

The logo for MGT, consisting of the letters 'MGT' in a bold, blue, sans-serif font. The letter 'T' has a stylized white arrow pointing to the right integrated into its vertical stem.The background image shows a modern, multi-story brick and glass apartment building at dusk. In the foreground, there is a circular fountain with a bronze statue of a woman holding a tablet. The scene is illuminated by streetlights, and there are trees and a paved walkway in the foreground.

# Montgomery County, MD

*2024 Disparity Study*



# Montgomery County, MD

Disparity Study  
SEPTEMBER 24, 2024

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# Preface

## MGT Consulting Project Team

MGT Impact Solutions, LLC, is a Tampa-based research and management consulting firm exclusively working in the public sector. Since 1990, MGT has conducted over 250 disparity and disparity-related studies. The team of experts who dedicated their time, attention, and expertise to this Study includes some of the most experienced and accomplished social science experts in the field of disparity studies:

- **Mr. Andres Bernal**, Vice President/Project Executive/Disparity Study Methodology/Legal Research
- **Ms. Vernetta Mitchell**, Project Director/Project Lead/Qualitative Research/Subcontractor Manager
- **Ms. Debby Kreit**, Manager/Assistant Project Lead/Qualitative Research/Subcontractor Manager
- **Ms. Corlisha Mitchell**, Manager/Policy Research
- **Mr. Walter Benitez**, Senior Consultant/Data Collection Manager
- **Mr. Jaime Benitez**, Consultant/Data Analyst
- **Ms. Haita Toure**, Consultant/Qualitative Research

## Subconsultants

**McMillon Communications Inc. (Minority Business Enterprise [MBE])** is a full-service marketing communications agency based outside of Washington, D.C. in Fort Washington, Maryland. Led by Doris McMillon, one of the top media training consultants in the United States, the woman-owned, minority business has served government agencies, non-profit organizations and Fortune 500 corporations with award-winning campaigns and measurable success for more than 30 years. McMillon Communications conducted area businesses in-depth interviews and professional organizations in-depth interviews.

**Chrysalis Collaborations, LLC (WBE & Disability-Owned Business Enterprise [DOBE])** works with organizations, community members, and government to understand how education, community, human services, housing, health, and employment work on the ground. They develop innovative, evidence-based programs and policies that improve employment success and life chances for community members. Chrysalis provides translation of research into practice/policy, training, and technical assistance, and technical writing. Chrysalis Collaborations conducted area businesses in-depth interviews.

**SkyBase7 (WBE)** is a national public opinion polling firm that provides advertising, branding, and market research services. Their focus is to provide clients with sound strategies based on factual research and quantifiable results. They offer dynamic strategies that use a multi-generation approach to marketing and media across diverse platforms. SkyBase7 administered the custom census surveys to establish estimates of M/FBE availability and the qualitative vendor survey of business owners.

**Create A Heart Marketing (MBE)** creates fully automated, highly targeted digital marketing campaigns. Their highly curated content and campaigns help service-based organizations in every industry increase their market reach, awareness, audience engagement and stakeholder support. Create A Heart designed, built, and maintained the disparity study website.

# Acknowledgements

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# Notice

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# Glossary of Terms

This glossary contains definitions of common terms and acronyms used throughout the County's Disparity Study. Additional and more detailed definitions can be found in various chapters of the report.

Anecdotal	A personal account of experiences of businesses doing business with or attempting to do business with the County collected through surveys, interviews, and public hearings.
Aspirational Goal	A benchmark percentage of spending by an agency with a particular group over a period of time. The aspirational goal is typically an annual goal.
Anecdotal Database	A compiled list of utilized firms, registered vendors, and certification lists developed from several different sources, including Dun & Bradstreet. This list was used to develop the pool of available firms to participate in the anecdotal activities.
Awards	Awards reflect anticipated dollar amounts a prime contractor or vendor are scheduled to receive upon completion of a contract.
Combined Statistical Area	Combined Statistical Areas (CSA) are geographic entities defined by the U.S. Office of Management and Budget (OMB) for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics.
Contract	An agreement made between Montgomery County and the vendor to provide services and or goods with a defined scope of work, terms, and conditions.
Custom Census	Custom census involves using Dun & Bradstreet as a source of business availability. A short survey is conducted on a random sample of firms supplied by Dun & Bradstreet requesting specific information, i.e., ethnic and gender status, and willingness to work on the County projects.
Direct Payment	Payment made to prime contractors or vendors without the development of a contract.
Disparity Index/ Disparity Ratio	The ratio of the percentage of utilization and the percentage of availability for a particular demographic group times 100. Disparities were calculated for primes and subcontractors for each of the business categories.
Disparity Study	A study that reviews and analyzes the utilization and availability of disadvantaged, minority- and female-owned businesses in a particular market area to determine if disparity exists in the awarding of contracts to minority and female business enterprises by a public entity.
DOBE	An acronym for a Disability-Owned Business Enterprise. A DOBE is a for-profit business that is at least 51% owned and operated by one or more individuals with disabilities.

Expenditures	Expenditures are payments made by the County to primes and payments made by primes to subcontractors.
Good Faith Efforts	Documented evidence of the primes' efforts to meet established project goals to contract with M/FBE firms.
Intermediate Scrutiny	The second level of Federal judicial review to determine whether certain governmental policies are constitutional. Less demanding than "strict scrutiny."
Lowest Responsible, Responsive Bidder	An entity that provides the lowest price, has responded to the needs of the requestor, and has not violated statutory requirements for vendor eligibility.
MFD	An acronym for a minority, female, and disabled-business enterprise. An MFD is a business that is at least 51% owned, controlled and managed daily by a minority person(s) as defined by county code and regulations to include the following categories: African American, Hispanic American, Asian American, Native American, Disabled Persons, and Female.
M/FBE	An acronym for a minority- or woman-owned business enterprise. An M/FBE is a business that is at least 51% owned and operated by one or more individuals who are African American, Asian American, Hispanic American, Native American or Nonminority Females.
Master Utilization Database	A database that maintains firms who have conducted business with the County and were paid by the County for Goods & Services.
MBE	An acronym for a minority-owned business enterprise. An MBE is a business that is at least 51% owned and operated by one or more individuals who are African American, Asian American, Hispanic American, or Native American.
Non-MFD	An acronym for firms not identified as minority-, female, or disabled-owned.
Passive Discrimination	The act of perpetuating discrimination by awarding contracts to firms that discriminate against minority- and female-owned firms.
Prima Facie	Evidence which is legally sufficient to establish a fact or a case, unless disproved or rebutted.
Prime	The contractor or vendor to whom a purchase order or contract is issued by the County.
Private Sector	The for-profit part of the national economy that is not under direct government control.
Procurement Category	The type of service or good provided under a contract awarded.

Project Goals	Goals placed on an individual project or contract, as opposed to aspirational goals placed on overall agency spending.
Public Sector	The non-profit part of the economy that is controlled by the government.
PUMS	An acronym for Public Use Microdata Sample. PUMS contains records for a sample of housing units with information on the characteristics of each unit and each person in it. PUMS files are available from the American Community Survey (ACS) and the Decennial Census.
Purchase Order	A commercial document and first official offer issued by a buyer to a seller, indicating types, quantities, and agreed prices for products or services.
Relevant Geographic Market	The geographical area where the firms that have been awarded the majority of the County contract dollars are located.
Sole Source	The contracting or purchasing of goods or services, without bidding, when performance or price competition for a product are not available; when a needed product is available from only one source of supply; or when standardization or compatibility is the overriding consideration
Statistically Significant	The likelihood that a result or relationship is caused by something other than mere random chance. Statistical hypothesis testing is traditionally employed to determine if a result is statistically significant or not. This provides a "p-value" representing the probability that random chance could explain the result. In general, a 5% or lower p-value is considered to be statistically significant.
Strict Scrutiny	The highest level of Federal judicial review to determine whether certain governmental policies are constitutional. Applies to race-conscious programs.
Subcontractor	A vendor or contractor providing goods or services to a prime contractor or vendor under contract with the County.
Unclassified Firms	Identified as a firm that is not identified or certified as a minority, female, or disabled-owned businesses and could not be determined as such.
Utilization	Examines the expenditures and payments made to primes and subcontractors in the County's geographic market area for each procurement category. The utilization data are presented as the dollars spent or awarded and the percentage of the total dollars by racial, ethnic, and gender classification.
FBE	An acronym for a female-owned business enterprise. A FBE is a business that is at least 51% owned and operated by one or more Nonminority Females.



# 1 Introduction

## 1.1 Introduction

Montgomery County, Maryland (County) retained MGT to conduct a Disparity Study for the purpose of ascertaining whether there is a statistically significant disparity between the availability of qualified minority, female, and disabled-businesses (MFDs) in the relevant geographic marketplace that are willing and able to provide goods and services to the County—and in addition, ascertaining the County's utilization of such MFDs.



### Chapter Sections

**1.1 Introduction**

**1.2 Background**

**1.3 Overview of Study Approach**

**1.4 Report Organization**

The County will use this information from this study to determine whether conditions continue to exist that would make the County's minority-owned business procurement program sustainable under Croson, and thereby justify allowing the program to continue beyond its current sunset date.

To conduct the study, MGT examined MFD utilization in County contracting, the availability of these firms in the relevant geographic marketplace, and the qualitative evidence of whether discrimination is the cause of any identified disparity. The statistical data was collected and analyzed for the following business categories:

- Construction
- Professional Services
- Other Services
- Goods

## 1.2 Background

Montgomery County's MFD Program has a rich history of supporting minority, female, and disabled-owned businesses, reflecting the county's commitment to diversity and inclusivity. Established in 1978 as the Minority Business Enterprise (MBE) Program, it aimed to increase the participation of minority-owned businesses in county contracts. This early initiative paved the way for greater inclusivity, leading to the program's expansion in 1980 to include female-owned businesses and in 1985 to encompass disabled-owned businesses. By 1990, these programs were consolidated into the Minority, Female, and Disabled-Owned Business Enterprise (MFD) Program, symbolizing a holistic approach to supporting underrepresented business owners.

As the MFD Program matured, it introduced additional initiatives to further empower MFD-owned businesses. In 2001, the program began offering outreach and technical assistance, recognizing the need to provide support beyond certification. This step was crucial in helping MFD-owned businesses navigate the complexities of contracting and procurement, ultimately enhancing their competitiveness in the marketplace.



The establishment of the Local Small Business Reserve Program (LSBRP) in 2008 marked another milestone in the MFD Program's evolution. This program was designed to provide contracting opportunities specifically for small businesses, including those owned by minorities, females, and individuals with disabilities. By creating a pathway for small businesses to participate in county contracts, the LSBRP contributed to a more diverse pool of contractors and promoted economic growth among underrepresented groups.

In 2010, the MFD Program expanded its support for MFD-owned businesses with the creation of the Business Development Assistance Program (BDAP). This program offered training and support to help MFD-owned businesses enhance their competitiveness and navigate the challenges of the business landscape. By providing resources and guidance, the BDAP empowered MFD-owned businesses to thrive and succeed.

Recent advancements in the MFD Program include the adoption of a new MFD Program Policy in 2015, reaffirming Montgomery County's commitment to supporting MFD-owned businesses. The launch of the MFD Online Certification and Compliance System in 2020 further streamlined the certification process, making it easier for MFD-owned businesses to access county contracts.

The Montgomery County MFD Program has evolved significantly since its inception, reflecting the county's commitment to diversity, equity, and inclusion in its business practices. Through its various initiatives and policies, the MFD Program has not only supported MFD-owned businesses but has also contributed to the economic vibrancy and inclusivity of the local community.

## 1.3 Overview of Study Approach

The County's study includes procurement activity from July 1, 2015 through June 30, 2021. The objectives of this study were:



- Determine if a disparity exists in awarding contracts to Minority- and Female- owned businesses that are qualified and available to perform Construction, Professional Services, Other Services, or provide Goods as well as participate on Montgomery County contracts in the County's Relevant Geographic Market Area (RGMA).
- If disparity as described above does exist, determine whether the effects of any past discrimination against Minority- and Female-owned businesses in the County's procurement of Construction, Professional Services, Other Services, and Goods exist or continue to exist within the County's RGMA, as a result of direct action by the County, or as a result of the County's role as a passive participant in discriminatory behavior practiced by entities that do business with the County.

The Study analyzed contracting opportunities in these procurement categories to identify with particularity whether a statistical disparity exists. Disparity is determined and detailed within Chapter 5 of this report. A statistical disparity demonstrates whether the County is a passive participant in private sector discrimination and/or lingering effects of past discrimination exist that give rise to a compelling governmental interest for continued and developmental support to include but not limited to the County's MFD program.

The work plan consisted of, but was not limited to, the following major tasks:

- Establish data parameters and finalize the work plan.
- Conduct a legal review.
- Review the County's policies, procedures, and programs.

### RESEARCH QUESTIONS

These research questions are embedded in relevant chapters throughout this report.

1. Is there factual predicate evidence to continue to support a race - and gender - conscious MFD program for the County?
2. How does case law inform the research methodology for the County's disparity study? (Chapter 2)
3. Are there disparities between the availability and utilization of Minority and Female primes and subcontractors?
4. If so, what is the cause of the disparity? Is there other evidence that supports and/or explains why there is disparity?
5. Does the County passively engage in private sector discrimination?
6. Are there statistically significant disparities in the utilization of Minorities and Females by primes on projects where there are no Minority and Female goals?
7. Is there qualitative/anecdotal evidence of disparate treatment of Minority and Female subcontractors by prime contractors?

- Conduct public engagement meetings.
- Determine the County's geographic and product markets.
- Conduct market area and utilization analyses.
- Determine the availability of qualified firms.
- Analyze prime and subcontractor utilization and availability for disparity.
- Analyze disparities in the private sector.
- Conduct a survey of business owners.
- Collect and analyze anecdotal information.
- Prepare and present draft and final reports for the study.

## 1.4 Report Organization

In addition to this introductory chapter, the County’s disparity study report consists of:


<b>CHAPTER 2</b>	<p><b>LEGAL REVIEW</b></p> <p><b>Chapter 2</b> presents the legal framework and an overview of the controlling legal precedents that impact remedial procurement programs with a particular concentration on the United States Court of Appeals for the Fourth Circuit.</p>
<b>CHAPTER 3</b>	<p><b>PROCUREMENT AND PROGRAM POLICY REVIEW</b></p> <p><b>Chapter 3</b> provides MGT’s analysis of the County’s race- and gender-neutral, and race- and gender- conscious policies, procedures, and programs.</p>
<b>CHAPTER 4</b>	<p><b>MARKET AREA AND AVAILABILITY ANALYSES</b></p> <p><b>Chapter 4</b> presents the methodology used to determine the County’s relevant geographic market area and the analysis of availability estimates within the relevant geographic market area.</p>
<b>CHAPTER 5</b>	<p><b>PRODUCT MARKET, UTILIZATION, AND DISPARITY ANALYSES</b></p> <p><b>Chapter 5</b> presents the product market and analyses of vendor utilization by the County for the procurement of Construction, Professional Services, Other Services, and Goods and the disparity between the availability and utilization of Minority and Female firms by the County.</p>
<b>CHAPTER 6</b>	<p><b>PRIVATE SECTOR ANALYSIS</b></p> <p><b>Chapter 6</b> provides an analysis of the disparities present in the private sector and the effect on Minority and Female firms. This private sector analysis demonstrates why the County’s race- and gender- conscious programs and goals are necessary to ensure it does not become a passive participant in private sector discrimination.</p>
<b>CHAPTER 7</b>	<p><b>QUALITATIVE ANALYSIS</b></p> <p><b>Chapter 7</b> contains an analysis of qualitative data collected from the survey of business owners, one-on-one interviews, focus groups, and business information sessions.</p>
<b>CHAPTER 8</b>	<p><b>FINDINGS, COMMENDATIONS, AND RECOMMENDATIONS</b></p> <p><b>Chapter 8</b> summarizes the findings, commendations, and recommendations based upon the analyses presented in this Study.</p>
<b>APPENDICES</b>	<p>The appendices contain additional analyses and supporting documentation and data.</p>

MGT recommends reading the disparity study in its entirety to understand the basis for the findings and conclusions presented in **Chapter 8, Findings, Commendations and Recommendations**.

# 2 Legal Review

## 2.1 Introduction

The Supreme Court decisions in *Richmond v. J. A. Croson Co. (Croson)*,<sup>1</sup> and *Adarand v. Peña (Adarand III)*<sup>2</sup> established and applied the legal framework that governs race- and gender-conscious procurement programs. These cases held that strict scrutiny should be the standard by which race-conscious governmental programs should be reviewed, including programs of federal, state, and local governments. In particular, the courts held that to survive a constitutional challenge under a strict scrutiny standard, a race-conscious governmental procurement program must be (1) justified by a compelling governmental interest in remedying identified discrimination in the marketplace; and (2) narrowly tailored to remedy that discrimination. Decisions of the Fourth Circuit offer the most directly binding authority to Montgomery County, particularly the decision involving the North Carolina Department of Transportation’s (NCDOT) M/WBE<sup>3</sup> program in *H.B. Rowe Co., Inc. v. Tippett (Rowe)*.<sup>4</sup> Other circuit court cases outside of the Fourth Circuit offer persuasive authority where the Fourth Circuit does not directly address all aspects of a legally defensible M/WBE program. This review also addresses the most pertinent cases outside of the Fourth Circuit.



<b>Chapter Sections</b>
2.1 Introduction
2.2 Strict Scrutiny Standards for Race- and Gender-Specific Programs
2.3 Strict Scrutiny Analysis
2.4 Legal Review Summary

## 2.2 Scrutiny Standards for Race- and Gender-Specific Programs

### 2.2.1 Strict Scrutiny - *Richmond v. J. A. Croson Co. as Applied to State and Local Governments*

Justice O’Connor in *Croson* established the framework for testing the validity of race-based programs in state and local governments. In 1983, the Richmond City Council (Council) adopted a Minority Business Utilization Plan (the Plan). In adopting the Plan, the Council relied on information that showed that there was, “no direct evidence of race discrimination on the part of the city” in its contracting activities and no “evidence that the city’s prime contractors had discriminated against minority-owned subcontractors.”<sup>5</sup>

The Plan required the city’s prime contractors to subcontract at least 30 percent of the dollar amount of each contract to one or more MBEs. The Plan did not establish any geographic limits

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<sup>1</sup> *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). It should be noted that as it relates to this analysis, *Croson* refers to the Court’s opinion delivered by Justice O’Connor in Parts I, III-B, and IV. Parts II, III-A, and V were plurality opinions delivered by Justice O’Connor.

<sup>2</sup> *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

<sup>3</sup> *M/WBEs as used in the legal chapter are equivalent to the County’s M/FBEs.*

<sup>4</sup> *H.B. Rowe Co., Inc. v. Tippett*, 615 F.3d 233 (4th Cir. 2010).

<sup>5</sup> *Croson*, 488 U.S. at 480.



for eligibility. Therefore, an otherwise qualified MBE from anywhere in the United States could benefit from the 30 percent set-aside.

J.A. Croson Company, a non-MBE mechanical plumbing and heating contractor, filed a lawsuit against the city of Richmond, alleging that the Plan was unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. After a considerable record of litigation and appeals, the Fourth Circuit Court of Appeals struck down the Richmond Plan, and the Supreme Court affirmed this decision.<sup>6</sup> The Supreme Court determined that strict scrutiny was the appropriate standard of judicial review for MBE programs, which means that a race-conscious program must be based on a compelling governmental interest and be narrowly tailored to achieve its objectives. This standard requires a firm evidentiary basis for concluding that the underutilization of minorities is a product of past discrimination.<sup>7</sup>

### 2.2.2 Intermediate Scrutiny - *H.B. Rowe Co., Inc. v. Tippett*

The Supreme Court has not addressed the specific issue of a gender-based classification in the context of a WBE program. *Croson* was limited to the review of an MBE program. In evaluating gender-based classifications, the Court has used what some call “intermediate scrutiny,” a less stringent standard of review than the “strict scrutiny” applied to race-based classifications. Intermediate scrutiny requires that classifying persons based on sex “must carry the burden of showing an exceedingly persuasive justification for the classification.”<sup>8</sup>

The Fourth Circuit has ruled that the intermediate scrutiny standard is satisfied “by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”<sup>9</sup> The Fourth Circuit in *Rowe* agreed with other federal circuits that intermediate scrutiny “can rest safely on something less than the ‘strong basis in evidence.’”<sup>10</sup> This “something less can mean that the statute must ‘present[] sufficient probative evidence in support of its stated rationale for enacting a gender preference, i.e., . . . the evidence [must be] sufficient to show that the preference rests on evidence-informed analysis rather than on stereotypical generalizations.”<sup>11</sup>

## 2.3 Strict Scrutiny Analysis

Although Justice O’Connor in *Croson* did not specifically define the methodology used to establish the evidentiary basis required by strict scrutiny, the Court outlined governing principles. Lower courts have expanded the Supreme Court’s *Croson* guidelines and have applied or

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<sup>6</sup> *Id.* at 511.

<sup>7</sup> *Id.* at 488.

<sup>8</sup> *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). See also *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979).

<sup>9</sup> *Hogan*, 458 U.S. at 724 (internal quotation marks omitted). *H.B. Rowe Co., Inc. v. Tippett*, 615 F.3d 233, 242 (4th Cir. 2010).

<sup>10</sup> *Id.*; see also *Concrete Works of Colo. v. City & County of Denver (Concrete IV)*, 321 F.3d 950, 959-60 (10th Cir. 2003); *Contractors Ass’n of E. Pa. v. City of Phila.*, 6 F.3d 990, 1010 (3rd Cir. 1993); *Coral Constr. Co. v. King County*, 941 F.2d 910, 931-32 (9th Cir. 1991); *H.B. Rowe Co., Inc. v. Tippett*, 615 F.3d 233, 242 (4th Cir. 2010).

<sup>11</sup> *Engineering Contrs. Ass’n v. Metropolitan Dade County*, 122 F.3d 895, 910 (11th Cir. 1997); *Concrete Works IV*, 321 F.3d at 959; *H.B. Rowe Co., Inc. v. Tippett*, 615 F.3d 233, 242 (4th Cir. 2010).

distinguished these principles when asked to decide the constitutionality of state, county, and city programs to enhance opportunities for minorities and women.

### 2.3.1 Compelling Governmental Interest

*Croson* identified two necessary factors for establishing racial discrimination sufficiently to demonstrate a compelling governmental interest in establishing an MBE program. First, there needs to be identified discrimination in the relevant market.<sup>12</sup> Second, “the governmental actor enacting the set-aside program must have somehow perpetuated the discrimination to be remedied by the program,”<sup>13</sup> either actively or at least passively with “the infusion of tax dollars into a discriminatory industry.”<sup>14</sup>

#### 2.3.1.1 STATISTICAL EVIDENCE

The Court in *Croson* indicated that the proper statistical evaluation would compare the percentage of qualified MBEs in the relevant market with the percentage of total municipal construction dollars awarded to them.<sup>15</sup> In *Croson*, Justice O’Connor recognized statistical measures of disparity that compared the number of qualified and available M/WBEs with the rate of state construction dollars actually awarded to M/WBEs to demonstrate discrimination in the local construction industry.<sup>16</sup> To meet this more precise requirement, courts, including the Fourth Circuit, have accepted the use of a disparity index.<sup>17</sup>

##### 2.3.1.1.1 AVAILABILITY

M/WBEs are deemed to be “available” if they are ready, willing, and able to perform. In determining availability of M/WBEs, the approach utilized to assess the universe of available firms should neither be too overinclusive or underinclusive. The “Custom Census” approach for identifying the pool of available firms has been favorably approved by several courts. In *Northern Contracting*, the plaintiff attempted to argue that Illinois Department of Transportation (IDOT) miscalculated the number of DBEs by using a custom census instead of a count of the number of DBEs registered and prequalified by IDOT. The Seventh Circuit upheld the broader custom census count of DBEs, concluding that it reflected an attempt by IDOT to arrive at more accurate numbers than what would be possible through a use of the registered vendors list.<sup>18</sup>

##### 2.3.1.1.2 RELEVANT MARKET AREA

Another issue in availability analysis is the definition of the relevant market area. Specifically, the question is whether the relevant market area should be defined as the area from which a specific percentage of purchases are made, the area in which a specific percentage of qualified, willing, and able contractors may be located, or the area determined by a fixed geopolitical boundary.

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<sup>12</sup> *Croson*, 488 U.S. at 492, 509-10.

<sup>13</sup> *Coral Const. Co. v. King County*, 941 F.2d 910, 916 (9th Cir. 1991).

<sup>14</sup> *Id.* at 922.

<sup>15</sup> *Croson*, 488 U.S. at 501-02.

<sup>16</sup> *Id.* at 503-04.

<sup>17</sup> *H.B. Rowe, Inc. v. Tippet*, 615 F.3d 233, 243-44 (4th Cir. 2010). See also *Engineering Contractors*, 122 F.3d at 914; *Concrete Works IV*, 321 F.3d at 962-67.

<sup>18</sup> *N. Contracting, Inc. v. Illinois*, 473 F.3d 715, 723 (7th Cir. 2007).

The Supreme Court has not yet established how the relevant market area should be defined, and the relevant market was not directly addressed in *H.B. Rowe*. However, the study in *Rowe* defined the relevant market as the area in which the agency spent 75 percent of the dollars with vendors in a particular procurement category.

#### 2.3.1.1.3 ABILITY

Another availability consideration is whether the firms being considered are able to perform a particular service. Those who challenge affirmative action often question whether M/WBE firms have the “capacity” to perform specific services. In *Rowe*, the court noted that capacity does not have the same force for relatively small subcontracts. In addition, the study for NCDOT contained a regression analysis indicating that “African American ownership had a significant negative impact on firm revenue unrelated to firm capacity or experience.”<sup>19</sup>

In *Concrete Works IV* the court noted that “M/WBE construction firms are generally smaller and less experienced because of discrimination....Additionally, we do not read *Croson* to require disparity studies that measure whether construction firms are able to perform a particular contract.”<sup>20</sup>

#### 2.3.1.1.4 DISPARITY INDEX

In the *Rowe* decision, the plaintiff noted that there was no substantial disparity when the percentage of subcontractors was used compared to their availability. However, the Fourth Circuit stated that “[t]he State pointed to evidence that prime contractors used minority businesses for low-value work in order to comply with the Department’s goals.”<sup>21</sup> Along these lines, the Fourth Circuit noted that the average subcontract awarded to nonminority male subcontractors was more than double the size of subcontracts won by MBE subcontractors.<sup>22</sup>

#### 2.3.1.1.5 STATISTICAL SIGNIFICANCE IN DISPARITY STUDIES

While courts have indicated that anecdotal evidence may suffice without statistical evidence, no case without statistical evidence has been given serious consideration by any circuit court. In practical effect, courts require statistical evidence. Further, the statistical evidence needs to be held to appropriate professional standards.<sup>23</sup> In *Rowe*, the court noted that the NCDOT study focused on disparity ratios lower than 80 percent and conducted t-tests of statistical significance.<sup>24</sup>

#### 2.3.1.2 BURDEN OF PROOF

The *Croson* decision imposes the original burden of proof upon the government to demonstrate that a challenged DBE program is supported by documented evidence of past discrimination or current discrimination. The plaintiff then has the burden to prove that the DBE program is unconstitutional through various methods such as the flawed methodology used by the

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<sup>19</sup> *Id.*

<sup>20</sup> *Concrete Works IV*, 321 F.3d 950, 981, 983 (10th Cir. 2003).

<sup>21</sup> *H.B. Rowe, Inc. v. Tippett*, 615 F.3d at 243-244.

<sup>22</sup> *Id.* at 245.

<sup>23</sup> *Contractors Ass’n v. City of Philadelphia*, 91 F.3d 586, 603 (3rd Cir. 1996).

<sup>24</sup> *H.B. Rowe, Inc. v. Tippett*, 615 F.3d at 245.

government to show that past or present discrimination exists, the race-neutral reasons for the disparity, or the existence of controverting data.<sup>25</sup>

### 2.3.1.3 STALENESS OF DATA AND TIME PERIOD OF STUDY

A few cases have addressed the issue of the quantity and currentness of the data required to satisfy strict scrutiny. There is no clear guidance from the district courts about how many years should be studied, although there is cautionary language in cases about relying on small data samples.<sup>26</sup> Concerning the age of data, the court in *Rothe* ruled that the data relied on in the disparity studies was not stale with regard to reenacting a federal program in 2006. While agencies should rely on the most current available data, other circuit courts have “relied on studies containing data more than five years old when conducting compelling interest analyses.”<sup>27</sup>

### 2.3.1.4 PASSIVE PARTICIPATION TO DISCRIMINATION

In *Croson*, Justice O’Connor stated, “It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that *public* dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of *private* prejudice.”<sup>28</sup> *Croson* provided that the government “can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment.”<sup>29</sup> The government agency’s active or passive participation in discriminatory practices in the marketplace may show a compelling interest. Defining passive participation, *Croson* stated, “Thus, if the city could show that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system.”<sup>30</sup>

Relying on this language in *Croson*, several local agencies have increased their emphasis on evidence of discrimination in the private sector. This strategy has not always succeeded. Evidence of private discrimination presented in litigation was found inadequate in the Philadelphia and Miami-Dade County cases<sup>31</sup> The Third Circuit stated, in discussing low MBE participation in a local contractors association in the city of Philadelphia, “racial discrimination can justify a race-based remedy only if the City has somehow participated in or supported that discrimination.”<sup>32</sup> Nevertheless, in *Concrete Works IV*, the Tenth Circuit upheld the relevance of data from the private marketplace to establish a factual predicate for M/WBE programs.<sup>33</sup> The courts mainly seek to ensure that M/WBE programs are based on active or passive discrimination

<sup>25</sup> See, e.g., *Concrete Works of Colo. v. City & County of Denver*, 321 F.3d 950, 959 (10th Cir. 2003), citing *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 277-78 (1986) (“The ultimate burden remains with the [plaintiff] to demonstrate the unconstitutionality of an affirmative-action program”).

<sup>26</sup> See, e.g., *Associated Gen. Contrs. of Am. v. City of Columbus*, 936 F.Supp. 1363, 1393 (S.D. Ohio 1996) (*rev’d on other grounds*, 172 F.3d 411).

<sup>27</sup> *Rothe Dev. Corp. v. DOD*, 545 F.3d 1023, 1038 (Fed. Cir. 2008) (citing district court discussion of staleness in *W. States Paving Co. v. Wash. State DOT*, 407 F.3d 983 (9th Cir. 2005) and *Sherbrooke Turf, Inc. v. Minn. DOT*, 345 F.3d 964 (8th Cir. 2003)).

<sup>28</sup> *Coral Cons Co.*, 941 F.2d at 922 (citing *Croson*, 488 U.S. at 492) (emphasis added).

<sup>29</sup> *Croson*, 488 U.S. at 492; see generally Ian Ayres and Fredrick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?* 98 *Colum. L. Rev.* 1577 (1998).

<sup>30</sup> *Croson*, 488 U.S. at 492.

<sup>31</sup> *Contractors Ass’n*, 91 F.3d at 602; *Engineering Contrs. As’n v. Metropolitan Dade County*, 122 F.3d 895, 910-11 (11th Cir. 1997).

<sup>32</sup> *Contractors Ass’n*, 91 F.3d at 602; see also *Webster v. Fulton County*, 51 F. Supp. 2d 1354 (N.D. Ga. 1999).

<sup>33</sup> *Concrete Works IV*, 321 F.3d at 969.

findings in the government contracting marketplace and not simply attempts to remedy general societal discrimination<sup>34</sup>.

Courts also seek to find a causal connection between a statistical disparity and actual underlying discrimination. In *Engineering Contractors*, one component of the factual predicate was a study comparing entry rates into the construction business for M/WBEs and non-M/WBEs.<sup>35</sup> The analysis provided statistically significant evidence that minorities and women entered the construction business at rates lower than expected, given their numerical presence in the population and human and financial capital variables. The study argued that those disparities persisting after applying appropriate statistical controls were most likely the result of current and past discrimination. Even so, the Eleventh Circuit criticized this study for reliance on general census data and the lack of particularized evidence of active or passive discrimination by Miami-Dade County, holding that the district court was entitled to find that the evidence did not show compelling justification for an M/WBE program.<sup>36</sup>

The Seventh Circuit has perhaps set a higher bar for connecting private discrimination with government action. In the Cook County case, the trial court extensively considered evidence that prime contractors did not solicit M/WBEs as subcontractors and considered carefully whether this evidence on solicitation served as sufficient evidence of discrimination, or whether instead, it was necessary to provide further evidence that there was discrimination in hiring M/WBE subcontractors.<sup>37</sup> The Seventh Circuit held that this evidence was largely irrelevant.<sup>38</sup> Beyond being anecdotal and partial, evidence that contractors failed to solicit M/WBEs on Cook County contracts was not the same as evidence that M/WBEs were denied the opportunity to bid.<sup>39</sup> Furthermore, such activities on the part of contractors did not necessarily implicate the County as being a passive participant in such discrimination as might exist because there was no evidence the County knew about it.<sup>40</sup>

### 2.3.1.5 ANECDOTAL EVIDENCE

Justice O'Connor in *Croson* discussed the relevance of anecdotal evidence, stating: "[E]vidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."<sup>41</sup>

There was evidence from a telephone survey, interviews, and focus groups in *Rowe*. The Fourth Circuit favorably cited survey evidence of a good old boys' network excluding MBEs from work, double standards in qualifications, primes viewing MBEs as less qualified, dropping MBEs after contract award, and the firms changing their behavior when not required to use MBEs. This material was affirmed in interviews and focus groups. The Fourth Circuit also concluded that "[t]he surveys in the 2004 study exposed an informal, racially exclusive network that systematically disadvantaged minority subcontractors."<sup>42</sup>

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<sup>34</sup> *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000).

<sup>35</sup> *Engineering Contrs. Ass'n v. Metropolitan Dade County*, 122 F.3d at 921-22.

<sup>36</sup> *Id.* at 922.

<sup>37</sup> *Builders Ass'n of Greater Chicago v. County of Cook*, 123 F. Supp. 2d 1087 (N.D. Ill. 2000).

<sup>38</sup> *Builders Ass'n of Greater Chicago v. County of Cook*, 256 F.3d 642, 645 (7th Cir. 2001).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Croson*, 488 U.S. at 509.

<sup>42</sup> *H.B. Rowe*, 615 F.3d at 251.



The plaintiff argued that this data was not verified, to which the Fourth Circuit responded, “a fact finder could very well conclude that anecdotal evidence need not— and indeed cannot—be confirmed because it ‘is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perceptions.”<sup>43</sup> The Fourth Circuit also commented favorably on the NCDOT study survey oversampling MBEs as long as the sample was random.

In *Associated General Contractors of California, Inc. v. Coalition for Economic Equity (AGCC II)*, the Ninth Circuit discussed the specificity of anecdotal evidence required by *Croson*.<sup>44</sup> Seeking a preliminary injunction, the contractors contended that the evidence presented by San Francisco lacked the specificity needed for an earlier appeal in that case and by *Croson*.<sup>45</sup> The court held that the City’s findings were based on substantially more evidence than the anecdotes in the two prior cases and were “clearly based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as significant statistical disparities in the award of contracts.”<sup>46</sup>

The court also ruled that the City was under no burden to identify every instance of discriminatory practices or policies.<sup>47</sup> Reiterating the City’s perspective, the court stated that the City “must simply demonstrate the existence of past discrimination with specificity; there is no requirement that the legislative findings specifically detail each instance that the legislative body ha[d] relied upon in support of its decision that affirmative action is necessary.”<sup>48</sup> Not only have courts found that a municipality does not have to identify all the discriminatory practices impeding M/WBE utilization specifically, but the Tenth Circuit in *Concrete Works IV* also held that anecdotal evidence collected by a municipality does not have to be verified. “There is no merit to [the plaintiff’s] argument that the witnesses’ accounts must be verified to provide support for Denver’s burden. Anecdotal evidence is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perceptions....Denver was not required to present corroborating evidence and [the plaintiff] was free to present its own witnesses to either refute the incidents described by Denver’s witnesses or to relate their own perceptions on discrimination in the Denver construction industry.”<sup>49</sup>

### 2.3.1.6 NARROWLY TAILORING

Many courts have held that even if a compelling interest for the M/WBE program can be found, the program can still be found not to be narrowly tailored.<sup>50</sup> The Fourth Circuit has laid out the following factors in determining whether or not a program was narrowly tailored:

- (1) the necessity of the policy and the efficacy of alternative race neutral policies;
- (2) the planned duration of the policy;
- (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population;
- (4)

<sup>43</sup> *Id.* at 249 (quoting *Concrete Works*, 321 F.3d at 989).

<sup>44</sup> *AGCC II*, 950 F.2d 1401, 1414-15 (9th Cir. 1991).

<sup>45</sup> *Id.* at 1415-1416.

<sup>46</sup> *Id.* at 1416. This evidence came from 10 public hearings and “numerous written submissions from the public.” *Id.* at 1414.

<sup>47</sup> *Id.* at 1416 n.11.

<sup>48</sup> *Id.* at 1416.

<sup>49</sup> *Concrete Works IV*, 321 F.3d 950, 989 (10th Cir. 2003).

<sup>50</sup> *Contractors Ass’n v. City of Philadelphia*, 91 F.3d at 605; *Engineering Contrs.*, 122 F.3d at 926-29; *Virdi v. Dekalb County Sch. Dist.*, 135 F. App’x 262 (11th Cir. 2005).

the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties.<sup>51</sup>

In *H.B. Rowe*, the Fourth Circuit added to this list “overinclusiveness,” defined as the “tendency to benefit particular minority groups that have not been shown to have suffered invidious discrimination.”<sup>52</sup>

#### 2.3.1.6.1 RACE-NEUTRAL ALTERNATIVES

Concerning race-neutral alternatives, Justice O’Connor in *Croson* concluded that a governmental entity should also evaluate the use of race-neutral means to increase minority business participation in contracting or purchasing activities. In *Rowe*, the Fourth Circuit noted that NCDOT had a Small Business Enterprise program and had undertaken all the race-neutral methods suggested by the Department of Transportation (DOT) DBE program regulations. The court pointed out that the plaintiff had identified “no viable race-neutral alternatives that North Carolina has *failed* to consider and adopt”<sup>53</sup> (emphasis in the original). The Court further noted that disparities persisted despite NCDOT employing these race-neutral initiatives.

#### 2.3.1.6.2 DURATION OF THE REMEDY

Concerning program duration, in *Adarand v. Peña*, the Supreme Court wrote that a program should be “appropriately limited such that it ‘will not last longer than the discriminatory effects it is designed to eliminate.’”<sup>54</sup> In *Rowe*, the Fourth Circuit stated that “the district court found two facts compelling in establishing that it was narrowly tailored: the statute’s provisions (1) setting a specific expiration date and (2) requiring a new disparity study every 5 years.... We agree.”<sup>55</sup> Other appellate courts have noted possible mechanisms for limiting program duration: required termination if goals have been met<sup>56</sup>, decertification of MBEs who achieve certain levels of success, or mandatory review of MBE certification at regular, relatively brief periods.<sup>57</sup>

#### 2.3.1.6.3 RELATIONSHIP OF GOALS TO AVAILABILITY

Narrow tailoring under the *Croson* standard requires that remedial goals be in line with measured availability. Setting percentages arbitrarily have played a vital part in finding programs unconstitutional, as evident with what the city of Richmond did in *Croson*. Setting goal percentages need to be based on statistical studies.<sup>58</sup>

In *H.B. Rowe*, the Fourth Circuit found that NCDOT participation goals were related to percentage MBE availability. First, the NCDOT goals were set project by project. Second, NCDOT generates a report detailing the type of work likely to be subcontracted. Third, the NCDOT goal-setting

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<sup>51</sup> *H.B. Rowe*, 615 F.3d at 252 (quoting *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 344 (4th Cir. 2001)).

<sup>52</sup> *H.B. Rowe*, 615 F.3d at 252 (quoting *Alexander v. Estep*, 95 F.3d 312, 316 (4th Cir. 1996)).

<sup>53</sup> *H.B. Rowe*, 615 F.3d at 252.

<sup>54</sup> *Adarand Constructors v. Peña*, 515 U.S. 200, 238 (1995) (citations omitted).

<sup>55</sup> *H.B. Rowe*, 615 F.3d at 253 (citing *H.B. Rowe, Inc.*, 589 F. Supp. 2d at 597).

<sup>56</sup> *Sherbrooke Turf, Inc.*, 345 F.3d at 972.

<sup>57</sup> *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1179-80 (10th Cir. 2000).

<sup>58</sup> *Contractors Ass’n v. City of Philadelphia*, 91 F.3d at 607 (“The district court also found significant that the ... Ordinance offered only one reference point for the percentages selected for the various set-asides – the percentages of minorities and women in the general population”). See also *Builders Ass’n of Greater Chicago*, 256 F.3d at 647.

committee checks its database for availability. Finally, the Fourth Circuit noted that 10 percent of the NCDOT projects had a zero M/WBE goal.<sup>59</sup>

#### 2.3.1.6.4 FLEXIBILITY

In *H.B. Rowe*, the Fourth Circuit agreed with the ruling of the federal district court in the case that the NCDOT M/WBE program was flexible, stating that “unlike the City of Richmond’s unconstitutional set-aside program in *Croson*, North Carolina’s statutory scheme does not mandate that specific percentages of subcontracting dollars always be apportioned to minority groups or women. Rather, the statute *prohibits* the Department from setting project-specific participation goals ‘rigidly.’”<sup>60</sup>

In contrast, the Third Circuit observed in *Contractors Association* that, “[a]s we have explained, the 15 percent participation goal and the system of presumptions, which in practice require non-black contractors to meet the goal on virtually every contract, result in a 15% set-aside for black contractors in the subcontracting market.”<sup>61</sup>

The Fourth Circuit also noted that, “*the State does not require or expect the prime contractor to accept any bid from an unqualified bidder, or any bid that is not the lowest bid. Moreover, prime contractors can bank any excess minority participation for use against future goals over the following two years*”.<sup>62</sup>

#### 2.3.1.6.5 BURDEN ON THIRD PARTIES

Narrow tailoring also requires minimizing the burden of the program on third parties’ waivers. Good faith compliance is a tool that serves the purpose of reducing the burden on third parties.<sup>63</sup> The plaintiff in *Rowe* argued that the solicitation requirements were burdensome and that it was forced to subcontract out work that could be self-performed. The Fourth Circuit noted that the solicitation requirements could be met with existing staff, and the M/WBE program did not require subcontracting out work that could be self-performed.<sup>64</sup>

#### 2.3.1.6.6 OVER-INCLUSION

Finally, narrow tailoring involves limiting the number and type of program beneficiaries. As noted above, there has to be evidence of discrimination to justify a group-based remedy, and over-inclusion of uninjured individuals or groups can endanger the entire program. In essence, there must be sufficient statistical evidence of discrimination to include a particular minority group in the remedial program. In *Croson*, the Court noted that “[i]f a 30% set-aside was ‘narrowly tailored’ to compensate black contractors for past discrimination, one may legitimately ask why they are forced to share this ‘remedial relief’ with an Aleut citizen who moves to Richmond tomorrow? The gross over inclusiveness of Richmond’s racial preference strongly impugns the city’s claim of remedial motivation”.<sup>65</sup>

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<sup>59</sup> *H.B. Rowe*, 615 F.3d at 253.

<sup>60</sup> *Id.* at 256.

<sup>61</sup> *Contractors Ass’n*, 91 F.3d at 606.

<sup>62</sup> *H.B. Rowe*, 615 F.3d at 253-54.

<sup>63</sup> 49 C.F.R. § 26.53.

<sup>64</sup> *H.B. Rowe*, 615 F.3d at 254.

<sup>65</sup> *Croson*, 488 U.S. at 506.

Additionally, as noted above in *Rowe*, there has to be evidence of discrimination to justify a group-based remedy, and over-inclusion of uninjured individuals or groups can endanger the entire program. The statistical evidence that was evaluated by the court to determine if the Statute's definition of minorities was determined to be overinclusive by including groups for which the 2004 disparity study did not establish sufficient evidence of discrimination. Although, the statute in question limited relief to "those racial or ethnicity classifications ... that have been subjected to discrimination in the relevant marketplace and that have been adversely affected in their ability to obtain contracts with the Department"<sup>66</sup> lumping all minority groups together may provide preference for groups where no discrimination was found.

## 2.4 Legal Review Summary

As summarized earlier, when governments develop and implement a contracting program sensitive to race and gender, they must understand the case law developed in the federal courts. These cases establish specific requirements that must be addressed so that such programs can withstand judicial review for constitutionality and prove to be just and fair. Given current trends in applying the law, local governments must engage in specific fact-finding processes to compile a thorough, accurate, and specific evidentiary foundation to determine whether there is, in fact, discrimination sufficient to justify an affirmative action plan. Further, state and local governments must continue to update this information and revise their programs accordingly.

While the Supreme Court has yet to return to this exact area of law to sort out some of the conflicts, the Fourth Circuit has provided some guidance on core standards. Ultimately, MBE and WBE programs can withstand challenges if state and local governments comply with the requirements outlined by the courts.


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<sup>66</sup> N.C. Gen. Stat. § 136-28.4(c)(2).

# 3 Procurement and Program Policy Review

## 3.1 Introduction

Procurement policies and practices significantly impact businesses seeking opportunities with governmental entities. Examining the impact of procurement and contracting policies and procedures is essential to a comprehensive, legally defensible disparity study. **Chapter 3** examines Montgomery County’s procurement and contracting policies, procedures, and programs designed to ensure that all interested parties can participate in the County’s procurement and contracting activities.



<b>Chapter Sections</b>
<b>3.1 Introduction</b>
<b>3.2 Methodology and Definitions</b>
<b>3.3 Procurement Environment and Structure</b>
<b>3.4 Source Selection</b>
<b>3.5 Business Diversity and Inclusion</b>
<b>3.6 Procurement and Program Policy</b>

This chapter includes an overview of Montgomery County’s procurement process. It examines the routine application of policies and procedures and the impact of businesses seeking opportunities to provide their goods or services to the County. MGT’s review of policies and procedures is presented in six sections. Section 2 describes the methodology used to review the County’s procurement policies, procedures, and programs. The remaining sections summarize procurement policies, procedures, programs, and the structure and environment in which procurement and contracting occur. The review and examination of policies in this chapter are intended to provide the foundation for analyzing availability and utilization in **Chapters 4** and **5** and the findings and recommendations in **Chapter 8**.

## 3.2 Methodology and Definitions

A multi-faceted approach was used to conduct the procurement and policy review, which included reviewing source documents and regulations related to procurement and contracting. MGT used its methodology that has been refined over 250 disparity studies, which includes developing an understanding of the County’s organizational structure and procurement roles and responsibilities of Office of Procurement and other County departments. The policy review was conducted with the complete cooperation of the County staff who provided data, information, and assistance to MGT throughout the policy review. To conduct the policy review and to prepare this chapter, MGT’s approach included collecting and reviewing procurement and contract-related documents. Procurement policies and practices were also reviewed and discussed with staff to understand better how such policies are operationalized throughout the County and their perceived impact on businesses currently doing or seeking to do business with the County. However, the full effect of these policies and procedures can only be made in conjunction with the statistical and anecdotal evidence in **Chapters 4, 5, and 7** of this report. The review of policies and procedures included the following significant steps:

- Finalizing the scope and parameters of the policy review.
- Collection, review, and summarization of the County’s contracting and procurement policies.
- Collection, review, and summarization of policies, procedures, and related information and data about the County’s business inclusion efforts.

- Collection and review of supplemental information and data pertinent to the policy review.
- Review of applicable federal, state, and County regulations and laws pertaining to procurement.
- Discussions with staff to review and discuss procurement policies and roles and responsibilities in the County’s procurement process.
- Navigating the County’s website and department websites to help inform areas of inquiry and to identify information and resources available to businesses seeking opportunities with the County.
- Analysis of data and information gathered throughout the policy review to develop key findings and recommendations.
- Virtual policy discussions with Montgomery County staff began in May 2023 and continued through November 2023. During this period, discussions were held with the Office of Procurement, IT/Compliance, Operations, Highway Operation Services, Minority, Female, and Disabled and the Local Business Subcontracting Program (LBSP). As needed, follow-up contacts were made to obtain additional information and insights.

MGT collected and reviewed various source documents and information about the policy review. Primary source documents and other information collected and reviewed are itemized in **Table 3-1**.

**TABLE 3-1. DOCUMENTS REVIEWED DURING POLICY AND PROCEDURES REVIEW**

INDEX	DESCRIPTION
<b>Procurement Related Documents</b>	
1.	Montgomery County Charter <ul style="list-style-type: none"> <li>- Article 3 Sec. 313. Purchasing.</li> <li>- Article 3 Sec. 314 Competitive Procurement</li> </ul>
2.	Montgomery County Code Chapter 11B. Contracts and Procurement <ul style="list-style-type: none"> <li>- Article I. General Provisions</li> <li>- Article II. Organization</li> <li>- Article III. Methods of Source Selection</li> <li>- Article IV. Source Selection</li> <li>- Article V. Contract Formation</li> <li>- Article VI. Contract Administration</li> <li>- Article VIII. Intergovernmental Procurements</li> <li>- Article XI. Services Provided to Municipalities, Taxing Areas, and Non-Profit Organizations</li> <li>- Article XII. Ethics in Public Contracting</li> <li>- Article XIV. Purchases From Minority Owned Businesses</li> <li>- Article XV. Local Small Business Reserve Program</li> <li>- Article XVI. Service Contracts</li> <li>- Article XVIII. Local Business Subcontracting Program</li> <li>- Article XIX. Vending Machine Service Contracts</li> <li>- Article XXI. Local Business Preference Program</li> </ul>
3.	Code of Montgomery County Regulations (COMCOR) Chapter 11B. Contracts and Procurement – Regulations <ul style="list-style-type: none"> <li>- 11B.00.01 Procurement Regulations</li> <li>- 11B.65.01 - Local Small Business Reserve Program</li> </ul>



### 3.2.1 Definitions

The following section includes selected definitions from the Montgomery County Code<sup>67</sup> and Code of Montgomery County Regulations (COMCOR)<sup>68</sup>. The definitions helped to provide context for the procurement and contracting policies reviewed by MGT.

**Advance Payment** means a payment to the contractor prior to performance of the work for which the payment is made.

**Bid** means an offer to furnish goods, services, or construction in conformity with the specifications, delivery terms and conditions, and other requirements included in an invitation for bids or other solicitation of a bid.

**Bidder** means an Offeror.

**Bidder's List** means the list of sources of supply for each category of goods, services, or construction purchased by the County.

**Broker** means a person that provides goods or services (other than real estate, investment, or insurance sales) on a pass-through basis as follows:

(1) a supplier of goods who:

(A) does not own, operate, or maintain a place of business in which goods of the general character required under the contract are kept in stock in the regular course of business;

(B) does not regularly assume physical custody or possession of goods of comparable character to those offered to the County, or

(C) exclusively acts as an intermediary in the sale of goods to the County; or

(2) a supplier of services who does not regularly maintain the capability, capacity, training, experience, and applicable regulatory licensing to directly perform the principal tasks of a contract with the County and must provide the principal tasks through a subcontract with a third party.

**CAO** means the Chief Administrative Officer for Montgomery County

**Change Order** means an order authorized by the County, directing the contractor to make changes which the contract authorizes the County to order without the consent of the contractor.

**Competitive Negotiation** means a process by which the County and one or more prospective suppliers communicate successive respective positions with respect to price, specifications, and other relevant terms and conditions in order to arrive at a contract for procurement of goods, services, or construction.

**Construction** means the process of building, altering, repairing, improving, rehabbing, resurfacing, pavement milling or demolishing any structure or building, or other improvements of any kind to

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<sup>67</sup> Montgomery County Code update contains legislation effective through July 26, 2024.

<sup>68</sup> Regulations effective as of April 2, 2024; COMCOR 11B.00.01.02 - DEFINITIONS

any real property, including routine operation, repair, and mechanical systems service contract for maintenance of existing structures, buildings, or real property.

**Contract Award** means the delivery by the County of a fully executed contract to an offeror.

**Contract Modification** means any authorized alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual agreement of the parties to the contract or by change order.

**Contract** means any agreement to which the County is a party for the procurement or disposal of goods, services, or construction, including any contract modification.

**Contractor** means any person that is a party to a contract with the County.

**Cost-Reimbursement Contract** means a contract under which a contractor is reimbursed for costs which are allowable under the provisions of the contract, this Chapter, and a fee, if any.

**County-Based Bidder or Offeror** means a person that has its principal place of business in Montgomery County.

**Data** means recorded information, regardless of form or characteristic.

**Direct Purchase** means an informal procurement of goods, services, or construction under the direct authority of the Using Department Head. Competition should be preserved with this method to the extent practical. Contracting with MFD firms is encouraged.

**Direct Purchase** means an informal solicitation defined by regulation under Section 11B-13.

**Director** means the Director of the Office of Procurement or the Director's designee.

**Emergency** means any dangerous condition or unforeseen curtailment, diminution or termination of an essential service which poses an immediate danger to health, life, or property.

**Emergency Procurement** means an emergency procurement is an informal procurement of goods, construction, or services required as a result of an emergency.

**Field Order** means a limited and specific written order usually used in construction contract situations where the authority to direct timely limited change to contract work has been specifically delegated by the contract to the authorized government official at the place of performance.

**Formal Solicitations** means Invitation for Bid, Request for Proposals and Request for Expressions of Interest.

**Goods** means all supplies, equipment, materials, and all tangible personal property, excluding real property.

**High Dollar Value Contract** means an initial Contract Award that is estimated to exceed \$10 million.

**Invitation for Bids (IFB)** means A formal solicitation in which competitive sealed bids are invited through a public notice procedure requiring that bids be received by a specified time, opened publicly, and are evaluated solely in terms of responsiveness, price, and bidder responsibility.

**Local Business Program Manager** means a person designated by the Director to administer and monitor the Local Business Subcontracting Program.

**Local Business Subcontractor** means a Local Business that enters into a contract with a Contractor to perform work related to a High Dollar Value Contract for that Contractor.

**Local Business** means a for-profit business other than a broker that has its principal place of business in the County, as further defined by Executive Regulation, and that is certified by the Director as a Local Business under the provisions of this Article.

**Local Small Business Reserve** means any procurement that is limited to responses from local small businesses.

**Local Small Business** means a for-profit business or non-profit entity, other than a broker, that:

- (1) has its principal place of business or non-profit operations in the County;
- (2) in the case of a for-profit business, is independently owned and operated;
- (3) is not a subsidiary of another business or entity; and
- (4) meets criteria, size limits, and gross sales amounts established by method 2 regulations.

**Mechanical Systems Service Contract** means a contract for service of the following systems:

- plumbing systems, including pipes, tanks, fittings, and other elements that control the water and gas supply,
- heating, ventilation, and air conditioning (HVAC ) systems, including heating, ventilation, and cooling/air conditioning equipment;
- heating, and sanitation of a building;
- refrigeration systems;
- electrical systems, including any electrical power and overhead and underground lines, poles, transformers, and other related equipment; or
- elevator systems, including escalators, moving walkways, and other related conveyances.

**Mini-Contract** means a contract awarded through documented informal competition for professional services.

**Minority Owned Business** means, unless the context indicates otherwise, any legal entity that:

- (1) Is a minority business enterprise as defined under the State procurement law; and
- (2) Does not exceed a ceiling set by regulation on the number and value of contracts or subcontracts awarded during the first five years after it is certified under this article, or during the next three years if it did not exceed the ceiling during the first five years after it is certified.

However, a not-for-profit entity organized to promote the interests of persons with a disability is a minority owned business only if at least 51 percent of the individuals used by the nonprofit entity to perform the services or manufacture the goods contracted for by the County are persons with a disability.

**Person** means any business, individual, union, committee, club, organization, group of individuals, firm, association, corporation, partnership, sole proprietorship, or other entity.

**Preference** means a policy that favors one bidder over another and includes:

- (1) a percentage preference;
- (2) an employee residency requirement; or
- (3) any other law, policy, or practice that favors a resident over a nonresident.

**Procurement** means buying, purchasing, leasing, or otherwise acquiring any goods, services, or construction. It also includes all functions that pertain to the obtaining of any goods, service, or construction, including description of requirements, selection and solicitation of sources, evaluation of offers, preparation and award of contract, dispute and claim resolution, and all phases of contract administration.

**Professional Services** means the services of attorneys, physicians, architects, engineers, consultants, and other recognized professional individuals, associations, corporations, and groups whose services are customarily negotiated because of the individuality of those services and level of expertise involved.

**Proposal** means an offer binding on the offeror in response to an RFP and non-binding in response to a Request for Expressions of Interest (REOI).

**Public Entity** means

- (1) the federal government;
- (2) a state government and any of its agencies;
- (3) any political subdivision of a state government and any of its agencies;
- (4) any board, commission, or committee established by federal, state, or local law;
- (5) any organization or association of the federal government, state governments, or political subdivisions of state governments; and
- (6) any other entity that is:
  - (A) qualified as a non-taxable corporation under the United States Internal Revenue Code, as amended; and
  - (B) incorporated by an entity under paragraphs (1) through (5) for the exclusive purpose of supporting or benefitting an entity under paragraphs (1) through (5).

**Regulation** means a regulation adopted by the Executive under method (1).

**Relevant Geographic Market Area** means the geographic market area identified by the County Executive in the most recent report that evaluates the need to continue the MFD program.

**Request for Proposals (RFP) – Best Value Procurement** means a solicitation to prospective offerors, the response to which is analyzed in accordance with evaluation criteria set forth in the solicitation for the purpose of ranking the proposals received in order to obtain the best value for the County.

**Responsible Bidder or Offeror** means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will help assure good faith performance.

**Responsive Bidder** means a person who has submitted a bid which conforms in all material respects to the invitation for bids.

**Socially or Economically Disadvantaged Group** means a group expressly identified as eligible to control a minority business enterprise under the State procurement law. For purposes of this Article XIV, disabled owned businesses and not-for-profit entities organized to promote the interests of persons with a disability are a single group.

**Services** means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance. This term does not include employment agreements or collective bargaining agreements.

**Small Purchase** means an informal solicitation of goods, construction or non-professional services valued below a certain monetary threshold.

**Sole Source** means A noncompetitive procurement in which goods, services, or construction necessary to meet minimum valid needs of the County are available from only one person as provided in Chapter 11B of the County Code including those having the exclusive right to manufacture, sell or otherwise market certain goods or services.

**Specification** means the words used to describe the goods, services, or construction to be purchased.

**Standardized Procurements** means a purchase of equipment or parts for which the CAO determines standardization and interchangeability of parts is necessary or is in the public interest. A standardized procurement should include competition when reasonably available. Standardization approval must be for a stated period which bears a reasonable relationship to the life of the equipment and the specialized training or specialized equipment necessary to maintain the standardized item. A standardization decision includes the decision to procure compatible parts, equipment, maintenance, and training.

**Tie Bid** means a low bid submitted by a responsible and responsive bidder that is identical in price to a bid from another responsible and responsive bidder under a formal solicitation.

**Using Department** means any department, office, or agency which utilizes any goods, services, or construction procured under this Chapter.

### 3.3 Procurement Environment and Structure

Montgomery County is comprised of many departments to deliver services to County residents and visitors. The organizational units shown in **Exhibit 3-1** purchase a variety of goods and services for internal use and to deliver essential services. To operate efficiently and effectively, the County requires collaboration and coordination between various departments. Within this context, the organization units shown in **Exhibit 3-1** frequently engage in the acquisition process at varying degrees of involvement. With an operating budget of \$6.7 billion and capital budget of \$5.7, the adopted FY24 budget aligned with Montgomery County's priorities for:

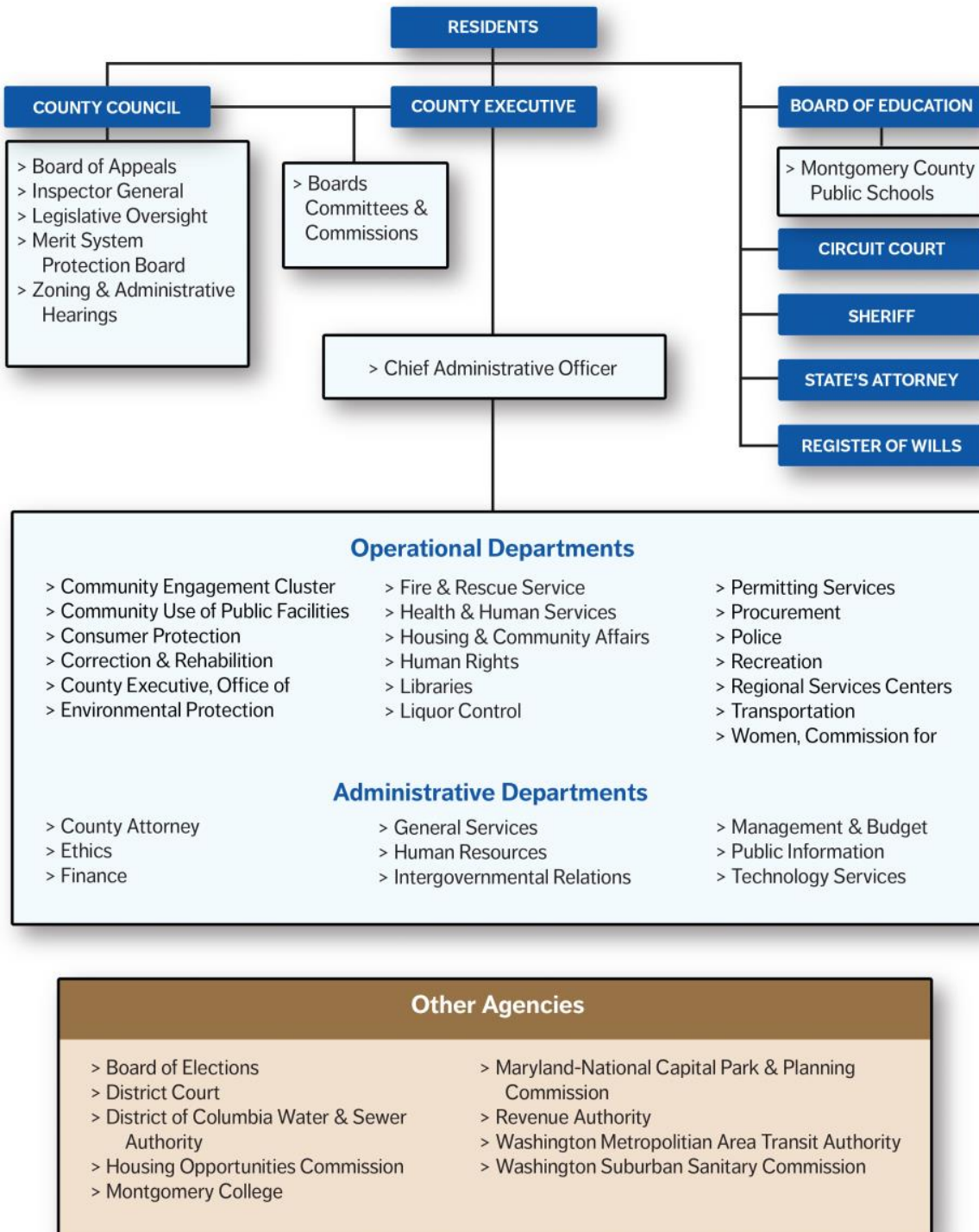
- thriving youth and families
- a growing economy
- a greener county
- easier commutes
- an affordable and welcoming county for a lifetime
- safe neighborhoods, and
- effective, sustainable government.<sup>69</sup>

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<sup>69</sup> Montgomery County, FY24 Recommended Operating Budget in Brief, March 15, 2023



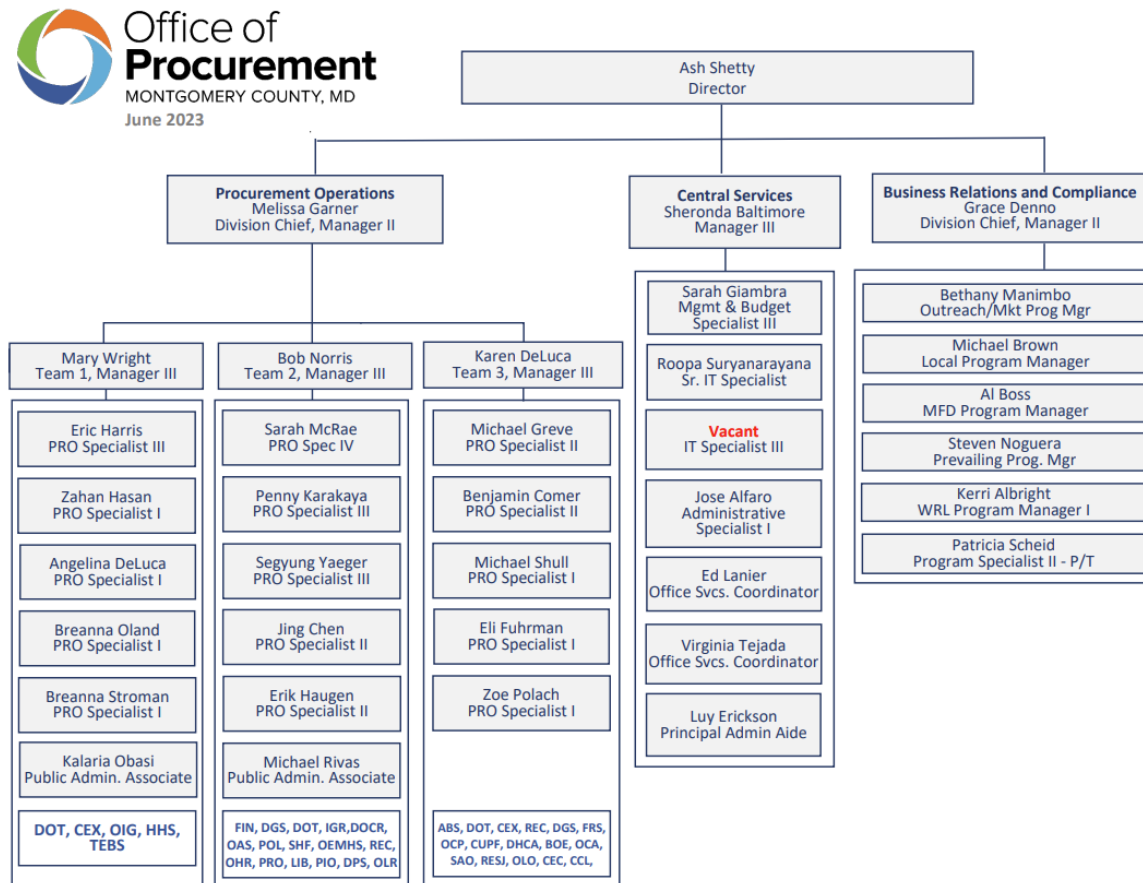
EXHIBIT 3-1.  
MONTGOMERY COUNTY ORGANIZATIONAL CHART



Source: Montgomery County, Organizational Chart website May 2023.

The County requires collaboration and coordination between various departments to operate efficiently and effectively. Within this context, the organization units shown in **Exhibit 3-1** frequently engage in procurement at varying levels based on projected costs and category of the requested good or service. Each department leader is held accountable for ensuring that procurement policies are communicated throughout their department and followed by the staff with the delegated authority to make purchases. The degree to which departments are engaged with the Office of Procurement (**Exhibit 3-2**) is dependent upon the good or service being acquired and its anticipated dollar value. The structure and environment in which Montgomery County's procurement and contracting occurs were important for understanding the operational impact of procurement policies on departments and businesses seeking to meet the County's service requirements.

EXHIBIT 3-2.  
MONTGOMERY COUNTY OFFICE OF PROCUREMENT ORGANIZATIONAL CHART



Source: Montgomery County, Office of Procurement website July 2024.

The Office of Procurement supports the County in the acquisition of goods, services, and construction; the administrative function of resulting contracts; and leads the governance related to Countywide procurement and contracting to ensure standardization throughout contracting processes. Staff roles within the Office of Procurement include the Director of Procurement,

Division Chiefs, Procurement Managers, Procurement Specialists, Public Administration Associates, and Office Service Coordinators, etc., who play a key role in coordinating and working with departments to purchase goods and services. Some of the procurement methods permitted within the County are centralized while others are decentralized with varying involvement from the Office of Procurement. The procurement process impacts nearly all County departments, from basic supplies to large-scale strategic purchases that shape County functions and services.

The Procurement Department has three divisions, as shown in **Exhibit 3-2**. The Central Services Division provides departmental direction, oversight, and support for the Contract Review Committee, analysis, budget preparation, and monitoring. This section also manages contract scanning activities for documents, contracts, and subsequent contract actions, manages archiving standards, and provides departmental customer service assistance. Additionally, it centrally coordinates departmental training and tracking including national certifications and re-certification, expenditure control, escrow management, human resources activities, management of departmental knowledge-based materials. The Information Technology (IT) staff provide support in developing and maintaining information systems for the department's business operations. This includes purchase and maintenance of IT equipment, service, and support for major end-use systems on a Countywide basis. IT management of applications, databases, systems, and department website design and maintenance is included in this program as well as coordination with the County's Department of Technology Services.

The Procurement Operations Division assist departments in the development of procurement strategies and documents to ensure a competitive, transparent, and fair procurement process in accordance with the County Code and the Procurement Regulations. Procurement Specialists develop contract administration procedures, research vendors, review contracts, and recommend revisions to County procurement policies and regulations to streamline the procurement process.

The mission of the Division of Business Relations and Compliance (DBRC) is to plan and implement programmatic strategies to expand business opportunities for minority, female, and disabled business owners as well as Montgomery County local and small businesses. This division administers the County's Wage Requirements and Prevailing Wage programs for service and construction contracts. The DBRC is responsible for ensuring County government contracting compliance with the socioeconomic laws, programs, and policies of the County.

The responsibilities carried out by the Office of Procurement are essential to meeting the County's procurement goals. Ideally, purchasing systems should be transparent, cost-effective, and responsive to provide goods and supplies, professional services, architectural and engineering services, and construction services. It is the objective of the Office of Procurement to impartially and equitably evaluate bids and proposals from vendors and help departments to establish fair and reasonable contracts. In the event of a contract dispute or claim resolution, the Office acts as mediator.

### 3.3.1 Procurement Policies

The review that follows is narrowly focused on major policies that significantly impact purchasing goods and services. Although MGT reviewed a variety of procurement-related documents and information listed in **Table 3-1**, the sections which follow are intended to provide a high-level summary of policies, procedures, and practices. It is not intended to provide a detailed discussion

about the processes associated with each policy or specifics of how each policy is carried out. MGT paid considerable attention to the Procurement Code, a part of the Montgomery County Code, and Procurement Regulation, a part of the COMCOR. Key sections of the Procurement Code, Chapter 11B Contracts and Procurement, that were reviewed in detail include the following:

- Article III. Methods of Source Selection.
- Article IV. Source Selection.
- Article XIV. Purchases From Minority Owned Businesses.
- Article XV. Local Small Business Reserve Program.
- Article XVI. Service Contracts.
- Article XVIII. Local Business Subcontracting Program.
- Article XXI. Local Business Preference Program.
- COMCOR 11B.00.01.03 Administrative Process – Procurement
- COMCOR 11B.00.01.04 Source Selection Methods and Contract Types
- COMCOR 11B.00.01.05 Using Department Responsibilities
- COMCOR 11B.00.01.07 Minority Owned Business Contracting

The above sections of the Procurement Code and Procurement Regulation were used to identify current policies and procedures. From MGT's experience, policies can either inhibit or facilitate vendor participation depending on their execution. The review of these two key documents also helped to shape the discussions with County staff about how policies are operationalized and the impact of such policies on both agencies/departments and the businesses seeking procurement and contracting opportunities with the County. Within the context of reviewing these two major documents, MGT also noted whether relevant state laws and regulations in **Table 3-1** are appropriately referenced in County policies and procedures. MGT also sought to determine the extent to which the policies are referenced in the solicitations reviewed during this process.

Efficient and effective coordination and execution of the purchasing and acquisitions process is largely dependent upon knowledgeable staff, well-established policies, and effectively executed policies and procedures for advertisement, solicitation, vendor evaluation/selection, contract negotiation, and approval. Much of the overview that follows is based on the policy documents that were reviewed and discussions with staff about the acquisitions process and outreach to M/FBE businesses.

### 3.4 Source Selection

Source selection is a fundamental but critical purchasing activity that is performed to acquire essential goods and services needed by County departments. MGT's discussions with County staff focused on primary source selection methods, related policies, and practices, and how businesses are impacted. MGT also examined resources for businesses interested in doing business with the County. Competitive bidding is a core principle of public sector procurement and is the County's preferred method of procuring goods and services as required by Board Policy. The requirement to conduct a competitive procurement applies to all purchases of goods

or services except where a request for exemption or exception to competitive procurement is pre-approved in accordance with the Procurement Code. Firms interested in conducting business with the County would benefit from understanding how the County makes purchases. **Table 3-2** provides a snapshot of required advertising and source selection methods.

TABLE 3-2. SOLICITATION METHODS

Level	Estimated Cost of Good or Service	Advertising Method	Source Selection Method
1	Any	-	<b>Bridge Contract:</b> A contract for a good or service when the contract is a product of a competitive process undertaken by another governmental entity. Such a contract must offer the county the same goods and pricing as well as meet all of the County's legal requirements.
2	\$10,000 or below	Informal	<b>Direct Threshold:</b> Using Departments are permitted to make purchases from a vendor when the value of the goods or services acquired is estimated to be \$10,000 or below.
3	Between \$10,000 and \$100,000	Informal	<b>Informal Solicitation:</b> The County may issue an informal solicitation when the estimated value of the contract is between \$10,000 and \$100,000.
4	\$100,000 and above	Formal	<b>IFB:</b> An IFB is issued when the using department seeks to make an award to the responsive, responsible bidder based on lowest price.
5	\$100,000 and above	Formal	<b>RFP:</b> An RFP is issued when the using department seeks to evaluate proposals based on the "best value".

Source: Adapted from Purchasing Policy - Competitive Requirement & Approval, 2021.

### 3.4.1 Formal Solicitation: Competitive Sealed Bids

An IFB is a formal competitive solicitation method that is used in the procurement of clearly defined goods or services. An IFB may include criteria for the acceptability of a bid (i.e., inspection, testing, quality, workmanship, delivery, suitability, etc.) for a particular purpose. All criteria in the IFB that affect the evaluation of the bid price must be quantifiable, such as discounts, transportation costs, and total or life cycle costs. The IFB solicits competitive sealed bids from the marketplace, as announced via a Public Notice, and the bids are evaluated based upon the requirements set forth in the IFB. An award should be made based on the lowest responsive and responsible bidder. Any deviation from selecting the lowest responsive and responsible bidder is explained in the bid award documentation and submitted to the Director or designee for review of responsiveness, responsibility, and all other factors prior to contract award. For example, a tie bid between a county business and a non-county business must be awarded to the county business. If the Director determines that the use of competitive sealed

bidding is not practical or advantageous to the County, a contract may be awarded by competitive sealed proposals.<sup>70</sup>

### 3.4.2 Formal Solicitation: Competitive Sealed Proposals

Competitive sealed proposals are solicited through a RFP when determined by the Procurement Department or agency/department that a solution and qualifications are important criteria for selection beyond price. However, at least 10 percent of the total points for all evaluation criteria must be assigned to price.<sup>71</sup> The process starts with the preparation of the scope of work by the agency/department in need. RFPs are publicly advertised at a reasonable time before the date set for submission. Pre-proposal conferences and/or site visits may be used depending on specifications and requirements. Generally, a contract for professional services is awarded by competitive sealed proposals.<sup>72</sup>

### 3.4.3 Request for Expression of Interest

A request for expression of interest may be used to gather procurement information to make a solicitation, develop a pool of potential bidders who can respond within a short notice to a solicitation, or resolve technological or programmatic questions on how government requirements are best supplied. A request for expressions of interest does not directly lead to the award of a contract. Only those bidders or offerors determined to be eligible to receive a subsequent solicitation may participate in the subsequent solicitation. A subsequent solicitation may be accomplished through competitive sealed bids, competitive sealed proposals, or an informal solicitation. Proposals received under a request for expressions of interest may form a basis for justifying a noncompetitive contract award.<sup>73</sup>

### 3.4.4 Competitive Negotiations

Competitive negotiation may be utilized under specific circumstances. These include situations where no bids or proposals are received by the specified deadline, or only a single bid is submitted. It may also be employed if none of the bids or proposals received are acceptable, do not meet the County's price or budget limitations, including considerations of fairness and reasonableness of price, or if the bidders or offerors are not deemed responsible. In cases where negotiations with the most qualified bidder or offeror fail, negotiations may continue with the next most qualified bidder or offeror.<sup>74</sup>

### 3.4.5 Informal Solicitation

An informal solicitation is conducted in the open market without advertisement or following competitive bid or proposal procedures. The estimated value of the purchase must be between

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<sup>70</sup> Montgomery County Procurement Code §11B-9

<sup>71</sup> Montgomery Procurement Regulations 11B.00.01.04.1.2.3(6)

<sup>72</sup> Montgomery County Procurement Code §11B-10

<sup>73</sup> *Ibid.* §11B-11

<sup>74</sup> *Ibid.* §11B-12



\$10,000 and \$100,000 and meet other regulations established under the Procurement Regulations.<sup>75</sup>

### 3.4.6 Direct Purchases

A direct purchase is an informal procurement method used for acquiring construction, goods, or services with a total value not exceeding \$10,000. The Using Department Head is responsible for ensuring that all construction, goods, and services obtained through this method are purchased at fair and reasonable prices. While using this method, efforts are made to maintain competition as much as possible. It's important to note that purchases that exceed the \$10,000 limit in total cannot be subdivided or split to fall within the direct purchase limitations. If there is a recurring need for a particular product or service within a reasonable timeframe, the purchase would be consolidated rather than divided into smaller transactions.

A direct purchase involves submitting a Request for Payment form to the Department of Finance, Division of Accounts, accompanied by an invoice or receipt from the vendor. The Request for Payment form must include, at a minimum, the name and address of the vendor to be paid, the signature of the Using Department Head, a description of the construction, goods, or services procured, and the appropriate account code.<sup>76</sup>

## 3.5 Business Diversity and Inclusion

This disparity study aims to determine the effects of race, ethnicity, and gender on a firm's ability to do business with the County. The procurement policy review specifically focused on the policies, procedures, and practices that impact the participation and utilization of minority and women-owned businesses in County procurement and contracting. The outcomes of the disparity study will guide suggested mechanisms to remedy disparity of M/FBE firms, if identified. The County's commitment to business inclusion is reflected in procurement the establishment of several initiatives including the Minority, Female, Disabled-Business Program and the Local and Small Business Programs.

### 3.5.1 Minority, Female, and Disabled-Owned Businesses Program

It is the policy of the County to actively recruit minority-owned businesses to provide goods and services to perform governmental functions pursuant to Section 11B-57 of the County Code. The Office of Procurement, Division of Business Relations, and Compliance,<sup>77</sup> administers programs that attempt to address previous marketplace discrimination and barriers faced by M/FBEs in its contracting. These practices are categorized into two distinct remedies: race- and gender-conscious and race- and gender-neutral measures. Race- and gender-conscious measures are specifically designed to encourage the participation of minority- and woman-owned businesses in an organization's contracting. The County's MFD Program is a race- and gender-conscious program. In contrast, race- and gender-neutral measures are methods designed to encourage the participation of all businesses in an organization's contracting and do not consider the impact of

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<sup>75</sup> *Ibid.* §11B-13

<sup>76</sup> *Ibid.*

<sup>77</sup> DBRC also administers the Wage Requirements Law and Prevailing Wage Law to ensure that the County's contractors provide equitable benefits and a livable wage for contracted workers.

active or passive race, ethnicity, or gender discrimination. The County's DBEs and Local and Small Business Enterprise (LSBE) Programs are both race and gender neutral.

Montgomery County's procurement regulations encourage departments and agencies to actively recruit certified MFDs to provide goods, services (professional and non-professional) and construction services for the performance of Montgomery County government functions. The County's MFD Program attracts and assists certified minority firms in gaining access to prime contractor and subcontractor opportunities with County government agencies. The Program also conducts outreach activities and workshops to provide a forum for businesses to explore individual and joint contracting opportunities.

### **3.5.1.1 MFD CERTIFICATION**

A MFD is a business that is at least 51% owned, controlled, and managed daily by a minority person(s) as defined by state, county, and federal laws to include the following categories: African American, Hispanic American, Asian American, Native American, Disabled Persons, and Women. Businesses that are certified as a minority business enterprise under State procurement law and certain non-profit entities organized to promote the interests of persons with a disability are eligible to be certified as an MFD business in accordance with the Procurement Regulations. To participate in Montgomery County's MFD Program, a firm must be certified by one of the six agencies listed below:

- Maryland Department of Transportation, Minority Business Enterprise
- U.S. Federal Small Business Administration, 8(a) Program
- Women's Business Enterprise National Council, Women's Business Enterprise
- Capital Region Minority Supplier Development Council, Minority Business Enterprise
- City of Baltimore, Minority and Women's Business Opportunity Office
- U.S. Department of Veterans Affairs (VA), Service-Disabled Veteran Owned Small Business

MFD certifications are not required for a business enterprise to participate in County contracting opportunities. However, certifications are required to receive credit for their participation on contracts that have established MFD participation goals. Many MFD businesses use their certifications as additional marketing tools, which frequently become integral to their statement of qualifications.

### **3.5.1.2 MFD PROCEDURES**

The County applies MFD goals to contracts valued over \$50,000. Prior to awarding such contracts, a prospective contractor must demonstrate that a minimum percentage of the overall contract value, as set by the County, will be subcontracted to certified MFD businesses. The completed MFD Subcontractor Performance Plan, naming all participating MFD subcontractors and committed percentage(s) of the contract, accompanies each bid or proposal submission. A decision as to whether the prospective Contractor has demonstrated a good faith effort to meet the subcontracting requirement is made by the Minority Business Program Manager, who may waive this requirement.

Once a contract with a MFD goal is executed, the contractor must report its progress toward meeting the established MFD goal. Additionally, MFD subcontractors submit MFD Report of Payments Received on a quarterly basis to confirm payments received for work performed, services rendered, or materials supplied during the quarter. Throughout the contract, prime contracts are forbidden from replacing a MFD subcontractor with the approval of the Minority Business Program Manager and consent of the impacted subcontractor. DBRC staff also provide mediation services to aid in resolving contract disputes between prime contractors and certified MFD subcontractors listed for goal credit on an awarded contract.

County staff acknowledged that the policies guiding the administration of the MFD program and related contracts are well-written and clearly articulated. However, they expressed concern that the program lacks enforceable measures and effective sanctions to ensure compliance. While the framework for administering the program is solid, there is a perceived gap in the ability to hold parties accountable, which diminishes the program's overall effectiveness.

### **3.5.2 Local and Small Business Programs**

The County's Local and Small Business Programs are designed to foster economic growth and support the community by providing opportunities for local and small businesses to participate in county contracts and procurement activities. The programs aim to promote economic growth within Montgomery County by ensuring that smaller enterprises have a fair chance to compete for county business. Through targeted outreach, simplified procurement processes, and dedicated resources, the programs seek to empower local entrepreneurs, and stimulate job creation. The County administers three local, small business programs: Local Business Preference Program (LBPP), Local Small Business Reserve Program (LSBRP), and Local Business Subcontracting Program (LBSP).

#### **3.5.2.1 ELIGIBILITY**

A firm is eligible for the Local and Small Business Programs determined by ownership type, location, number of employees and gross sales. A firm must be independently owned with its physical location(s) within Montgomery County or physical location(s) both in and outside the County. If the firm has multiple locations, its Montgomery County location must account for over 50% of the business's total number of employees, or over 50% of the business's gross sales. Additionally, the firm must meet size and annual revenue thresholds for all business types (i.e. retail, wholesale, services, construction, and services).

#### **3.5.2.2 LOCAL BUSINESS PREFERENCE PROGRAM**

The County Executive's Expedited Bill 25-19, Local Business Preference, was unanimously approved by the County Council on June 23, 2020. Under the LBPP a Montgomery County-based business will receive a 10% preference points on competitive bids (IFBs) or proposals (RFPs). Preference points do not apply to LSBRP IFBs or RFPs or solicitations where State or Federal funding sources may prohibit it. Vendors applying for Local Business certification must be certified prior to contract award.

#### **Local Small Business Reserve Program**

The LSBRP ensures that County departments award 25 percent (with specified exceptions) of their procurements for goods, services, and construction to registered and certified local, small

businesses.<sup>78</sup> The program designates procurements less than \$10 million specifically for local, small vendors (including non-profits) to provide them an opportunity to compete with businesses of similar size and resources. The DBRC staff assist County departments in identifying solicitations appropriate for LSBRP competition.

### **Local Business Subcontracting Program**

To increase the participation of local businesses in certain large County procurement contracts, the County established a subcontracting goal for local businesses in procurement contracts with an estimated value to exceed \$10 million. Local business subcontracting goals stipulate that at least 10% of the contract dollars awarded for each high-dollar value contract should be allocated to a local business. Additionally, at least 10% of the total dollar value of all high-dollar value contracts, in aggregate, should be awarded to local businesses.

## **3.6 Procurement and Program Policy Summary**

MGT's policy review focused on procurement policies, procedures, and practices that facilitate the participation of M/FBEs. MGT held discussions with County staff involved with contracting, procurement, and program administration to understand what may impede procurement and contracting processes and doing business with diverse businesses. Understanding the structure and environment in which procurement and contracting occurs was also important for assessing the operational impact of procurement policies on County agencies/departments and vendors actively doing business with the County or seeking to do so. MGT noted that Montgomery County has detailed policies that guide its solicitation and contacting processes. The policies also guide department end users and suppliers seeking procurement opportunities.

All County departments play a role in promoting the County as an organization committed to business inclusion. Advancing participation of disadvantaged businesses will require continuously encouraging diverse business participation in all County procurement and contracting. Encouraging participation in this context is based on strengthening relationships and outreach with the diverse vendor community and providing staff with tools necessary to track diverse business participation through the entire procurement cycle. The overall assessment of the impact of these policies and procedures on the vendor community can only be made in conjunction with the statistical and qualitative evidence contained in Chapters 4, 5, and 7 of this report and will be used collectively to make recommendations and identify selected practices.


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<sup>78</sup> Local Small Business Program Amendment Bill #39-19 – (March 2, 2020) – Increased LSBRP goal from 20% to 25%.

# 4 Market Area and Availability Analysis

## 4.1 Introduction

The market area analysis is essential to establishing the universe of available vendors and spending that will be considered in the identification of any disparate treatment of assorted classifications of firms. Availability is a measure of the numbers and proportions of vendors willing and able to work with an agency, while disparity is an observed statistically significant difference between the utilization of minority- and women-owned firms relative to their respective availability.



<b>Chapter Sections</b>
<b>4.1 Introduction</b>
<b>4.2 Data Collection and Management</b>
<b>4.3 Market Area Analysis</b>
<b>4.4 Availability Estimations</b>
<b>4.5 Market Area and Availability Summary</b>

This chapter presents the results of the relevant geographic market area and availability estimates analyses of firms willing and able to do business in the Montgomery County market area. The specific procurement categories analyzed were Construction Services, Architecture & Engineering Services, Professional Services, Other Services, and Goods during July 1, 2015, through June 30, 2021.

## 4.2 Data Collection and Management

At the onset of the study, MGT submitted a detailed data query to the County. The data query asked for descriptive information regarding prime- and subcontractor-level contracting data. Based on the data query and the subsequent data provided, MGT assessed the prime and subcontractor records using payment data to determine its use in the Study. MGT began the data-collecting process by understanding the difference in the County's list of executed contracts and the payments made to contracts within the study period. After discussing the data with the County, we decided to use the payment data as the basis of the study. The payment data more accurately represents contracts that were paid and executed during the study period, rather than just executed.

MGT staff compiled and reconciled electronic data provided by the County to develop a master set of prime contract and purchase order data into a Master Utilization Database to support the needs of the Study. MGT utilized the County's financial data as the source of prime data. MGT then began the process to verify and collect subcontractor information.

MGT administered a survey directly to prime contractors. The County aided in contacting firms who were nonresponsive to MGT's request. The prime survey included an attempt to gather subcontractor demographic and payment data that did not exist in the financial data. After creating the master database of prime contracts, MGT identified contracts above \$100,000 contracts because of an increased likelihood of such purchases having subcontracting opportunities. MGT selected a sample of contracts which would be targeted for subcontractor collection. MGT sampled the largest contracts with certainty. Based on a common contract ID across all data sets, MGT merged the subcontractor data with the prime data to make the Master Utilization Database.

### 4.2.1 Study Period

- The preliminary market area analysis is based on contract transactions from July 1, 2015, through June 30, 2021.

### 4.2.2 Procurement Categories and Exclusions

- MGT analyzed the procurement categories competitively bid by the County, encompassing five sectors: Construction, Professional Services, Other Services, and Goods. These procurement categories are defined as:
- **Construction:** Services provided for the construction, renovation, rehabilitation, repair, alteration, improvement, demolition, and excavation of physical structures, excluding the performance of routine maintenance.
- **Professional Services:** Services that contemplate labor and skill that are predominantly mental or intellectual rather than physical or manual and includes services of members of disciplines requiring special knowledge or attainment and a high order of learning, skill, and intelligence. This category also includes architecture & engineering, which are services related explicitly to preparing plans and specifications for construction projects.
- **Other Services:** This category includes all services that do not typically require a provider to have experience in a specialized field or hold an advanced degree.
- **Goods:** This category includes all purchases of physical items, including but not limited to equipment and materials, excluding land or a permanent interest in land.

The following types of transactions were excluded from the analysis:

- Transactions outside of the study period.
- Transactions associated with non-procurement activities, for example:
  - Administrative items such as utility payments, leases for real estate, or insurance.
  - Salary and fringe benefits, training, parking, or conference fees.
- Transactions associated with nonprofit organizations and governmental agencies.

### 4.2.3 Classification of Firms

Firms included in the utilization analysis have been assigned to business owner classifications according to the definitions provided below.<sup>79</sup>

- **M/FBE Firms:** In this Study, businesses classified as M/FBE are firms that are at least 51 percent owned and controlled by members of one of six groups: African Americans, Hispanic Americans, Asian Pacific Americans, Native Americans, Subcontinent Asian Americans, or non-minority females. These groups were defined according to the United States (U.S.) Census Bureau as follows:

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<sup>79</sup> Business ownership classification was based on the race, ethnicity, and gender classification of the owner during the study period.



- **African Americans:** U.S. citizens or lawfully admitted permanent residents having an origin in any of the black racial groups of Africa.
  - **Hispanic Americans:** U.S. citizens or lawfully admitted permanent residents of Mexican, Puerto Rican, Cuban, Central, or South American, or other Spanish or Portuguese cultures or origins regardless of race.
  - **Asian Americans:** U.S. citizens or lawfully admitted permanent residents who originate from the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands.
  - **Native Americans:** U.S. citizens or lawfully admitted permanent residents who originate from any of the original peoples of North America and who maintain cultural identification through tribal affiliation or community recognition.
  - **Subcontinent Asian American:** which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal, or Sri Lanka<sup>80</sup>;
  - **Non-Minority Females:** U.S. citizens or lawfully admitted permanent residents who are non-Hispanic white females. Minority females were included in their respective minority category.
  - Minority female - and minority male- owned firms are classified and assigned to their corresponding minority groups. For example, a Hispanic American female- or Hispanic American male-owned firm was assigned to the Hispanic American-owned firm minority group.
- **Unclassified Firms.** Firms that are identified as nonminority male or majority-owned were classified as non-M/FBE firms. If there was no indication of business ownership, these firms were also classified as non-M/FBE firms.
  - **MBE Firms.** All minority-owned firms, regardless of gender.
  - **Non-Minority Female Firms.** All non-minority female-owned firms.
  - **Disabled-Owned Business Enterprise (DOBE).** A for-profit business that is at least 51% owned and operated by one or more individuals with disabilities.

### 4.3 Market Area Analysis

As prescribed by Croson and subsequent cases, a disparity study requires definition of a market area to ensure that a relevant pool of vendors is considered in analyzing the availability and utilization of firms. In Croson for example, the Court explained that the city of Richmond’s MBE goal “rest[ed] upon the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.” In Coral Construction, the Court went further to clarify that a DBE (or MBE) program must limit its geographical scope to the boundaries of the enacting jurisdiction.<sup>81</sup>

If these boundaries are stretched too far, the universe of vendors becomes diluted with firms with no interest or history in working with the governmental entity, and thus their demographics and experiences have little relevance to actual contracting activity or policy. On the other hand, a

<sup>80</sup> Subcontinent Asian Americans were not calculated as a separate ownership classification.

<sup>81</sup> *Coral Construction*, 941 F.2d at 925.

boundary set too narrowly risks the opposite circumstance of excluding a high proportion of firms who have contracted with, or bid for work with, the governmental entity, and thus may also skew the prospective analyses of disparity.

### 4.3.1 Methodology

Based on *Crososn* guidelines, the County should include in its relevant market area the geographic areas from which the majority of its purchases are procured. MGT recommends using counties as the geographic unit of measurement by which the relevant market area is established. The choice of counties as the unit of measurement is based on the following: 1) the courts have accepted counties as a standard geographical unit of analysis in conducting equal employment and disparity analyses; 2) county boundaries are externally determined and, hence, are free from any researcher bias that might result from any arbitrary determinations of boundaries of geographical units of analysis; 3) U.S. Census data and other federal and county data are routinely collected and reported using county boundaries. The following presents the methodology used to determine the overall market area and relevant market area.

- Overall Market Area.** To determine the full extent of the market area in which the County utilized firms, MGT staff determined geographic locations of utilized vendors by their county jurisdictions. The overall market area presents the total dollars paid for each procurement category included within the scope of the study. The overall market area results by procurement category are presented in **Section 4.3.2** of this chapter.
- Relevant Market Area.** Once the overall market area was established, the relevant market area was determined by examining geographic areas from which the majority of its purchases are procured. Based on the results of the market area analysis conducted for each business category, the recommended relevant geographic market area are the 12 counties which are within the Washington-Arlington-Alexandria, DC-VA-MD-WV and Baltimore-Columbia-Towson, MD Metropolitan Statistical Areas (MSA).

Montgomery County, MD Relevant Market Area	
District Of Columbia, DC	Charles County, MD
Anne Arundel County, MD	Frederick County, MD
Baltimore City, MD	Howard County, MD
Baltimore County, MD	Montgomery County, MD
Calvert County, MD	Prince George’s County, MD
Carroll County, MD	Fairfax County, VA

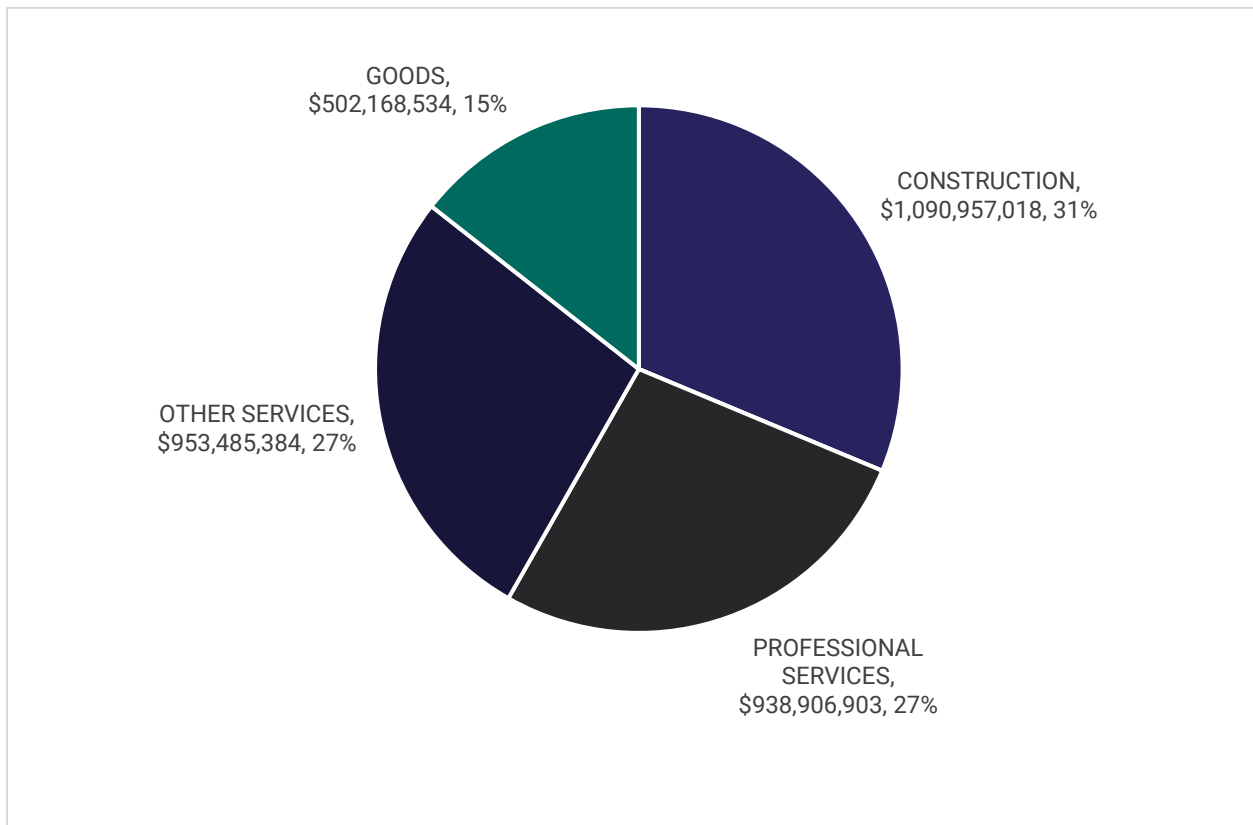
The dollars paid to each vendor were summarized by County according to the location of each firm and by the services they provided to the Montgomery County, MD: Construction, Professional Services, Other Services, and Goods. Corresponding market area analyses showing the dollars awarded by county within each procurement category are presented in **Appendix B, Detailed Market Area Analysis**.

### 4.3.2 Analysis and Identification of Relevant Market Area

As described in the preceding section, an overall market area was first established to account for all relevant County payments, after which more specific regions were analyzed to arrive at a relevant market area to support the goals of the study. Detailed information supporting this market area analyses are presented in **Appendix B, Detailed Market Area Analysis** to this report.

**Figure 4-1** shows \$3,485,517,838.55 were paid to firms located within the overall market area between July 1, 2015 through June 30, 2021.

FIGURE 4-1. SUMMARY OF DOLLARS,  
TOTAL CONTRACTS (PAID) BY PROCUREMENT CATEGORY,  
OVERALL MARKET AREA



Source: MGT developed a Master Utilization Database based on County's spending between July 1, 2015 through June 30, 2021.

Narrowing the geographic scope, **Table 4-1** shows that firms located within the relevant market area accounted for 76.15 percent of spend across all procurement categories. When broken down by procurement categories, Construction had the highest spend within the relevant market area with 88.21 percent of payments; and Goods had the smallest at 53.71 percent.

TABLE 4-1. MARKET AREA ANALYSIS, CONTRACTS DISTRIBUTION OF DOLLARS BY BUSINESS CATEGORY, COUNTY MARKET AREA

CONSTRUCTION	Amount	Percent
<i>Inside MONTGOMERY COUNTY, MD RGMA</i>	\$962,872,013.89	88.26%
Outside MONTGOMERY COUNTY, MD RGMA	\$128,085,003.62	11.74%
<b>CONSTRUCTION, TOTAL</b>	<b>\$1,090,957,017.51</b>	<b>100.00%</b>
PROFESSIONAL SERVICES	Amount	Percent
<i>Inside MONTGOMERY COUNTY, MD RGMA</i>	\$766,080,080.91	81.59%
Outside MONTGOMERY COUNTY, MD RGMA	\$172,826,822.24	18.41%
<b>PROFESSIONAL SERVICES, TOTAL</b>	<b>\$938,906,903.15</b>	<b>100.00%</b>
OTHER SERVICES	Amount	Percent
<i>Inside MONTGOMERY COUNTY, MD RGMA</i>	\$659,761,407.18	69.19%
Outside MONTGOMERY COUNTY, MD RGMA	\$293,723,976.39	30.81%
<b>OTHER SERVICES, TOTAL</b>	<b>\$953,485,383.57</b>	<b>100.00%</b>
GOODS	Amount	Percent
<i>Inside MONTGOMERY COUNTY, MD RGMA</i>	\$275,889,463.06	54.94%
Outside MONTGOMERY COUNTY, MD RGMA	\$226,279,071.26	45.06%
<b>GOODS, TOTAL</b>	<b>\$502,168,534.32</b>	<b>100.00%</b>
ALL BUSINESS CATEGORIES	Amount	Percent
<i>Inside MONTGOMERY COUNTY, MD RGMA</i>	\$2,664,602,965.04	76.45%
Outside MONTGOMERY COUNTY, MD RGMA	\$820,914,873.51	23.55%
<b>ALL BUSINESS CATEGORIES, TOTAL</b>	<b>\$3,485,517,838.55</b>	<b>100.00%</b>

Source: MGT developed a Master Prime File based on City's system between Fiscal Years 2015 to 2021.

Corresponding market area analyses showing the dollars awarded by county for each procurement category are presented in **Appendix A Detailed Product Market Analysis**.

## 4.4 Availability Estimations

Included in the sections that follow are descriptions of the approach and methodology used by MGT to estimate availability followed by the results of the data collection and estimation process.

### 4.4.1 Availability Methodology

As noted in **Chapter 2**, the Supreme Court stated in *Croson* that,

“Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.”

**Availability** is defined by courts as whether a firm is *willing and able* to work with the agency in question, as a method of constructing the universe of firms that might be considered in that

agency's procurement activities. Due to the statistical limitations of deriving a vendor's ability, MGT will concentrate on the willingness of the vendors and not adjust availability due to capacity.

- **Willing** is reasonably presumed via the vendors' active pursuit of registration to work with any public (government) agency, which drives the scope of identification for the sources of available firms considered.
- **Able**, or capability to perform work, is more loosely defined due to two obscuring factors: (1) the scalable nature of firms, who may reasonably add capacity to handle jobs beyond previous performance, and (2) the inherent concern that discrimination may have influenced the historic or existing scale of operation of the firms within the market. Therefore, the only confining measure of "ability" used to cull the universe of available vendors is that they have some presence within the defined market area.

Thus, a reliable estimation of the number of firms *willing* and *able* to provide each of the respective services under the scope of examination is an element in the determination of disparity. Post-*Croson* case law has not prescribed a single, particular approach to deriving vendor availability, and agencies have used a variety of means to estimate pools of available vendors that have withstood legal scrutiny; however, among the array of methods utilized, what is known as a "custom census" has received favorable endorsement. A custom census is characterized as a survey of a representative sample of firms offering the procured goods and services within an organization's relevant market area to determine an estimate of the prospective *universe* of vendors.

MGT's data assessment and evaluation of alternative methods for measuring the numbers of firms of the types and classifications available to work with the County confirmed that a version of a custom census of firms in the relevant market area would provide the most accurate representation of available firms. The custom census approach used by MGT in this instance required development of representative samples of firms within each of the four procurement categories identified for the study, each of which had to cover the defined 10 county geographic boundaries of the relevant market area.

First, an intensive examination of the County's procurements was required to define the appropriate characteristics of the universe of prospective vendors, in terms of the types of goods and services offered. County procurements were assigned North American Industry Classification System (NAICS) codes that Dun & Bradstreet uses to classify firms' primary lines of business. These industry selections were then used to establish weighting criteria to be used in random selections of vendors to be surveyed. Target response thresholds were established for each industry subsector to ensure a 95 percent confidence interval and +/-5 percent margin of error for findings. Second, a survey was designed and administered to sampled firms by telephone and email to (1) determine and/or validate the race, ethnicity, and gender of ownership as well as (2) to elicit these representative firms' interest in working with County.

Results of the survey were then extrapolated to the full scale of the applicable universe to arrive at an estimation of available firms by ethnicity/gender classification and procurement category.

#### 4.4.2 Availability Analysis

Following the methodology prescribed in the previous section, MGT derived estimates for proportions of available firms for the racial, ethnic, and gender ownership classes and five defined procurement categories. Corresponding detailed analyses showing the availability of firms by race, ethnicity, and gender are presented in **Appendix C, Utilization, Availability, and Disparity by NAICS Codes**.

**Table 4-2** presents availability estimates spanning across all procurement categories, in aggregate. The estimates conclude that M/FBE availability is approximately 42.52 percent of the total availability in the marketplace. It is important to note that the availability is based on the types of goods and services that the County procures and firms that provide said goods and services. We observe that Nonminority Female firms make up over 18.14 percent of the total M/FBE availability.

TABLE 4-2.  
ESTIMATION OF AVAILABLE FIRMS, **ALL PROCUREMENT CATEGORIES**

BUSINESS OWNERSHIP CLASSIFICATION	% OF AVAILABLE FIRMS
African Americans	11.58%
Hispanic Americans	6.83%
Asian Americans	5.25%
Native Americans	0.71%
<b>Total MBE Firms</b>	<b>24.37%</b>
Nonminority Females	18.14%
<b>Total M/FBE Firms</b>	<b>42.52%</b>
Unclassified Firms	57.48%

Source: Custom Census Analysis. Study Period: July 1, 2015 through June 30, 2021.

Tables **4-3** through **4-6** provide the availability estimates for each procurement category analyzed. M/FBE availability estimates vary by category. As shown in the tables, M/FBE firms make up 38.46 percent availability in Construction, 61.39 percent in Professional Services, 40.32 percent in Other Services, and 20.22 percent in Goods.

TABLE 4-3.  
ESTIMATION OF AVAILABLE FIRMS, **CONSTRUCTION**

BUSINESS OWNERSHIP CLASSIFICATION	% OF AVAILABLE FIRMS
African Americans	9.18%
Hispanic Americans	10.50%
Asian Americans	5.62%
Native Americans	0.65%
<b>Total MBE Firms</b>	<b>25.94%</b>
Nonminority Females	12.51%



BUSINESS OWNERSHIP CLASSIFICATION	% OF AVAILABLE FIRMS
<b>Total M/FBE Firms</b>	<b>38.46%</b>
Unclassified Firms	61.54%

Source: Custom Census Analysis. Study Period: July 1, 2015 through June 30, 2021.

TABLE 4-4.  
ESTIMATION OF AVAILABLE FIRMS, **PROFESSIONAL SERVICES**

BUSINESS OWNERSHIP CLASSIFICATION	% OF AVAILABLE FIRMS
African Americans	19.03%
Hispanic Americans	6.21%
Asian Americans	8.20%
Native Americans	0.75%
<b>Total MBE Firms</b>	<b>34.19%</b>
Nonminority Females	27.20%
<b>Total M/FBE Firms</b>	<b>61.39%</b>
Unclassified Firms	38.61%

Source: Custom Census Analysis. Study Period: July 1, 2015 through June 30, 2021.

TABLE 4-5.  
ESTIMATION OF AVAILABLE FIRMS, **OTHER SERVICES**

BUSINESS OWNERSHIP CLASSIFICATION	% OF AVAILABLE FIRMS
African Americans	10.90%
Hispanic Americans	6.47%
Asian Americans	2.58%
Native Americans	0.91%
<b>Total MBE Firms</b>	<b>20.87%</b>
Nonminority Females	19.45%
<b>Total M/FBE Firms</b>	<b>40.32%</b>
Unclassified Firms	59.68%

Source: Custom Census Analysis. Study Period: July 1, 2015 through June 30, 2021.

TABLE 4-6.  
ESTIMATION OF AVAILABLE FIRMS, **GOODS**

BUSINESS OWNERSHIP CLASSIFICATION	% OF AVAILABLE FIRMS
African Americans	4.14%
Hispanic Americans	0.73%
Asian Americans	3.98%
Native Americans	0.42%
<b>Total MBE Firms</b>	<b>9.27%</b>

BUSINESS OWNERSHIP CLASSIFICATION	% OF AVAILABLE FIRMS
Nonminority Females	10.95%
<b>Total M/FBE Firms</b>	<b>20.22%</b>
Unclassified Firms	79.78%

Source: Custom Census Analysis. Study Period: July 1, 2015 through June 30, 2021.


## 4.5 Market Area and Availability Summary

Based on the market area analysis of the County’s procurement activity it was determined that the 12 counties should be used as the relevant market area. This 12-County Market Area represents a majority of the County’s procurement activity, with 76.15 percent of the payments to vendors within this market area. Individually all the categories, represent a majority of the County’s procurement activity within the corresponding categories. Construction having the highest spend in the market area with 88.21 percent of payments; and Goods with the smallest at 53.71 percent. The definition of the relevant market area allows for detailed examinations of contracting activity with local vendors. The following section describes the results of this utilization analysis for the County.

# 5 Product Market, Utilization, and Disparity Analyses

## 5.1 Introduction

This chapter presents the results of MGT’s analyses regarding the **product market, utilization, and disparity**. Utilization data is central to defining this market area and thus is first presented as a means of identifying the market area for consideration, and then is examined within that market area to assess assorted levels of contracting activity as the first step in the quantitative determination of disparity. Consistent with prior chapters, this analysis focuses on procurements in the categories of Construction, Professional Services, Other Services, and Goods.



- Chapter Sections
  - 5.1 Introduction
  - 5.2 Analysis and Identification of Product Market
  - 5.3 Utilization Analysis
  - 5.4 Overall Utilization
  - 5.5 Disparity Analyses and Significance Testing
  - 5.6 Product Market, Utilization, and Disparity Summary

## 5.2 Analysis and Identification of Product Market

Based on the major categories and description of work on each contract, MGT assigned NAICS codes to each transaction based on the description of what was purchased for both primes and subcontractors. MGT assigned both NAICS code industry groups (4-digit level) and NAICS code industries (6-digit level). **Table 5-1** through **Table 5-4** show the payments and their associated weights for Construction, Professional Services, Other Services, and Goods. **Appendix A, Detailed Product Market Analysis** shows the NAICS code industries (6-digit level) for the four procurement categories.

Overall, County procurements occur in 203 NAICS industry groups. In Construction, County procurements occur in 56 NAICS industry groups. In Professional Services, County procurements occur in 95 NAICS industry groups. In Other Services, County procurements occur in 108 NAICS industry groups. In Goods, County procurements occur in 99 NAICS industry groups.

**Table 5-1** shows that for Construction, the top five NAICS codes make up 75.69 percent or \$825,729,811.3 of the total utilization and are distributed among the industry groups 2362, 2373, 2382, 2371 and 2382.

TABLE 5-1. SUMMARY OF DOLLARS,  
TOP 5 NAICS CODES,  
CONSTRUCTION

NAICS CODE	NAICS DESCRIPTION	AMOUNT	NAICS WEIGHT
236220	Commercial and Institutional Building Construction	\$479,095,626.68	43.92%
237310	Highway, Street, and Bridge Construction	\$181,096,102.65	16.60%
238210	Electrical Contractors and Other Wiring Installation Contractors	\$71,336,651.89	6.54%
237110	Water and Sewer Line and Related Structures Construction	\$48,462,376.12	4.44%
238220	Plumbing, Heating, and Air-Conditioning Contractors	\$45,739,053.97	4.19%

Source: MGT developed a Master Utilization Database based on County's spending between July 1, 2015 through June 30, 2021.

For Professional Services, **Table 5-2** the top five NAICS codes make up 56.76 percent or \$532,932,096.40 of the total utilization and are distributed among the industry groups 5413, 5416, 5415, and 6213.

TABLE 5-2. SUMMARY OF DOLLARS,  
TOP 5 NAICS CODES,  
PROFESSIONAL SERVICES

NAICS CODE	NAICS DESCRIPTION	AMOUNT	NAICS WEIGHT
541330	Engineering Services	\$199,108,957.44	21.21%
541690	Other Scientific and Technical Consulting Services	\$112,156,514.68	11.95%
541511	Custom Computer Programming Services	\$81,566,695.08	8.69%
541519	Other Computer Related Services	\$79,402,334.61	8.46%
621330	Offices of Mental Health Practitioners (except Physicians)	\$60,697,594.59	6.46%

Source: MGT developed a Master Utilization Database based on County's spending between July 1, 2015 through June 30, 2021.

For Other Services, **Table 5-3** the top five NAICS codes make up 39.35 percent or \$375,169,029.76 of the total utilization and are distributed among the industry groups 5621, 5161, 5619, 5617, and 8111.

TABLE 5-3. SUMMARY OF DOLLARS,  
TOP 5 NAICS CODES,  
OTHER SERVICES

NAICS CODE	NAICS DESCRIPTION	AMOUNT	NAICS WEIGHT
562111	Solid Waste Collection	\$99,909,716.20	10.48%

NAICS CODE	NAICS DESCRIPTION	AMOUNT	NAICS WEIGHT
516110	Radio Broadcasting Stations	\$71,356,885.00	7.48%
561910	Packaging and Labeling Services	\$71,061,598.51	7.45%
561730	Landscaping Services	\$66,497,921.91	6.97%
811111	General Automotive Repair	\$66,342,908.14	6.96%

Source: MGT developed a Master Utilization Database based on County's spending between July 1, 2015 through June 30, 2021.

For Goods, **Table 5-4** the top five NAICS codes make up 40.59 percent or \$203,846,609.44 of the total utilization and are distributed among the industry groups 3363, 3399, 3351, 4572, and 4231.

TABLE 5-4. SUMMARY OF DOLLARS,  
TOP 5 NAICS CODES,  
GOODS

NAICS CODE	NAICS DESCRIPTION	AMOUNT	NAICS WEIGHT
336390	Other Motor Vehicle Parts Manufacturing	\$78,947,514.67	15.72%
339950	Sign Manufacturing	\$46,225,684.42	9.21%
335132	Commercial, Industrial, and Institutional Electric Lighting Fixture Manufacturing	\$28,664,050.93	5.71%
457210	Fuel Dealers	\$26,649,304.22	5.31%
423110	Automobile and Other Motor Vehicle Merchant Wholesalers	\$23,360,055.20	4.65%

Source: MGT developed a Master Utilization Database based on County's spending between July 1, 2015 through June 30, 2021.

## 5.3 Utilization Analysis

The utilization analysis presents a summary of payments within the scope of the study and an initial assessment of the effectiveness of initiatives in promoting the inclusion of M/FBEs in the County's contracting and procurement activities.

The utilization analysis is based on the defined relevant market area, as described in the preceding chapter. The payments data included within this analysis encompass both (1) total dollars paid to primes located within the market area (excluding all subcontracting payments) and (2) dollars allocated to subcontractors located within the market area, independent of their respective prime contractor location. Analysis of these data is broken down by the procurement categories of Construction, Professional Services, Other Services, and Goods and encompasses payments between July 1, 2015 through June 30, 2021.

## 5.4 Overall Utilization

**Table 5-5** shows the M/FBE utilization amounted to 22.07 percent of total payments. Corresponding detailed analyses showing the utilization of firms by business ownership classification are presented in **Appendix C, Utilization, Availability, and Disparity NAICS Codes**.

TABLE 5-5.  
UTILIZATION ANALYSIS BY BUSINESS OWNERSHIP CLASSIFICATION,  
**ALL PROCUREMENT CATEGORIES**

BUSINESS OWNERSHIP CLASSIFICATION	ALL PROCUREMENT CATEGORIES	
	Dollars (\$)	Percent (%)
African Americans	\$241,194,355.63	6.92%
Asian American	\$32,419,844.86	0.93%
Hispanic Americans	\$291,477,444.49	8.36%
Native Americans	\$4,566,190.16	0.13%
<b>Total MBE Firms</b>	<b>\$569,657,835.14</b>	<b>16.34%</b>
Nonminority Females	\$470,766,268.10	13.51%
<b>Total M/FBE Firms</b>	<b>\$769,372,453.87</b>	<b>22.07%</b>
Unclassified Firms	\$2,716,145,384.68	77.93%
<b>TOTAL</b>	<b>\$3,485,517,838.55</b>	<b>100.00%</b>

Source: MGT developed a Master Utilization Database based on County's spending between July 1, 2015 through June 30, 2021.

There are a few business ownership classifications, where MWBE firms have higher utilization rates than the represented in availability. For example, two businesses accounted for more than 65% of the County's total spend with African American firms within their Other Services procurements. Two businesses accounted for more than 79% of the County's total spend with Non-Minority Female firms within their Goods procurements. Two businesses accounted for over 63% of the County's total spend with Hispanic American firms. The higher utilization rates within such firms indicate successful examples of businesses owned by individuals from underrepresented groups thriving in the Montgomery County marketplace. These success stories can serve as valuable examples for other MFBEs, showcasing strategies, resilience, and adaptability that have enabled them to secure substantial contracts and revenue. While the higher utilization rates reflect progress in the County's business inclusion efforts, they may also indicate potential barriers to entry for other MFBEs within these categories. If such barriers exist in the County's marketplace, private sector and qualitative evidence contained in Chapters 6 and 7 of this report, will provide additional context.

### 5.4.1 Utilization by Procurement Category

The next series of tables show the summary results of MGT's utilization analysis of each of the procurement categories. Corresponding detailed analyses, showing the utilization of firms by business ownership classification for each procurement category, are presented in **Appendix C, Utilization, Availability, and Disparity NAICS Codes**.



Tables 5-6 through 5-9 show the utilization of M/FBE firms for each procurement category analyzed. M/FBE utilization varies by category. As shown in the tables, the County utilized 20.43 percent of M/FBE firms within Construction, 23.25 percent of M/FBE firms within Professional Services, 21.83 percent of M/FBE firms within Other Services and 23.91 percent of M/FBE firms within Goods.

TABLE 5-6.  
UTILIZATION ANALYSIS BY BUSINESS OWNERSHIP CLASSIFICATION,  
**CONSTRUCTION**

BUSINESS OWNERSHIP CLASSIFICATION	CONSTRUCTION	
	Dollars (\$)	Percent (%)
African Americans	\$14,566,868.60	1.34%
Asian American	\$1,343,396.12	0.12%
Hispanic Americans	\$177,648,356.35	16.28%
Native Americans	\$2,538,190.69	0.23%
<b>Total MBE Firms</b>	<b>\$196,096,811.76</b>	<b>17.97%</b>
Nonminority Females	\$26,752,827.40	2.45%
<b>Total M/FBE Firms</b>	<b>\$222,849,639.16</b>	<b>20.43%</b>
Unclassified Firms	\$868,107,378.35	79.57%
<b>TOTAL</b>	<b>\$1,090,957,017.51</b>	<b>100.00%</b>

Source: MGT developed a Master Utilization Database based on County's spending between July 1, 2015 through June 30, 2021.

TABLE 5-7.  
UTILIZATION ANALYSIS BY BUSINESS OWNERSHIP CLASSIFICATION,  
**PROFESSIONAL SERVICES**

BUSINESS OWNERSHIP CLASSIFICATION	PROFESSIONAL SERVICES	
	Dollars (\$)	Percent (%)
African Americans	\$77,580,973.32	8.26%
Asian American	\$12,114,798.36	1.29%
Hispanic Americans	\$65,869,347.65	7.02%
Native Americans	\$111,294.00	0.01%
<b>Total MBE Firms</b>	<b>\$155,676,413.33</b>	<b>16.58%</b>
Nonminority Females	\$62,589,768.07	6.67%
<b>Total M/FBE Firms</b>	<b>\$218,266,181.40</b>	<b>23.25%</b>
Unclassified Firms	\$720,640,721.75	76.75%
<b>TOTAL</b>	<b>\$938,906,903.15</b>	<b>100.00%</b>

Source: MGT developed a Master Utilization Database based on County's spending between July 1, 2015 through June 30, 2021.

TABLE 5-8.  
UTILIZATION ANALYSIS BY BUSINESS OWNERSHIP CLASSIFICATION,  
**OTHER SERVICES**

BUSINESS OWNERSHIP CLASSIFICATION	OTHER SERVICES	
	Dollars (\$)	Percent (%)

African Americans	\$135,341,846.76	14.19%
Asian American	\$18,285,641.04	1.92%
Hispanic Americans	\$25,057,489.36	2.63%
Native Americans	\$1,682,982.34	0.18%
<b>Total MBE Firms</b>	<b>\$180,367,959.50</b>	<b>18.92%</b>
Nonminority Females	\$27,798,447.15	2.92%
<b>Total M/FBE Firms</b>	<b>\$208,166,406.65</b>	<b>21.83%</b>
Unclassified Firms	\$745,318,976.92	78.17%
<b>TOTAL</b>	<b>\$953,485,383.57</b>	<b>100.00%</b>

Source: MGT developed a Master Utilization Database based on County's spending between July 1, 2015 through June 30, 2021.

TABLE 5-9.  
UTILIZATION ANALYSIS BY BUSINESS OWNERSHIP CLASSIFICATION,  
GOODS

BUSINESS OWNERSHIP CLASSIFICATION	GOODS	
	Dollars (\$)	Percent (%)
African Americans	\$13,704,666.95	2.73%
Asian American	\$676,009.34	0.13%
Hispanic Americans	\$22,902,251.13	4.56%
Native Americans	\$233,723.13	0.05%
<b>Total MBE Firms</b>	<b>\$37,516,650.55</b>	<b>7.47%</b>
Nonminority Females	\$82,573,576.11	16.44%
<b>Total M/FBE Firms</b>	<b>\$120,090,226.66</b>	<b>23.91%</b>
Unclassified Firms	\$382,078,307.66	76.09%
<b>TOTAL</b>	<b>\$502,168,534.32</b>	<b>100.00%</b>

Source: MGT developed a Master Utilization Database based on County's spending between July 1, 2015 through June 30, 2021.

The data collection and preparations included identifying firms that classify as owned by persons with disabilities. Data sources that identify these business ownership classifications were limited because it is not maintained as broadly as minority and female data sources are. Being that there is an overlap of the race, ethnicity, and gender classifications, utilization is shown at the total DOBE classification and not by race, ethnicity, or gender. **Table 5-10** shows the utilization of DOBE firms.

TABLE 5-10.  
UTILIZATION ANALYSIS FOR DOBE FIRMS

BUSINESS OWNERSHIP CLASSIFICATION	ALL	CONSTRUCTION	PROFESSIONAL SERVICES	OTHER SERVICES	GOODS
DOBE	\$237,343.63	\$0.00	\$237,343.63	\$0.00	\$0.00
BUSINESS OWNERSHIP CLASSIFICATION	ALL	CONSTRUCTION	PROFESSIONAL SERVICES	OTHER SERVICES	GOODS
	(%)	(%)	(%)	(%)	(%)
DOBE	0.01%	0.00%	0.01%	0.00%	0.00%

Source: MGT developed a Master Utilization Database based on County's spending between July 1, 2015 through June 30, 2021.

### 5.4.2 Utilization Summary

The utilization analysis shows that M/FBE firms are utilized at lower rates than their Unclassified counterparts. Overall, 22.07 percent of the County payments went to M/FBE firms, while 77.93 percent went to Unclassified Firms. While M/FBE utilization is low throughout the views on utilization that have been presented in this chapter, the proportion of firms willing and able to provide services to the County are a critical qualifying context in any determinations of disparity. Availability presented in **Chapter 4** and resulting disparity ratios, which follows, provide more definitive conclusions in this respect.

## 5.5 Disparity Analyses and Significance Testing


Building on our understanding of the County's vendor utilization in the previous section of this chapter (**Section 5.3**) and the availability estimates presented in the previous chapter (**Section 4.4**), we can use this information to identify potential disparities in the County's procurement. A brief summary of the approach is provided in **Section 5.5.1** followed by the results of these disparity calculations and associated statistical significance testing in **Section 5.5.2**.

### 5.5.1 Disparity Analysis Methodology

Disparity, in this context, is the analysis of the differences between the utilization of minority- and female-owned firms (as presented in **Section 5.2**) and the respective availability of those firms (**Chapter 4**). Thus, MGT calculated disparity indices to examine whether minority-owned and female-owned firms received a proportional share of dollars based on the respective availability of minority-owned and female-owned firms located in the Study's defined relevant market area (as presented in **Chapter 4**).

MGT's disparity index methodology yields a value that is easily calculable, understandable in its interpretation, and universally comparable such that a disparity in utilization within minority-owned and female-owned firms can be assessed with reference to the utilization of nonminority-owned and male-owned firms.

The **disparity index** is a simple proportional calculation that divides utilization rates (percent of dollars awarded to firms by class) by their associated availability (percent of firms available to work, within that same class) and multiplies this value by 100. Thus, a disparity index value of zero (0.00) indicates absolutely no utilization and, therefore, absolute disparity. A disparity index of 100 indicates that utilization is perfectly proportionate to availability, therefore indicating the absence of disparity (that is, all things being equal). Alternately, firms are considered **underutilized** if the disparity indices are less than 100, and **overutilized** if the indices are above 100.



**Disparity Index =**  
**%Um<sub>1p1</sub> ÷ %Am<sub>1p1</sub> x 100**

Um<sub>1p1</sub> = utilization of minorities- and women-owned firms<sub>1</sub> for procurement<sub>1</sub>

Am<sub>1p1</sub> = availability of minorities- and women-owned firms<sub>1</sub> for procurement<sub>1</sub>

Since there is no standardized measurement to evaluate the levels of underutilization or overutilization within a procurement context, MGT's methodology to measure disparity, if disparity is found, is based on the Equal Employment Opportunity Commission's (EEOC) "80 percent rule."<sup>82</sup> In the employment discrimination framework,

an employment disparity index below 80 indicates a "substantial disparity." The Supreme Court has accepted the use of the "80 percent rule" in *Connecticut v. Teal* (*Teal*), 457 U.S. 440 (1982).<sup>83</sup> Therefore, following a similar pattern, firms are considered substantially underutilized (substantial disparity) if the disparity indices are 80 or less.

Standard deviation tests or testing for **statistical significance**, in this context, is the analysis to determine the significance of the difference between the utilization of minority- and female-owned firms and the availability of those firms. This analysis can determine whether the disparities are substantial or statistically significant, which lends further statistical support to a finding of discrimination. The following explains MGT's methodology.

Standard deviation measures the probability that a result is a random deviation from a predicted result, where the greater the number of standard deviations, the lower the probability the result is a random one. The accepted standard used by Courts in disparity testing has been two standard deviations. That is, if there is a result that falls within two standard deviations, then one can assume that the results are nonsignificant, or that no disparity has been confidently established.

Regarding the use of statistical significance in the disparity study context the National Cooperative Highway Research Program Report 644<sup>84</sup> notes that:

**Statistical Significance Testing**

$$t = \frac{u - a}{\sqrt{\frac{a * (1 - a) * \sum c_i^2}{(\sum c_i)^2}}}$$

t= the t-statistic

u = the ratio of minorities- and women-owned firms' dollars compared to total dollars  
a = the ratio of M/W/DBE firms to all firms  
c<sub>i</sub> = the dollar amount.

<sup>82</sup> Equal Employment Opportunity Commission, *Uniform Guidelines on Employee Selection Procedures*, Section 4, Part D, "Adverse impact and the 'four-fifths rule.'"

<sup>83</sup> In *Teal* and other affirmative action cases, the terms "adverse impact," "disparate impact," and "discriminatory impact" are used interchangeably to characterize values of 80 and below.

<sup>84</sup> Transportation Research Board of the National Academies, National Cooperative Highway Research Program Report 644, *Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program* (2010), pages 49-50.

- “...for statistical disparities to be taken as legally dispositive in the discrimination context, they should be (a) statistically significant and (b) “substantively” significant. Substantive significance is taken to mean, for example, a DBE utilization measure that is less than or equal to 80% of the corresponding DBE availability measure.”
- “In discrimination cases, the courts have usually required p-values of 5% or less to establish statistical significance in a two-sided case.”

Note that p-values are used to determine whether the differences between two populations feature legitimate differences (that would be sustained if we continued to collect more observations), or if the variation between them is simply a product of normal random variation between observations that would be washed out if we collected more data. A p-value of less than 0.05 suggests it is highly unlikely that the differences between two groups are just driven by chance. The use of the t-test to calculate p-values for disparity indices was approved by the Fourth Circuit in *H.B. Rowe v. Tippett*, 615 F.3d 233, 244-45 (4<sup>th</sup> Cir 2010).

Thus, MGT applies two major tests to determine statistical significance: (1) whether the disparity index is less than or equal to 80 percent of respective M/FBE availability, which is labeled “substantial disparity” and (2) whether the disparity index passes the t-test determination of statistical significance. In cases where one, or especially both, measures hold true, a remedy is typically deemed to be justifiable by courts, making these results critical outcomes of the subsequent analyses.

### 5.5.2 Disparity Analyses and Statistical Significance Testing

Included in this section are inputs and calculations of disparity indices and significance testing for each of the procurement categories and ownership classifications. Corresponding detailed analyses showing the disparity analysis of firms by race, ethnicity, and gender are presented in **Appendix C, Utilization, Availability, and Disparity NAICS Codes**. Analysis of disparities across all procurement categories in **Table 5-11** reveals:

- African American firms were underutilized with a statistically significant disparity index of 59.77;
- Asian American firms were underutilized with a statistically significant disparity index of 17.72;
- Hispanic American firms were overutilized with a substantial disparity index of 122.35;
- Native American firms were underutilized with a substantial disparity index of 18.35;
- MBE firms were underutilized with a statistically significant disparity index of 67.05;
- Nonminority female firms were underutilized with a statistically significant disparity index of 74.75;
- Unclassified Firms were overutilized with a statistically significant disparity index of 135.56.

TABLE 5-11.  
DISPARITY INDICES AND SIGNIFICANCE TESTING,  
ALL PROCUREMENT CATEGORIES

Ethnic/Gender Classification	Utilization	Availability	Disparity Index	Disparity Impact	Statistical Significance	Disparity Conclusion
<b>African Americans</b>	<b>6.92%</b>	<b>11.58%</b>	<b>59.77</b>	<b>Underutilization</b>	¥	<b>Disparity</b>
<b>Asian Americans</b>	<b>0.93%</b>	<b>5.25%</b>	<b>17.72</b>	<b>Underutilization</b>	¥¥¥	<b>Disparity</b>
Hispanic Americans	8.36%	6.83%	122.35	Overutilization		No Disparity
<b>Native Americans</b>	<b>0.13%</b>	<b>0.71%</b>	<b>18.35</b>	<b>Underutilization</b>		<b>Disparity</b>
<b>Total MBE Firms</b>	<b>16.34%</b>	<b>24.37%</b>	<b>67.05</b>	<b>Underutilization</b>	¥¥¥	<b>Disparity</b>
<b>Nonminority Females</b>	<b>13.51%</b>	<b>18.14%</b>	<b>74.45</b>	<b>Underutilization</b>		<b>Disparity</b>
<b>Total M/FBE Firms</b>	<b>22.07%</b>	<b>42.52%</b>	<b>51.92</b>	<b>Underutilization</b>	¥¥¥	<b>Disparity</b>
Unclassified Firms	77.93%	57.48%	135.56	Overutilization	¥¥¥	No Disparity

Note: Disparity index values may vary slightly from calculations of depicted figures due to rounding of presented levels of utilization and availability. "¥" indicates an adverse disparity that is statistically significant at the 15% level or better (85% confidence). "¥¥" indicates the disparity is significant at a 10% level or better (90% confidence). "¥¥¥" indicates significance at a 5% level or better (95% confidence).

**BOLD** Indicates a substantial level of disparity, which is a disparity index below 80.00.

The calculation of disparity indices and significance testing for the **Construction** procurement category are depicted in **Table 5-12**. Relevant findings include:

- African American firms were underutilized with a substantial disparity index of 14.54;
- Asian American firms were underutilized with a substantial disparity index of 2.19;
- Hispanic American firms were overutilized with a substantial disparity index of 155.13;
- Native American firms were underutilized with a substantial disparity index of 36.05;
- MBE firms were underutilized with a substantial disparity index of 69.28;
- Nonminority female firms were underutilized with a substantial disparity index of 19.60; and
- Unclassified Firms were overutilized with a substantial disparity index of 129.30;

TABLE 5-12.  
DISPARITY INDICES AND SIGNIFICANCE TESTING,  
CONSTRUCTION

Ethnic/Gender Classification	Utilization	Availability	Disparity Index	Disparity Impact	Statistical Significance	Disparity Conclusion
<b>African Americans</b>	<b>1.34%</b>	<b>9.18%</b>	<b>14.54</b>	<b>Underutilization</b>		<b>Disparity</b>
<b>Asian Americans</b>	<b>0.12%</b>	<b>5.62%</b>	<b>2.19</b>	<b>Underutilization</b>		<b>Disparity</b>
Hispanic Americans	16.28%	10.50%	155.13	Overutilization		No Disparity
<b>Native Americans</b>	<b>0.23%</b>	<b>0.65%</b>	<b>36.05</b>	<b>Underutilization</b>		<b>Disparity</b>
<b>Total MBE Firms</b>	<b>17.97%</b>	<b>25.94%</b>	<b>69.28</b>	<b>Underutilization</b>		<b>Disparity</b>
<b>Nonminority Females</b>	<b>2.45%</b>	<b>12.51%</b>	<b>19.60</b>	<b>Underutilization</b>		<b>Disparity</b>
<b>Total M/FBE Firms</b>	<b>20.43%</b>	<b>38.46%</b>	<b>53.12</b>	<b>Underutilization</b>	¥	<b>Disparity</b>
Unclassified Firms	79.57%	61.54%	129.30	Overutilization	¥	No Disparity

Note: Disparity index values may vary slightly from calculations of depicted figures due to rounding of presented levels of utilization and availability. "¥" indicates an adverse disparity that is statistically significant at the 15% level or better (85% confidence). "¥¥" indicates the disparity is significant at a 10% level or better (90% confidence). "¥¥¥" indicates significance at a 5% level or better (95% confidence). ).

**BOLD** Indicates a substantial level of disparity, which is a disparity index below 80.00.



Disparity indices and significance testing for **Professional Services** appear in Table 5-13. Noteworthy observations include:

- African American firms were underutilized with a statistically significant disparity index of 43.43;
- Asian American firms were underutilized with a statistically significant disparity index of 15.73;
- Hispanic American firms were overutilized with a statistically significant disparity index of 112.92;
- Native American firms were underutilized with a statistically significant disparity index of 1.59;
- MBE firms were underutilized with a statistically significant disparity index of 48.50;
- Nonminority female firms were underutilized with a statistically significant disparity index of 24.51; and
- Unclassified Firms were overutilized with a statistically significant disparity index of 198.76.

TABLE 5-13.  
DISPARITY INDICES AND SIGNIFICANCE TESTING,  
**PROFESSIONAL SERVICES**

Ethnic/Gender Classification	Utilization	Availability	Disparity Index	Disparity Impact	Statistical Significance	Disparity Conclusion
<b>African Americans</b>	<b>8.26%</b>	<b>19.03%</b>	<b>43.43</b>	<b>Underutilization</b>	¥¥¥	<b>Disparity</b>
<b>Asian Americans</b>	<b>1.29%</b>	<b>8.20%</b>	<b>15.73</b>	<b>Underutilization</b>	¥¥¥	<b>Disparity</b>
Hispanic Americans	7.02%	6.21%	112.92	Overutilization		No Disparity
<b>Native Americans</b>	<b>0.01%</b>	<b>0.75%</b>	<b>1.59</b>	<b>Underutilization</b>		<b>Disparity</b>
<b>Total MBE Firms</b>	<b>16.58%</b>	<b>34.19%</b>	<b>48.50</b>	<b>Underutilization</b>	¥¥¥	<b>Disparity</b>
<b>Nonminority Females</b>	<b>6.67%</b>	<b>27.20%</b>	<b>24.51</b>	<b>Underutilization</b>	¥¥¥	<b>Disparity</b>
<b>Total M/FBE Firms</b>	<b>23.25%</b>	<b>61.38%</b>	<b>37.87</b>	<b>Underutilization</b>	¥¥¥	<b>Disparity</b>
Unclassified Firms	76.75%	38.62%	198.76	Overutilization	¥¥¥	No Disparity

Note: Disparity index values may vary slightly from calculations of depicted figures due to rounding of presented levels of utilization and availability. "¥" indicates an adverse disparity that is statistically significant at the 15% level or better (85% confidence). "¥¥" indicates the disparity is significant at a 10% level or better (90% confidence). "¥¥¥" indicates significance at a 5% level or better (95% confidence).

**BOLD** Indicates a substantial level of disparity, which is a disparity index below 80.00.

Disparity indices and significance testing for the **Other Services** sector are presented in **Table 5-14**. Some findings include that:

- African American firms were overutilized with a substantial disparity index of 130.18;
- Asian American firms were underutilized with a substantial disparity index of 74.37;
- Hispanic American firms were underutilized with a substantial disparity index of 40.60;
- Native American firms were underutilized with a substantial disparity index of 19.30;
- MBE firms were underutilized with a statistically significant disparity index of 90.63;

- Nonminority female firms were underutilized with a substantial disparity index of 14.99; and
- Unclassified Firms were overutilized with a statistically significant disparity index of 130.99.

TABLE 5-14.  
DISPARITY INDICES AND SIGNIFICANCE TESTING,  
OTHER SERVICES

Ethnic/Gender Classification	Utilization	Availability	Disparity Index	Disparity Impact	Statistical Significance	Disparity Conclusion
African Americans	14.19%	10.90%	130.18	Overutilization		No Disparity
<b>Asian Americans</b>	<b>1.92%</b>	<b>2.58%</b>	<b>74.37</b>	<b>Underutilization</b>		<b>Disparity</b>
<b>Hispanic Americans</b>	<b>2.63%</b>	<b>6.47%</b>	<b>40.60</b>	<b>Underutilization</b>		<b>Disparity</b>
<b>Native Americans</b>	<b>0.18%</b>	<b>0.91%</b>	<b>19.30</b>	<b>Underutilization</b>		<b>Disparity</b>
Total MBE Firms	18.92%	20.87%	90.64	Underutilization		Disparity
<b>Nonminority Females</b>	<b>2.92%</b>	<b>19.46%</b>	<b>14.99</b>	<b>Underutilization</b>	¥¥¥	<b>Disparity</b>
<b>Total M/FBE Firms</b>	<b>21.83%</b>	<b>40.32%</b>	<b>54.14</b>	<b>Underutilization</b>	¥¥¥	<b>Disparity</b>
Unclassified Firms	78.17%	59.68%	130.99	Overutilization	¥¥¥	No Disparity

Note: Disparity index values may vary slightly from calculations of depicted figures due to rounding of presented levels of utilization and availability. "¥" indicates an adverse disparity that is statistically significant at the 15% level or better (85% confidence). "¥¥" indicates the disparity is significant at a 10% level or better (90% confidence). "¥¥¥" indicates significance at a 5% level or better (95% confidence).

**BOLD** Indicates a substantial level of disparity, which is a disparity index below 80.00.

Table 5-15 presents disparity indices and significance testing for the **Goods** sector.

- African American firms were underutilized with a substantial disparity index of 65.90;
- Asian American firms were underutilized with a statistically significant disparity index of 3.38;
- Hispanic American firms were overutilized with a statistically significant disparity index of 624.67;
- Native American firms were underutilized with a substantial disparity index of 11.09;
- MBE firms were underutilized with a substantially significant disparity index of 80.56;
- Nonminority female firms were overutilized with a substantial disparity index of 150.24; and
- Unclassified Firms were underutilized with a statistically significant disparity index of 95.37.

TABLE 5-15.  
DISPARITY INDICES AND SIGNIFICANCE TESTING,  
GOODS

Ethnic/Gender Classification	Utilization	Availability	Disparity Index	Disparity Impact	Statistical Significance	Disparity Conclusion
African Americans	2.73%	4.14%	65.90	Underutilization		Disparity
Asian Americans	0.13%	3.98%	3.38	Underutilization		Disparity

Hispanic Americans	4.56%	0.73%	624.67	Overutilization	¥¥¥	No Disparity
<b>Native Americans</b>	<b>0.05%</b>	<b>0.42%</b>	<b>11.09</b>	<b>Underutilization</b>		<b>Disparity</b>
Total MBE Firms	7.47%	9.27%	80.56	Underutilization		Disparity
Nonminority Females	16.44%	10.95%	150.24	Overutilization		No Disparity
Total M/FBE Firms	23.91%	20.22%	118.28	Overutilization		No Disparity
Unclassified Firms	76.09%	79.78%	95.37	Underutilization		Disparity

Note: Disparity index values may vary slightly from calculations of depicted figures due to rounding of presented levels of utilization and availability. "¥" indicates an adverse disparity that is statistically significant at the 15% level or better (85% confidence). "¥¥" indicates the disparity is significant at a 10% level or better (90% confidence). "¥¥¥" indicates significance at a 5% level or better (95% confidence).

**BOLD** Indicates a substantial level of disparity, which is a disparity index below 80.00.

## 5.6 Product Market, Utilization, and Disparity Summary

The calculations of availability and disparity within this chapter and the preceding depiction of utilization serve as the foundation for the future of the County M/FBE program. These analyses provide the quantitative legal justification for any current or future remedies to assist M/FBE enterprises within the market. As summarized in the table below (**Table 5-16**), disparities between utilization and availability have been observed for most procurement and M/FBE categories included within the scope of the study, both in terms of the order of magnitude (Disparity Indices less than or equal to 80) and statistical significance.

TABLE 5-16. DISPARITY ANALYSIS SUMMARY

Business Ownership Classification	All	CONSTRUCTION	PROFESSIONAL SERVICES	OTHER SERVICES	GOODS
African Americans	<b>Disparity</b>	<b>Disparity</b>	<b>Disparity</b>	No Disparity	<b>Disparity</b>
Asian Americans	<b>Disparity</b>	<b>Disparity</b>	<b>Disparity</b>	<b>Disparity</b>	<b>Disparity</b>
Hispanic Americans	No Disparity	No Disparity	No Disparity	<b>Disparity</b>	No Disparity
Native Americans	<b>Disparity</b>	<b>Disparity</b>	<b>Disparity</b>	<b>Disparity</b>	<b>Disparity</b>
Total MBE Firms	<b>Disparity</b>	<b>Disparity</b>	<b>Disparity</b>	Disparity	Disparity
Nonminority Females	<b>Disparity</b>	<b>Disparity</b>	<b>Disparity</b>	<b>Disparity</b>	No Disparity
Total M/FBE Firms	<b>Disparity</b>	<b>Disparity</b>	<b>Disparity</b>	<b>Disparity</b>	No Disparity
Unclassified Firms	No Disparity	No Disparity	No Disparity	No Disparity	Disparity

**BOLD** Indicates a substantial level of disparity, which is a disparity index below 80.00. **Disparity** indicates statistically significant disparity.

# 6 Private Sector Analysis

## 6.1 Introduction

The **Legal Framework** presented in **Chapter 2** explains that a government entity must have evidence of active or passive discrimination to permit the institution of a M/FBE program. Courts require a *compelling interest* analysis showing a connection between the government or agency and the public or private discrimination that may exist within their jurisdiction. This chapter focuses on the overarching question:

- ♦ ***Does evidence of discrimination in the private sector marketplace support Montgomery's continuance of its MBE program to avoid becoming a passive participant in discrimination?***



### Chapter Sections

- 6.1 Introduction
- 6.2 Private Sector Disparities in SBO Census Data
- 6.3 Private Sector Disparities in ABS Census Data
- 6.4 Analysis of Race, Ethnicity, and Gender Effects on Self-Employment and Earnings
- 6.5 Access to Credit
- 6.6 Private Sector Summary

*Passive discrimination* describes a circumstance where a public entity resides in a market with measurably discrimination in the public and private sector but fails to take proactive actions to implement remedies. Courts have favorably looked upon private sector analyses as support to determine *compelling interest* in M/FBE programs:

- Defining passive participation, Justice O'Connor in *Croson* stated, "if the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system."<sup>85</sup>
- In *Adarand*, the Tenth Circuit favorably cited evidence of capital market discrimination as relevant in establishing the factual predicate for the federal DBE program.<sup>86</sup>
- *Concrete Works IV* found that barriers to business formation were relevant insofar as the evidence demonstrated that M/FBEs were "precluded from the outset from competing for public construction contracts."<sup>87</sup>
- In *Adarand*, the courts concluded a compelling interest for a government DBE program in part on evidence of private-sector discrimination.<sup>88</sup>
- Along related lines, a court found regression analysis of census data to be relevant evidence showing barriers to M/FBE formation.<sup>89</sup>

<sup>85</sup> *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1989).

<sup>86</sup> *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1168-70 (10th Cir. 2000).

<sup>87</sup> *Concrete Works of Colo. v. City & Cnty. of Denver*, 321 F.3d 950, 977 (10th Cir. 2003).

<sup>88</sup> *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000)

<sup>89</sup> *Concrete Works IV*, 321 F.3d 950, 967-69 (10th Cir. 2003).

Thus, in many circumstances, discriminatory practices in the private marketplace may show or serve to support the *compelling interest* required by courts to support an agency’s program to intervene and prevent the agency from becoming a *passive participant* in discrimination.

Various data sources are analyzed to comprehensively assess disparities in revenue and self-employment levels among businesses, as no single source provides all necessary variables for a complete analysis. The data sources used for the analysis of disparities in the private sector are detailed in **Table 6-1** below.

TABLE 6-1.  
DISPARITY ANALYSES DATA SOURCES

Data Source	Data Usage	Notes
2012 Census Survey of Business Owners (SBO)	Provides data on the number of firms in a specific industry, both employer firms <sup>90</sup> and non-employer firms <sup>91</sup> .	In 2017 this data was replaced with the Annual Business Survey (ABS)
2020 Census Annual Business Survey (ABS)	Provides data on the number of firms in a specific industry employer firms only.	
2020 Nonemployer Statistics by Demographics (NES-D)	Provides information on nonemployer firms. Nonemployer firms tend to have higher levels of small and minority owned businesses.	This does not include employer data, so it used in conjunction with the SBO data for a complete assessment of the business marketplace.
2016-2020 Census American Community Survey (ACS) Public Use Microdata Sample (PUMS)	Used to determine, through regression analyses, how race, ethnicity, and gender specifically affects a person’s wages, business earnings, and self-employment (entrepreneurship) rates compared to their non-minority males’ counterparts controlling for other factors such as education, number of employees, etc.	Five years provides the most robust aggregation of data at a 95% confidence level.
Small Business Credit Survey (SBCS)	National sample of small businesses, or firms with fewer than 500 employees, aimed at providing insight into firms’ financing and debt needs and experiences.	

These court decisions support an investigation into the existence of discrimination in the private sector to determine whether or not evidence exists warranting M/FBE programs. This chapter provides evidence for the overarching question of whether or not Montgomery has a continued compelling interest in maintaining its MBE program based on discriminatory circumstances

<sup>90</sup> Employer firms include firms with payroll

<sup>91</sup> Nonemployer firms can hire independent contractors to increase capacity and can be seen as provide services at the subcontractor/subconsultant level.

observed in the private sector. Three sources of data can help to answer the overarching research question regarding disparities in the private sector:

- 2012 Census Survey of Business Owners (SBO) and 2017 Census ABS data, which are used to determine:
  - Do marketplace disparities exist in the private sector regarding revenue within similar Montgomery procurement categories for firms owned by minorities or females?
- **2016-2020 Census American Community Survey (ACS) Public Used Microdata Sample (PUMS) data**, which is used to determine whether, even after controlling for a number of relevant factors, there are disparities between minority- and women-owned firms on the one hand, and non-minority, non-women owned firms on the other hand. Among the questions this data allows us to answer are:
  - Does racial, ethnic, and gender status impact individual wages even after controlling for differences among firms?
  - Does racial, ethnic and gender status impact business owner earnings even after controlling for differences among firms?
  - Are racial, ethnic, and gender minority groups less likely than nonminority males (non-M/FBEs) to be self-employed after controlling for differences? If so, does race, ethnicity, or gender have a role in the disparity?
  - If M/FBEs and nonminority male-owned firms shared similar traits and marketplace “conditions” (i.e., similar “rewards” in terms of capital, wages, earning, etc.), what would be the effect on rates of self-employment by race, ethnicity, and gender?

Notably, the results of this private sector analysis mirror many of the same qualitative and anecdotal results offered in **Chapter 7, Anecdotal Analysis**, regarding discrimination faced by M/FBE firms in attempting to secure work on private sector projects.

## 6.2 Private Sector Disparities in SBO Census Data

To answer the overarching research question regarding the existence of disparities in the private sector, as well as the specific question of whether these disparities exist in procurement categories relevant to the Montgomery contracting domain, MGT obtained and analyzed the U.S. Census Bureau’s 2012 SBO data.<sup>92</sup> SBO provides data on economic and demographic characteristics for businesses and business owners by geography (such as states and metropolitan areas), categorized by industries defined by NAICS codes, and supporting information, including firm receipts (sales)<sup>93</sup> firm employment size, and business ownership classification. The survey has been administered every five years since 1972 as part of the economic census.

The SBO gathers and reports data on (1) firms with paid employees, including workers on the payroll (employer firms), (2) firms without paid employees, including sole proprietors and partners of unincorporated businesses that do not have any other employees on the payroll (nonemployer

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<sup>92</sup> These represent the most recent available data provided through the SBO program and were released in 2016.

<sup>93</sup> Sales includes total shipments, receipts, revenue, or business done by the firm.



firms), as well as (3) in aggregate across employer and nonemployer firms (all). MGT calculated private sector disparity indices to examine whether M/FBE firms in any of these categories received a proportionate share of firm sales based on the availability of M/FBE firms. Disparity indices were reviewed for all firms and employer firms. It should be noted that all of the disparity indices in the SBO tables are statistically significant within a **95 percent** confidence interval.

The following NAICS codes<sup>94</sup> were analyzed because they align with the procurement categories used for Montgomery’s utilization analysis:

- NAICS Code 23, Construction
- NAICS Code 42, Wholesale Trade
- NAICS Code 54, Professional, Scientific, and Technical Services
- NAICS Code 56, Administrative and Support and Waste Management and Remediation Services
- NAICS Code 81, Other Services (Except Public Administration)

### 6.2.1 Results of Analysis

This private sector analysis presents disparity results based on the Montgomery geographic marketplace. The Montgomery marketplace contains the following counties in the Frederick-Gaithersburg-Rockville, MD Metropolitan Statistical Areas: Frederick County, MD; Montgomery County, MD.

### 6.2.2 Montgomery Marketplace

**Tables 6-2** through **6-6** show the measures of private sector disparities based on U.S. Census 2012 SBO data for the population of available firms in the Montgomery marketplace by race, ethnicity, and gender for construction; wholesale trade; professional, scientific, and technical services; administrative and support and waste management and remediation services; and other services (except public administration).

Based on the analysis of the U.S. Census 2012 SBO data, overall, there remains a significant gap between the market share of M/FBE firms and their share of the Montgomery marketplace business population, where data was available. SBO data is a vital resource in helping to answer the overarching research question regarding the existence of disparities in the private sector and the specific question of whether these disparities exist in procurement categories relevant to the Montgomery contracting domain. A limitation with the SBO data is, of course, its age.

#### 6.2.2.1 NAICS CODE 23: CONSTRUCTION, MONTGOMERY MARKETPLACE

**Table 6-1** shows the construction availability, sales, and disparity results (NAICS Code 23).

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<sup>94</sup> The two-digit NAICS code level was utilized as those codes are the most prevalent level across all the 2012 SBO data.

There was a total of 106,447 construction firms (all firms<sup>95</sup>) in the Montgomery marketplace in 2012.

- African American firms (disparity index of 20.15) were substantially underutilized, accounting for 0.83 percent of all firms and 0.17 percent of sales.
- American Indian and Alaska Native firms (disparity index of 60.00) were substantially and significantly underutilized, accounting for 0.07 percent of all firms and 0.04 percent of sales.
- Asian American firms (disparity index of 27.71) were substantially and significantly underutilized, accounting for 0.74 percent of all firms and 0.21 percent of sales.
- Hispanic American firms (disparity index of 10.19) were substantially and significantly underutilized, accounting for 4.12 percent of all firms and 0.42 percent of sales.
- Native Hawaiian and Pacific Islander firms were substantially and significantly underutilized, accounting for 0.01 percent of all firms and 0.00 percent of sales.
- Nonminority female firms (disparity index of 39.52) were substantially and significantly underutilized, accounting for 1.33 percent of all firms and 0.53 percent of sales.

There were 24,888 construction employer firms<sup>96</sup> in the Montgomery marketplace in 2012.

- African American firms (disparity index of 60.43) were substantially and significantly underutilized, accounting for 0.20 percent of all firms and 0.12 percent of sales.
- American Indian and Alaska Native firms (disparity index of 146.85) were overutilized, accounting for 0.0 percent of all firms and 0.04 percent of sales.
- Asian American firms (disparity index of 28.88) were substantially and significantly underutilized, accounting for 0.66 percent of all firms and 0.19 percent of sales.
- Hispanic American firms (disparity index of 18.57) were substantially and significantly underutilized, accounting for 1.38 percent of all firms and 0.26 percent of sales.
- Native Hawaiian and Pacific Islander firm data did not allow for a proper analysis.
- Nonminority female firms (disparity index of 49.92) were substantially and significantly underutilized, accounting for 1.00 percent of all firms and 0.50 percent of sales.

TABLE 6-2.  
PRIVATE SECTOR CENSUS DISPARITIES  
NAICS CODE 23, CONSTRUCTION  
U.S. CENSUS 2012 SURVEY OF BUSINESS OWNERS,  
MONTGOMERY MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	ALL FIRMS <sup>1</sup> (#)	ALL FIRMS, SALES <sup>2</sup> (\$1,000)	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	106,447	88,374,552	24,888	83,590,767
Nonminority Male	98,893	87,172,081	24,074	82,663,281
African American	885	148,048	50	101,483

<sup>95</sup> All firms include firms with and without payroll at any time during 2012.

<sup>96</sup> Employer firms include firms with payroll at any time during 2012.

BUSINESS OWNERSHIP CLASSIFICATION	ALL FIRMS <sup>1</sup> (#)	ALL FIRMS, SALES <sup>2</sup> (\$1,000)	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
American Indian and Alaska Native	73	36,362	7	34,526
Asian	792	182,209	165	160,040
Hispanic <sup>4</sup>	4,387	370,981	343	213,913
Native Hawaiian and Other Pacific Islander	0	0	0	0
Nonminority Female	1,417	464,871	249	417,524
PERCENTAGE OF MARKETPLACE				
All Firms	100.00%	100.00%	100.00%	100.00%
Nonminority Male	92.90%	98.64%	96.73%	98.89%
African American	0.83%	0.17%	0.20%	0.12%
American Indian and Alaska Native	0.07%	0.04%	0.03%	0.04%
Asian	0.74%	0.21%	0.66%	0.19%
Hispanic <sup>4</sup>	4.12%	0.42%	1.38%	0.26%
Native Hawaiian and Other Pacific Islander	0.00%	0.00%	0.00%	0.00%
Nonminority Female	1.33%	0.53%	1.00%	0.50%
DISPARITY RATIOS <sup>3</sup>				
All Firms		100.00		100.00
Nonminority Male		106.17		102.23
African American		20.15		60.43
American Indian and Alaska Native		60.00		146.85
Asian		27.71		28.88
Hispanic <sup>4</sup>		10.19		18.57
Native Hawaiian and Other Pacific Islander		-		-
Nonminority Female		39.52		49.92

Source: MGT Impact Solutions, LLC conducted private sector disparities marketplace analyses based on U.S. Census Bureau, 2012 SBO data.

<sup>1</sup>Firms include employer and nonemployer firms since nonemployer firms can provide services at the subcontractor/subconsultant level and hire independent contractors to increase capacity. Employer firms include firms with payroll at any time during 2012.

<sup>2</sup>Sales includes total shipments, receipts, revenue, or business done by the firm.

<sup>3</sup>Disparity index is the ratio of the percentage of sales to the percentage of available firms multiplied by 100.00. A disparity index below 80.00 indicates a substantial level of disparity.

<sup>4</sup>Hispanic firms are considered an ethnicity in this Census data and therefore may be double counted in race categories, which leads to percentages equaling greater than 100%.

N/A Denotes that there were no firms or sales for the classification.

Disparity results are statistically significant within a 95 percent confidence interval.

### 6.2.2.2 NAICS CODE 42: WHOLESALE TRADE, MONTGOMERY MARKETPLACE

Table 6-2 shows wholesale trade availability, sales, and disparity results (NAICS Code 42).

There was a total of 18,953 wholesale trade firms (all firms) in the Montgomery marketplace in 2012.

- African American firms (disparity index of 14.36) were substantially and significantly underutilized, accounting for 1.35 percent of all firms and 0.19 percent of sales.
- American Indian and Alaska Native firms (disparity index of 0.0) were substantially and significantly underutilized, accounting for 0.0 percent of all firms and 0.0 percent of sales.
- Asian American firms (disparity index of 32.02) were substantially and significantly underutilized, accounting for 1.57 percent of all firms and 0.50 percent of sales.
- Hispanic American firms (disparity index of 21.86) were substantially and significantly underutilized, accounting for 0.56 percent of all firms and 0.12 percent of sales.
- Native Hawaiian and Pacific Islander marketplace firm data did not allow for a proper analysis.
- Nonminority female firms (disparity index of 49.48) were substantially and significantly underutilized, accounting for 3.60 percent of all firms and 1.78 percent of sales.

There was a total of 7,305 wholesale trade employer firms in the Montgomery marketplace in 2012.

- African American firms (disparity index of 52.43) were substantially and significantly underutilized, accounting for 0.36 percent of all firms and 0.19 percent of sales.
- American Indian and Alaska Native marketplace firm data was minimal and therefore did not allow for a proper analysis.
- Asian American firms (disparity index of 32.19) were substantially and significantly underutilized, accounting for 1.51 percent of all firms and 0.48 percent of sales.
- Hispanic American firms (disparity index of 39.46) were substantially and significantly underutilized, accounting for 0.30 percent of all firms and 0.12 percent of sales.
- Native Hawaiian and Pacific Islander marketplace firm data did not allow for a proper analysis.
- Nonminority female firms (disparity index of 66.48) were substantially and significantly underutilized, accounting for 2.68 percent of all firms and 1.78 percent of sales.

TABLE 6-3.  
PRIVATE SECTOR CENSUS DISPARITIES  
NAICS CODE 42, WHOLESALE TRADE  
U.S. CENSUS 2012 SURVEY OF BUSINESS OWNERS,  
MONTGOMERY MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	ALL FIRMS <sup>1</sup> (#)	ALL FIRMS, SALES <sup>2</sup> (\$1,000)	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	18,953	75,580,822	7,305	74,483,619
Nonminority Male	17,611	73,614,840	6,951	72,566,439
African American	256	146,554	26	138,995
American Indian and Alaska Native	0	0	0	0
Asian	297	379,275	110	361,003
Hispanic <sup>4</sup>	106	92,392	22	88,512
Native Hawaiian and Other Pacific Islander	0	0	0	0
Nonminority Female	683	1,347,761	196	1,328,670
<b>PERCENTAGE OF MARKETPLACE</b>				
All Firms	100.00%	100.00%	100.00%	100.00%
Nonminority Male	92.92%	97.40%	95.15%	97.43%
African American	1.35%	0.19%	0.36%	0.19%
American Indian and Alaska Native	0.00%	0.00%	0.00%	0.00%
Asian	1.57%	0.50%	1.51%	0.48%
Hispanic <sup>4</sup>	0.56%	0.12%	0.30%	0.12%
Native Hawaiian and Other Pacific Islander	0.00%	0.00%	0.00%	0.00%
Nonminority Female	3.60%	1.78%	2.68%	1.78%
<b>DISPARITY RATIOS<sup>3</sup></b>				
All Firms		100.00		100.00
Nonminority Male		104.82		102.39
African American		14.36		52.43
American Indian and Alaska Native		-		-
Asian		32.02		32.19
Hispanic <sup>4</sup>		21.86		39.46
Native Hawaiian and Other Pacific Islander		-		-
Nonminority Female		49.48		66.48

Source: MGT Impact Solutions, LLC conducted private sector disparities marketplace analyses based on U.S. Census Bureau, 2012 SBO data.

<sup>1</sup>Firms include employer and nonemployer firms since nonemployer firms can provide services at the subcontractor/subconsultant level and hire independent contractors to increase capacity. Employer firms include firms with payroll at any time during 2012.

<sup>2</sup>Sales includes total shipments, receipts, revenue, or business done by the firm.

<sup>3</sup>Disparity index is the ratio of the percentage of sales to the percentage of available firms multiplied by 100.00. A disparity index below 80.00 indicates a substantial level of disparity.

<sup>4</sup>Hispanic firms are considered an ethnicity in this Census data and therefore may be double counted in race categories, which leads to percentages equaling greater than 100%.

N/A Denotes that there were no firms or sales for the classification.

Disparity results are statistically significant within a 95 percent confidence interval.

### 6.2.2.3 NAICS CODE 54: PROFESSIONAL, SCIENTIFIC, AND TECHNICAL SERVICES, MONTGOMERY MARKETPLACE

**Table 6-3** shows the availability, sales, and disparity results for professional, scientific, and technical services (NAICS Code 54).

There was a total of 235,406 professional, scientific, and technical services firms (all firms) in the Montgomery marketplace in 2012.

- African American firms (disparity index of 40.43) were substantially and significantly underutilized, accounting for 1.24 percent of all firms and 0.50 percent of sales.
- American Indian and Alaska Native (disparity index of 78.90) were substantially and significantly underutilized, accounting for 0.05 percent of all firms and 0.04 percent of sales.
- Asian American firms (disparity index of 92.29) underutilized, accounting for 1.51 percent of all firms and 01.40 percent of sales.
- Hispanic American firms (disparity index of 42.41) were substantially and significantly underutilized, accounting for 0.74 percent of all firms and 0.31 percent of sales.
- Native Hawaiian and Pacific Islander firm data did not allow for a proper analysis.
- Nonminority female firms (disparity index of 40.29) were substantially and significantly underutilized, accounting for 4.28 percent of all firms and 1.72 percent of sales.

There was a total of 49,442 professional, scientific, and technical services employer firms in the Montgomery marketplace in 2012.

- African American firms (disparity index of 82.83) were underutilized, accounting for 0.55 percent of all firms and 0.46 percent of sales.
- American Indian and Alaska Native firms (disparity index of 149.74) were overutilized, accounting for 0.02 percent of all firms and 0.04 percent of sales.
- Asian American firms (disparity index of 71.19) were substantially and significantly underutilized, accounting for 1.96 percent of all firms and 1.40 percent of sales.
- Hispanic American firms (disparity index of 74.41) were substantially and significantly underutilized, accounting for 0.39 percent of all firms and 0.29 percent of sales.
- Native Hawaiian and Pacific Islander firm data did not allow for a proper analysis.
- Nonminority female firms (disparity index of 52.26) were substantially and significantly underutilized, accounting for 2.94 percent of all firms and 1.54 percent of sales.

TABLE 6-4.  
PRIVATE SECTOR CENSUS DISPARITIES  
NAICS CODE 54, PROFESSIONAL, SCIENTIFIC, AND TECHNICAL SERVICES  
U.S. CENSUS 2012 SURVEY OF BUSINESS OWNERS,  
MONTGOMERY MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	ALL FIRMS <sup>1</sup> (#)	ALL FIRMS, SALES <sup>2</sup> (\$1,000)	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	255,341	115,469,452	49,442	104,686,397
Nonminority Male	235,406	110,888,589	46,540	100,794,324
Minority	9,017	2,591,487	1,448	2,283,286
African American	3,161	577,897	274	480,523
American Indian and Alaska Native	115	41,030	12	38,046
Asian	3,864	1,612,610	969	1,460,638
Hispanic <sup>4</sup>	1,877	359,950	193	304,079
Native Hawaiian and Other Pacific Islander	0	0	0	0
Nonminority Female	10,918	1,989,376	1,454	1,608,787
<b>PERCENTAGE OF MARKETPLACE</b>				
All Firms	100.00%	100.00%	100.00%	100.00%
Nonminority Male	92.19%	96.03%	94.13%	96.28%
Minority	3.53%	2.24%	2.93%	2.18%
African American	1.24%	0.50%	0.55%	0.46%
American Indian and Alaska Native	0.05%	0.04%	0.02%	0.04%
Asian	1.51%	1.40%	1.96%	1.40%
Hispanic <sup>4</sup>	0.74%	0.31%	0.39%	0.29%
Native Hawaiian and Other Pacific Islander	0.00%	0.00%	0.00%	0.00%
Nonminority Female	4.28%	1.72%	2.94%	1.54%
<b>DISPARITY RATIOS<sup>3</sup></b>				
All Firms		100.00		100.00
Nonminority Male		104.17		102.29
Minority		63.55		74.47
African American		40.43		82.83
American Indian and Alaska Native		78.90		149.74
Asian		92.29		71.19
Hispanic <sup>4</sup>		42.41		74.41
Native Hawaiian and Other Pacific Islander		-		-
Nonminority Female		40.29		52.26

Source: MGT Impact Solutions, LLC conducted private sector disparities marketplace analyses based on U.S. Census Bureau, 2012 SBO data.

<sup>1</sup>Firms include employer and nonemployer firms since nonemployer firms can provide services at the subcontractor/subconsultant level and hire independent contractors to increase capacity. Employer firms include firms with payroll at any time during 2012.

<sup>2</sup>Sales includes total shipments, receipts, revenue, or business done by the firm.

<sup>3</sup>Disparity index is the ratio of the percentage of sales to the percentage of available firms multiplied by 100.00. A disparity index below 80.00 indicates a substantial level of disparity.



<sup>4</sup>Hispanic firms are considered an ethnicity in this Census data and therefore may be double counted in race categories, which leads to percentages equaling greater than 100%. Disparity results are statistically significant within a 95 percent confidence interval.

#### **6.2.2.4 NAICS CODE 56: ADMINISTRATIVE AND SUPPORT AND WASTE MANAGEMENT AND REMEDIATION SERVICES, MONTGOMERY MARKETPLACE**

**Table 6-4** shows the availability, sales, and disparity results for administrative, support, waste management, and remediation services (NAICS Code 56).

There were 95,958 administrative and support and waste management and remediation services firms (all firms) in the Montgomery marketplace in 2012.

- African American firms (disparity index of 49.32) were substantially and significantly underutilized, accounting for 1.60 percent of all firms and 0.79 percent of sales.
- American Indian and Alaska Native firms (disparity index of 20.68) were substantially and significantly underutilized, accounting for 0.12 percent of all firms and 0.02 percent of sales.
- Asian American firms (disparity index of 37.68) were substantially and significantly underutilized, accounting for 1.06 percent of all firms and 0.40 percent of sales.
- Hispanic American firms (disparity index of 20.46) were substantially and significantly underutilized, accounting for 4.34 percent of all firms and 0.89 percent of sales.
- Native Hawaiian and Pacific Islander marketplace firm data did not allow for a proper analysis.
- Nonminority female firms (disparity index of 47.20) were substantially and significantly underutilized, accounting for 5.95 percent of all firms and 2.81 percent of sales.

There were 16,151 administrative and support and waste management and remediation services employer firms in the Montgomery marketplace in 2012.

- African American firms (disparity index of 89.22) were underutilized, accounting for 0.86 percent of all firms and 0.77 percent of sales.
- American Indian and Alaska Native firms (disparity index of 0.00) were substantially and significantly underutilized, accounting for 0.01 percent of all firms and 0.00 percent of sales.
- Asian American firms (disparity index of 63.73) were substantially and significantly underutilized, accounting for 0.55 percent of all firms and 0.35 percent of sales.
- Hispanic American firms (disparity index of 48.19) were substantially and significantly underutilized, accounting for 1.59 percent of all firms and 0.77 percent of sales.
- Native Hawaiian and Pacific Islander marketplace firm data did not allow for a proper analysis.
- Nonminority female firms (disparity index of 132.77) were overutilized, accounting for 2.02 percent of all firms and 2.69 percent of sales.

TABLE 6-5.  
PRIVATE SECTOR CENSUS DISPARITIES  
NAICS CODE 56, ADMINISTRATIVE AND SUPPORT/WASTE MANAGEMENT AND REMEDIATION  
SERVICES  
U.S. CENSUS 2012 SURVEY OF BUSINESS OWNERS,  
MONTGOMERY MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	ALL FIRMS <sup>1</sup> (#)	ALL FIRMS, SALES <sup>2</sup> (\$1,000)	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	95,958	32,578,766	16,151	30,387,933
Nonminority Male	83,425	30,980,388	15,338	28,997,999
African American	1,531	256,358	139	233,337
American Indian and Alaska Native	112	7,862	1	0
Asian	1,018	130,231	89	106,721
Hispanic <sup>4</sup>	4,164	289,230	257	233,033
Native Hawaiian and Other Pacific Islander	0	0	0	0
Nonminority Female	5,708	914,697	327	816,843
<b>PERCENTAGE OF MARKETPLACE</b>				
All Firms	100.00%	100.00%	100.00%	100.00%
Nonminority Male	86.94%	95.09%	94.97%	95.43%
African American	1.60%	0.79%	0.86%	0.77%
American Indian and Alaska Native	0.12%	0.02%	0.01%	0.00%
Asian	1.06%	0.40%	0.55%	0.35%
Hispanic <sup>4</sup>	4.34%	0.89%	1.59%	0.77%
Native Hawaiian and Other Pacific Islander	0.00%	0.00%	0.00%	0.00%
Nonminority Female	5.95%	2.81%	2.02%	2.69%
<b>DISPARITY RATIOS<sup>3</sup></b>				
All Firms		100.00		100.00
Nonminority Male		109.38		100.48
African American		49.32		89.22
American Indian and Alaska Native		20.68		0.00
Asian		37.68		63.73
Hispanic <sup>4</sup>		20.46		48.19
Native Hawaiian and Other Pacific Islander		-		-
Nonminority Female		47.20		132.77

Source: MGT Impact Solutions, LLC conducted private sector disparities marketplace analyses based on U.S. Census Bureau, 2012 SBO data.

<sup>1</sup>Firms include employer and nonemployer firms since nonemployer firms can provide services at the subcontractor/subconsultant level and hire independent contractors to increase capacity. Employer firms include firms with payroll at any time during 2012.

<sup>2</sup>Sales includes total shipments, receipts, revenue, or business done by the firm.

<sup>3</sup>Disparity index is the ratio of the percentage of sales to the percentage of available firms multiplied by 100.00. A disparity index below 80.00 indicates a substantial level of disparity.

<sup>4</sup>Hispanic firms are considered an ethnicity in this Census data and therefore may be double counted in race categories, which leads to percentages equaling greater than 100%.

N/A Denotes that there were no firms or sales for the classification.

Disparity results are statistically significant within a 95 percent confidence interval.

### **6.2.2.5 NAICS CODE 81: OTHER SERVICES (EXCEPT PUBLIC ADMINISTRATION), MONTGOMERY MARKETPLACE**

**Table 6-5** shows the availability, sales, and disparity results for NAICS Code other services (except public administration) (NAICS Code 81).

There were a total of 116,726 other services (except public administration) firms (all firms) in the Montgomery marketplace in 2012.

- African American firms (disparity index of 16.79) were substantially and significantly underutilized, accounting for 2.19 percent of all firms and 0.37 percent of sales.
- American Indian and Alaska Native firms (disparity index of 11.22) were substantially and significantly underutilized, accounting for 0.13 percent of all firms and 0.01 percent of sales.
- Asian American firms (disparity index of 94.23) were underutilized, accounting for 1.98 percent of all firms and 1.87 percent of sales.
- Hispanic American firms (disparity index of 44.44) were substantially and significantly underutilized, accounting for 2.62 percent of all firms and 1.17 percent of sales.
- Native Hawaiian or Pacific Islander firms (disparity index of 21.45) were substantially and significantly underutilized, accounting for 0.00 percent of all firms and 0.00 percent of sales.
- Data for nonminority female firms (disparity index of 41.05) were substantially and significantly underutilized, accounting for 6.29 percent of all firms and 2.58 percent of sales.

There were 12,134 other services (except public administration) employer firms in the Montgomery marketplace in 2012.

- African American firms (disparity index of 0.00) were substantially and significantly underutilized, accounting for 0.45 percent of all firms and 0.00 percent of sales.
- American Indian and Alaska Native firms (disparity index of 0.00) were substantially and significantly underutilized, accounting for 0.00 percent of all firms and 0.00 percent of sales.
- Asian American firms (disparity index of 55.76) were substantially and significantly underutilized , accounting for 2.60 percent of all firms and 1.45 percent of sales.
- Hispanic American firms (disparity index of 48.93) were substantially and significantly underutilized, accounting for 1.09 percent of all firms and 0.53 percent of sales.
- Native Hawaiian or Pacific Islander marketplace firm data did not allow for a proper analysis.
- Data for nonminority female firms (disparity index of 57.73) were substantially and significantly underutilized, accounting for 3.04 percent of all firms and 1.76 percent of sales.

TABLE 6-6.  
PRIVATE SECTOR CENSUS DISPARITIES  
NAICS CODE 81, OTHER SERVICES (EXCEPT PUBLIC ADMINISTRATION)  
U.S. CENSUS 2012 SURVEY OF BUSINESS OWNERS,  
MONTGOMERY MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	ALL FIRMS <sup>1</sup> (#)	ALL FIRMS, SALES <sup>2</sup> (\$1,000)	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	116,726	10,264,101	12,134	7,371,781
Nonminority Male	101,078	9,618,263	11,264	7,096,415
African American	2,620	66,838	54	0
American Indian and Alaska Native	162	3,871	0	0
Asian	3,080	195,188	315	106,702
Hispanic <sup>4</sup>	2,507	91,168	132	39,242
Native Hawaiian and Other Pacific Islander	0	0	0	0
Nonminority Female	7,279	288,773	369	129,422
<b>PERCENTAGE OF MARKETPLACE</b>				
All Firms	100.00%	100.00%	100.00%	100.00%
Nonminority Male	86.59%	93.71%	92.83%	96.26%
African American	2.24%	0.65%	0.45%	0.00%
American Indian and Alaska Native	0.14%	0.04%	0.00%	0.00%
Asian	2.64%	1.90%	2.60%	1.45%
Hispanic <sup>4</sup>	2.15%	0.89%	1.09%	0.53%
Native Hawaiian and Other Pacific Islander	0.00%	0.00%	0.00%	0.00%
Nonminority Female	6.24%	2.81%	3.04%	1.76%
<b>DISPARITY RATIOS<sup>3</sup></b>				
All Firms		100.00		100.00
Nonminority Male		108.21		103.70
African American		29.01		0.00
American Indian and Alaska Native		27.17		-
Asian		72.07		55.76
Hispanic <sup>4</sup>		41.36		48.93
Native Hawaiian and Other Pacific Islander		-		-
Nonminority Female		45.12		57.73

Source: MGT Impact Solutions, LLC conducted private sector disparities marketplace analyses based on U.S. Census Bureau, 2012 SBO data.

<sup>1</sup>Firms include employer and nonemployer firms since nonemployer firms can provide services at the subcontractor/subconsultant level and hire independent contractors to increase capacity. Employer firms include firms with payroll at any time during 2012.

<sup>2</sup>Sales includes total shipments, receipts, revenue, or business done by the firm.

<sup>3</sup>Disparity index is the ratio of the percentage of sales to the percentage of available firms multiplied by 100.00. A disparity index below 80.00 indicates a substantial level of disparity.

<sup>4</sup>Hispanic firms are considered an ethnicity in this Census data and therefore may be double counted in race categories, which leads to percentages equaling greater than 100%.

N/A Denotes that there were no firms or sales for the classification.

Disparity results are statistically significant within a 95 percent confidence interval.

### 6.2.3 SBO Conclusion

The SBO analysis shows consistent underutilization of M/FBE firms relative to their availability in the marketplace. The results suggest that disparities exist in the broader private sector in which Montgomery conducts business and supports the idea that Montgomery should maintain remedies to avoid passive participation in discrimination, irrespective of circumstances in the public sector.

Furthermore, the five procurement categories analyzed showed substantial and statistically significant disparities among defined M/FBE classes where sufficient data were available.

## 6.3 Private Sector Disparities in ABS Census Data

In 2017, the Census Bureau replaced the SBO data with the ABS. Essentially this dataset is the same as the SBO with one caveat. ABS data no longer provides information for all firms, only employer firms. This data is still valuable for determining more recent private sector disparities, but it excludes a sector usually dominated by smaller businesses that are the beneficiary of any M/FBE program.

As with the SBO data, ABS gathers and reports data on firms with paid employees, including workers on the payroll (employer firms). MGT calculated private sector disparity indices to examine whether M/FBE firms in any of these categories received a proportionate share of sales based on the availability of M/FBE firms. Disparity indices were reviewed for employer firms. It should be noted that all of the disparity indices in the ABS tables are statistically significant within a **95 percent** confidence interval. The same NAICS codes as the SBO analysis were analyzed for the ABS data and the same marketplace.

### 6.3.1 Results of Analysis

**Tables 6-7** through **6-11** show the measures of private sector disparities based on U.S. Census 2017 ABS data for the population of available firms in the Montgomery marketplace by race, ethnicity, and gender for construction; wholesale trade; professional, scientific, and technical services; administrative and support and waste management and remediation services; and other services (except public administration).

Based on the analysis of the U.S. Census, 2017 ABS data, overall, there remains a significant gap between the market share of M/FBE firms and their share of the Montgomery marketplace business population, where data was available.

#### 6.3.1.1 NAICS CODE 23: CONSTRUCTION, MONTGOMERY MARKETPLACE

**Table 6-6** shows the construction availability, sales, and disparity results (NAICS Code 23).

There were 341,300 construction employer firms<sup>97</sup> in the Montgomery marketplace in 2018.

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<sup>97</sup> Employer firms include firms with payroll at any time during 2018.

- African American firms (disparity index of 58.81) were substantially underutilized, accounting for 2.34 percent of all firms and 1.38 percent of sales.
- American Indian and Alaska firms (disparity index of 83.78) were underutilized, accounting for 0.10 percent of all firms and 0.09 percent of sales.
- Asian American firms (disparity index of 95.80) were underutilized, accounting for 1.23 percent of all firms and 1.18 percent of sales.
- Hispanic American firms (disparity index of 91.95) were underutilized, accounting for 6.45 percent of all firms and 5.93 percent of sales.
- Native Hawaiian and Pacific Islander firms (disparity index of 65.60) were substantially and significantly underutilized, accounting for 0.02 percent of all firms and 0.02 percent of sales.
- Nonminority female firms (disparity index of 75.40) were substantially and significantly underutilized, accounting for 1.79 percent of all firms and 1.35 percent of sales.

TABLE 6-7.  
PRIVATE SECTOR CENSUS DISPARITIES  
NAICS CODE 23, CONSTRUCTION  
U.S. CENSUS 2017 ANNUAL BUSINESS SURVEY,  
MONTGOMERY MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	341,300	23,354,378
Nonminority Male	300,570	21,034,475
African American	8,000	321,962
American Indian and Alaska Native	350	20,064
Asian	4,200	275,325
Hispanic <sup>4</sup>	22,000	1,384,226
Native Hawaiian and Other Pacific Islander	80	3,591
Nonminority Female	6,100	314,735
PERCENTAGE OF MARKETPLACE		
All Firms	100.00%	100.00%
Nonminority Male	88.07%	90.07%
African American	2.34%	1.38%
American Indian and Alaska Native	0.10%	0.09%
Asian	1.23%	1.18%
Hispanic <sup>4</sup>	6.45%	5.93%
Native Hawaiian and Other Pacific Islander	0.02%	0.02%
Nonminority Female	1.79%	1.35%
DISPARITY RATIOS <sup>3</sup>		
All Firms		100.00
Nonminority Male		102.27
African American		58.81
American Indian and Alaska Native		83.78
Asian		95.80
Hispanic <sup>4</sup>		91.95
Native Hawaiian and Other Pacific Islander		65.60
Nonminority Female		75.40

Source: MGT Impact Solutions, LLC conducted private sector disparities marketplace analyses based on U.S. Census Bureau, 2017 ABS data.

<sup>1</sup> Employer firms include firms with payroll at any time during 2017.

<sup>2</sup> Sales includes total shipments, receipts, revenue, or business done by the firm.

<sup>3</sup> Disparity index is the ratio of the percentage of sales to percentage of available firms multiplied by 100.00. A disparity index below 80.00 indicates a substantial level of disparity.

<sup>4</sup> Hispanic firms are considered an ethnicity in this Census data and therefore may be double counted in race categories, which leads to percentages equaling greater than 100%.

N/A Denotes that there were no firms or sales for the classification.

Disparity results are statistically significant within a 95 percent confidence interval.



### 6.3.1.2 NAICS CODE 42: WHOLESALE TRADE, MONTGOMERY MARKETPLACE

Table 6-7 shows wholesale trade availability, sales, and disparity results (NAICS Code 42).

There were 32,550 wholesale trade employer firms in the Montgomery marketplace in 2018.

- African American firms (disparity index of 51.79) were substantially and significantly underutilized, accounting for 3.17 percent of all firms and 1.59 percent of sales.
- American Indian and Alaska Native firm data did not allow for a proper analysis.
- Asian American firms (disparity index of 132.38) were overutilized, accounting for 2.30 percent of all firms and 3.05 percent of sales.
- Hispanic American firms (disparity index of 76.29) were substantially and significantly underutilized, accounting for 1.38 percent of all firms and 1.05 percent of sales.
- Native Hawaiian and Pacific Islander firm data did not allow for a proper analysis.
- Nonminority female firms (disparity index of 58.86) were substantially and significantly underutilized, accounting for 5.22 percent of all firms and 3.07 percent of sales.

TABLE 6-8.  
PRIVATE SECTOR CENSUS DISPARITIES  
NAICS CODE 42, WHOLESALE TRADE  
U.S. CENSUS 2017 ANNUAL BUSINESS SURVEY,  
MONTGOMERY MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	32,550	2,716,759
Nonminority Male	28,650	2,478,497
African American	1,000	43,227
American Indian and Alaska Native	0	0
Asian	750	82,870
Hispanic <sup>4</sup>	450	28,654
Native Hawaiian and Other Pacific Islander	0	0
Nonminority Female	1,700	83,511
PERCENTAGE OF MARKETPLACE		
All Firms	100.00%	100.00%
Nonminority Male	88.02%	91.23%
African American	3.07%	1.59%
American Indian and Alaska Native	0.00%	0.00%
Asian	2.30%	3.05%
Hispanic <sup>4</sup>	1.38%	1.05%
Native Hawaiian and Other Pacific Islander	0.00%	0.00%
Nonminority Female	5.22%	3.07%
DISPARITY RATIOS <sup>3</sup>		
All Firms		100.00
Nonminority Male		103.65
African American		51.79
American Indian and Alaska Native		-
Asian		132.38
Hispanic <sup>4</sup>		76.29
Native Hawaiian and Other Pacific Islander		-
Nonminority Female		58.86

Source: MGT Impact Solutions, LLC conducted private sector disparities marketplace analyses based on U.S. Census Bureau, 2017 ABS data.

<sup>1</sup> Employer firms include firms with payroll at any time during 2017.

<sup>2</sup> Sales includes total shipments, receipts, revenue, or business done by the firm.

<sup>3</sup> Disparity index is the ratio of the percentage of sales to the percentage of available firms multiplied by 100.00. A disparity index below 80.00 indicates a substantial level of disparity.

<sup>4</sup> Hispanic firms are considered an ethnicity in this Census data and therefore may be double counted in race categories, which leads to percentages equaling greater than 100%.

N/A Denotes that there were no firms or sales for the classification.

Disparity results are statistically significant within a 95 percent confidence interval.

### **6.3.1.3 NAICS CODE 54: PROFESSIONAL, SCIENTIFIC, AND TECHNICAL SERVICES, MONTGOMERY MARKETPLACE**

**Table 6-8** shows the availability, sales, and disparity results for professional, scientific, and technical services (NAICS Code 54).

There was a total of 797,460 professional, scientific, and technical services employer firms in the Montgomery marketplace in 2018.

- African American firms (disparity index of 58.79) were substantially and significantly underutilized, accounting for 2.38 percent of all firms and 1.40 percent of sales.
- American Indian and Alaska Native firms (disparity index of 67.51) were substantially and significantly underutilized, accounting for 0.03 percent of all firms and 0.02 percent of sales.
- Asian American firms (disparity index of 93.58) were underutilized, accounting for 1.76 percent of all firms and 1.64 percent of sales.
- Hispanic American firms (disparity index of 79.35) were substantially and significantly underutilized, accounting for 0.95 percent of all firms and 0.76 percent of sales.
- Native Hawaiian and Pacific Islander firms (disparity index of 53.06) were substantially and significantly underutilized, accounting for 0.01 percent of all firms and 0.00 percent of sales.
- Nonminority female firms (disparity index of 74.48) were substantially and significantly underutilized, accounting for 6.21 percent of all firms and 4.62 percent of sales.

TABLE 6-9.  
PRIVATE SECTOR CENSUS DISPARITIES  
NAICS CODE 54, PROFESSIONAL, SCIENTIFIC, AND TECHNICAL SERVICES  
U.S. CENSUS 2017 ANNUAL BUSINESS SURVEY,  
MONTGOMERY MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	797,460	45,060,430
Nonminority Male	707,100	41,255,762
African American	19,000	631,173
American Indian and Alaska Native	200	7,629
Asian	14,000	740,243
Hispanic <sup>4</sup>	7,600	340,762
Native Hawaiian and Other Pacific Islander	60	1,799
Nonminority Female	49,500	2,083,062
PERCENTAGE OF MARKETPLACE		
All Firms	100.00%	100.00%
Nonminority Male	88.67%	91.56%
African American	2.38%	1.40%
American Indian and Alaska Native	0.03%	0.02%
Asian	1.76%	1.64%
Hispanic <sup>4</sup>	0.95%	0.76%
Native Hawaiian and Other Pacific Islander	0.01%	0.00%
Nonminority Female	6.21%	4.62%
DISPARITY RATIOS <sup>3</sup>		
All Firms		100.00
Nonminority Male		103.26
African American		58.79
American Indian and Alaska Native		67.51
Asian		93.58
Hispanic <sup>4</sup>		79.35
Native Hawaiian and Other Pacific Islander		53.06
Nonminority Female		74.48

Source: MGT Impact Solutions, LLC conducted private sector disparities marketplace analyses based on U.S. Census Bureau, 2017 ABS data.

<sup>1</sup> Employer firms include firms with payroll at any time during 2017.

<sup>2</sup> Sales includes total shipments, receipts, revenue, or business done by the firm.

<sup>3</sup> Disparity index is the ratio of the percentage of sales to the percentage of available firms multiplied by 100.00. A disparity index below 80.00 indicates a substantial level of disparity.

<sup>4</sup> Hispanic firms are considered an ethnicity in this Census data and therefore may be double counted in race categories, which leads to percentages equaling greater than 100%.

N/A Denotes that there were no firms or sales for the classification.

Disparity results are statistically significant within a 95 percent confidence interval.

#### **6.3.1.4 NAICS CODE 56: ADMINISTRATIVE AND SUPPORT AND WASTE MANAGEMENT AND REMEDIATION SERVICES, MONTGOMERY MARKETPLACE**

**Table 6-9** shows the availability, sales, and disparity results for administrative and support and waste management and remediation services (NAICS Code 56).

There were 333,550 administrative and support and waste management and remediation services employer firms in the Montgomery marketplace in 2018.

- African American firms (disparity index of 71.40) were substantially and significantly underutilized, accounting for 4.20 percent of all firms and 3.00 percent of sales.
- American Indian and Alaska Native firms (disparity index of 83.71) were underutilized, accounting for 0.09 percent of all firms and 0.08 percent of sales.
- Asian American firms (disparity index of 96.44) were underutilized, accounting for 1.23 percent of all firms and 1.19 percent of sales.
- Hispanic American firms (disparity index of 93.95) were underutilized, accounting for 4.80 percent of all firms and 4.51 percent of sales.
- Native Hawaiian and Pacific Islander firms (disparity index of 96.13) were underutilized, accounting for 0.02 percent of all firms and 0.02 percent of sales.
- Nonminority female firms (disparity index of 76.05) were substantially and significantly underutilized, accounting for 8.09 percent of all firms and 6.16 percent of sales.

TABLE 6-10.  
PRIVATE SECTOR CENSUS DISPARITIES  
NAICS CODE 56, ADMINISTRATIVE AND SUPPORT/WASTE MANAGEMENT AND REMEDIATION  
SERVICES U.S. CENSUS 2017 ANNUAL BUSINESS SURVEY,  
MONTGOMERY MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	333,550	8,610,436
Nonminority Male	272,080	7,323,961
African American	14,000	258,041
American Indian and Alaska Native	300	6,483
Asian	4,100	102,073
Hispanic <sup>4</sup>	16,000	388,056
Native Hawaiian and Other Pacific Islander	70	1,737
Nonminority Female	27,000	530,085
PERCENTAGE OF MARKETPLACE		
All Firms	100.00%	100.00%
Nonminority Male	81.57%	85.06%
African American	4.20%	3.00%
American Indian and Alaska Native	0.09%	0.08%
Asian	1.23%	1.19%
Hispanic <sup>4</sup>	4.80%	4.51%
Native Hawaiian and Other Pacific Islander	0.02%	0.02%
Nonminority Female	8.09%	6.16%
DISPARITY RATIOS <sup>3</sup>		
All Firms		100.00
Nonminority Male		104.28
African American		71.40
American Indian and Alaska Native		83.71
Asian		96.44
Hispanic <sup>4</sup>		93.95
Native Hawaiian and Other Pacific Islander		96.13
Nonminority Female		76.05

Source: MGT Impact Solutions, LLC conducted private sector disparities marketplace analyses based on U.S. Census Bureau, 2017 ABS data.

<sup>1</sup> Employer firms include firms with payroll at any time during 2017.

<sup>2</sup> Sales includes total shipments, receipts, revenue, or business done by the firm.

<sup>3</sup> Disparity index is the ratio of the percentage of sales to percentage of available firms multiplied by 100.00. A disparity index below 80.00 indicates a substantial level of disparity.

<sup>4</sup> Hispanic firms are considered an ethnicity in this Census data and therefore may be double counted in race categories, which leads to percentages equaling greater than 100%.

N/A Denotes that there were no firms or sales for the classification.

Disparity results are statistically significant within a 95 percent confidence interval.

### **6.3.1.5 NAICS CODE 81: OTHER SERVICES (EXCEPT PUBLIC ADMINISTRATION), MONTGOMERY MARKETPLACE**

**Table 6-10** shows the availability, sales, and disparity results for NAICS Code other services (except public administration) (NAICS Code 81).

There were 371,750 other services (except public administration) employer firms in the Montgomery marketplace in 2018.

- African American firms (disparity index of 70.22) were substantially and significantly underutilized, accounting for 4.44 percent of all firms and 3.12 percent of sales.
- American Indian and Alaska Native firms (disparity index of 86.62) were underutilized, accounting for 0.10 percent of all firms and 0.09 percent of sales.
- Asian American firms (disparity index of 113.98) were overutilized, accounting for 3.50 percent of all firms and 3.99 percent of sales.
- Hispanic American firms (disparity index of 106.03) were overutilized, accounting for 1.67 percent of all firms and 1.77 percent of sales.
- Native Hawaiian or Pacific Islander firms (disparity index of 71.68) were substantially and significantly underutilized, accounting for 0.01 percent of all firms and 0.01 percent of sales.
- Nonminority female firms (disparity index of 79.49) were substantially and significantly underutilized, accounting for 8.47 percent of all firms and 6.74 percent of sales.



TABLE 6-11.  
PRIVATE SECTOR CENSUS DISPARITIES  
NAICS CODE 81, OTHER SERVICES (EXCEPT PUBLIC ADMINISTRATION)  
U.S. CENSUS 2017 ANNUAL BUSINESS SURVEY,  
MONTGOMERY MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	EMPLOYER FIRMS (#)	EMPLOYER FIRMS SALES (\$1,000)
All Firms	371,750	11,181,645
Nonminority Male	304,130	9,425,905
African American	16,500	348,506
American Indian and Alaska Native	370	9,640
Asian	13,000	445,678
Hispanic <sup>4</sup>	6,200	197,727
Native Hawaiian and Other Pacific Islander	50	1,078
Nonminority Female	31,500	753,111
PERCENTAGE OF MARKETPLACE		
All Firms	100.00%	100.00%
Nonminority Male	81.81%	84.30%
African American	4.44%	3.12%
American Indian and Alaska Native	0.10%	0.09%
Asian	3.50%	3.99%
Hispanic <sup>4</sup>	1.67%	1.77%
Native Hawaiian and Other Pacific Islander	0.01%	0.01%
Nonminority Female	8.47%	6.74%
DISPARITY RATIOS <sup>3</sup>		
All Firms		100.00
Nonminority Male		103.04
African American		70.22
American Indian and Alaska Native		86.62
Asian		113.98
Hispanic <sup>4</sup>		106.03
Native Hawaiian and Other Pacific Islander		71.68
Nonminority Female		79.49

Source: MGT Impact Solutions, LLC conducted private sector disparities marketplace analyses based on U.S. Census Bureau, 2017 ABS data.

<sup>1</sup> Employer firms include firms with payroll at any time during 2017.

<sup>2</sup> Sales includes total shipments, receipts, revenue, or business done by the firm.

<sup>3</sup> Disparity index is the ratio of the percentage of sales to the percentage of available firms multiplied by 100.00. A disparity index below 80.00 indicates a substantial level of disparity.

<sup>4</sup> Hispanic firms are considered an ethnicity in this Census data and therefore may be double counted in race categories, which leads to percentages equaling greater than 100%.

N/A Denotes that there were no firms or sales for the classification.

Disparity results are statistically significant within a 95 percent confidence interval.

### 6.3.2 ABS Conclusion

Like the SBO analysis, the ABS analysis shows consistent underutilization of M/FBE firms relative to their availability in the marketplace. These results provide evidence that disparities exist in the broader private sector, thus supporting the need for Montgomery to maintain remedies to avoid passive participation in discrimination, irrespective of circumstances in the public sector.

As with the SBO results, the ABS results for each of the five procurement categories analyzed showed substantial disparity among defined M/FBE classes where sufficient data were available.

## 6.4 Analysis of Race, Ethnicity, and Gender Effects on Self-Employment and Earnings

This section examines further evidence regarding the overarching research question of whether business discrimination exists in the private sector and addresses four more specific questions:

1. *Does racial, ethnic, and gender status impact individual wages even after controlling for differences among firms?*
2. *Does racial, ethnic and gender status impact business owner earnings even after controlling for differences among firms?*
3. *Are racial, ethnic, and gender minority groups less likely than nonminority males (non-M/FBEs) to be self-employed after controlling for differences? If so, does race, ethnicity, or gender have a role in the disparity?*
4. *If minority and female-owned business enterprises (M/FBEs) and nonminority male-owned firms shared similar traits and marketplace “conditions” (i.e., similar “rewards” in terms of capital, wages, earning, etc.), what would be the effect on rates of self-employment by race, ethnicity, and gender?*

Answers to these questions are achieved by examining the effects of race, ethnicity, and gender, alongside controls for individual economic and demographic characteristics, on individuals' participation in the private sector as self-employed business operators and the effects of these variables on individuals' wages and business-owner earnings. Any negative and statistically significant effects by race, ethnicity, and gender found in the model after individual economic and demographic characteristics are controlled for would be consistent with business-related discrimination. The analysis is targeted to five categories of private sector business activity (Construction, Architecture & Engineering, Professional Services, Goods & Services, and all categories combined) that generally align with Montgomery procurement categories defined for the study.

Adopting the methodology and variables employed by a City of Denver disparity study (see *Concrete Works v. City and County of Denver*<sup>98</sup>), MGT used PUMS data derived from the 2016-2020 American Community Survey (ACS) to which MGT applied appropriate regression statistics to draw conclusions. The ACS is an ongoing survey covering the same type of information collected in the decennial census. The ACS is sent to approximately 3.5 million addresses annually, including housing units in all counties within the 50 States and the District of Columbia. The PUMS

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<sup>98</sup> *Concrete Works of Colo. v. City & Cnty. of Denver*, 321 F.3d 950, 967 (10th Cir. 2003).

file from the ACS contains records for a subsample of the full ACS. The data used for the regression analyses are the multi-year estimates combining 2016 through 2020 ACS PUMS records. The combined file contains over six million person-level records. The 2016-2020 ACS PUMS data provides a full range of population and housing information collected in the annual ACS and the decennial census.

### 6.4.1 Links to Business Formation and Maintenance

Economics research consistently finds group differences by race, ethnicity, and gender in business formation rates.<sup>99</sup> MGT knows, for instance, that most minorities and females have a lower median age than nonminority males (ACS PUMS, 2016-2020). In general, the likelihood of being self-employed increases with age (ACS PUMS, 2016-2020). An examination of these variables within the context of a disparity study seeks to control for these other important demographic and economic variables in conjunction with race, ethnicity, and gender – since they also influence group rates of business formation. Through the analyses, MGT can determine whether inequities specific to minorities and females are demonstrably present to warrant consideration of public sector remedies. Questions about marketplace dynamics affecting self-employment— or, more specifically, the odds of forming one’s own business and then excelling (i.e., generate earnings growth)— are at the heart of disparity analysis research.

### 6.4.2 Statistical Models and Methods

MGT employed two multivariate regression techniques to answer the research questions identified for this section: (1) logistic regression and (2) linear regression. Logistic regression is an econometric method that allows for analyzing dichotomous dependent variables. The results can then be translated into log-likelihoods that examine how likely one variable is to be true compared to another variable. Linear regression is an econometric method that helps explain the linear relationship between the dependent and independent variables – how substantially and in what direction each independent variable influences the dependent variable. This will help analyze the direct impact of being part of a specific minority or gender group on earnings.

To understand the appropriate application of these regression techniques, it is helpful to explore the variables inherent in these questions in greater detail. There are two general categories of variables employed in the regression techniques: (1) dependent variables and (2) independent variables.

- Dependent variables are the phenomena to be explained by influences such as age, race, gender, and disability status (i.e., the independent or “explanatory” variables).
- The first dependent variable is individual wages, a continuous variable with many possible values. A simple linear regression is used to analyze this variable.
- The second dependent variable is self-employment business earnings, a continuous variable with many possible values. A simple linear regression is used to analyze this variable.

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<sup>99</sup> See Journal of Econometrics, Vol. 61, Issue 1, devoted entirely to the econometrics of labor market discrimination and segregation.

- The third dependent variable is the probability of self-employment status, which is a binary, categorical variable based on two possible values: 0 (not self-employed) versus 1 (self-employed). Logistic regression is appropriately used to perform an analysis in which the dependent variable is binary and categorical. This technique was employed to analyze self-employment.<sup>100</sup>
- For each analysis, several specifications were conducted. The first specification looked at the impact of race, ethnicity, and gender on individuals from the national level. The second and third specifications examined whether race, ethnicity, and gender significantly impacted individuals in the Montgomery market more than at the national level. The results presented in this chapter are specific to the Montgomery marketplace. Full specification results can be found in **Appendix J, Private Sector Analysis**.

### 6.4.3 The Influences of Race, Ethnicity, and Gender on Individual Wages

To explore whether there are any measurable impacts on wages, MGT compared minority and female nonbusiness owner wages to those of nonminority males in the Montgomery marketplace when the effect of other demographic and economic characteristics was controlled. Holding all other personal characteristics constant, if minority and female wage earners cannot achieve comparable wages due to discrimination as their nonminority counterparts, then they are not able to save the necessary capital to start their own businesses. MGT was able to examine the wages of individuals of similar education levels, ages, etc., to permit comparisons more purely by race, ethnicity, and gender.

First, MGT derived a set of independent variables known to predict wages, including:

- **Race and Gender:** African American, Asian American, Hispanic American, Native American, nonminority woman, nonminority males.
- **Availability of Capital:** Homeownership, home value, mortgage rate, unearned income, residual income.
- Marital Status.
- Ability to Speak English Well.
- **Disability Status:** From individuals' reports of health-related disabilities.
- **Age and Age Squared:** Squaring the age variable acknowledges the positive, curvilinear relationship between each year of age and earnings.
- Owner's Level of Education.
- Residing in the Montgomery Marketplace.

MGT used 2016-2020 wages from employment for the dependent variable, as reported in the 5 percent PUMS data.

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<sup>100</sup> Logistical regression, or logit, models generate predicted probabilities that are almost identical to those calculated by a probit procedure, used in *Concrete Works v. City and County of Denver* case. Logit, however, has the added advantage of dealing more effectively with observations at the extremes of a distribution. For a complete explanation, see *Interpreting Probability Models* (T.F. Liao, Text 101 in the Sage University series).

This analysis examined the statistical effects of these variables on wages for nonbusiness employees in the Montgomery marketplace. As the linear regression analysis yielded, each number in **Table 6-12** represents a percent change in earnings associated with introducing the variable (business ownership classification) in the left-hand column. For example, across all industries, the adjustment factor for an Asian American is -0.261, meaning that an Asian American would be predicted to earn 26 percent less than a nonminority male, all other variables considered or controlled for. Complete results of linear regression outputs can be found in **Appendix J, Private Sector Analysis**. Specifically:

- In construction, the negative disparity differences ranged from -11 percent for Hispanic Americans to -36 percent for nonminority females.
- In architecture & engineering, the negative disparity differences ranged from -14 percent for Hispanic Americans to -40 percent for nonminority females.
- In professional services, the negative disparity differences ranged from -18 percent for Asian Americans to -38 percent for nonminority females.
- In goods & services, the negative disparity differences ranged from -22 percent for Hispanic Americans to -40 percent for nonminority females.
- The findings provide further positive evidence that disparities exist in the private sector of Montgomery’s marketplace, compelling the continuation of remedies in the domain of the government’s influence. The findings also provide affirmative evidence to the more specific questions regarding impacts on wages, demonstrating that racial, ethnic, and gender minority groups earn less wages than their nonminority male counterparts, all variables considered.

TABLE 6-12.  
WAGES ELASTICITIES OF MINORITY GROUPS RELATIVE TO NONMINORITY MALES AFTER  
CONTROLLING FOR DEMOGRAPHIC AND ECONOMIC CHARACTERISTICS

WAGES	TOTAL	CONSTRUCTION	A&E	PROFESSIONAL SERVICES	GOODS & SERVICES
AFRICAN AMERICAN	-24%***	-16%***	-18%***	-26%***	-28%***
ASIAN AMERICAN	-26%***	-32%***	-16%***	-18%***	-37%***
HISPANIC AMERICAN	-23%***	-11%***	-14%***	-26%***	-22%***
NATIVE AMERICAN	-25%***	-16%***	-27%***	-26%***	-25%***
MBE	-24%***	-19%***	-19%***	-24%***	-28%***
NONMINORITY FEMALE	-41%***	-36%***	-40%***	-38%***	-40%***
TOTAL M/FBE	-28%***	-22%***	-23%***	-27%***	-30%***

Source: PUMS data from 2016-2020 American Community Survey (Montgomery marketplace) and MGT Impact Solutions, LLC, calculations using SPSS Statistics software.

“\*” indicates a significant adverse disparity at the 15% level or better (85% confidence). “\*\*\*” indicates the disparity is significant at a 10% level or better (90% confidence). “\*\*\*\*” indicates significance at a 5% level or better (95% confidence).

The regression “elasticity” means the percent change resulting from being a member of one of the M/FBE groups.

#### 6.4.4 The Influences of Race, Ethnicity, and Gender on Business Owner Earnings

To explore whether there are any measurable impacts on business owner earnings, MGT compared minority and female business owner earnings to those of nonminority males in the Montgomery marketplace when the effect of other demographic and economic characteristics was controlled or neutralized. Holding all other personal characteristics constant, if minority and female business owners cannot achieve comparable earnings from their businesses as similarly situated nonminorities because of discrimination, then failure rates for M/FBEs will naturally be higher and M/FBE formation rates will be lower. MGT was able to examine the earnings of business owners of similar education levels, ages, etc., to permit comparisons more purely by race, ethnicity, and gender.

MGT utilized the same model specifications as outlined for wages in this linear regression model. MGT used the dependent variable's 2016-2020 earnings from business owners, as reported in the 5 percent PUMS data.

This analysis examined the statistical effects of the controlled variables on earnings for business owners in the Montgomery marketplace. As the linear regression analysis yielded, each number in **Table 6-13** represents a percent change in earnings associated with introducing the variable (business ownership classification) in the left-hand column. For example, across all industries, the adjustment factor for an African American is -0.234, meaning that an African American would be predicted to earn 23 percent less than a nonminority male, all other variables considered or controlled for. Complete results of linear regression outputs can be found in **Appendix J, Private Sector Analysis**. Specifically:

- In construction, the negative disparity differences ranged from -19 percent for African Americans to -46 percent for nonminority females.
- In architecture & engineering, the negative disparity differences ranged from 0 percent for Native Americans to -18 percent for African Americans.
- In professional services, the negative disparity differences ranged from -29 percent for Native Americans and Hispanic American to -35 percent for nonminority females.
- In goods & services, the negative disparity differences ranged from -10 percent for Native Americans to -15 percent for Asian Americans and nonminority females.
- As with individual wages, business owner earnings overall in the Montgomery marketplace provide consistent evidence that disparities exist in the private sector, indicating marketplace discrimination against M/FBEs when all other variables are controlled for.

TABLE 6-13.  
BUSINESS EARNINGS ELASTICITIES OF MINORITY GROUPS RELATIVE TO NONMINORITY  
MALES AFTER CONTROLLING FOR DEMOGRAPHIC AND ECONOMIC CHARACTERISTICS

BUSINESS EARNINGS	TOTAL	CONSTRUCTION	A&E	PROFESSIONAL SERVICES	GOODS & SERVICES
AFRICAN AMERICAN	-23%***	-31%***	-18%***	-34%***	-14%***
ASIAN AMERICAN	-21%***	-24%***	-6%***	-31%***	-15%***
HISPANIC AMERICAN	-18%***	-19%***	-12%***	-29%***	-13%***
NATIVE AMERICAN	-17%***	-22%***	0%	-29%***	-10%***
MBE	-20%***	-24%***	-9%***	-31%***	-13%***
NONMINORITY FEMALE	-22%***	-46%***	-16%***	-35%***	-15%***
TOTAL M/FBE	-20%***	-28%***	-11%***	-32%***	-13%***

Source: PUMS data from 2016-2020 American Community Survey (Montgomery marketplace) and MGT Impact Solutions, LLC, calculations using SPSS Statistics software.

“\*” indicates an adverse disparity that is statistically significant at the 15% level or better (85% confidence). “\*\*” indicates the disparity is significant at a 10% level or better (90% confidence). “\*\*\*” indicates significance at a 5% level or better (95% confidence).

The regression “elasticity” means the percent change resulting from being a member of one of the M/FBE groups.

### 6.4.5 The Influences of Race, Ethnicity, and Gender on Self-Employment

As noted in the wages and business earnings analyses, discrimination that negatively affects the wages and entrepreneurial earnings of minorities and women will negatively affect the number of businesses formed by these groups as well. MGT used the 2016-2020 U.S. Census ACS 5 percent PUMS data to derive a set of variables known to predict employment status (self-employed/not self-employed). Logistic regression was used to calculate the probability of being self-employed (the dependent variable) based on selected socioeconomic and demographic characteristics with the potential to influence the likelihood of self-employment. The sample for the analysis was limited to labor force participants who met the following criteria:

- A resident of the Montgomery marketplace.
- Self-employed in construction, architecture & engineering, professional services, or goods and services.
- Employed full-time (more than 35 hours a week).
- Eighteen years of age or older.
- Employed in the private sector.



Next, MGT derived the following variables<sup>101</sup> hypothesized as predictors of employment status:

- **Race and Gender:** African American, Asian American, Hispanic American, Native American, nonminority woman, nonminority male.
- **Availability of Capital:** Homeownership, home value, mortgage rate, unearned income, residual income.
- Marital Status.
- Ability to Speak English Well.
- **Disability Status:** From individuals' reports of health-related disabilities.
- **Age and Age Squared:** Squaring the age variable acknowledges the positive, curvilinear relationship between each year of age and earnings.
- Owner's Level of Education.
- Number of Individuals Over the Age of 65 Living in Household.
- Number of Children Under the Age of 18 Living in Household.

**Table 6-14** summarizes the business ownership formation rates in the United States and in the Montgomery marketplace by race, ethnicity, and gender. Additionally, it compares the differences in formation rates of M/FBEs to non-M/FBEs. As an example, African Americans in the Montgomery marketplace have a formation rate of 2.69 percent compared to 12.08 percent for their non-M/FBE counterparts. Thus, the formation rate for African Americans in the Montgomery marketplace is 77.74 percent lower than non-M/FBEs  $((2.69 - 12.08)/12.08)$ .

TABLE 6-14.  
SELF-EMPLOYMENT FORMATION RATES

TOTALS			
	US	MONTGOMERY	DIFFERENCE FROM NON-M/FBE (MONTGOMERY)
AFRICAN AMERICAN	3.91%	2.69%	-77.74%
ASIAN AMERICAN	6.93%	4.60%	-61.90%
HISPANIC AMERICAN	8.11%	6.59%	-45.41%
NATIVE AMERICAN	7.39%	10.00%	-17.18%
MBE	5.75%	4.64%	-61.56%
WHITE FEMALES	5.48%	5.81%	-51.91%
M/FBE	5.59%	5.18%	-57.12%
NON-M/FBE	13.09%	12.08%	
CONSTRUCTION			

<sup>101</sup> The variables used in this analysis were modeled after those incorporated in the same analysis from *Concrete Works v. City and County of Denver*.

	US	MONTGOMERY	DIFFERENCE FROM NON-M/FBE (MONTGOMERY)
<b>AFRICAN AMERICAN</b>	15.09%	9.80%	-47.73%
<b>ASIAN AMERICAN</b>	16.71%	11.27%	-39.87%
<b>HISPANIC AMERICAN</b>	21.83%	12.21%	-34.87%
<b>NATIVE AMERICAN</b>	17.88%	0.00%	-100.00%
<b>MBE</b>	16.54%	11.26%	-39.92%
<b>WHITE FEMALES</b>	15.46%	18.03%	-3.85%
<b>M/FBE</b>	16.22%	13.00%	-30.67%
<b>NON-M/FBE</b>	22.93%	18.75%	
<b>A&amp;E</b>			
	US	MONTGOMERY	DIFFERENCE FROM NON-M/FBE (MONTGOMERY)
<b>AFRICAN AMERICAN</b>	6.09%	0.14%	-98.60%
<b>ASIAN AMERICAN</b>	9.18%	5.88%	-39.70%
<b>HISPANIC AMERICAN</b>	6.86%	7.55%	-22.57%
<b>NATIVE AMERICAN</b>	8.25%	0.00%	-100.00%
<b>MBE</b>	7.00%	2.47%	-74.72%
<b>WHITE FEMALES</b>	8.40%	31.15%	219.27%
<b>M/FBE</b>	7.78%	13.56%	39.00%
<b>NON-M/FBE</b>	13.82%	9.76%	
<b>PROFESSIONAL SERVICES</b>			
	US	MONTGOMERY	DIFFERENCE FROM NON-M/FBE (MONTGOMERY)
<b>AFRICAN AMERICAN</b>	3.40%	2.97%	-75.83%
<b>ASIAN AMERICAN</b>	5.63%	2.97%	-75.83%
<b>HISPANIC AMERICAN</b>	7.44%	5.68%	-53.68%
<b>NATIVE AMERICAN</b>	4.90%	11.69%	-4.76%
<b>MBE</b>	4.74%	4.08%	-66.73%
<b>WHITE FEMALES</b>	5.12%	4.63%	-62.30%
<b>M/FBE</b>	4.99%	4.36%	-64.48%
<b>NON-M/FBE</b>	13.73%	12.27%	
<b>GOODS &amp; SERVICES</b>			
	US	MONTGOMERY	DIFFERENCE FROM NON-M/FBE (MONTGOMERY)
<b>AFRICAN AMERICAN</b>	2.49%	1.02%	-85.04%
<b>ASIAN AMERICAN</b>	4.00%	1.54%	-77.54%

<b>HISPANIC AMERICAN</b>	7.89%	8.26%	20.83%
<b>NATIVE AMERICAN</b>	5.18%	0.00%	-100.00%
<b>MBE</b>	4.04%	3.88%	-43.29%
<b>WHITE FEMALES</b>	5.27%	5.56%	-18.75%
<b>M/FBE</b>	4.72%	4.51%	-34.10%
<b>NON-M/FBE</b>	6.71%	6.84%	

Source: PUMS data from 2016-2020 American Community Survey (Montgomery marketplace) and MGT Impact Solutions LLC, calculations using SPSS Statistics software.

To test the impact that race, ethnicity, and gender has on the self-employment rates, the logistic regression analysis examined the statistical effects of these variables on being self-employed in the Montgomery marketplace. The results in **Table 6-15** indicate the percentage difference between the probability of business ownership for a given race, ethnicity, or gender group compared to similarly situated nonminority males. For example, African Americans in the construction industry have a business formation rate of 51 percent lower than expected in a race-ethnicity-, and gender-neutral market area. The results in the following tables present rates for the groups after variables such as age and education have been controlled for. Results of logistic regression can be found in **Appendix J, Private Sector Analysis**.

TABLE 6-15.  
SELF-EMPLOYMENT PERCENT DIFFERENCES CONTROLLING FOR DEMOGRAPHIC AND ECONOMIC CHARACTERISTICS

SELF-EMPLOYMENT PERCENT CHANGES	TOTAL	CONSTRUCTION	A&E	PROFESSIONAL SERVICES	GOODS & SERVICES
AFRICAN AMERICAN	-100%***	-94%***	-39%***	-105%***	-97%***
ASIAN AMERICAN	-43%***	-47%***	-42%***	-62%***	-30%***
HISPANIC AMERICAN	-62%***	-53%***	-13%***	-77%***	-77%***
NATIVE AMERICAN	-64%***	-61%***	-7%	-91%***	55%***
MBE	-67%***	-64%***	-25%***	-84%***	-37%***
NONMINORITY FEMALE	-65%***	-72%***	-39%***	-85%***	-66%***
TOTAL M/FBE	-67%***	-65%***	-28%***	-84%***	-43%***

Source: PUMS data from 2016-2020 American Community Survey (Montgomery marketplace) and MGT Impact Solutions, LLC, calculations using SPSS Statistics software.

“\*” indicates a significant adverse disparity at the 15% level or better (85% confidence). “\*\*\*” indicates the disparity is significant at a 10% level or better (90% confidence). “\*\*\*\*” indicates significance at a 5% level or better (95% confidence).

- These findings demonstrate that minorities and women, in general, are statistically significantly less likely to own their businesses than expected based upon their observable demographic characteristics, including age, education, geographic location, industry, and trends over time. Additionally, as with wage and business earnings, these groups are at a significant disadvantage to nonminority males whether they work as wage and salary employees or as entrepreneurs. These findings are consistent with results that would be observed in a discriminatory market area.

### 6.4.6 Disparities in Rates of Self-Employment

The analyses of self-employment rates and 2016-2020 ACS self-employment earnings revealed general disparities, consistent with business market discrimination, between minority and nonminority self-employed individuals whose businesses were located in the Montgomery marketplace. **Table 6-16** presents the results of observed formation rates vs. expected formation rates from the logistic regression. Column A presents the observed rates as seen in **Table 6-14**. Column B is calculated using the regression results and adjusting the observed rates accordingly. For example, for an African American in professional services, the percentage difference compared to a nonminority male controlling for all other variables is 105 percent, indicating that the expected self-employment rate for an African American should be 105 percent higher than what is observed (2.97 percent) or 6.07 percent. Column C is the disparity ratio between observed rates and expected rates.

TABLE 6-16.  
OBSERVED AND PREDICTED SELF-EMPLOYMENT RATES  
MONTGOMERY MARKETPLACE

BUSINESS OWNERSHIP CLASSIFICATION	OBSERVED SELF-EMPLOYMENT RATES (A)	EXPECTED SELF-EMPLOYMENT RATES (B)	DISPARITY RATIO (C)
Overall			
African American Firms	2.69%	5.37%	50
Asian American Firms	4.60%	5.87%	78
Hispanic American Firms	6.59%	10.70%	62
Native American Firms	10.00%	16.40%	61
MBE Firms	4.64%	7.58%	61
Nonminority Female Firms	5.81%	9.59%	61
M/FBE Firms	5.18%	8.39%	62
Construction			
African American Firms	9.80%	14.40%	68
Asian American Firms	11.27%	16.59%	68
Hispanic American Firms	12.21%	18.67%	65
Native American Firms	0.00%	0.00%	
MBE Firms	11.26%	16.72%	67
Nonminority Female Firms	18.03%	31.00%	58
M/FBE Firms	13.00%	20.28%	64
Architecture & Engineering			
African American Firms	0.14%	0.19%	72
Asian American Firms	5.88%	8.38%	70
Hispanic American Firms	7.55%	8.50%	89
Native American Firms	0.00%	0.00%	
MBE Firms	2.47%	3.24%	76
Nonminority Female Firms	31.15%	43.19%	72
M/FBE Firms	13.56%	18.06%	75
Professional Services			
African American Firms	2.97%	6.07%	49
Asian American Firms	2.97%	4.80%	62
Hispanic American Firms	5.68%	9.51%	60
Native American Firms	11.69%	22.32%	52
MBE Firms	4.08%	7.45%	55
Nonminority Female Firms	4.63%	8.57%	54
M/FBE Firms	4.36%	7.93%	55
Goods & Services			
African American Firms	1.02%	2.02%	51
Asian American Firms	1.54%	1.99%	77
Hispanic American Firms	8.26%	14.63%	56
Native American Firms	0.00%	0.00%	
MBE Firms	3.88%	7.25%	53

BUSINESS OWNERSHIP CLASSIFICATION	OBSERVED SELF-EMPLOYMENT RATES	EXPECTED SELF-EMPLOYMENT RATES	DISPARITY RATIO
Nonminority Female Firms	5.56%	9.21%	60
M/FBE Firms	4.51%	6.44%	70

Source: PUMS data from 2016-2020 American Community Survey (Montgomery marketplace) and MGT Impact Solutions, LLC, calculations using SPSS Statistics software.

- The findings provide evidence that for M/FBEs, discriminatory barriers exist to achieving the same level of self-employment rates as their non-M/FBE counterparts. The results further show that discriminatory marketplace factors are the cause of these differences in several instances.

## 6.5 Access to Credit

As noted throughout this chapter, discrimination occurs when different outcomes occur for individuals of different races, ethnicities, and gender after holding all of the personal characteristics constant. This might happen in private and public labor markets when equally productive individuals in similar jobs are paid different wages because of their race, ethnicity, or gender. In credit markets, it might occur when loan approvals differ across racial or gender groups with otherwise similar financial backgrounds. In this chapter, MGT examined whether there is evidence consistent with the presence of discrimination in the private sector against M/FBE businesses. Discrimination in the credit market against M/FBEs can significantly affect the likelihood that they will form and succeed, negatively impacting the business's size and longevity.

This section summarizes some national analyses about credit disparities and thus offers illustrative evidence of M/FBE firms' barriers to accessing credit. This information provides guidance to the results provided throughout the private-sector analysis.

### 6.5.1 Minority Business Development Agency

The U.S. Department of Commerce, Minority Business Development Agency published a report in January 2010 entitled, *"Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs."* Findings highlighted that access to affordable credit remains one of the main impediments to minority-owned firm growth.

General findings show that minority-owned businesses: pay higher interest rates on loans, are more likely to be denied credit, and are less likely to apply for loans because they fear their applications will be rejected.

- Among high sales firms, 52% of nonminority firms received loans compared with 41% of minority firms.
- The average loan amount for all high sales minority firms was \$149,000. The nonminority average was more than twice this amount at \$310,000.

- Among firms with gross receipts under \$500,000, loan denial rates for minority firms were about three times higher, at 42%, compared to those of non-minority-owned firms, at 16%.
- Among firms with gross receipts under \$500,000, 33% of minority firms did not apply for loans because of fear of rejection compared to 17% of nonminority firms.
- For all firms, minority firms paid 7.8% on average for loans compared with 6.4% for nonminority firms.

## 6.5.2 The Federal Reserve Small Business Credit Survey

The Small Business Credit Survey (SBCS) is a national collaboration of the 12 Reserve Banks of the Federal Reserve System<sup>102</sup>. This survey has been conducted annually since 2015. Survey responses are collected from firms throughout the United States. While statistics are provided regarding how many responses are from each census region and division<sup>103</sup>, the data provided online does not report race by division. The reports vary somewhat from year to year. For example, the 2016 reports include specific reports for minority and female-owned firms; and the 2018 reports included one regarding disaster-affected firms. Overall, each year's report documents that minority- and female-owned firms, particularly Black-owned firms, have less access to credit and pay more for credit than similarly situated white-owned firms. Data from four consecutive years documents the continuing challenge that minority-owned firms, particularly Black-owned firms, face regarding access to, and cost of, credit. Summary information from reports for employer firms is provided below.<sup>104</sup>

### 6.5.2.1 SBCS 2016

#### 6.5.2.1.1 REPORT ON MINORITY-OWNED FIRMS

The 2016 SBCS fielded in Q3 and Q4 2016 yielded 7,916 responses from employer firms with race/ethnicity information in 50 states and the District of Columbia.

- Black-owned firm application rates for new funding are ten percentage points higher than White-owned firms, but their approval rates are 19 percentage points lower.
- 40% of Black-owned firms did not apply for financing because they were discouraged (i.e., they did not think they would be approved), compared with 14% of White-owned firms.
- Looking at just firms approved for at least some financing, when comparing minority- and nonminority-owned firms with good credit scores, 40% of minority-owned firms received the total amount sought compared to 68% of nonminority-owned firms.
- Black-owned firms report more credit availability challenges (58% vs. 32%) and difficulty obtaining funds for expansion (62% vs. 31%) than White-owned firms.

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<sup>102</sup> The survey methodology provides for sample weighting to adjust for any sampling biases; race, ethnicity, and gender imputation by using statistical models to capture missing data; comparisons and adjustments to past reports; and credibility intervals to aide in survey estimates.

<sup>103</sup> Census regions and divisions are areas delineated for the purposes of statistical analysis and presentation.

<sup>104</sup> Source: Small Business Credit Survey, Federal Reserve Banks.



### 6.5.2.1.2 REPORT ON FEMALE-OWNED FIRMS

- Low credit risk female-owned firms were less likely to be approved for business loans than their low credit risk male counterparts (68% compared to 78%).
- Sixty-four percent of female-owned firms reported a funding gap, receiving only some or none of the financing sought, compared to 56% of male-owned firms.
- Fewer female-owned firms received all of the funding sought than male-owned firms, and more females received none. Among low credit risk firms, 48% of female-owned firms received all of the financing requested, compared to 57% of male-owned firms.

### 6.5.2.2 SBCS 2017

#### 6.5.2.2.1 REPORT ON EMPLOYER FIRMS

Fielded in Q3 and Q4 2017, the survey yielded 8,169 responses from small employer firms in the 50 states and the District of Columbia.

- Minority-owned firms report higher rates of financial challenges in the previous 12 months due to lack of credit availability than White-owned firms.
- For firms with revenues less than \$1M, Black-owned firms (58%) reported financial challenges at twice the rate of white-owned firms (32%) (Asian 42%, Hispanic 45%).
- MGT sees the same ratio for firms with revenues at more than \$1M: Black-owned firms, 49%, and White-owned firms, 24% (Asian 38%, Hispanic 34%).
- Rates of firms receiving at least some of the financing requested: for Black-owned firms, 61%, and White-owned firms 80% (Asian 73%, Hispanic 74%).
- For low credit risk firms, 85% of nonminority-owned firms received at least some of the financing requested compared with only 75% for similarly situated minority-owned firms.
- For low credit risk firms receiving total financing, 68% of nonminority-owned firms were approved compared to only 40% of minority-owned firms.

### 6.5.2.3 SBCS 2018

#### REPORT ON EMPLOYER FIRMS

There were 8,072 responses received for this survey from firms throughout the United States.

- Minority-owned firms report higher rates of financial challenges in the prior 12 months due to credit availability than white-owned firms. Rates were: Black-owned firms, 50%; Asian, 33%; Hispanic, 41%; and White-owned firms, 28%.
- Rates of firms receiving at least some of the financing requested ranged from a high of 80% for White-owned firms to a low of 59% for Black-owned firms.
- Rates of firms receiving the total amount requested ranged from a high of 49% for White-owned firms to a low of 23% for Black-owned firms.
- 38% of Black-owned firms did not apply for financing because they were discouraged (i.e., they did not think they would be approved), compared with 12% of White-owned firms.

## 6.5.2.4 SBCS 2019

### 6.5.2.4.1 REPORT ON MINORITY-OWNED FIRMS & REPORT ON EMPLOYER FIRMS

The annual survey of businesses was fielded in the third and fourth quarters of 2018 and generated 6,614 responses from employer firms.

- Minority-owned firms report higher rates of financial challenges in the prior 12 months due to credit availability than white-owned firms. Rates were: Black-owned firms, 51%; Asian, 36%; Hispanic, 40%; and White-owned firms, 30%.
- Rates of firms receiving at least some of the financing requested ranged from a high of 80% for White-owned firms to a low of 62% for Black-owned firms.
- Rates of firms receiving the total amount requested ranged from a high of 49% for White-owned firms to a low of 31% for Black-owned firms.
- 28% of Black-owned firms did not apply for financing because they were discouraged (i.e., they did not think they would be approved), compared with 13% of White-owned firms.
- On average, Black- and Hispanic-owned firm applicants received approval for smaller shares of the financing they sought than White-owned small businesses that applied for financing.
- Larger shares of Black- and Hispanic-owned firm applicants did not receive any financing they applied for—38% and 33%, respectively—compared to 20% of White-owned business applicants.
- White-owned business applicants received approval for all the financing they applied for: 49%, compared to 39% of Asian-, 35% of Hispanic-, and 31% of Black-owned firm applicants.

## 6.6 Private Sector Summary

Analysis of the U.S. Census 2012 SBO data, 2017 ABS data, and the PUMS 2016-2020 data demonstrate, in response to the overarching research question driving this analysis, that marketplace discrimination exists for M/FBE firms operating in the private sector within Montgomery's marketplace. Thus, based on the courts' guidance in this domain, Montgomery has a compelling interest in continuing its current M/FBE program (referred to as MFD for the County).

To the more specific research questions:

- Findings from the U.S. Census 2012 SBO and 2017 ABS data indicate substantial disparities for most M/FBE firms across industry sectors resembling the procurement categories identified for this study.
- Findings from the 2016-2020 PUMS data indicate that:
  - Minority and women wages were significantly less in 2016-2020 than those of nonminority males, holding all other variables constant.
  - M/FBE firms were significantly less likely than nonminority males to be self-employed.

- If they were self-employed, most M/FBE firms earned significantly less in 2016-2020 than self-employed nonminority males, holding all other variables constant.
- Analysis of observed vs. predicted self-employment rates show that marketplace discrimination impacted these rates. Further, this analysis indicates that holding all factors consistent, race, ethnicity, and gender play a role in the lower level of self-employment for M/FBEs.

A review of access to credit indicates that minorities and females tend to receive less than the requested amount of credit when they are approved than nonminority men; they are approved for credit less frequently than nonminority males, and that credit costs them more than nonminority males.

In light of these findings, credence may be given to the proposition established by Justice O'Connor in *Croson*, which suggested a government could be a passive participant in private-sector discrimination if it did not act to counter these dynamics within the domain of its influence. This evidence stands alongside the disparities observed in public sector contracting to illustrate the substantial discriminatory inequities that continue to exist in Montgomery's marketplace, underscoring its compelling interest in continuing to pursue remedies to address these gaps.

# 7 Qualitative Analysis

## 7.1 Introduction

This chapter examines anecdotal evidence of conditions and obstacles faced by M/FBE and DOBE firms in the Study market area in their experiences working with County, County's prime contractors, and the private sector. The collection and analysis of anecdotal data was focused on firms registered to do business with the County and helps to explain and provide context for the quantitative data analyses found in **Chapter 4, Market Area and Availability Analyses** and **Chapter 5, Product Market, Utilization, and Disparity Analyses**. In conjunction with the quantitative data, MGT also was able to draw inferences from the anecdotal data as to the prevalence of obstacles perceived as limiting the participation of M/FBEs and other firms in the County's procurement transactions.

Qualitative or anecdotal comments in this chapter detail the perceptions and opinions of individuals, and the evidentiary weight of these opinions depends on how much they are corroborated by statements of others and the quantitative data that has been compiled to substantiate these perceptions. Unlike conclusions derived from other types of analysis in this report, the conclusions derived from anecdotal analyses do not rely solely on quantitative data. Rather, the analysis in this chapter utilizes qualitative data to describe the context of the examined social, political, and economic environment in which businesses and other relevant entities applicable to the Study operates.

The collective anecdotal activities gathered input from over 600 business owners or representatives regarding their opinions and perceptions of their experiences working with the County, or on the County's projects as subcontractors.

## 7.2 Methodology

The blueprint for collecting and analyzing qualitative and anecdotal information for this Study was provided by the U.S. Supreme Court in *City of Richmond v. J.A. Croson*, 488 U.S. 469, 109 S.Ct. 706 (1989) (*Croson*). In that case, the Court held that race-conscious programs must be supported by strong documentation of discrimination, including evidentiary findings that go beyond the demographics of a community. Anecdotal information can bolster the quantitative analyses of contract expenditures to explain whether minority business creation, growth, and retention are negatively affected by discrimination. In *Croson*, the Court held that anecdotal accounts of discrimination could help establish a compelling interest for a local government to institute a race-conscious remedy. Moreover, such information can provide a local entity with a firm basis for fashioning a program that is narrowly tailored to remedy identified forms of marketplace discrimination and other barriers to M/FBE participation in contract opportunities. Further discussion regarding the basis and motivation for collection and analysis of anecdotal data is contained in **Chapter 2, Legal Framework**.



### Chapter Sections

7.1 Introduction

7.2 Methodology

7.3 Anecdotal Comments

7.4 Suggested Remedies from  
Participants

7.5 Qualitative Summary

MGT used a combination of surveys, online comments, focus groups, and one-on-one interviews with businesses to collect qualitative information that are analyzed to identify issues and concerns that were common to businesses in the market area. In addition to the qualitative data collection from area businesses, MGT conducted interviews with area trade associations, and business organizations to gather anecdotes on their perceptions on the County's procurement process and impact of the M/FBE program to firms in the market area, both M/FBEs and non-M/FBEs. While the collection of anecdotes from organizations and associations is not required by the courts, input from advocacy and professional development organizations give a third-party perspective of M/FBE issues and broadens the collection of M/FBE firms experiences doing business or attempting to do business with the County.

### 7.2.1 Communication, Outreach, and Engagement

Businesses in the County's Relevant Market Area were contacted using various communication methods of phone calls, email blasts distributed by the County and MGT, and County-sponsored procurement events. Additionally, MGT maintained a study website that was available to the public. MGT developed a master vendor database of firms that incorporated vendor datasets from multiple sources, such as the County's vendor and certification lists; membership lists provided by area trade associations and business organizations; and vendor and certification lists collected from other public agencies to establish a base for the outreach efforts. This database was created to ensure that a broad range of firms in the marketplace were notified about the qualitative data collection activities.

MGT worked with the County to create a Communication, Outreach, and Engagement Plan that included various outreach methods geared to inform and encourage the business community's utilization and engagement for the anecdotal data collection activities. Outreach methods included:

- ♦ MGT and Montgomery County identified area trade associations and business organizations, referred to as professional organizations for purposes of this report, whose insights would be valuable to understanding the dynamics and perceptions of the vendor community. The stakeholders were notified via e-mail blasts and phone calls of anecdotal data collection activities and asked to encourage their members to participate.
- ♦ MGT and Montgomery County transmitted numerous email blasts to the business community to increase awareness and engagement.
- ♦ Montgomery County provided in its newsletter a direct link to the MGT-hosted disparity study website and vendor survey, which is an electronic letter that businesses and organizations regularly receive to obtain information about the County its procurements.

### 7.2.2 Sampling Methodology

MGT's sampling methodology for the in-depth interviews, focus groups, and business surveys was to randomly select firms from the Study's master vendor database. Each sample pulled included M/FBE and non-M/FBE firms in each procurement category studied in this report. To avoid contacting businesses multiple times, the database was cross-referenced with previous extractions to ensure that firms did not participate in more than one anecdotal activity. The

master vendor database contained approximately 11,500 unique potential qualitative respondents.

Additionally, M/FBE firms were oversampled to facilitate statistical comparisons with non-M/FBEs. Oversampling is the practice of selecting respondents so that some groups make up a larger share of the survey sample than they do in the population. Knowing that M/FBEs make up a smaller population, oversampling is crucial to acquire accurate and comparable responses.

**Table 7-1** illustrates the overall participation of M/FBE and non-M/FBE firms in all qualitative collection activities. African Americans (50% of participants), Hispanic American or Latino (11% of participants), and Asian Americans (6% of participants), respectively, represented the largest group of participants.

TABLE 7-1. MONTGOMERY COUNTY  
QUALITATIVE BUSINESS DEMOGRAPHICS  
PROPORTION OF RESPONDENTS BY BUSINESS CLASSIFICATION & INDUSTRY

Business Ownership Classification	Construction	Professional Services	Other Services	Goods	Total
African American	34%	55%	56%	45%	50%
Asian American	5%	8%	3%	9%	6%
Hispanic American or Latino	24%	8%	11%	4%	11%
Native American / American Indian	3%	6%	3%	2%	5%
<b>Total M/FBE</b>	66%	78%	74%	60%	73%
Non-Minority Female	14%	11%	10%	22%	13%
<b>Total M/FBE</b>	<b>80%</b>	<b>89%</b>	<b>83%</b>	<b>82%</b>	<b>86%</b>

Source: Qualitative participants from business engagement meetings, in-depth interviews, focus groups, and vendor surveys.

## 7.2.3 Online and Telephone Survey

### 7.2.3.1 METHODOLOGY

The business survey asked respondents to provide information on business ownership, demographics, and structure; work bid upon or performed as prime contractors with the County; work bid upon or performed as subcontractors to the County’s prime contractors; whether the respondent firm bid or performed work in the private sector; and any perceived barriers to doing business with the County or its primes that the respondents believed they had experienced during the study period. The survey was administered via telephone and online survey to a randomly selected list of firms.

Disparity study survey analyses are commonly plagued by sample size limitations, especially where the size of the minority business population is insufficient to permit a valid and representative sample. This problem is compounded when analyses are stratified further by business category. Insufficient sample size can pose problems for the statistical confidence of the results. MGT attempted to collect data in proportion to the distribution of M/FBEs and non-M/FBEs in the relevant market area. Although MGT’s goal is to report data that can satisfy the 95

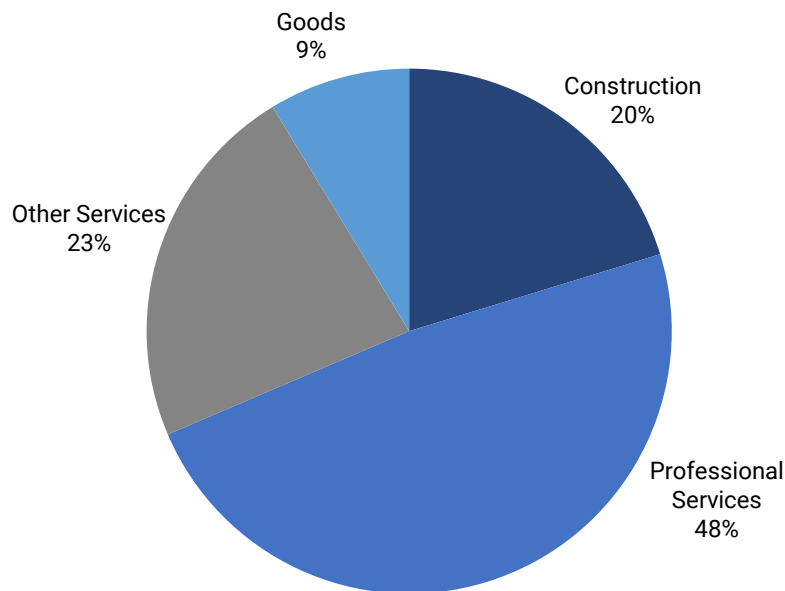
percent confidence level, this does not mean that data should not be reported because of slightly reduced confidence intervals, especially when extreme due diligence has been exercised in attempting to meet the 95 percent standard. The survey of vendors questionnaire is included in this report as **Appendix E, Vendor Survey Instrument**.

The data from the survey responses were analyzed to determine the types of firms represented in the findings included within this chapter. These survey demographics are included as **Appendix F, Vendor Survey Results**.

### 7.2.3.2 DEMOGRAPHICS

This survey collected 528 responses from firm owners and representatives in the County's relevant market area. M/FBE firms accounted for 84 percent or 443 of the total respondents. **Figure 7-1** represents the industries of the survey respondents.

FIGURE 7-1. MONTGOMERY COUNTY  
SURVEY OF VENDORS DEMOGRAPHICS:  
PROPORTION OF RESPONDENTS BY INDUSTRY



Source: Vendor Surveys, MGT and SkyBase7, 2024.



## 7.2.4 In-Depth Interviews with Businesses

### 7.2.4.1 METHODOLOGY

The in-depth interviews consisted of one-on-one interviews with M/FBE and non-M/FBE business owners or representatives to gather information about the firms' experiences in attempting to do, and conduct, business with the County (both directly as a prime and/or as a subcontractor). During the interviews demographic information was gathered such as the firm's primary line of business, ethnicity, gender, education/training background of the owner, number of employees, and gross revenues during selected calendar and/or fiscal years. The in-depth interviews were structured settings in which an interviewer or facilitator used an interview guide (**Appendix G**) to obtain input from participants. The interviews provided more latitude for additional information gathering on issues that are unique to the respondents' experiences and that were not covered in the online or telephone surveys. The interviewer made no attempt to prompt or guide responses from the participants, although follow-up questions were asked to obtain further clarification or information as necessary and appropriate. Before the interviews began, each participant attested that their responses were given freely and were true and accurate reflections of their experience with Montgomery County, its prime contractors, in the marketplace or working with subcontractors.

### 7.2.4.2 DEMOGRAPHICS

The in-depth interviews were conducted with randomly selected firms extracted from the master vendor database and located in the County's relevant market area.<sup>105</sup> MGT cross-referenced the list of firms for the interviews to ensure they were not previously selected for other anecdotal activities. In total, 82 firms were interviewed. The racial and ethnic composition of the firms that completed an interview are illustrated in **Table 7-2**.

TABLE 7-2. MONTGOMERY COUNTY  
IN-DEPTH INTERVIEW DEMOGRAPHICS: M/FBE CLASSIFICATION

Business Ownership Classification	Construction	Professional Services	General Services	Goods	Total
African American	25%	54%	50%	60%	49%
Asian American	17%	10%	13%	20%	12%
Hispanic American or Latino	33%	17%	17%	0%	18%
Native American/American Indian	0%	0%	0%	0%	0%
<b>Total MBE</b>	<b>75%</b>	<b>80%</b>	<b>79%</b>	<b>80%</b>	<b>79%</b>
Non-Minority Females	25%	12%	8%	0%	12%
<b>Total M/FBE</b>	<b>100%</b>	<b>93%</b>	<b>88%</b>	<b>80%</b>	<b>91%</b>

Source: In-Depth Interviews, Chrysalis Collaborations and McMillon Communications, 2024.

## 7.2.5 Focus Groups Methodology

The focus groups were small group conversations with businesses in the relevant geographic market area to gather information about the firms' experiences in attempting to do, and

<sup>105</sup> See Chapter 4, Market Area and Utilization Analyses.

conducting, business with the County (both directly as a prime and/or as a subcontractor). MGT scheduled four focus groups by industry and invited firms to participate. The industries were construction, professional services, and goods and services. The following focus groups were advertised and held virtually:

- Professional Services
  - February 6, 2024, 1:00 p.m. - 3:30 p.m.
- Construction Primes
  - February 6, 2024, 4:00 p.m. - 5:30 p.m.
- Rescheduled for February 23, 2024, 4:00 p.m. - 5:30 p.m. due to low registration for initial date
  - Other Services and Goods
- February 7, 2024, 10:00 a.m. - 11:30 a.m.
  - Rescheduled for February 22, 2024, 10:00 a.m. - 11:30 a.m. due to low registration for initial date
- Construction Subcontractor
  - February 7, 2024, 3:30 p.m. - 5:00 p.m.

### 7.2.5.1 FOCUS GROUPS

Focus groups were conducted with randomly selected firms extracted from the master vendor database and located in the County’s relevant market area. MGT cross-referenced the list of firms for the interviews to ensure they were not previously selected for other anecdotal activities. Invitations were sent out to a random sample of vendors via email multiple times throughout the weeks prior to the scheduled session. MGT emailed the study and focus group information to professional organizations asking them to share with their membership. The sessions were advertised on the study website with a registration link and the County utilized its marketing efforts to advertise the sessions as well. In total, 19 businesses participated. The racial and ethnic composition of the firms that completed an interview are illustrated in **Table 7-3**.

TABLE 7-3. MONTGOMERY COUNTY  
FOCUS GROUPS DEMOGRAPHICS: M/FBE CLASSIFICATION

Business Ownership Classification	Construction	Professional Services	General Services	Goods	Total
African American	0%	57%	100%	75%	63%
Asian American	0%	14%	0%	25%	16%
Hispanic American or Latino	0%	7%	0%	0%	5%
Native American/American Indian	0%	0%	0%	0%	0%
<b>Total MBE</b>	0%	79%	100%	100%	84%
Non-Minority Female	0%	14%	0%	0%	11%
<b>Total M/FBE</b>	<b>0%</b>	<b>93%</b>	<b>100%</b>	<b>100%</b>	<b>95%</b>

Source: Focus Groups, MGT, 2023.

## 7.2.6 Professional Organization Outreach Methodology

Outreach to stakeholders (trade associations and business organizations) was beneficial to the outreach efforts because their assistance extended communication efforts to inform and engage the business community in anecdotal activities. Stakeholders were asked to provide their feedback on the MFD program and on procurement processes from the perspective of the objectives of the organization. In addition, stakeholders were asked to disseminate community meeting notices and encourage their members to participate in the anecdotal data collection activities.

Stakeholders were also asked to provide MGT with a copy of membership or vendor lists which were used to help build the master vendor outreach database. The organizations and associations included in these efforts are identified in **Appendix I, List of Professional Organizations**.

### 7.2.6.1 PROFESSIONAL ORGANIZATION INTERVIEWS

Stakeholders were identified as area trade associations and business organizations that have a stake in the development and growth of area businesses, including minority- and women-owned businesses. MGT invited stakeholders to participate in interviews. The stakeholder organizations that participated in the interviews provide capacity building, advocacy, and technical and/or business development to their members, many of which are M/FBE firms. The common themes expressed by stakeholders included:

- LACK OF SUPPORT
  - A minority focused organization [6] stated, “When pandemic hit, lots of high quality skilled Hispanic workers decided to stop working for others and chose to go on their own (open their own businesses). They start from scratch/zero at this point (not a known quantity). They, as new businesses, don’t have business history & so are turned down because of this lack of ‘experience’ – even though highly skilled. They don’t have connections, funding, credit build up, etc. hurdles. It’s a struggle to be hired as a sub by a Prime.”
- ACCESS TO CAPITAL
  - A business organization [5] stated they have established a loan fund due to their members having issues accessing capital.
- COMMUNICATION
  - A minority focused organization [9] stated, “There is a disconnect in communication of the opportunities to the Black business community.”

## 7.2.7 Online Comments

The opportunity to submit written comments via email provided businesses that weren't sampled for interviews or surveys with a chance to share their anecdotal feedback. Comments were accepted until the conclusion of outreach efforts to ensure these firms had ample time to submit their input. As mentioned, the use of a multi-pronged approach to collecting qualitative data provided a broader reach within the relevant market area.

Submission of online comments was available via email and the Study website for firms to provide their comments regarding their experiences doing business with County, its primes, or in the private marketplace. Any comments received were reviewed for study inclusion.

## 7.3 Anecdotal Comments

The findings below reflect the opinions and perceptions of anecdotal participants characterized in the preceding demographic summary. As such, the themes are drawn from a very broad base of participants reflecting a comprehensive array of viewpoints and experiences regarding work with the County or its primes.

In the successive sections, findings are generally organized around themes of concerns expressed by vendors, with evidence divided between (1) items identified through qualitative input from anecdotal research participants (interviews and open-ended comments) and (2) quantitative summaries of perceptions collected through the custom census business surveys. In some cases, content is limited to one category of findings or the other based on the scope of information collected through either medium.

- The guide below clarifies the source of each excerpt, based on the various categories of anecdotal collections employed: F=Focus Group
- I=In-depth Interview
- V=Vendor Survey

### 7.3.1 Procurement Process Issues and Challenges of M/FBEs

Procurement processes and challenges are frequent issues of concern among vendors in the relevant market. The fair and equal opportunity to bid or propose on the County's contracts is critical to the growth and success of all firms, and particularly those of disadvantaged social or economic circumstances, such as M/FBEs.

Included below is a sampling of comments from participants reflecting specific instances of these barriers:

- An African American female owned [V22] professional services business stated, "The application process is not clear at all. I started the application process, but no one responded to me promptly for my line of work. We missed the deadline. They are slow to respond about anything. The information was not clear about how to complete it, and no one responded before the application deadline. I needed help with the application."
- An African American female owned [V18] professional services business stated, "Montgomery County needs to improve its system when it comes to notifying contractors on dates to submit bids and apply for contracts. Contractors do not have enough notice and time to submit bids."
- A Hispanic American female owned [I6] professional services business stated, "So my experience is it has been very hard for me to get work from Montgomery County, okay? It

has been difficult mostly because I think there is a...there's a tradition that they are...they have companies that they like or that they prefer."

- An Asian American owned [I80] professional services business stated regarding the procurement process, "...The process was complex. The County asked for a lot, i.e., over 100 pages of documentation with lots of forms. It was a rigorous process...The County needs to lessen the burden on the submitter as a small business."
- A Hispanic American owned [F2] professional services business stated, "The RFP's are definitely long, heavy to fill up, and then they vanish and interest disappears and you basically put 80 hours into something that goes absolutely nowhere."

### 7.3.2 MFD Program Opportunities

The MFD program provides support, policy guidelines, compliance, and oversight to ensure minority-, Female, and disabled-owned businesses have a fair opportunity to compete on the County's contracts. The department is committed to cultivating an inclusive and competitive economic environment in Montgomery County by promoting the success of small and disabled-owned businesses.

Included below is a sampling of comments from participants reflecting specific instances of barriers:

- An African American female owned [V11] professional services business stated, "I stopped submitting bids because the County never gave my company the bid. When I spoke to the staff about my issues and concerns about the bidding process, they did not want to expand my business with bidding contracts, and they were very rude."
- A Hispanic American female owned [V41] professional services business stated, "Since COVID, we have not been receiving the amount of work required to sustain our small business. The contracts go to the larger businesses. It's been really challenging."
- An Asian American owned [V38] goods business stated, "I've applied a few times and just stopped because it put a bad taste in my mouth. They put all these jobs out there with MBE goals in mind, when they know good and well they are going to select the larger prime. I can't compete with the likes of Sysco and US Foods. Everything is all price-driven. When I reach out and ask about where I stand, I never get an answer, so I stopped following up."
- An African American owned [I40] professional services business stated, "I would lean towards saying suspicion of discrimination as why we stopped going after Montgomery County contracts. A few years ago, we submitted a bid with Montgomery County itself for a small contract, we had no response, or feedback on bid, I felt like my company was competing in arena where my company was not well positioned to favorably gain contract. Not being in "In group", not enough influence, or being looked down on – this is why we stopped going for Montgomery County jobs."
- An African American female owned [F1] goods business stated their contract was cancelled because the agency determined the needed supplies on the original bid was not enough. "So, our company tried to work with the agency to inquire what additional

products would be needed and how we could potentially add those products as an addendum to the contract award and the agency just was unwilling to do that. We were sent a letter asking us to basically cancel the contract 2 weeks prior to the beginning of when we were supposed to start the work.”

### 7.3.3 Financial Barriers

Limited access to capital and inconsistent cash flow impacts M/FBE and small firms’ ability to successfully complete projects, apply for and receive bonds, hire employees, and operate their businesses. Similarly, cash flow becomes a barrier for M/FBE firms, particularly smaller M/FBE firms, because it limits the amount of work they can bid on. As the results in **Chapter 6 Private Sector Analysis** show, M/FBEs consistently earn less wages and less business earnings than their non-M/FBE counterparts. The anecdotes add credence to the assertion that with less capital M/FBEs face financial barriers to operating their businesses. Included below is a sampling of comments on this barrier.

- An African American owned [V12] construction business stated, “I wish that Montgomery County would give more opportunities to small businesses. Make the conditions less difficult to obtain financial credit, which would allow us to qualify for contracts.”
- An African American owned [I72] general services business described they applied for credit to exponentially grow the company and although they were approved, the funding was never enough. They did not receive the full requested amount. They believed race/ethnicity played a role in the outcome.
- A Hispanic owned [I14] professional services business stated regarding to turning down offered credit, “Well, it’s never cheap enough. We were successful. The problem I see now with the credit world is the cost of money. This is where being a small company really hurts because a large company can do a lot of different things. When we applied for credit, at least in the last couple of months to be honest with you, it was painful. They would loan me the money, but the cost was just too high. I said, maybe we’ll try next year.”

### 7.3.4 Prime Contracting Behavior

Subcontracting offers M/FBE firms a way to grow their businesses. Primes that treat M/FBEs unfairly or deny the opportunity to bid on contracts impacts the local economy but also potentially negatively impacts the growth of M/FBEs in the marketplace. Specific issues and challenges noted in this area include:

- A Hispanic American owned [I13] construction business stated regarding working with primes, “I always have to go into a legal email battle with people rather than just being a, ‘Let’s talk, and let’s get this over with.’ When I go to the project manager and say, ‘Hey, I was awarded a million dollars for this project, but, so far, we’ve been on the project six months, and I’ve only worked 100,000, but I see you’re using other haulers on this project, and they’re not part of the minority.’ So, I had to go out to the job site, I had to take pictures, I have to go send those emails. And by the time someone from compliance gets back to me, it’s like, ‘Oh, I’m sorry, we already use these people. We only have this much work left.’ And that’s just been the caveat with this business for 17 years, it’s monopolized.”

- An Asian American owned [137] professional services business stated, “We had experience being asked to be sub for a prime, who asked us to do level of work that was more than our capabilities. Once we told them we couldn’t do it, they asked us to write a note (showing they attempted to get small business) to them to say we were contacted and we responded that we couldn’t do that work – WE DID NOT WRITE THE NOTE. The prime could have done the work themselves, so possibly they were going to use the note to say they tried, then take the work on themselves.”
- An Asian American female owned [123] general services business stated in relation to primes not following up after a bidders’ conference, “We send out emails, we call, and follow the relationship we build in the pre-bid conference, we text, nothing, no response at all.”

### 7.3.5 Discrimination and Disparate Treatment

This section examines the type of discriminatory treatment encountered by M/FBEs working with the County, the County’s prime vendors, or in the County’s marketplace. A trend for firms that participated in interviews, surveys, or focus groups was the indication that discrimination is prevalent and happens frequently in subtle ways and even to their peer competitors in the marketplace. Included below is a summary of survey of vendors responses as to whether they encountered disparate treatment or discrimination working with the County, or with the County’s primes.

Overall, indications of discriminatory treatment were reported highest by Hispanic American firms, with an overall rate of 17 percent. Across the other groups, the reports were: Non-Minority females (10 percent), African Americans (7 percent), Asian Americans (0 percent), and Native American (0 percent). All M/FBE groups except Native Americans indicated experiencing some form of discrimination and/or disparate treatment compared to nearly no indication for non-M/FBEs.

**Exclusion from Business Networks and Events:** There was a noticeable trend where M/FBEs faced exclusion from business networks and events due to the prevalence of a “good old boy network.” This network, consisting of prime contractors and subcontractors, tends to favor relationships over merit, often selecting firms of the same race, ethnicity, or gender. For firms seeking opportunities, this exclusionary practice affects M/FBEs, with approximately 8% reporting such discrimination.

**Price Discrimination by Suppliers:** Price discrimination poses another challenge for M/FBEs, albeit to varying degrees. M/FBEs reported facing price discrimination at 4%. Hispanic American businesses report the highest incidence at 8%. This practice undermines the competitiveness of M/FBE firms in the marketplace.

**Bid Shopping:** Bid shopping is an additional challenge faced by M/FBEs, with primes disclosing the low bidder’s price to others, often to obtain even lower bids. This practice is particularly pronounced among Non-Minority female-owned businesses, where 5% reported being affected.

**Discrimination During Execution of Work:** While executing their work, M/FBEs reported being subjected to various forms of discrimination, including racial slurs, workplace violence,



intimidation, harassment, or sabotage. Non-Minority female owned businesses report the highest incidence at 10%, followed by Hispanic American-owned businesses at 8%.

**Double Standards in Performance Measurement:** M/FBEs also face challenges related to double standards in performance measurement and inspections of their work. Inspectors often target minority and female-owned businesses unfavorably, while non-minority firms escape similar scrutiny. This discrepancy in treatment undermines the credibility and fairness of regulatory processes, with 7% of minority owned businesses reporting this experience. Hispanic Americans reported the highest incidence at 17%

**Refusal to Deal with Minorities or Females:** Another significant barrier is the outright refusal by agencies, primes, suppliers, and/or customers to engage with M/FBEs based on their race, ethnicity, or gender. Approximately 4% of M/FBEs report facing such discrimination, with Hispanic American-owned businesses experiencing the highest incidence of this occurrence.

**Denial of Bidding Opportunities:** Finally, M/FBEs encounter denial of bidding opportunities based on their race, ethnicity, or gender, further limiting their access to economic opportunities. While the overall incidence is relatively low, at 2% this practice perpetuates systemic inequalities in the business landscape. While firms had not been denied opportunities to bid, disparate or discriminatory treatment and additional barriers has alluded their ability to successfully secure opportunities.

Further testimonials of M/FBEs indicating such experiences were as follows:

- An African American owned [174] professional services business described they have experienced discrimination when trying to work or working on County contracts. They expressed White, Asian, and Indian IT companies are seen as the ‘cream of the crop’ and not African American businesses. On a call, there was an older White man talking down to their team. He said, ‘When you start a business, you’re going to need to work on weekends.’”
- An African American female owned [177] general services business described that she was illegally removed from a project. They [the County] have tried to disqualify her by accusing her of not using authentic parts, but she was able to show them her receipts to refute their claim. She stated that she experiences a significant amount of violence and aggression on a daily basis. Her pricing is higher than men’s. The perception is it’s “almost like punishing” her for being a woman operating in Montgomery County.

### 7.3.6 Barriers to Doing Business

Firms that participated in the qualitative data collection who also work in the private sector as primes noted that relationships are the foundation of their success. However, M/FBE subcontractor firms were not as fortunate in developing such relationships because the private sector does not historically have M/FBE goal requirements on their contracts, which means that without goals, primes hire M/FBE subcontractors for their projects at lower rates than their non-M/FBE counterparts. In *Builders Association of Greater Chicago v. County of Chicago*<sup>106</sup>, the court

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<sup>106</sup> *Builders Association of Greater Chicago v. City of Chicago*, 298 F.Supp. 2d 725, 737 (N.D. Ill. 2003).

held that the failure of prime contractors even to solicit qualified M/FBE firms is a “market failure” that is significant evidence in helping to establish a government’s compelling interest in remedying such failures.

Specifically, survey respondents were asked whether prime vendors who contract with their company on public sector projects with M/FBE goals do so on private sector projects without M/FBE goals. The survey sought to determine if prime behavior was the same when projects applied M/FBE goals versus projects without goals. Participants overwhelmingly agreed that primes who work with their company on public sector contracts with goals did not solicit M/FBE firms for private projects without goals. 14 percent of M/FBEs responded they are not solicited to bid on projects without goals compared to 7 percent of non-M/FBEs African Americans reported the highest incidence at 267% higher than non-M/FBEs.

The top three barriers for all qualitative participants were:

- Limited communication from the County before, during, and after the bidding process.
- Perception of informal networks and preferred businesses winning bids.
- Lack of access to capital to maintain or improve business.

## 7.4 Suggested Remedies from Participants

All qualitative data collection included the opportunity for participants to express their ideas and recommendations for improving the procurement process, MFD Program, or to increase M/FBE participation. A few recurring ideas and/or suggested remedies provided by participants are:

- The County should offer feedback to businesses on their bids for improvement
- Allow businesses to showcase their services to the County
- Increase transparency and communication on current bids


## 7.5 Qualitative Summary

Anecdotal data was gathered from a broad spectrum of businesses and industries using various methods. Many M/FBEs pointed to informal networks, limited access to capital, limited communication from the County, and similar factors as obstacles in their dealings with the County. Some M/FBEs reported feeling discriminated against by the County or its prime contractors based on race, ethnicity, or gender, citing remarks or a lack of contracting opportunities as evidence. Additionally, M/FBEs frequently expressed concerns about the lack of support from the County, challenges in competing with larger businesses for contracts, and frustrations with the prolonged bidding process. The insights collected from the diverse business group serve as a foundation for developing policies and procedures that address the needs of businesses in the area.

# 8 Findings, Commendations, and Recommendations

## 8.1 Introduction

Montgomery County (County) engaged MGT Impact Solutions (MGT) to conduct its **Disparity Study** to determine if there is a disparity between the number of viable minority- and woman-owned businesses that are ready, willing, and able to perform Construction, Professional Services, Other Services and Goods contracts, and the numbers of these same business types who are actually participating in these same types of contracts with Montgomery County.



<b>Chapter Sections</b>
<b>8.1 Introduction</b>
<b>8.2 Findings</b>
<b>8.3 Commendations and Recommendations</b>
<b>8.4 Conclusions</b>

Within the context of studying the County’s procurement practices, the study was conducted in a manner consistent with disparity study best practices, controlling local legal precedents, and constitutional law in order to properly advise the County about the legal basis for potential remedies, if necessary. MGT’s methodology included a review of disparity studies legal framework, a policy and procedures review, analyses of utilization, availability, and statistical disparity, anecdotal research, private sector analyses, and findings, commendations, and recommendations.

The results of this study and conclusions drawn are presented in detail in **Chapters 3** through **7** of this report. This chapter summarizes the evidence on the central research question: *Is there factual predicate evidence for the continuation of a race- and gender-conscious M/FBE program for the County?* MGT’s findings and evidence are based on fact finding to analyze County procurement trends and practices between July 1, 2015 through June 30, 2021; evaluation of the impact of race-and gender-neutral remedial efforts; and evaluation of options for future program development. *MGT found sufficient evidence of disparity to recommend the continuation of a narrowly tailored race- and gender-based procurement program to address identified disparities.*

## 8.2 Findings

The subsequent sections highlight key findings of the Study. These pivotal insights shed light on the underutilization of M/FBEs compared to their availability in the marketplace. As such, the County should further establish initiatives and processes to remedy past discrimination against such firms.

### 8.2.1 Finding A: Relevant Geographic Market Areas (*Chapter 4, Appendix A*)


Expenditure data was utilized to determine the Relevant Geographic Market Area for the study.<sup>107</sup> This included both expenditures to prime contractors and subcontractors. Based on the market area analysis results for each business category, the recommended relevant market area are the

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<sup>107</sup> Chapter 4, Market Area and Availability Analyses

12 counties within the Montgomery County Market Area (“Market Area”), as seen in **Figure 8-1** below.

FIGURE 8-1. RELEVANT GEOGRAPHIC MARKET AREA



<b>Montgomery County, MD Relevant Market Area</b>	
District Of Columbia, DC	District Of Columbia, DC
Anne Arundel County, MD	Frederick County, MD
Baltimore City, MD	Howard County, MD
Baltimore County, MD	Montgomery County, MD
Calvert County, MD	Prince George’s County, MD
Carroll County, MD	Fairfax County, VA

The spending in the Relevant Geographic Market Area is represented in

**Table 8-1.** The product market represents the spending by North American Industry Classification System (NAICS). Overall, City procurements occur in **203** NAICS industry groups. In Construction, County procurements occur in **56** NAICS industry groups. In Professional Services, County procurements occur in **95** NAICS industry groups. In Other Services, County procurements occur in **108** NAICS industry groups. In Goods, County procurements occur in **99** NAICS industry groups. The City's product markets are shown in **Appendix A, Detailed Product Market Analysis**.

TABLE 8-1.  
MARKET AREA ANALYSIS, CONTRACTS DISTRIBUTION OF DOLLARS BY BUSINESS CATEGORY,  
COUNTY MARKET AREA

<b>CONSTRUCTION</b>	<b>Amount</b>	<b>Percent</b>
<i>Inside MONTGOMERY COUNTY, MD RGMA</i>	\$962,872,013.89	88.26%
Outside MONTGOMERY COUNTY, MD RGMA	\$128,085,003.62	11.74%
<b>CONSTRUCTION, TOTAL</b>	<b>\$1,090,957,017.51</b>	<b>100.00%</b>
<b>PROFESSIONAL SERVICES</b>	<b>Amount</b>	<b>Percent</b>
<i>Inside MONTGOMERY COUNTY, MD RGMA</i>	\$766,080,080.91	81.59%
Outside MONTGOMERY COUNTY, MD RGMA	\$172,826,822.24	18.41%
<b>PROFESSIONAL SERVICES, TOTAL</b>	<b>\$938,906,903.15</b>	<b>100.00%</b>
<b>OTHER SERVICES</b>	<b>Amount</b>	<b>Percent</b>
<i>Inside MONTGOMERY COUNTY, MD RGMA</i>	\$659,761,407.18	69.19%
Outside MONTGOMERY COUNTY, MD RGMA	\$293,723,976.39	30.81%
<b>OTHER SERVICES, TOTAL</b>	<b>\$953,485,383.57</b>	<b>100.00%</b>
<b>GOODS</b>	<b>Amount</b>	<b>Percent</b>
<i>Inside MONTGOMERY COUNTY, MD RGMA</i>	\$275,889,463.06	54.94%
Outside MONTGOMERY COUNTY, MD RGMA	\$226,279,071.26	45.06%
<b>GOODS, TOTAL</b>	<b>\$502,168,534.32</b>	<b>100.00%</b>
<b>ALL BUSINESS CATEGORIES</b>	<b>Amount</b>	<b>Percent</b>
<i>Inside MONTGOMERY COUNTY, MD RGMA</i>	\$2,664,602,965.04	76.45%
Outside MONTGOMERY COUNTY, MD RGMA	\$820,914,873.51	23.55%
<b>ALL BUSINESS CATEGORIES, TOTAL</b>	<b>\$3,485,517,838.55</b>	<b>100.00%</b>

### 8.2.2 Finding B: Availability Estimates (Chapter 4, Appendix C)

A reliable estimation of the number of firms willing and able to provide each of the respective services under the examination scope is an incumbent element in the determination of disparity. Post-Croson case law has not prescribed a single approach to deriving firm availability, and agencies have used various means to estimate pools of available vendors that have withstood legal scrutiny.

MGT calculated availability based on a “custom census” approach. This approach is the most accurate for calculating availability at its most granular level. An in-depth explanation of this approach is provided in **Chapter 4, Market Area and Availability Analyses**. Detailed availability results by business category and 4-digit NAICS code are provided in Appendix C. The availability estimates aggregated by all procurement categories are illustrated in **Table 8-2**.

TABLE 8-2 - ESTIMATION OF AVAILABLE FIRMS, ALL PROCUREMENT CATEGORIES

BUSINESS OWNERSHIP CLASSIFICATION	% OF AVAILABLE FIRMS
African Americans	11.58%
Hispanic Americans	6.83%
Asian Americans	5.25%
Native Americans	0.71%
<b>Total MBE Firms</b>	<b>24.37%</b>
Nonminority Females	18.14%
<b>Total M/FBE Firms</b>	<b>42.52%</b>
Unclassified Firms	57.48%

Source: Custom Census Analysis. Study Period: July 1, 2015, through June 30, 2021

### 8.2.3 Finding C: M/FBE Utilization (Chapter 5, Appendix C)

In **Table 8-3**, the utilization analysis shows that Unclassified Firms are utilized at higher rates than their M/FBE counterparts. The County’s utilization with M/FBE firms was 22.07 percent while Unclassified Firms totaled 77.93 percent. MBE utilization represented 16.34 percent of the total dollars analyzed. The highest utilization rates among M/FBE classifications included Nonminority Female firms accounting for 13.51 percent of dollars paid.

TABLE 8-3 - UTILIZATION ANALYSIS BY BUSINESS OWNERSHIP CLASSIFICATION ALL PROCUREMENT CATEGORIES

BUSINESS OWNERSHIP CLASSIFICATION	ALL PROCUREMENT CATEGORIES	
	Dollars (\$)	Percent (%)
African Americans	\$241,194,355.63	6.92%
Asian American	\$32,419,844.86	0.93%
Hispanic Americans	\$291,477,444.49	8.36%
Native Americans	\$4,566,190.16	0.13%
<b>Total MBE Firms</b>	<b>\$569,657,835.14</b>	<b>16.34%</b>
Nonminority Females	\$470,766,268.10	13.51%
<b>Total M/FBE Firms</b>	<b>\$769,372,453.87</b>	<b>22.07%</b>
Unclassified Firms	\$2,716,145,384.68	77.93%
<b>TOTAL</b>	<b>\$3,485,517,838.55</b>	<b>100.00%</b>

Source: MGT developed a Master Utilization Database based on County’s spending between July 1, 2015, through June 30, 2021

### 8.2.4 Finding D: Disabled-Owned Business Enterprise Utilization (Chapter 5)

The utilization analysis shows that the Disabled-Owned Business Enterprises (DOBE) utilization amounted to \$237,343.63, or less than a half percent of total payments analyzed. The data collection and preparations included identifying firms that classify as owned by persons with disabilities. Data sources that identify these business ownership classifications were limited because it is not maintained as broadly as minority and female data sources are. Being that there is an overlap of the race, ethnicity, and gender classifications, utilization is shown at the total DOBE classification and not by race, ethnicity, or gender.



TABLE 8-4 - UTILIZATION ANALYSIS BY BUSINESS OWNERSHIP CLASSIFICATION  
DISABLED-OWNED BUSINESS ENTERPRISES

BUSINESS OWNERSHIP CLASSIFICATION	ALL	CONSTRUCTION	PROFESSIONAL SERVICES	OTHER SERVICES	GOODS
<b>DOBE</b>	\$237,343.63	\$0.00	\$237,343.63	\$0.00	\$0.00
BUSINESS OWNERSHIP CLASSIFICATION	ALL	CONSTRUCTION	PROFESSIONAL SERVICES	OTHER SERVICES	GOODS
	(%)	(%)	(%)	(%)	(%)
<b>DOBE</b>	0.01%	0.00%	0.01%	0.00%	0.00%

Source: MGT developed a Master Utilization Database based on County’s spending between July 1, 2015 through June 30, 2021

### 8.2.5 Finding E: Disparity (Chapter 5 and Appendix C)

This section includes the results of the disparity ratios calculated in **Chapter 5**. MGT’s disparity index methodology yields an easily calculable value, understandable in its interpretation, and universally comparable. MGT applies two significant tests to determine statistical significance: (1) whether the disparity index is less than or equal to 80 percent of respective M/FBE availability, which is labeled “substantial disparity,” and (2) whether the disparity index passes the t-test determination of statistical significance. In cases where one, or especially both, measures hold true, a remedy is typically deemed justifiable by courts, making these results critical outcomes of the subsequent analyses.

The overall results show disparity for minority and nonminority female, collectively. Statistically significant disparity was identified collectively for minority and nonminority females within Goods and Other Services. Detailed disparity results by business category and 4-digit NAICS code are provided in **Appendix C, Utilization, Availability, and Disparity by NAICS Codes**.

TABLE 8-5 – DISPARITY ANALYSIS SUMMARY

Business Ownership Classification	All	CONSTRUCTION	PROFESSIONAL SERVICES	OTHER SERVICES	GOODS
<b>African Americans</b>	<b>Disparity</b>	<b>Disparity</b>	<b>Disparity</b>	No Disparity	<b>Disparity</b>
<b>Asian Americans</b>	<b>Disparity</b>	<b>Disparity</b>	<b>Disparity</b>	<b>Disparity</b>	<b>Disparity</b>
<b>Hispanic Americans</b>	No Disparity	No Disparity	No Disparity	<b>Disparity</b>	No Disparity
<b>Native Americans</b>	<b>Disparity</b>	<b>Disparity</b>	<b>Disparity</b>	<b>Disparity</b>	<b>Disparity</b>
<b>Total MBE Firms</b>	<b>Disparity</b>	<b>Disparity</b>	<b>Disparity</b>	Disparity	Disparity
<b>Nonminority Females</b>	<b>Disparity</b>	<b>Disparity</b>	<b>Disparity</b>	<b>Disparity</b>	No Disparity
<b>Total M/FBE Firms</b>	<b>Disparity</b>	<b>Disparity</b>	<b>Disparity</b>	<b>Disparity</b>	No Disparity
<b>Unclassified Firms</b>	No Disparity	No Disparity	No Disparity	No Disparity	Disparity

**BOLD** Indicates a substantial level of disparity, which is a disparity index below 80.00. **Disparity** indicates statistically significant disparity.

### **8.2.6 Finding F: Private Sector Disparities in Census SBO and ABS Data (Chapter 6)**

Analysis of the U.S. Census 2012 SBO data, 2017 ABS data, and the PUMS 2016-2020 data demonstrate, in response to the overarching research question driving this analysis, that marketplace discrimination exists for M/FBE firms operating in the private sector within Montgomery's marketplace. Thus, based on the courts' guidance in this domain, Montgomery has a compelling interest in continuing its current M/FBE program (referred to as MFD for the County).

To the more specific research questions:

- Findings from the U.S. Census 2012 SBO and 2017 ABS data indicate substantial disparities for most M/FBE firms across industry sectors resembling the procurement categories identified for this study.
- Findings from the 2016-2020 PUMS data indicate that:
  - Minority and women wages were significantly less in 2016-2020 than those of nonminority males, holding all other variables constant.
  - M/FBE firms were significantly less likely than nonminority males to be self-employed.
  - If they were self-employed, most M/FBE firms earned significantly less in 2016-2020 than self-employed nonminority males, holding all other variables constant.

Analysis of observed vs. predicted self-employment rates show that marketplace discrimination impacted these rates. Further, this analysis indicates that holding all factors consistent, race, ethnicity, and gender play a role in the lower level of self-employment for M/FBEs.

### **8.2.7 Finding G: Disparities in Individual Wages, Business Earnings, Self-Employment Rates (Chapter 6)**

The analyses of self-employment rates and 2016-2020 ACS self-employment earnings revealed general disparities, consistent with business market discrimination, between minority and nonminority self-employed individuals whose businesses were located in the Montgomery marketplace.

The analysis of observed versus predicted self-employment rates showed that marketplace discrimination impacted these rates. Further, this analysis indicates that holding all factors consistent, race, ethnicity, and gender play a role in the lower level of self-employment for M/FBEs.

### **8.2.8 Finding H: Qualitative Results (Chapter 7)**

The collective qualitative and anecdotal activities gathered input through vendor surveys, in-depth interviews, and business engagement meetings, business owners or representatives in the Relevant Market Area regarding their opinions and perceptions of how discrimination has

affected their experiences working with County or with primes as subcontractors on County projects. Together, the County and MGT executed various outreach methods including direct emails, postcards, personal contact, and more to encourage business participation in the study.

Anecdotal data was gathered from a broad spectrum of businesses and industries using various methods. Many M/FBEs pointed to informal networks, limited access to capital, limited communication from the County, and similar factors as obstacles in their dealings with the County. Some M/FBEs reported feeling discriminated against by the County or its prime contractors based on race, ethnicity, or gender, citing remarks or a lack of contracting opportunities as evidence. Additionally, M/FBEs frequently expressed concerns about the lack of support from the County, challenges in competing with larger businesses for contracts, and frustrations with the prolonged bidding process. The insights collected from the diverse business group serve as a foundation for developing policies and procedures that address the needs of businesses in the area

## **8.3 Commendations and Recommendations**

Montgomery County is applauded for its ongoing commitment to investing resources in fostering M/FBE growth and development. The recent Disparity Study conducted by MGT has played a pivotal role in this endeavor by meticulously identifying existing initiatives aimed at promoting inclusive opportunities for businesses within the community. Through this study, the County has demonstrated its dedication to creating an environment that fosters diversity, equity, and inclusion, thus paving the way for a more vibrant and thriving local economy.

Therefore, the remedies are suggested to encourage the participation of small, minority-owned, woman-owned, physically disabled businesses in government contracting and procurement. The majority of the forthcoming suggestions are derived from a combination of various discoveries and may not exclusively reflect or address a single finding. The practices identified below have worked well in certain localities, though some have not been as effective as others. Effectiveness can depend on a variety of factors. As such, it is difficult to determine whether a particular policy or practice is solely responsible for the success of a program. Most of the following commendations and recommendations are based on multiple findings and do not necessarily tie to one finding.

### **8.3.1 Recommendation A: Expand Race- and Gender-Neutral Initiatives**

The County is commended for incorporating various layer of race- and gender-neutral initiatives in its procurement process. Initiatives such as the Local Small Business Reserve Program, Local Business Preference Program, Local Business Subcontracting Program, and Disabled-Owned Business Enterprise Program. Small and Local Business Program initiatives have more flexibility to increase the economic mobility of businesses in the marketplace where the County does business. Race- and gender-neutral programs also offer more flexibility for the inclusion of minority and female businesses to engage in procurement opportunities.

As such, the County should expand the small and local business initiatives to include the Maryland Department of Transportation Disadvantaged Business Enterprise (DBE) certified firms as part of their outreach and engagement for procurement opportunities. The County should also incorporate contract specific goals in procurements where these initiatives are enacted.

### 8.3.2 Recommendation B: Expand and Enhance Data Collection

Within this report, MGT detailed the level of effort it took to combine multiple data sources for an accurate analysis of the utilization. It was identified during the study that there are significant gaps and processes that are lacking in order for the latter to be the case. Improved data collection will allow the County to understand its true economic impact of the diverse businesses in the market area and produce more detailed reports on the program's utilization. Agencies achieve comprehensive data collection through the use of an e-procurement system that integrates contract compliance to streamline processes and reduce manual workloads. The County also should incorporate and regulate a process to collect all subcontractor data to include non-minority, LSBP, DBE, etc. for comprehensive analysis as part of the contract with vendors. Improving techniques for collecting subcontractor data requires that there is consistency across departments, which aids in internal and external reporting and future disparity studies.

### 8.3.3 Recommendation C: Business Outreach and Engagement

Montgomery County should be commended for its extensive and creative outreach to encourage M/FBE and disabled businesses to engage in the County's procurement opportunities. The County hosts several events such as procurement fairs where firms learn about upcoming bids, how to do business with Montgomery County workshops, and a recurring online open house session with procurement staff. These are a few examples of the extensive outreach to M/FBE and disabled firms that the County hosts.

Anecdotal comments by businesses indicated that the County's procurement process as opaque and somewhat of a closed shop, which may not be a fair representation of the actual process. Knowledge of contracting opportunities is the first step in gaining trust with the business community that procurement is open and transparent. Contracting opportunities can be posted on the County's website as well as emailed to M/FBE to encourage bidding on contracts. The County should consider administering a short survey to understand how firms learn about the outreach sessions, if the firms that attend outreach events, bid on County opportunities even as subcontractors, and which of the sessions are useful for their business growth.

To address technical and professional development of M/FBEs, the County should work with professional organizations to facilitate business growth workshops and to improve public understanding of the procurement process. Better education on the procurement process should be a frequent workshop offered directly by the County. need for more educational outreach to the vendor community, including vendor fairs and meetings, to clarify the procurement process and address common questions and concerns.

### 8.3.4 Recommendation D: Narrow Tailoring

Modifications to the County's MFD Program to address the findings of this study should be narrowly tailored to specifically address the identified disparity in accordance with guidance from case law regarding race- and gender-based procurement programs. Developments in court cases involving federal disadvantaged business enterprise (DBE) programs provide important insight into the design of local M/FBE programs. Federal courts have consistently found DBE regulations in 49 CFR 26 to be narrowly tailored. The federal DBE program has the features in [Table 8-6](#) that contribute to this characterization as a narrowly tailored remedial procurement preference

program. The County should adopt these features in any new or revised M/FBE program policies and procedures.

TABLE 8-6 - NARROWLY TAILORED M/FBE PROGRAM FEATURES

NARROWLY TAILORED GOAL-SETTING FEATURES	DBE REGULATIONS
The County should not use M/FBE quotas.	49 CFR 26(43)(a)
The County should use race- or gender-conscious set-asides only in extreme cases.	49 CFR 26(43)(b)
The County should meet the maximum amount of M/FBE goals through race-neutral means.	49 CFR 26(51)(a)

### 8.3.5 Recommendation E: Expand the Division of Business Relations and Compliance Staff

The Division of Business Relations and Compliance plays a crucial role in fostering economic mobility for businesses in the marketplace. Key responsibilities include coordinating with County departments to identify M/FBE opportunities, contract compliance, goal setting, etc.

The presence of more Business Relations and Compliance personnel is essential for extending contract compliance, goal setting, and outreach to the business community. The necessity for more staff and enhanced system support to effectively manage the growing workload and complexity of tasks associated with economic growth of small, minority, and female businesses.

### 8.3.6 Recommendation F: Implement a Graduation Program

The utilization analysis identified Hispanic American overutilization in multiple procurement categories in the study where larger M/FBE firms were successfully winning multiple large prime contracts. The County should consider a graduation program for M/FBE firms once they have scaled their businesses to the point where there are no barriers to competing. The County should consider one-half of the Small Business Administration size standards to determine whether a firm graduates out of its program. However, this standard may not accurately reflect the economic landscape, and challenges faced by businesses at the local level. Local size standards can be crafted to align with the economic conditions, industry makeup, and business environment of the Montgomery County region. This ensures that the graduation criteria are more relevant and reflective of the challenges and opportunities faced by M/FBE firms operating within the community. Furthermore, tailoring the M/FBE graduation criteria to local dynamics can aid in stimulating economic growth and supporting small businesses. This ensures that contracting opportunities are accessible to a broader range of local vendors, thereby maximizing the socio-economic impact of the County’s spending. These standards can be reviewed during recertification or a routine audit to confirm continued eligibility in the County’s programs.

### 8.3.7 Recommendation G: Adopt Annual Aspirational M/FBE Goals

Estimates of M/FBE availability in the County’s market area provide the starting point for countywide annual aspirational goals for contracting across all industry categories. As the County continues to review its achievement toward the annual aspirational goals, it should assess whether race- and gender-based remedies are necessary for all industry categories. Proposed goals are presented in **Table 8-7**. The proposed goals are based on a weighted average of utilization and availability. Aspirational goals are based on an accumulation of all spending within the County and should not be applied rigidly to every individual procurement. Future adjustments to countywide aspirational goals should be based on relative availability and adjusted as needed.

TABLE 8-7 – M/FBE ASPIRATIONAL GOALS

Procurement Category	Current Goals	Study Recommended Goal
Construction	16%	22%
Professional Services	19%	25%
Other Services	23%	24%
Goods	8%	10%

### 8.3.8 Recommendation H: M/FBE Program Sunset

The County should continue the review of their M/FBE program to determine if an evidentiary basis to continue these programs exists every five years and that it should be continued only if there is strong evidence that discrimination continues to disadvantage M/FBEs in the relevant market area. The Program should be reevaluated prior to the sunset date in 2030.

## 8.4 Conclusions

Montgomery County is commended for its dedication to economic inclusion of small, minority, and female businesses. M/FBE utilization exceeds the County’s 2023 goals, however, disparity exists in many categories and with multiple business classifications. A well-rounded disparity study has three major components: 1) quantitative, 2) qualitative, and 3) private sector analysis. The composite of these three components is important to fully assess marketplace discrimination. This evidence of passive discrimination stands alongside the disparities observed in public sector contracting to illustrate that substantial discriminatory inequities that exist in the County’s Market Area, supporting the key finding that the County still has a compelling interest in implementing remedies to address these gaps.