

# TACIR

The Tennessee Advisory Commission  
on Intergovernmental Relations



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## **MEMORANDUM**

**TO:** Commission Members

**FROM:** Cliff Lippard  
Executive Director *Cliff*

**DATE:** 14 September 2021

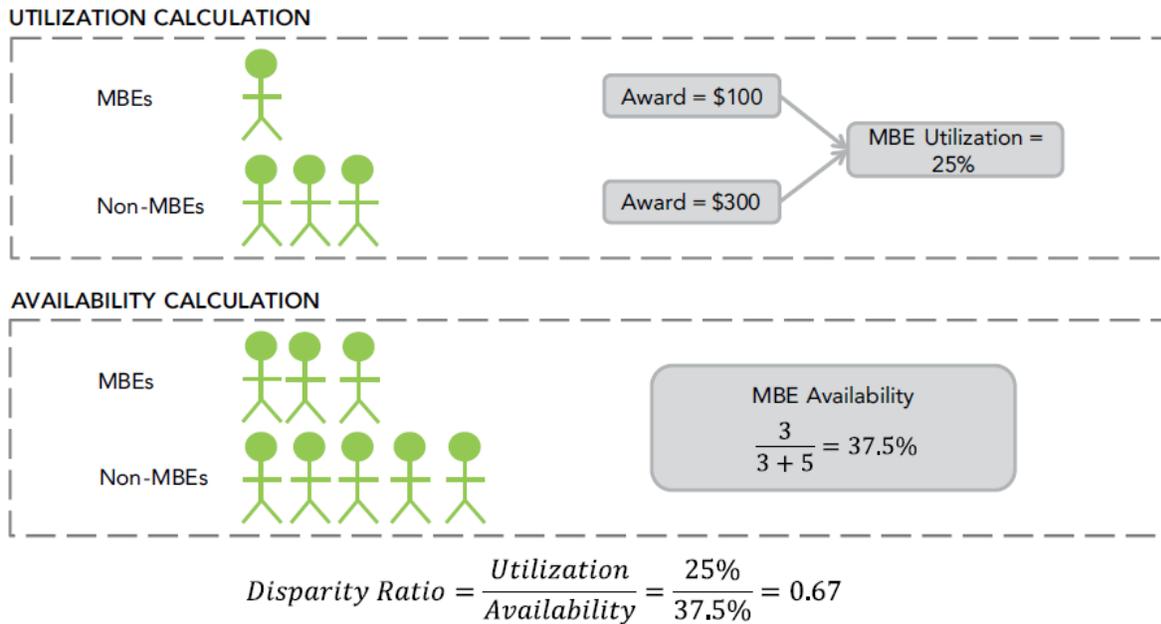
**SUBJECT:** House Bill 1593/Senate Bill 1235 (State Contracting and African-American Owned Businesses)—Update

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In February 2021, House Bill 1593 and Senate Bill 1235 were introduced, directing the Commission to study whether disparities exist in the issuance of state contracts to businesses owned and operated by African Americans, and to report its findings no later than January 31, 2022. The house bill passed unanimously but the senate bill did not advance during the session. The Commission voted at its June 9, 2021, meeting to add the study to its work program. This memo serves to provide commission members with preliminary findings from staff's research thus far and to allow for questions and discussion of the topic to guide further investigation and consideration of possible recommendations for a draft report to be presented at the Commission's December meeting.

Disparity is a term that has arisen within a legal context to mean a statistical shortcoming between the number of qualified minority-owned business enterprises (MBEs) available to provide goods and services to a particular government and the actual share of spending those businesses receive from that government. Such empirical evidence can infer past discrimination. In the example figure below, MBEs make up 37.5% of the government's available market for a particular need but receive only 25% of its spending.

**Figure 1. Disparity Ratio Computation Example.**



Source: US Department of Commerce Minority Business Development Agency 2016.

### ***History of State Law and the Governor’s Office of Diversity Business Enterprise***

In the 1960s and '70s, government policies at the federal and state level began to acknowledge that the country’s history of segregation and discrimination had left qualified African American and other minority business owners at a competitive disadvantage relative to their white counterparts. In 1977, Tennessee created the Office of Business Enterprise within the Department of Economic and Community Development (today known as the Business Enterprise Resource Office, or BERO), acknowledging that some business owners were “impeded from normal entry into the economic mainstream because of past practices of discrimination based on race . . . [or] ethnic background,” and that the state should “aid, counsel and assist in every practical manner disadvantaged businesses in order to preserve free competition on equal terms with those businesses constituting the major part of the business community.” In 1988, the General Assembly amended the Tennessee Small Business Purchasing and Contracting Act of 1980 to require that, “whenever possible,” state agencies must “actively solicit bids” not only from small businesses, but from businesses with minority owners, in order to purchase a “fair proportion of purchases” from such businesses.

Finding that “Previous programs to assist minority owned, woman owned and small businesses desiring to do business with state departments and agencies did little to increase participation in state procurement and contracting opportunities,” Governor Phil Bredesen issued an executive order in 2003 to create the Governor’s Office of Diversity Business Enterprise (Go-DBE), which would serve as a central organization to coordinate the state’s efforts—with “specific efforts to secure state contracting and procurement opportunities.” The order declared:

*“It is the unwavering policy of this state to expand economic opportunities, both inside and outside state government, for small businesses and businesses owned by minorities and women. A primary component of this effort will be to expand opportunities for these businesses to compete successfully for the state’s expenditures for goods and services.”*

In 2004, the Go-DBE was codified by the Tennessee Minority Owned, Woman Owned and Small Business Procurement and Contracting Act.

### ***Richmond v. J. A. Croson Co. and the Advent of Disparity Studies***

In 1989, the US Supreme Court decided *Richmond v. J. A. Croson Co.*, ruling that a minority business set-aside program of the city of Richmond, Virginia, was unconstitutional under “strict scrutiny” review, in that the city both lacked evidence of specific racial discrimination and had not narrowly tailored its program to target only those groups affected by such prior discrimination. The Court did not, however, expressly prohibit programs for racial minorities, stating, “If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.” However, in the absence of such evidence, governments must rely on race-neutral strategies.

In 1991, Tennessee’s Attorney General was asked if “the provisions of the Tennessee Small Business and Minority-Owned Business Purchasing and Contracting Act mandate the establishment of a set-aside program for state government contracts,” and if the Board of Standards was “required to make an annual determination of the amount of state purchases which must be set aside for small businesses and minority-

owned businesses?" The opinion stated that "the establishment of such set-aside programs is not mandatory, since the statutory phrase 'whenever possible' gives state agencies a degree of discretion," and concluded, "If Tennessee is to pursue the goal of establishing race-conscious set-asides, it will be necessary to enact a new statute supported by the sort of factual findings required by *Croson*."

### Tennessee's 2009 Disparity Study: Findings and Recommendations

In September 2007, the State of Tennessee contracted with Griffin & Strong, P.C. to conduct a comprehensive disparity study, focused on purchasing by executive branch departments and agencies over the period beginning on July 1, 2002 and ending June 30, 2007 (state fiscal years 2003-2007). The results of this study were published in September 2009. "The evidence in this study," said the report, "gives rise to an inference of discrimination and/or the continuing effects of past discrimination against minorities and women in business transactions in the State of Tennessee," and that Tennessee "has a strong basis in evidence to take proactive measures to prevent discrimination based on race, ethnicity, or gender against women and minority prime contractors and subcontractors."

Like the example shown in figure 1, table 1 shows the disparity ratios, as determined by the study, for African American businesses over the five-year study period in each of the study's purchasing categories.

**Table 1. Disparity Ratios from 2009 Disparity Study.**

Business Category	% of Firms in Relevant Market that were African American Owned (Availability)	% of State Spending that went to African American Firms (Utilization)	Disparity Ratio
Construction	3.80%	0.22%	0.06
Architecture / Engineering	6.80%	0.70%	0.10
Professional Services	0.94%	0.08%	0.09
Other Services	7.09%	2.96%	0.42
Goods and Supplies	1.95%	0.40%	0.21
<b>TOTAL</b>	<b>2.18%</b>	<b>0.40%</b>	<b>0.18</b>

Source: Griffin & Strong 2009.

In 2021, House Minority Leader Camper, one of several co-sponsors of House Bill 1593, referred to the 2009 disparity study in committee discussions, questioning whether its recommendations had been acted upon. She also questioned the status of \$772,000 allocated at the time for an additional study of the University of Tennessee and Tennessee Board of Regents systems, which the Tennessee Board of Regents has recently requested be used to fund a dedicated Procurement Diversity Coordinator position.

The 2009 report made 16 recommendations it said could be implemented without amending the statutes that existed at the time. TACIR staff has been evaluating the first eight of these:

*1. Continue the Current Programs.*

The findings of the disparity study gave the state “justification required under *Croson* to support the continuance of the current MBE/WBE programs under the Tennessee MWSB Act.” The report noted that the Go-DBE was created in the middle of the five-year study period, and that, after its creation, there was “a significant increase in the participation of Woman owned, Minority owned and small businesses in the State of Tennessee’s procurement activities.” The authors wrote, “continued development of the Go-DBE program can address these issues, provided the program is strengthened through the aggressive outlining of goals, tracking of performance against the goals, with incentives or consequences, as appropriate, for performance by departments toward meeting their annual departmental goals.”

The Go-DBE and the state’s minority business enterprise programs have continued.

*2. Goals for MBE, WBE and SBEs Should be More Distinguishable to Meet the Narrow Tailoring Requirements of Croson.*

At the time of the 2009 study, it appears the statute requiring “fair proportion” spending goals intended there to be “a separate amount . . . for each of the four subcategories of minority businesses.” The report believed its findings gave the state the support needed “so that any resulting programs may be narrowly tailored, as required by *Croson* for the specific race/gender/ethnicity for which evidence of discrimination has been established.” Current law reads differently, requiring “a separate amount of fair proportion for each of the five subcategories of businesses identified in § 12-3-1102: minority-owned businesses, woman-owned businesses, service-disabled veteran-owned businesses, businesses owned by persons with disabilities, and small businesses.”

As it did then, the Go-DBE sets specific agency goals for purchasing from minority-owned businesses, but it has never set separate goals for each minority group. According to Go-DBE staff, “Go-DBE did not want to give the appearance of any ‘favoritism’ with any specific racial group, as all four minority groups have been equally determined to be socially disadvantaged with the United States government.” Prior to 2015, annual reports published by Go-DBE listed each agency’s separate goals and achievement for the different types of disadvantaged business. However, starting with the 2015 report, “individual category goals and spend have been left out of the chart to more concisely communicate whether an agency met their overall goal.”

In fiscal year (FY) 2009, 14 of 30 departments and agencies met their MBE spending goals. In FY 2013, 11 of 29 met their MBE goal, and in FY 2014, only 9 of 29 did—this as the average goal across all departments fell from 4.3% in 2009 to 3.2% in 2013 and 2014, and the average percentage spent dropped from 7.4% in 2009 to 6.0% in 2013 and 5.9% in 2014. Commission staff has requested data from 2015 forward but has not yet received it from Go-DBE.

### 3. Track the Attainment of Goals Through Award and Payment Data

The 2009 report said it was necessary for the state to measure payment data, as opposed to awarded amounts, to meet legal disparity goal requirements and ensure state dollars end up in the hands of awardees. This has been the case for many years. The amounts Go-DBE reports are defined as:

*“The actual dollars paid to Suppliers by the State of Tennessee and its State Procurement Agencies (“SPAs”) (Tennessee Board of Regents (“TBR”) and state funded colleges and universities) in exchange for the purchase of goods and/or services. Spend in this context is inclusive of dollars paid through Edison for contracts resulting from formal procurements (i.e., Invitations to Bid (ITB), Requests for Proposals (RFP), Requests for Information (RFI)), the State’s Purchasing Card (P-Card), subcontracting dollars reported by Prime contractors, and diversity spend reports received from SPAs.”*

### 4. Diversity Business Enterprises Outreach

The 2009 report suggested ways for Go-DBE “to strengthen outreach efforts.” It counted 72 workshops and conferences over the five-year time frame. Chief Procurement Officer Mike Perry told Commission staff that the Go-DBE held 29 outreach events in 2020, mostly virtual due to the COVID-19 pandemic. The office now utilizes social media to reach a wide audience as well. Mr. Perry said Go-DBE needs

help from local communities to promote their businesses to the state, and that he has asked members of the General Assembly to recommend diverse businesses from their districts. Commission staff has requested details about Go-DBE outreach events over the past several years.

#### *5. Promote MBE/WBE/SBEs within the Tennessee Marketplace and Coordination of Go-DBE Efforts*

The 2009 report stated “Go-DBE alone cannot make this effort successful without a corresponding change in the business culture,” and recommended that members of various agencies should form an “advisory committee.” An Advisory Council on State Procurement was created by Public Chapter 295, Acts of 2011. The council reviews and comments on “all procurement policies, standards, guidelines, and procedures established by the Chief Procurement Officer.” Furthermore, every agency names a business liaison to work with Go-DBE and the office says it uses “dedicated certified business software, State agency training and close communication with procurement staff . . . to determine the status of each State agency or department throughout the year.”

#### *6. Contract Sizing*

The 2009 report recommended “the State should issue contracts in smaller dollar amounts, when possible, thus expanding the opportunities that smaller firms have to do business with the State.” It noted that the state’s “delegated purchase authority threshold” was about to increase from \$5,000 to \$25,000, effective as of July 1, 2009; it is now \$50,000. The dollar limit of purchases that require competitive bids increased from \$2,000 to \$5,000 effective as of September 1, 2009; it is now \$10,000.

Commission staff has requested data from Go-DBE to investigate whether this has influenced contracting for African American suppliers.

#### *7. Promote MBE/WBE Collaboration*

The 2009 report highlighted a successful “collaboration of three Go-DBE certified minority firms,” and recommended minority suppliers “be encouraged to form collaborations with each other.” There is no specific data available to measure such collaborations, although Go-DBE points to the use of subcontractors as an opportunity for small firms to gain experience and encourages vendors to attend pre-bid conferences to interact with one another.

*8. Uniform Procedures for Department Solicitation of MBE/WBE/SBEs Bids*

There are uniform procedures in place for solicitation of all bids.

TACIR staff are still gathering information on the status of the last eight recommendations:

- 9. Evaluate whether performance reviews are giving true weight to the attainment of MBE/WBE/SBE goals.*
- 10. Institute annual aspirational MBE/WBE goals for construction industry in the area of sub-contracting.*
- 11. Consider private sector initiatives.*
- 12. Require all contractors to submit a list of all sub-contractors contacted in preparation of their response to bid and proposal packages.*
- 13. Procurement officer training should be reviewed, evaluated, and considered for enhancement.*
- 14. Consider increasing staff at Governor's Office of Diversity Business Enterprise.*
- 15. Create a Mentor-Protégé Program.*
- 16. Develop additional measures to gauge the effectiveness of the state's efforts.*

The report had seven recommendations that would have required new legislation. TACIR staff are still studying these seven recommendations.

- 1. Goals to be set in accordance with the availability of businesses in each business category and expand availability pool.*
- 2. Narrow Tailoring of MBE/WBE Programs.*
- 3. Declining schedule for race conscious remedies.*
- 4. Mandatory sub-contracting.*
- 5. Adjust current Legislation to clearly define the means for tracking the attainment of agency goals.*
- 6. Consider raising the thresholds for SBE qualifications.*
- 7. General Services and the State Treasurer should be given joint responsibility for developing a comprehensive program to ensure equal access to capital.*

### ***Is There Evidence of Disparities Today?***

The firm contracted for the state's 2009 disparity study hired temporary contract workers to review every contract and payment over the five-year study period covering fiscal years 2002-2007. The firm hired a company to send a mail survey to all prime contractors awarded any contract during that period. They reviewed more than 90,000 vendor records. The report took two years to produce—in short, many more resources were expended than what TACIR has available for the study as directed by House Bill 1593. The Commission's final report will likely not be able to meet the same level of judicial scrutiny as a well-funded contracted disparity study. However, Commission staff is attempting to gather as much current data as possible to allow the Commission and the General Assembly to make informed decisions with respect to any disparities for African American businesses.

While a direct comparison of statistical disparities may not be possible, there are several measures by which the state has improved its share of spending with African American businesses. The 2009 report looked at \$6.9 billion in prime contract spending over a five-year period and found that only 1.95% went to minority- or women-owned businesses. Just \$28 million (0.41%) went to businesses owned by African Americans. See table 64 from the 2009 report below.

**Table 64: MBE/WBE Prime Utilization by Relevant Market**

IN CONSTRUCTION, A/E, PROFESSIONAL SERVICES, OTHER SERVICES, AND GOODS/SUPPLIES (July 1, 2002 through June 30, 2007)

	African American	Asian American	Hispanic American	Native American	Non-Minority Women	TOTAL MBE/WBE
By Dollars	\$28,017,838	\$25,188,244	\$24,410,643	\$2,858,088	\$54,760,520	\$135,235,333
Percent	0.41%	0.36%	0.35%	0.04%	0.79%	1.95%

Non-Minority Male	Total
\$6,782,995,320	\$6,918,230,653
98.05%	100.00%

Source: Griffin & Strong, P.C. (2009)

In comparison, Commission staff preliminary analysis of data published in Go-DBE annual reports from fiscal years 2016-2020 found a total of \$19.7 billion in state procurement spending, with \$1.9 billion (9.5%) going to firms certified by Go-DBE as minority- or women-owned. Businesses owned by African Americans received \$657 million (3.3%) over the five-year period.

Additionally, the number of African American suppliers certified by Go-DBE has increased since 2012, the earliest year for which certification data by racial group was provided—particularly over the three most recent years. For FY 2020, Go-DBE reported a total of 243,665 vendors registered in Edison, meaning certified African American firms make up just 0.24% of all vendors. However, the total in Edison includes many “inactive” registrants, and Commission staff is working with Go-DBE staff to obtain numbers of “active” bidders on a yearly basis, which would allow for a more accurate comparison to the findings in the 2009 disparity study. See table 2.

**Table 2. Number of African American Suppliers Certified by Go-DBE, 2012-2020.**

FY 2012	364	FY 2015	347	FY 2018	492
FY 2013	329	FY 2016	383	FY 2019	557
FY 2014	346	FY 2017	435	FY 2020	596