

EXECUTIVE SUMMARY

E.1 INTRODUCTION

E.1.1 OVERVIEW OF SCOPE OF WORK

The San Francisco Bay Area Rapid Transit District (BART) has established a Disadvantaged Business Enterprise (DBE) Program, consistent with the requirements of 49 Code of Federal Regulations (CFR) Part 26. BART has also established a Non-Discrimination for Subcontracting Program for Non-Federally Funded Contracts. To support the District's DBE Program and to determine Availability analysis for its Non-Discrimination Program, BART commissioned Miller³ Consulting, Inc. (M³ Consulting) on May 18, 2015 to conduct a Disparity Study (the Study) by performing the scope of work outlined below:

- Investigate whether or to what extent discrimination exists in the contracting industry relevant to BART contracting activities in the BART market area;
- Satisfy all legal requirements for such a study established by all relevant judicial precedent including a determination whether statistically significant disparities exist regarding DBE utilization in the contracting industry relevant to BART contracting activities in the BART market area;
- Provide data to support the District's Disadvantaged Business Enterprise (DBE) program, including setting of its Triennial DBE Goal, Contract Specific DBE goals and Small Business Entity (SBE) goals under 49 CFR Part 26; and,
- Provide data on the availability of Small Business Entities (SBEs), Minority and Women-Owned businesses in the BART market area to support the District's Non-Discrimination Program for Subcontracting on Non-Federally Funded Contracts (ND Program) and Small Business Elements of the District's DBE Program (SB Elements).

M³ Consulting conducted this study consistent with current legal and regulatory standards applicable to BART in the 9th Circuit and the State of California, including *Western States Paving Co., Inc., v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005), Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), State of California laws, including Proposition 209 and various other federal/state/local/BART sources.

E.1.2 OVERVIEW OF BART'S CURRENT RACE/GENDER-CONSCIOUS AND RACE AND GENDER-NEUTRAL PROGRAMS

BART administers four programs targeted to promote inclusion of DBEs and SBs and one program that ensures that primes do not discriminate or give preference in the award of subcontracts based on race, national origin, color, ethnicity or gender. The four programs are:

- Disadvantaged Business Enterprise (DBE) Program;
- DBE Program Small Business Elements (SBE);
- Small Business (SB) Program; and,
- Non-Discrimination for Subcontracting Program.

An overview of each program is provided below.

A. Disadvantaged Business Enterprise (DBE) Program (Federally Funded)

As a recipient of federal funds from the Federal Transit Administration (FTA), BART's Disadvantaged Business Program has been developed pursuant to the requirements of 49 CFR Part 262. The purpose of the DBE program is "to create a level playing field on which a Disadvantaged Business Enterprise ("DBE") can compete fairly for federally funded agreements, contracts and subcontracts, including but not limited to construction, procurement and proposal contracts, professional and technical services agreements and purchase orders."³

Based on the results of the 2009 Disparity Study, BART could establish DBE goals on Federally Funded Construction contracts only. For Procurement and Professional Services, including Architectural and Engineering, BART utilized exclusively race and gender-neutral efforts.

B. DBE Program Small Business Elements (SBE)

Under the DBE Program Small Business Elements, BART includes all reasonable steps to eliminate obstacles to small business participation on Federally funded contracts. SBE program efforts can include:

- Race and gender-neutral SBE goals on Federally Funded contracts;

² 49 CFR Part 26 was enacted on January 8, 1999 and revised on October 1, 2006 and October 2, 2014.

³ San Francisco Bay Area Rapid Transit District Disadvantaged Business Enterprise Program, February 2012, p. 4.

- MSBE set-aside contracts on federal funded contracts. MSBE set-aside contracts cannot exceed the following limits:
 - Construction—\$2 million
 - Services—\$3 million
 - Procurement—\$3 million

MSBE set-aside contracts are not eligible for SBE or DBE goals, although MSBE vendors are encouraged to include SBE and DBE subcontractors.

C. Small Business (SB) Program (Non-Federally Funded)

BART has established a Small Business (SB) Program, pursuant to California Public Contract Code Section 2002. The purpose of the SB Program is to encourage the full and equitable participation by small businesses in Non-federally funded construction, procurement and services contracts. The SB Program is targeted to:

- BART award of contracts;
- The award of contracts by Prime Contractors to First Tier Subcontractors; and,
- The award of contracts by First Tier Subcontractors to Second Tier Subcontractors.⁴

To encourage SB prime participation on contracts under \$10,000,000, BART may, at its sole discretion, apply a bid preference to SB Bidders of up to 5 percent of the lowest responsible bidder's bid amount up to a total amount of \$250,000 on contracts valued under \$10,000,000. An annual limit of \$2,000,000 for total dollar preferences is allowed each year. However, the actual contract will reflect the actual amount of the bid.

For contracts over \$10,000,000, BART may apply a SB subcontracting, participation goal. For prime vendors that meet the SB subcontracting goal, a bid preference up to 5 percent of the lowest responsible bidder's bid amount up to a total of \$1,000,000 will be applied. However, the actual contract will reflect the amount of the original bid. BART may, at its discretion, count Second Tier Subcontractors toward the SB goal, upon the First-Tier subcontractor meeting the requirements outlined in the SB Program.⁵ Under California Public Code Section 22160 et seq, BART may also establish three separate SB goals for construction, services, and procurement on Design-Build contracts. A 5 percent preference will apply.

D. Non-Discrimination (ND) in Subcontracting Program (Non-Federally Funded)

Under Proposition 209 adopted by the State in 1996, BART is prohibited from taking measures that discriminate for or against the participation of firms based on their race or

⁴ BART Small Business (SB) Program Non-Federally Funded Contracts, 9/01/11, p. 2.

⁵ Ibid, pp. 6-8.

gender, unless required as a Federal grant requirement. As a result, in 1997, the BART Board adopted BART's Non-Discrimination Program for Subcontracting on Non-Federally Funded Contracts (ND Program). Under the terms of the ND Program, the purpose is to ensure that contractors do not discriminate or give a preference in the award of subcontracts on the basis of race, national origin, color, ethnicity, or gender.

Under BART's ND Program, which is a race and gender-neutral program, there has been some measurable MWBE participation although it has not resulted in the overall participation of MWBEs matching availability in BART's Non-Federal construction, procurement, or services contracting. The Disparity Study will provide up to date availability percentages for MBEs and WBEs for the ND Program.

The ND Program does not require a bidder to subcontract any portion of the work. If the bidder does not subcontract any of the work, the ND Program does not apply. Further, the ND Program does not utilize subcontracting percentage goals nor require a bidder to make good faith efforts to utilize minority owned business enterprise (MBE) and women owned business enterprises (WBE) subcontractors.

However, if the bidder does subcontract a portion of the work, a determination is first made whether the bidder has listed subcontracts in dollar amounts that reflect the availability percentages of MBEs and WBEs in the pool of all subcontractors available to perform the contract work. The availability percentages for MBEs and WBEs are not subcontracting goals. They are, instead, what MBE and WBE participation would be expected in the absence of discrimination. If the bidder meets the availability percentages, the bidder is presumed to have not discriminated and is eligible for award of the contract.

If the bidder does not meet the availability percentages, the bidder must submit documentation pertinent to determining if the bidder discriminated. If the documentation shows no evidence of discrimination the bidder is recommended for award of the contract. If documentation shows discrimination, a hearing is set before a hearing officer and the District has the burden to prove that the bidder discriminated. A bidder is non-responsive only if it does not cooperate in providing evidence of Non-Discrimination or if a finding is made after a hearing that the bidder has discriminated in the award of subcontracts. A bidder cannot be found non-responsive simply because it did not select subcontractors in a manner which reflects MBE and WBE availability as long as it has not discriminated.

E.2 MILLER³ CONSULTING'S APPROACH AND METHODOLOGY

M³ Consulting's exclusive disparity study methodology includes ten analyses which lead to overall conclusions and recommendations.

E.2.1 M³ CONSULTING'S 10-PART DISPARITY STUDY METHODOLOGY

M³ Consulting employs a 10-part disparity study methodology that provides a complete factual predicate consistent with evolving case law and BART's regulatory environment. The statistical analysis—relevant market, availability, utilization, disparity and capacity—comports with the requirements of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706 (1989), *Adarand Contractors, Inc. v. Federica Pena*, 515 U.S. 200, 115 S. Ct. 2097 (1995) and *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005) and determines whether there are statistically significant disparities from which an inference of discrimination may be drawn. The remaining analysis reflected under the industry and market analysis assist in determining whether organizational factors (active discrimination or exclusion) or private sector and marketplace factors (passive discrimination or exclusion) cause any disparity found. Together, these findings allow BART to determine whether there is a compelling governmental interest in utilizing race and gender-conscious remedies for any statistically significant disparity. The combined analysis also leads to a set of customized recommendations that includes race and gender-neutral initiatives and narrowly tailored race and gender-conscious initiatives.

BART Disparity Study

Industry Analysis	Statistical Analysis	Market Analysis	Conclusions	Recommendations
<ul style="list-style-type: none"> •Legal Analysis •Procurement and M/W/DBE Operational Analysis 	<ul style="list-style-type: none"> •Relevant Market •Availability Analysis •Utilization Analysis •Disparity Ratios •Regression and Capacity Analysis 	<ul style="list-style-type: none"> •Anecdotal and Survey Analysis •Race-Gender-neutral Analysis •Private Sector Analysis 	<ul style="list-style-type: none"> •Finding of discrimination, passive or active, if any •Identification of barriers to M/W/DBE participation 	<ul style="list-style-type: none"> •Procurement and M/W/DBE programmatic initiatives •Goal-setting •Non-Discrimination initiatives •Management and Technical Assistance

Description of Disparity Study Components

1. **Legal Analysis** outlines the legal standards of *Richmond v. Croson*, *Adarand v. Peña* and their progeny, as well as around the country. Such a legal analysis provides critical insight to current judicial opinions relevant to both DBE program design, Non-Discrimination programs and disparity study analysis.
2. **Procurement and DBE Program Operational Analyses** examines BART’s contracting history to determine the impact of BART’s policies, procedures and practices on M/W/DBEs’ ability to do business with BART, along with the effectiveness of the DBE and SB Program operations on increasing M/W/DBE participation.
3. **Relevant Market Analysis** determines the geographic boundaries within which BART performs the substantial part (about 70 percent) of its business activities. The identification of the bounds is also guided by legal criterion that BART must refine its efforts to impact DBE business activity to its market area.
4. **Availability Analysis** determines the available M/W/DBE and non-M/W/DBE firms who are available to do business with BART within the determined relevant market.
5. **Utilization Analysis** quantitatively examines BART’s contracting history and determines the number of contracts and levels of expenditures with M/W/DBEs.
6. **Disparity Analysis** determines the difference between the availability of M/W/DBEs and their utilization by BART and whether any disparity is statistically significant.
7. **Capacity and Regression Analyses** examines differences in capacity of firms based on race and gender using established statistical methods and also examines whether race/gender and ethnicity still impacts the participation decision once a set of variables that proxy capacity are controlled for.

8. **Anecdotal and Survey Analyses** determine the experiences of M/W/DBEs and non-M/W/DBEs attempting to do business with BART and in the business community overall. Further, the survey provides information on business characteristics, such as owner qualifications, years in business, capacity, and credit market experiences.
9. **Race- and Gender-Neutral Analysis** determines the effectiveness of race- and gender-neutral programs in increasing M/W/DBE participation in both public and private sector opportunities.
10. **Private Sector Analyses** determine M/W/DBE participation in private sector opportunities. Factors that impact business formation and self-employment are also analyzed in this analysis.

The methodology components that M³ Consulting deploys reflect the continuing development of case law that has increased the level and sophistication of the statistical analysis necessary to comply with *Croson* and *Adarand* standards.

E.2.2 STATISTICAL METHODOLOGY

The statistical methodology below discusses in more detail relevant market, availability, utilization, and disparity. It includes various definitions of availability and M³ Consulting's "Ready, Willing and Able" (RWASM) model. M³ Consulting has adapted this model to the specific BART data sources available for this study. Also discussed are the types of utilization analysis that will be performed. The statistical methodology section concludes by defining the disparity ratio and significance tests, crucial for drawing conclusions regarding any disparity in BART's recent history of contracting with M/W/DBEs.

To conduct the analysis, M³ Consulting collected vendor, bidder, contract award, purchase order and payments data for calendar years 2011-2014, covering both Federally-funded and Non-federally funded contracts.

A. Relevant Market

The *Croson* statistical analysis begins with the identification of the relevant market. The relevant market establishes geographical limits to the calculation of M/W/DBE availability and utilization. Most courts and disparity study consultants characterize the relevant market as the geographical area encompassing most of a public entity's commercial activity. The *Croson* Court required that an MBE program cover only those groups that have actually been affected by discrimination within the public entity's jurisdiction.⁶

⁶ *Richmond v. Croson*, at 725.

Two methods of establishing the relevant market area have been used in disparity studies. The first utilizes vendor and contract awardee location of dollars expended by an entity in the relevant industry categories. In the second method, vendors and contractors from an entity's vendor or bidder list are surveyed to determine their location. The former is based on approaches implemented under the U.S. Justice Department guidelines for defining relevant geographic markets in antitrust and merger cases. M³ Consulting has developed a method for determining an entity's relevant market by combining the above methods and using an entity's bidder lists, vendor lists, and awardee lists as the basic foundation for market definition.

By examining the locations of bidders, vendors, and winners of contract awards, M³ Consulting seeks to determine the area containing a preponderance of commercial activity pertaining to an entity's contracting activity. While case law does not indicate a specific minimum percentage of vendors, bidders, or contract awardees that a relevant market must contain, M³ Consulting has determined a reasonable threshold is somewhere around 70 percent, each, for bidders, vendors, and contract award winners. Further analysis may be necessary if there are "large" differences in the percentages of these three measures.

B. Availability Analysis

The fundamental comparison to be made in disparity studies is between firms owned by minorities and/or women ("MBEs and WBEs") and other firms ("non-MWBEs") ready, willing and able to perform a particular service (i.e., are "available"), and the number of such businesses actually being utilized by the locality or its prime contractors. This section presents a discussion of the availability estimates for M/W/DBEs who are ready, willing and able to perform work on contracts for BART.

Availability is the most problematic aspect of the statistical analysis of disparity. It is intrinsically difficult to estimate the number of businesses in the marketplace that are ready, willing and able to perform contracts for or provide services to a particular public entity. In addition to determining an accurate head count of firms, the concomitant issues of capacity, qualification, willingness, and ability complicate the production of accurate availability estimates.

1. Miller³ Consulting, Inc. Availability Model

M³ Consulting employs two general approaches to measuring availability: the Ready, Willing and Able (RWASM) Model and Marketplace Availability. In summary, the Availability measures can fall into the following categories:

- **RWASM Availability**—Those firms who are ready, willing and able to do business with BART;
- **Public Sector Availability**—Those firms who are ready, willing and able to do business with similar public sector agencies within BART’s marketplace⁷; and,
- **Marketplace Availability**—All firms’ available in BART’s marketplace, as measured by Census, Dun & Bradstreet and Reed Construction data.

The Availability matrix below in Figure E.1 outlines M³ Consulting’s Availability Model. The matrix starts with the optimum availability measure of those firms “ready, willing and able” to do business with BART and cascades down to less optimum measures. Factors that determine which level of availability best suits BART’s environment include quality of available data, legal environment, and previous levels of inclusion of M/W/DBE in bidding and contracting activity. For BART, Level 3 RWASM Availability was deemed the most representative and robust, in light of the completeness of data provided by BART.

⁷This analysis requires inter-governmental cooperation between public entities providing bidder, vendor and awardee data, thus is not performed, unless such agreement is developed for individual agencies or a consortium of agencies conducted a consortium disparity study.

Figure E.1
RWASM Availability Model



Source: M³ Consulting, Inc.

C. Utilization Analysis

Utilization represents the contracting and subcontracting history of Non-M/W/DBEs and M/W/DBEs with BART. In developing the contract database to be used as the basis for determining utilization, there are three alternative measures of utilization that can be taken in each procurement category. These are:

1. The numbers of contracts awarded;
2. The dollar value of contracts received; and,
3. The raw numbers of firms receiving contracts.

The current report presents two of the three measures of utilization: the number of contracts awarded and the dollar value of the contract awards. Both dollars and counts are reported in order to determine if there are any outliers or large single contracts that cause utilization dollar values to be at reported levels. These were preferred over the third measure—the number of firms, which is less exact and more sensitive to errors in measurement.

For instance, if a single firm, owned by a Non-M/W/DBE, received 30 contracts for \$5 million, and ten African American-owned firms received one contract each worth \$100,000, measured by the number of firms, African American-owned firms would appear to be over utilized, and Non-M/W/DBEs underutilized. Using the number of contracts and the dollar value of contracts awarded, the aforementioned result would reverse (depending on relative availability).

M³ Consulting's position with regard to percentage estimates of utilization, by the dollar value of contracts and number of contracts, is that discrimination would be more likely to affect the dollars awarded than the number of contracts awarded to M/W/DBEs or the number of M/W/DBEs utilized, particularly if there are stereotypical attitudes that M/W/DBEs cannot handle larger contracts, and the largest volume of contracts awarded are smaller contracts.

M³ Consulting also sought to analyze subcontracting utilization data. Because prime contractors, especially in Construction, Construction-related Professional Services and Architecture and Engineering, often subcontract work to other contractors/consultants and because the utilization of M/W/DBEs in the absence of a set-aside or goal provision usually occurs at the subcontract level, assembling data on subcontract work is critical to utilization analysis.

In the area of Construction and Architecture and Engineering contracting, the standard presentation of utilization data by M³ Consulting is to show Total “Pure Prime + Subcontractor” utilization and Subcontractor utilization in separate tables, if data allows. “Pure prime utilization” based on dollar value of contracts is defined here differently from “prime contract award value” due to the necessity to avoid double-counting of subcontract awards when examining subcontractor utilization. “Pure prime utilization” is correctly defined as the value of prime contracts *net of subcontract value*. This magnitude, when added to the value of subcontractor utilization, results in a correct measurement of “total” utilization, by the M/W/DBE category.

D. Disparity Analysis

A straightforward approach to establishing statistical evidence of disparity between the availability of M/W/DBEs and the utilization of M/W/DBEs by BART is to compare the utilization *percentage* of M/W/DBEs with their availability *percentage* in the pool of total businesses in the relevant market area. M³ Consulting’s specific approach, the “Disparity Ratio,” consists of a ratio of the percentage of dollars spent with M/W/DBEs (utilization), to the percentage of those businesses in the market (availability).

Disparity ratios are calculated by actual availability measures. The following definitions are utilized in the M³ Consulting ratio:

A	=	Availability proportion or percentage
U	=	Utilization proportion or percentage
D	=	Disparity ratio
N _w	=	Number of women-owned firms
N _m	=	Number of minority-owned firms
N _t	=	Total number of firms

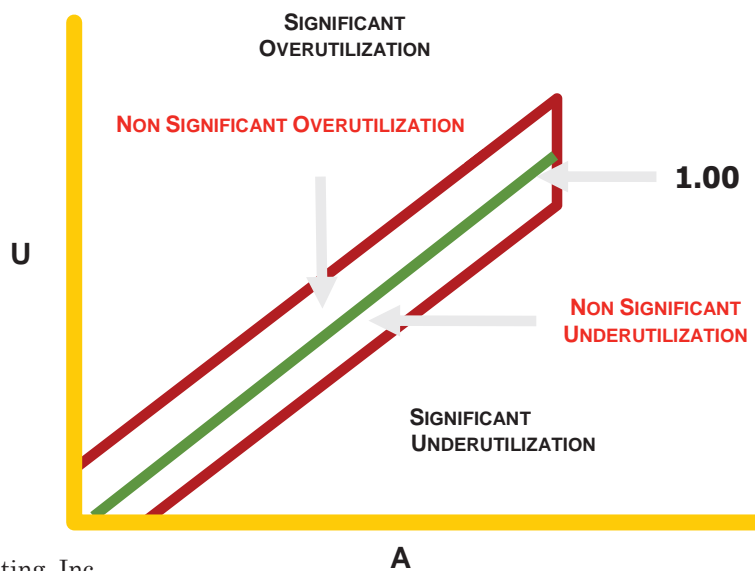
Availability (A) is calculated by dividing the number of minority and/or women-owned firms by the total number of firms. Utilization (U) is calculated by dividing total dollars expended with minority and women-owned firms by the total expenditures.

$$\begin{aligned}A_w &= N_w / N_t \\A_m &= N_m / N_t \\D &= U / A\end{aligned}$$

When D=1, there is no disparity, (*i.e.*, utilization equals availability). As D approaches zero, the implication is that utilization is disproportionately low compared to availability. As D gets larger (and greater than one), utilization becomes disproportionately higher compared

to availability. Statistical tests are used to determine whether the difference between the actual value of D and 1 are statistically significant, (*i.e.*, whether it can be stated with confidence that the difference in values is not due to chance (see Figure E.2).

Figure E.2
Disparity Ratio Indicating Areas of Significant and Non-Significant Disparity and Overutilization



The statistical disparity ratio used in this study measures the difference between the proportion of available firms and the proportion of dollars those firms received. Therefore, as the proportion of contract dollars received becomes increasingly different than the proportion of available M/W/DBEs, an inference of discrimination can be made.

1. Statistical Significance

The concept of statistical significance as applied to disparity analysis is used to determine if the difference between the utilization and availability of M/W/DBEs could be attributed to chance. Significance testing often employs the t-distribution to measure the differences between the two proportions. The number of data points and the magnitude of the disparity affect the robustness of this test. The customary approach is to treat any variation greater than two standard deviations from what is expected as statistically significant.

A statistical significant outcome or result is one that is unlikely to have occurred as the result of random chance alone. The greater the statistical significance, the smaller the probability that it resulted from random chance alone. P-value is a standard measure used to represent the level of statistical significance. It states the numerical probability that the stated relationship is due to chance alone. For example, a p-value of 0.05 or 5 percent indicates that the chance a given statistical difference is due purely to chance is 1 in 20.

2. Practical Significance

The concept of statistical significance should not be confused with practical significance. According to Mansfield, even if there is a statistically significant difference between a sample value and a postulated value of a parameter, the difference may not really matter.⁸ This means disparities not statistically significant are not necessarily caused by chance. It also means that chance cannot be ruled out as a cause.

The most commonly used practical significance measure in the EEO context is the 4/5th or 80 percent rule, which indicates how large or small a given disparity is. An index less than 100 percent indicates that a given group is being utilized less than would be expected based on its availability, and courts have adopted the Equal Employment Opportunity Commission's "80 percent" rule, that is, that a ratio less than 80 percent presents a prima facie case of discrimination⁹.

Under the EEOC's "four-fifths" rule, a disparity ratio is substantively significant if it is 0.8 or less on a scale of 0 to 1 or 80 or less on a scale of 1 to 100 (i.e., Group A selection rate divided by Group B selection rate). Codified in the Uniform Guidelines on Employee Selection Procedures (UGESP, section 4D), the rule is described as follows:

"A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms and

⁸ Mansfield, Edwin, *Statistics for Business and Economics*, p. 322. Two standard deviations imply 95 percent confidence level which is the norm of the courts.

⁹ *Engineering Contractors II*, 122 F3d at 914; see 29 C.F.R. § 1607.4(D) ("A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.")

where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant.”

Thus, the 4/5th rule is a measure of the size of the disparity, but may need to be interpreted in light of particular context (e.g., sample size, in combination with statistical significance testing). However, case law suggests that the 4/5th rule can be interpreted as adequate stand-alone evidence in some situations, although it is unclear exactly what circumstances warrant such interpretation. The 80 percent rule is a general rule, and other factors such as statistical significance, sample size, discouraged applicants, etc., should be analyzed. The rationale for combining practical and statistical significance results is an intuitive one. In situations where the measures come to identical conclusions, the analyst can usually feel very confident in a finding of meaningful impact or no impact. In other situations, context may play an important role when statistical and practical significance measures produce different conclusions (i.e., when a standard deviation analysis is greater than 2.0 but the 4/5th rule is not violated)¹⁰.

E.3 FINDINGS AND CONCLUSIONS

E.3.1 SIGNIFICANT DISPARITY

Based on the statistical findings in the disparity chapter, the utilization of qualified firms as reflected by the percentage of contracts or purchase orders awarded and payments made, appears to be less inclusive than warranted, when compared to the availability of ready, willing and able firms (RWASM). Thus, M³ Consulting draws an inference of discrimination against the following race, ethnicity and gender groups:

¹⁰ See Tables 1 and 2 that explain this in, “A Consideration of Practical Significance in Adverse Impact Analysis,” Eric M. Dunleavy, July 2010, <http://dciconsult.com/whitepapers/PracSig.pdf>

Table E.1. Inference of Discrimination Based on Findings of Statistically Significant Disparity By Race/Ethnicity/Gender By Procurement Type By Federal/Non-Federal			
Procurement Areas	Overall	Federal	Non-Federal
Architectural and Engineering Services Agreements	<ul style="list-style-type: none"> • African Americans • Hispanic Americans • Caucasian Females 	<ul style="list-style-type: none"> • Asian Americans • Hispanic Americans • Caucasian Females • African Americans • Native Americans 	<ul style="list-style-type: none"> • African Americans • Hispanic Americans • Caucasian Females
Construction Contracts	<ul style="list-style-type: none"> • African Americans • Asian Americans • Hispanic Americans • Caucasian Females 	<ul style="list-style-type: none"> • African Americans • Hispanic Americans • Caucasian Females 	<ul style="list-style-type: none"> • African Americans • Asian Americans • Hispanic Americans • Caucasian Females
Professional Services	<ul style="list-style-type: none"> • Asian Americans • Hispanic Americans • Caucasian Females 	<ul style="list-style-type: none"> • Asian Americans • Hispanic Americans • Caucasian Females 	<ul style="list-style-type: none"> • Asian Americans • Hispanic Americans • Caucasian Females
Other Services	<ul style="list-style-type: none"> • African Americans • Caucasian Females 	<ul style="list-style-type: none"> • African Americans • Caucasian Females 	<ul style="list-style-type: none"> • Hispanic Americans • Caucasian Females
Procurement Contracts	<ul style="list-style-type: none"> • African Americans • Asian Americans • Caucasian Females 	<ul style="list-style-type: none"> • African Americans • Asian Americans • Hispanic Americans • Caucasian Females 	<ul style="list-style-type: none"> • African Americans • Asian Americans • Caucasian Females

Source: M³ Consulting

Below is a discussion of the factors leading to and impacting the findings of statistically significant disparities above.

E.3.2 STATISTICAL FINDINGS IMPACTING STATISTICALLY SIGNIFICANT DISPARITY

A. Relevant Market

In order to estimate availability, the marketplace in which BART purchases from vendors needs to be defined. This enables a practical count of “available” firms and also facilitates policy implementation.

Based on the data provided for this study, five relevant markets were defined and are presented below:

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- San Francisco-Oakland-Hayward, CA MSA—consists of the following five counties: Alameda, San Francisco, Contra Costa, Marin, San Mateo; This MSA is a subset of the San Francisco Bay Area;
- San Francisco Bay Area—consists of the following nine counties: Alameda, San Francisco, Contra Costa, Marin, San Mateo, Solano, Napa, Santa Clara, Sonoma
- San Jose-San Francisco-Oakland, CA CSA—consists of the following twelve counties: Alameda, San Francisco, Contra Costa, Marin, San Mateo, Solano, Napa, Santa Clara, Sonoma, San Joaquin, Santa Cruz, San Benito
- San Jose-San Francisco-Oakland, CA CSA + Plus Sacramento County—consists of the following twelve counties: Alameda, San Francisco, Contra Costa, Marin, San Mateo, Solano, Napa, Santa Clara, Sonoma, San Joaquin, Santa Cruz, San Benito, Sacramento County
- State of California
- Nationwide

The relevant market for each industry category is summarized in Table E.1, for each procurement type by location because of the commercial activity that BART conducts with its vendors in different procurement areas.

	MSA	Bay Area	State	Nationwide
Architecture and Engineering	√			
Professional Services			√	
Construction		√		
Other Services			√	
Procurement				√

Source: M³ Consulting; BART Procurement Bidder Data, PeopleSoft Final Data, BART Planning and Development Work Plan Data; BART OCR Vendor Payment Tracking Data; BART Plan Holders; BART Vendors

B. Availability Analysis

Based upon industry standards, M³ Consulting's practice, experience and understanding of data available, credence is typically placed on RWASM estimates derived from bidders, sub-bidders and awardees in that order of importance. Marketplace availability measures, based on D&B Availability, are presented as a benchmark of minority and women-owned firm

availability (inclusive of certified and unverified MBEs/WBEs) and for BART to consider potentially available firms for outreach purposes.

For construction, MBE availability percentage is about 18.43 percent which is almost evenly derived from the Asian American and Hispanic American MBE groups and a smaller portion to African American-owned firms. Caucasian Female-owned firms are similar to African American-owned firms in their availability in the construction industry at 4.48 percent available based on the RWASM availability measure. The marketplace availability measure based on construction shows a lower presence of MBEs in the industry and a similar presence of Caucasian Female-owned firms. In A&E, the availability of M/W/DBEs was at 29.82 percent based on RWASM availability estimates. MBEs were at 22.43 percent and Caucasian Females at 7.39 percent in the MSA marketplace. The Dun and Bradstreet availability measure shows a slightly lower representation in the marketplace of M/W/DBEs at 21.53 percent with Caucasian Female-owned firms almost at par with the RWASM availability estimate at 8.1 percent in the MSA. For Professional Services, M/W/DBEs availability based on RWASM availability was only at 11.89 percent, while the marketplace availability reflecting the upper bound of available firms was at 14.45 percent. MBEs and Caucasian Female-owned firm were both evenly low in availability based on RWASM availability estimates.

Other Services witnessed a declining pattern in M/W/DBEs presence with only 7.22 percent availability; Caucasian Female-owned firms represented 1.37 percent of availability. Marketplace estimates of available firms shows a higher proportion of M/W/DBEs at 16.26 percent and of Caucasian Female-owned firms at 8.86 percent. It may imply that Caucasian Female-owned firms are present in the market area, but do not participate in BART contracts. The presence of Caucasian Female-owned firms in Procurement is considerably higher in the marketplace at 8.33 percent compared to only 0.67 percent availability at BART. In general, the Procurement industry shows a very small presence of M/W/DBEs in the RWASM availability pool at 2.93 percent as opposed to 16.56 percent provided by Dun and Bradstreet's potentially available firms. Whether the latter meet the RWASM availability criteria or express interest in BART contracting process remains to be explored.

Table E.3.
Summary Table - RWASM Availability Level 3 Percentage Participation
San Francisco Bay Area Rapid Transit District
Relevant Market; 2011 – 2014

Ethnicity	A&E ¹	Construction ²	Professional Service ³	Other Services ⁴	Procurement ⁵
Race/Ethnicity/Gender					
Non-M/W/DBE	62.27	67.25	82.60	83.51	93.63
African American	7.65	4.86	3.96	3.78	0.84
Asian American	10.29	6.48	2.42	0.69	0.84
Hispanic American	3.96	6.85	2.42	1.37	0.59
Other MBE	0.53	0.25	0.00	0.00	0.00
Total MBE	22.43	18.43	8.81	5.84	2.26
Caucasian Female	7.39	4.48	3.08	1.37	0.67
Total M/W/DBE	29.82	22.91	11.89	7.22	2.93
D&B MWBE	7.92	9.84	5.51	9.28	3.43
Total	100.00	100.00	100.00	100.00	100.00

Source: M³ Consulting; BART Procurement Bidder Data, PeopleSoft Final Data, BART Planning and Development Work Plan Data; BART OCR Vendor Payment Tracking Data; BART Planholders; BART Vendors
 Level 3: Bidders, Sub-bidders, Formal and Informal Awards from PeopleSoft Data, Prime/Sub Payees from Work Plans and VPTS data
¹MSA, ²Bay Area, ³State of California, ⁴Nationwide

Table E.4.
D&B Summary Availability
San Francisco Bay Area
2014

	A&E		Construction		Professional Services		Other Services		Procurement	
	#	%	#	%	#	%	#	%	#	%
Non-MWBE	2,471	78.47	6,775	88.18	11,286	85.55	8,994	83.74	9,615	83.44
MBE	253	8.03	364	4.74	444	3.37	383	3.57	529	4.59
MWBE	170	5.40	165	2.15	419	3.18	411	3.83	419	3.64
WBE	255	8.10	379	4.93	1,044	7.91	952	8.86	960	8.33
Total MWDBE	678	21.53	908	11.82	1,907	14.45	1,746	16.26	1,908	16.56
Total	3,149	100.00	7,683	100.00	13,193	100.00	10,740	100.00	11,523	100.00

Source: 2014 D&B Hoovers Data; M³ Consulting
 *Bay Area—Consists of counties of San Francisco, Alameda, Contra Costa, Marin, San Mateo, Santa Clara, Napa, Solano, Sonoma
 **Equivalent to Caucasian Female-owned firms

When RWASM Availability is adjusted to the requirements of BART’s Non-Discrimination Program in Subcontracting, the following availability results:

**Table E.5.
 Non-Discrimination Availability, Level 3 RWASM Availability
 San Francisco Bay Area Rapid Transit District
 Relevant Market; 2011-2014**

	A&E ¹	Construction ²	Professional Services ³	Other Services ³	Procurement ⁴
Race/Ethnicity/Gender					
Non-MWBE	62.01	67.25	82.6	83.51	93.63
African American	7.65	4.86	3.74	3.78	0.75
Female	2.37	0.75	1.76	0.69	0.17
Male	5.28	4.11	1.98	3.09	0.59
Asian American	10.03	5.48	2.42	0.34	0.84
Female	2.64	1.62	0.66	0	0.25
Male	7.39	3.86	1.76	0.34	0.59
Caucasian Female	6.86	3.99	2.86	1.37	0.59
Hispanic American	3.69	6.35	2.2	1.37	0.59
Female	1.06	1.87	0.44	0.69	0.08
Male	2.64	4.48	1.76	0.69	0.5
Native American	0	0	0	0	0
Female	0	0	0	0	0
Male	0	0	0	0	0
Other MBE	0.53	0.12	0	0	0
Female	0.53	0.12	0	0	0
Male	0.26	0	0	0	0
Total BART Certified MWBE	28.76	20.8	11.23	6.87	2.76
Female	13.46	8.34	5.73	2.75	1.09
Male	15.57	12.45	5.51	4.12	1.68
Other Certified S/M/W/DBE	1.32	2.12	0.66	0.34	0.17
Total MWBE	30.08	22.91	11.89	7.22	2.93
D&B MWBE	7.92	9.84	5.51	9.28	3.43
Total	100	100	100	100	100

Source: M³ Consulting; BART Procurement Bidder Data, PeopleSoft Final Data, BART Planning and Development Work Plan Data; BART OCR Vendor Payment Tracking Data; BART Planholders; BART Vendors

Level 3: Bidders, Sub-bidders, Formal and Informal Awards from PeopleSoft Data, Prime/Sub Payees from Work Plans and VPTS data

¹MSA, ²Bay Area, ³State of California, ⁴Nationwide

Often, it is argued that actual availability, based on bidders, is significantly impacted by the presence of race and gender-conscious goals. BART’s data reflects M/W/DBE participation in Construction, where BART does apply race and gender-conscious goals on Federal contracts, but to suggest that the difference is due to the utilization of DBE goals would be conjecture.

This is highlighted even more by Utilization results, where BART has been able to achieve a greater proportion of M/W/DBE utilization in A&E and Professional Services areas, where race and gender-conscious goals cannot be applied.

Potentially, the difference in Potential Availability and Actual Availability could reflect the impact on Actual Availability of “But-For Discrimination”, but it could also reflect the absence of outreach by BART to potentially available firms, as well. In other words, from the RWASM estimates, bidders, sub-bidders, and awardees are presumed to be actually available, whereas the D&B figures includes firms that may not be actually available due to discrimination or other factors. Significantly more research and analysis is necessary to determine the reasons for differences in availability levels between RWASM and D&B. Other than race and gender-conscious goals, such factors influencing the difference between RWASM Availability measures and D&B Availability figures could include, but not be limited to:

- Firms available in D&B, while falling into a North American Industry Classification System code utilized by BART, do not provide the specific goods and services required by BART;
- Firms within the D&B availability pool may not be interested in doing business with BART or in the public sector; and,
- As a public entity with consistent commitment in its Strategic Mission to community economic development, BART may be viewed by the community as a more inclusive environment, than the private sector or other public entities.

As the Office of Civil Rights begins to conduct inclusive outreach to and surveying of firms on the D&B list to determine their interest and ability to provide their services to BART and the willingness of unverified D&B Minority/Women-business enterprises to become certified to be eligible for BART’s race and gender-conscious initiatives, more conclusive determinations can be made regarding the difference between RWASM and D&B availability figures.

C. Utilization Analysis

Table E.6 reflects a summary of utilization for all procurement types. This summary is followed by more detailed analysis for A&E and Construction in Tables E.7 and E.8.

Based on the most robust data source for each procurement type—contract awards, purchase orders or payments—M/W/DBEs achieved the highest levels of participation in A&E at 34.60 percent, utilizing on On-call A&E Payments, and the lowest levels of participation in Procurement at 1.36 percent.

The level of achievement in A&E is worthy of note, given that there were no race and gender-conscious goals utilized in this procurement category. On the other hand, in Construction, the only procurement category where BART can utilize race and gender-conscious goals on federal contracts, M/W/DBE participation reached only 11.38 percent, even though BART's overall triennial DBE goal was 22 percent for 2011-2013 and 23 percent for 2014-2016 and despite achieving over 40 percent M/W/DBE participation at the subcontracting level. A key difference between A&E and Construction levels of M/W/DBE participation is Pure Prime participation, 36 percent for A&E M/W/DBE Pure Prime utilization, combined with 32.38 percent for M/W/DBE subcontracting, contrasted with 0.85 percent for Construction M/W/DBE Pure Prime utilization, combined with 40.64 percent for M/W/DBE subcontracting.

When comparing On-call A&E Payments data to On-call A&E Commitments data to see if there are similar trends, it is revealed that African American-owned participation drops from 15.17 percent based on On-call A&E Commitments to 7.39 based on On-call A&E Payments. Asian American-owned firms show the opposite trend, with 16.38 percent participation based on On-call A&E Commitments and 23.39 percent based on On-call A&E Payments.

For participation by specific MBE group and Caucasian Female-owned firms, Asian American-owned firms had higher participation than African American-owned firms in A&E and Construction, while African American-owned firms were more represented than Asian American-owned firms in Professional Services and Other Services. African American-owned firm participation in Professional Services was significantly higher than all other MWBE groups at 12.37 percent. However, over 60 percent of this participation reflects awards to one African American-owned firm.

Hispanic American-owned firms fared best in Construction at 4.62 percent and Other Services at 3.60 percent. Although their level of participation was greater than the other MBE groups and Caucasian Female-owned firms, it was not significantly so. Caucasian Female-owned firms appear to have the lowest levels of participation, except in Professional Services, where 0.54 percent participation outpaced that of Asian American- and Hispanic

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American-owned firms. D&B MWBEs reflected significant levels of participation in the procurement categories of Construction and Other Services.

Ethnicity	A&E ^{1,6}	Construction ^{2,5}	Professional Services ^{3,8}	Other Services ^{3,8}	Procurement ^{4,8}
	%	%	%	%	%
Non-M/W/DBE	61.06	75.23	84.17	77.58	97.30
African American	7.39	3.11	12.37	1.80	0.23
Asian American	23.39	3.65	0.19	1.14	0.29
Hispanic American	1.37	4.62	0.37	3.60	0.81
Total MBE	32.15	11.38	12.93	6.54	1.33
Caucasian Female	2.45	2.02	0.54	0.12	0.03
Total M/W/DBE	34.60	13.39	13.47	6.65	1.36
D&B MWBE	4.35	11.38	2.36	15.77	1.35
Total	100.00	100.00	100.00	100.00	100.00

Source: BART Purchasing, BART PeopleSoft Financial Management Information System; M³ Consulting

¹ Relevant Market = MSA

² Relevant Market = Bay Area

³ Relevant Market = State of California

⁴ Relevant Market = Nationwide

⁵ Contract Awards data

⁶ On-Call Commitment data

⁷ Accounts Payable data

⁸ Purchase Orders data

Table E.7.
Architecture and Engineering
Pure Prime + Sub Contract—PDC On-call Payments, Detailed
San Francisco Bay Area Rapid Transit District
Relevant Market, 2011 – 2014

	MSA*									
	Pure Prime + Sub		Pure Prime Only		Subcontractors Only		Federal Prime + Sub		Nonfederal Prime + Sub	
Ethnicity	\$	%	\$	%	\$	%	\$	%	\$	%
Non-M/W/DBE	59,019,734	61.06	34,721,756	58.71	24,297,977	64.76	26,541,208	60.52	32,478,525	61.50
African American	7,142,603	7.39	2,952,491	4.99	4,190,112	11.17	6,555,424	14.95	587,180	1.11
Asian American	22,609,351	23.39	15,911,699	26.90	6,697,652	17.85	4,347,004	9.91	18,262,347	34.58
Hispanic American	1,322,732	1.37	1,140,424	1.93	182,308	0.49	182,308	0.42	1,140,424	2.16
Total MBE	31,074,686	32.15	20,004,614	33.82	11,070,072	29.51	11,084,735	25.28	19,989,951	37.85
Caucasian Female	2,367,152	2.45	1,287,444	2.18	1,079,709	2.88	2,025,683	4.62	341,469	0.65
Total M/W/DBE	33,441,839	34.60	21,292,057	36.00	12,149,781	32.38	13,110,419	29.90	20,331,420	38.50
D&B MWBE	4,202,529	4.35	3,131,190	5.29	1,071,339	2.86	4,202,529	9.58	0	0.00
Total	96,664,101	100.00	59,145,004	100.00	37,519,097	100.00	43,854,156	100.00	52,809,945	100.00

Source: BART Procurement, M³ Consulting,

*MSA—Consists of counties of San Francisco, Alameda, Contra Costa, Marin, San Mateo

**Table E.8.
 Construction
 Pure Prime + Sub Contract Awards—Detailed
 San Francisco Bay Area Rapid Transit District
 Relevant Market, 2011 – 2014**

	Bay Area*									
	Pure Prime + Sub		Pure Prime Only		Subcontractor Only		Federal Prime + Sub		Nonfederal Prime + Sub	
Ethnicity	\$	%	\$	%	\$	%	\$	%	\$	%
Non-M/W/DBE	369,822,861	75.23	301,152,333	89.53	68,670,528	44.23	65,832,363	68.95	303,990,498	76.74
African American	15,296,069	3.11	234,500	0.07	15,061,569	9.70	2,695,633	2.82	12,600,436	3.18
Asian American	17,932,277	3.65	262,530	0.08	17,669,747	11.38	6,290,475	6.59	11,641,802	2.94
Hispanic American	22,699,984	4.62	2,352,622	0.70	20,347,361	13.11	4,301,848	4.51	18,398,136	4.64
Total MBE	55,928,330	11.38	2,849,652	0.85	53,078,677	34.19	13,287,956	13.92	42,640,374	10.76
Caucasian Female	9,906,681	2.02	-	0.00	9,906,681	6.38	3,033,670	3.18	6,873,011	1.74
Total M/W/DBE	65,835,011	13.39	2,849,652	0.85	62,985,358	40.57	16,321,626	17.10	49,513,385	12.50
D&B MWBE	55,938,248	11.38	32,351,458	9.62	23,586,789	15.19	13,320,639	13.95	42,617,609	10.76
Total	491,596,120	100.00	336,353,443	100.00	155,242,675	100.00	95,474,628	100.00	396,121,492	100.00

Source: BART Procurement, M³ Consulting,

*Bay Area—Consists of counties of San Francisco, Alameda, Contra Costa, Marin, San Mateo, Santa Clara, Napa, Solano, Sonoma

BART's utilization data suggests that BART has been able to achieve significant levels of utilization of DBEs on Federally funded contracts, utilizing different techniques and not solely relying on race and gender-conscious goals to do so. As stated previously, based on the findings of its 2009 disparity study and Proposition 209, BART has only been able to apply race and gender-conscious goals to Federal Construction activity. This activity represents only about 20 percent of Construction dollars in the relevant market and slightly less than 10 percent of total dollars in the relevant market. Any M/W/DBE participation achieved outside of these dollars, would have been achieved through race and gender-neutral means.

The procurement area of most note in this regard is A&E, whose overall levels of M/W/DBE participation outpaced that of Construction. Given that Planning, Development and Construction and Maintenance and Engineering, along with the Procurement Department, are responsible for both A&E and Construction services, the procurement techniques and the contracting vehicles utilized may have a significant influence on outcomes:

- A&E services—which includes Architecture and Engineering, Construction Management, Environmental Services and other Design and Construction-related Professional Services—are considered a Professional Service and are procured using Requests for Proposal. For A&E Agreements, BART relies heavily on the contract vehicle of Indefinite Quantity Contracts (IDIQ) on a Cost-Plus basis. These procurement and contract vehicles provide more discretion in decision-making at both the prime and subcontracting levels.
- Construction, on the other hand, is primarily procured using Invitation to Bid (ITB) for all Construction projects over \$10,000, consistent with State of California law. ITBs are procured on lowest responsible and responsive bid, unless a two-step bidding process is utilized.

Further, it appears that the majority of M/W/DBE participation in Construction is found at the subcontracting level, with little participation of M/W/DBE firms as prime contractors. In contrast, on A&E, participation proportions reflect M/W/DBE commitments at both the prime and subcontracting levels. When comparing Construction Thresholds from \$0 to \$1.5 million, using Pure Prime + Subcontract Award data and Purchase Orders data, which is Prime level activity only, the differences are stark. Based on Prime Award Purchase Order data, M/W/DBE participation did not exceed 2.36 percent in any threshold. Given the levels of participation achieved at the subcontracting level of almost 40 percent, with significant participation in thresholds between \$0 and \$1.5 million, this prime level performance suggest that BART views the achievement of race and gender-conscious goals as a subcontracting requirement under ITBs, due to the low bid requirement. If such a view is indeed held by

BART (and other public and private entities in the Bay Area), and procurement interviews suggest that it may well be, this perspective/bias could have a significant influence on the capacity of M/W/DBEs to grow and develop in the Bay Area. Additionally, while M/W/DBEs have shown that they are capable of satisfactorily performing subcontracts of significant value and size, State of California bonding insurance and financing required for Public Works contracts affects the ability of many M/W/DBE firms to bid as prime contractors on similarly sized contracts.

Given that specialization is a factor to be considered across all procurement categories, lower levels of participation in other procurement categories—Professional Services, when outliers are adjusted for, Other Services and Procurement—may reflect a lack of organizational focus on inclusive efforts that promote M/W/DBE participation in these areas.

D. Disparity Analysis

Table E.9 summarizes the disparity ratios discussed in this chapter for each procurement categories at the race/ethnic/gender group level, for BART procurements for the study period 2011–2014. Based on the foregoing analysis and the summary below, findings of statistically significant disparity are made for the following groups in the following procurement categories:

- Architecture and Engineering—African American-owned firms, Hispanic American-owned firms, Caucasian Female-owned firms;
- Construction—African American-owned firms, Asian American-owned firms, Hispanic American-owned firms, Caucasian Female-owned firms;
- Professional Services—Asian American-owned firms, Hispanic American-owned firms, Caucasian Female-owned firms;
- Other Services—African American-owned firms, Caucasian Female-owned firms;
- Procurement—African American-owned firms, Asian American-owned firms, Caucasian Female-owned firms.

Table E.9.
Summary Disparity Ratios by Race, Ethnicity and Gender
Utilization vs. RWASM Availability Level 3
San Francisco Bay Area Rapid Transit District
Relevant Market; FY 2011-FY 2014

Ethnicity	A&E (On-call Payments)		Construction (Contract Awards)		Professional Services (Purchase Orders)		Other Services (Purchase Orders)		Procurement (Purchase Orders)	
	Ratio	Sign.	Ratio	Sign.	Ratio	Sign.	Ratio	Sign.	Ratio	Sign.
Non-M/W/DBE	0.98	S	1.12	S	1.02	S	0.93	S	1.04	S
African American	0.97	S	0.64	S	3.12	S	0.48	S	0.27	S
Asian American	2.27	S	0.56	S	0.08	S	1.65	S	0.35	S
Hispanic American	0.35	S	0.67	S	0.15	S	2.63	S	1.37	S
Total MBE	1.43	S	0.62	S	1.47	S	1.12	S	0.59	S
Caucasian Female	0.33	S	0.45	S	0.18	S	0.09	S	0.04	S
Total M/W/DBE	1.16	S	0.58	S	1.13	S	0.92	S	0.46	S
D&B MWBE	0.55	S	1.16	S	0.43	S	1.70	S	0.39	S

Source: BART Procurement, BART PeopleSoft Financial Management Information System, BART VPTS Data; BART On-Call Data; M³ Consulting
 Significance is S and Ratio is Greater than 1—Statistically Significant Overutilization; Significance is S and Disparity Ratio is Less than 1 –
 Statistically Significant Underutilization;
 Significance is NS and Ratio is Greater than 1—Over utilized, but not Statistically Significant; Significance is NS and Disparity Ratio is Less than 1 –
 Underutilized, but not Statistically Significant;
 ND: Not Defined

E. Capacity Issues

As disparities in procurement and contracting are often attributed to differences in capacity of Non-M/W/DBE and M/W/DBE firms, the capacity analysis sought to examine if there were any differences in capacity of firms based on race or gender that impact disparity outcomes and could hinder firms from being actually and potentially available to BART. Because the pool of 76 firms that have actually contracted with BART is too small to draw definitive conclusions, M³ Consulting can only conduct an analysis on the pool of total respondents that include potential and actually available firms. Therefore, this analysis does not support drawing conclusions on any disparity outcomes since the sample of respondents is too small to generalize toward the population of all firms. Moreover, on important questions that discussed contracts and awards, the response rate was even smaller overall.

Even so, M³ Consulting was able to draw some conclusions from the various capacity analysis conducted. Based on D&B, there is little difference in capacity based on number of employees and revenues among the race/gender/ethnic groups in the Bay Area.

- To analyze capacity of S/M/W/DBEs compared to Non-M/W/DBEs, M³ Consulting conducted a survey of vendors that registered to do business with BART and examined the differences in capacity by race/gender/ethnic groups. Some summary highlights from the survey are as follows:
 - On average, majority women-owned firms are statistically significantly younger, but do not have significantly lower start-up capital as well as gross receipts.
 - There is also no significant difference in the number of times women-owned firms apply for a bond than their male counterparts but women-owned firms are denied a bond significantly fewer times on average. Similarly, MBEs apply almost half the times than Non-M/W/DBEs apply for bonds and loans/lines of credit, but get denied significantly more often.
 - Women-owned firms, including Caucasian Female-owned firms are denied more often on loans or lines of credit, although this difference is not statistically significant.
 - MBEs and WBEs have significantly fewer full time employees and are younger on average than Non-M/W/DBEs.
 - While start-up monies are not significantly different between the groups, the gross receipts between MBEs and WBEs are significantly smaller than Non-M/W/DBEs.
- After accounting for variables that may impact revenues of firms, race/gender/ethnicity of the firm's owner does not seem to have any influence, with the exception of Caucasian Female ownership, wherein they seem to positively influence revenues. Any variation in revenues of African-American owned, Hispanic American-owned and Asian American-owned firms from similarly situated Non-M/W/DBEs was purely due to chance.
- Examining the factors that impact the self-employment decision, it is noted that comparing similarly situated individuals (in terms of economic and demographic variables), in the State, a non-minority male is 1.87 times more likely to be self-

employed as an African American, 1.62 times as likely as an Asian American, about 1.15 times as likely as any Other Race and only little over half as likely as a Hispanic American to be self-employed. Also, women are half as likely as men to be self-employed.

- Further examining the likelihood of self-employment based on race and gender characteristics, controlling for variables related to economic and demographic factors, we find that compared to non-minority male, Asian American-owned and African American-owned firms and Women-owned firms are significantly less likely to be self-employed in California, whereas Hispanic Americans are significantly more likely to be self-employed. Also, consistent with the literature, those in the Construction industry appear to have more self-employment. Examination of the construction industry shows consistent results.
- Examining the factors that impact self-employment earnings, we note that all other variables kept constant, a self-employed Hispanic American will earn about \$960 more than a non-minority firm; a self-employed African American will earn about \$1,546 less, an Asian American will earn about \$1,535 less and a female will earn \$1,803 less than a male, if self-employed.

While capacity differences do not appear to be distinct in the size of the firms based on revenues or full time employees based on race/gender or ethnicities, the constraints in capacities are more notable in business formation and factors related to the self-employment decision and earnings which include denials in bonds and loans/lines of credit.

E.3.3 QUALITATIVE FINDINGS IMPACTING STATISTICALLY SIGNIFICANT DISPARITY

A. Procurement

1. Procurement Process

BART operates in a fairly decentralized procurement environment, with sponsor departments having significant input on the “buy” decision in many instances. The decentralization is particularly evident in the procurement area of A&E, where the utilization of On-call (Indefinite Quantity contracts) provides Planning, Development and Construction significant control over the manner in which dollars are expended post-award through the execution of work plans. It is important to note that decentralized procurement alone is not the primary concern, but whether there is sufficient infrastructure support and

organizational oversight to ensure transparency, accountability, efficiencies and above all, fairness and inclusiveness on an on-going basis.

On procurements that it does not directly procure, the Procurement Department serves in a mostly administrative role, particularly as it relates to change orders and work plans executed against IDIQs. In so doing, BART's procurement objectives of creating an inclusive, efficient, fair and open procurement process are sometimes secondary to providing Sponsor Department's the greatest degree of flexibility in achieving their departmental objectives. That flexibility has supported, in some instances, the ability of BART project managers, to continuously select favored firms through the work plan process in A&E. In other areas where the Procurement Department does directly procure, including Construction, BART's procurement process does not reflect an effort to include M/W/DBEs at the prime level on either formal or informal purchases. M/W/DBE participation is viewed as a Senior Management mandate, as opposed to a component of inclusive public sector procurement. M³ Consulting formulated barriers within the procurement system into the following areas:

- Lack of integration of diversity and inclusion throughout BART Strategic Plan minimizes organizational focus on achievement of DBE, SB and MWBE inclusion in BART opportunities as a policy objective.
- Decentralized procurement function without strategic oversight reduces BART's ability to develop an inclusive and sustainable procurement operation; lack of enterprise resource planning (ERP) integration further exacerbates problems caused by decentralization.
- Minimal procurement forecasting reduces BART's ability to engage in effective planning to meet BART's strategic mission of "economic prosperity" and to achieve inclusive procurement through its procurement opportunities.
- Underdeveloped vendor registration impacts BART's ability to effectively identify DBEs, SBs and MWBEs "ready and willing" to bid on BART opportunities, as well as reduces BART's ability to establish tailored project goals.
- While sealed bid and RFP processes are consistent with industry practice, over-reliance on broad on-call contracts and lack of price caps reduces BART's ability to ensure inclusiveness and sustainability in levels of M/W/DBE participation in these procurements.
- BART's approach to the issue of contractor/consultant substitutions reflects an organizational culture that is overprotective of prime vendor rights to the detriment of BART's rights, which includes BART's strategic mission, as well as subcontractors/subconsultants on BART projects.

- While BART's General Manager has exhibited leadership in promoting DBE, SB and MWBE participation through race-neutral programmatic initiatives and community outreach, the effectiveness of these initiatives are lessened by the issues outlined above, leading to greater organizational inefficiencies.

2. Data Infrastructure Challenges

Issues resulting from unchecked decentralization are greatly compounded by issues related to BART's data infrastructure. Given the size and complexity of many of BART's A&E and Construction contracts, some over \$300 million, a combination of decentralization and data systems limitations can mask operational issues that may have become discriminatory and exclusionary. As such, these factors can impact the accurate reporting of BART awards, commitments and payments, as required by 49 CFR Part 26, and the monitoring and reporting that the California courts¹¹ have deemed allowable and appropriate under Proposition 209. We note that in an Equal Employment Opportunity environment, such inability to provide accurate and complete reporting on key decision-making impacting hiring, promotions and termination in and of itself could result in a finding of adverse impact. The procurement and DBE (federal) and MWBE (principally state and local) regulatory environment has not kept pace with EEO. Key data issues are summarized below:

- BART only implemented an online vendor portal in January 2016. Currently, only RFPs are available on-line. Previously, for notification of opportunities and solicitation, BART procurement specialists and buyers relied principally on individual lists of firms that each had developed.
- BART's bidder and sub-bidder data on formal contracts is maintained in hard-copy formats, as well as any written quotes solicited. Telephone quotes are not always recorded in any electronic formats. Furthermore, BART does not collect requisite data on a consistent basis, including age of firm and annual gross receipts for bidders and sub-bidders (and quotes) as required under 49 CFR Part 26.11. In 2013, OCR attempted to begin compliance with the data collection requirements of 49 CFR Part 26, however, such an effort requires collaboration with Procurement. BART does not have a system for collecting prime contractor's sub-bidder data. Data needed on a semi-annual basis to report DBE participation to FTA is performed through a manual data collection process.
- BART's award data is maintained in hard-copy formats in Procurement's bid files. OCR attempted to collect prime and subcontractor award and commitment data

¹¹ See *Hi-Voltage v. San Jose*, 101 Cal Rptr. 653, 671 (2000) and *Connerly v. State Personnel Board*, 92 Cal. App. 4th 16 (2001).

directly from BART's prime vendors through the Vendor Payment Tracking System, but this effort has not produced reliable information.¹² Prime vendor commitment data is available from the PeopleSoft Financial Management system. Subcontractor commitment data is potentially available through PeopleSoft in PDF invoices that may or may not reflect detailed subcontractor data.

- Because of BART's reliance on IDIQs cost plus contract vehicles (on-call contracts) for much of its A&E activity, BART's data systems can not accurately capture award and commitment data for A&E, as both are considered budgetary figures only. Definite quantities for A&E can be determined only at the point of payment at both the prime and subcontractor levels. OCR's Vendor Payment Tracking System does not include work plan data against the IDIQs. Only PDC's work plan summaries and invoices contain prime and subcontractor commitment (budget) and payments data.
- Payments data is maintained at the prime vendor level in the PeopleSoft financial management system. Subcontractor data may be gleaned through a manual effort from PDFs of invoices attached in PeopleSoft system. Subcontractor payments are maintained in disparate systems utilized by project managers in sponsor departments and resident engineers. OCR attempted to collect subcontractor payments through the Vendor Payment Tracking System. However, lack of systems integration impacts the reliability of this data system.
- These hard-copy, online and electronic databases are not integrated, thus limiting the depth of analysis that BART can conduct on the impact of its annual spend decisions on DBE, SB and MWBE participation, as well as BART's overall impact on economic development in the Bay Area. Furthermore, BART is not positioned to report on DBE, SB and MWBE participation in real-time, which reduces its ability to quickly respond to changes in DBE, SB and MWBE levels of participation on its contracting activity, until well after procurement spend has occurred, and often, after payment has already been made. Lastly, because complete and detailed procurement data is not available in easily retrievable formats, reporting to FTA on DBE participation on a semi-annual basis requires a significant data collection effort by OCR from different BART departments and data collection for disparity studies performed every five years is laborious, costly, and quickly outdated. Because OCR reports on the inclusiveness of the "buy" decisions made by Procurement and Sponsor Departments, it is dependent on the effectiveness and efficiency of data recorded by procurement decision-makers.

¹² As discussed in Chapter 4: Statistical Methodology, in a comparison of contract information by individual Contract ID, M³ Consulting was unable to match a significant number of contract and subcontract values reflected in the VPTS data to other sources of data, ie On-call data, Purchase Order data, Payments data and Contract awards data. Given that VPTS is designed to simply be a "storehouse" of information from these other sources, VPTS data should directly match contract values in these sources.

- This lack of procurement consistency, and its effect on perceived lack of accountability and transparency also compromises BART's ability to respond to community concerns in a manner that builds trust and goodwill.

A sound procurement system and data infrastructure is critical to meeting the spirit and intent of *Richmond v. Croson*. The U.S. Supreme Court did not intend for race and gender-conscious remedies to become permanent fixtures for public entities. Instead, these remedies should be utilized only when needed. Without adequate insight into organizational decision-making regarding procurement in real-time, BART does not have the flexibility to utilize this "tool" in an as-needed manner, quickly responsive to a changing, organic procurement process. Additionally, if the California courts do indeed identify a set of facts requiring the utilization of race and gender-conscious remedies on non-federal procurement, this flexibility may also be a key requirement to addressing the courts' and voters' concerns on the utilization of such remedies as expressed in Proposition 209.¹³

B. Anecdotal

The anecdotal data from 49 participants was gathered through a series of 22 one-on-one in-depth interviews and five focus groups, which included 27 participants. Those interviewed included both minority and women business owners, as well as non-minority male business owners. The objective of the in-depth interviews was to capture the experiences, attitudes, issues, and perceptions of business owners seeking opportunities with BART, and with other public and private organizations in the San Francisco Bay area.

The anecdotal testimony tended to reflect the impact of BART's bureaucracy on the ability of DBEs, SBs and MWBEs to do business with the agency in a fair and open manner. Interviewees expressed concerns about the perceived large size of contracts, the repeated use of the same firms, BART's preference for large firms over DBEs, SBs and MWBEs, excessive red tape, and the unfair cancellation of contracts to DBEs, SBs and MWBEs, as well as the unwillingness to award to DBE, SB and MWBE at the prime level.

Interviewees also revealed perceived unfair practices by prime contractors including lack of serious consideration provided at matchmaking sessions, excessive bonding and insurance requirements for subcontractors, unwillingness to contract with DBEs, SBs and MWBEs listed on winning bid (being dropped after contract award), and derogatory comments and attitudes utilized. The contracting issues voiced by interviewees require more investigation

¹³ See *Coral Construction, Inc. v. City and County of San Francisco*, 50 Cal.4th 315 (2010).

by BART to determine whether Public Contract Code 4100, Fairness in Subcontracting and Subletting, is being violated as it relates to BART specific public works contracts.

The impact of the 2008 recession and Proposition 209 was also discussed by interviewees. These events have resulted in a decline in the number of DBEs, SBs and MWBEs in the Bay Area. The growth and development of these firms is also being impacted by the unavailability of skilled employees.

C. Private Sector

The local demographics in the San Francisco-Oakland-Fremont MSA includes about 54 percent Whites, a little over 19 percent Hispanic/Latino Americans and Asian Americans each, less than 8 percent African Americans. Of those persons who are in the labor force, Hispanic Americans in the San Francisco-Oakland-Fremont MSA were represented to a greater degree, with 70.6 percent of the total Hispanic population participating in the labor force, compared to 67.6 percent of the White population. African Americans had the lowest level of participation in the labor force at 61 percent of the African American population, followed by Asian Americans at 66.0 percent.

It is expected that the differences in the availability of firms in the relevant market would be representative of these statistics. As such, it is important to study the degree to which the population is gaining education and experience that could lead to business formation. Because of the intense focus on inclusion of DBEs, MWBEs and SBs in construction by many public agencies, we focus here in these Private Sector Conclusions on that industry.

Among all racial and ethnic groups, Hispanic Americans have the greatest employment presence in construction in the San Francisco-Oakland-Fremont MSA, at 47.8 percent of Construction and Extractive Craft Workers and 52.3 percent of Laborers and Helpers. Asian Americans have some representation in all areas of construction, whereas African Americans have a relatively small presence in construction. Even so, in actual BART Construction availability and utilization, Hispanic American-owned firms do not significantly outpace other M/W/DBE proportions.

Further evidence of DBE and MWBE participation and penetration within the construction marketplace was obtained from Reed Elsevier (Reed), which is a private firm that surveys construction-related activity in various regions around the United States. The San Francisco-Oakland-Fremont MSA and the San Jose-San Francisco-Oakland CSA regions were reported for this disparity study. Reed bid and award data indicates that DBEs and MWBEs within

the San Francisco-Oakland-Fremont MSA appear to obtain few construction sector projects, even in subcontracting opportunities. The Reed data is self-reported.

A more telling picture on M/W/DBE participation in the private sector emerges from a review of City and County of San Francisco Building Permits data.¹⁴ Over 95 percent of building permits, based on counts, were issued to Non-M/W/DBEs, compared to 80 percent in the public sector. Based on actual dollar values of these building permits, almost 98 percent went to Non-M/W/DBEs in both the Private and Public sector. Even when broken down into threshold categories, starting with \$0-50,000, Non-M/W/DBE participation was between 95-99 percent in the different categories. Despite earlier evidence from Census EEO data that Hispanic American dominated the construction industry occupations, in the public sector, no permit was issued to any Hispanic American-owned firm represented on the Master S/M/W/DBE certification list and only 0.01 percent and 0.3 percent of issued permits were awarded to African American-owned firms and Asian American-owned firms, respectively. Caucasian Female-owned firms were issued 0.01 percent of public sector building permits.

Of the top 20 awardees of building permits for the FY 2010-15, a total of three D&B MWBE firms from the Master S/M/W/DBE certification list are among the top 20 awardees that received building permits. None of the three were among the RWASM firms within the relevant market for BART.

D. Race Neutral

M³ Consulting reviewed over 100 Management, Financial and Technical Assistance providers, along with Chambers of Commerce and other networking organization, in San Francisco, Alameda and Contra Costa County. Further, 18 Executive Directors were interviewed. Key concerns expressed by these leaders were as follows:

- Proposition 209 reduced the availability of contracting opportunities and reduced contracting activity to MWBEs;
- MWBEs have a very difficult time obtaining loans, especially African Americans. Some of the reasons cited are lack of resources, bad credit decisions, and generational poverty;

¹⁴ This did not include Alameda County and Contra Costa since the former was unresponsive and the latter sent data in unusable formats. Thus, these two counties were not included in the data presented.

- The lack of access to decision makers who award contracts prevents MWBEs from obtaining business and growing their firms;
- Lack of access to and participation in management, technical and financial assistance programs;
- Unwillingness of prime contractors to utilize MWBEs, unless required to do so by governmental agencies.

M³ Consulting found that, while these organizations had some impact on improving DBEs, SBs and MWBEs management skills, access to capital, and greater exposure to the larger business community, DBEs, SBs and MWBEs still face difficulty in gaining access to public and private sector contracting opportunities. Additionally, while there have been some efforts to address capacity in the Bay Area and BART has seen slight increases in DBEs, SBs and MWBEs participation in contract awards in some industry categories, in general, the slow growth in increased capacity remain an issue. While race and gender-neutral efforts may have contributed in some degree to increased capacity and participation in contract awards, race and gender-neutral programs alone have not been fully effective in increasing availability, capacity or utilization of DBEs, SBs and MWBEs.

E.4 RECOMMENDATIONS

Based on the foregoing findings and conclusions, M³ Consulting developed recommendations to address the factors creating the disparity. An overview of the recommendations is provided in Section E.3 of this Executive Summary and in detail in Chapter 12, Conclusions and Recommendations.

The recommendations below include both race and gender-conscious and race and gender-neutral recommendations. These conclusions and recommendations should assist the BART Board of Directors and BART Staff to determine whether the disparity rises to a level of discrimination warranting the utilization of race and gender-conscious remedies within the parameters of the U.S. Supreme Court's *Richmond v. Croson* decision and its progeny, including *Western States Paving v. Washington DOT*, decided by the 9th Circuit, along with 49 CFR Part 26 and Proposition 209.

If BART chooses to continue to utilize some form of a race and gender-conscious program, it will need to meet the U.S. Supreme Court requirements of *Richmond v. Croson*. Narrow tailoring is the crucial element in crafting appropriate *Croson* remedies. Courts, have struck down many MWBE programs due to the failure of local jurisdictions to narrowly tailor their

remedies Once a factual predicate has been established, post-*Crosby* case law presents several broad guidelines for crafting recommendations for MWBE programs by a public entity, based on the factual predicate findings.

- Race and gender-conscious MWBE programs should be instituted only after, or in conjunction with, race/gender-neutral programs.
- MWBE programs should not be designed as permanent fixtures in a purchasing system without regard to eradicating bias in standard purchasing operations or in private sector contracting. Consequently, each MWBE program should have a sunset provision, as well as provisions for regular review. Additionally, there is the implication that reform of purchasing systems should be undertaken.
- MWBE programs should have graduation provisions for the MWBEs that have largely overcome the effects of discrimination and no longer are in need of a remedy.
- Rigid numerical quotas run a greater risk of being overturned by judicial review than flexible goals.
- Race and gender-conscious goals, if any, should be tied to MWBE availability and to addressing identified discrimination.
- MWBE programs should limit their impact on the rights and operations of third parties.
- MWBE programs should be limited in scope to only those group(s) and firms that suffer the on-going effects of past or present discrimination.

These measures are designed to address the underlying systemic factors that contributed to the disparity in contracting. In light of the findings and conclusions above, M³ Consulting is providing the following recommendations to BART.

E.4.1 BART ORGANIZATIONAL RECOMMENDATIONS

BART enjoys forward looking leadership and a mission that matters as it relates to Equity and Inclusion. In order to build upon this advantage, below is a summary of recommendations to BART for organizational, cultural, structural and programmatic changes that will lead to inclusive, transformative and sustainable change in BART's

procurement operations and that will bring BART into regulatory compliance and alignment with best practices. These recommendations are largely race and gender-neutral.

- 1. Change inclusion focus from programmatic (compliance with DBE regulations) to organizational (commitment to inclusive procurement environment)**
 - a. Identify BART's inclusive procurement objectives
 - b. Connect BART's inclusive procurement objectives, strategies, tactics and tasks to BART strategic mission, which includes community economic development, equity and inclusion objectives

- 2. Recognize that planning and procurement are often the first steps in actualizing the Board's Strategic Mission, particularly as it relates to community economic development**

- 3. Determine procurement operational structure that ensures reporting to the Board of Directors and General Manager on**
 - a. Manner in which procurement spend has met the strategic mission and policy objectives established by the Board of Directors and General Manager
 - b. Targets and goals met by the entire organization
 - c. Procurement techniques and contracting vehicles that best meet the mission and objectives established by the Board of Directors and General Manager
 - d. Remember: The Office of Civil Rights is the Advocate; OCR does not make the "Buy Decision" and thus, cannot be solely accountable to the Board for the organization's performance on inclusive procurement.

- 4. Promote greater transparency and accountability in procurement and post-award contract activity**
 - a. Develop fully integrated data systems that address procurement, project management, OCR and accounts payable requirements
 - i. To maximize transparency of procurement decision-making
 - ii. To ensure compliance with requirements of 49 CFR Part 26
 - iii. To allow for greater planning consistent with strategic mission and policy objectives
 - iv. To allow BART staff to respond real-time to inclusion/exclusion issues
 - b. Review procurement methods and contract vehicles utilized to ensure transparency and accountability on decision-making pre- and post-award
 - c. Monitor contracts for issues of overconcentration

5. **Ensure that Decision-Making within BART can be monitored, using an EEO Applicant Flow model equivalent**
 - a. Develop ability to track procurement spend in a manner that highlights decision-making points (selection, evaluations, contract changes) to ensure decisions by BART and its prime contractors/prime consultants are being made in a non-discriminatory manner. RWASM and Disparity Analysis tracking and compliant reporting should include the following:
 - i. Potential Availability from D&B Firms, Firms Receiving Building Permits and/or Business License, certified DBE, SB and MWBE firms, non-certified DBE, SB and MWBE firms, trade organization membership; on-line data bases
 - ii. Registered Vendors, Plan Holders, Pre-Qualified Vendors
 - iii. Bidders and Sub-bidders (inclusive of quotes)
 - iv. Awardees and Payees and Sub-awardees and Sub-payees
 - v. Difference between prime and subcontracting opportunities; vendor performance
 - vi. Contract terminations, for convenience and for cause; subcontractor substitutions
6. **Develop “development-based” inclusion programs based on 7 Stages of DevelopmentSM**
 - a. Planning
 - b. Financing
 - c. Designing
 - d. Construction
 - e. Equipping
 - f. Maintaining
 - g. Operating
7. **Promote prime level participation**
 - a. Identify prime-level procurement opportunities where a significant pool of DBEs, SBs and MWBEs are available
 - b. Establish prime-level participation targets (federal only)
 - c. Increase the utilization of SB set-asides and sheltered market opportunities
 - d. Advertise small business opportunities
 - e. Review pool of DBE, SB and MWBE sub-bidders and subcontractors to determine those ready for prime level awards
 - f. Utilize bid rotation on IDIQs

- g. Unbundle contracts into commercially viable units
- h. Optimize joint ventures, mentor/protégé, distributorships

E.4.2 BART DBE, SBE and SB Recommendations

Further recommendations include augmenting BART's DBE, SBE and SB program operations by developing effective outreach and matchmaking programs; maximizing the utilization of small business and sheltered market programs; developing effective bonding and insurance assistance programs; developing processes for certifying and tracking joint ventures, mentor-protégé and distributorships; and developing working capital and paymaster programs with Financial Assistance Providers.

E.4.3 UTILIZATION OF RACE AND GENDER-CONSCIOUS GOALS

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

Table E.10. Categories for Race/Ethnicity/Gender-Conscious Means of Addressing Disparity By Procurement Type By Federal/Non-Federal			
Procurement Areas	Overall	Federal	Non-Federal
A&E	<ul style="list-style-type: none"> • African Americans • Hispanic Americans • Caucasian Females 	<ul style="list-style-type: none"> • Asian Americans • Hispanic Americans • Caucasian Females 	<ul style="list-style-type: none"> • African Americans • Hispanic Americans • Caucasian Females
Construction	<ul style="list-style-type: none"> • African Americans • Asian Americans • Hispanic Americans • Caucasian Females 	<ul style="list-style-type: none"> • African Americans • Hispanic Americans • Caucasian Females 	<ul style="list-style-type: none"> • African Americans • Asian Americans • Hispanic Americans • Caucasian Females
Professional Services	<ul style="list-style-type: none"> • Asian Americans • Hispanic Americans • Caucasian Females 	<ul style="list-style-type: none"> • Asian Americans • Hispanic Americans • Caucasian Females 	<ul style="list-style-type: none"> • Asian Americans • Hispanic Americans • Caucasian Females
Other Services	<ul style="list-style-type: none"> • African Americans • Caucasian Females 	<ul style="list-style-type: none"> • African Americans • Caucasian Females 	<ul style="list-style-type: none"> • Hispanic Americans • Caucasian Females
Procurement	<ul style="list-style-type: none"> • African Americans • Asian Americans • Caucasian Females 	<ul style="list-style-type: none"> • African Americans • Asian Americans • Hispanic Americans • Caucasian Females 	<ul style="list-style-type: none"> • African Americans • Asian Americans • Caucasian Females

Source: M³ Consulting

As significant disparity is eliminated in the above categories, the utilization of race and gender-neutral means in attaining the established goals should be increased. However, in all instances where race and gender-neutral means are utilized, if significant disparity re-emerges, then race and gender-conscious techniques can be utilized on a non-permanent basis to correct identified disparities. Given the recommendations regarding data capture, these categories should be closely monitored, as BART implements the procurement and organizational recommendations above, which may result in changes in disparity findings.

E.5 SUMMARY

In summary, it is reiterated that Miller³ Consulting, Inc. found that BART purchasing activities suggest that DBEs, SBs and MWBEs continue to have some difficulties obtaining significant contracts with BART. In submitting specific findings within the Disparity Study for BART, M³ Consulting formulated recommendations that allow BART to rely upon race and gender-conscious means when necessary to address ongoing hindrances to eliminating disparities, while also addressing DBE, SB and MWBE participation through race and gender-neutral efforts. Our economic and statistical utilization analyses could serve as part of the policy and procedure-making decisions needed to ensure enhanced and legally defensible DBE, SB and MWBE participation in BART's purchasing processes.