

Free to Compete?

Measuring the Impact of Proposition 209
on Minority Business Enterprises



In 1996, Proposition 209 eliminated affirmative action in public education, employment, and contracting. Called the California Civil Rights Initiative, this proposition ended race- and gender-conscious programs designed to increase participation and opportunity in public contracting. *Free to Compete?* reports on the 10-year impact of Proposition 209 on Minority Business Enterprises seeking public contracts in California's transportation construction industry.

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**DISCRIMINATION
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Executive Summary

Affirmative action programs were initiated at the federal level in the 1960s to level the playing field for people who had been excluded from equal opportunities due to discriminatory laws and biased practices. These programs, which developed over the following two decades at the federal, state, and local levels of government, were designed to expand the participation of people of color and women in higher education, public contracting, and public employment. Following the 1989 Supreme Court decision in *City of Richmond v. J.A. Croson Company*, public contracting affirmative action programs throughout the country underwent a considerable amount of reconstruction. As a result of this decision, race-conscious affirmative action programs in public contracting needed to be supported by research demonstrating the prevalence of discrimination and underutilization of firms owned by underrepresented groups. In California, the legality of all race-conscious affirmative action programs, even if supported by findings of underutilization, was put into question when a majority of voters passed Proposition 209, the California Civil Rights Initiative, in 1996. This law ended race-conscious goals and affirmative action programs that were designed to facilitate equal access to public education, contracting, and employment.

California's transportation construction industry is the source of over \$950 million in public contracts from the federal portion of awards alone. As the primary granting agency for transportation construction, the California Department of Transportation (Caltrans) has strong potential to affect wealth and employment among California's racially and ethnically diverse population. Before Proposition 209, Caltrans administered a race-conscious Disadvantaged Business Enterprise (DBE) program designed to increase the level of participation of businesses considered to be disadvantaged in all federal and state contracting activities. The DBE program includes Minority Business Enterprises (MBEs), which are firms owned and run by contractors of color, as well as Women Business Enterprises (WBEs), and Disabled Veteran Business Enterprises (DVBES). The implementation

of Proposition 209 and subsequent legal battles ended Caltrans' race-conscious DBE program for all but the federal portion of awards. The results of a disparity study commissioned by Caltrans expected in 2007 may restore a race-conscious program, but as of this report the program is race-neutral.

In 2006, the Discrimination Research Center (DRC) set out to measure the impact of Proposition 209 on businesses that were certified as MBEs in 1996. *Free to Compete?* intends to clarify how Caltrans' race-conscious affirmative action program affected transportation construction companies owned by people of color both before and after Proposition 209. Using a four-pronged approach, DRC analyzed MBE survival and award access, surveyed transportation construction contractors whose surviving businesses were certified MBEs in 1996, led focus groups with MBE owners, and conducted in-depth case studies. Using this multi-method approach, DRC documented a significant impact of Proposition 209 on MBEs. Among DRC's key findings are:

- **Only one-third of certified MBEs in California's 1996 transportation construction industry are still in business today.** In 1996, Caltrans listed 3,269 transportation construction contractors who were certified as Minority Business Enterprises. Out of those businesses, 32 percent continued to be in operation. However, without a comparative figure for an appropriate non-MBE comparison group in the transportation construction industry, the interpretation of this survival rate is unclear.
- **After the passage of Proposition 209 in 1996, MBEs experienced a greater than 50 percent reduction of total awards and contracts from Caltrans.** In the nine years leading up to the passage of Proposition 209 in 1996, MBEs received, on average, 16.0 percent of award revenue for Caltrans projects with federal funding. However, this amount was reduced to 7.9 percent of award revenue in the nine years after the passage of Proposition 209 in

1996. DRC found that although MBEs always received over ten percent of total awarded revenue before 1996 (with the percentage reaching as high as 20.1 percent in Fiscal Year 1994), participation by MBEs never reached above ten percent of total revenue awarded after 1996. The number of contracts awarded to MBEs has declined over 50 percent since Fiscal Year 1999, the first year these records were available by ethnicity for MBEs. African American-owned MBEs showed the largest reductions relative to other MBEs.

- **MBEs reported that the aspects of the federal race-conscious DBE program that were the most helpful before 1996, such as good faith efforts by prime contractors and pre-bidding conferences, were less helpful after 1996.** After Proposition 209 passed, a DBE program for federal funding still operated, but it was much smaller in scope than previously. In general, surviving MBEs did not find the DBE program to be very helpful before or after 1996. The fiduciary aspects of the program, such as assistance with loans and bonds, were seen as significantly less helpful than other aspects of the program, both before and after 1996.
- **Among surviving MBEs, those owned by African Americans and women of color have experienced more of an impact from Proposition 209 than other MBEs.** Following Proposition 209, most of the surviving MBEs remained steady or grew in terms of the number of contracts received per year, total revenue, the number of employees, and the number of services offered. However, African American- and women-owned MBEs, on average, did not fare as well.
- **Surviving MBEs could not have initially succeeded, or maintained their success, without incentives in place that helped provide equal access to bids.** Focus groups and in-depth profiles reveal that MBE owners face many financial, social and political obstacles to overcoming a “good old boy” network. Contractors of color agreed that success and survival

are always contingent upon positive professional relationships and skill, but that a lack of access to projects has hindered growth for some.

This study found significant barriers for contractors of color who seek to participate on equal footing with their white counterparts in California’s public transportation construction industry. Assuming that it is a compelling interest for California to support the expanded participation of people of color in the transportation construction industry, DRC suggests that public agencies partner with ethnic Chamber of Commerce chapters and advocacy, research, and community organizations to provide technical assistance for MBEs regarding their initial access to this industry. As part of any existing or new DBE program designed to foster equal opportunity, these efforts would also sustain and grow MBEs in order to promote healthy competition among equally prepared and resourced candidates. DRC also recommends continued research on the impact of anti-affirmative action law and policies, to further illuminate the extent to which they have impacted not only surviving certified MBEs, but also firms that did not survive, those that did not maintain MBE certification, and those that have launched in the post-Proposition 209 climate. ■

Introduction

In an era of racial segregation and epidemic poverty, President Lyndon B. Johnson proposed a series of corrective responses to fulfill the civil and human rights that had previously been denied to people of color. As a way to foster a culture of inclusion in employment, and later in education, affirmative action programs were initiated with the intention that they would open doors for those populations previously locked out by centuries of slavery and servitude, decades of Jim Crow segregation, criminalization, and other cultural and institutional measures.

Between 1969 and 1989, race-conscious remedies to discrimination in public contracting expanded throughout state, city, and local governments.¹ While programs varied among localities, many included outreach, training, and mentorship programs as tools to strengthen the competitiveness of Minority Business Enterprises (MBEs). Several of these programs also included race-conscious participation goals, such as procurement set-aside programs, diversity goals, and incentives, to increase MBE utilization and establish a climate in which business owners of color could competitively bid and receive public contracts. Those decades saw impressive growth in the number of firms owned by people of color.

The Dismantling of Affirmative Action in Public Contracting

Regents of the University of California v. Bakke was one of the first cases to challenge affirmative action, specifically in higher education admission decisions.² However, it was not until the late 1980s that efforts were made to dismantle affirmative action in public contracting. The 1989 Supreme Court decision in *City of Richmond v. J.A. Croson Company*³ fed growing national debate on affirmative action in public contracting. In order to use race-conscious affirma-

tive action measures, the Court decided that entities must first document discrimination or under-representation against specific groups of people, and then create narrowly tailored measures to address this discrimination, using race-conscious measures only where race-neutral means are not sufficient.⁴ As a result, MBE programs, which numbered over 200 nationwide in 1989, as well as any proposed affirmative action plans, needed disparity studies to provide evidence of a gap between the availability and utilization rates of MBEs. Many affirmative action programs that were developed to increase utilization of people of color in public contracting were affected by this decision, including those administered by the California State Personnel Board and the Office of Small and Minority Business (OSMB).⁵ In California, MBEs were further jeopardized in 1995, when then-Governor Pete Wilson vetoed a bill, sponsored by then-Assemblymember Barbara Lee, which would have commissioned a statewide study to support participation goals for MBEs, Women Business Enterprises (WBEs), and disabled person-owned business enterprises. After the veto, state agencies that still had participation goals, such as the Department of General Services, Department of Corrections, and Department of Transportation (Caltrans),⁶ were at risk of being dismantled in court.⁷ Later in 1995, Wilson issued Executive Order W-124-95, which required all state agencies to dismantle “preferential treatment requirements” that exceeded federal or state law.

¹ Wainwright, J. S. (2000). *Racial Discrimination and Minority Enterprise*. New York & London: Garland Publishing, Inc. A Member of the Taylor & Francis Group.

² 438 U.S. 265 (1978).

³ 488 U.S. 469 (1989). See legal review for further explanation.

⁴ Bendick, Jr., M. (1990, Spring). “The Croson Decision Mandates that Set-Aside Programs be Tools of Business Development.” *George Mason University Civil Rights Law Journal*. 1(1), 87-104.

⁵ Ong, P. (1997, October). “Introduction.” In P. Ong, ed., *The Impact of Affirmative Action on Public-Sector Employment and Contracting in California*. Berkeley, CA: California Policy Seminar. 9(3), 1-7.

⁶ California Department of Transportation, Caltrans, and CA DOT are used interchangeably in this report.

⁷ Jung, D. & Wadia, C. (1996, February). *Affirmative Action and the Courts*. Sacramento, CA: Public Law Research Institution.

“Freedom is the right to share, share fully and equally, in American society—to vote, to hold a job, to enter a public place, to go to school. It is the right to be treated in every part of our national life as a person equal in dignity and promise to all others. But freedom is not enough. . . . You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, “you are free to compete with all the others,” and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates. This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. ”

— President Lyndon B. Johnson,
Commencement address at Howard University,
“To Fulfill These Rights” 6/4/1965

The 1990s show a long record of attempts in California to further remove affirmative action measures in public education, hiring, and contracting through efforts in the Assembly, Senate, and on the ballot. All attempts were defeated in committee until Proposition 209, also known as the California Civil Rights Initiative, reached the ballot in November 1996. This proposition passed by 55 percent of the vote and legally ended many affirmative action programs throughout the state. With the passage of Proposition 209, Wilson presented a list of 30 statutes that violated the new amendment, including a range of laws relating to affirmative action in education, government, health and safety, labor, and public contracting and hiring. As a result, state and some federal race-conscious measures designed to boost MBE participation in public contracting were deemed illegal in California. However, some programs continued, including the Caltrans Disadvantaged Business Enterprise (DBE) program, a race-conscious program justified by federal transportation funding requirements.⁸ Thus, the MBE program was merged into the DBE program, which consisted of firms owned by people of color, women of all ethnicities, and disabled veterans. For MBEs, the program was allowed to operate only for the federal portion of awards.⁹

Proponents of Proposition 209 argued that legislative responses to discrimination should emphasize individual merit rather than special privileges and thereby end preferential treatment.¹⁰ Opponents of Proposition 209 argued that its language was misleading to the public. Language used in the proposition suggested that affirmative action programs were providing an unfair advantage to candidates who were perceived as under-qualified rather than providing opportunity to qualified yet historically excluded individuals. After sur-

viving a number of legal and constitutional challenges, Proposition 209 went into effect in 1997.¹¹

As of this report’s publishing, a decade has passed since Proposition 209 disputed Lyndon B. Johnson’s proposal that America correct a discriminatory past through race-conscious measures. Since the passage of Proposition 209, most research on its impact has focused on higher education, resulting in a paucity of research to measure its effects on MBEs seeking public contracts.

Free to Compete? Measuring the Impact of Proposition 209 on Minority Business Enterprises reports on the ways in which the removal of race-conscious programs affected public contractors of color in California. This report examines whether MBEs have been provided with the equal opportunity to compete in California’s transportation construction industry, focusing on those contractors who work with Caltrans. This report seeks to answer the question that is at the core of President Johnson’s vision of how to provide equal opportunity for communities of color: Are MBEs free to compete? ■

⁸ Chung, J., McCabe, L., Seigel, S., & Gen, S. (2006, June). *Experiences, Perceptions, and Preferences of Caltrans’ Certified DBEs*. San Francisco, CA: San Francisco State University Public Administration Program & Asian, Inc.

⁹ See legal review for further explanation.

¹⁰ Jabbara, N.W. (2001). “Affirmative Action and the Stigma of Gender and Ethnicity: California in the 1990’s.” *Journal of Asian and African Studies*. 36(3), 253-274.

¹¹ Federal courts upheld the constitutionality of Proposition 209 in *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997). See also legal review for further explanation.

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On a national scale, affirmative action programs designed to increase MBE participation experienced considerable reconstruction following the 1989 Supreme Court decision in *City of Richmond v. J.A. Croson Company*.¹² After the passage of Proposition 209 in 1996, further debate about the constitutionality of affirmative action in public contracting played out in California courts. This review highlights relevant major cases and their impact on public contracting in California's transportation industry.

Affirmative Action and Strict Scrutiny

In 1989, seven years before Proposition 209 was passed in California, a U.S. Supreme Court decision did much to create the framework within which future affirmative action programs would be built. In the decision of *City of Richmond v. J.A. Croson Company*,¹³ the United States Supreme Court declared that the city's race-conscious affirmative action program was unconstitutional under the Fourteenth Amendment's Equal Protection Clause, which allows for the use of race-based measures to remedy the effects of past discrimination if they survive "strict scrutiny," the highest standard of judicial review in the United States.

To pass strict scrutiny, race-conscious affirmative action programs must follow two criteria. In the first, the program must serve a compelling governmental interest. The Supreme Court allowed government entities to take remedial measures to ameliorate the effects of current and past discrimination that they participated in creating. Second, the program must be carefully defined to meet the narrow tailoring requirement, which states that only those racial groups with a demonstrated history of discrimination should be included. As such, all affirmative action programs that make classifications on the basis of race need to be supported by facts indicating a presence of discrimination, and the

programs must include effective and efficient means of removing the impact of discrimination.¹⁴ To do this, government entities should consider race-neutral alternatives in addition to race-conscious ones, and the programs they enact should have a reasonable expiration or renewal date. Attempts should also be made to minimize the harm or disadvantage endured by individuals not benefiting from a program.¹⁵ While the strict scrutiny test allows for carefully crafted ordinances, policies, and statutes to exist, these same ordinances, policies, and statutes, no matter how meticulously drawn up, would likely be considered illegal in California in the years following the passage of Proposition 209.

Analyzing Proposition 209: Discrimination and Preferential Treatment

Proposition 209, adopted as Article I, Section 31 in the California State Constitution, drastically changed the fate of affirmative action in California. Section 31 declares that: "the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."¹⁶ The law applies to state and local governments such as cities, counties, and municipal districts. Since its passage, Proposition 209 has been challenged, analyzed, and examined in court, consistently resulting in a broadly defined ban on preferential measures created with the intent to protect the interests of communities that have faced historical discrimination.

In the 2000 California Supreme Court case *Hi-Voltage Wire Works, Inc. v. City of San Jose*,¹⁷ the Court struck down an outreach program established by the City of San Jose that was designed to increase participation by available MBEs and WBEs in pub-

¹² 488 U.S. 469 (1989).

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ See *Grutter*, 539 U.S. at 341.

¹⁶ Cal. Const. art. I, sec. 31(a) (West 2006).

¹⁷ 24 Cal. 4th 537 (2000).

lic works contracting. Due to Proposition 209, the Court rejected the City of San Jose's race-conscious outreach program, which included a participation component that authorized quotas and set-asides that were preferential in nature.¹⁸ In *Hi-Voltage*, the Court decided that the terms "discriminate" and "preferential treatment," as used in Section 31, were to be defined as the Civil Rights Act of 1964 originally defined them: "discriminate" means to "make distinctions in treatment; show partiality or prejudice," and "preferential" means "giving of priority or advantage to one person...over others."¹⁹ This interpretation of the Civil Rights Act reflected the Court's belief that: "however it is rationalized, a preference to any group constitutes inherent inequality."²⁰

Redefining "Discrimination"

Opponents of Proposition 209 have attempted to challenge the way that key terms such as "racial discrimination" have been defined by the California Supreme Court. In 2003, state legislators passed and then-Governor Gray Davis signed into law Assembly Bill No. 703, which was codified as California Government Code Section 8315.²¹ This law declared that "racial discrimination" and "discrimination on the basis of race" were not defined within Section 31(a) of the state constitution, as was decided in *Hi-Voltage*. Instead, the terms were those defined in the International Convention on the Elimination of All Forms of Racial Discrimination²² as adopted by the General Assembly of the United Nations and

Due to Proposition 209, the Court rejected the City of San Jose's race-conscious outreach program.

ratified by the United States Senate as a treaty on June 24, 1994.

The City defendant in *Coral Construction, Inc. v. City and County of San Francisco* argued that Congress' ratification of the International Convention "preempt[ed] Proposition 209 by operation of the Supremacy Clause of the United States Constitution."²³ The Superior Court, however, rejected the defendant's contention, arguing that California Government Code Section 8315 included qualifying language that provided that affirmative action measures would only fall outside of the definition of discrimination if "such measures [did] not...lead to the maintenance of separate rights for different racial groups."²⁴ The Court prohibited the use of affirmative action by San Francisco because "the City's public contracting program violates this provision by seeking separate rights for different racial groups and women through its public contracting program."²⁵ The Court also reasoned that the United States Senate ratified the treaty "subject to reservations," thus nullifying its ability to

¹⁸ *Ibid.* at 562.

¹⁹ *Ibid.* at 559-60.

²⁰ *Ibid.* at 561.

²¹ Cal. Gov. Code § 8315 (2006 West).

²² In defining discrimination, the International Convention states in part that "special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination."

²³ *Coral Construction*, No. 421249 at *14.

²⁴ *Ibid.* at *15 (citing Cal. Gov't Code § 8315(b)(4)).

²⁵ *Ibid.*

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preempt Proposition 209's ban on preferential treatment within California.²⁶

Challenges within the Courts

Several court challenges to Proposition 209's ban on preferential programs in public contracting have involved the Equal Protection Clause. In the case *Coalition for Economic Equity v. Wilson*,²⁷ pro-affirmative action organizations argued that Proposition 209's elimination of local governments' abilities to enact preferential treatment programs for women and people of color, and the transfer of such power to higher and more remote levels of the state, imposed an unequal political structure that ran counter to the Fourteenth Amendment's equal protection guarantees.²⁸ The District Court concluded that the extra burden on women and people of color to petition for preferential programs could not withstand the exacting review of strict scrutiny, and thus violated the Equal Protection Clause.²⁹

The Ninth Circuit Court of Appeals disagreed with the District Court's reasoning and rejected the plaintiffs' claim, concluding that Proposition 209 was not discriminatory in nature and did not deny women and people of color equal protection of the law because it applied in a non-discriminatory manner to all individuals living in the state.³⁰ The Court held that Proposition 209 did not serve "as an impediment to protection against unequal treatment but as an impediment to receiving preferential treatment."³¹ It concluded that even though the Equal Protection Clause allows for race- and gender-conscious measures to remedy the effects of past discrimination, the clause does not mandate these measures.

Seven years after *Coalition for Economic Equity*, the City and County of San Francisco used a similar defense to protect its Minority/Women/Local Business Utilization Ordinance that granted a number of benefits and preferences to MBEs and WBEs, including a bid discounting program for MBE and WBE prime contractors. In *Coral Construction, Inc. v. City and County of San Francisco*,³² the defendant city challenged the constitutional validity of Proposition 209, arguing that "the state may not grant power to local authorities over contracting decisions and then selectively withdraw that power in a way that burdens minorities."³³ The Superior Court rejected the defendant city's claim.³⁴

Another post-Proposition 209 Fourteenth Amendment claim was advanced in *L. Tarango Trucking v. County of Contra Costa*.³⁵ In *L. Tarango*, a group of MBEs and WBEs brought a class action against the County of Contra Costa alleging that the County failed to rigorously enforce its existing affirmative action ordinance and failed to collect data on its utilization of women and minority contractors, and that both were violations of the Fourteenth Amendment. As a result of Proposition 209, the county suspended its MBE/WBE program and adopted a new outreach program that encouraged outreach to MBEs, WBEs, Small Business Enterprises (SBE), and Local Business Enterprises (LBE) "without setting specific numerical goals for utilization of those types of businesses in County contracts."³⁶ After evaluating the facts of the case, the U.S. District Court held that the County of Contra Costa's failure to actively

²⁶ *Ibid.*

²⁷ *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 703 (9th Cir. 1997).

²⁸ *Ibid.* at 702-03.

²⁹ *Ibid.* at 703.

³⁰ *Ibid.* at 706-07.

³¹ *Ibid.* at 708.

³² *Coral Construction, Inc. v. City and County of San Francisco*, California Superior Court, County of San Francisco, No. 421249 (July 26, 2004).

³³ *Ibid.* at *15.

³⁴ *Ibid.* at *16.

³⁵ *L. Tarango Trucking v. County of Contra Costa*, 181 F. Supp. 2d 1017 (N.D. Cal. 2001).

³⁶ *Ibid.* at 1034-35.

enforce its outreach program was not a product of intentional discrimination.³⁷

Although not directly related to Proposition 209, the Equal Protection case *Monterey Mechanical Co. v. Wilson*³⁸ had important effects on the transportation construction industry. In *Monterey Mechanical*, the Ninth Circuit Court of Appeals struck down a California statute that required general contractors to either subcontract—or demonstrate good faith efforts to subcontract—15 percent of their work to MBEs, five percent to WBEs, and three percent for disabled veteran-owned businesses.³⁹ The Court held that this statute violated the Equal Protection Clause of the Fourteenth Amendment because the law was not designed to remedy past discrimination against people of color and women who have not been specifically discriminated against by the state of California.⁴⁰ The Court also decided that the law needed to be narrowly tailored in a way that would allow it to address past discrimination while maintaining the rights of non-DBEs.⁴¹ Since the defendants did not provide specific proof that each of the groups included within the statute’s definition of the term “minority”⁴² actu-

Despite these federal regulations and the results of the disparity study, the Appellate Court concluded that SMUD’s affirmative action program was illegal.

ally suffered discrimination in the awarding of contracts by the state, the Appellate Court concluded that the statute failed to meet the narrow tailoring prong of the strict scrutiny test. As a consequence, the Court reasoned, many affirmative action programs are over-inclusive,⁴³ and this particular statute’s use of racial classifications violated the Equal Protection

Clause of the Fourteenth Amendment.⁴⁴ Following the *Monterey Mechanical Co. v. Wilson* decision in 1997, Caltrans eliminated its MBE program, but continued its race-conscious DBE program, consistent with federal funding requirements.

Efforts to Limit the Reach of Proposition 209

Some federal statutes and regulations permit or mandate the use of affirmative action-type programs to remedy past discrimination, so another strategy that some local governments and affirmative action advocates have used to circumvent the broad reach of Proposition 209 has been to utilize the federal funding exception contained within Section 31(e) of the California state constitution.⁴⁵

³⁷ *Ibid.*

³⁸ *Monterey Mechanical Co.*, 125 F.3d at 714 (9th Cir. 1997).

³⁹ *Ibid.* at 702, 704.

⁴⁰ *Ibid.* at 712-13.

⁴¹ *Ibid.* at 714.

⁴² The statute specifically defined “minority” in the following manner: “Minority,” for purposes of this section, means a citizen or lawful permanent resident of the United States who is an ethnic person of color and who is: Black (a person having origins in any of the Black racial groups of Africa); Hispanic (a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin regardless of race); Native American (an American Indian, Eskimo, Aleut,

or Native Hawaiian); Pacific-Asian (a person whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, or the United States Trust Territories of the Pacific including the Northern Marianas); Asian-Indian (a person whose origins are from India, Pakistan, or Bangladesh); or any other group of natural persons identified as minorities in the respective project specifications of an awarding department or participating local agency. Cal. Pub. Cont. Code § 10115.1(d) (West 2006).

⁴³ *Supra*, note 38.

⁴⁴ *Ibid.*

⁴⁵ Section 31(e) states that “nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where

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In a 2004 case, *C & C Construction, Inc. v. Sacramento Municipal Utility District*,⁴⁶ a California Court of Appeal evaluated the legality of the Sacramento Municipal Utility District (SMUD) 1998 Equal Business Opportunity Program. SMUD implemented the affirmative action program after commissioning a disparity study in 1998. Even though it documented improvement in the utilization of contractors of color over the years since its previous disparity study was commissioned in 1993, it revealed that “a statistically significant disparity continued to exist among certain subsets of minority contractors in identified categories of SMUD’s contracting.”⁴⁷ This affirmative action program provided a five percent price advantage and extended evaluation credits for prime contractors that met a subcontractor MBE/WBE participation goal of eight percent on certain proposals.⁴⁸ Additionally, the program mandated broad outreach procedures to provide notification of requests for bids to subcontractors,⁴⁹ and it also required contractors to document their good faith efforts.⁵⁰ The bid of any

contractor who failed to meet these procedures would subsequently be rejected by SMUD.

SMUD argued that while its program constituted “preferential treatment” under Section 31 of the California Constitution, its program was nonetheless permissible under the section’s federal funding exception because SMUD received funding from the Departments of Energy (DOE), Defense (DOD), and Transportation (DOT). Each of these federal departments and their agencies required that any entity that receives federal funding would be bound by regulations adopted in compliance with Title VI of the Civil Rights Act of 1964, which forbids discrimination based on race, color, or national origin in all programs that receive financial assistance from the federal government.⁵¹ SMUD argued that its affirmative action program was in compliance with the regulations issued by the DOE, DOD, and DOT, and it would risk losing important financial assistance if it removed the program.

Despite these federal regulations and the results of the disparity study, the Appellate Court concluded that SMUD’s affirmative action program was illegal. The Court found that the federal departments called for the use of both race-neutral and race-based programs to remedy existing or past discrimination; they did not mandate solely the use of race-based measures.⁵² The Court also argued that even though SMUD commissioned disparity studies, it did not evaluate the effectiveness of race-neutral methods to remedy discrimination.⁵³ While the Court accepted that there was empirical data

ineligibility would result in a loss of federal funds to the state.” Cal. Const. art. I, sec. 31(e) (West 2006).

⁴⁶ *C&C Construction*, 122 Cal. App. 4th 284 (3d Dist. 2004).

⁴⁷ *Ibid.* at 294.

⁴⁸ *Ibid.* at 294.

⁴⁹ These procedures include written evidence that the contractor has: (1) attended a SMUD affirmative action program briefing so that the contractor may fully understand the program requirements, (2) requested assistance from SMUD’s affirmative action program office, (3) identified specified units of work that improve the likelihood of subcontracting, (4) contacted potential minority subcontractors not less than 10 days prior to the proposal due date, and (5) contacted interested minority subcontractors subsequent to the initial contact to determine with certainty whether they were interested in performing the specific work on the project.

⁵⁰ In order to meet the good faith requirement to comply with the SMUD program’s goals, contractors had to document their efforts to do the following: (1) Efforts to comply with the notification procedures, (2) advertisements at least 10 days prior to the openings of proposals in at least one trade association and two minority focused media, one of them targeting African-

American firms, (3) provision of information to the firms on the plans, specifications, and requirements for the subcontracts and assistance in reviewing those plans and specifications, (4) written proposals received from the firms seeking subcontract work and, if rejected, reasons why the proposals were rejected, and (5) efforts to assist the firms contacted in obtaining bonding, insurance and lines of credit, if required.

⁵¹ 42 U.S.C. § 2000d (West 2006).

⁵² *Supra*, note 46, at 308-09.

⁵³ *Ibid.*

supporting the existence of past and ongoing discrimination in the awarding of contracts by SMUD and in the Sacramento area, proof of such discrimination in public contracting did not justify the use of affirmative action. This Court opinion established judicial precedent that has made it more difficult for other municipalities to qualify for Section 31's federal funding exception.

In this current legal climate, the ten years following the passage of Proposition 209 have shown resistance from the courts to allow affirmative action programs for MBEs seeking public contracts. Even with empirical evidence and disparity studies indicating under-representation and potentially unfair practices, Proposition 209 has made it difficult for any county, city, or local municipality to maintain or justify race-conscious equal opportunity action programs that could increase participation and development of businesses owned by contractors of color. ■



Ray Chavez

Literature Review

One of the first models of affirmative action in public contracting was the Philadelphia Plan, implemented in the late 1960s by then-Assistant Secretary of Labor, Dr. Arthur Fletcher. This program set up goals and timetables for the participation of business owners of color on federal contracts in Pennsylvania. Many programs were to follow in other cities; in 1970 the U.S. Department of Labor announced that unless cities formulated their own measures for ending discrimination in the construction industry, the Philadelphia Plan prototype would be employed.⁵⁴ Throughout the 1970s and 1980s, before *Croson*, federal, state, and local governments implemented a wide range of affirmative action programs for MBEs by formally encouraging their participation in government processes.⁵⁵ These programs fell under two main categories: 1) those that used race as a factor in the awarding of contracts, and 2) those that increased the capacity of firms owned by people of color. Included among efforts in the first category are programs such as source contracts, race-conscious set-asides, bid preferences, subcontractor compensation clauses, notification of bidding opportunities to businesses owned by people of color, the use of good faith effort goals for prime or subcontracting, and the operation of certification programs to reduce false MBE fronts.⁵⁶ Included among efforts in the second category are lending assistance programs to expand working capital, outreach efforts to bring more MBEs into existing networks, and technical assistance programs to help with bidding procedures.⁵⁷ While the first strategy directly increased the number

of contracts awarded to MBEs, the second increased the number of MBEs that would be eligible and competitive in a public bidding process.

While the *Croson* decision established stringent standards for race-conscious set-asides and procurement programs, it also acknowledged that past discrimination, current bias, systemic favoritism, and patterns of exclusion against people of color still remained a challenge for MBE development and viability.⁵⁸ In recognition of these barriers, *Croson* allowed that certain MBE programs, if narrowly and appropriately tailored, could be developed to offset any discrimination against a certain group. Under *Croson*, any race-conscious program must provide a benefit beyond receiving a contract under the set-aside program; the program must additionally provide “opportunity to strengthen the firm—to develop a track record, enhance staff experience, or expand its scale of operations—so that it can more effectively compete for future contracts not covered by set asides.”⁵⁹ In theory, these programs would help to boost business skills and ameliorate the detrimental effects of having unequal capital, less powerful networks, and discrimination in the market.

Barriers to Minority Business Enterprise Development and Viability

To remain competitive in a public bidding process, securing adequate financing and capital, particularly working capital, is vital. For MBEs, securing capital can present more of a challenge than for white-owned firms.⁶⁰ Historical discrimination—resulting in lower incomes, fewer assets, fewer personal contacts who are able to finance firms, and discriminatory bank and commercial loan practices—makes

⁵⁴ Office of the Assistant Secretary for Administration and Management. “Nixon and Ford Administrations.” In *Brief History of DOL*. Retrieved March 24, 2006, from <http://www.dol.gov/oasam/programs/history/dolchp07.htm>

⁵⁵ *Supra*, note 1.

⁵⁶ Enchautegui, M.E., Fix, M., Loprest, P., von der Lippe, S.C., & Wissoker, D. (1997). *Do Minority-Owned Businesses Get a Fair Share of Government Contracts?* Washington, DC: The Urban Institute.

⁵⁷ *Supra*, note 1.

⁵⁸ *Supra*, note 56.

⁵⁹ *Supra*, note 4, p 97.

⁶⁰ *Supra*, note 56; See also: Blanchflower, D.G., & Wainwright, J. (2005, November). *An Analysis of the Impact of Affirmative Action Programs on Self-Employment in the Construction Industry*. Cambridge, MA: National Bureau of Economic Research.

These strong social ties—
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establishing adequate capital a challenge for MBEs.⁶¹ In a study commissioned by the City of San Diego in 1995, MBEs reported that they had experienced discrimination in securing loans and that non-MBE/WBE suppliers had sold them supplies at a higher price than they would have charged white males.⁶² These factors work against the viability and growth opportunities of MBEs; many are ultimately prevented from increasing business volume and are delayed in bidding on large public contract opportunities. Some race-conscious programs allowed under *Crosby* were designed to make securing capital more equitable: some set out to remove discriminatory lending practices, others developed loan programs set up by agencies and local governments, and others subsidized costs of insurance or bonding.⁶³

Networks are key to securing public contracts and developing a successful business. Businesses owned by people of color tend to lack networks with people in decision-making positions to the same degree as their non-MBE counterparts.⁶⁴ These strong social ties—developed through business contacts and through education and social activity—create networks that are very difficult for MBEs to access. These networks control large sections of the public contracting market and have historically excluded new members based on race, ethnicity or gender. This type of “good old boy” network can create a powerful barrier to accessing opportunities to bid for businesses owned by people of color, especially women

of color.⁶⁵ While good faith effort requirements created by race-conscious programs were intended to lessen the effects of exclusionary networks, collusion and “bid rigging” remain as barriers to receiving subcontracts in public construction projects.⁶⁶ MBEs have reported in interviews that bid rigging—when general contractors receive bids from several subcontractors and then allow businesses within their network to know the lowest bid, essentially giving them a second opportunity to underbid—is a practice that hurts MBE opportunity to compete on a level playing field.⁶⁷ Prime contractors can claim to have made a good faith effort to include MBEs on public projects while continuing to award subcontracts to those non-MBE businesses in their network.⁶⁸ Agencies and local governments can reduce the effects of favoritism by ensuring equal opportunity for MBEs and that the bid processes are fair, open, and impartial.⁶⁹

Another major barrier to the growth and competitiveness of MBEs is the negative stereotype that these firms are under-performing. Biased beliefs can also impede the progress of MBEs. Interviews with white males in the San Diego business community in 1995 revealed stereotypical and harmful attitudes regarding people of color’s capabilities for owning or managing a business.⁷⁰ In addition to providing major barriers for MBE participation in business opportunities, these negative attitudes also increase the pressure for MBEs to

⁶¹ DEGA/TMS. (1995, May). *City of San Diego MBE/WBE Predicate Study Report. V. 1*. San Diego, CA: City of San Diego. See also: Blanchflower, D.G., & Wainwright, J., *Ibid.*; *Supra*, note 4.

⁶² DEGA/TMS, *Ibid.*

⁶³ *Supra*, note 4.

⁶⁴ *Supra*, note 56.

⁶⁵ DEGA/TMS, *Supra*, note 61.

⁶⁶ Blanchflower, D.G., & Wainwright, J., *Supra*, note 60.

⁶⁷ *Ibid.*

⁶⁸ DEGA/TMS, *Supra*, note 61.

⁶⁹ *Supra*, note 4.

⁷⁰ DEGA/TMS, *Supra*, note 61.

Literature Review

perform better than their white male counterparts. While previous discriminatory treatment in employment, education, and training opportunities can negatively affect management practices and expertise,⁷¹ training and counseling can improve the overall business savvy of MBEs. Race-conscious set-aside programs and bid systems can help to develop track records for MBEs, allowing them to access the larger breadth and depth of experience required to make them more competitive.⁷² In a study commissioned by Caltrans, contractors recommended that the agency adjust the type and size of work (e.g., the magnitude of individual contracts, the nature of the work, and the time available to complete the work) to make bidding more attractive.⁷³ If large government contracts are not broken down into smaller projects, small businesses cannot compete, and they must then rely on prime contractors awarding them subcontracts. This returns MBEs, which tend to be smaller, to the problems experienced when competing against non-MBEs, as described above.⁷⁴

Disparity Studies Reveal Under-Representation

Disparity studies examine the “underlying factual predicate for race and/or gender-conscious preference programs for contracting and procurement in accordance with *Croson*.”⁷⁵ After the *Croson* decision, many state and local governments commissioned disparity studies to measure differences between the proportion of available MBEs and the distribution of government contracts in order to determine whether underutilization of MBEs justifies a race-conscious DBE program. These disparity

studies have also documented the role that state and local governments, unions, prime contractors, bonding companies, suppliers and financiers have played in perpetuating discrimination and blocking opportunity to succeed.⁷⁶ By showing that there are large and statistically significant disparities against a particular group of business owners who are people of

Interviews with white males in the San Diego business community in 1995 revealed stereotypical and harmful attitudes regarding people of color’s capabilities for owning or managing a business.

color, a government entity can and should initiate or continue an affirmative action program.⁷⁷ While these studies are important to build consensus regarding the need for affirmative action measures and for providing benchmarks for future evaluation, it is important to note that earlier studies have overlooked businesses that have gone out of business and do not include those entrepreneurs who have not had the opportunity to enter certain lines of business because of systemic discrimination and bias.⁷⁸

Studies have consistently shown that participation in public contracting continues to be a

⁷¹ *Supra*, note 56; *See also*: DEGA/TMS, note 61.

⁷² *Supra*, notes 1 and 4.

⁷³ Rouen, L. & Mitchell, D.J. (2005, October 24). *California Construction Market Analysis: Causes of Bidding Trends and Industry Ability to Respond to Increased Department Funding*. Sacramento, CA: The California Department of Transportation, Division of Construction, Office of Construction Engineering.

⁷⁴ *Supra*, note 56.

⁷⁵ DEGA/TMS, *Supra*, note 61.

⁷⁶ *Supra*, note 56; *See also*: Blanchflower, D.G., & Wainwright, J., note 60.

⁷⁷ *Supra*, note 1.

⁷⁸ *Ibid*.

challenge to communities of color both before the enactment and after the enforcement of Proposition 209. In one study pre-Proposition 209, it was found that MBEs that relied heavily on government contracts were more likely than comparable small businesses to go out of business following *Croson*.⁷⁹ In a study commissioned by the Department of Minority Business Enterprise of the Commonwealth of Virginia,⁸⁰ it was found that in the five-year period from 1997 through 2002, spending with MBE firms was less than .44 percent of total spending. The study, which controlled for management experience and owner education, found that substantial disparities existed particularly for African American, Asian American, and Native American construction prime contractors and subcontractors. In a 2005 disparity study commissioned by New Jersey, statistically significant disparity was found in construction and construction-related services for businesses owned by African Americans, Asian Americans, and Latinos.⁸¹ Many other disparity studies have been performed in states and municipal localities across the nation following *Croson*. Some of these include the states of North Carolina,⁸² Texas, and Maryland,⁸³ as well as the City of San Diego⁸⁴ and an upcoming report for the City of Oakland.⁸⁵ In 1997, the Urban Institute analyzed the results of 58 disparity studies across the nation and found substantial disparity in gov-

ernment contracting. The study found that MBEs nationally received 57 cents of each dollar that they would be expected to receive based on their total share of available contractors.⁸⁶

Programs designed to level the playing field and ensure equitable utilization rates are allowed to exist because of the government's compelling interest to remedy their role in allowing past and current discrimination. Few researchers, however, have performed cost/benefit analyses on the monetary effects of affirmative action programs on the government. One study, though it was limited in scope and examined only short-term costs, suggested that the Caltrans affirmative action program raised the price of winning bids.⁸⁷ Other studies have suggested that increasing the participation rates of MBEs in public contracting and providing equal opportunity for everyone can increase the competitiveness of a bid and be more cost effective for governments.⁸⁸ A reduction in competitiveness was such a concern for Caltrans that in 2005, a market analysis was commissioned to determine why the number of contractors bidding for Caltrans construction projects had declined in previous years, while the submitted low bids for these same contracts had increased relative to the department's estimates. As these factors increased necessary funding levels for new construction work, the analysis was to also determine whether these factors made up a trend of declining level of competition for contracts.⁸⁹ Caltrans sent a survey to contractors to find out the causes of the increasingly expensive

⁷⁹ Bates, T., & Williams, D. (1996, May). "Do Preferential Procurement Programs Benefit Minority Business?" *The American Economic Review*. 86(2), 294-297.

⁸⁰ MGT of America. (2004, January 12). *A Procurement Disparity Study of the Commonwealth of Virginia*. Tallahassee, FL: Department of Minority Business Enterprise, Commonwealth of Virginia.

⁸¹ Mason Tillman Associates, Ltd. *State of New Jersey Construction Services Disparity Study*. October 2005.

⁸² Office for Historically Underutilized Businesses. (2003). *Historically Underutilized Businesses Annual Report*. Raleigh, NC: State of North Carolina Department of Administration.

⁸³ *Supra*, note 56.

⁸⁴ DEGA/TMS, *Supra*, note 61.

⁸⁵ Mason Tillman was commissioned to do this report in 2006.

⁸⁶ *Supra*, note 56.

⁸⁷ Marion, J. (2005, September). *How Costly is Affirmative Action? Government Contracting and California's Proposition 209*. Santa Cruz, CA: University of Santa Cruz Department of Economics.

⁸⁸ *Supra*, note 73. See also: Ayres, I., & Cramton, P. (1996, April). "Pursuing Deficit Reduction through Diversity: How Affirmative Action and the FCC Increased Auction Competition." *Stanford Law Review*: 48(4), 761-815; Maryland General Assembly. (2005). *Procurement-Minority Business Enterprise and Small Business Reserve Programs*. HB 1432 Fiscal and Policy Note.

⁸⁹ *Ibid.*, Rouen, L. & Mitchell, D.J.

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and reduced number of bids, and 70 percent of the respondents reported that they had reduced their volume of Caltrans bids or stopped bidding Caltrans jobs altogether. The most frequent recommendation that surveyed contractors gave to improve the process was that Caltrans should be fair; in other words, they should administer the contract fairly and develop better working relationships.⁹⁰

Impact of Race-Specific Remedies vs. Non Race-Specific Remedies

Since 1982, the U.S. Department of Transportation (USDOT) has offered race-conscious programs to increase the participation of DBEs⁹¹ in federal highway, transit, and airport contracts.⁹² Due to the federal funding requirement, Caltrans continued a race-conscious DBE program following the passage of Proposition 209, although the department did subsequently cut its DBE goal from 20 percent to 10

From 1998 to 2002, the proportion of federal aid dollars awarded to DBEs decreased by 30 percent.

percent. By 1997, actual DBE participation had fallen from 26 percent to 12 percent.⁹³ While the actual participation rate was still above stated goals, it is notable that the rate had fallen almost exactly by the same percentage by which the goal had dropped.

⁹⁰ *Ibid.*

⁹¹ The Caltrans DBE program includes women, people of color, and disabled veterans.

⁹² Blanchflower, D.G., & Wainwright, J., *Supra*, note 60.

⁹³ *Ibid.*

Research has highlighted the role of race-conscious goals in the participation rates of DBEs. In 2000, USDOT allowed its grant recipients (e.g., state transportation agencies such as Caltrans) to set annual goals for participation by MBEs and WBEs with either a race/gender-conscious component, or a race/gender-neutral component, or a combination of the two.⁹⁴ Researchers from the National Bureau of Economic Research (NBER) found that between 2000 and 2002, 35 percent of state transportation agencies chose to adopt either predominantly or entirely race/gender-neutral DBE goals. The increased use of race-neutral goals in the implementation of transportation programs coincided with decreased participation of DBEs. From 1998 to 2002, the proportion of federal aid dollars awarded to DBEs decreased by 30 percent.⁹⁵

An analysis performed by the Urban Institute compared jurisdictions where race-conscious programs were in place with those without such programs. Disparity was greater in jurisdictions where there were no goals articulated in programs.⁹⁶ After *Crosson*, participation of MBEs in Richmond, Virginia reduced drastically from 30 percent to four percent.⁹⁷ In a review of states and localities that removed race-conscious programs, NBER found that “once these programs are removed, the utilization of MWBEs drops precipitously” and that “there is no evidence... that suggests that when programs are removed utilization of minorities goes up or remains constant. The evidence is universally that utilization drops.”⁹⁸

This downward trend continues. In January 2006, the Alaska Department of Transportation adopted a race-neutral policy, and only one percent of contracts (out of \$110 million in available funds)

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Supra*, note 56.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

went to MBEs in the first half of 2006.⁹⁹ In Atlanta, MBE participation in city contracts declined from 35 percent to 14 percent following an end to the city's equal opportunity program, and in the city of Tampa, participation of African American and Latino contractors fell by 99 percent and 50 percent, respectively.¹⁰⁰ In San Jose, participation by people of color in the city's prime contracts fell by more than 80 percent immediately following the suspension of the city's race-conscious programs. Similar patterns are visible in cities and counties across the country that have adopted race-neutral programs.

In May 2006, Caltrans changed its DBE program from being a race-conscious program to a race-neutral program,¹⁰¹ eliminating mandated participation goals and incentives for prime contractors to provide equal opportunity for firms owned by people of color. This change resulted from the ruling in the case of *Western States Paving Co., Inc. v. Washington State Department of Transportation*. In this case, the Ninth Circuit Court of Appeals found that Washington State's transportation DBE program was unconstitutional because there was not sufficient evidence of discrimination to support a race-conscious program. The ruling applied to all states and localities within the Court's jurisdiction, which includes California. Caltrans evaluated its DBE program and found that available disparity studies conducted in California were limited in scope to a local government agency or a project, geographically and chronologically limited, and did not provide "statistical evidence" of discrimination

in transportation contracting.¹⁰² A disparity study is expected to be released by Caltrans in 2007.¹⁰³

While disparity studies investigate underutilization of businesses, this study investigates the impact of Proposition 209 on the fate of businesses that were certified MBEs in the transportation construction industry in 1996, as well as on the trends in Caltrans awards over time. *Free to Compete? Measuring the Impact of Proposition 209 on Minority Business Enterprises* intends to clarify how Caltrans' race-conscious affirmative action program affected transportation construction companies owned by people of color before Proposition 209, and how its impact continued after the passage of Proposition 209, through the examination of MBE survival and award access, a survey of transportation construction contractors whose surviving businesses were certified MBEs in 1996, focus groups with MBE owners, and in-depth case studies. ■

⁹⁹ Campbell, M. (2006, May 14). "Study to Determine if State DOT Discriminates in Contracting." *Alaska Journal of Commerce*. Retrieved July 19, 2006, from http://www.alaskajournal.com/stories/051406/hom_20060514003.shtml

¹⁰⁰ Blanchflower, D.G., & Wainwright, J., *Supra*, note 60.

¹⁰¹ *Supra*, note 8.

¹⁰² Kempton, W. (2006, May 1). [Letter to Transportation Construction Community]. Retrieved July 19, 2006, from http://www.dot.ca.gov/hq/bep/documents/directors_letter.pdf

¹⁰³ *Ibid.*

Methodology

DRC implemented a multi-method approach to collect data on the impact of Proposition 209 on MBEs. Empirical data in this report were gathered using four distinct methodologies: an aggregate analysis of MBE survival and award access, a survey of contractors from surviving firms that were certified MBEs in 1996, focus groups consisting of MBE owners, and in-depth case studies of MBE owners.

A legal review provided an analysis of the legal arguments throughout the United States, noting trends at the national, regional, and local levels. A literature review examined previous research that documented the barriers facing MBEs and the impact of removing race-conscious DBE programs in California and other states.

DRC collected and analyzed quantitative data provided by Caltrans from the Quarterly/Annual 1405 Reports from Fiscal Year (FY) 1985 through FY 1998, the Quarterly Report of DBE Awards and Commitments from FY 1999 through FY 2002, and the Uniform Report of DBE Awards or Commitments and Payments from FY 2003 through FY 2005. The total and relative amounts of revenue from Caltrans to MBEs were examined for trends before and after 1996.

Additionally, DRC collected data for 3,269 in-state firms listed in the 1996 volumes of the *Department of Transportation Disadvantaged Business (DB)*, *State Woman Business Enterprise (SWBE)*, and *State Minority Business Enterprise (SMBE) List* that were certified as SMBEs¹⁰⁴ and that worked in the construction industry during that period. Due to a limited sample size, the 100 MBEs categorized as Spanish American and Portuguese American were not included in this study. A search by DRC researchers indicated that of the 3,169 companies that were certified as SMBEs in 1996 and categorized as being owned by Hispanic/Latino American, Asian Indian American, Asian Pacific American, African American, or Native American contractors, 1,005 were either verified as

being in business or possibly still in business as of the beginning of 2006.¹⁰⁵

DRC contacted contractors from surviving MBEs in order to investigate their experiences since 1996. A sample size of at least 24 respondents from each of the three largest groups (Hispanic/Latino American, Asian Pacific American, and African American) was desired. After receiving a letter alerting them that they may be contacted to complete a survey, MBEs were randomly selected in May and June of 2006 to complete a 20-minute, 98-question survey. Surveys were administered by phone, fax, or mail.

The survey investigated how the Caltrans race-conscious DBE program was used before and after 1996 and also how MBE firms have changed in the past ten years. Programs in this analysis included: mentoring opportunities, networking events to establish relationships with prime contractors and suppliers, diversity goals, technical assistance programs, and pre-bidding conferences. Additionally, DRC measured changes in the size and viability of the firms since 1996.

The analysis of MBE data yielded results indicating differences in the trends across time periods and differences among demographic groups. In order to assess the importance of these differences, a variety of statistical tests were conducted.¹⁰⁶

Focus groups and interviews were conducted to collect the input of contractors and to identify and discuss themes in preliminary research findings. Five focus groups were held in regions throughout

¹⁰⁵ Differences in survival rates were analyzed using Chi-squares.

¹⁰⁶ Response rates were analyzed using Chi-squares. For continuous variables, changes over time from before 1996 until after 1996 were analyzed using paired t-tests. Differences in changes over time by ethnicity or sex were analyzed using independent samples t-tests on change scores from before 1996 until after 1996. Differences at each time point by ethnicity or sex were analyzed using independent samples t-tests at each time point, before 1996 and after 1996. For dichotomous variables, differences between ethnic groups or sex over time were analyzed using McNemar tests, and differences at each time point were analyzed using Chi-squares.

¹⁰⁴ In this report, enterprises owned by a person of color will be referred to as MBEs.

California, including Orange County, San Diego, and the San Francisco Bay Area. In total, six men and two women participated in the focus groups, with five African American men, two Asian American women, and one Native American man contributing. These focus groups focused on Proposition 209, equal opportunity in bidding, and benefits/challenges of the MBE program. Participants included owners of construction firms who were survey participants and/or referred to DRC by business networks for people of color. The focus groups influenced who was chosen for in-depth interviews and shaped the themes in the rest of the report. Four MBEs were selected to participate in an in-depth interview detailing their work experience. Of these interviews, two MBE personal profiles were selected for inclusion in this report.

Limitations

The limitations of this study include the following:

- The non-uniform method that Caltrans collects and presents data on MBEs, DBEs, and WBEs causes comparisons to be less precise both for comparing data collected in 1996 and 2006, as well as for data collected within those years. Additionally, the way in which firms are categorized as DBEs, MBEs, or WBEs makes it impossible to identify, with exact precision, the amount and number of contracts awarded to male and female contractors of color. Data from Caltrans are also not disaggregated by specific ethnicity for the Asian Pacific American and Hispanic/Latino American groups, limiting analyses for these populations.
- At the time of this study, DRC was unable to obtain disaggregated data (via reports) on awards for state contracts. The method that Caltrans uses to report the percentage of contracts awarded to MBEs, DBEs, and WBEs includes projects with at least some federal dollars. Until FY 2002, the total awarded amount and amount awarded to MBEs consisted of both the federal and state portion of awards with at least some federal dol-

lars. However, starting in FY 2003, only the federal portion of these awards was documented.

- The survey includes the common limitations that are associated with using self-reported data and data about recalled experiences from over ten years ago.
- In some cases, the sample size of the survey did not provide enough statistical power to determine whether apparent differences were statistically significant or due to random chance. Due to the small number of women-owned MBEs in the sample, caution should be used in the interpretation of results for women-owned MBEs.
- DRC sampled only businesses that were certified MBEs in 1996 and were still in operation ten years later. As the businesses that did not survive could not be surveyed, the sample will only be reflective of the businesses that survived, not those which failed.

Despite these limitations, this report gives valuable new information, enlightening an area in which virtually no systematic information is otherwise available. This report constitutes one of the first systematic, data driven analyses of the effect of Proposition 209 on MBEs. By using multiple methodologies, DRC was able to examine trends that may only be noticeable as aggregate data affecting the survival of all MBEs, as the combined surveyed experiences of surviving firms, or in the detailed, personal experiences of MBE contractors. Findings that are evident in more than one of these methodologies are worthy of special notice. ■

Results: MBE Survival and Award Access

Decline in MBEs

In 1996, 3,269 transportation construction businesses were registered with Caltrans as Minority Business Enterprises (MBEs). Today, only 1,005 (32%) of those enterprises have remained in business (see Table 1). Of those, a small percentage (3%) no longer qualifies for the MBE program. Requirements for certification include a minimum of 51 percent mi-

nority ownership, daily management of the business by one or more of such individuals, and an adjusted net worth that does not exceed \$750,000.¹⁰⁷

The 3,269 MBEs that were in existence ten years ago were owned by members of the following ethnicities: Hispanic/Latino American (38%), Asian Pacific American (24%), African American (23%), Native American (5%), Asian Indian American (5%),

¹⁰⁷ Disadvantaged Business Enterprise Program Plan. (2006, May). Retrieved July 19, 2006, from http://www.dot.ca.gov/hq/bep/DBE_Program.htm

Table 1: Ethnic and sex breakdown of MBEs certified in 1996 and in business in 2006[†]

	Number of certified MBEs in 1996 (percentage of total)	Number of MBEs definitely or possibly still in business (percentage of total)	MBE survival rate
Total sample	3,269 (100%)	1,005 (100%)	32% [‡]
Hispanic/Latino American	1,253 (38%)	403 (40%)	32%
Asian Pacific American	795 (24%)	282 (28%)	35%
African American	765 (23%)	209 (21%)	27%
Native American	178 (5%)	57 (6%)	32%
Asian Indian American	178 (5%)	54 (5%)	30%
Portuguese American [§]	73 (2%)	—	—
Spanish American [§]	27 (1%)	—	—
Men	2,782 (85%)	869 (86%)	32% [‡]
Women	487 (15%)	136 (14%)	29% [‡]

Source: Department of Transportation Disadvantaged Business (DB), State Woman Business Enterprise (SWBE), and State Minority Business Enterprise (SMBE) List & California Minority Business Enterprise Program Survey, Discrimination Research Center, 2006.

[†] Percentages may not add to 100% due to rounding.

[‡] Portuguese American- and Spanish American-owned MBEs are not included in this survival rate.

[§] Due to the low number of certified MBEs in 1996, Portuguese American-owned and Spanish American-owned MBEs were not investigated.

Portuguese American (2%), and Spanish American (1%). Across ethnic categories, the vast majority of business owners were male (85%).

Today, the breakdown of MBE ownership by ethnic groups remains similar to ten years ago. Of the 1,005 surviving businesses: 40 percent are owned by Hispanic/Latino Americans, 28 percent are owned by Asian Pacific American, 21 percent are owned by African Americans, six percent are owned by Native Americans, and five percent are owned by Asian Indian Americans. DRC did not follow up with Portuguese American and Spanish American firms due to their small sample size. Ownership by men (86%) is still much more prevalent than ownership by women (14%).

The average survival rate for the certified MBEs in 1996 that were included in this study was 32 percent, as 1,005 out of 3,169 businesses survived. DRC found that African American-owned MBEs were significantly less likely to survive than those owned by other contractors of color; with 209 out of 765 still in operation, the survival rate was only 27 percent.¹⁰⁸ As less than one-third of certified MBEs from 1996 have survived, it is clear that few of these firms were able to successfully endure in the field

¹⁰⁸ Differences that are described as “significant” meet this study’s requirement of being within the 95% level of confidence. In other words, statistically significant differences are differences that have no more than a 5% chance of being produced through random chance.

of transportation construction. However, without comparing this survival rate to one for an appropriate comparison group, the impact of Proposition 209 on this survival rate is unclear.

A study by the UC Berkeley Center for Labor Research and Education found that the field of construction has been one of the top industries to employ African American workers since 1970.¹⁰⁹ By the year 2000, employment in construction dropped three spots from the seventh spot, and was ranked as the tenth largest employer of African American workers. It should be noted that while the field is employing less African Americans as a whole, it still remains one of the top employers of African Americans in Northern California’s Bay Area. For instance, it is the sixth largest employer in San Francisco, and the third largest in the East Bay.¹¹⁰

Results: MBE Survival and Award Access

Table 2 and Figure 1 illustrate the dollars awarded for Caltrans transportation construction projects, in total, to MBEs, and to non-MBEs, from FY 1985 through FY 2005¹¹¹ for contracts that included at least some

¹⁰⁹ Pitts, S.C. (2006, June 15). “Black Workers in the Bay Area: 1970-2000.” Presented at *Job Quality and Bay Area Black Workers: 1970 – 2000*. San Francisco, CA.

¹¹⁰ *Ibid.*

¹¹¹ Caltrans awards by year are presented in fiscal years which begin October 1st of the preceding year and end September 30th of the denoted year. For example, the reported FY 1985 began October 1st, 1984 and ended September 30th, 1985.

DRC found that African American-owned MBEs were significantly less likely to survive than those owned by other contractors of color.

Results: MBE Survival and Award Access

Table 2: Real dollars of Caltrans FHWA awards, in total, to MBEs, and non-MBEs, and the percentage awarded to MBEs, by Fiscal Year[†]

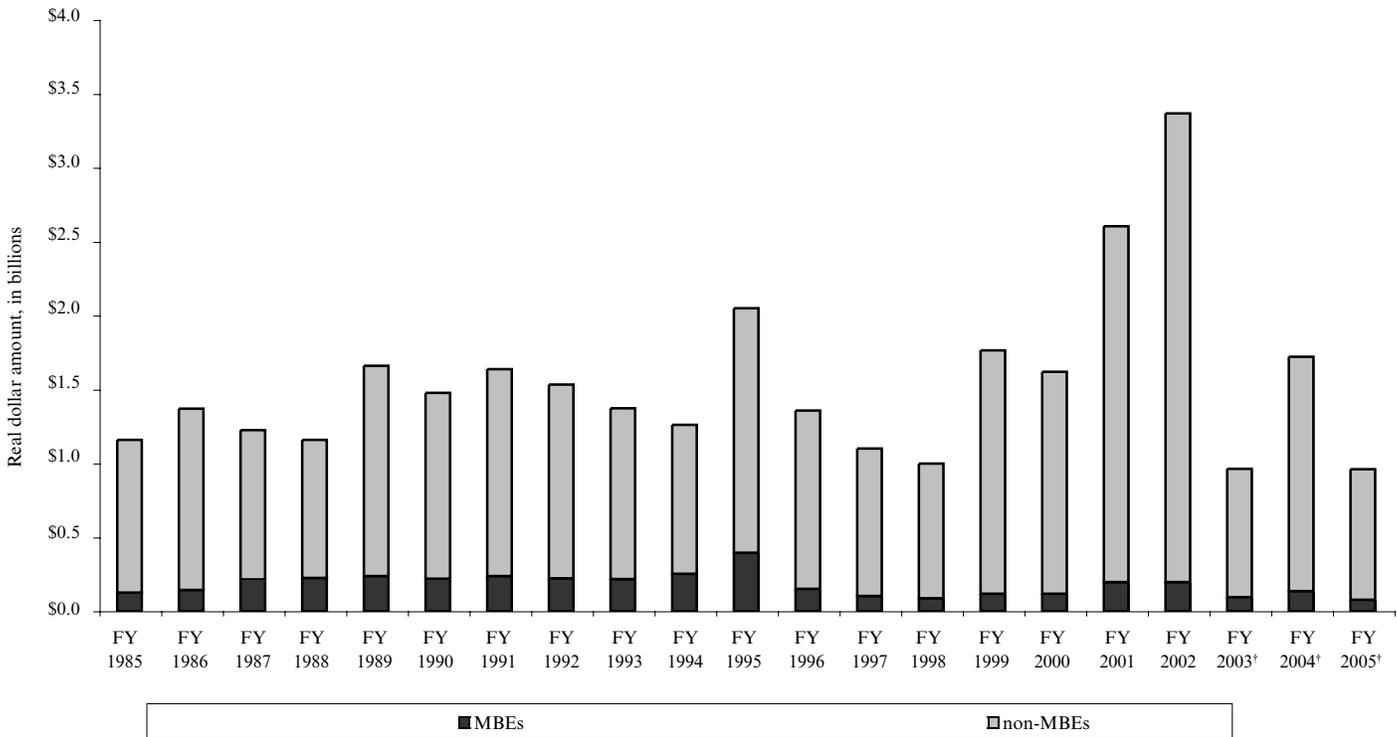
	Total contracts (real dollar)	Total contracts to MBEs (real dollar)	Total contracts to non-MBEs (real dollar)	Percentage of total dollars to MBEs
FY 1985	\$1,158,113,076	\$123,661,900	\$1,034,451,175	10.7%
FY 1986	\$1,370,029,809	\$142,977,070	\$1,227,052,738	10.4%
FY 1987	\$1,223,039,243	\$214,754,645	\$1,008,284,598	17.6%
FY 1988	\$1,158,538,172	\$224,829,961	\$933,708,211	19.4%
FY 1989	\$1,658,869,859	\$237,282,922	\$1,421,586,937	14.3%
FY 1990	\$1,476,107,167	\$219,751,334	\$1,256,355,833	14.9%
FY 1991	\$1,636,573,778	\$237,699,437	\$1,398,874,341	14.5%
FY 1992	\$1,532,763,920	\$221,930,996	\$1,310,832,923	14.5%
FY 1993	\$1,370,615,212	\$216,068,982	\$1,154,546,230	15.8%
FY 1994	\$1,260,329,054	\$253,071,067	\$1,007,257,987	20.1%
FY 1995	\$2,047,681,743	\$394,491,745	\$1,653,189,998	19.3%
FY 1996	\$1,356,302,349	\$151,257,519	\$1,205,044,830	11.2%
FY 1997	\$1,099,407,742	\$102,367,546	\$997,040,196	9.3%
FY 1998	\$998,251,155	\$86,780,532	\$911,470,623	8.7%
FY 1999	\$1,762,918,522	\$116,751,788	\$1,646,166,734	6.6%
FY 2000	\$1,617,164,423	\$115,859,590	\$1,501,304,833	7.2%
FY 2001	\$2,602,318,432	\$196,726,855	\$2,405,591,577	7.6%
FY 2002	\$3,367,574,097	\$194,953,657	\$3,172,620,441	5.8%
FY 2003 [‡]	\$962,226,135	\$95,060,379	\$867,165,756	9.9%
FY 2004 [‡]	\$1,719,791,608	\$135,403,605	\$1,584,388,002	7.9%
FY 2005 [‡]	\$958,505,986	\$75,799,497	\$882,706,489	7.9%

Source: Caltrans Quarterly/Annual 1405 Reports from FY 1985 - FY 1998, Quarterly Report of DBE Awards and Commitments from FY 1999 - FY 2002, & Uniform Report of DBE Awards or Commitments and Payments from FY 2003 - FY 2005.

[†] Total contracts to MBEs and total contracts to non-MBEs may not sum to total contracts due to rounding.

[‡] Total contracts, total contracts to MBEs, and total contracts to non-MBEs for these years only include the federal portion of these awards.

Figure 1: Real dollar amounts of Caltrans FHWA awards to MBEs and non-MBEs, by Fiscal Year



Source: Caltrans Quarterly/Annual 1405 Reports from FY 1985 - FY 1998, Quarterly Report of DBE Awards and Commitments from FY 1999 - FY 2002, & Uniform Report of DBE Awards or Commitments and Payments from FY 2003 - FY 2005.

† Only the federal portion of awarded projects is reported.

federal funding. The percentage of dollars awarded to MBEs is calculated by dividing the amount awarded to MBEs by the total value of projects awarded in that fiscal year.

Dollar values are inflation-adjusted 2005 real dollar amounts using the Consumer Price Index (CPI) as the measure of inflation.¹¹² From FY 1985 through FY 2002, the federal and state portions of awards with some federal funding are reported, but starting in FY 2003, only the federal portion of awards is reported. This

contributed to a reduction in the reported level of funding, both in total amount awarded and amount awarded to MBEs in particular. Additionally, in FY 2003 there was a sizeable reduction in the value of awards in transportation construction in general, a trend that was even more pronounced for Caltrans.¹¹³

The total amount of money awarded by Caltrans to contractors has increased since FY 1985, though it has varied from year to year. The fluctuation of awards is partly due to a variation in public projects for a particular year. For instance, an increase in funding in FY 2004 is due in part to seven contracts over \$50 million

¹¹² The national CPI was deemed a better inflation adjuster than the California CPI due to the methodology used to create the California CPI.

¹¹³ *Supra*, note 73.

Results: MBE Survival and Award Access

being awarded in that time period. Other large increases in funding for particular years are due to large-scale projects, including the Richmond-San Rafael Bridge and the Bay Bridge retrofits.

The real dollars awarded to MBEs demonstrate a steady increase over time from FY 1985 until FY 1995. There is a clear reduction in the total value of contracts awarded to MBEs after FY 1995. Not only was this reduction maintained over time, but additional reductions occurred for the next several years. Almost \$400 million real dollars were awarded to MBEs in FY 1995, but MBEs were awarded only \$100 million real dollars just two years later, a reduction that lasted for four years.

Some of the reductions in MBE funding can be explained by the fact that the amount awarded by Caltrans to all enterprises was reduced during the same time period. However, not only did the absolute level of funding decline, but the percentage of funds awarded to MBEs declined as well during the same time period. From FY 1985 through FY 1995, the percentage of total dollars awarded to MBEs in-

creased from 10.7 percent to 19.3 percent, and even reached as high as 20.1 percent in FY 1994. However, there is a sharp decline after FY 1995, with total MBE participation never exceeding ten percent after FY 1997.

During the nine years before the passage of Proposition 209, the percentage of awards to MBEs was 16.0 percent. However, that percentage significantly fell by more than half, to 7.9 percent for the nine years after the passage of Proposition 209. Of particular interest is FY 2002. This year had the highest amount of money awarded by Caltrans, yet it was also the year that MBEs received the lowest proportion of awards (5.8%). Strong leadership and advocacy from business councils have encouraged discussion and activity to support the participation of MBEs to reverse this trend.

The rate at which MBEs are awarded contracts has seen a steady decline over the past ten years. Between FY 1999 and FY 2005, the number of contracts awarded to MBEs was also reduced by 52 percent, from 834 in FY 1999 to 400 in FY 2005 (see

Table 3: Total number of Caltrans FHWA prime contracts and subcontracts to DBEs owned by contractors of color, by Fiscal Year

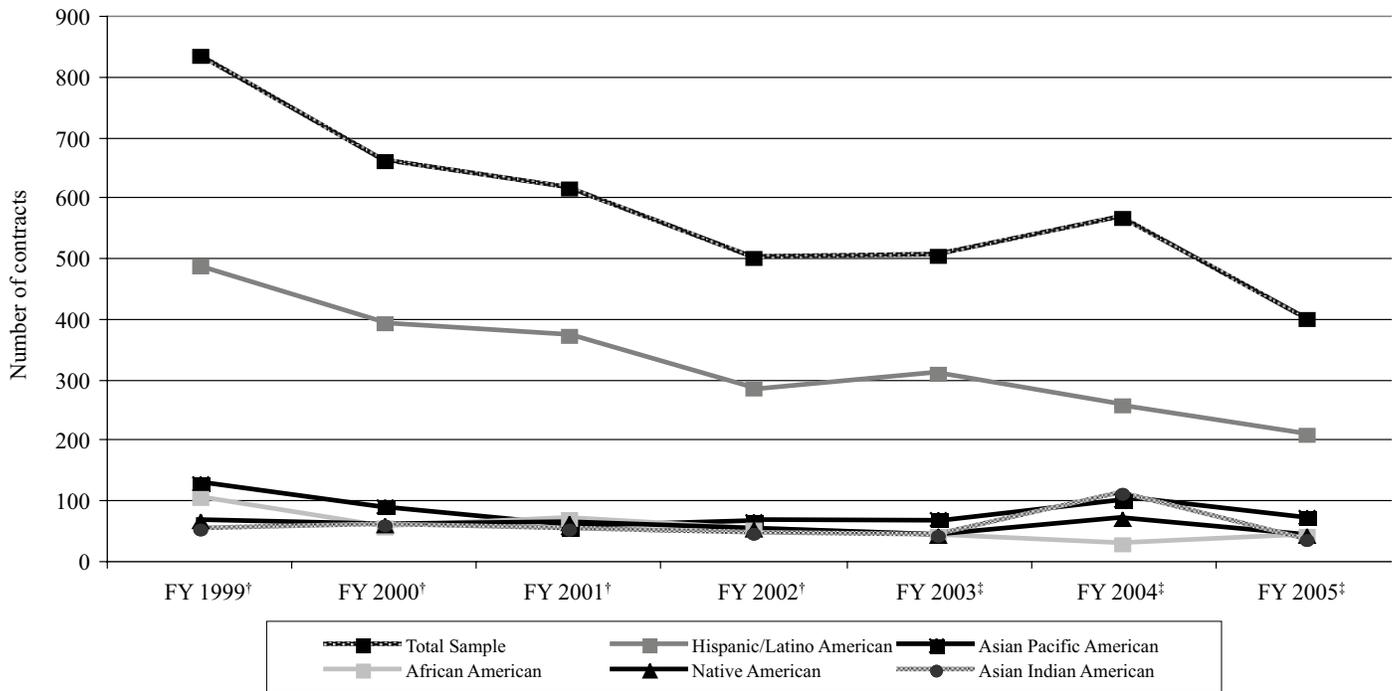
	Total sample	Hispanic/Latino American	African American	Asian Pacific American	Asian Indian American	Native American
FY 1999 [†]	834	486	104	128	51	65
FY 2000 [†]	661	394	55	92	60	60
FY 2001 [†]	614	373	68	57	52	64
FY 2002 [†]	499	286	52	66	44	51
FY 2003 [‡]	504	310	42	68	41	43
FY 2004 [‡]	566	256	28	101	112	69
FY 2005 [‡]	400	209	41	74	35	41

Source: Quarterly Report of DBE Awards and Commitments from FY 1999 - FY 2002 & Uniform Report of DBE Awards or Commitments and Payments from FY 2003 - FY 2005.

[†] Contracts represent largely those awarded to male contractors of color, though a small number of white disabled veterans and women may be included.

[‡] Contracts represent those awarded to male and female contractors of color.

Figure 2: Total number of Caltrans FHWA prime contracts and subcontracts to DBEs owned by contractors of color, by Fiscal Year



Source: Quarterly Report of DBE Awards and Commitments from FY 1999 - FY 2002 & Uniform Report of DBE Awards or Commitments and Payments from FY 2003 - FY 2005.

† Contracts represent largely those awarded to male contractors of color, though a small number of white disabled veterans and women may be included.

‡ Contracts represent those awarded to male and female contractors of color.

Table 3 & Figure 2).¹¹⁴ African American contractors saw the largest reduction in the number of contracts, from FY 1999 to FY 2005, 61 percent. Hispanic/Latino American contractors saw a 57 percent reduction, but

held the most amount of contracts. Asian Indian American contractors experienced the least amount of reduction (31%), but also held the least amount of contracts overall. It is important to note that the number of contracts would likely have been reduced by even more than 52 percent if data from before FY 1999 had been available, due to the reduction in total and relative real dollars awarded to MBEs between FY 1995 and FY 1997 that is not reflected in these numbers. ■

¹¹⁴ For FY 1999 through FY 2002, data on the number of contracts by ethnicity was reported only for the group labeled “DBE,” which largely consisted of men of color. A small number of white disabled veterans and women, both of color and white, are also included. In FY 2003, the reporting structure was amended, and the data on the number of contracts by ethnicity include men and women of color only.

Results: Survey

DRC identified 3,269 certified MBEs in 1996, and contacted MBEs still operating today in order to assess their attitudes and opinions of the DBE program before and after 1996, as well as their current business situation.¹¹⁵ Specifically, for the DBE program,

DRC focused on lending programs, mentorship, technical assistance, and pre-bidding conferences that MBEs were offered as part of small business development, as well as outreach efforts that were offered by the state to MBEs. DRC also assessed the current contracts, revenues and employees of the MBEs.

DRC identified 1,005 companies that were certified MBEs in 1996 and were either definitely or

¹¹⁵ Due to the low number of certified MBEs in 1996, Portuguese American-owned and Spanish American-owned MBEs were not investigated.

Table 4: Ethnic and sex breakdown of MBEs certified in 1996, in business in 2006, and contacted by DRC[†]

	Number of certified MBEs in 1996 (percentage of total)	Number of MBEs definitely or possibly still in business (percentage of total)	DRC attempted to survey	Completed survey	Response rate
Total sample	3,269 (100%)	1,005 (100%)	732	100	14%
Hispanic/Latino American	1,253 (38%)	403 (40%)	283	28	10%
Asian Pacific American	795 (24%)	282 (28%)	173	30	17%
African American	765 (23%)	209 (21%)	189	30	16%
Native American	178 (5%)	57 (6%)	43	8	19%
Asian Indian American	178 (5%)	54 (5%)	44	4	9%
Portuguese American [‡]	73 (2%)	—	—	—	—
Spanish American [‡]	27 (1%)	—	—	—	—
Men	2,782 (85%)	869 (86%)	640	79	12%
Women	487 (15%)	136 (14%)	92	21	23%

Source: Department of Transportation Disadvantaged Business (DB), State Woman Business Enterprise (SWBE), and State Minority Business Enterprise (SMBE) List & California Minority Business Enterprise Program Survey, Discrimination Research Center, 2006.

[†] Percentages may not add to 100% due to rounding.

[‡] Due to the low number of certified MBEs in 1996, Portuguese American-owned and Spanish American-owned MBEs were not investigated.

Table 5: Participation in the DBE program

	Lending programs		Mentorship opportunities		Technical assistance		Pre-bidding conferences	
	Pre-96	Post-96	Pre-96	Post-96	Pre-96	Post-96	Pre-96	Post-96
Total sample	4%	4%	5%	6%	8%	11%	56%	46%
Hispanic/Latino American	4%	0%	4%	4%	0%	4%	38%	38%
Asian Pacific American	0%	0%	7%	3%	10%	14%	62%	45%
African American	11%	7%	7%	10%	11%	14%	64%	54%
Men	4%	4%	6%	5%	9%	12%	55%	46%
Women	5%	5%	6%	5%	5%	10%	60%	45%

Source: California Minority Business Enterprise Program Survey, Discrimination Research Center, 2006.

possibly still in business in 2006. DRC attempted to contact 732 of these companies, and received 100 completed surveys, resulting in a response rate of 14 percent for contacted businesses (see Table 4). The goal of completing at least 24 surveys with the three largest ethnic groups, Hispanic/Latino American, Asian Pacific American, and African American contractors, was met.

Of the 1996 certified MBEs still in operation today, Hispanic/Latino American-owned MBEs were the largest, both in 1996 and currently, followed by Asian Pacific American-owned and African American-owned MBEs. There was a significant tendency for Asian Pacific American-owned MBEs, and a trend for African American-owned MBEs, to be more likely to respond than the rest, particularly compared with Hispanic/Latino American-owned MBEs. As a result, there were relatively similar numbers of Hispanic/Latino American-owned (n=28), African American-owned (n=30) and Asian Pacific American-owned (n=30) MBEs in the survey sample. There were eight Native American-owned and four Asian Indian American-owned MBEs that re-

sponded to the survey.¹¹⁶ Although few MBEs were owned by women, a significantly higher response rate, almost double that of men-owned MBEs, resulted in a sample size of 21 women-owned MBEs. On average, MBEs had been in business for 22 years, with Hispanic/Latino American-owned and women-owned firms slightly younger than the others.

Lending Programs, Mentorship Opportunities, and Technical Assistance

Few survey respondents participated in any lending programs, mentorship opportunities, or technical assistance, regardless of whether or not the opportunities were affiliated with the Caltrans DBE program (see Table 5). On average, no more than four percent of contractors of color had used a lending program, no more than six percent had taken advantage of any formal mentorship opportunity, and no more than 11 percent had received any formal technical assistance, either before or after 1996. Of the contractors who utilized these programs, some were programs

¹¹⁶ Due to the small number of Asian Indian American- and Native American-owned MBEs, survey results for these groups will not be presented.

Results: Survey

offered by Caltrans, while others were programs offered by other agencies. However, due to low usage among our respondents, it was not possible to further subdivide the usage of these programs between Caltrans and non-Caltrans offered programs.

Pre-Bidding Conferences

Before 1996, the majority (56%) of the survey respondents were invited to attend pre-bidding conferences. Before 1996, Hispanic/Latino American contractors were significantly less likely to be invited than other contractors of color. After 1996, however, there was a trend for contractors of color to receive fewer invita-

tions to pre-bidding conferences, with the invitation rate (46%) dropping by ten percentage points.

The number of pre-bidding conferences that contractors attended also decreased significantly, from 2.4 conferences per year before 1996 to 1.3 conferences per year after 1996. African American contractors attended significantly more pre-bidding conferences per year than other contractors of color, both before 1996 (4.6 conferences per year) and after 1996 (2.5 conferences per year).

Outreach Efforts

Overall, a majority of contractors reported being contacted by prime contractors as part of good faith efforts, both before 1996 (75%) and after 1996 (70%) (see Table 6). Before 1996, on average, contractors reported that 13 percent of their revenue was the result of good faith efforts by prime contractors. However, the percent of revenue coming from this outreach evidenced a trend towards reducing after 1996, to nine percent of total revenue. Although not reaching significance, women-owned MBEs saw a trend of reduced outreach and reduced revenue from good faith efforts, while men-owned MBEs evidenced a less pro-

The number of pre-bidding conferences that contractors attended also decreased significantly, from 2.4 conferences per year before 1996 to 1.3 conferences per year after 1996.

Table 6: Prime contractor outreach efforts

	Involvement in good faith efforts		Percent of revenue coming from good faith efforts		Percent of revenue coming from good faith efforts (for those who received efforts)	
	Pre-96	Post-96	Pre-96	Post-96	Pre-96	Post-96
Total sample	75%	70%	13%	9%	18%	14%
Hispanic/Latino American	77%	85%	7%	9%	11%	15%
Asian Pacific American	83%	72%	11%	11%	16%	18%
African American	64%	64%	18%	10%	32%	14%
Men	78%	74%	11%	9%	17%	13%
Women	65%	55%	22%	8%	24%	18%

Source: California Minority Business Enterprise Program Survey, Discrimination Research Center, 2006.

nounced trend. Contractors of color also reported that these good faith outreach efforts were significantly less helpful after 1996 (2.1 on a 1 to 5 scale) as compared to before 1996 (2.5 on a 1 to 5 scale).

DBE Program Utilization

The most utilized aspect of the DBE program was targeted outreach efforts by prime contractors; more than two-thirds of contractors were contacted

by prime contractors, both before and after 1996. Many contractors received invitations to pre-bidding conferences, with over 45 percent of contractors being invited, both before and after 1996. The other aspects of the DBE program, technical assistance, mentorship, and lending programs, were sparsely used.

Interestingly, the aspects of the DBE program that were the most used before 1996 were the aspects that experienced the largest drop in usage af-

Table 7: MBE program helpfulness – How helpful was the MBE program to:

	Helpfulness scale (all 8 items)		Fiduciary scale (3 items)		Obtain more credit?		Qualify for loan program?		More easily secure bonding?	
	Pre-96	Post-96	Pre-96	Post-96	Pre-96	Post-96	Pre-96	Post-96	Pre-96	Post-96
Total sample	2.0	1.8	1.5	1.4	1.5	1.4	1.5	1.4	1.3	1.3
Hispanic/Latino American	1.4	1.4	1.2	1.1	1.1	1.0	1.2	1.1	1.2	1.1
Asian Pacific American	2.1	1.9	1.2	1.2	1.3	1.2	1.2	1.2	1.1	1.1
African American	2.4	2.2	2.1	2.0	2.2	2.0	2.1	1.8	1.8	1.6
Men	1.9	1.8	1.8	1.6	1.4	1.3	1.4	1.3	1.3	1.2
Women	2.4	1.7	1.4	1.3	2.0	1.8	1.9	1.7	1.6	1.5

	Subcontract with prime contractors?		Develop relationships with suppliers?		Join or expand networks that made it easier for firm to receive contracts?		Develop a more extensive track record?		Expand the scope of services provided?	
	Pre-96	Post-96	Pre-96	Post-96	Pre-96	Post-96	Pre-96	Post-96	Pre-96	Post-96
Total sample	2.4	2.1	1.6	1.6	2.1	1.8	2.2	2.1	2.1	1.9
Hispanic/Latino American	1.9	1.9	1.3	1.3	1.5	1.3	1.4	1.6	1.3	1.4
Asian Pacific American	2.9	2.6	1.5	1.4	2.3	2.0	2.7	2.4	2.3	2.0
African American	2.2	2.1	2.2	2.0	2.3	2.2	2.6	2.4	2.6	2.5
Men	2.3	2.2	1.5	1.6	1.9	1.9	2.1	2.1	2.0	2.0
Women	2.8	1.8	2.3	1.6	3.0	1.8	2.6	1.7	2.8	1.7

Source: California Minority Business Enterprise Program Survey, Discrimination Research Center, 2006. On a scale of 1 to 5, where 1 is "not at all helpful" and 5 is "very helpful."

Results: Survey

ter 1996. In other words, while usage of mentorship opportunities, technical assistance, and lending programs remained the same or showed trends towards increasing after 1996, the usage of targeted outreach efforts and pre-bidding conferences dropped by five to ten percentage points after 1996. Analyses indicated that all eight items measuring the helpfulness of the DBE program could be incorporated into one “overall helpfulness” scale.¹¹⁷ Additionally, a second “fiduciary helpfulness” subscale consisting of the three fiduciary-related items (helping with credit, loans, and bonds) could also be formed. Analyses of these two scales and the eight individual items found that, overall, respondents did not find the DBE program very helpful in the areas listed in the survey (see Table 7). Before 1996, overall helpfulness was only 2.0 on a 1 to 5 scale, with the highest scoring aspect of the DBE program—help with subcontracting with prime contractors—only managing an average of 2.4 on a 1 to 5 scale. The fiduciary aspects of

MBEs saw a significant reduction in the percentage of revenue and a trend towards reduction in contracts that came from Caltrans since 1996.

the DBE program were seen as less helpful than the other aspects of the DBE program, both before and after 1996.

After 1996, the overall helpfulness of the program was significantly reduced, down to 1.8. The two most helpful items, both relating to receiving contracts,

¹¹⁷ A principal component analysis revealed two factors with eigenvalues over one.

Table 8: Challenges to working with the state – How much of a challenge was caused by:

	Qualifications or eligibility requirements needed to bid?		Number of hours needed to prepare a bid or proposal for a public contract?		Amount of lead time given to respond to a request for proposals?		Getting the information required or questions answered prior to the bid due date?		Costs involved in submitting the required documents to be certified as an MBE?	
	Pre-96	Post-96	Pre-96	Post-96	Pre-96	Post-96	Pre-96	Post-96	Pre-96	Post-96
Total sample	3.0	3.1	3.2	3.2	2.8	2.9	2.8	2.8	3.2	3.2
Hispanic/Latino American	2.4	2.5	3.2	3.1	2.2	2.3	2.6	2.6	3.1	3.0
Asian Pacific American	3.1	3.0	3.0	3.0	2.7	2.8	2.9	2.7	2.9	3.0
African American	3.5	3.4	3.4	3.1	3.2	3.1	2.8	2.8	3.6	3.2
Men	3.0	3.1	3.3	3.3	2.8	2.8	2.9	2.9	3.3	3.2
Women	3.4	3.4	2.6	2.6	2.4	3.1	2.3	2.3	2.4	3.0

Source: California Minority Business Enterprise Program Survey, Discrimination Research Center, 2006. On a scale of 1 to 5, where 1 is “not a challenge at all” and 5 is “an extreme challenge.”

“subcontracting with prime contractors” and “joining or expanding networks that made it easier to receive contracts” each declined significantly since 1996, while other items showed reduction trends.

On the whole Hispanic/Latino American contractors found the DBE program, including fiduciary- and contract-related aspects significantly less helpful, both before and after 1996, while African American contractors found the DBE program more helpful, particularly the fiduciary-related aspects. Female contractors of color found the DBE program to be significantly less helpful over time relative to their male counterparts.

Overall, respondents reported that each of the difficulties they experienced with the state was moderately challenging (see Table 8). There were no significant changes in attitude after 1996. The challenges that received the highest scores were: 1) the number of hours needed to prepare a bid or proposal for a public contract, and 2) the costs involved to be certified as an MBE/DBE.

Before 1996, the amount of lead time given to a request for proposals was less of an issue for Hispanic/Latino American contractors but more of an issue for African American contractors. Female contractors of color found the amount of lead time given to be increasingly challenging.

Before 1996, Hispanic/Latino American contractors found the qualification/eligibility requirements for a bid to be more difficult than did African American and other contractors of color. African American contractors found the costs associated with DBE certification, as well as the number of hours needed to prepare a bid or proposal, to be easier over time.

State of the Minority Business Enterprise

For the surveyed MBEs, the period after 1996 evidenced some modest gains in growth, with the total number of contracts increasing significantly, and the number of employees holding steady (see Table 9). However, while men-owned MBEs advanced, women-owned MBEs did not. Over time, women showed a significant relative worsening in the number of contracts compared to men-owned MBEs, and the same pattern of results for the number of employees. Hispanic/Latino American-owned MBEs showed significantly more growth than Asian Pacific American-owned MBEs, resulting in a significantly larger number of employees today.

The vast majority of MBEs reported that the number or type of services they offer—such as cement pouring, heavy equipment rental, or structural engineering—had increased or stayed the same since

Table 9: Number of employees and contracts

	Number of employees (median)		Number of employees (mean)		Number of total contracts (median)		Number of total contracts (mean)	
	Pre-96	Post-96	Pre-96	Post-96	Pre-96	Post-96	Pre-96	Post-96
Total sample	6	7	20	22	20	20	57	67
Hispanic/Latino American	7	9.5	20	33	25	20	46	61
Asian Pacific American	5	6.5	8	8	20	22.5	81	88
African American	6	6	32	21	6.5	10	22	31
Men	6	8	22	26	20	20	64	77
Women	5	3	7	5	15	10	27	17

Source: California Minority Business Enterprise Program Survey, Discrimination Research Center, 2006.

Results: Survey

Table 10: Number of services and percent of contracts and revenue from Caltrans

	Number of services offered <i>(relative to 1996)</i>			Percent of contracts coming from Caltrans		Percent of revenue coming from Caltrans	
	Percent offering fewer	Percent offering same	Percent offering more	Pre-96	Post-96	Pre-96	Post-96
Total sample	9%	54%	37%	7%	4%	12%	6%
Hispanic/Latino American	0%	44%	56%	1%	0%	5%	3%
Asian Pacific American	0%	69%	31%	8%	10%	16%	11%
African American	22%	44%	33%	8%	0%	14%	2%
Men	8%	52%	40%	5%	3%	8%	5%
Women	11%	63%	26%	15%	9%	28%	10%

Source: California Minority Business Enterprise Program Survey, Discrimination Research Center, 2006.

1996 (see Table 10). On average, 37 percent of the survey respondents offered more services and 54 percent offered the same number of services. For African American-owned MBEs, 22 percent reported offering fewer services, a significantly higher rate than that of the Hispanic/Latino American-owned or Asian Pacific American-owned MBEs, of which none reported offering fewer services. African American-owned MBEs were only 30 percent of the sample, but represented 80 percent of the MBEs who reported offering fewer services. Hispanic/Latino American-owned MBEs saw the most growth, with 56 percent offering more services currently as compared to 1996, significantly more than the other MBEs. Asian Pacific American-owned MBEs were significantly more likely than other MBEs to report offering the same number of services.

MBEs saw a significant reduction in the percentage of revenue and a trend towards reduction in contracts that came from Caltrans since 1996. Before 1996, women-owned MBEs received a significantly larger number of contracts and percentage of their revenue

from Caltrans relative to men-owned MBEs in 1996. However, a significant 66 percent reduction in revenue and a trend evidencing a 42 percent reduction in the percentage of contracts coming from Caltrans resulted in men- and women-owned MBEs receiving equal proportions of contracts and revenue from Caltrans.

Currently, Asian Pacific American-owned MBEs receive significantly more of their revenue from Caltrans than other MBEs, and they showed a significant relative increase in the percentage of contracts coming from Caltrans compared to African American-owned MBEs.

Survey Limitations

Caution should be used in interpreting the results of this survey since only surviving MBEs were examined. The experiences of MBEs that did not survive may be different from those that survived. Additionally, with a response rate of 14 percent, it is not possible to draw strong inferences for the entire sample of surviving MBEs. ■



Ray Chavez

Results: MBE Focus Groups and Interviews

The goal of the focus groups and interviews was to provide an opportunity for MBE-owners to discuss the impact of Proposition 209 on public contracting in California's transportation construction industry. To measure this impact, questions were posed in the following areas:

- *The culture of the construction industry:* What aspects of the construction industry are not directly related to race or ethnicity, but could have an impact on contractors of color?
- *The business challenges for MBEs:* What are the main challenges for MBEs when establishing a business in the transportation construction industry?
- *The federal DBE program:* What benefits and challenges exist for MBEs regarding California's implementation of the federal DBE program?
- *The impact of Proposition 209:* What was the impact of Proposition 209? Were there any collateral effects?
- *MBE survival strategies:* What are some of the main reasons why so many MBEs who were in operation in 1996 are not alive today? What strategies contribute to the survival and/or longevity of MBEs?

The Culture of the Construction Industry

Participants agreed that it is the general culture of the construction industry for prime contractors to operate within a virtually indestructible "good old boy" network that values personal relationships. Participants also reported that it is more beneficial for an MBE to be a prime contractor and thereby avoid relying on other companies to provide contracts. In general, people in this industry reward people they know and trust with work. Participants reported that collusion is perceived as a part of the industry culture and that forming meaningful relationships with other prime bidders or awarding

agencies is essential. Without these relationships, businesses cannot survive in this industry.

The Business Challenges for MBEs

Participants indicated that there are many obstacles to success for MBEs. Securing bonding, financing, and insurance were reported as the most challenging aspects of operating a business. Because many MBEs are small businesses and subcontractors, they rely on working with prime contractors. Slow payment from awarding agencies and prime contractors was also identified as a major barrier for MBEs, many of whom tend to be small businesses that need prompt payment to cover necessary expenses. Cash flow problems were considered common barriers for MBEs, largely due to the owners' relative inexperience operating a business. Participants also reported that they have personally been confronted with negative stereotypes about MBEs being "underperformers" or "inefficient." This can be overcome by developing relationships with prime contractors

In general, people in this industry reward people they know and trust with work.

and/or awarding agencies and efficiently producing high quality work. Still, these relationships can only be fostered if an MBE has the time and money to invest in this type of outreach. While DBE programs provided incentives for bids that included the participation of MBEs, participants noted that

breach of contract was also a common challenge. While MBEs may have been used to secure bids, participants reported that many MBEs never actually conducted their contracted work on a project. Participants also reported that the private industry was more inclined to work with firms that have the ability to work regionally or nationally, which is beyond the capacity of many MBEs.

The Federal DBE Program

Participants agreed that the most valuable aspect of the federal DBE program was that it opened a door for MBEs by providing a needed incentive for prime contractors to “pick up the phone.” Participants also agreed that every project builds a résumé. As such, one of the most valuable aspects of the DBE programs offered by Caltrans was that these programs encouraged utilization by providing announcements for jobs, thereby helping people of color gain access to opportunities that might not have otherwise been shared with them in a timely manner.

Participants criticized several aspects of the DBE programs as well. Large firms did not enthusiastically support these programs, so MBEs were often given late notification about bidding opportunities and good faith efforts were often haphazardly implemented. The programs only marginally opened the door to MBEs; the “good old boy” network is still the prevailing culture in construction. The programs also did not effectively address many of the business challenges for MBEs, such as slow payment or bonding and financing issues. Participants reported that there was little to no enforcement regarding prompt payment and no formal mechanism to address the attitude that MBEs

Participants agreed that the most valuable aspect of the federal DBE program was that it opened a door for MBEs by providing a needed incentive for prime contractors to “pick up the phone.”

were “lucky to be here” and should not complain.

Participants also noted that DBE programs incorporated a significant amount of “hand-holding,” which did not encourage MBE owners to learn the business aspects of their industry. Instead, participants indicated that many MBEs, though highly skilled in their crafts, were encouraged to compete for business on a “second-

tier” as subcontractors with large, prime firms that, in general, do not mentor MBEs in business. Without addressing the business development of MBE firms through education, DBE programs were perceived by many of the participants as contributing to the negative stereotypes that follow MBEs in the construction industry. Perceived as a “hurdle system” to label businesses owned by people of color, participants reported that prime contractors continue to view these programs as “subservient” and therefore use their power and leverage to withhold payment and set up MBEs for failure. Participants agreed that they should be evaluated not by whether they are people of color, but rather, on the merit of their skill, work, and reputation. Participants agreed that the promise of equal access to bids would provide this opportunity.

The Impact of Proposition 209

Participants agreed that for those MBE firms that relied on the race-conscious DBE measures to provide opportunities for contracts, the effects of Proposition 209 were more pronounced. For those participants whose firms did rely on subcontracts with prime companies (due to special trade or other reasons), Proposition 209 eliminated the incentives for prime contractors to call them. Participants reported that

Results: MBE Focus Groups and Interviews

many prime companies interpreted Proposition 209 as a reason to avoid working with MBEs altogether. This forced a number of MBE firms to downsize services and lay off employees, both of which impacted these firms' ability to compete.

Participants were split on the personal impact of Proposition 209. While a number of participants indicated that after the proposition passed, they were virtually shut out of the business by prime contractors, others reported that they suffered no negative impact as a result of Proposition 209. For those whose businesses were not harmed by Proposition 209, the main reason was that they had formed relationships with awarding agencies or prime contractors that gave them equal opportunity to compete with other prime contractors. Participants who reported no impact were also more likely to be prime bidders on contracts.

Participants agreed that there were collateral impacts of Proposition 209 that included unemployment as a result of lay-offs, fewer resources for immigrant communities to learn English, fewer re-

sources to support local organizations, and negative health outcomes as a result of stress. Participants reported that Proposition 209 did not fix the problem of unequal access to competitive bids; instead, it reinforced the system of exclusion that already existed and strengthened lingering preconceptions about the work product of people of color. Participants interpreted race-neutral strategies to encourage MBE participation as a signal that little to no people of color would be awarded public contracts post-Proposition 209. Race-neutral strategies were viewed as a strategy to strengthen the "good old boy" network by ignoring the legacy of racial discrimination.

MBE Survival Strategies

While participants acknowledged that many small businesses fail, they also noted that the federal DBE program has never fulfilled the promise of equal access to contracts. Participants also reported that a lack of business savvy on the part of many MBEs contributes to their failure. A lack of access to bonding and financing coupled with the demands of build-

For those whose businesses were not harmed by Proposition 209, the main reason was that they had formed relationships with awarding agencies or prime contractors that gave them equal opportunity to compete with other prime contractors.

ing networks where their presence is not necessarily encouraged often proves fatal for MBEs. Below is a summary of the survival strategies used by MBEs in California's transportation construction industry:

- *Expand services:* MBEs reported that expanding the type of services offered generates new business and allows for the type of flexibility required to survive.
- *Become a part of the network:* MBEs consistently reported that building relationships with granting agencies and prime contractors is essential to the survival of any construction business. Participants reported that through formal business associations and boards, MBEs can directly combat many of the challenges that impede progress for businesses owned by people of color.
- *Build capacity:* MBEs reported that in order to survive, firms owned by people of color need to utilize basic business development practices to invest in their own companies so as to support their ability to work on projects in other cities and communities (including those outside of California), and to compete as a prime contractor.
- *Promote the business model of diversity:* MBEs reported that many prime contractors, once they recognize the business benefit of working with people of color, respond favorably to fostering relationship with MBEs.
- *Contract with the private sector:* Though many MBEs reported that access to contracts in the private sector was often as challenging as those in the public sector, contracts with private industries, including individual clients, were seen as a strategy to sustain their business.
- *Be persistent:* MBEs agreed that in order to survive, an owner must be persistent. Participants agreed that MBEs should seek every opportunity to demonstrate their ability to perform well and commit

themselves to developing relationships with individuals, companies, and public agencies. ■

Profile:

Miguel Galarza

Yerba Buena Engineering & Construction, Inc.



A native of San Francisco, Miguel Galarza grew up wanting to be an architect. While he was discouraged by counselors who thought he should pursue manual labor, Miguel remained focused. He had a passion for building things with his hands, so at age 14, Miguel started working in construction—formally learning a craft that he thought might aid his dream of one day becoming an architect. When he heard that Chinese for Affirmative Action, a civil rights and advocacy organization, was looking for people to participate in a citywide carpenter apprenticeship program, he signed up. For six years, Miguel worked to hone his skills, but a personal loss forced him to change his objective from a focus on learning the craft to a focus on management and ownership.

While studying construction management, Miguel was offered a position as a junior project manager/estimator with an MBE-certified firm that he felt would give him practical experience, on-the-job training, and opportunity for growth. For two years he worked with this firm before leaving to become a senior project manager for a DBE-certified firm in San Francisco. Licensed in 1996, Miguel honed many of his skills during the nine years that he worked with this firm. However, his concern began to grow when he noticed that this firm was increasingly reliant on the DBE program to provide contracts. He realized that the firm was a “DBE baby”—a firm born from the owner’s enthusiasm about potential opportunities that might come from prime contractors being required to subcontract or work with firms owned by women and people of color. This firm worked almost exclusively through the DBE program. When Proposition 209 passed and race-conscious set-aside programs in the

state ended, this firm became unstable, primarily because the owner’s business model had been to rely on the DBE program for its business and growth.

In San Francisco, a city known to be progressive on a number of social justice issues, the impact of Proposition 209 took time to materialize. For a while, a number of prime firms, many of which were owned by white males, continued to work with MBEs. These firms understood that it was in their best business- and community-interest to cultivate a relationship with MBE firms and to foster their opportunities for business development. Still, Miguel was uncomfortable with the business model of *relying* on the DBE program to provide contracts that would sustain his business. He understood that the federal DBE program was designed to open the door for MBEs, and that they should serve as training wheels, not permanent fixtures to sustain the life of a business enterprise. Finding flaw with any business model that would wrap its existence around the race-conscious programs, and motivated by a desire to allow his hard work and expertise to generate wealth for him and his family, he decided it was time for a change.

In 2002, Miguel launched out and founded Yerba Buena Engineering and Construction, a heavy engineering construction firm. Using the DBE program to make initial contact with granting agencies, Miguel actively pursued and won prime contracting bids. Once those bids were won, Miguel focused on completing the job, fulfilling the terms of the contract, and meeting—and sometimes exceeding—the goals of the contract. Determined not to use the DBE program as a “profit center,” Miguel also focused on developing relationships with granting agencies and other prime contractors. Turning professional relationships into



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mentorship opportunities, Miguel learned successful business strategies from a number of major companies. For six years, he was coached on how to support the basic business practices that could foster growth in his organization. Advice such as “leave the profit in the company instead of using it as a personal profit,” “learn accounting and always pay your taxes on time,” and “bid as a prime contractor” became part of his organizational mantra. He knew that his access to this kind of “know-how” was rare. Prime contractors do not make a practice of showing MBEs the tricks of the trade, strategies that may turn many of them into serious competitors. So, to him, the advice gleaned

He knew that his
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from these relationships was more valuable than the diversity goals articulated through the various DBE programs in which he had participated. Miguel worked hard, took smaller projects so that he would not have to wait years to see a profit, and left money in the bank so that he could bond. Within a year of founding, Yerba Buena Engineering and Construction had three employees and earned \$500,000 in revenue. In 2006, Yerba Buena Engineering and Construction employed 30 people and earned over \$7 million in revenue. These lessons combined to serve as his real-world PhD—earning him not only the business savvy to expand his business model beyond the scope of the

DBE program, but also providing him with the clout in the community to share his strategies with others.

In 2003, Miguel joined the board of the San Francisco Hispanic Chamber of Commerce. In 2005, Miguel was elected as its Vice President. That year, he also won California Businessman of the Year, and in 2006 he was nominated for the California Small Business Administration’s award for Businessman of the Year. He recognizes that many MBEs are craftsmen, and his mentorship emphasizes the *business* of creating a Minority Business Enterprise. He coaches other MBEs on how to overcome the pitfalls that often contribute to their failure. He helps them understand how to make money by performing quickly and efficiently, and by understanding the dynamics and importance of maintaining a cash flow. He helps them channel their passion for the work such that they do not have to rely on special programs, but rather, to cultivate personal and professional relationships that can lead to the creation of new opportunities.

For Miguel, the impact of Proposition 209 was more visible among those who would have been his competitors—those who, in their reliance on the race-conscious DBE program, may not have been able to survive in an industry run on personal relationships. Unlike many MBEs he has known over the years, his phone did not stop ringing as a result of Proposition 209 because he had developed relationships that could weather the storm. Still, he recognizes that without the DBE program, and its incentives to make contracting agencies look in his direction, he would likely have been initially shut out of the process, standing on the other side of a door that remains closed to many people of color struggling to realize their dreams of equal opportunity and prosperity. ■

Profile:

Robert Wilson

Wilson Electrical Company



Raised in Flint, Michigan, Robert Wilson came to California in 1981 searching for a place among a developing niche of contractors doing work with the oil rigs in Martinez. As a member of the International Brotherhood of Electrical Workers, Robert worked for several years as an industrial electrician. His reputation as a skilled electrician led him to many projects. In 1984, he decided to start his own business, so he took the test to become a contractor and immediately began looking for work. He also immediately certified as an MBE firm with Caltrans and every other major contracting agency in the San Francisco and East Bay areas.

Robert's first major subcontract award was for \$112,000 to work with the San Francisco Airport. He was told that certain bonding agencies had relationships with MBE contractors and that he should go to these institutions to secure bonding for the project. When Robert went to secure a bond with the agency that was designated through the DBE program, the agent looked at him and responded, "Here comes another one," and then moments later, denied the request. Robert thought the statement was curious, but did not pursue the issue at that time. Instead, he went back to the general contractor and explained that he could not secure bonding. The general contractor did not make an issue of it and allowed Robert to proceed. Still nagged by the agent's comment, Robert went back to see if he could secure bonding after he had already completed half of the project. This time, his request was only for \$50,000, which was immediately approved. When Robert inquired about why he was denied the first time, he was shocked by the response. Subcontracting MBE firms, Robert was told, were subject to limited funding—up to \$50,000. In other

words, the agency approved by the DBE program generally would not approve loans over \$50,000 for subcontracting MBE firms. Robert interpreted this as a way to keep MBE subcontractors from ever competing for the bigger projects. He stopped working through this bonding agency when he realized that through other agencies, he was able to secure a bond for \$100,000 or more.

Securing funding continued to be a problem for Robert. He quickly realized that securing funding for his business was more of an obstacle than originally anticipated. Still, he wanted to pursue business development in what he thought was the American way—he'd go to a bank for a loan. When he was awarded a \$400,000 contract through the San Francisco Airport, he again attempted to secure a bond, this time more prepared for what awaited him at the financial institutions. Understanding many of the obstacles that prevent African Americans from securing loans, he stacked his team—comprised of an attorney, an insurance agent, and a bonding agent—with white males, thinking that might buffer him from any racially-motivated negative preconceptions. Together, they entered the bank, hoping to secure a loan for \$200,000. When the attorney introduced the team and indicated that they were there to secure a loan to support the development of Wilson Electrical Company, they were told that Robert would have to provide collateral. At that moment, Robert's attorney closed his book and motioned for Robert and the rest of the team to leave the bank. Once outside, the attorney told Robert that he had regularly secured loans for his white clients with comparable credentials without any opposition from the bank or requests for collateral. In this climate, Robert continued to



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fight for the survival for his business. His expertise and reputation as a skilled electrician followed him, and his business did grow. In 1995, at the height of his business, Robert’s company earned revenue in excess of \$600,000 a year and employed more than 20 electricians, many of whom were also African American.

Then, in 1996, Proposition 209 passed, and Robert immediately began to feel the effects. Right away, he heard rumors that “*minorities were no longer needed*” had been written on Caltrans specification booklets, and that prime contractors had begun to circulate materials that indicated ways to avoid contacting people of color for bids on projects. After 1996, Robert noticed that the number of calls from prime contractors began to decline. He noticed a steady rejection of his bids. In one instance, he watched as his bid for an Alameda County project was “shopped around” to competitors. After working on the Cypress Freeway in 1999, Robert decided to bid on work for the Bay Bridge. He submitted what he thought was a competitive bid, but ended up not being the low bidder. Then, he learned that Caltrans issued an addendum to prime contractors indicating that they would receive \$500,000 to submit a bid for the contract, while subcontractors, many of which were MBE firms, did not receive any money. To Robert, this was a clear signal. He decided to stop “spinning his wheels,” and has not submitted a bid on Caltrans projects since. Robert continued to make efforts to generate business for his company, but few resulted in actual contracts. Prime contractors seemed to feel that they did not need him anymore, and therefore, closed the door of opportunity.

Gradually, Robert had to lay off his employees, strap on his tool belt and start doing work himself.

He adjusted the focus of his company, moving from industrial electric projects to residential projects. In 2004, his business eventually hit a low, earning only \$40,000. Robert was evicted from his apartment and could barely survive. Robert persevered, knowing

Then, in 1996, Proposition 209 passed, and Robert immediately began to feel the effects.

he could turn things around. Two major electrical engineering companies tapped him for mentorship and began working with him to reinvigorate his business. His reputation landed him in the executive offices of these major companies, earning him the gift of their business savvy—savvy that has helped Robert breathe life into a company that was once on life-support.

Robert attributes the survival of his business to his belief in God, his knowledge of the trade, his ability to be flexible, and his ability to live with minimal resources. While he knows that Proposition 209 ended the primary strategy used to get prime contractors to pay attention to small firms that were owned by people of color, he also learned, as a result of Proposition 209, that “business has no color.” From his experience of success, loss, and rebuilding, Robert has identified stumbling blocks and shown a way to break down the financial barriers that keep MBEs from succeeding as public contractors, and established himself as a survivor, in more ways than one. ■

Discussion

Overall, themes from the four data collection methods—MBE survival and award access, survey, focus groups, and contractor profiles—highlight consistent themes that clarify how MBEs were affected by the impact of Proposition 209 and other anti-affirmative action measures. There are clear negative repercussions from Proposition 209—both Caltrans and the MBEs themselves reported that Caltrans utilized MBEs less frequently after Proposition 209. However, many of the surviving MBEs reported that on the whole they did not see dramatic changes to their business models, their business growth, or their perceptions of the federal DBE program after Proposition 209.

Surviving MBEs did not tend to place a high value on most aspects of the race-conscious DBE program. Since the federal DBE program was, in general, only modestly utilized and valued by these firms, little room was left for negative effects due to Proposition 209 and other anti-affirmative action measures. Of most value to surviving MBEs were the aspects of the DBE program that provided assistance with networking, such as outreach and pre-bidding conferences. These components, as the most utilized and valued aspects of the DBE program both before and after 1996, are perceived by surviving MBEs as key to making public bidding processes fair. As supported by the qualitative data presented in this report, MBEs do not want to rely on a race-conscious DBE program; instead they seek to remedy a history of racial discrimination through a facilitation of equal opportunity and access to business development and bids. Of greatest emphasis has been outreach and pre-bidding conferences; however, since 1996, these networking efforts have tapered off considerably.

On average, the surviving MBEs that were surveyed had matured positively since 1996. Overall, these MBEs grew in terms of the number of employees,

Of most value to surviving MBEs were the aspects of the DBE program that provided assistance with networking, such as outreach and pre-bidding conferences.

and most are now offering the same, or more, services than in 1996. For these MBEs, expanding their type of services was the primary strategy used to survive decreases in outreach following Proposition 209. This helped them to maintain a steady number of total

contracts from private and public sources between 1996 and 2006, a time in which DBEs experienced less business with Caltrans. Surveyed contractors reported that the percentage of revenue coming from Caltrans has dropped since 1996, with a downward trend in the percentage of contracts as well. These observations are consistent with Caltrans awards data confirming that the number of contracts and total revenue awarded to MBEs has dropped since the mid-1990s, with the percentage of awards secured by MBEs being reduced by over 50 percent, from 16.0 percent of total awards in the years preceding Proposition 209 to 7.9 percent of total awards in the years following the passage of Proposition 209. DRC found that although MBEs always received over ten percent of total revenue before 1996 (with the percentage reaching as high as 20.1 percent in FY 1994), participation by MBEs never reached ten percent of revenue awarded after 1996.

Women-owned and African American-owned MBEs fared more poorly over the last ten years than the other MBEs. Women-owned MBEs consistently showed a pattern of shrinking business; the number of employees, the total number of contracts, and the percentage of contracts and revenues obtained from Caltrans all demonstrated patterns of poorer outcomes relative to men-owned MBEs. Though

women-owned MBEs may have found DBE programs more useful before 1996 than men-owned MBEs, their perceptions of helpfulness were reduced in the past ten years.

Though African American-owned MBEs showed some prosper-

ity, these firms still consistently showed a pattern of poorer outcomes relative to other MBEs. Although several of the trends did not reach the traditional level of significance, African American-owned MBE firms were often on the worse-off end in measures of health for their enterprises. African American-owned MBEs were also significantly more likely to have decreased the number of services offered, rather than expanding like many of their peers. The evidence in this report, as exemplified in the contractor profile of Mr. Robert Wilson, appears to show that many African American-owned MBEs are struggling to stay afloat. ■

Recommendations:

Strategies for Providing Equal Opportunity

Public contracts remain unavailable to a considerable portion of people of color in California's transportation construction industry. Data consistently demonstrate the under-representation of these firms among those that are awarded public contracts, and barriers continue to keep MBEs from equal access to competitive prime-and sub-contracts. This study finds significant barriers for contractors of color who seek to participate on equal footing with their white counterparts in California's public transportation construction industry. To ensure equal opportunity for MBEs seeking public contracts in California's transportation construction industry, DRC recommends increased attention and action in four primary areas, including 1) equal opportunity programming, 2) capacity of businesses owned by people of color, 3) advocacy for the business model of diversity, and 4) continuation of research on the impact of anti-affirmative action laws and policies.

Equal Opportunity Programming

The findings of this report suggest that while MBEs do not perceive Caltrans' implementation of the federal race-conscious DBE program as perfect, there were specific components that were considered effective elements to improve MBE access to public contracts. Standards set by the *Croson* decision have resulted in a generation of disparity studies that consistently provide evidence of MBE underutilization, further sustaining the life of many race-conscious DBE programs. While Proposition 209 remains in effect, legal challenges to these types of programs are likely to continue in California. As noted earlier in this report, at the time of this study, Caltrans commissioned a disparity study to determine whether there is a legal justification to continue implementing the federal race-conscious DBE program in California. Nevertheless, the findings of this study reflect the

need for a specific, race-conscious strategy to ensure equal opportunity to compete for public contracts in California's transportation construction industry. Specific recommendations are as follows:

- *Recommendation:* Public agencies should develop a new equal opportunity program that emphasizes the most useful aspects of the race-conscious DBE program and incorporates new strategies to involve people of color. For example, public agencies should consider sending opportunity announcements by mail to all contractors instead of using the Internet as the main outreach tool. Public agencies should also advertise opportunities in the ethnic media in order to reach communities of color. Other components of a new program to facilitate MBE access to opportunities should include articulated diversity goals and dollar amounts for underrepresented racial and ethnic groups as well as tailored strategies to enforce these goals. These recommendations are important to ensure that outreach efforts are more than just good faith efforts; instead, these efforts must be indicative of equal opportunity among California's diverse communities.
- *Recommendation:* Public agencies should develop equal opportunity programming that includes formal relationships with ethnic local, regional, and statewide chapters of the Chamber of Commerce to host pre-bidding conferences so that opportunities are shared with business enterprises connected to networks that include strong representation from people of color. A stronger presence of people of color on the business councils and boards of major government granting agencies, contractor associations, and unions is also key to developing a climate in which open dia-

logue and strategic planning can ensure the development and implementation of strategies to provide MBEs with the equal opportunity to receive public contracts.

- *Recommendation:* Public agencies should change the nomenclature of equal opportunity programs to support a positive view of diversity as a business model. Being labeled a “Disadvantaged Business Enterprise” is not appealing to any entrepreneur, especially MBEs, which are already plagued by negative racial stereotypes that impede their efforts to compete on equal standing with their white counterparts. For example, private industry has implemented its equal opportunity efforts through “Diversity Business Enterprise” programs and goals.
- *Recommendation:* Public agencies should develop equal opportunity programming that includes routine, yet random, assessments of fairness in the bidding process. MBEs reported collusion, “bid-rigging,” and other illegal practices that undermine MBE access to public contracts. A routine audit of practices should minimize the prevalence of these activities.

Capacity of Businesses Owned by People of Color

The findings of this report suggest that while MBEs are subject to unequal access to public contracts, other factors also impact whether they are free to compete in California’s transportation construction industry. Capacity is an important predictor of whether a business will succeed or fail in the construction industry. For example, the number of Small Business Enterprises (SBEs) has also decreased in the past ten

years,¹¹⁸ experiencing a survival rate of approximately 30 percent, which is similar to that of the 1996 certified MBEs. As most MBEs are small business enterprises, their ability to sustain their capacity is critical. While Proposition 209 ended race-conscious efforts to level the playing field for businesses owned by people of color, any effort to enforce equal opportunity must include strategies designed to build the capacity of these business enterprises. Specific recommendations are as follows:

- *Recommendation:* Public agencies should implement strong enforcement strategies at public transportation agencies to ensure prompt payment of contractors at the agency or prime contracting level, and at the sub-contracting level.

¹¹⁸ Office of Small Business and DVBE Certification: Firms Certified in 1996.

Public agencies should change the nomenclature of equal opportunity programs to support a positive view of diversity as a business model.

Recommendations

- *Recommendation:* Public agencies should invest in technical assistance for businesses owned by people of color. In partnership with nonprofit small business development corporations, public agencies should provide technical assistance in areas of securing loans and bonds, entrepreneurial training and other educational services for small businesses owned by people of color. To reach a greater number of MBEs, public agencies should also establish satellite offices in communities of color that provide technical assistance (e.g., information regarding opportunity announcements, financial lending programs, various insurance options for subcontractors) to businesses in the community.
- *Recommendation:* Public agencies should partner with ethnic Chamber of Commerce chapters, apprenticeship programs, and community colleges at the regional and local level to sponsor workshops on the business of construction. Many

The data in this report capture trends from MBEs that survived after Proposition 209; however, they do not capture trends and barriers for those whose businesses failed.

contractors understand the craft of construction but fail due to a lack of command for basic business practices (e.g., accounting). Access to training and education in this arena could facilitate a greater ability to operate a successful business.

Advocacy for the Business Model of Diversity

Increasing the participation of MBEs should not only concern public agencies, MBEs, and advocates. Equal opportunity in public contracting affects the economic well-being of every community.

- *Recommendation:* Organizations that offer legal and/or political advocacy are critical conveners of community partners (including community members, attorneys, academics, policy analysts, researchers, and youth) that also have a vested stake in ensuring equal opportunity for businesses owned by people of color. These organizations should continue to form partnerships that can strengthen the visibility of MBEs in the development of solutions to rebuff efforts that undermine equal opportunity for people of color.
- *Recommendation:* Community organizers should develop multi-ethnic, multi-generational coalitions to increase accountability among state agencies and prime contractors. One strategy to increase accountability among public agencies and enforce a commitment to the business model of diversity is to implement Community Benefit Agreements.¹¹⁹ Community Benefit Agreements offer a broader, more flexible vision for how to maximize the power of community organizing so

¹¹⁹ Gross, J, with LeRoy, G. and Janis-Aparicio, M. (2005). *Community Benefit Agreements: Making Development Projects Accountable*. Washington, DC: Good Jobs First and the California Partnership for Working Families.

that local redevelopment efforts include concrete benefits for the community in which these activities occur. These agreements include, but are not limited to, selecting MBEs for local projects.

Continuation of Research on the Impact of Anti-Affirmative Action Laws and Policies

The development of research-based policies to protect the civil rights of all Americans is critical; for that reason, research must continue to measure the impact of Proposition 209 on MBEs seeking public contracts with federal, state, and local contracting agencies. While the data in this report demonstrate an impact of Proposition 209 on the access to bidding and awards for construction businesses owned by people of color in the transportation industry, they also reflect a need for additional research in at least four specific areas.

- *Recommendation:* Research the extent to which collusion, “good old boy” networks, and other violations of equal opportunity occur and impact businesses owned by people of color. This includes continuing research to analyze if there is a prevalence of racial discrimination and/or differential treatment in lending and bonding practices at financial institutions.
- *Recommendation:* Research the trends for MBEs who did not survive in the post-Proposition 209 climate. The data in this report capture trends from MBEs that survived after Proposition 209; however, they do not capture trends and barriers for those whose businesses failed. Research examining the economic trends of this population is necessary to fully understand the range and depth of Proposition 209’s impact on MBEs in California’s transportation construction indus-

try. Of additional value would be an analysis of best practices to promote success among MBEs, and the development of a realistic and accessible training tool for MBEs, agencies and/or corporations interested in fostering a diverse pool of contractors with which to conduct business.

- *Recommendation:* Research the impact of Proposition 209 on MBEs offering professional services. While this report documents the impact of the proposition on a large segment of the transportation construction industry, it does not fully capture the experiences of MBEs in professional services (e.g., architecture, engineering) who do not participate in public bidding processes, but rather in selection processes that may foster bias and/or discrimination.
- *Recommendation:* In order to further illuminate the MBE experience, research should include non-MBEs in future research, including SBEs and non-MBE DBEs. Adding these experiences will help clarify what is unique about the MBE experiences and what is shared with other comparable enterprises.
- *Recommendation:* Caltrans and other public agencies should develop a system of collecting and reporting data that clearly denotes categories for reporting on race, ethnicity, and gender for federal and state contracts. ■

Conclusion

In transportation construction—and the construction industry in general—every project builds a résumé. Every job makes an MBE more competitive for the next project. In theory, each MBE firm should be free to compete with non-MBE firms and be granted equal opportunity to compete on the same tier as their non-MBE counterparts. California is at a crossroads, reflecting on its response to an anti-affirmative action law that has reshaped the landscape of opportunity for its communities of color. Ten years have passed since California voters reversed the course set forth by this country's leadership in 1965. Still, according to a 2006 poll, California voters share a core value that celebrates equal opportunity and fairness. California voters also support public action as a strategy to ensure that everyone, irrespective of race or ethnicity, has an equal opportunity to succeed.¹²⁰

The struggle for equal access to public contracts continues; however, the opportunity to shift the paradigm remains. California can no longer afford to engage in racial politics-as-usual. As entrepreneurs and skilled craftsmen and craftswomen, MBEs have earned the right to equal opportunity and participation in state contracts. In a state as richly diverse as California, it is imperative for its leadership and corporations to embrace the business enterprises owned by people of color, for its own sake. As a state that is comprised of a majority of people of color, providing equal opportunity for the economic development of these communities is imperative. California's economic vitality depends on it. ■

¹²⁰ Equal Justice Society, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, American Civil Liberties Union of Northern California. (2006). *Survey Findings on Racial Discrimination and Affirmative Action in California*. Oakland, CA: Lake Research Partners.



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Racial Preferences: The Treatment of White and African American Job Applicants by Temporary Employment Agencies in California, 2003

A Study of the Treatment of Female and Male Employment Applicants by Auto Service Shops in the San Francisco Bay Area, 2000

Treatment of Caucasian and African American Applicants by San Francisco Bay Area Employment Agencies: Results of a Study Utilizing "Testers," 1999

Additional copies of *Free to Compete? Measuring the Impact of Proposition 209 on Minority Business Enterprises* and other DRC studies are available.



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