in projects with federal funding
1989	*City of Richmond v Croson* places the **strict scrutiny** standard on state and local governments in remedial contracting programs
1995	*Adarand v. Pena* places the same requirements of state and local Governments on the Federal Government

THE LASTING IMPACT OF CROSON

Across the country in the mid-1970s to late 1980s race-conscious contracting programs had some success, but rigid quotas and program application fueled concerns regarding their constitutionality in lieu of the 14th Amendment's Equal Protection Clause. Firms that were not benefiting from the programs began to level the complaint that the same programs designed to promote equality were discriminatory in application against them. In Croson, the Supreme Court opined the need for a statistical finding of discrimination to establish a "compelling governmental interest" in remedying discrimination alongside the need to satisfy "strict scrutiny," the highest standard of review applied by the courts. What this standard means in practical terms for governments is that substantial statistical and **anecdotal** evidence must be provided that establishes the basis (or "factual predicate") for a race-conscious program, and that the results must be "narrowly tailored" to address the specific findings of disparity or underutilization by demographic and work category. General population data and evidence of broad "societal discrimination" -as opposed to specific data on the population of available ("ready, willing, and able") businesses and their experiences- is inadmissible and factored into the overturning of Richmond's program. More on the specifics of the Croson case and its various requirements may be found in Appendix 2.

Following the Croson decision, the City of Richmond, Va. was forced to discontinue its MWBE program, highlighting the urgency of adhering to the Croson standard. When programs are challenged and cannot withstand legal scrutiny, any program deemed unconstitutional will no longer be permitted to operate. Unlike some other programs, those under challenge are not permitted to simply resolve the portion of the program in question. Instead they must be completely dissolved, causing a jurisdiction to lose a critical tool in combating deep disparities and potentially undoing years of progress.

The federal government was brought under the same requirements six years later in Adarand v. Pena, 515 U.S. 200 (1995). Those were the last U.S. Supreme Court cases to opine on MBE programs, although the various U.S. Circuit Courts of Appeal have delivered numerous decisions which refined the execution of the Supreme Court holdings. Croson and its progeny, including Adarand (which placed strict scrutiny requirements from Croson on the Federal Government) have since given specificity to both the role of government in remedial contracting programs and the process by which this action remains constitutional. Part of this process involves careful consideration in crafting and adherence to decisions of the Federal Court of Appeals, which impact state and local policy.

STATE AND LOCAL PROCUREMENT POLICY

In addition to the legal precedent set by Croson and Adarand, cities maintain a level of autonomy in their procurement operations, with the authority to create their own policies at either the state or local levels. Policies promoting MBE participation must be constitutionally sound, and the most effective way that this can be achieved is through the commissioning of a legally defensible disparity study. Disparity studies are traditionally crafted through methodology established in Court rulings governing the affirmative action in procurement. This framework not only guides the method and process by which research is conducted, but also guides any subsequent policy and programmatic response. Policy traditionally outlines the authority to act; while regulations contain the process by which procurement takes place and provide any needed definition and clarity in grey areas.

Those areas that may require definition are: the parties responsible for procurement, the manner of procurement employed for different types of purchasing, where and how cities solicit for bids, how bids are opened, and where MBE programs fit within the overall organizational structure. Policies may also establish boards and often outline the certification bodies that will be recognized and accepted. Some states have very loose guidelines for procurement, while others leave no room to deviate from a strict state policy; even when city ordinances and state policies align, interpretation may vary. Governments often utilize the findings of their disparity research studies to assist in the crafting of their programs and definition of their policy goals. It is best practice when navigating state and local policy in either disparity research or the crafting of a race-conscious contracting program to carefully consider the guidance of the U.S. courts governing a particular jurisdiction. Where courts have opined on particular disparity study methodologies, a prudent approach would be to adhere to this local guidance. If the local courts are silent on certain issues, a safe course of action would be to defer to the national landscape and interpret as other courts have responded.

CHALLENGES IN TODAY'S PROCUREMENT LANDSCAPE

Governments can promote inclusion in the letting of contracts for millions of tax dollars' worth of goods and services. Developing frameworks and strategies that promote good procurement practice across the board assists with the implementation of both race-conscious and race-neutral procurement practices by opening the door to newer, smaller, younger, and lesser-known firms. This is an inherent benefit to firms owned by people of color, which tend to operate outside of the networks commonly approached for public contracting. In addition, the first step to confronting the discrimination that MBEs continue to face from both individual actors and the private market, as well as their reduced access to business financing, capital, and bonding, is to ensure that the barriers facing small businesses more generally are reduced in the everyday procurement practices of governments.

Firms that are well-known in a community and active in government contracting have relationships that are fortified over time by government agents, who sometimes lean on these pre-established relationships out of comfort and convenience. Commonly referred to as the "Good Ole Boys" club, an informal network of incumbent firms may be awarded work without bid, receive renewals on contracts without competition, get first choice for use on discretionary spending areas, or receive advance notice of when a project will be released. In addition, even well-intentioned procurement professionals may unconsciously participate in discriminatory practices due to a risk-averse culture that favors going with a known entity rather than taking a risk on a new firm. Furthermore, firms with established relationships often keep similar arrangements with subcontractors whom they regularly engage, preventing new entrants from obtaining access either as subcontractors or prime contractors.

From the municipal perspective, these issues often result from a lack of uniform leadership, ambiguous or conflicting policies, unnecessary or antiquated procedural rules, a risk-averse bureaucratic structure, lack of resources, staff shortages, limited training on effective administration of contracts, and fragmented processes. Government employees, often lacking guidance on effective administration of MWBE programs and the cross-departmental teamwork these programs require, can be lulled into remaining in their comfort zone of working with the same firms over and over.

CITY SPOTLIGHT: MILWAUKEE, WI

- Population: 595,000
- Mayor-Council
- Annual Municipal Procurement Budget for FY17-18: Approximately $400M
- Race-Neutral Program

Behind the leadership of Mayor Tom Barrett, the City has demonstrated a commitment to leveraging City services to positively influence racial equity. The Mayor, Common Council, and stakeholders saw the City Accelerator as a way to unify the city's approach to inclusion, create measurable economic impact for its residents, and propel the City forward on its path towards a more inclusive Milwaukee. Despite not having a legally defensible disparity study to support aggressive race-conscious programming, the City of Milwaukee worked through the City Accelerator on ways to use race-neutral strategies to better understand, connect with and engage local small and minority businesses.

The biggest challenge to utilizing procurement to meet this objective was identifying potential businesses and increasing the growth of identified **Small Business Enterprise (SBE)** firms to ensure they are ready to perform on contract opportunities. Milwaukee also focused on increasing the number of available certified firms in professional services, an area which was found to be especially underrepresented by SBEs.

Beginning by collecting anecdotal data to help understand their business community and define the problems, the City partnered with the African American Chamber of Commerce and other community stakeholders to survey roughly 130 business owners to better understand the challenges they face in contracting with the City and to growth. Stakeholders and business owners were also engaged in the conversation through Small Business Enterprise (SBE) information sessions, business networking, an ongoing stakeholder group, lunch and learns, and community input.

Using the data gathered from community engagement, the team developed a capacity building strategy to help better identify, understand and service small and diverse firms. First, the City worked to re-brand its inclusion efforts to communicate the benefits of City certification. The team instituted a City-wide buying plan to address the most common reasons identified by businesses for not bidding with the City: a lack of awareness of contract opportunities or did not know how to access bid information. The Office of Small Business Development and African-American Chamber of Commerce worked together with other local diverse business chambers to ensure the Buying Plan is front and center at business development events.

Also, a gap analysis was performed to help the City identify SBE vendors who they were previously unaware were contracting in the region. This analysis compared Minority Business Enterprise (MBE) and Emerging Business Enterprise (EBE) certification lists from other public entities to help identify businesses that were certified or doing business with other agencies, but not with the City. Milwaukee used this analysis to target businesses, rather than just casting a wide net for more, and hosted a mixer event for those businesses and key city staff.

In engineering a shift in culture, the city is engaging employees from different departments to identify innovative opportunities to creatively leverage procurement for more inclusive economic opportunities. The City Accelerator team convened a group of key city purchasing staff to share the goals of the Accelerator and work on ways to make contracting opportunities and the contracting process easier and more accessible for the businesses they seek to reach.

LESSON LEARNED:

More equitable procurement results when we make the process friendlier for those outside government and make inclusion an easier lift for those inside government.

III.
DISPARITY STUDIES AND THEIR UTILITY

The first step in developing a truly inclusive procurement process is to ground the work in research and develop a narrowly-crafted policy response, after which, programs, training, and resource allocation can be created and adjusted to meet equitable procurement goals. Disparity studies are the foundation of any legally defensible race-conscious strategy. These studies are not only required for underpinning any race-conscious program strategy, but provide a wealth of information and analysis that can help a city design their overall strategies. However, disparity studies are often misunderstood in terms of the purpose for conducting them, the process by which they are enacted, and what they permit a jurisdiction to do.

A disparity study is a tool to determine if a governmental entity is either active or passively engaged in discrimination, or if MWBE firms within that jurisdiction continue to suffer from past discrimination. This analysis establishes availability ("ready, willing and able") of MWBEs, measures the presence of diversity in procurements, and determines to what levels diversity exists. A disparity study also provides the tools to respond to the "narrow tailoring" requirement set out in the Croson case. When performed correctly and depending on the outcome, this tool may establish a compelling governmental interest for remediation to allow race-conscious remedial programming. Traditionally, disparity studies include recommendations on whether the study supports the use of race-conscious elements, and if so, how to proceed with program implementation and which elements should be included based on the findings.

FREQUENTLY ASKED QUESTIONS ABOUT DISPARITY STUDIES

What is a disparity study and what is its purpose?

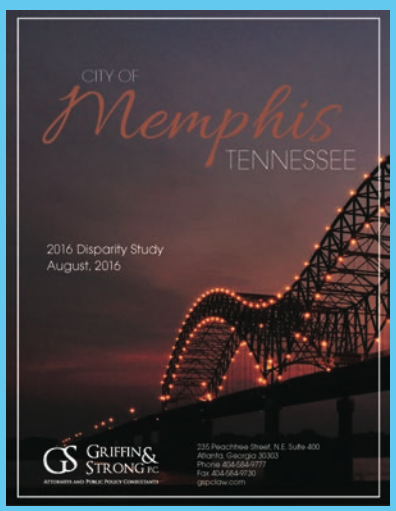
Though Croson did not give definition as to how "compelling governmental interest" is established, subsequent case law helped to refine methodological approaches. Disparity studies are a creation of the courts to determine whether there is a factual basis for a race- and/or gender-based program and whether any race- and/or gender-based program is narrowly tailored to that factual basis. The methodology for conducting a disparity study is very particularized and established by legal precedence starting with the Croson case, honed by various U.S. federal courts.

In addition, the courts have been clear that any remedial program cannot continue indefinitely, with Croson requiring a program sunset. Industry-based recommendations are that a new analysis should be conducted every 5-7 years to avoid making programmatic decisions based on stale data. Consultants with expertise in this area can lead city staff through the necessary methodologies to get to an informative and legally defensible disparity study. More on the tenets of Croson and its methodological requirements for studies can be found in Appendix 2.

DISPARITY STUDIES IN ACTION

The city of Charlotte used their 2017 Disparity Study to identify areas of ongoing disparities in contracting and then used the analysis to work backwards through its policies to find ways to increase opportunities for MBE firms in contracting. After preliminary analysis, they evaluated ways to expand the Charlotte Business Inclusion ("CBI") program, including the utility of a race-neutral Sheltered Market program, strengthening their **Good Faith Efforts** ("GFE") review process and identifying diverse participation opportunities in their **alternative delivery contracting methods** (CMARs and Design Build).

In **Memphis**, they have used their 2016 Disparity Study as a guide for improving their contracting process, with MWBE contracting reported up nearly 60 percent since completion of the study. The city was also able to identify delays in their payment process and barriers created by risk management as two areas that were preventing MBE growth. During the City Accelerator, they were successful in piloting a new prompt payment program to address these concerns.



Do disparity studies also gather responses from Non-MBE contractors?

MWBE initiatives get most of the attention at the rollout phase of disparity studies, but these studies are not designed solely for firms owned by people of color. The analysis includes both MWBE firms and non-MWBE firms, and the feedback gathered from these studies may help inform policy decisions that impact businesses of various sizes and backgrounds (including small and local firms). With the Croson requirement that race-neutral remedies be considered, a firm sense of the businesses that are truly available for city contracts is established in a way that can guide goal setting and establish a baseline for measuring inclusive contracting efforts.

What is the "Relevant Market" area?

The **relevant market**, which defines the geographic area of the study, is not a subjective or predetermined market area. Borrowing principles from antitrust law, the relevant market has been established by the location of 75-85 percent of the qualified vendors that service a work category. This is a critical analysis, because, along with product markets, it defines the geographic parameters of firms that will be considered in the study analysis.

Some disparity study RFPs[13] have mistakenly limited the scope of inquiry only to an evaluation of their program and its current participants. This is somewhat like studying the effects of a flu virus by studying only people who have taken the flu vaccine. Limiting research to a current program or program area restricts the city from determining whether there were changes in the relevant market, new entrants into the market area/business community, or a shift in the geographic region which would provide the municipality more options for crafting a program.

[13] Requests For Proposals ("RFP") is a document that solicits a proposal, often made through a bidding process

How is availability determined?

Although the Croson decision determined what was needed for a factual predicate, it did not detail acceptable methodologies, so that has been left largely to the various U.S. Circuit Courts of Appeal. The outcome has been that, although there is no one way to conduct a disparity study, two court-supported methodologies for establishing availability have emerged: the Custom Census and list-based methodologies.

The Custom Census approach uses Dun and Bradstreet's Hoover (D&B) data to identify available vendors in the geographic and product markets and then verifies the D&B data. Variations on this method conduct telephone surveys of the D&B list and limit available firms to only those from that list who were available to perform on each contract during the study period.

- **Benefits:**
  The Custom Census methodology offers the ability to do a snapshot of vendor capacity, including looking at firm revenue and providing current **commodity codes** for vendors; the data is generally cleaner and does not require as intensive an effort from the consultant in data clean up; can be good for establishing overall aspirational goals.

- **Drawbacks:**
  1. D&B data has historically undercounted small, minority, and women owned firms who may be less likely to register with them.
  2. Vendors located in the D&B database may not have indicated a willingness to do business with government as required by Croson. This may be rectified by surveying the firms.
  3. D&B data relies heavily on self-reported ethnic and gender identities, potentially misrepresenting their actual MWBE status.
  4. Custom Census and other inferential methodologies may be missing relevant data sources such as the current vendors and bidders that the government entity is already using.
  5. This method also requires the consultant to survey firms to confirm information since much of it may be unreliable.
  6. Because of the large quantity of vendors in D&B database, consultants rely on sampling methodologies and adjust for the margin of error.
  7. In the variations of "Custom Census," using a list that has only firms that are from D&B and that are further limited as only those that could have actually performed on a contract during the Study period artificially reduces the number of firms to be included in the analysis and cannot be used for goal setting purposes.

The List-based methodology uses the government entity's own bidder, vendor, subcontractors (if available), certified, awardee, and other internal lists, along with government lists from other entities in the region, including third party certified or prequalified lists.

- **Benefits:** This methodology includes firms who have expressed interest in doing business with government and have taken steps to do so. All of these firms can be utilized to determine goals and provide outreach and supportive services.

- **Drawbacks:**
  1. The list-based methodology is much more labor intensive, requiring significant data management.
  2. Lists must be reconciled to each other to fill missing data related to names, ethnicities, contact information, or work categories.
  3. For purposes of contract-by-contract goals, firms would all have to be assigned one consistent set of work code identifiers.
  4. The List-based methodology would need to be supplemented with additional data sources, such as annual firm revenues or bonding limits, for the purposes of determining capacity.

A Combined Approach of both "Custom Census" and "List-Based" may be preferred. Although it still involves more work in combining various lists, it will include a much larger data set of firms that can be surveyed and verified and eliminates most of the drawbacks of each methodology.

Why is anecdotal research included and how is it conducted?

Some may discount anecdotal evidence as simply an individual's opinion, but the Croson court has held anecdotal evidence as critical to establishing the compelling governmental interest. Not only is anecdotal research a key part of a defensible disparity study from a legal standpoint, it is also crucial to support **quantitative** analysis and to assist in identifying problems and potential solutions in the procurement process. It is important to note that the inclusion of "particularized anecdotal accounts" of discrimination require the re-telling of personal experiences but are not required to be corroborated by quantitative analysis. Most disparity researchers, however, find ways to marry the two through robust **qualitative data** collection methodologies and careful analysis alongside the study's quantitative analysis. To accomplish this, a multifaceted qualitative methodology should be employed with consideration given to several factors. Considering each community's unique complexities and internal heterogeneity, the data gathered from taking a more anthropological and immersive approach can (and should) inform factors such as: (1) the methods of preferred outreach, (2) the times and locations most advantageous for community engagement, and (3) the best time to engage in outreach. Anecdotal research for disparity studies may include a combination of the following:

- **Community Engagement/Informational Meetings** designed to bring awareness to the study process and galvanize participation.
- **Public Hearings** that are open to the public for providing testimony about past experiences on the record.
- **Organizational Meetings** with community organizations to both engage their membership and gather their perspectives on business opportunity.
- **Focus Groups** with representatives from the business community chosen at random to provide feedback in small group sessions.
- **Anecdotal Interviews** – one-on-one interviews with business owners chosen at random to preserve representation.
- **Email/Social Media Outreach** for individuals who may be unable to attend community meetings or have a discomfort for public speaking.

Furthermore, in attempting to reach diverse business communities and individuals of different cultures and backgrounds, a level of intentionality must be made to promote culturally competent methods of engagement by considering the methods and mediums of communication (diverse media outlets, social media), and translation of documents or translators hired for events and meetings. As in quantitative analysis researchers should engage non-MBE businesses alongside diverse businesses to get perspectives on the business marketplace and their experiences as well.

To promote representation in anecdotal collection, city staff may assist by identifying relevant community stakeholders, giving a platform to business startups, small, local, or diverse firms who otherwise may not be actively engaged in government contracting. These organizations are often the gatekeepers to a wealth of information about the business community that is relevant for analysis. These communities can be engaged through soliciting feedback from local business, trade, and civic organizations, ethnic business groups, religious communities, and locally-known community organizers and activist associations.

What happens if study results are "bad"?

If disparities are found, this provides policymakers with a tool to aggressively address an area where their community is experiencing discrimination. This is not particularly a finding that the current administration is discriminatory, but that because of the history of discrimination, there are still present effects of discrimination. It is likely that the local MWBE community already anticipates what the findings of the study will be. It will reflect negatively on an administration only if it refuses to acknowledge the disparate outcomes instead of charting a way forward to change the current environment.

IV.
THE FUNDAMENTALS OF CONTRACT COMPLIANCE

To maximize participation of diverse business owners, government leaders' focus should be on creating an environment for active compliance, learning and educating staff on the discipline of Contract Compliance that has emerged in response to the unique process requirements of equitable procurement. Equal parts science and art, contract compliance is defined by an adherence to both research and law, and creativity in their applicability to the environment of a government entity. A concentration on the pillars of assessment, outreach, certification, verification, procurement and monitoring make contract compliance by far the most effective tool for embedding racial equity in the procurement process.

Though it may be most attractive to jump directly into innovation in procurement reform, innovation without the foundational tools will be ineffective. Contract Compliance as a field represents effective best practices which, when properly employed, will have a considerable impact on cities' procurement inclusion efforts. How does one take equity from rhetoric to realization? Beyond the foundational steps of developing a contract compliance office or MBE program through policy and allocating it with the appropriate resources – all functions of the legislative process – there are several crucial components that must be understood to ensure a program's effectiveness. The five race-neutral tools below are commonly referred to as the "Science of Compliance," and served as essential strategies for the City Accelerator. Each of these broad fundamentals will be revisited in their application to the more specific program tools reviewed in Section VI.

5 KEY STEPS TO COMPLIANCE

ASSESSMENT | OUTREACH | CERTIFICATION & VERIFICATION | PROCUREMENT | MONITORING

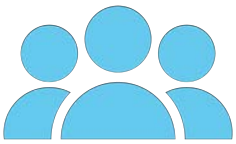
5 KEY STEPS TO COMPLIANCE:
ASSESSMENT

An initial assessment of MBE availability and capacity should be performed to determine what firms are actively capable of performing the required scope of services, as well as the of impact current laws on diverse participation in the procurement process. Based on an analysis of existing laws, ordinances, policies and procedures, cities can first determine the legal basis of a compliance program, and how to apply it most effectively. Once governments know what is allowable legally, a fundamental aspect of a disparity study, they may work closely with the consultants/researchers to identify and engage stakeholders, determine compliance goals and objectives, and develop a strategic plan to implement supplier diversity objectives. As part of the assessment process, cities (or designated consultants) should carry out the following tasks:

1. Conduct an availability analysis or disparity study
2. Conduct a legal review of their purchasing policies and practices;
3. Conduct interviews with the appropriate procurement staff;
4. Conduct interviews with the local contracting community;
5. Produce a comprehensive plan for inclusion and compliance.

Another consideration of the assessment phase is the assessment of available stakeholders and resources that can partner to build the availability and capacity of diverse businesses. This may include working alongside anchor institutions, other local organizations such as business incubators, and ethnic chambers to help build technical skill and capacity. A legally defensible disparity study should provide an entity with the majority of these individual components, and careful consideration should be given to the qualifications, expertise, and scientific rigor of disparity researchers. In the event that there is a finding of discrimination significant enough to warrant a remedial contracting program, thought should also be given to ensuring that the researchers or consultants are skilled in building and implementing effective programs.

5 KEY STEPS TO COMPLIANCE:
OUTREACH



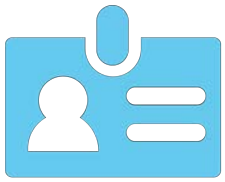
A critical aspect of outreach is the identification and engagement of MBE firms with the desire, technical knowledge and financial capability to provide services. From the efforts of the Assessment phase, cities should establish a comprehensive database of diverse firms capable of performing on every facet of the project. Outreach involves two critical components: 1) from the municipality to potential vendors; and 2) from vendors to potential partners/subcontractors. When supported by a comprehensive outreach strategy, vendors can prepare to bid and team with other firms, which helps to build their capacity.

Associated contracting opportunities should be communicated by the public entity to the contracting community through contract forecasting, workshops and seminars, community newsletters and information meetings with trade groups and other minority business organizations. Business profile information can also be used to continue the growth of a diverse vendor database and assist in the facilitation of networking between MBE firms and non-MBE firms looking to share their technical capability and resources.

While small businesses are critical to any city's local economy, small businesses that scale into larger more robust businesses create lasting impact. As a component of the outreach strategy, technical assistance and supportive services should be offered to help scale businesses. During vendor outreach, all vendors may not be ready to compete on city contracts, but cities can assess vendor needs through outreach and identify new entrants that are prepared to scale. Through uniform vendor registration processes, reciprocal certifications (discussed below in Certification/Verification) and cultivating relationships with civic and trade organizations like the local trade unions, local and ethnic chambers of commerce, or the local Minority Supplier Development Council (MSDC), cities can also identify and recruit new businesses into the vendor pool. In creating a more expansive and better qualified pool of prospective bidders, cities can help to promote competitive pricing and lower costs.

The City of Baltimore has taken a unique approach to using public data from the state Department of Assessment and Taxation to help identify businesses for outreach. Using a unique approach, the City's Office of Small, Minority and Women-Owned Business Development Baltimore proposed purchasing this data, which is often provided to third parties who use the information to send mail and other types of solicitations to business owners. After getting approval from the state, the City was able to buy data from Info USA. They then supplemented this with data from Dun and Bradstreet and other sources to verify business performance and operation. The city then uses this data for outreach, making direct contact with business owners to inquire about their interest in getting involved in government contracting.

5 KEY STEPS TO COMPLIANCE:
CERTIFICATION & VERIFICATION

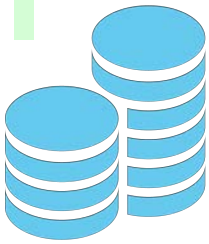


This component requires governments to verify the legitimacy of MBE firms interested in bidding on scopes of work. Through a strong certification process, including conducting site and office visits, cities can verify the race or ethnicity of firms to avoid fraudulent behavior in their diverse contracting programs. Cities are then also equipped to determine the level of technical competence, capacity, financial assistance requirements, training needs and general business acumen for each prospective MBE firm. In meeting local, state and federal regulations, firms should be required to provide documentation of their MBE status as contractors or suppliers.

Certification is a critical component of any well-run MBE program, which allows accurate data to be captured on the available vendor pool and utilization. Strong certification processes include thorough documentation and a verification component conducted with desk audits, site visits, and **"commercially useful function"** reviews (i.e., determining whether a proposed subcontractor is providing actual services of value to the government project). These measures protect against certification fraud, such as business "fronts," or Non-MBE vendors falsely portraying themselves as a member of a qualifying group to gain access to remedial contracting goals. Similarly, "pass-throughs" are MBE firms who team with Non-MBEs to meet the goals, but do not perform a commercially useful function on the job site or are paid to not perform. For practitioners, the lack of a vigorous certification process skews the data and, ultimately, the goals, making governments unaware of who is available and who has the capacity to perform on an opportunity.

Finally, some cities contract out the certification component to third parties to alleviate the administrative burden on municipal operation; however, cities must be careful that the paid incentive for third party certification does not reduce the rigor, integrity, or accessibility of the process. Cities may also look to establish reciprocal certification programs with other municipal agents who have a strong certification program to reduce the barriers to paperwork and financial investment in the certification process.

5 KEY STEPS TO COMPLIANCE:
PROCUREMENT



Throughout the procurement process, efforts should be made to maximize the participation of businesses owned by people of color. It is in these decisions where their direct involvement in the contracting process is determined and the decisions are made by government agents. Governments should carefully consider development of bid packages to ensure that each one supports maximum opportunities for MBE participation, either through direct contracting possibilities or other alternatives such as subcontractor, supplier, joint venture, or mentor-protégé participation. To do this, procurement personnel in consultation with contract compliance staff can evaluate methods such as breaking apart large contracts to create more opportunity for small and diverse firms.

All bids, solicitations and contract documents should be evaluated by procurement and compliance personnel to ensure that proper language emphasizing MBE participation is included. As a part of their bid submission, prime contractors should be required to include an MBE Utilization Plan identifying the name, address, scope of services, and proposed subcontract award amount for prospective MBE firms capable of carrying out the components of their total scope of work. In addition, Non-MBE bidders should be encouraged to provide outreach programs, technical assistance, and "mentoring" supportive of the project MBE objectives. Cities should be careful to protect the integrity of the bid process, exploring methods such as submission of MBE contract documents and GFE documents alongside the bid submission to avoid collusion or “bid shopping”.

The local vendor community, including all suppliers, trade associations and MBE business organizations should be provided with periodic updates on the status and timing of bid packages 60 - 90 days in advance (at minimum) of requested receipt of bid. This can be updated alongside the City’s forecasting process, affording vendors more information closer to the bid date.

Upon receipt of the bids, municipal contract compliance teams or MBE program personnel should be employed to review the proposed participation of the apparent winning bidder to ensure that the bidder made GFE in meeting any established contract or project MBE goals. Cities may also include scoring components that encourage, and measure proposed MBE utilization.

5 KEY STEPS TO COMPLIANCE:
MONITORING

The Monitoring phase begins after a contract has been awarded, during the actual administration of the contract. This must be an ongoing aspect of compliance service efforts. City compliance staff should monitor each contract to ensure that prime contractors and subcontractors are in compliance with the regulations and goals set forth as a part of the MBE compliance program and their contract award. Additionally, it is essential that monitoring techniques be employed to verify that MBE firms are performing the work that they have been contracted to perform and are adequately compensated, and in a timely manner. This can be ensured through:

- One-on-one interviews with MBE firms to determine the status of their work on the job;
- Implementation of prompt payment procedures designed to increase MBE cash flow;
- Collection of monthly payment progress reports submitted by each contractor and;
- Regular tracking of Affidavits of Payments required to be certified each month by any MBE firms that receive payment for work performed.

In addressing this work with intentionality, it should be the goal of any city to support MBE firms and identify discriminatory or adverse barriers to obtaining and performing on government contracts. By having compliance staff regularly interview and meet with the project management team, MBEs, Non-Minority contractors, and other vendors on the job site, potential areas of dispute can be identified and mediated peaceably before problems arise. Participation status and contract progress will then be tracked more effectively, with relevant and verifiable data that can be analyzed and communicated to stakeholders. Cities should be careful to invest in compliance staff who have the tools, training and resources to perform proper monitoring functions, complete with regular site visits.

Even though cities engage in compliance, it can be done passively without full attention to detail. In jurisdictions that lack active compliance and monitoring, it is not unusual to hear of issues of MWBE subcontractors being inspected in a discriminatory manner, being harassed, or being replaced by other contractors the prime vendor prefers to work with. Without oversight, cities may confront more issues of business fronts and pass-throughs.

In this cohort, the City of Chicago gave substantial attention to contract compliance. One of Chicago's Procurement Reform Task Force recommendations involved an evaluation of the feasibility of a joint compliance function, where individual public agencies (e.g., the City of Chicago, the Chicago Public School, the Chicago Housing Authority, etc.) would not be responsible for doing compliance on their own projects. A division for compliance would be responsible for job site compliance, an approach that can be strengthened by working in concert with the City Planning Department to identify and map active job sites using GIS software.

CITY SPOTLIGHT: CHICAGO, IL

- Population: 2.7 Million
- Mayor-Council Government
- Annual Municipal Procurement Spend: $2.5 billion
- Race-Conscious Program

Recognizing that everybody wins when public procurement is more inclusive, uniform, efficient, and accountable, the City of Chicago, under the leadership of Mayor Rahm Emanuel, took a leadership role both within their region and the across the nation in advancing procurement reform. Keeping the priorities of uniformity, efficiency and transparency at the forefront, the City has been working to address the recommendations put forth by the 2015 Procurement Reform Task Force (PRTF), a collaborative effort of the City and six sister agencies: Chicago Housing Authority, Chicago Park District, Chicago Public Schools, Chicago Transit Authority, City Colleges of Chicago and the Public Building Commission.

The PRTF, Co-chaired by the City's Chief Procurement Officer and its Inspector General, issued 31 Immediate, Mid-Term and Long-Term Recommendations that touched on a wide range of procurement, certification and compliance areas. Diversifying the makeup of businesses that bid on City contracts by lowering barriers to entry is just as critical to the PRTF as streamlining purchasing processes.

Through the City Accelerator, the City's Department of Procurement Services partnered with Chicago Anchors for a Strong Economy (CASE) to tackle the more challenging, long-term recommendations of the Task Force. CASE, a public-private-nonprofit partnership aligned with the vision of procurement as a tool for economic development, has been a strong partner to the City in analyzing new opportunities for more equitable procurement.

One area of analysis conducted was to reduce the burden on diverse businesses seeking contracts by advancing a universal procurement system for public agencies in the region and creating greater alignment across these systems. Working across seven procurement systems with different policies, procedures and needs requires painstaking efforts to understand and catalog existing efforts to look for opportunities for convergence, but the City has made significant progress. By the end of 2018, the City had taken several interim steps towards a universal procurement system, issuing an RFP for a common compliance and certification system and aggregating open bid opportunities in support of the creation of an Open Data Portal. The City also gathered agency requirements for economic disclosure statements to assess whether there could be a common disclosure for all sister agencies, streamlining the process for businesses seeking contracts.

An in-depth analysis also revealed that the partner agencies have a portion of their contracts that could be managed by another agency to make it easier for vendors or contractors of a particular type (e.g., landscapers or office supply vendors) to learn one system and develop one set of relationships to gain access to contracts for all of the participating agencies.

At the same time, the City and sister agencies discovered that some ideas, such as joint MWBE compliance teams and efforts to reduce risk shifting, turned out to be quite challenging across multiple agencies with different statutory requirements. The City will continue to explore more modest or incremental approaches to make compliance more effective and efficient and reduce the bonding/insurance burden on contractors.

LESSON LEARNED:

City governments can be leaders and catalysts, but are only one piece of the procurement landscape. Through partnerships with sister agencies and anchor institutions, cities can dramatically expand the contracting opportunities for diverse vendors and contractors in the region.

V.
IMPLEMENTATION OF EQUITABLE PROCUREMENT PROGRAMS

Known nationally as "contract compliance," the field of equitable procurement has accumulated a wealth of best practices that can be tapped by cities interested in procurement reform or in developing a dedicated contract compliance team to assist procurement. Creating or strengthening an inclusive procurement program requires strong leadership to mobilize support for the policy, program, budget, and cultural changes necessary to impact outcomes. Regardless of whether cities choose (or are able) to implement a race-conscious contracting program, there are steps that can be taken for effective implementation that incorporate the five pillars above and provide a strong foundation for a more inclusive procurement landscape. This guide will review both race-neutral and race-conscious tools that can be employed prior to release of the bid, during the preparation for the bid, during the procurement process, and during the active compliance and administration of the contract after it has been awarded.

Race-neutral programs are not subject to the Croson analysis of "strict scrutiny," but are analyzed constitutionally using the "**rational basis test**," which seeks to determine whether a law is rationally related to a legitimate government interest. . Race- and gender-neutral programs are often an effective tool for positively impacting both SBE and MWBE participation. In fact, Croson requires that race-neutral remedies be strongly considered before employing race-conscious remedies.

RACE- CONSCIOUS PROGRAMS

Race-conscious programs, focused on subcontracting, are subject to the Croson standard and require that the government meet the strict scrutiny constitutional standard.

The Federal Disadvantaged Business Enterprise ("DBE") Programs

The Federal Disadvantaged Business Enterprise Program was established after the passage of the decision of the United States Supreme Court in Adarand which required that the federal government adhere to the same constitutional standard required of local governments in the Croson case. Codified in CFR 49 Part 23 and 26, the federal DBE program is applied to any procurement, state, local or federal, Non-MBE groups.

Most DBE procurement is administered on the local level by state Departments of Transportation or county and municipal Public Works departments. The program is administered in accordance with a DBE program plan and goals are set based on DBE availability, which is different from MWBE availability.

Airport Concessions Disadvantaged Business Enterprise ("ACDBE")

A component of the Federal DBE program, is the Airport Concessions Disadvantaged Business program which guides the participation of concessionaires in airports which receive federal funds. The ACDBE program, codified in 49 U.S.C. 47107(e), requires utilization of diverse firms in federal airport procurement.

This program has been especially impactful in building DBE capacity in airport expansion and concessions work.

The Federal 8(a) Program

The 8(a) Business Development Program is a business assistance program for small disadvantaged businesses. The 8(a) Program offers a broad scope of assistance to firms that are owned and controlled at least 51 percent by socially and economically disadvantaged individuals.

The 8(a) Program is an essential instrument for helping socially and economically disadvantaged entrepreneurs gain access to the economic mainstream of American society. The programs assist thousands of aspiring entrepreneurs to gain a foothold in government contracting.

The focus of the program is to provide business development support including:

- Mentoring
- Procurement assistance
- Business counseling
- Training
- Financial assistance
- Surety bonding
- Other management and technical assistance participation in the program is divided into two phases over nine years: a four-year developmental stage and a five-year transition stage.

MWBE Programs

Administered on the state and local level, these programs are designed to build, support and connect MWBEs to opportunity. These initiatives use contracting to encourage MBE participation through subcontracting.

Before employing race-conscious approaches to increasing MBE participation, government leaders should remember that any procurement decision based on race is subject to strict scrutiny. This determination means that the appropriate, legally-defensible factual predicate must be established prior to taking race into consideration in the decision-making process. Most pre-bid approaches are not subject to strict scrutiny, but participation goals, enforceable GFE processes and some joint venture arrangements may be. Race-conscious procurement programs at the state and local level are frequently focused on subcontracting opportunities (as opposed to prime contractor opportunities), but joint venture requirements and bid preferences, coupled with supportive services and needs assessments, can boost prime contract procurement opportunities for diverse firms.

Finally, while all cities deal with similar issues in contracting and economic development, there are unique circumstances from one jurisdiction to another that impact which set of tools the city should employ. For example, the same approach taken in Memphis, which has developed a race-conscious program, may not work in Los Angeles' race-neutral environment. Best practices are a good starting point, but rigorous analysis should be undertaken to understand how those practices could fit into – or be adapted for – a different local context. The chart below provides solutions and options for both race-conscious and race-neutral programs. Keep in mind that, in many cases, the best strategy for accomplishing a city's goals of leveraging procurement for inclusive economic opportunity involves a mixture of race-neutral and race-conscious components.

EFFECTIVE IMPLEMENTATION OF COMPLIANCE PROGRAMS

The following is a review of best practices in compliance programs, and the challenges to procurement that they address. The icons next to each identify which of the five fundamentals of contract compliance (reviewed in section IV) the tool addresses.

	PRE-BID	CONTRACT PROCUREMENT	CONTRACT ADMINISTRATION
Race Neutral	Contract Procurement Forecasting	Non-Discrimination Reviews	Contract Monitoring
	Vendor Outreach& Matchmaking	Streamlining the Bidding Process	
	Assessing the Needs of Diverse Businesses	Breaking Up Large Contracts	
	Technical Assistance Programs	Prompt Payment Programs	
	Financial Supportive Services	Rethinking Low-Bid Procurement	
	Joint Venture, Teaming & Mentor-Protégé Relationships	Sheltered Markets or Other Small, Micro, and Local Business Programs	
Race Conscious	Joint Venture, Teaming & Mentor-Protégé Relationships	Good Faith Efforts (race-conscious)	Contract Compliance and Monitoring
		Participation Goals	
		Evaluation Preferences	
		Minority Business Distributorship Programs	

This chart demonstrates generalities. Whether a program element is race neutral or race conscious may be in its administration. In other words, is a decision for award based upon race or gender.

1. CONTRACT PROCUREMENT FORECASTING

CHALLENGE:

Limited awareness of upcoming procurement opportunities; limited resources to devote to bidding with the City.

The forecasting process, while daunting, often begins from data which most municipalities already collect. Before a government issues items for bid, the budget process is traditionally used to anticipate the needs for the upcoming year. Part of that process should involve identification of projects and opportunities that will be bid and making them accessible to the public. This allows for all small and diverse firms to be made aware of this opportunity prior to it being released. This addresses one of the most common complaints in the contracting process: that MBE firms (and other firms outside of informal networks) are not made aware of contract opportunities. Contractors who have pre-established relationships with the City may be made privy to information about upcoming opportunities before the rest of the vendor community, placing them at a strategic advantage in preparing for the bid. The forecasting method allows procurement staff to account for communication gaps by providing this data to all firms simultaneously as a resource to guide their preparation.

Taking an equitable approach in contract forecasting involves aggregating the anticipated expenditures for the upcoming fiscal year, including bids set for expiration, contracts anticipated to be re-bid and large capital projects. For most cities, contract forecasting is an easy-to-implement step to help make procurement more equitable, since most already know and can anticipate the impending expenditures and soon-to-expire contracts. For small businesses, who often lack the human capital and financial capability to pursue every contract opportunity, forecasting gives them a more advantageous position in the competition by allowing them to strategically prepare for the opportunities they are most interested in and align their resources accordingly. For larger contracts, forecasting also will permit the MBE community the time to design teaming arrangements and joint ventures to increase their competitive profile.

The City of Chicago brought to the cohort one of the more comprehensive forecasting tools – their Quarterly Buying Plan – which they freely shared with the cohort. Behind the lead of then-Chief Procurement Officer, Jamie Rhee, the City took the initiative to start by compiling the expiring contracts which were going to be re-purchased, and from there began the effort of collecting additional contracting opportunities from City departments. What makes this approach unique, is that the City updates and re-releases its buying plan on a quarterly basis, allowing them to regularly add new procurements and give further detail to procurements that had been included in earlier forecasts. Several of our cohort cities have also initiated the use of their own buying plans, including the City of Milwaukee, the City of Charlotte, and the City of Memphis' county-wide procurement forecasting with its sister agencies: Shelby County school system, Memphis Gas Light and Water, Downtown Memphis Commission, EDGE (Memphis Economic Development Growth Engine) and the Shelby County government.

2. VENDOR OUTREACH MATCHMAKING

CHALLENGE:

Limited awareness of upcoming procurement opportunities. Discrimination or lack of relationships with non-MBE prime contractors, limiting opportunities to serve as sub-contractors.

Cities can actively recruit diverse vendors into the procurement process by communicating the benefits of certification and getting firms into vendor rotation. It is commonly stated that cities lack MBEs to compete in certain contract arenas, which leaves the government with no options for diversity. However, forecasting (described above) can serve as a foundation for cities to take a more aggressive stance in outreach, including communication, certification, partnerships with "assist agencies," and strategic matchmaking. Most of our cohort cities placed increased attention to their social media recruitment by using social media profiles for the City MWBE offices or procurement services to increase awareness of upcoming bids, recruit bidders, and promote upcoming outreach events and links to technical assistance programming. While many cities attempt to bring together prime and subcontractors for general outreach, it is rarely done around specific contract opportunities. With a strategic forecasting plan, procurement personnel may plan contract-specific outreach and tailored approaches to subcontractors with specific skill sets for certain work scopes. Unlike larger events, which can sometimes be overwhelming for business owners, smaller and more targeted outreach events facilitate more impactful conversation.

In Chicago, they have mobilized specialists to work inside the city departments where vendors apply for business licensing. Having them interface with the business community and using them to communicate the benefits of businesses registering as vendors and getting certified with the City. In addition to talking to them about the benefits, they also provide potential vendors with a copy of the quarterly buying plan to alert them to these potential opportunities.

The City of Los Angeles used their own unique spin on vendor outreach by hosting three outreach events, BuildWith (for construction), BuyWith (for goods and commodities) and TeamWith (for services) where they employed a variety of techniques to connect potential MBE vendors and primes. Los Angeles employed a cloud-based software to pre-match prime and subcontractors based on a series of matchmaking questions. This strategic matchmaking approach put these subs in front of primes in a more intimate setting, where they could discuss the upcoming contract opportunities, scopes, and subcontractor capabilities.

3. ASSESSING THE NEEDS OF DIVERSE BUSINESS

CHALLENGE:
Diverse firms may be available and in operation, but not prepared to compete for contract opportunities.

Prior to throwing new vendors into the procurement process, best practice is a preliminary assessment to help determine the vendor capacity to participate in the city contracting process. If firms are not ready for competition, this assessment should begin the effort for supportive services provision, to help identify what would be the most effective tool in building the ability to compete. Establishing vendor capacity on the front end, and supporting them to increase capacity, alleviates concerns about the ability of firms to perform once they are in the contracting sphere.

As previously mentioned, the City of Milwaukee used a needs assessment as a component of their vendor survey process. This helped them to identify specific areas in which vendors needed technical assistance to incorporate into their vendor outreach strategy.

4. TECHNICAL ASSISTANCE PROGRAMS

CHALLENGE:

Smaller businesses may need additional business coaching and preparation to compete aggressively on contracts.

Critical to the expansion of the number of MBE firms available to perform on projects, technical assistance with business operations may also help firms that have the trade skills to perform jobs to manage their back office and successfully compete for contracts. From estimation and bid preparation, to navigating teaming arrangements, bonding and insurances, there are several areas of technical knowledge which directly impact the ability of MBE firms to compete. Cities are now looking to provide more proactive coursework to help educate the MBE community in these areas.

It is best practice for cities to provide some technical assistance directly, but also ensure access to online courses for increased impact and efficiency in service delivery. Chicago's online technical assistance courses are available through the Department of Procurement Services website, and are made to engage MBE vendors, after they have gone through registration and certification, on the next steps they should take to get involved in competitive bidding, build their technical capacity, and grow their firms. This is in addition to a workshop roster of nearly 20 different classes, that are taught monthly or quarterly, free of charge to the vendor community. Chicago has implemented a YouTube channel which livestreams these workshops to ensure that the content is widely available.

In Charlotte, the Streetwise MBA program through Interise was launched in conjunction with their upcoming award of the 2019 NBA All Star game. This cohort of 17 local, small and minority business owners will participate in technical business improvement courses to increase their ability to compete, grow and scale.

The Memphis team focused on using technical assistance programming to alleviate stressors on another MBE growth barrier: bonding capacity. By bringing in a financial services consultant, the City of Memphis believed that helping MBE vendors improve their back-office function and financial organization would positively impact the ability for MBEs to access and increase their bonding capacity, which will hopefully lead to their ability to win more contracts.

5. FINANCIAL SUPPORTIVE SERVICES

CHALLENGE:

Smaller businesses may have the needed technical capacity for a contract, but more limited back-office capacity. Limited access to insurance/bonding at required levels.

Depending on the business growth identified in the research study or needs assessment, services should be strategically provided to aid in the financial side of business development. Components such as prompt payment programs, low-interest loan programs to assist with cash flow, bonding/insurance programs to promote growth and scale, and other supportive mechanisms such as technical equipment programs are examples of services designed to support MBE performance.

Bonding and insurance are often cited as a barrier to MBE participation due to the size and financing limitations that many MBE firms experience. In a City's desire to protect its interests and manage risk, it often places small and emerging diverse firms at a competitive disadvantage. Insurance requirements can be very costly and bid and surety bonds are often held by municipalities, adding to the challenge for MBEs. In addition, many vendors feel that the insurance thresholds are unnecessarily high for the value of the contracts or types of work, and some MBE firms choose to exclude themselves from bidding if the contract risk outweighs the contract value.

To combat this, cities often create programs directly designed to help firms prepare to compete. Best practices in bonding and insurance programs across the nation include:

Constructing bonding assistance programs to help vendors increase bond access by providing services like back office support, consultation and education. The City of Los Angeles' bonding assistance program provides these services along with project management support. The Dormitory Authority of the State of New York (DASNY) offers financing as a conduit issuer for projects including tax-exempt or taxable bonds, Fixed or variable rate bonds and private placements or public offerings;

Using Owner Controlled Insurance Programs ("OCIPs") and Contractor Controlled Insurance Programs ("CCIPs") involve issuance of umbrella insurance policies that contractors can opt in for short term coverage on a project specific basis. These types of programs help to reduce insurance costs and may provide higher limits and access to contracts for contractors who otherwise may not have qualified. Similar programs have been used by The City of Atlanta and Hartsfield-Jackson International Airport. In San Francisco, the City Risk Management and Controller's office convened an OCIP Working Group providing recommendations on OCIP implementation, program design, and general policy. While OCIPs are highly complex and technical, The San Francisco group found that OCIPs helped to limit risk of higher project losses and provide upfront cost certainty and promoted efficiency by having all insurance functions streamlined through a single risk management body.

Exercising more discretion in the application of bonding and insurances to help take on some of the risk traditionally passed to its contractors.

Cities may also explore areas where they place unnecessary stress on vendors by holding their bonds and deposits past the date of the project conclusion, and strategically identify areas within procurement where they can use policy to waive bonding and insurances altogether. Furthermore, cities should review contract language and subcontractor agreements to ensure the prime contractor's risk is not being passed to subcontractors for only portions of the project scope.

6. JOINT VENTURE, TEAMING AND MENTOR-PROTÉGÉ RELATIONSHIPS

CHALLENGE:

More limited awareness of upcoming procurement opportunities. Discrimination or lack of relationships with non-MBE prime contractors, limiting opportunities to serve as subcontractors. More limited opportunities to scale as needed for larger city contracts.

As previously noted, business management knowledge – and therefore the capacity to operate as a prime contractor – is a barrier for many small, diverse, and new-to-market vendors. Teaming arrangements are one of the most effective means of building capacity. Through a variety of teaming arrangements, MBE firms can build capacity by combining resources with other firms or allowing larger firms to use their bonding, capital and resources to assist firms in their growth.

- **Joint Ventures ("JV")**
- **Mentor-protégé relationships** allow for a larger and often more experienced prime contractor to mentor a smaller firm to help guide them through the process of prime performance.
- **Other teaming strategies**

This tool is not without its own set of challenges, and often requires a strong compliance effort to help manage the relationships. By constructing teaming relationships, cities can begin to build a pipeline of contractors to perform work on city contracts, and as competition builds, it helps to increase quality of services while reducing the cost of contracting for the city.

In many jurisdictions, like the City of Atlanta and City of Chicago, ordinances have been put in place which strongly encourage mentor-protégé teaming relationships, and the presence of other tools, like a vibrant forecasting plan, go a long way towards preparation of teaming arrangements.

1. NON-DISCRIMINATION REVIEWS

CHALLENGE:
Protecting against discrimination of diverse firms in the procurement process.

In some jurisdictions, strong non-discrimination programs are written into commercial non-discrimination policies to permit the City to trigger investigations that protect the City from being complicit in discriminatory actions. In some jurisdictions, these are designed to activate when prime vendors fail to substantially meet either MWBE goals or propose participation significantly underneath the identified business availability (determined through a disparity study or availability analysis). When empowered with these types of enforceable GFE programs, cities can collect additional information about GFE compliance from vendors to ensure that they are not intentionally leaving diverse firms out of the contracting process. Nevertheless, the application of this program, and the designations of noncompliance are in the subjective determination of the legal counsel in respective cities.

2. STREAMLINING THE BIDDING PROCESS

CHALLENGE:

Smaller businesses may have less capacity for a cumbersome bidding process.

As many MBEs are also small businesses, resource allocation is always an important component of business growth. To promote governments becoming more agile in procurement, a user-friendly approach should be employed, involving collaboration, flexibility to change, individuals, and interactions. To assist smaller firms in competing for public contracts, consideration should be given to ways to make the process less cumbersome and more accessible, including tools like procurement forecasting, process re-engineering and creating a collaborative culture to help smaller firms compete. Through taking steps to streamline the bid process by automating bid procedures, creating reciprocal certifications and condensing and eliminating excessive forms and paperwork (when appropriate) the playing field will become leveled.

3. BREAKING UP LARGE CONTRACTS

CHALLENGE:

More limited opportunities to scale as needed for larger city contracts.

For small businesses, contract sizing often precludes them from competitive bidding. Breaking apart large contracts tends to increase the opportunities for MBEs. Smaller contracts position small firms to not only compete as subcontractors but as prime contractors, helping to build capacity. In addition to creating more contract opportunities, smaller contract sizing also alleviates other barriers, such as bonding and insurance, where larger contract sizes increase liability for MBE firms and can prevent firms from bidding successfully.

According to Jesse Posilkin and City Accelerator contributor, 18F, a civic consultancy within the federal government which helps improve digital government services, breaking up large contracts also produces significant benefit for government agencies by helping reduce the scale of projects. Smaller, more narrowly scoped RFPs produce:

- Less staff time to prepare and review
- Smaller dollar contracts and faster delivery reduce overall project risk (versus big contracts with lengthy terms which are expensive to change). Both success or failure are cheaper in this alternative.
- Lighter weight (less cumbersome) RFPs help increase small businesses bidders (versus big contracts that attract big bidders)
- Smaller procurements allow governments to demonstrate progress quickly (versus long term planning, uncertainty and resource allocation)

As a part of its City Accelerator project, the City of Los Angeles' Bureau of Contract Administration worked alongside procurement personnel to employ this strategy to break apart large contracts and increase competitiveness for small and diverse businesses. The City explicitly looked at contracts for services, like mobile truck washing and right of way construction, to make them more accessible for small businesses.

The City of Chicago developed the Small Business Initiative ("SBI") program, wherein construction projects under a certain dollar threshold are limited to bidding exclusively by firms falling within particular size standards. The program has evolved to multi-tiered structure, which included the Mid-Sized Business Initiative ("MBI") for firms that are growing and thriving. This tiered approach is creating a pipeline for businesses to build capacity at all levels.

Even though most governments focus on their larger, multimillion-dollar contracts, most government procurements are significantly below this threshold. By conducting a **threshold analysis** through a disparity study, city leaders can best illustrate contract award intervals.

4. PROMPT PAYMENT INITIATIVES

CHALLENGE:

Less overall cash flow, making it difficult to weather slow payments for goods or services rendered.

In recognition of the cash flow challenges that slow payment places on smaller firms, many cities institute aggressive prompt payment programs to ensure that prime contractors and subcontractors are paid within a shorter amount of time. Though many cities are cautious about addressing relationships between prime contractors and their subcontractors to avoid "privity of contract" issues some cities include contract language requiring payment of first tier subcontractors (or second tier sub-contractors for some alternative delivery methods involving sub-prime contractors) in a timely manner.

During the cohort, the City of Memphis aggressively dealt with this issue, with team lead Joann Massey pushing to initiate a prompt payment pilot, which would allow for a contracted third party to handle and process all subcontractor payments on a large development project. Some technical issues in application slowed them on this initiative, but this City pushed forward with piloting a new prompt payment methodology, which aims to have City-certified MWSBE firms paid within five business days. As currently constructed, the city identifies invoices, marks them received and identifies whether the contractor is a City certified MWSBE. Once received, the City expedites them for payment. This program, piloted under the City Accelerator, has been a huge success for the City thus far.

5. RETHINKING LOW-BID PROCUREMENT

CHALLENGE:

Larger firms with more resources and connection often retain access to favorable pricing which places small and diverse firms at a competitive disadvantage.

Typically, governments employ a "low bid" framework in selecting contractors and vendors, but this criteria privileges large, well-established, national or international companies over smaller, newer, more locally based companies. As a result, more MBE firms miss out on these prime contracting opportunities and strict low bid environments may also undermine GFE and subcontractor programs.

The best value approach, which is common in the private sector but more selectively employed in the public sector (and most traditionally utilized in qualifications-based procurement), offers the most upside to MBE firms. By taking factors other than lowest cost into account, it equalizes MBE bidding in one specific area.

Another approach some cities have taken is to offer bid preferences that promote small business inclusion by providing scoring preferences and bid discounts for SBE bidders that fall within a certain percentage of the lowest responsible and responsive bid (i.e. the City of Oakland offers bid discounts up to five (5) percent by small local businesses). However, programs like these may not be favorable in more risk averse jurisdictions, or areas whose policy restricts the use of these types of incentives.

6. SMALL, MICRO, AND LOCAL BUSINESS PROGRAMS OR SHELTERED MARKETS

CHALLENGE:
Difficulty competing with larger more well-established firms.

Race-Neutral Programs

- **Small Business Programs**

Founded in July of 1953, the Small Business Administration ("SBA") is an agency of the federal government designed to assist and support small businesses and entrepreneurs. The SBA provides both technical training and supportive services, such as funding and bonding assistance programs, for small businesses across the United States. The SBA operates local offices that assist businesses in most larger local jurisdictions.

In addition, most municipalities operate programs designed to include more small businesses in government contracting regardless of the race or gender status of the owner. These programs focus predominantly on addressing barriers established by the size of a business and their ability to scale; in addition, they often include personal net worth requirements or growth caps to define who is eligible for the program and exclude firms that have grown to the point of being able to compete independent of the program. Most programs establish growth caps that adhere to SBA standards, but due to the large size of the SBA net worth caps (e.g., $35 million in construction) some cities establish caps below this value for local small business programs. The program incubates growth by using technical assistance and supportive services, along with participation goals in contracting. These goals do have to be based on the rational basis test and are most effective when framed by an analysis that can accurately demonstrate goals and baselines.

- **Sheltered Markets**

As noted, these race-neutral programs often have an influence on prime contracting opportunities for diverse firms. To impact this, many cities have employed race-neutral sheltered market programs which assist in leveling the playing field for small firms. Rather than being forced to compete for contracts with better resourced firms, a sheltered market suppresses the available pool of bidders by firm size to allow smaller bidders to more readily compete.

- **Local Business Programs**

Local business programs are designed to encourage spending within a municipality or local geographic area. Because of the tax revenue that is associated with local business growth, it is self-serving for jurisdictions to do more contracting with local businesses. Local businesses tend to work closely with other local firms and hire locally with employees who spend money in the city, creating a natural incentive for local contracting.

This race-neutral tool can be useful in addressing MBE spending by being applied to communities with a contingent of minority businesses as well, but these programs are subject to the Interstate Commerce Clause and Privileges or Immunities Clause of the United States Constitution, which are designed to ensure equal treatment of all U.S. Citizens and establishes the basis for local business (and hiring) preference programs. These programs have become preferred method of procurement through many private sector anchor programs but fail to address discrimination based on race and gender, which limits its effectiveness for MBE growth. In creating local programs, municipalities must be cautious in administration not to undermine MBE programming by incentivizing local business participation over diverse businesses.

- **Emerging Business Programs**

A newer programming area, Emerging Businesses (commonly referred to as Micro Business Programs) are centered around encouraging growth and development of very small businesses and addressing barriers commonly related to new business development. Business incubator pilots in targeted fields are growing in popularity but are not yet widespread.

7. GOOD FAITH EFFORTS WAIVER REVIEW

CHALLENGE:

Encouraging utilization of diverse firms in public contracting

Good Faith Efforts ("GFE") initiatives are designed to operate as goals waivers rather than stand-alone programs. To avoid "unyielding preferential quotas," the determination of GFE is built into most legally defensible programs as a means of accepting the effort to adhere to the predetermined goal. Cities require that a prime contractor must request waiver when there are MWBE goals or other requirements attached to bids that they assert they have tried but been unable to meet. It is a demonstration that the bidder tried, in good faith, to comply with the requirement, but was unable to do so.

It is best practice for this program element to be tied to a goals program or other race-conscious program, however many cities wrongly attempt to employ this as a race-neutral process to garner some MBE participation. For example, if a city lacks an aggressively administered goals program, they may set a goal and require outreach to MBE firms to solicit them for participation. If a firm chooses to exclude MBE firms and not solicit their participation and fails to meet the goal, the city has no recourse. If they were to reject the goal, they would have officially crossed into race-conscious remedy. GFE processes with limited enforcement rarely produce an increase in participation and can invite litigation if enforced without a factual predicate. Administrators are left hoping that outreach alone will encourage MBE participation. Like most policies that lack teeth to enforce compliance, they become pro forma in nature, making it impossible for the municipality to enforce the policy even in the presence of concerns about the legitimacy of the action taken by the prime contractor.

A true, hardy GFE process serves as a waiver to some requested action by the municipality. Race-conscious GFE programs. For example, in the example stated above, if the contractor attempted, in good faith to meet the goal and was unable to find an available subcontractor, the waiver would then come into consideration to prevent the bidder from being deemed Non-Responsive or Non-Responsible. If the bidder attempted to bid and was found to have not given good faith consideration to MBE subcontracting as determined by the city's investigative process, the bid could be rejected based on not having been solicited in good faith.

8. PARTICIPATION GOALS

CHALLENGE:
Marketplace discrimination or lack of relationships with prime contractors, limiting opportunities to serve as subcontractors.

The most effective method of ensuring MBE participation in the contracting process is through a race-conscious goal program. Goals programs are designed primarily for subcontracting rather than prime contracting, to avoid awarding prime contracts by race rather than qualifications. Prime preference programs, which may be supported in theory by the findings of a disparity study, closely mirror quota programs in application, exposing a jurisdiction to legal challenge based on "malevolent discrimination" (per Croson). By using aspirational and subcontracting goals, a city can effectively ensure participation while not running afoul of the Croson decision.

Aspirational goals set an overall benchmark that the city intends to reach regarding its contracting process. That aspirational goal is met by setting contract-by-contract goals. Both goals are based on availability, established through a factual predicate study and are administered either broadly by work category, or more efficiently through availability by trade area or commodity code. For example, if the city disparity study found overall MWBE availability at 25 percent, the overall aspirational goal may be established at 25 percent. In contract application, if a construction prime firm is hiring a subcontractor who performs concrete work and availability is 7 percent for MBEs in concrete work, this is the basis of the contract-specific goal setting process. This is discussed in further detail in the box on Goal Setting on page 57.

Many jurisdictions try to do blind goal-setting or establish goals based on broad or imprecise information, such as general population statistics (discussed explicitly in Croson) or the current number of MBE firms on the city's current vendor list (incomplete, assuming that the city is aware of ALL firms in the marketplace). A good disparity study establishes a firm sense of availability. Instead of operating from assumptions based on limited statistics, deeper knowledge of the available business community guides better goal setting and establishes a baseline for measuring inclusive contracting efforts.

GOAL SETTING METHODOLOGIES

Goal setting may be conducted in one of two ways: as aspirational goals that are set as a benchmark for overall MWBE participation within a fiscal year, or as goals set on a contract-by-contract basis. The use of these two types of goals are, in best practice, separate in administration, with contract goals narrowly tailored to availability by commodity codes or work description. Aspirational goals serve best as a benchmark for overall spending across categories and are not typically effective for contract goal setting. However, in practice, they are often used for non-construction projects. For instance, in a jurisdiction with a 25 percent aspirational MWBE goal in construction, there may not be sufficient subcontracting opportunities to support that goal on a specific project, opening the City up for legal scrutiny. In a contract-by-contract goal setting process, opportunities are identified by specialty trades or by commodity code. Once identified, a goal is set by trade with an overall goal for the project set by weighting the percentages of DBE availability against the percentage of dollars from the project spent in these trades.

While the goal setting process may appear to be rigid and calculated, following the formula, along with proper administration, will assure adherence to the narrow tailoring standards required in Croson. Effective program administrators often possess intimate knowledge of the MBE business community and its needs: Who are the vendors in the community? What is their capacity to compete? Are there opportunities and exclusions on the contract? What level of outreach is being done? All of these are important considerations in goal setting and GFE.

Generally, 49 CFR 23 or 26 provides the best practices for goal setting. They state that:
Any recipient of federal transportation funding from the U.S. Department of Transportation is mandated and authorized to have a Disadvantaged Business Program ("DBE"). They are further directed to conduct their own disparity studies to support the on-going validity of the federal DBE program and to define the status of DBEs in their marketplace.

Every three years these recipients of federal funding also have to conduct a goal-setting process under 49 CFR 23 or 49 CRF 26 utilizing the methodology set forth in those regulations. Essentially the methodology establishes a baseline goal by, preferably weighting the availability by work category (balanced over how much of the annual budget is set in that work category). Then adjusting that goal based on various factors like past attainment. Then the agency will determine how much of that goal can be attained through race neutral measures and how much will need to be required through race-conscious measures. This will establish the overall agency annual aspirational goal.

Project specific goals are set in a similar fashion using currently certified DBE firms to establish availability in each trade where there are subcontracting opportunities in each project.

9. EVALUATION PREFERENCES

CHALLENGE:

Marketplace discrimination or lack of relationships with prime contractors, limiting opportunities to serve as subcontractors.

Another tool in promotion of MBEs in government contracting is the use of evaluation criteria to promote MBE utilization. This involves dedicating a portion of bid scoring to either compliance with MBE goals or maximizing MBE participation. For example, if a bid has 10 available points for MBE utilization, the proposer with the highest amount of MBE participation would garner all ten points. All subsequent proposers would be scored in relation to the highest proposer. It might also award more points to MBE prime contractors.

10. MINORITY BUSINESS DISTRIBUTORSHIP PROGRAMS

CHALLENGE:
Encouraging MBE utilization in goods and commodities.

Though construction and professional services make up the largest portion of remedial contracting programs, MBE opportunities in goods and commodities are typically overlooked. Often, cities have barriers to these procurements created by policies requiring long-term or multi-department blanket agreements for certain goods. Furthermore, in many cities, stringent requirements on what businesses can be "authorized distributors" or licensed resellers of certain goods and commodities prevent MBEs from competing on government contracts in commodities field. To combat this, some governments have explored the use of distributorship programs which encourage vendors to create and do business with more MBEs through creating authorized distributors for goods. These types of programs could utilize commercial non-discrimination policies to promote commerce in goods and commodities by incentivizing doing business with diverse suppliers using option years added to the contract for diversifying the vendor pool.

CITY SPOTLIGHT: MEMPHIS, TN

- Population: 652,000
- Mayor-Council
- Annual Municipal Procurement Budget for FY17-18: $600,000,000
- Race-Conscious Program

Based on recommendations stemming from their 2016 Disparity Study, the City of Memphis has seen monumental improvement in its ability to identify and connect with MWBE firms. During the last two fiscal years, the City's reported MWBE business spend has significantly outperformed its historical MWBE utilization. Seeking to continue the City's progress diversifying public contracting, the City of Memphis identified some additional areas where improvements could be made, including reviewing the City's prompt pay policy and risk shifting provisions, two areas of ongoing concern identified by their study.

Recognizing that the marketplace had become increasingly siloed, the City set out to connect its local ecosystem to catalyze greater MBE inclusion. To accomplish this, the City relaunched the Shelby County Consortium with other public and quasi-governmental agencies, such as Memphis Gas, Light & Water, the Shelby County School system, and the Memphis Economic Development Growth Engine (EDGE). This consortium is sharing best practices and working to develop a joint procurement forecast across all regional partners.

This community coordination took on a new life with the development of the 800 Initiative, with leadership from community partners like FedEx, StartCo. and Christian Brothers University to address MBE growth and capacity with intentionality. Building on the Memphis team's efforts to provide financial literacy consulting, share the hidden rules of business through targeted workshops and symposia, and support businesses through the Propel Diverse Business Accelerator, the 800 Initiative seeks to grow the revenue of the roughly 800 African-American owned businesses that are between start-up and full scale by $50 million by 2023. Memphis Mayor Jim Strickland is investing in this initiative as a way of promoting economic justice.

Within city government, Memphis continues to look at process re-engineering, supporting subcontractors scaling into to primes, and offering small businesses an opportunity at increased competitiveness through a sheltered market program and prompt pay pilot program to address the significant delays in payment that can be disastrous for smaller contractors. This program allows for the City to use technology to identify certified small businesses and expedite their invoices for faster payment. The City's compliance system permits them to identify all SBE certified firms and cue their invoices for payment, allowing the City to ensure faster payment for all small business owners. These improvements are addressing real and pressing challenges for local businesses. As Cynthia Daniels of Cynthia Daniels & Company describes: "It's difficult to manage needed inventory to complete a project before getting paid. Therefore, small businesses go into debt before they can earn money. The City of Memphis has made prompt payment a priority."

As with the other cities in the cohort, the City is still pursuing some of its goals, such as addressing the way City contracts currently shift risk onto contractors in burdensome – and sometimes prohibitive – ways.

LESSON LEARNED:

Systemic racism and discrimination are barriers that cannot be broken by policy alone. Culture change is required.

VI.
CONSIDERATIONS FOR PROCUREMENT PROCESS IMPROVEMENT

Once the five initial principles are in place, a city is well-positioned to begin tackling other areas for improvement. To optimize program success, administrators must first understand the current policies governing how they procure and must evaluate whether any barriers are created by internal processes. A race-neutral approach, evaluating internal performance, and using data to inform process have a significant impact on programmatic success.

Many of these strategies are built on a community engagement approach, using anecdotal accounts to frame desired process improvements. Though quantitative data is important in understanding disparities, it is the community feedback and engagement process that informs what programmatic needs exist. By using more vigorous anecdotal evidence collection and survey methodologies, cities are then more equipped to make policy, program and process improvement efforts internally and offer support to local businesses that fits their needs.

When cities baseline performance, track accurate data, and have mechanisms for internal evaluation, programs will increase in effectiveness. Some key strategies to understand and monitor a city's procurement system include:

- Policy and Process Review
- Stakeholder and MBE Engagement for Process Feedback
- Accurate Data Systems and Tracking

Policy and Process Review

The power of policy has been explored throughout this document and is noted as the primary tool in the fight against systemic disenfranchisement. However, to be effective, policy must be enforced as intended. Often, well-intended policies are not administered because of gaps in staff knowledge, vague language within the code, or overlooked elements of program operation.

In reviewing policies and processes, city leaders should consider implementing the following:

1. Review of the city's procurement policies to determine whether any latent barriers exist through day-to-day operation and if these policies produce unintended consequences,
2. Interviews with City staff to determine and evaluate whether staff understand the written policies.
3. Program evaluation to determine if there are gaps between policy as implemented and policy as written, or if there are policies that lack the clarity to guide application?

In addition to interviews, cities may use their disparity studies as an opportunity to review internal policies. Administrators should also carefully engage their staff, as end users, to gain their perspective on areas in which the process may be breaking down. Some cities have explored the use of confidential surveys from internal staff which help them understand honest feedback from end users. Investment in personnel development and training also helps to alleviate these issues. Cities in this City Accelerator cohort conducted a series of internal evaluations geared towards identifying structural performance gaps.

Chicago's Procurement Reform Task Force ("PRTF") was a process review effort designed to fully revamp the procurement process from policy to full implementation. The PRTF has formed the basis of both the City Accelerator project goals and what has become one of the most progressive procurement programs nationwide. During the City Accelerator, the City of Chicago continued to advance its PRTF recommendations, which included addressing such issues as barriers created through non-uniform contract language across public agencies and conducting an analysis of inter-departmental purchasing and compliance to identify ways to create a more unified and efficient process delivery.

Understanding barriers in their risk-shifting contract provisions, they also did a deep dive into their own bonding and insurance policies to seek ways to remove this burden from MBE firms.

Operating in the strictest race-neutral environment due to California's Proposition 209, Los Angeles' task force on procurement reform took a top-to-bottom review of city procurement. Of issues recognized, were significant delays between contract award and execution, decentralized procurement across City departments and recognized opportunities for improved communication between the City and the vendor community. Interested in better operationalizing its vendor outreach and certification process, Los Angeles trained and mobilized certification specialists to be active in various sites around the City and used the hire of their new Chief Procurement Officer to set up monthly training sessions with all departmental procurement staff to help train and empower them to engage in active compliance.

Stakeholder Engagement

To truly incorporate the experiences of diverse vendors, cities should find ways to engage business owners, advocates, business, civic and trade organizations in the community to gather feedback on what works and to craft how cities can become responsive to these needs. In addition to helping to identify needed reforms, stakeholder groups can add external pressure to advance inclusive agendas. Without external advocates applying pressure and holding elected and appointed officials responsible for helping inclusive procurement programs operate effectively, cities may lose some of the urgency to properly administer these programs, and programs may lose necessary political backing and funding. While anecdotal research is a critical element in disparity studies, cities can also actively use anecdotal evidence as a tool for process improvement after the study is completed. Over the course of the City Accelerator, the City of **Charlotte**, with leadership from City Manager Marcus Jones, launched the PAIC, which brought together departmental leaders and end users to gather their perspectives on ways to improve the procurement process for small and diverse businesses in Charlotte. This group focused on building synergy across departments to help promote inclusive contracting, while using their disparity study data, findings and recommendations to make process improvements for the City.

The City of **Milwaukee** first performed a gap analysis on its vendor population to identify where potential vendors exist for targeted outreach, and then conducted a needs assessment of the vendor community to create a safe space for honest feedback about their performance in the contracting arena. The City took a comprehensive approach, utilizing both internal stakeholders (aldermen/alderwomen, Cabinet members, and other departmental leaders), and external stakeholders (potential vendors, ethnic chambers and "untapped" businesses) to gather feedback and intentionally promote racial equity. They then surveyed the vendor community regarding their expectation and experiences in the City bid process along with a needs assessment to determine areas where the vendors would like additional guidance from the City. Through this outreach, Milwaukee discovered a significant gap in vender registration, particularly in the professional services arena, and that only 28 percent of all vendors surveyed had plans to bid on future City of Milwaukee contracts. It was also noted that the community had difficulty navigating the procurement process and struggled with determining information regarding bids. To counter this, the City developed and launched its first contracting forecast for FY19 and made the information available online to its vendor community. They also partnered with local African American Chambers of Commerce to conduct a City sponsored lunch-and-learn with unsuccessful bidders to train them on how to engage with the City bid process. The City will use the survey responses as a guide for future supportive services and strategic outreach to their SBE/MWBE community.

In **Memphis,** the Memphis-Shelby County Consortium, consisting of both the City and County governments and many other local partners, such as the local School system and Memphis Gas Light and Water ("MGL&W") reconvened under the City Accelerator with the purpose of promoting economic inclusion and development. Resulting from this group was a strong county-wide contracting forecast illustrating the contract opportunities with *all* county agencies in the consortium, including the school system and Airport to increase firms' visibility and access to all contract opportunities.

Data Systems Management

Data systems management is crucial to the effective functioning of any program. There are steps municipalities can begin to take to improve their data gathering process. The first step is simply uniform data points and tracking. Many cities invest in data solutions with the expectation that they will be a fix-all for data issues, but do not invest in all the necessary (and expensive) add-on modules that help to ensure that the system operates as intended.

To mitigate this, cities should critically evaluate data platforms that have uniform operation. In organizations that seek to share data, having similar platforms will allow them to more effectively aggregate information on performance from other data sources. For instance, upon conducting analysis on cross departmental buying and looking for consistency in what was being purchased, the City of Chicago uncovered that the product descriptions and commodity codes were inconsistent from agency to agency.

Data also has many positive and interesting uses as well. Milwaukee, using the results of their gap analysis, was able to map communities around the City with the highest concentrations of minority businesses not registered with the City. When narrowing this data down to location, the city can be more strategic in how it aims to reach the vendor community to increase the number of certified firms. Data Management and reporting is discussed in more detail in the "Measuring Outcomes" section below.

VII.
LEVERAGING PROCUREMENT FOR COMMUNITY ECONOMIC DEVELOPMENT

MAKING THE CASE FOR ANCHOR ENGAGEMENT

The implications for racial equity go far beyond government contracting. While Croson gave specific acknowledgement to the influence of "societal discrimination," it was noted that these phenomena fell outside of the purview of remedial government procurement programming. However, governments have ample opportunities to utilize equitable procurement in rectifying systemic inequities. Through procurement, government spending can impact workforce development, business development and community economic development. In addition, by addressing community economic development, governments can begin to address neighborhood redevelopment, affordable housing and services that create paths to home ownership, equity growth, and new business formation, redeveloping the communal business infrastructure.

The conversation about equitable procurement must go beyond the benefit to government and begin to discuss the implications for other institutions who are similarly vested in the health of the surrounding community. According to Initiative for Competitive Inner Cities ("ICIC"), anchor institutions' "history, relationships, institutional mission, and investments root them in their local communities. The sustainability of anchor organizations is inextricably linked to the vitality of their surrounding communities." Anchor institutions may be universities, hospitals, municipal governments, community foundations, corporations, sports teams, and arts and cultural organizations. These organizations are defined by their geography, their status as long-term community partners, and the fact that their sustainability is inseparable from that of their surrounding community, which creates demand for their services and job-generating capabilities. Understanding this, anchors have a vested interest in the economic vitality of a community. Tapping the purchasing power of the private sector and nonprofit anchors can significantly enhance equitable government procurement programs and directly influence community economics.

By this definition, anchors also include large businesses and corporations, many of whom already hold national or regional footprints. They can also be local banks, CDFIs and other financial institutions, but regardless of their identification and corporate structure, there is a role they can play in community revitalization. To orchestrate this, cities around the country are taking an "ecosystem" approach in convening, organizing, and mobilizing community resources for community economic development.

When seeking to engage and connect with anchors, Dr. Michael Porter of the Harvard Government Performance Lab and ICIC have championed the need to identify mutually beneficial relationships for the strategy to reach its peak effectiveness. Operating from a framework of shared benefit allows both the City and the anchor to find the most advantageous opportunity for collaboration, creating sustainable partnerships. An example of this is the healthcare sector, which is beginning to take a more active position on community development. With procurement that is approximately 20 percent of the annual U.S. economy and growing, hospitals offer this shared benefit. For hospitals, economic wellness is a conduit to health and wellness. In the 2015 report commissioned by the Democracy Collaborative titled "Can Hospitals Heal America's Cities", authors Tyler Norris and Ted Howard address the ways hospital anchors were seeking to bridge the nexus between social/economic wellness and community health, noting:

"For over two decades, overwhelming evidence from the U.S. Department of Health and Human Services, the Centers for Disease Control and Prevention, and other sources suggests that social, economic, and environmental factors are more significant predictors of health than access to care."

The University of Wisconsin Health Institute found that over 40 percent of all factors contributing to lifespan and quality of life are social and economic factors, 30 percent are health behaviors directly impacted by socio-economic indicators, and another 10 percent are impacted by the physical environment where we reside, which directly correlates to an individual's economic status, arguing that "Your zip code is more predictive of your health than your genetic code." (Howard & Norris, 2015) [14]

Furthermore, a 2018 report by Sameera Fazili of the Federal Reserve Bank of Atlanta titled "Can Community Development Improve Health"[15] explores emerging opportunities for collaborative action between the health sector and community developers. This report argues that community developers could use improvement of health indicators as a means of attracting new funding sources for private development. In recognizing the shared goals of different community partners, cities are partnering to construct ecosystems that leverage procurement and other anchor assets to promote inclusive economic development.

The Differences in Public and Private Procurement

The fundamental differences between public and private procurement are pronounced. Procurement in the public sector involves numerous guidelines and significant legal scrutiny. Conversely, private sector procurement does not face constitutional requirements for equitable spending, or transparent process. Public institutions are forced to spend in accordance with public accommodations, while private entities are free to spend according to their own interests. Public bids are often governed by the competitive bidding process, low cost restrictions, and bureaucratic scrutiny. Private procurement often can be as simple as the desire to award more contracts to an individual or business. Though both are very relationship-oriented, purchasing authorities in the private sector possess much more autonomy than the public sector.

In some regions, the assumption has been made that these two sectors involve and engage different business populations. We would disagree with that assessment, as all businesses can seamlessly transition between both sectors because they are all, by nature of operation, private firms. However, because of differences in the procurement process between both parties some treat and service these as though they were two separate populations.

The public and private sector often demonstrate different approaches to procurement as well, reflecting the two dominant schools of thought about how to procure goods and services:

- Lowest cost focuses predominantly on resourcefulness and using resources for maximum return.
- Best value is focused more on getting the best service for the cost (or despite cost).

While not always the case, the public sector, where resources are limited by annual budgets, tax revenue, and shifting priorities, tends to be more risk averse in its procurement approach, often choosing to focus on getting the work done for the least cost. Administrators in the public sector are aware of their budgetary constraints, leading them to focus on efficient use of taxpayer dollars, actions which distinguish them as responsible administrators. The requirements are often codified in low-bidder requirements across many U.S. cities. Conversely, the private sector tends to be focused on performance, agility and efficiency, relating more to the best value approach. Nowhere is this approach more apparent than in the construction industry, which is the largest portion of municipal spending and is traditionally monopolized by large prime contractors who build and develop across the nation and adhere with GFE requirements or MBE spending when required but may overlook this opportunity when not required.

[14] Howard, Ted and Tyler Norris. Democracy Collaborative "Can Hospitals Heal America's Communities (2015)
[15] Fazili, Sameera, 2017. "Can Community Development Improve Health? Emerging Opportunities for Collaboration between the Health and Community Development Sectors," FRB Atlanta Community and Economic Development Discussion Paper 2017-3, Federal Reserve Bank of Atlanta. **click for web reference**

PUBLIC SECTOR PROCUREMENT	PRIVATE SECTOR PROCUREMENT
Focused on public interest	Focused on shareholder interest (but many now recognizing value in equitable procurement)
Legal restrictions on how to procure what is permissible	More flexibility/autonomy in how to pursue procurement
Tax revenue as primary funding source	Private capital as funding source
Competitive/transparent bidding process	Contracts at business' discretion
Typically, "low cost" or qualifications-based framework	Typically, "best value" framework

INCENTIVIZING PRIVATE SECTOR MBE PARTICIPATION

Often overlooked in the conversation on inclusive procurement is the role that private sector entities and nonprofit anchors (e.g., hospitals and universities) can play in expanding contract opportunities for MBEs to continue to strengthen their financial position and overall capacity.

Engaging the Private Sector: Because private entities lack the same requirements of strict scrutiny, involving them in contracting with the local MBE community could pay immediate dividends and expand the reach of public sector procurement programs. In Chicago, their Diversity Credit Program with the private sector is designed to incentivize MBE participation outside of solely public procurements. For every $3 used with a diverse firm on a private development, the City credits $1 in diverse participation towards a future City of Chicago public bid. Other engagement strategies are discussed below.

Anchor Strategies: An emerging national best practice is an anchor procurement strategy, which involves not just cooperative purchasing agreements between cities and private parties such as hospitals and universities, but also supportive services and assistance programs designed to increase MBE presence in key industries or ability to compete and succeed in contracts. Similar programs exist in two of the cohort cities: Chicago Anchors for a Strong Economy ("CASE") initiative and the newly developed 800 Initiative in the Memphis. In the CASE model, firms are assessed and serviced to prepare for contracting. The 800 initiative, on the other hand, is focused on capacity building for minority firms to increase contracting by local entities.

Private parties are very aware if municipalities are serious about their MBE initiatives or not. If MBE initiatives are not taken seriously, or not rigorously administered, private partners will find ways to not adhere. However, the heavy-handed approach is never a favorable one to employ, and it is better that the two sectors find ways to meet in the middle. When seeking to engage with either private businesses, developers, corporations or anchors, some key tools (discussed below) can be employed to help maintain leverage in negotiation.

Policy and Zoning

Policy and zoning are two of the most powerful tools that cities can employ in encouraging MBE participation with private sector partners. Once a tool for the disenfranchisement of certain groups, this zoning can also be utilized to encourage inclusiveness in community economic development. By using policy tools that require MBE participation in certain types of public/private engagements, or zoning land usage to include MBE and workforce inclusion components, cities can exert more influence in their engagement with corporations and developers. In many cities, they have taken steps to codify the use of coveted tax increment financing "(TIFs"), Tax Allocation Districts ("TADs") and other incentives as a means of negotiated MBE participation with the private sector. Private developers have the right to build through private equity, but cities can still use diverse procurement and local hiring requirements to support MBE participation and community wellness.

With many cities encountering rapid gentrification in predominantly minority urban centers, several have turned to using zoning requirements to help maintain community integrity, both through land use planning and equitable zoning requirements. While most of the attention to this tool has been surrounding affordable housing, like the Minneapolis' 2040 Comprehensive Plan, some communities are exploring crafting and passing into legislation professional community development plans which promote equity and inclusion. In Atlanta's Neighborhood Planning Units, similar development plans, like those in the English Avenue community, have been drafted and used to provide a framework to guide and advocate for future community redevelopment.

Administration of these requirements tends to be the biggest challenge; cities would then have to define how a MWBE program would be applied and administered through community development. This was attempted in New York City's West Chelsea Rezoning, where the City attempted to use zoning specifications to increase MWBE business inclusion by the Department of Small Business Services ("DSBS"). This agreement specified that DSBS' vendor database, alongside the New York City Economic Development Corporation ("EDC"), would use pre-bid strategies, technical assistance, bid matching/alert process and information sharing for High Line sub-contracting and West Chelsea contracting opportunities.

Promise Zones and Opportunity Zones

Twenty-two federal Promise Zones have been established since 2013 and are currently in operation across the United States. Established by former President Barack Obama, these initiatives were designed to identify areas, including urban, rural and tribal settings, for economic growth. Promise Zones are high poverty communities where the federal government has partnered with local advocates and leadership to improve socioeconomic indicators, including economic vitality, educational opportunities, private investment and public health. Within these federal zones, more aggressive tactics may be employed for mobilizing MBE growth and development between identified partners.

A new tool that emerged from the 2017 Tax Cuts and Jobs Act, Opportunity Zones establish and designate geographic regions for long term capital infusion and capital investment through private investors. Capital gains from sale of stock or real estate and other assets can be invested into either an eligible business within an Opportunity Zone, or into an Opportunity Fund, which must then re-invest at least 90 percent of its assets into eligible businesses located in Opportunity Zones. Eligible businesses also include real estate projects. As previously noted, if this investment remains for five years, there is a 10 percent reduction on the original taxable income. At seven years, this rate increases to fifteen percent.

If this investment remains in place for up to ten years, the entire capital gains amount becomes tax free at the federal level. To protect against concerns of these investments leaving the community, the IRS instituted a "To-30" rule, which permits up to 30 percent of an eligible businesses property to be located outside of a designated opportunity zone, however the clear majority must remain in the zone to receive this benefit. Some remain concerned that the federal government has not instituted a strong method for compliance in implementation; however additional guidelines are expected to be set at the state level. Through utilizing and re-investing capital gains into Opportunity Funds, it creates an additional funding pool for state leaders and provides additional incentives for those who keep their capital gains in the fund for ten years or more.

While some advocates are concerned that this infusion of capital into underserved areas will only accelerate gentrification, regulatory oversight will ultimately determine whether this tool will be abused and further negatively impact urban communities. Regulations for Federal Opportunity Zones were proposed by the IRS in October 2018,[16] which would not only clarify how Opportunity Zones work in operation but outline the potential for MBE capital investment through Opportunity Funds. Evan Absher, an entrepreneurship expert from the Kauffman Foundation, cites an additional concern: "Opportunity Funds only offer equity financing, which is not a good match for the majority of entrepreneurs (93 percent) that never seek venture equity financing, relying instead on debt or revenue-based financing." However, cities may also choose to design "bridge" or educational programs for contractors regarding methods for obtaining equity financing, and its potential benefits, or form partnerships with lending institutions to help eligible contractors obtain such financing. It may even be possible for a government to encourage or support the development of a venture fund targeted toward small and historically disadvantaged businesses in the Opportunity Zone areas.

Even though these are federally determined categories, cities will directly benefit from designation as Opportunity Zones. It will be useful to explore whether this influx of capital will be used by proponents of diverse business growth to help increase opportunity for MBEs. Community partners, such as investors, philanthropic efforts and CDFIs, may all take an aggressive role in utilizing this tool to benefit diverse businesses and communities. If done properly, these can encourage community growth and development and boost outcomes for businesses owned by people of color.

Anchor Procurement and Corporate Supplier Diversity

Across the country cooperative anchor partnerships are emerging not only to buy from MBE firms, but are using their resources to promote healthy and equitable community development. Diverse spending Programs at universities such as the University of Chicago and hospitals like the M.D. Anderson Cancer Center at the University of Texas have led the way in these initiatives as a means of investment in their local communities, doing everything from engaging in traditional MBE goals programs to robust community development strategies alongside philanthropic partners.

Included in this opportunity are corporate supplier diversity programs, which are employed by most major corporations. Google and FedEx, as well as other major businesses, seek to demonstrate a commitment to community wellness through diverse procurement. Other anchors, such as sports franchises, have also focused on community contribution, with teams like the San Antonio Spurs and Atlanta Falcons (detailed below) taking aggressive supplier diversity efforts in construction of new stadiums. Some others, like Ohio State University's Weinland Park redevelopment, have focused directly on community revitalization.

[16] Investing in Qualified Opportunity Funds, 83 Fed. Reg. 54279 (proposed October 29, 2018) (to be codified 26 CFR Part 1)

While these strategies offer significant opportunity in MBE impact, they are often very difficult to develop, requiring the alignment and influence of strong central executives who reach out to have conversations with corporate decision makers. Well positioned advocates are also needed to encourage MBE utilization in corporate supplier diversity and anchor development. The difficulty often lies in the differences between public and private procurement. Often, Cities will need to use influential bargaining chips like tax incentives and negotiated agreements to bring corporate supplier diversity to the forefront. Even then, many cities, dependent on private industry for their community's morale, are afraid to push for benefits to local diverse businesses out of fear that a private firm may relocate to other communities with fewer restrictions.

Carefully crafted anchor procurement strategies often involve a mixture of shared resource allocation and shared mission. The convener of the anchor strategy is often tasked with organizing the group around a shared purpose or coordination of resources. As a result, the strategies can often be time consuming and arduous to develop but can move quickly and be impactful under the right circumstances. Though many anchor strategies stop short of intentionally engaging in MBE focused procurement initiatives, choosing to retain a race-neutral approach with a focus on local, emerging, or small businesses, they are not constrained by the Croson requirements. As previously detailed, race-neutral approaches many not be as impactful for MBE firms, and therefore part of the government's role in promoting equitable procurement is to educate private industry that these initiatives are largely untapped opportunities within their grasp. Further, with cities using executive influence to promote MBE inclusion through praise, award, or the "bully pulpit", corporate opportunities may expand. If cities partner with corporate and anchor institutions to employ race-conscious goal setting in promoting MBE utilization, anchors could, if they choose, more aggressively establish MBE contracting programs. Regardless, cities should take an active role in this conversation by engaging the parties responsible for procurement on developing strategies for partnership.

THE 800 INITIATIVE IN MEMPHIS

The City of Memphis took advantage of its momentum in MWBE contracting improvement by partnering with FedEX and Christian Brothers University (prominent anchor institutions in the region) to launch the 800 Initiative. This program was coordinated by the City of Memphis with technical support from StartCo and the Memphis Epicenter and will provide programming to scale local MBEs. Using strategies including technical assistance, coaching, loans, and grants, the program will target the roughly 800 African American owned businesses in Memphis that are in between start-up and full-scale phases, with a goal of growing their annual revenues by $50 million by 2023.

A true partnership, all the parties involved have allocated resources to the 800 Initiative, including $500,000 from the City's 2018-19 budget and a $1 million commitment over four years from FedEx. Christian Brothers University, StartCo, and Epicenter will provide strategy and programming assistance. Other resource partners, such as the Tennessee Small Business Development Centers, the Black Business Association of Memphis, and the Mid-South Minority Business Council will be added into future programming as well. StartCo will administer much of the programming, network building and capital acquisition and fundraising. Epicenter, a local entrepreneurship hub, will provide some technical assistance through their Entrepreneurs in Residence program. Christian Brothers University will launch a Center for Innovation & Entrepreneurship to coordinate programming and provide entrepreneurship-related course offerings, job placements for students, and experiential learning credit.

"To truly boost our economy, we must do everything we can to empower small businesses. And for us to have a direct impact on generational poverty, and to achieve true equity in our economy, we know we must do everything we can to empower minority owned businesses," Mayor Strickland said. "The 800 Initiative isn't just a step in the right direction — it's a major leap forward."

Negotiated MWBE Programs

Cities maintain influence throughout the negotiation process for both employers and large developers and are in a unique position to negotiate and codify within the contractual agreements the need for private firms to engage equitably in community economics. By utilizing land use planning and other bureaucratic functions, public financing and city bonds, or tax and economic development incentives, cities should come to the table prepared to advocate and negotiate for inclusion of MBEs in these new opportunities. Cities with established MBE programs based on a solid disparity study should explore codifying use of their MWBE programs in private development to maintain an equitable focus in economic development. In minority populated urban areas which are at risk of gentrification, there should be negotiation of local MBE utilization into the contract process, both in development and in long term participation.

This model is exemplified in the City of Atlanta's new Mercedes Benz Stadium. The $1.5 billion-dollar stadium and home to the NFL's Atlanta Falcons was a negotiated public/private partnership between the City of Atlanta and the Arthur Blank Foundation located in West Atlanta, an underserved minority community which had long gone ignored in development. This negotiation led to the city contributing funding and tax incentives in exchange for the assurance that the Atlanta Falcons would mobilize the City of Atlanta's Equal Business Opportunity ("EBO") program. Additional funding was pushed by the Blank Foundation into the Westside Futures Fund and into what is now known as Westside Works, a local NFP which handled job readiness and training for prospective employees both on the job site in construction, but also in stadium operations. Demonstrating their commitment to diversity through hiring an outside consultant responsible for ensuring the participation of MBE firms, the result was a project with over 36 percent of MWBE participation.

Community Benefits Agreements and Project Labor Agreements

As redevelopment and gentrification continues in many major cities, displacement and the wealth gap have placed the concerns of disenfranchised urban communities at the forefront of discussion. In response, more advocates are beginning to employ the use of Community Benefits Agreements ("CBAs") Project Labor Agreements ("PLAs") or Community Workforce Agreements ("CWA", a form of PLA that contains a community benefits component) as a means of protecting community interests which may not align with political or developer agendas. Because of how closely these tools can be tied to government development producing disparate outcomes, advocates have begun to tout these as effective tools in combating displacement and promoting community wellness. PLAs have been used to promote equity through workforce development and training, be economically beneficial through wage requirements, and bring diversity to the job sector. Conversely, CBAs, help to place community benefits at the forefront of the development conversation by creating legally binding agreements with developers, or the City, designed to protect community interest.

PLAs are negotiated agreements among project owners, project managers, and workers' representatives designed to protect against work stoppages during construction. PLAs have been touted as effective tools in construction development and for assisting in the resolution of labor conflicts and helping to create cost savings during development. Some of the purported benefits include:

- Eliminating risk of strikes and disruptions during construction period;
- A process for resolution of disputes that allows work to proceed while disputes are being resolved;
- Access to a pool of skilled labor through union hiring halls;

- A process for meeting labor requirements through other sources if the hiring halls are not able to meet the requirements in a timely fashion; and
- Uniform work rules to improve efficiency and save money.

To address diversity in construction trades and workforce, PLAs may define conditions for diverse workforce recruitment and service provision. These conditions may include diverse contracting goals or designations that allot opportunities for both union and non-union labor, alike. These negotiated agreements – usually made between labor representatives, private developers and city governments – are generally coordinated around local and diverse hiring and contracting goals.

Similarly, CBAs which were first implemented in California's Bay Area in the early 2000s, are legally binding agreements between community groups (or coalitions) impacted by development, developers, and governments. These agreements, which often are separate from formal development agreements between the City and developer, can be set up to address various community concerns, including funding and development of community infrastructure, affordable housing, procurement with local and diverse businesses and jobs. According to a 2018 report by PolicyLink, the Partnership for Working Families and Community Benefits Law Center titled "Common Challenges in Negotiating Community Benefits Agreements and How To Avoid Them,"[17] the most impactful CBAs possess four components:

1. It is negotiated by a coalition that effectively represents the interests of the impacted community;

2. The CBA process is transparent, inclusive, and accessible to the community;

3. The terms provide specific, concrete, meaningful benefits, and deliver what the community needs; and

4. There are clearly defined, formal means by which the community can hold the developer (and other parties) accountable to their obligations.

Both methods have had some successes but can also present barriers to successful administration. First, CBAs must be carefully and expertly negotiated and are susceptible to being co-opted by developers or other interests. It is important to remember that no community is monolithic, and all communities represent a variety of interests and needs. Often it becomes difficult to build the necessary consensus to incentivize developers and local governments to forge such agreements, and both entities may have little interest in entering into these agreements which require the expenditure of significant political capital to promote their campaigns. Additional concerns include: securing adequate resources to sustain a CBA, developing structured agreements to conduct effective compliance, and the possibility of entering long-term developments that may outlast a community coalition.

There has been some debate as to whether the use of PLAs has been effective in promoting to diverse business and workforce participation. Because of the disproportionate representation in many trade unions, and requirements often included in PLAs/CWAs that appear to steer contract opportunities to businesses who are union affiliated, some see PLAs as a form of advantage which promotes union interest over open access and competition. PLAs/CWAs with union requirements may create other barriers for small and diverse businesses by forcing layoffs of core workforce, requiring the hiring of most or all employees from a union hiring hall or by forcing non-union contractors to make contributions to expensive benefit plans (that they do not benefit from without becoming vested in a union member benefit plan).

[17] Partnership for Working Families and Community Benefits Law Center. "Common Challenges in Negotiating Community Benefits Agreements and How to Avoid Them." 2016 PolicyLink. **click for web reference**

Overall, issues involving higher payroll taxes, prevailing wage rates, fringe benefits, and tighter payroll schedules for non-union firms may stress resources for minority owned businesses. Advocates for these policies will point to purported benefits such as having a more diverse and well-trained workforce, however there has been conflicting evidence to suggest these types of policies have produced a net positive impact on either MWBE contractor utilization or comparative project quality, as neither PLAs nor a union seal of approval can guarantee quality work performance.

This description is not meant to serve as an indictment against either organized labor or PLAs as a whole; however, the Department of Labor released guidelines on PLA application in 2011[18] that should be closely followed to help ensure project execution. Some of the considerations include:

- Selecting projects where scope is well defined and the construction environment and labor market factors are well understood;
- Undertaking early planning and analysis of PLA use, and conducting a feasibility study that demonstrates economic benefits, appropriate labor conditions and open competition;
- Negotiating the PLA prior to the bid process, and including PLA terms in the documents, so that all potential bidders are aware of labor costs and availability; and
- Including public policy provisions in the PLA, addressing DBE goals (or specific MBE, WBE, or SBE goals as appropriate) and local resident participation goals.

Community Redevelopment Strategies

One innovative approach is the use of corridor redevelopment strategies in minority business districts. In an area which affords both cities and developers the creativity to think outside the box, using this approach to build MBE capacity while engaging in community redevelopment is the best of both worlds. Across America, new business districts are emerging with work, live, play components, but minority businesses have often been overlooked in these development strategies for larger retailers and national brands.

One innovative approach to promote MBE inclusion in private development is the use of corridor redevelopment strategies to revitalize historic minority business districts. Under the leadership of GSPC CEO Rodney K. Strong, who previously served as the Director of Contract Compliance for the City of Atlanta, the City created a program for MBEs that identified and assisted them in obtaining financing to open businesses in a downtown festival marketplace, now known as Underground Atlanta.

Cities may also look at using rotating kiosk rental space in blighted properties or municipal markets to allow smaller vendors (who may not otherwise be able to shoulder the overhead for a full-time storefront but who offer great services) increased exposure for growth. In Chicago, some have begun experimenting with this strategy, now termed "'Pop-up' urbanism".

Corridor redevelopment strategies afford both cities and developers the creativity to think outside the box, using approaches like these to build MBE capacity while engaging in community redevelopment. Cities should consider engaging in aggressive redevelopment strategies incorporating the inclusion of MBE firms not only in development, but also in the leasing of storefront and retail space to help them grow and scale.

[18] Interactive Elements Incorporated in association with Hill International. "Implementation of Project Labor Agreements in Federal Construction Projects: An Evaluation." 2011 New York: U.S. Department of Labor. click for web reference

CITY SPOTLIGHT:
LOS ANGELES, CA

- Population: 4 Million
- Mayor-Council-Commission
- Annual Municipal Procurement Budget for FY17-18: Approximately $7 billion
- Race-Neutral Program (Race-Conscious Programs Prohibited)

Analyzing the City's 2015-2016 spending, the Mayor's Operations team discovered that the City's general funded departments spent $1.475 billion on professional services with only 7.4 percent going to MBEs, and the City's Department of General Services spent about 1.9 percent of their commodity procurements with MBEs. Through the City Accelerator, Los Angeles was seeking a triple bottom line: 1) competitive pricing leading to increased savings; 2) diverse approaches and solutions to City challenges; and 3) the potential to increase local employment, further stimulating the economy.

Despite being restricted by Proposition 209, a state constitutional amendment, which outlaws affirmative action in public contracting and limits what types of race conscious efforts can be taken, Los Angeles recognized that there were steps they could take to reduce systemic barriers and pave the way for new, more diverse contractors. The procurement process was in need of overhaul: it lacked consistent, centralized leadership which created inefficiencies and hindered competition, diversity, and innovation. Mayor Eric Garcetti began by recruiting Michael Owh to serve as the City's first Chief Procurement Officer, a role that is proving critical in shaping the values, culture and direction of the City's procurement system to be inclusive, responsible, modern, efficient, and accountable. Owh seeks to empower people, improve processes, and facilitate data-driven decision making.

The Los Angeles team significantly advanced their ability to get more businesses certified with the city, particularly businesses owned by people of color. The Los Angeles team developed a series of trainings for counselors at the Business Source Centers. At the conclusion of the training, the participants had to take a written exam demonstrating proficiency; at least one participant from each of the nine resource centers passed the exam and now serve as the point people to help walk small and minority businesses through the local vendor certification process. In addition, the City leveraged private funding to contract with, Avisare-—a purpose-driven MBE firm – to create an online certification platform. Not only will this platform significantly increase the City's ability to connect with diverse firms, but Avisare's contract with the city demonstrates the power of procurement for growing businesses owned by people of color.

In addition, the City worked with the departmental contract coordinators, offering trainings, peer networking opportunities, improvements to data collection, and a new internal website (dubbed *buy*LA) with resources to support inclusive, efficient procurement. The Los Angeles team also worked with city agencies, councilmembers, and the South Los Angeles Transit Empowerment Zone (or SLATE-Z) to build relationships with diverse businesses. In February 2018, they hosted *Build*WITH, an all-day construction and related services matchmaking forum where prime contractors met with small and diverse construction-related firms to discuss opportunities to partner on upcoming public and private contracts. Based on the success of this event, the City hosted two additional matchmaking events in the spring: *Buy*WITH, a commodities vendor fair hosted by Los Angeles' purchasing agent, and *Team*WITH, to equip service providers to work with the City.

LESSON LEARNED:

Solutions must be developed in the context of legal and political realities, but regardless of those realities, all cities can take meaningful steps to opening up procurement to diverse businesses.

VIII.
MEASURING OUTCOMES

The establishment of accurate baselines for tracking and reporting key measures is a necessary component of any data-centric analysis. Often, governments invest significant resources in costly financial systems with long-term contracts hoping that they will provide solutions to problems in tracking and performance, only to find that the system does not operate as fully intended. Some jurisdictions track data aggressively, but lack knowledge of how to use It in establishing accurate baselines. Furthermore, in many jurisdictions, even where there exists a legally defensible disparity study which provides the basis for aggressive goal setting, data shortages impact cities' ability to engage in accurate and effective goal setting. This section of the implementation guide will discuss data in detail, including ways that governments can establish accurate baselines, fill data gaps, and use data to fortify or strengthen existing programs.

ESTABLISHING BASELINES TO MEASURE UTILIZATION

While most cities have a great understanding of prime contract spending and can confidently report prime contractor utilization, this number often lacks context. Though reporting dollar figures is accurate for measuring spending, the dollar figure alone does not give the full representation of the spend analysis. Like a fraction with no denominator, MBE spending reports need to be compared to the full universe of dollars --- both subcontracts and prime contracts---spent by the City to measure its MBE contracting success. This is most often achieved through a disparity study, which should identify total business availability. However, some cities may lack the resources or political will to conduct this research. Though not having a study may preclude an entity from legally defensible remediation of contracting disparities, it does not prevent robust data collection and reporting.

Through publicly available data sets, governments can begin to build an understanding of their available businesses to supplement their business contracting analysis and further their outreach efforts. Collection of this data, alone and comparing to utilization will not satisfy the Croson standard for analysis. Furthermore, measuring spending against the governmental vendor or certified lists is insufficient, as it excludes a portion of the business community which otherwise may be available, but not actively contracting with the government. Also excluded are new entrants into the business marketplace or firms who may be doing business with other public entities. Knowing this, the following data sets could be used for outreach, to build vendor registrations, and to help establish baseline metrics for a local vendor file:

- Hoovers/Dun & Bradstreet Data (subscription-based service, will identify firms, but ethnicities may not be accurate)
- U.S. Census Data
- American Community Survey Data
- Local Building Permit Data
- Local Chambers of Commerce Lists
- Certified MWBE Lists from Outside Certifying Agencies
- Tax Data
- Secretary of State's Office
- Contract Bidder Documents

In some other cities, like Baltimore, Maryland, the City has begun to use third-party business data aggregators which purchased business data from the Maryland Department of Assessment and Taxation as a basis of outreach to newly developed firms.

City bid documents can also be used to help build vendor pools. In many jurisdictions, prime bidders must submit documents illustrating what firms were solicited for subcontracting opportunities on the project. Many times, only the awarded bidder's subcontractors are recognized and measured.

However, there is an opportunity available in the use and analysis of proposed bidders and bidder documents, that are missed by many contractors in helping to gain an understanding of their bidder pool. Compiling these lists, or a series of lists, is very labor intensive, but the compilation of these publicly available data sets would likely provide an entity with a broad database that could be cross checked for accuracy and used to build vendor registration and certification lists.

DATA TRACKING FOR SUBCONTRACTOR AVAILABILITY AND UTILIZATION

Data systems also allow governments to track subcontractor payments and participation either manually, through input by project managers, or through software and online vendor systems. Because of the scrutiny often given to MBE and WBE spending, many governments choose to extensively track utilization related to MBE subcontractors. However, this same level of scrutiny is necessary for non-MBE contractors as well. Without this data, governments are incapable of drawing clear distinctions between their total expenditure with all vendors, and their discrete spending with certified firms.

Disparity studies should help to fill some of these gaps, should they exist, by utilizing methodologies that identify and fill data gaps through econometric analysis. Some studies may include the use of vendor surveys to draw inferences to the whole, flow-through analyses that illustrate the "Total Utilization"[19] of MBE firms by analyzing MBE subcontractor data and MBE prime contractor data as a portion of all contracting dollars. Also, if the MBE subcontractor utilization dollars are available, analysis can be done taking the total dollars of MBE participation and average percentage of overall MBE subcontracting done by MBEs in a jurisdiction. With this, non-MBE subcontracting would be subtracted from total MBE utilization to extrapolate the non-MBE utilization.

In the absence of a disparity study, governments can use bid documents (to view the subcontractors solicited), proposed subcontractor awards, payment records and contract closeout affidavits (which verify subcontractors) to gather this information. Some cities also utilize automated bidder platforms such as Bid USA or contract compliance software such as PRiSM or B2GNow to capture this data. Ensuring that the codes and categories in certification platforms are compatible with any e-procurement program in use by the entity is also crucial, so collaboration across departments is a necessity in managing data and selecting effective software platforms. Some have also explored inclusion of contract language which requires timely reporting as a part of the invoicing process or response to City inquiries regarding contracting or subcontracting process, which may assist the government in collection of all necessary data. As a best practice, municipalities should require reporting of all subcontractors solicited and anticipated to be utilized on contract opportunities to capture the full universe of vendors and avoid data gaps.

CAPTURING AND MAINTAINING RELEVANT DATA

In addition to contractor data, there are several other data fields that, when well maintained, can help support MBE utilization and reporting. The areas discussed below should not be applied only to MBE firms, but should be uniformly applied in a race-neutral fashion to all vendors within the city's vendor system to maintain the highest level of accuracy. Data is ever changing, and contractor data must be updated routinely to account for new firms, firms that are no longer in existence, and firms that have grown or expanded.

[19] Illustration of MBE utilization for both prime contractors and subcontractors as a percentage of all contracting.

- **Commodity Codes**

Commodity codes represent a data field that is critical to the identification of trades and skills represented by local vendors. Though governments vary in preference between the use of NAICS, NIGP, UNSPSC (see Appendix 1), or create their own in-house codes, the misapplication of commodity codes will easily undermine even the strongest program legislation. Commodity codes form the most accurate basis for contract-by-contract goal setting, allowing for practitioners to establish weighted availability by trades on a contract-specific basis.

Without knowing a vendor's commodity code, governments are at a disadvantage in verifying the areas where businesses perform work. Ambiguity in commodity codes will strip MBE programs of their effectiveness by preventing cities from constructing programs that verify solicitation. Complicating this issue are vendor self-registration systems which permit businesses to register to receive notice under multiple commodity codes without requiring them to certify under a primary or secondary code to identify their line of work. For example, staffing companies, who seek information on solicitations under several commodity codes for information to the potential workforce, may register under several codes and show on vendor lists as being available to do work under those codes but not perform work in these areas. Also problematic is human error in code application, where commodity codes are misapplied to vendors in their trade areas or at initiation of a contract solicitation.

To maximize effectiveness, commodity codes should be reported to the digit level which gives the most specificity to the solicited trade. NIGP codes used at the three-digit level may generally express what overall work area is being petitioned but the use of five-digit level codes will instruct on the specific service being is rendered. Pre-qualification programs can also be effective in verifying that available firms can perform in registered trade areas. To avoid code misapplication, some organizations are switching to automated bidder systems that systematically apply work descriptions and commodity codes at the time a solicitation is generated. Systems like this are in use in Seattle with their Sound Transit transportation authority. Cities may also evaluate the feasibility of investing in more training for procurement personnel to help prevent this issue.

In application, taking these steps will help protect both the vendor community and the governmental entity by helping ensure governments are not irresponsibly granting GFE waivers, while also connecting the right businesses to appropriate opportunities in their trades. For cities who have not adopted the use of commodity codes, it is strongly encouraged to invest in this tool for aligning data systems. If this is unavailable, a city can use clear and accurate work descriptions to help supplement availability and goal setting considerations.

- **Vendor Ethnicities and Gender Status**

Without keeping accurate demographic data on City vendors, cities will be unable to accurately report on spending with diverse business groups. All governmental jurisdictions should maintain data on the firm owner's ethnicity – ideally independently verified – to help better understand the businesses in the marketplace. Also, using more granular descriptions, such as specific ethnicities instead of identifications by certification statuses such as "MBE" or "WBE," provide an additional layer of analysis which is critical to both utilization analysis and contract availability and goal setting In best practice these are segmented by vendor ethnicities and work categories.

This lack of specificity in vendor ethnicities has been one of the biggest drawbacks to utilization of Hoover/ D&B data, which would identify firm's general ethnic status, but not specific ethnic identities.[20] This data is also best supplemented with a vendor certification

[20] It has been reported to GSPC that DNB now has the capability to provide vendor ethnicities. However, this data should be independently verified

program, or some sort of identification process verifying vendor identities which can be operated within the City or outside of the City structure by a third party. Ethnicities and gender status should be verified by a staff member or outside consultant through an approved and consistent process, as self-reported identities can reduce the quality of data and may allow business owners to misrepresent their status. While some extremely risk averse legal departments may argue against identification of firm ethnicities out of fear that it would somehow impact the race-neutral application of any program elements, best practices for accurate data reporting are to keep this set of demographic data on potential vendors.

- **Names and Contact Information**

Human error contributes significantly to inconsistencies in vendor name entries, payment and vendor registration data. Small things, like the use of an ampersand over the word "and" or misplaced punctuation can lead to duplicated vendor entries or misaligned vendor ID numbers. Whenever possible, municipal data systems should enable features which auto populate and auto correct vendor names to avoid duplicative (and incorrect) data entry.

Data validation is critically important; vendor contact information should be regularly updated and closely maintained by government personnel. Vendor self-registration on outward facing vendor portals is also an issue for data maintenance, as cities face issues with maintaining data accuracy over time because of the reluctance of vendors to update information. Business owner Sky Kelley, Founder of Avisare, notes that when multiple jurisdictions or entities use the same registration system, vendors have greater incentive to update their information, because they use only one profile for contracting opportunities with multiple partners.

Yearly vendor maintenance involving cleaning contact lists and re-registration campaigns assist in keeping data cleaned and accurate for contract solicitations. Some other cities include this as a part of the yearly re-certification process. Katya Abazajin, the Open Cities Director at the Sunlight Foundation, underscores the importance of collaboration with IT departments in gathering and maintain good data: when IT departments are actively engaged in designing e-procurement or even paper forms that will eventually be entered into the data system, they can help ensure appropriate data validation at every step of the procurement process.

EMERGING INNOVATION: USING BIG DATA

Seeking to know more about the communities they serve, cities are looking for ways to reform data infrastructure. With emerging advancements in data collection, like big data, and a wealth of publicly available data sources, the Kauffman Foundation and Coleridge Initiative are looking to train municipalities on the ways they can manage publicly available data to help frame a more comprehensive story on how to assist businesses with their growth and development. By creating bridges between datasets, cities can understand the unique challenges and characteristics of firms within their marketplace. An annual series of courses surrounding this new and emerging innovation in data infrastructure is available to city representatives.

REPORTING AND TRANSPARENCY

Understanding the complexities in procurement and community engagement allows for practitioners to take an active role in shaping how the story is told. Public employees are especially mindful of data reporting, as they are subject to Sunshine Laws and open records requests in their daily transactions. Typically, while cities are required to report regularly on efforts to engage and contract with local and diverse firms, many jurisdictions, out of fear of what the data may show and how it reflects against themselves as individuals, their agency, or the administration, shy away from the opportunity for transparency. Instead of being proactive in solving the issues, the push for political expediency often causes administrators to rationalize away the need for solutions. However, by proactively releasing open contracting data, city governments can benefit from collaboration and innovation with their vendors and community members participating in city decision-making as equal partners. Like the international standards for open data in general, open contracting data can be made publicly available as a free and accessible resource to catalyze citizens to innovate with their city for their community.

Across the country, the push for transparency is leading to more governments pulling back the curtain to illustrate the work being done for equity. In Atlanta, the Open Checkbook program has been enacted to allow constituents to track spending of taxpayer dollars, view historical trends, and access raw data and future projections. In Austin, TX, the City has piloted an Equity Scorecard designed to score individual departments on their work surrounding equity. The City of Los Angeles has also made it an aim of the City Accelerator grant to develop a similar transparency tool and is also working to develop a publicly available online system which will promote transparency in procurement as well. More information regarding standards for, and implementation of, open contracting can be found at the Open Contracting Partnership. Los Angeles and Philadelphia are pioneers in implementing the Open Contracting Data Standard, which is being adopting in a growing number of countries around the globe.

To encourage reporting transparency, cities can explore writing into program policies timelines for doing periodic analysis to help promote equity. By writing reporting requirements and research and analysis into program requirements, governments can promote continued use of data to inform equity decisions.

DATA AND PROGRAM "SUNSET" PERIODS

Lastly, the Croson decision made it abundantly clear that remedial contracting programs cannot continue perpetually. In Western States Paving Co. v. State of Washington Dept. of Transportation, 407 F. 3d 983 (9th Cir. 2005), the courts defined a "sunset" as a review to determine whether the remedial program has met its intended remedial purpose. Croson, Western States and other cases have not drawn a distinction as to what the appropriate time period for these reviews should be, choosing instead to focus on whether the program has met its intended function. Industry best practices have become to conduct this review, through form of an updated disparity study every five (5) to seven (7) years. Disparity studies, while not defined as a program evaluation tool, can serve both this purpose, as well as establish the factual predicate for a new program, if needed.

IX.
CONCLUSION

Inclusive procurement presents an opportunity for governments to directly impact economic growth while fostering good practice, transparency, and goodwill among stakeholders. When government leaders approach equity as a serious concern, integrative of various areas and levels of government and requiring sustained focus, they can create a culture within entities that is collaborative and service-focused, drawing out the best of what government has to offer. Finding new and creative ways to reach out to the community and providing diverse contractors with the resources they need to succeed will only improve the pool of businesses available to draw from and the economic outcomes of the surrounding community. This guide is a resource for leaders who seek to assess their community's needs and take measured steps toward reaching stated goals of equity and diversity.

Government contracting does not have to remain concentrated among the few individuals and companies who traditionally have had access to the institutional knowledge, education, capital, and support to win a government contract. These City Accelerator cities prove that a more inclusive and equitable approach is possible. There are many barriers to doing this work, as have been detailed, but there is also ample opportunity for governments to remove or reduce those barriers and increase competition. Crossing the threshold into public contracting success requires more than just having the capacity to respond effectively to a government proposal or bid. In several jurisdictions, communities of color have been barred from access to the resources necessary to succeed. However, it is in these communities that government can choose to use its resources to ameliorate some of those historical inequities, not just for fairness or equity's sake, but also for the economic development and vitality of all segments of the community.

APPENDIX 1.
GLOSSARY

Alternative Project Delivery Method – Any mode of project delivery which deviates from the traditional "Design-Bid-Build" or "Design-Award-Build" contracting method. This includes methods such as: Construction Manager at Risk ("CMAR/CMR"), "Design-Build," "Design-Build-Operate-Maintain," and "Design-Build-Finance-Operate-Maintain" ("DBOM/DBFOM") and Public/Private Partnerships (or "P3s")

Anecdotal – A reported personal experience or encounter, retold through interview, testimony, email, or survey. Not necessarily purported by quantitative analysis.

Availability –A calculated percentage computed by dividing the number of businesses in each group by the total number of businesses in the pool of vendors for that work category. Businesses are analyzed by a Disparity Study, within the determined relevant market to determine if they are "ready, willing, and able" per Croson.

City of Richmond v. J.A. Croson Company, 488 U.S. 469, 109 S.Ct 706, 102 L.ED 2d 854 (1989) (1989) ("Croson") – Seminal case by the U.S. Supreme Court which governs and frames the permissibility of race-based programs under the Fourteenth Amendment of the U.S. Constitution. [See also Appendix 2 for additional details]

Commercially Useful Function ("CUF") – A requirement set to prevent fraud that ensures that MBE/DBE firms are performing functions necessary to the completion of a contract. A CUF is performed when the MBE/DBE is responsible for execution of the work under contract and is carrying out its responsibilities by performing, managing, and/or supervising the project as specified. Under the terms established in 49 CFR §26.55, a DBE firm performs a CUF when it is: "Responsible for execution of the work of the contract or a distinct element of the work . . . by actually performing, managing, and supervising the work involved."

Commodity Code – Codes assigned as standard classification for goods, services, and products. Most commonly, cities will utilize either the National Institute of Governmental Purchasing ("NIGP") codes, the North American Industry Classification System ("NAICS") codes, or United Nations Standard Products and Services ("UNSPSC") codes. Some cities may also choose to create their own classification system.

Disadvantaged Business Enterprise ("DBE") – In accordance with 49 CFR Part 26, the U.S. Department of Transportation defines a DBE as for-profit small business concerns where socially and economically disadvantaged individuals own at least a 51 percent interest and control management and daily business operations. African Americans, Hispanic Americans, Native Americans, Asian Pacific Americans and Subcontinent Asian Americans, and women are presumed to be socially and economically disadvantaged. Other individuals can also qualify as socially and economically disadvantaged on a case-by-case basis.

To participate in the DBE program, a small business owned and controlled by socially and economically disadvantaged individuals must receive DBE certification from the relevant state– generally through the state Uniform Certification Program ("UCP").

To be regarded as economically disadvantaged, an individual must have a personal net worth that does not exceed $1.32 million. To be a small business, a firm must meet SBA size criteria AND have average annual gross receipts not to exceed $23.98 million. Size limits for the airport concessions DBE program are higher. (See the link: https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/definition-disadvantaged-business-enterprise).

Disparity Index ("DI") – A disparity index is a measurement of disparity used in Disparity Studies calculated by comparing utilization percentages (by dollars) to the percentage of the total pool of firms in the relevant geographic and product areas. (The actual disparity derived as a result of employing this approach is measured by use of a Disparity Index.)

The Disparity Index is defined as the ratio of the percentage of MWBE firms utilized (U) divided by the percentage of such firms available in the marketplace, (A):

Let:
U =Utilization percentage for the group
A =Availability percentage for the group
DI =Disparity Index for the group
DI =U/A

Disparity Study ("Study") – A factual predicate, or "compelling governmental interest" set forth in Croson to satisfy the first of two prongs of the strict scrutiny judicial review required of race-based governmental programs.

Fiscal Year ("FY") – The business year for City purchasing and accounting purposes. Traditionally measured either from July 1st – June 30th or from January 1 – December 31.

Good Faith Efforts ("GFE") – The waiver process associated with MWBE goals program requiring documentation and verification of prime contractors' efforts to act in good faith to engage minority and women businesses as subcontractors.

Historically Underutilized Business ("HUB") –Designated grgistration of a business owned and controlled by an individual or group of individuals who have at least 51 percent stake in ownership who identify in one of the historically underutilized businesses identified by that state, typically minorities and women; sometimes DBEs, Disabled, or Service Disabled Veterans are included.

Minority Business Enterprise ("MBE") – any for-profit business owned and controlled by an individual or group of individuals who identify with an ethnic minority group and have at least 51 percent stake in ownership in a business.

Women Business Enterprise ("WBE") – Any for profit business owned and controlled by an individual or group of individuals who identify as women and have at least 51 percent stake in ownership in a business. In many jurisdictions this group predominantly represents Caucasian women.

MWBE (collectively, also "Non-White businesses) – For-profit businesses owned and controlled by individual persons or groups of individuals who have at least 51 percent stake in ownership and identify as either members of an ethnic minority group or Caucasian Women.

Non-MBE (also "Caucasian Male" or "White male") – Any for-profit business owned and controlled by an individual person or group of individuals who have at least 51 percent stake in ownership and identify as either Caucasian males, is publicly traded, or no ethnic identification.

Overutilization – The measure in a disparity study by which the utilization percentage is higher than the availability percentage.

Parity – The absence of disparity, demonstrated by the utilization percentage being equal to availability percentage.

Prime Contractor – A business who has entered direct contractual relationship with a project owner to provide a good, service, or perform a scope of services.

Project Delivery Method (or "Delivery Method") –system used by an agency or owner for organizing and financing design, construction, operations, and maintenance services for a structure or facility.

Public/Private Partnership (aka "P3") – An alternative delivery method where a public entity and private entity agree to finance a portion of the project to completion.

Qualitative Analysis – Also known as anecdotal analysis. Referring to a measurement of quality (e.g.,. how good over how much). Typified through collection and analysis of anecdotal impressions, such as interviews, public hearings, focus groups, and other forms of commentary.

Quantitative Analysis – Commonly referred to as statistical data. Referring to a measurement of quantity over quality (e.g.,. how much over how good). Typified by analysis of mathematical or statistical modeling.

Race/Gender-Conscious – Any policy or programmatic response that takes race or gender into account in crafting a remedial action. For context, race/gender-conscious actions may be represented as MWBE participation goals on contracts.

Race/Gender-Neutral – Policy or programmatic responses which operate independent of race or gender consideration. For example, Small Business Enterprise ("SBE") contracting goals are based on size and not racial classification.

Rational Basis Test – The fundamental legal basis for developing new programs or making fundamental changes to any existing programs.

Regression Analysis – Statistical measure used to determine whether the race, ethnicity, or gender status of a business owner are an impediment to contracting in the public and/or private sector and whether but for race or gender status, these firms would have the capacity to provide services.

Relevant Market – A statistical measure, often determined by where the city has spent 75 percent-85 percent of its prime and subcontractor awards dollars by work category. In a disparity study, analysis will predominantly include only firms located within the relevant market, by work category, to ensure that any resulting program is "narrowly tailored" per Croson standards.[21]

Small Business Enterprise ("SBE") – Any for profit business independently owned and operated with fewer than 100 employees and/or an average annual gross receipt of $15 million or less, over the last three (3) tax years. In accordance with Small Business Administration standards (or a portion of these standards, otherwise identified by a government organization). The number of employees and the amount of gross receipts needed to qualify is contingent on local regulations and type of business.

[21] This is preferable, but if subcontracting award dollars are not available data or are not otherwise accounted for, prime-only data may have to be used.

Strict Scrutiny – The highest level of judicial scrutiny used in determining constitutionality. "Strict scrutiny" review involves two co-equal considerations: First, the need to demonstrate a compelling governmental interest; Second, implementation of a program or method narrowly-tailored to achieve/remedy the compelling interest. The Croson case outlines the requirement for Strict scrutiny in race-based contracting decisions.

Subcontractor – A business which has entered a direct contractual relationship with a prime contractor to either provide a good or service or perform a full scope, or portion of a scope, of services.

Threshold Analysis – A measure of all contract awards disaggregated by contract size thresholds. This may demonstrate average or median contract size procured, total number of contracts let by size, or compare contracts awarded to various race and/or gender groups by size.

Utilization – A calculation of award, purchase order ("P.O.") and/or payment dollars to determine where and with whom expenditures are made to prime contractors and/or subcontractors.

Work Assignments- Determination of work performed or capable of being performed using commodity codes (NAICS, NIGP, etc.) or descriptions. These may be broad categories (e.g., construction, services, goods) or specific trades (e.g. asphalt paving or janitorial services).

Underutilization – The measure in a disparity study by which the utilization percentage is identified as lower than the availability percentage and the Disparity Index ("DI") is less than 1.00. A finding of underutilization is required by any disparity study prior to administering a race-conscious program.

APPENDIX 2. LAWS GOVERNING EQUITABLE PROCUREMENT: A BRIEF SOCIAL AND LEGAL HISTORY OF CIVIL RIGHTS

In 1856, fewer than two hundred years ago, the U.S Supreme Court proclaimed that slaves of African descent were not citizens of the United States by birth and had no rights or benefits of citizenship under the U.S. Constitution This is evidenced by the Three-Fifths (3/5) Compromise[22] and was affirmed by the U.S. Supreme Court in Dred Scott, which held that persons of African descent were not, nor were they ever intended to be, citizens under the U.S. Constitution. After the American Civil War in which over 189,000 African Americans fought for their freedom, the 13th Amendment to the Constitution, which ended slavery, was passed and ratified in 1865. These freed men and women, who had been denied education, rights of ownership, and were forcibly separated from their families, faced ongoing, state-sanctioned discrimination and violence. To survive, most African American men and women were forced into economic subservience, exchanging manual labor for food, shelter, and insignificant wages.

Although the Civil Rights Act of 1866 purported to grant citizenship – and its associated rights – to all people born in the United States, many civil rights advocates did not believe that it was permanent enough, and African American leaders, including Fredrick Douglass, continued to agitate for "birthright" citizenship, which culminated in the passing of the 14th amendment in 1868. This amendment made African-American former slaves, and indeed anyone born on US soil regardless of origin or circumstance, citizens in the eyes of the Constitution. The 14h Amendment also guaranteed equal protection for all persons under the law, and Congress was granted "plenary power" to enforce the citizenship rights of African Americans.

State and local governments countered with discriminatory legal regimes known as Jim Crow laws which abridged these rights of citizenship and terrorized African Americans for nearly a hundred years. These laws were designed to institutionalize segregation and subjugate African Americans. The litigation over these local dictates culminated with Plessy v. Ferguson, 163 U.S. 537 (1896), which upheld the constitutionality of racial segregation. This remained the law and practice in Southern states and elsewhere until Brown v. Board of Education rendered the concept of "separate but equal" unconstitutional, overturning Plessy v. Ferguson. This decision undermined the legal basis for segregation and paved the way for the 1964 Civil Rights Act, which used the Commerce Clause to outlaw segregation in public accommodations and employment, enacting more substantive means for the pursuit of equity.

Despite these legal advancements, the foundation for systemic economic inequity continued to be laid. Through the practice of "redlining" (where people of color were denied access to home loans in certain communities[23]) and racialized community planning, people of color were forced to live in high concentration and stripped of access to necessary community services, while their accumulation of wealth was suppressed, and their economic opportunities consistently undermined. The 1967 Voting Rights Act and the 1968 Fair Housing Act were designed to address these realities by empowering African Americans with the right to vote and outlawing housing segregation. However, despite changes in the laws, equity had not yet been achieved. African Americans and other people of color remained severely economically disadvantaged. Speaking at Howard University in 1966, then President, Lyndon Johnson, stated,

Freedom is the right to share, share fully and equally, in American society--to vote, to hold a job, to enter a public place, to go to school. It is the right to be treated in every part of our national life as a person equal in dignity and promise to all others. But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair. Thus, it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates. This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.

Under Richard Nixon, the concept of Black capitalism was supported to counteract the frustrations of groups like the Black Panther Party and Student Nonviolent Coordinating Committee ("SNCC"), by inviting African Americans to share in economic opportunity rather than rebel against the oppressive structures of American society. This prompted the first piece of major procurement-related legislation, the 1969 Philadelphia Plan, which required government contractors to hire minority employees in response to Executive Order 11246. [24] Assistant Secretary of Labor, Art Fletcher, then pushed for the integration of the construction trades and employment in the late 1960s. Lending programs such as the SBA's Minority Enterprise Small Business Investment Companies ("MESBIC"), and later the Small Business-focused Small Business Investment Companies ("SBICs") were created to ease capital access for minority owned businesses.

[22] Art. 1, Sec. 2, Clause 3 of the U.S. Constitution in 1787 stated: "Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free Persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other Persons.

[23] Mapping Inequality map by University of Richmond illustrating the ongoing effects of redlining on communities across the U.S. **click for web reference**

[24] September 28, 1965, 30 F.R. 12319

By the mid- to late-1970s, equitable contracting programs began to move to the forefront, with Maynard Jackson's push in Atlanta to develop the Equal Business Opportunity ("EBO") ordinance to help increase diverse representation in contracting. At the federal level, Congressman Parren Mitchell pushed for the passage of the 1982 Surface Transportation Assistance Act, which effectively established the federal DBE contracting program, all designed to give business owners identified as historically disadvantaged opportunities in government procurement and to increase diverse capital in the private sector. Litigation followed in opposition to this attempt to enhance opportunities for people of color, which ended in the federal programs being upheld in Fullilove v. Klutznick, 448 U.S. 448. Following the guidance of the courts, state and local governments began to model minority business programs after the federal program, not believing there would be a legal distinction drawn between the two. It became clear in the late 1989s that the court was going to opine on such programs, which it did in City of Richmond v. J.A. Croson, 488 U.S. 469 (1989), the seminal case in government procurement law. More on Croson and its progeny can be found in Section II of this document.

Landmark Case: J.A. Croson Company v. The City of Richmond, VA (1989)

Laws that, on their face, favor one class of citizens over another may run afoul of the Equal Protection Clause of the Fourteen Amendment. Depending on the nature of the differentiation (e.g., based on race, ethnicity, gender), courts evaluating the constitutionality of a minority business program will apply. Race-based programs are evaluated under a "strict scrutiny" standard, while gender-based programs are evaluated under the "intermediate scrutiny" standard. In its Croson decision, the Supreme Court ruled that the City of Richmond's Minority Business Enterprise ("MBE") program failed to satisfy the requirements of strict scrutiny. Strict scrutiny review involves two equal considerations: 1) the need to demonstrate a compelling governmental interest; and 2) implementation of a program or method narrowly-tailored to achieve the compelling interest. In Croson, the Supreme Court concluded that the City of Richmond failed to meet either test or show that its set-aside program was "necessary" to remedy the effects of discrimination in the marketplace.

In fact, the Court found that the City of Richmond had not established the necessary factual predicate –the evidence on which the city's case was based -- to infer that discrimination in contracting had occurred. The Court reasoned that a mere statistical disparity between the overall African American population in Richmond (50 percent) and awards of prime contracts to African American owned firms (.67 percent) was an irrelevant statistical comparison and insufficient to raise an inference of discrimination. The Court emphasized the need to distinguish between "societal discrimination," which it found to be an inappropriate and inadequate basis for social classification, and the type of identified discrimination that can support and define the scope of race-based relief.

The Court opined that the generalized assertion of past discrimination in an entire industry provided no guidance in determining the present scope of the injury a race-conscious program seeks to remedy and emphasized that "there was no direct evidence of race discrimination on the part of the City in letting contracts or any evidence that the City's prime contractors had discriminated against minority owned subcontractors." And that there was no constitutional or statutory violation by anyone in the construction industry which might justify continuation of the program. *Id.* at 480.

However, Justice O'Connor provided guidance on the type of evidence that might indicate a proper statistical comparison: *[W]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.* Id. at 509.

Stated otherwise, the statistical comparison should be between the percentage of MBEs in the marketplace available to do contracting work (including prime contractors and subcontractors), and the percentage of total government contract awards (and/or contractual dollars paid) to qualifying MBE firms. Additionally, the Croson court stated that anecdotal accounts of past discrimination also could provide a basis for establishing a compelling interest for local governments to enact race-conscious remedies. However, conclusory claims of discrimination by City officials, alone, would not suffice, nor would an amorphous claim of societal discrimination, simple legislative assurances of good intention, or congressional findings of discrimination in the national economy. To uphold a race- or ethnicity-based program, the Court held, there must be a determination that a strong basis in evidence exists to support the conclusion that the remedial use of race is necessary.

Regarding the second prong of the strict scrutiny test, the Croson Court ruled that Richmond's MBE program was not narrowly tailored to redress the effects of discrimination. The Court held that:

1. The City of Richmond's MBE program was not remedial in nature because it provided preferential treatment to groups such as Eskimos and Aleuts, for whom there was no evidence of discrimination in Richmond. Thus, the scope of the City's program was too broad.

2. The thirty percent (30%) goal for MBE participation in the Richmond program was a rigid quota not related to identified discrimination. Specifically, the Court criticized the City for its lack of inquiry into whether a particular business, seeking racial preferences, had suffered from the effects of past discrimination.

3. The City failed to consider race-neutral alternatives to remedy the under-representation of non-white groups in contract awards.

4. The City's MBE program should have contained a sunset provision for a periodic review process intended to assess the continued need for the program. id. at 500

Since then, the Supreme Court and the Federal Circuit Courts have provided additional guidance regarding the considerations, measurements, information, and features surrounding MWBE programs which assist in protecting City's programs from constitutional challenge. Of significant note is the analysis determining what firms are "Available" to perform on government contracts. Two primary methods – the custom census and list-based approach – have gained general acceptance. (These methods are described on pages 27/28)