

# Metropolitan Nashville Airport Authority

## DISPARITY STUDY EXECUTIVE SUMMARY

November 2020



# Executive Summary

## I. INTRODUCTION

In October 2018, the Metropolitan Nashville Airport Authority (“MNA”) contracted with Griffin & Strong, P.C. (“GSPC”) to conduct an updated disparity study to determine the utilization of Small, Minority, Nonminority Females, and Disadvantaged Business Enterprises (collectively, “MWDBE”) and Airport Concessions Disadvantaged Business Enterprises (“ACDBE”) relative to the availability of such firms to compete for business on Construction and Construction-Related Professional Services, Professional Services, and Goods and Services contracts led by MNA. Governmental entities, such as MNA, have utilized disparity studies as a tool to respond to the Supreme Court’s decision in, City of Richmond v. J.A. Croson Co.<sup>1</sup> and the cases which followed, to determine whether there has been a compelling interest for remedial procurement programs, based upon ethnicity, race, and gender.

The Study collected and analyzed relevant data on businesses in the industries of:

- Construction and Construction-Related Professional Services
- Professional Services
- Goods and Services

The disparity study (“Study”) analyzes the five (5) year period from July 1, 2013 - June 30, 2018 (FY2014-FY2018) (“Study Period”).

## Our Team **GRIFFIN & STRONG, P.C. PROJECT TEAM**

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<sup>1</sup> City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

## II. OBJECTIVES OF THE STUDY

The principal objectives of this study are:

1. There is a statistically significant disparity in the relevant geographic and product markets between the percentage of qualified minority and Nonminority Female owned firms ("MWBE"), Disadvantaged Enterprises Businesses ( and "DBE") willing and able to provide goods or services to MNAA in each category of contracts and the percentage of such firms actually utilized by MNAA (whether as prime contractors/consultants or subcontractors/consultants)?

2. If a statistically significant disparity exists, have factors, other than race and gender, been ruled out as the cause of that disparity, such that there can be an inference of discrimination?

3. If there is an inference of discrimination, can the discrimination be adequately remedied with race-neutral and gender-neutral remedies?

4. If there is an inference of discrimination and race and gender-neutral remedies are not sufficient, does the evidence from the Study legally support a race and/or gender-conscious remedial program?

5. If there is an inference of discrimination, are the proposed remedies narrowly tailored to the strong basis in evidence from the Study?



### III. TECHNICAL APPROACH

In conducting this Study and preparing its recommendations, GSPC followed a carefully designed work plan that allowed Study team members to fully analyze availability, utilization, and disparities regarding MWDBE participation. The final work plan consisted of, but was not limited to, the following major tasks:

- establishing data parameters and finalizing a work plan;
- legal analysis;
- policy and procurement process review and remedial program analysis;
- collecting, organizing, and cleaning data;
- conducting market area analyses;
- conducting product market analysis;
- conducting utilization analyses;
- estimating the availability of qualified firms;
- analyzing the utilization and availability data for disparity and significance;
- conducting private sector analysis including credit and self-employment analysis;
- collecting and analyzing anecdotal information; and
- preparing a final report that presents race- and gender-neutral and narrowly tailored race- and gender-based remedies.

### IV. LEGAL BASIS AND UTILITY OF DISPARITY STUDIES

#### A. Historical Development of the Relevant Law Regarding DBE/MBE/WBE Programs

The outgrowth of disparity studies was in large measure a response to constitutionally based legal challenges made against federal, state, and local minority business enterprise programs enacted to remedy past or present discrimination (whether real or perceived). Such studies were effectively invited by the United States Supreme Court in rendering its seminal decision in City of Richmond v. J. A. Croson Company, 488 U.S. 469; 109 S. Ct. 706; 102 L. Ed. 2d 854 (1989), and subsequent judicial decisions have drawn a direct line between Croson and the utilization of disparity studies. See, for example, Adarand Constructors, Inc. v. Slater (Adarand III), 228 F.3d 1147, 1172-73 (10th Cir. 2000) (“Following the Supreme Court’s decision in Croson, numerous state and local governments have undertaken statistical studies to assess the disparity, if any, between availability and utilization of minority owned businesses in government contracting.”).

Disparity studies have therefore become an important tool for governmental entities in deciding whether to enact minority business programs or legislation, and in justifying existing programs or legislation in the face of constitutional challenge. To better understand the proper parameters of such programs, one must understand their judicial origin.

## B. Federal DBE Program and State Implementation

MNAA is required by federal law to establish and implement a Disadvantaged Business Enterprise Program (“DBE”) when using federal transportation funds. It is important to note why DBE programs exist today. The most recent iteration of the federal DBE program is the 2015 reauthorized Fixing America’s Surface Transportation Act (“FAST Act”), which authorizes the U.S. Department of Transportation (“US DOT”) to distribute funds to states for transportation-related projects.<sup>2</sup>

Thus, because MNAA receives federal funding from the US DOT, it is mandated and authorized to implement a DBE program. MNAA is guided in the crafting of its DBE program by Part 26 of the Code of Federal Regulations (C.F.R.).

Under § 26.45(c), the first step in goal setting is to determine “a base figure for the relative availability of DBEs.” 49 C.F.R. § 26.45(c). Once this is done, the regulation requires the recipient of funds to “examine all of the evidence available in . . . [its] jurisdiction to determine what adjustment, if any, is needed to the base figure to arrive at . . . [its] overall goal,” and sets forth an explanation of the term “evidence” and the quality of such that is acceptable. 49 C.F.R. § 26.45(d).<sup>3</sup>

After a state or “local” goal is established, the DBE plan must be submitted to US DOT for approval, with explanations from the state as to how it arrived at the goal. 49 C.F.R. § 26.45(f); Northern Contracting Inc. v. Illinois, 417 F.3d 715, 718 (7th Cir. 2007). In Part 26.51, regulations provide a mandate that the recipient must “meet the maximum feasible portion of . . . [its] overall goal by using race-neutral means of facilitating race-neutral DBE participation,” along with providing examples of what is meant by “race-neutral means.” 49 C.F.R. § 26.51(a)-(d).<sup>4</sup>

If a governmental entity cannot meet its overall DBA solely through the use of race- and gender-neutral means, it is permitted to employ race- and gender-conscious measures as part of its implementation – in a manner which satisfies the relevant regulatory and legal standards set forth herein. See 49 C.F.R. § 26.51(c).

Of note, the regulations define what a DBE is (in § 26.5), and provide for a “rebuttable presumption” that “citizens of the United States (or lawfully admitted permanent residents) who are woman, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals.” 49 C.F.R. § 26.67.<sup>5</sup>

## V. FINDINGS

### FINDING 1: LEGAL FINDINGS

- Current Measures Not Effective -Consistent with the “narrow tailoring” aspect of the strict scrutiny analysis, MNAA continues to implement race- and gender-neutral measures to try to increase utilization of MWDDBE firms, but the present Study shows that those measures have not been effective in ameliorating the identified disparities.<sup>6</sup>
- Basis to Continue Race-and Gender Conscious Remedies - Accordingly, MNAA has a basis to continue and/or introduce race- and gender-conscious remedies or policies toward that goal.<sup>7</sup>

- Adverse Impact of MWDBE Status -Moreover, the use of a regression analysis and consideration of the contracting environment in the private sector as part of this Study allow MNAA to demonstrate that factors other than MWDBE status cannot fully account for the statistical disparities found. Stated otherwise, MNAA can show that MWDBE status continues to have an adverse impact on a firm’s ability to secure contracting opportunities with MNAA, further supporting more aggressive remedial efforts.
- Remedies Limited to Certain MWDBE Groups - Lastly, having obtained statistical and anecdotal evidence of disparities that are race-, ethnicity-, and gender-specific, MNAA can ensure that the more robust remedies considered as a result of this Study can be limited to minority groups for which underutilization and an inference of discrimination has been identified.<sup>8</sup>

## FINDING 2: GEOGRAPHIC RELEVANT MARKET

The figure below summarizes the geographical area where at least 75% of prime awardees were located in each industry. In analyzing the Relevant Market data, GSPC tabulated the percentage of dollars paid, beginning with Davidson County, TN (by zip codes). GSPC next radiated out to count the dollars spent in the Nashville Metropolitan Statistical Area (MSA) <sup>9</sup> until the cumulative percentage was equal to or greater than 75%. The availability and utilization analyses were conducted only on firms with offices within the Relevant Markets. The results were as follows:

**Figure 1: Summary of Relevant Geographic Market (by payments):**

### MNAA Disparity Study

<b>Construction and Construction Related Professional Services (Federal)</b>	<ul style="list-style-type: none"> <li>• 82.04% Nashville MSA</li> </ul>
<b>Construction and Construction Related Professional Services (Non-Federal)</b>	<ul style="list-style-type: none"> <li>• 99.84% Nashville MSA</li> </ul>
<b>Professional Services</b>	<ul style="list-style-type: none"> <li>• 83.54% Nashville MSA</li> </ul>
<b>Goods and Services</b>	<ul style="list-style-type: none"> <li>• 79.06% Nashville MSA</li> </ul>



### FINDING 3: AVAILABILITY

The measures of availability utilized in this disparity study incorporate all of the criteria of availability required by *Croscon*:

- The firm does business within an industry group from which MNAA makes certain purchases.
- The firm's owner has taken steps to demonstrate interest in doing business with government.
- The firm is located within a relevant geographical area such that it can do business with MNAA.

The firms used to calculate Availability came from GSPC's Master Vendor File of firms seeking public sector opportunities in the Relevant Market. GSPC found that firms were available to provide goods and services to MNAA as reflected in the following percentages by each race, ethnicity, and gender group.

**Table 1: Summary of Availability Estimates by Work Category In the Relevant Market  
(Based upon GSPC's Master Vendor File)  
MNAA Disparity Study**

BUSINESS OWNERSHIP CLASSIFICATION	CONSTRUCTION AND CONSTRUCTION-RELATED PROFESSIONAL SERVICES	PROFESSIONAL SERVICES	GOODS AND SERVICES
Black American	18.61%	15.70%	10.40%
Asian American	1.66%	0.72%	0.70%
Hispanic American	1.97%	1.99%	1.17%
Native American	0.45%	0.18%	0.35%
TOTAL MBE	22.69%	18.59%	12.62%
Nonminority Female	15.13%	10.29%	5.26%
TOTAL M/WBE	37.82%	28.88%	17.87%
NON-M/W/DBE	62.18%	71.12%	82.13%
TOTAL FIRMS	100.00%	100.00%	100.00%

*Griffin & Strong, P.C. 2019*

## FINDING 4: M/WBE PRIME UTILIZATION

As the table below shows, MNAA paid out a total of \$201.7 million in prime Construction and Construction-Related Professional Services (non-federal) spending in the Relevant Market during the study period and \$12.3 million of this amount, or 6.13% of this amount was paid to M/WBE firms as prime contractors. MNAA expended a total of \$84.3 million in prime Construction and Construction-Related Professional Services (federal) in the Relevant Market during the study period and \$176,854 of this amount, or 0.21% of this amount was paid to M/WBE firms as prime contractors. M/WBEs were paid 1.63% and 0.91% of Professional Services and Goods & Services expenditures respectively.

**Table 2: Summary of Prime Utilization by Work Category  
(Based upon Spend)  
MNAA Disparity Study**

Firm Ownership	Construction and Construction Related Professional Services - Nonfederal		Construction and Construction Related Professional Services - Federal		Professional Services		Goods and Services		Total
	\$	%	\$	%	\$	%	\$	%	
Black American	\$ 1,886,793	0.94%	\$ 66,892	0.08%	\$ 777,057	0.76%	\$ 590,917	0.65%	\$ 3,321,659
Asian American	\$ 36,693	0.02%	\$ -	0.00%	\$ -	0.00%	\$ -	0.00%	\$ 36,693
Hispanic American	\$ 2,436,713	1.21%	\$ 21,315	0.03%	\$ 125,522	0.12%	\$ 16,814	0.02%	\$ 2,600,364
Native American	\$ -	0.00%	\$ -	0.00%	\$ -	0.00%	\$ -	0.00%	\$ -
<b>TOTAL MINORITY</b>	<b>\$ 4,360,199</b>	<b>2.16%</b>	<b>\$ 88,207</b>	<b>0.10%</b>	<b>\$ 902,579</b>	<b>0.89%</b>	<b>\$ 607,731</b>	<b>0.67%</b>	<b>\$ 5,958,715</b>
Nonminority Female	\$ 7,997,275	3.96%	\$ 88,646	0.11%	\$ 756,647	0.74%	\$ 214,298	0.24%	\$ 9,056,867
<b>TOTAL M/WBE</b>	<b>\$ 12,357,474</b>	<b>6.13%</b>	<b>\$ 176,854</b>	<b>0.21%</b>	<b>\$ 1,659,226</b>	<b>1.63%</b>	<b>\$ 822,029</b>	<b>0.91%</b>	<b>\$ 15,015,583</b>
NON-M/WBE	\$ 189,396,375	93.87%	\$ 84,152,221	99.79%	\$ 100,288,808	98.37%	\$ 89,557,269	99.09%	\$ 463,394,673
<b>TOTAL FIRMS</b>	<b>\$ 201,753,849</b>	<b>100.00%</b>	<b>\$ 84,329,075</b>	<b>100.00%</b>	<b>\$ 101,948,034</b>	<b>100.00%</b>	<b>\$ 90,379,298</b>	<b>100.00%</b>	<b>\$ 478,410,256</b>

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## FINDING 5: M/WBE TOTAL UTILIZATION (PRIME PLUS SUBCONTRACTOR)<sup>10</sup>

MBEs received \$17.8 million during the Study Period, 8.84% of the total (prime plus subcontractor) Construction and Construction-related Professional Services (non-federal) dollars, while Nonminority Female owned firms (WBEs) were paid a total of \$14.9 million, 7.42% of the total Construction dollars. M/WBEs received 16.26% of the total Construction and Construction-related Professional Services (non-federal) dollars (Table 3).

MBEs received \$4.8 million during the Study Period, 5.80% of the total (prime plus subcontractor) Construction and Construction-related Professional Services (federal) dollars, while Nonminority Female owned firms were paid a total of \$408,476, 0.48% of the total Construction and Construction-Related Professional Services dollars. M/WBEs received 6.28% of the total Construction and Construction-related Professional Services (federal) dollars (Table 3).

MBEs received \$1.4 in total Professional Services (prime plus subcontractor) during the Study Period, 1.36% of the total Professional Services dollars, while Nonminority Female owned firms were paid a total of \$1.1 million, 1.12% of the total Professional Services dollars. M/WBEs received 2.48% of the total Professional Services dollars (Table 3).



MBEs received \$607,731 in total Goods & Services (prime plus subcontractor) during the Study Period, 0.67% of the total Goods & Services dollars, while Nonminority Female owned firms were paid a total of \$214,298, 0.24% of the total Goods & Services dollars. M/WBEs received 0.91% of the total Goods & Services dollars (Table 3).

**Table 3: Summary of Total Utilization by Work Category In the Relevant Market  
(Based upon Spend FY2014-FY2018)  
MNAA Disparity Study**

Business Ownership Classification	Construction Non-Federal	Construction Federal	Professional Services	Goods & Services
	(\$)	(\$)	(\$)	(\$)
Black American	\$ 13,609,302	\$ 4,467,457	\$ 1,261,673	\$ 590,917
Asian American	\$ 1,247,639	\$ 398,731	\$ -	\$ -
Hispanic American	\$ 2,476,613	\$ 21,315	\$ 125,522	\$ 16,814
Native American	\$ 503,365	\$ -	\$ -	\$ -
<b>TOTAL MINORITY</b>	<b>\$ 17,836,919</b>	<b>\$ 4,887,503</b>	<b>\$ 1,387,195</b>	<b>\$ 607,731</b>
Nonminority Female	\$ 14,974,177	\$ 408,476	\$ 1,141,247	\$ 214,298
<b>TOTAL M/WBE</b>	<b>\$ 32,811,096</b>	<b>\$ 5,295,979</b>	<b>\$ 2,528,443</b>	<b>\$ 822,029</b>
NON-M/WBE	\$ 168,942,753	\$ 79,033,096	\$ 99,419,591	\$ 89,557,269
<b>TOTAL FIRMS</b>	<b>\$ 201,753,849</b>	<b>\$ 84,329,075</b>	<b>\$ 101,948,034</b>	<b>\$ 90,379,298</b>
Business Ownership Classification	TOTAL	TOTAL	TOTAL	TOTAL
	(%)	(%)	(%)	(%)
Black American	6.75%	5.30%	1.24%	0.65%
Asian American	0.62%	0.47%	0.00%	0.00%
Hispanic American	1.23%	0.03%	0.12%	0.02%
Native American	0.25%	0.00%	0.00%	0.00%
<b>TOTAL MINORITY</b>	<b>8.84%</b>	<b>5.80%</b>	<b>1.36%</b>	<b>0.67%</b>
Nonminority Female	7.42%	0.48%	1.12%	0.24%
<b>TOTAL M/WBE</b>	<b>16.26%</b>	<b>6.28%</b>	<b>2.48%</b>	<b>0.91%</b>
NON-M/WBE	83.74%	93.72%	97.52%	99.09%
<b>TOTAL FIRMS</b>	<b>100.00%</b>	<b>100.00%</b>	<b>100.00%</b>	<b>100.00%</b>
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## FINDING 6: SUMMARY OF DISPARITY ANALYSIS FOR FY2014-FY2018

Indicated below are those M/WBE groups where a statistically significant underutilization was found in prime utilization and total utilization (prime + subcontractor):

Construction and Construction-Related Services (Nonfederal): All MWBE groups;  
 Construction and Construction-Related Services (Federal): All MWBE groups;  
 Professional Services: All MWBE groups;  
 Goods and Services: All MWBE groups.

Statistically significant disparity (Confidence interval of 95% and probability of error of less than 5%).

Significant Underutilization (Disparity percentage below 80%.

## FINDING 7: STATEWIDE PROGRAM AREA AVAILABILITY

MNAA's current MWBE program is a Tennessee statewide program, however the Relevant Market for purposes of the Study included only the three-counties of the Nashville MSA. Therefore, GSPC conducted an analysis of the State of Tennessee to determine if there was statistical and anecdotal support to continue the MWBE Program on a statewide basis. Table 4 below shows the Availability of firms in the State and Appendix J contains the statewide disparity analysis. GSPC found that there were statistically significant disparities that extended statewide and therefore substantial support for MNAA to continue with the State of Tennessee as its Program Area.

**Table 4: Summary of Availability in the MNAA Current Program Area (State of Tennessee)  
MNAA Disparity Study**

BUSINESS OWNERSHIP CLASSIFICATION	CONSTRUCTION AND CONSTRUCTION-RELATED PROFESSIONAL SERVICES		PROFESSIONAL SERVICES		GOODS AND SERVICES	
	Count	Percentage	Count	Percentage	Count	Percentage
Black American	156	16.05%	90	12.93%	192	16.86%
Asian American	15	1.54%	6	0.86%	11	0.97%
Hispanic American	18	1.85%	17	2.44%	13	1.14%
Native American	6	0.62%	1	0.14%	5	0.44%
<b>TOTAL MBE</b>	<b>195</b>	<b>20.06%</b>	<b>114</b>	<b>16.38%</b>	<b>221</b>	<b>19.40%</b>
Nonminority Female	123	12.65%	58	8.33%	75	6.58%
<b>TOTAL M/WBE</b>	<b>318</b>	<b>32.72%</b>	<b>172</b>	<b>24.71%</b>	<b>296</b>	<b>25.99%</b>
<b>NON-M/W/DBE</b>	<b>654</b>	<b>67.28%</b>	<b>524</b>	<b>75.29%</b>	<b>843</b>	<b>74.01%</b>
<b>TOTAL FIRMS</b>	<b>972</b>	<b>100.00%</b>	<b>696</b>	<b>100.00%</b>	<b>1,139</b>	<b>100.00%</b>

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## COMPARISON BETWEEN ACHIEVEMENT AND EXPECTED UTILIZATION

Availability in the Program Area is the percentage that would be expected to be the MWBE participation in MNAA's contracting. Table 5 below translates the Availability percentage to the payments to MWBEs upon full achievement of the amounts to be expected. GSPC also shows the difference between actual spend during the Study Period and the expected amount based upon Availability.

It should be noted that Availability is not necessarily equivalent to Annual Aspirational Goals. And, the Triennial Goal-Setting may use goals based upon Availability from the Disparity Study as Step One: Base Goal, but is permitted (but not required) to make adjustments under Step Two, based upon a number of factors, including current achievement.

**Table 5: Comparison Between MWBE Spend and MWBE Expected Spend Based Upon Availability in the MNAA Current Program Area (State of Tennessee) MNAA Disparity Study**

	MBE Spend	MBE Expected Spend	MBE Difference	WBE Spend	WBE Expected Spend	WBE Difference
<b>Construction Non-Federal</b>	\$ 18,021,138	\$ 43,215,130	\$ (25,193,992)	\$ 18,912,868	\$ 27,251,814	\$ (8,338,946)
<b>Construction Federal</b>	\$ 4,887,503	\$ 16,917,771	\$ (12,030,268)	\$ 409,950	\$ 10,668,485	\$ (10,258,535)
<b>Professional Services</b>	\$ 1,872,403	\$ 16,960,355	\$ (15,087,952)	\$ 1,532,614	\$ 8,625,138	\$ (7,092,524)
<b>Goods &amp; Services</b>	\$ 607,731	\$ 17,999,824	\$ (17,392,093)	\$ 223,869	\$ 6,105,095	\$ (5,881,226)

	MBE Spend	MWBE Expected Spend	MWBE Difference
<b>Construction Non-Federal</b>	\$ 36,934,006	\$ 70,466,944	\$ (33,532,938)
<b>Construction Federal</b>	\$ 5,297,453	\$ 27,586,256	\$ (22,288,803)
<b>Professional Services</b>	\$ 3,405,017	\$ 25,585,493	\$ (22,180,476)
<b>Goods &amp; Services</b>	\$ 831,600	\$ 24,104,919	\$ (23,273,319)

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## FINDING 8: POLICY FINDINGS

### 1. Procurement Methods

The following table shows the contract thresholds for MNAA



**Table 4: Contract Threshold and Procurement Methods  
MNAA Disparity Study**

Price Threshold	Method of Procurement	Notes
Small purchases up to \$10,000	Use the P-card where feasible or enter requisition in AX (the Microsoft Enterprise Resource System) or submit iRFQ to Procurement	Does not track MWBE participation on P cards.
Small purchases \$10,000 to \$50,000	Complete iRFQ for at least 3 vendors or have Procurement obtain quotes	Attempt to receive quotes from MWBEs
Formal competitive purchases (\$50,000 and over)	Bids exceeding the threshold must be purchased through existing MNAA contract, existing cooperative agreement for formal solicitation process	DBE/MWBE participation from BDD

Source: MNAA Procurement Procedures Manual, pages 9-10.

The following methods of procurement are utilized by MNAA:

- a. Purchase Orders (PO) are required for any scopes of work not procured through a formal solicitation process.
- b. Invitations to Bid (ITB) are used where the criteria are primarily price and specifications and the awards are to the responsive and responsible bidder with the lowest price.
- c. Requests for Proposal (RFP) are used for goods and services that are evaluated on price and other criteria that include qualifications and experience. MNAA has used RFPs for goods and services, Design-Build, Construction Manager At-Risk, and Progressive Design-Build. MNAA has put DBE and MWBE goals on all these methods of construction procurement.
- d. Request for Qualifications (RFQ) are used to obtain professional services.
- e. Waiver of Competitive Selection.
- f. On-Call construction and design services are procured by an RFP.
- g. Job Order Contracting.

## **2. Airport Concessions**

Until very recently concessions operated under a master concessionaire model, including prime concessionaires and sub-concessionaires. Under the master concessionaire model MNAA had contracts with HMS Host, Hudson Group and Delaware North for concession work in food and beverage and news and gifts. Going forward Fraport USA will oversee the MNAA concessions and retail program for ten years. Under Fraport's model, most of the businesses in ninety new locations will be independently and locally owned. Fraport will manage tenants as a mall and rent out spaces. In FY 2017 MNNA had 5 ACDBE prime concessionaires, 3 ACDBE sub-concessionaires and 21 ACDBEs in Goods & Services.

## **3. Bonding and Insurance Requirements**

All MNAA construction projects require 100% payment and performance bonds. MNAA does not have a policy or practice of waiving bonds. BDD staff did report some MWBE complaints about bonding.

MNAA recently began using an owner-controlled insurance program (OCIP) under which commercial general liability and other insurance policies are purchased and administered by MNAA. The OCIP provides insurance coverage for MNAA, its prime contractors and subcontractors while they are performing the work at MNAA project sites. Generally, MNAA staff report fewer vendor complaints of insurance requirements as a barrier since the implementation of the OCIP.

## **4. DBE and ACDBE Goals**

The MNAA overall DBE goal was 12.4% for FY 2018. In 2018 MNAA had seven bids that failed to meet DBE goals or good faith efforts. MNAA has set an ACDBE goal for 22.6% involvement under the new concessions business model discussed above. Fraport has committed to achieve 40.5% ACDBE participation, along with a mentoring program for tenants at the airport.<sup>11</sup>

## **5. Fostering Small business Utilization**

MNAA has made limited use of target markets to foster SBE utilization in pavements, parking lots and professional services (staff augmentation). Target markets procurement limits bidders to SBEs. MNAA has been broadly satisfied with the outcome of target markets for the few projects where it was employed. MNAA is currently working on a process to select more projects for target market solicitations.

## **6. Business Development**

MNAA provides a Mentor Protégé program, which provides businesses with classroom- training on topics such as bonding, operations and succession planning. MNAA did not use a third-party supportive services consultant during the study but has undertaken a number of business development initiatives.

## **FINDING 9: PRIVATE SECTOR FINDINGS**

The results of the GSPC disparity analysis suggests that being a minority, woman, or disadvantaged business enterprise ("MWDBE") in the Metropolitan Nashville market area is associated with having lower firm revenues than Nonminority male owned firms. MWDBE firms are also less likely to be self-employed as compared to non-MWDBEs.

Overall, the GSPC regression analysis<sup>12</sup> suggests that any observed disparities in public contracting outcomes between MWDBEs and non-MWDBEs are not explained by differences in capacity for public contracting success with MNA. This follows as a result of the GSPC regression specifications controlling for firm public contracting capacity by including measures for the education level of the firm owner, the age and market tenure of the firm, the size of the firm with respect to the number of employees and revenues, firm bonding capacity, willingness and ability to do business with MNA, and firm financial standing. In other words, GSPC tested the statistically significant disparity that was found between the availability of MWDBEs in the marketplace to see if the disparity was caused by something other than the race or gender status of the owner and found that it was not due to other likely capacity factors. This left the race and gender status of the owner as the likely cause of the disparity.

Additionally:

- As compared to non MWDBEs, Black American owned firms, Native American owned firms, bi/multiracial owned firms, and Nonminority Female owned firms are particularly harmed by perceived private sector discrimination.
- As compared to non MWDBEs, MWDBEs are no more likely to be a new firm entering the Nashville market area as a new firm. This means that the disparity in MWDBEs not receiving contract awards cannot be explained because they are new or start up firms.
- As compared to non MWDBEs, the credit capacity of MWDBEs owned by Subcontinent Asians, Asian Pacific Islanders, and possibly for Black American owned firms, certified DBEs, ACDBEs, and certified small business enterprises (“SBEs”) is less than non-MWDBEs. This suggests that any MNA public contracting disparities between small or MWDBEs could be explained by the differentials in access to credit capital.
- As compared to non MWDBEs, with the exception of ACDBEs, the likelihood of MWDBEs never receiving a prime contract was higher relative to non-MWDBEs over the time period under consideration in our analysis. This means that, like contracting with MNA, MWDBEs are less likely to receive a contract in the Metropolitan Nashville Marketplace than Non-MWDBEs.

## FINDING 10: ANECDOTAL FINDINGS

GSPC engaged in several different types of anecdotal evidence collection, including responses from the Online Survey of Business Owners, a focus group, two public hearings, review of bid protest documents and interviews with staff and local organizations. Listed below are impressions gathered from the community about MNA and diverse contracting.

### 1. Informal Networks

In the anecdotal interviews, several firms indicated that they benefited personally from having connections – or at least some semblance of connections – to prime contractors or Airport Authority officials.

There were other firms, however, that complained about being excluded from MNA contracts because of informal networks.

It was reported by interviewees that MNAA engineers recommend “preferred” firms to the primes ahead of issuing the RFP. Others stated doing business with any governmental agency is basically a “good ole boys’ network”, a colloquial term referring to an informal network of individuals made privy to information or access that places them at a competitive advantage.

#### **Survey Results:** <sup>13</sup>

- 43% of survey respondents believe in the presence of an “informal network” of contractors that do business with MNAA. This includes 40% of Nonminority Females, 75.5% of Black Americans and 40% of Hispanic American respondents.
- 40.3% of those who believe in the presence of informal networks say their exclusion from this network has prevented them from winning contracts with MNAA.

#### **Key Quotes:**

- “A prime told me, ‘we were told our chances would be better if we have a specific contractor on our team.’”
- “I have attempted to be part of the bid at every opportunity but have not been included on a single bid team.”
- AI-11 felt he would have a better chance to land a contract if “there were more opportunities to build relationships with MNAA purchasing managers,” and “if the owner is closer to the people who run Metro and MNAA diversity offices.”

## **2. Marketplace Discrimination**

While some participants believed they had not experienced any discrimination, several business owners talked about subtle references made about the impact of race and gender. For example, one business owner stated how “he feels lucky to be in a white-collar business” because often “blue-collar companies or (vendors) with an accent complain about feelings of discrimination.” A Nonminority Female believes that her status as an Army veteran helps garner respect from the males who dominate her industry. A minority retailer stated that because of airport security, she could not readily visit the shops where her products were being sold to get inventory. The retailer would have expired product in their display, and would not notify her when product was low, or would have a competitor’s product in their display. She had to rely on friends or family flying out of the airport or flying out herself to get reports. She ended the relationship.

Additionally, some nonminority firms felt that they were being “reverse discriminated” against, which could support feelings of racial animosity. One firm owner stated that, he was not aware of any discrimination, “unless it’s reverse.” He said minority subcontractor “quotas” have often forced him to have to make hires he did not need in order to win a bid.

## Survey Results

- 58% of survey respondents either “Agree” or “Strongly Agree” that nonminority contractors only use small or diverse firms when required by MNA. This includes over 30% of nonminority firms, 83% of all Black American respondents, 66% of all Hispanic Americans and over half of all Nonminority Females
- 36.3% of respondents either “Agree” or “Strongly Agree” that small and diverse firms are seen as “less competent” than nonminority firms. This expands to over 25% of Nonminority Females and over 75% of Black Americans
- Only 18% of all survey respondents, but 41% of Black American respondents believe they have experienced discriminatory behavior from the Nashville private sector.

### Key Quotes:

- “If not for my niche industry ... I could see lots of difficulty doing business with MNA and other government agencies.”
- “Color matters. If I were a white male vendor for 10 years, I would get a better response.”
- “This world view severely impacts the way they do business... They see me as different.”
- “I guess the opportunities are less for black business owners”

### 3. Business Fronts and Pass-Throughs

The barriers to doing business with MNA aligned primarily with process and economic factors. However, given the competitive climate and rigors of the RFP and bidding processes, some vendors are reported to have adopted strategies to circumvent diversity goals designed to increase opportunities for minority owned and Nonminority Female owned businesses.

One such way is the use of “front” and “pass-through” businesses, a form of certification fraud where illegitimate M/WBE businesses are partnered to win projects. An Hispanic American subcontractor said that the practice is an open secret. He pointed to business owners who subcontract shell companies set up in the names of qualifying family members. Similar situations occurred in GSPC’s interviews where in several cases, certified M/WBE firms provided nonminority male representatives for our interviews because they held management responsibility or a stake in the business.

### Key Quotes

- “It’s known in the industry that the general contractors ... they have certain ways to get around the system.”
- “I’ve heard in the past that there was a general contractor they claimed had used a small business, WBE or MBE designation. It turned out that it was the general contractor’s wife, so it was a disadvantage to other firms.”
- “Occasionally, you have to hire a gate security guard when you don’t need one.”
- “If you’re chasing a project and they’ve got an MBE and WBE percentage they want to hit, they point blank tell you how to do it and you’ve got to be creative in putting your team together.”

### Other Barriers to Participation

- Prompt Payment
- Oversight and Monitoring
- Outreach
- Navigating the MNA website



## FINDING 11: M/WBE NON-CAR RENTAL CONCESSION REVENUE

MBEs received \$36.8 million during the Study Period, 13.05% of the Restaurant concession revenue, while Nonminority Female owned firms received \$105,381, 0.04% of the Restaurant concession revenue. M/WBEs received 13.09% of Restaurant concession revenue.

MBEs received \$24.0 million during the Study Period, 14.55% of the Retail concession revenue, while Nonminority Female owned firms received \$64,859, 0.04% of the Retail concession revenue. M/WBEs received 14.59% of Retail concession revenue.

MBEs received \$16.3 million during the Study Period, 12.69% of the Services concession revenue, while Nonminority Female owned firms received \$803,450, 0.63% of the Services concession revenue. M/WBEs received 13.32% of Services concession revenue (Table x).

Overall M/WBEs received 13.57% of concession revenue dollars from FY 2014-FY2019.

**Table 5: Summary of Non Car Rental Concession Revenue by Concession Category  
(Using revenue Dollars FY2014-FY2019)  
MNAA Disparity Study**

Business Ownership Classification	Restaurants	Retail	Services	TOTAL
	(\$)	(\$)	(\$)	(\$)
Black American	\$36,811,362	\$22,425,514	\$16,288,462	\$75,525,337
Asian American	\$ -	0	\$25,262	\$25,262
Hispanic American	\$ -	\$1,657,129	\$0	\$1,657,129
Native American	\$ -	0	\$ -	\$0
<b>TOTAL MINORITY</b>	<b>\$36,811,362</b>	<b>\$24,082,643</b>	<b>\$16,313,724</b>	<b>\$77,207,728</b>
Nonminority Female	\$105,381	\$64,859	\$803,450	\$973,691
<b>TOTAL M/WBE</b>	<b>\$36,916,743</b>	<b>\$24,147,502</b>	<b>\$17,117,174</b>	<b>\$78,181,419</b>
Non-M/WBE	\$245,137,996	\$141,364,296	\$111,408,193	\$497,910,484
<b>TOTAL FIRMS</b>	<b>\$282,054,739</b>	<b>\$165,511,798</b>	<b>\$128,525,367</b>	<b>\$576,091,903</b>
Business Ownership Classification	Restaurants	Retail	Services	TOTAL
	(%)	(%)	(%)	(%)
Black American	13.05%	13.55%	12.67%	13.11%
Asian American	0.00%	0.00%	0.02%	0.00%
Hispanic American	0.00%	1.00%	0.00%	0.29%
Native American	0.00%	0.00%	0.00%	0.00%
<b>TOTAL MINORITY</b>	<b>13.05%</b>	<b>14.55%</b>	<b>12.69%</b>	<b>13.40%</b>
Nonminority Female	0.04%	0.04%	0.63%	0.17%
<b>TOTAL M/WBE</b>	<b>13.09%</b>	<b>14.59%</b>	<b>13.32%</b>	<b>13.57%</b>
Non-M/WBE	86.91%	85.41%	86.68%	86.43%
<b>TOTAL FIRMS</b>	<b>100.00%</b>	<b>100.00%</b>	<b>100.00%</b>	<b>100.00%</b>

Source: B2G

## FINDING 12: M/WBE NON-CAR RENTAL CONCESSION REVENUE

The table below indicates those M/WBE groups where a statistically significant disparity was found in non-car rental concessions. Black American owned concessions were over utilized in Restaurants and Retail.

**Table 6: Summary of Statistically Significant Disparity Outcomes of Underutilization of MWBEs  
MNAA Disparity Study**

	Restaurants	Retail	Services
Black American			X
Asian American	X	X	X
Hispanic American	X	X	X
Native American	X	X	X
Nonminority Female	X	X	X

*Griffin & Strong, P.C. 2020*



## V. COMMENDATIONS

Within the Disparity Study process, GSPC is careful to look for opportunities to highlight the successes and advancements being made through equitable processes and diverse contracting initiatives. The commendations below are areas where GSPC believes MNAA and its staff should be noted for their contributions to inclusion and equity.

### 1. MNAA Staff

Several interviewees and Study participants offered glowing reviews for MNAA staff for keeping the lines of communication open before and during the RFP and bidding processes. There were very few complaints about the way procurement information was distributed to prospective and/or returning bidders except there was some concern that phone calls were not returned in a timely manner. AI-12 called the airport a “sophisticated purchaser of services ... that has been supportive and understanding with firms that are submitting for services.” MNAA was also commended by several respondents about their “intentionality” and commitment to diversity and inclusion.

### 2. Supportive Services

MNAA currently partners with the Nashville Business Incubation Center (“NBIC”) to provide supportive services for DBEs. NBIC also services the MNAA Mentor-Protégé program and takes referrals from MNAA to service DBE firms. They report that MNAA has been an excellent partner and they look forward to continued work with the airport.

### 3. COMMENDATION 1: MNAA’S ACDBE REPRESENTATION.

ACDBE’s have accounted for about 30% of MNAA’s concessions, which already indicates a successful program. The percentage of ACDBE’s has increased under the new concessions program to 45%. This is likely second in the country only to the 50-55% achieved at Hartsfield Jackson Atlanta International Airport.

It should be noted that ACDBE’s did mention that they should be trained separately from other vendors.

## VI. RECOMMENDATIONS

### RECOMMENDATION 1: M/WBE GOALS

The findings of this Study indicate that MNAA should continue to implement programs to promote the utilization of minority and Nonminority Female owned businesses. GSPC specifically recommends that the federal Disadvantaged Business Enterprise (“DBE”) Program continue to be fully administered to all race/ethnicity/gender/gender categories.

Subcontracting goals should be set on a contract-by-contract basis. In addition, MNAA should set aspirational goals for each work category. Aspirational goals are an internal measurement or benchmark of where MNAA’s utilization of MWBE firms should be. The aspirational goals should be based upon the Availability of firms in the Relevant Market representing the anticipated achievement of both prime and subcontractor MWBEs.

For non-federally funded projects, GSPC recommends the continuation of MNAA’s MWBE program, but that any SBE elements should be administered on the prime level as an SBE set aside rather than combined with the MWBE subcontractor program. SBE subcontracting goals, used in concert with DBE or MWBE goals may work against DBE and MWBE participation and function as a non-MWBE goal.

As noted in the above Legal Finding the continued disparities identified in the Study provide the necessary factual basis for continued use of race- and gender-conscious remedies. In order to comply with the narrow tailoring requirement discussed in the case law, the remedies implemented (or continued) by MNAA as a result of this Study must be limited to the minority groups for which underutilization has been statistically identified.

In order to effectively administer an M/WBE goals program, MNAA must begin to track all subcontractors, both M/WBEs and non-MWBEs whether or not there are goals. This will enable MNAA to measure the full extent that it is utilizing MWBE subcontractors and the percentage of subcontractors that are MWBEs.

GSPC performed an analysis of the State of Tennessee to determine whether there was sufficient evidence for MNAA to continue its statewide program. GSPC found that there was sufficient evidence to support MNAA keeping the current Statewide Program Area, which includes continuing to certify firms throughout the State of Tennessee.

### RECOMMENDATION 2: STRENGTHEN THE EXISTING SMALL BUSINESS RESERVE PROGRAM.

MNAA has a small business (“SBE”) prime set aside program, but it is not being fully utilized. This program is an excellent tool for increasing minority and Nonminority Female owned business participation as prime contractors.

It is important to note that the Small Business Reserve program recommended herein are race- and gender-neutral. As discussed in the Legal Analysis chapter (Section D.7.), good faith consideration of race-neutral (and/or gender-neutral) alternatives is an important part of the narrow tailoring requirement.<sup>13</sup>

### RECOMMENDATION 3: BONDING AND INSURANCE

MNAA should review its bonding and insurance requirements to reduce the burden on small, minority and Nonminority Female owned businesses. A comprehensive effort should be undertaken to ensure that MNAA is not requiring limits which are higher than necessary to protect MNAA’s interests.

Specifically, GSPC found that MNAA has given no bond waivers. Therefore, it recommends that MNAA consider bond waivers for small projects. Though this recommendation is anticipated to have a positive effect on M/WBE firm participation, it is facially a race- and gender-neutral remedy, and thus comports with the narrow tailoring requirement discussed above relating to the need for good faith consideration or race- and gender-neutral alternatives before implementing remedies which are race- or gender-conscious.<sup>14</sup>

#### RECOMMENDATION 4: GREATER PROJECT OVERSIGHT

GSPC received comments that once firms are on the job, there is a breakdown of oversight to make sure that prime contractor properly administering the work of subcontractors. Bad behavior on job sites and payments were specifically mentioned. GSPC recommends increasing periodic site visits and follow up with subcontractors by the Business Diversity department.

#### RECOMMENDATION 5: DEVELOP FORECASTING PLAN

In addition to “Business Taking Off” where upcoming solicitations can be viewed, MNAA should consider reviewing all its anticipated expenditures for each upcoming fiscal year as part of its budget approval process, based on the anticipated expenditures of each department. M/WBE spending targets could be set based on M/WBE availability to perform the work anticipated on various projects. Anticipated expenditures could be made public as a forecast which would allow M/WBE firms to understand early on what projects are anticipated in the coming fiscal year and to prepare to compete for them.

Planning plays an important role in establishing and maintaining effective remedial programs. This begins with understanding what services and goods MNAA will be buying in the year to come.

**Targeted Outreach-** Annual forecasting will enable the contract compliance personnel to target firms that can do the work for notification of the work;

**Encourage Teaming-** Knowing ahead of time what work will be presented in the coming year will give room for contract compliance to schedule networking events and encourage firms to team. It also gives more time for mandatory pre-bid conferences where potential prime contractors can meet potential subcontractors;

**Supportive Services -** Annual forecasting will allow MNAA to provide supportive services well in advance of the bid issuance, if needed. Supportive services may be offered internally in coordination with other agencies, the Small Business Administration bonding program, and the Small Business Development Centers. This is particularly important on MNAA’s large capital projects to insure diverse supplier participation.

Again, though this Recommendation is anticipated to have a positive effect on M/WBE firm participation, it is facially a race- and gender-neutral remedy, and thus comports with the narrow tailoring requirement discussed above relating to the need for good faith consideration or race- and gender-neutral alternatives before implementing remedies which are race- or gender-conscious<sup>15</sup>



## VII. STUDY CONCLUSION

MNAA has had a long history and commitment to pursuing equity and inclusion in procurement but still has not achieved substantial parity in awarding contracts to minority and women owned firms. This Study found that there was a statistically significant underutilization of MWDBEs in every work category for and all races, ethnicities, and genders, except non-MWDBEs that were overutilized in every work category. In other words, MWDBEs were not utilized to the extent that should be expected based upon their availability in the marketplace.

GSPC believes that the issues that are impacting MWDBE are primarily fine-tuning programs that already exist but have glitches in their implementation. For example, MNAA has a subcontractor program but does not track all subcontractors. It has an ACDBE program but the revenue reports are still in paper format. More tracking through the use of electronic data files would assist, not only in tracking firms, but also in knowing which firms are being utilized and which firms remain unutilized.

MNAA is already doing a great job in outreach to MWDBE firms but it is important that the outreach be measurable to make sure that firms that are being outreached to are experiencing procurement opportunities.

MNAA should be sensitive to the perception that societal discrimination still exists in the MNAA marketplace and be prepared to address any issues of discrimination, whether in procurement or otherwise.



# End Notes

<sup>1</sup> City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

<sup>2</sup> Associated General Contractors of America, San Diego Chapter v. California D.O.T., 713 F.3d 1187, 1190 (9th Cir. 2013). “The Act . . . [provides] for race- and gender-based preferences in the transportation contracting industry in response to pervasive and ongoing discrimination and directs the Secretary of Transportation to ensure that 10% of funds distributed to states and municipalities are expended on “disadvantaged business enterprises.” *Id.* It does not however, “establish a uniform national affirmative action program,” but commands that each State receiving federal funds “implement a preference program that complies with federal regulations.” See also 49 C.F.R. § 26.1 et seq.

<sup>3</sup> In §26.45, regulations require recipients who “receive federal funding . . . [to] establish overall goals for disadvantaged business participation in federally assisted contracts,” while specifically denying to them in subpart (b) the ability to “rely on either the 10% national goal, . . . [their] previous overall goal or past DBE participation rates in. . . [their] program without reference to the relative availability of DBEs in...[their] market.” 49 C.F.R. 26.45. See Gross Seed Company v. Nebraska Department of Roads, 345 3d 964 (8th Cir. 2003).

<sup>4</sup> See Associated General Contractors v. California D.O.T., 713 F.3d at 1191.

<sup>5</sup> Part 26.67 provides that a Caucasian male can qualify for DBE status if the individual can demonstrate that he is in fact socially and economically disadvantaged. *Id.* § 26.67(d).

<sup>6</sup> See Croson, 488 U.S. at 507-08.

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

<sup>8</sup> *Id.*; see also H.B. Rowe Company, Inc. v. W. Lindo Tippet, 615 F.3d 233, 256-58 (4th Cir. 2010) (finding strong basis in evidence for remedial action for Black American and Native American firms, but no similar basis for inclusion of other minority groups (including Nonminority Female owned businesses) in the remedial policy).

<sup>9</sup> The Nashville MSA includes the counties of Davidson, Williamson, and Wilson.

<sup>10</sup> GSPC conducted a total utilization analysis by combining prime contract dollars with subcontract dollars, after subtracting subcontract dollars from prime contract dollars on a contract-by-contract basis. This analysis was only conducted for construction and professional services which had significant levels of subcontracting reported

<sup>11</sup> MNAA, August 15, 2018, Minutes of the Joint Meeting of the MNAA Board of Commissioners and MPC Board of Directors.

<sup>12</sup> The regression analysis shows whether race/ethnicity/gender factors are impediments overall to the success of M/WBEs in obtaining awards in the Nashville marketplace and whether, but for those factors, firms would have the capacity to provide goods and services on a level higher than what is presently being utilized.

<sup>13</sup> See Croson, 488 U.S. at 507-08; see also Sherbrooke Turf, Inc. v. Minnesota DOT, 345 F.3d 964, 971-72 (8th Cir. 2003).

<sup>14</sup> See *infra*, Recommendation 2.

<sup>15</sup> See *infra*, Recommendation 2.