



*Market research · Policy analysis  
Business strategy · Implementation*

100 Fillmore Street, 5th Floor  
Denver CO 80206  
303-385-8515

[www.keenindependent.com](http://www.keenindependent.com)



## **2016 FULTON COUNTY SMALL BUSINESS STUDY**

### **Prepared for:**

Fulton County  
Department of Purchasing & Contract Compliance  
130 Peachtree Street, S.W., Suite 1168  
Atlanta, GA 30303

### **Prepared by:**

Keen Independent Research LLC  
100 Fillmore Street, 5<sup>th</sup> Floor  
Denver, Colorado 80206

In association with

Holland & Knight LLP, Atlanta, Georgia  
TCG Consulting, Inc., Atlanta, Georgia  
Customer Research International, San Marcos, Texas

April 2016

# TABLE OF CONTENTS

## FULTON COUNTY SMALL BUSINESS STUDY SUMMARY REPORT

A. Summary of Research Results .....	1
1. Types and geographic distribution of County prime contracts and subcontracts.....	2
2. Alternative definitions of a “small business” .....	2
3. Small business utilization in County procurement and contracting.....	3
4. Availability of small businesses for County procurement and contracting .....	3
5. Any barriers for small business participation in Country procurement and contracting .....	3
6. Small business element of the Federal DBE Program .....	3
7. Legal issues surrounding small business programs .....	4
8. Input on program design from local small business owners .....	5
9. Small business certification options .....	6
10. How a small business program might affect the County’s goal of .....	
non-discrimination in contracting for minority- and women-owned firms .....	7
B. Recommendations for a Fulton County Program .....	8

## APPENDIX A. LEGAL FRAMEWORK AND ANALYSIS

A. Introduction.....	A-1
B. Existing Georgia Law on Small Business Programs .....	A-1
C. Georgia’s Small Business Assistance Act .....	A-5
D. Summary of Georgia Authority.....	A-6
E. Other Jurisdictions Have Provided For Small Business Programs by Statute .....	A-7
F. The Small Business Element Requirements for the Federal DBE Program.....	A-11
G. Challenges to Analogous Programs that are Instructive to a Small Business Program	A-13
H. Summary of Challenges .....	A-26

## APPENDIX B. FULTON COUNTY CONTRACT DATA COLLECTION AND ANALYSIS

A. Sources of County Contract Data .....	B-1
B. Methods Used to Identify Location, Type of Work and Firm Size .....	B-2
C. Results of the Analysis of County Contracts .....	B-4

**APPENDIX C. SMALL BUSINESS AVAILABILITY ANALYSIS**

A. Purpose of the Availability Analysis.....C-1  
B. General Approach to Collecting Availability Information .....C-2  
C. Development of the Interview Instrument.....C-5  
D. Businesses Included in the Availability Database .....C-5  
E. Availability Interview Instrument .....C-6

**APPENDIX D. FOCUS GROUPS AND OTHER PUBLIC INPUT**

A. Qualitative Research Process ..... D-1  
B. Background on County Procurement Practices..... D-2  
C. Focus Group 1: Small Businesses with County Experience..... D-4  
D. Focus Group 2: Small Businesses without County Experience ..... D-10  
E. Input from Availability Telephone Interviews ..... D-13

**APPENDIX E. SMALL BUSINESS ELEMENT OF THE FEDERAL DBE PROGRAM ..... E-1**

**APPENDIX F. EXAMPLES OF SMALL BUSINESS PROGRAMS ..... F-1**

**APPENDIX G. MFBE PARTICIPATION IN FULTON COUNTY AND OTHER JURISDICTIONS’  
CONTRACTS ..... G-1**

**APPENDIX H. OVERVIEW OF CONTRACT GOAL-SETTING PROCESS ..... H-1**

# **KEEN INDEPENDENT RESEARCH LLC**

## **FULTON COUNTY SMALL BUSINESS STUDY**

### **SUMMARY REPORT**

Fulton County is considering a new Small Business Enterprise (SBE) Program to further the goals of its current Non-Discrimination in Purchasing and Contracting Policy. The Non-Discrimination in Purchasing and Contracting Policy prohibits race and gender discrimination in County purchasing and contracting. The Policy includes a number of tools for the County to open procurement and contracting opportunities to minority business enterprises (MBEs) and female business enterprises (FBEs). The County seeks an SBE program that will:

- Promote the economic welfare of the people of Fulton County;
- Promote full and equal business opportunities for all persons seeking to do business with the County;
- Encourage small businesses to actively seek bid opportunities as either a prime contractor or subcontractor; and
- Provide training, education and technical assistance to small businesses, which would increase their ability to compete for business, be successful in the competitive bid process and to ultimately grow their business.

In 2015, Fulton County retained Keen Independent Research LLC (Keen Independent) to perform the Fulton County Small Business Availability Study. Team member Holland & Knight examined legal issues regarding County potential small business programs as they pertain to procurement (see Appendix A). Customer Research International conducted telephone interviews with firms in the Atlanta Metropolitan Area to research the availability of small businesses for different types of County contracts. TCG Consulting conducted two focus groups with small businesses to solicit feedback about County procurement practices and potential programs.

#### **Summary of Research Results**

There are many examples of SBE programs operated by state and local governments throughout the country, including several in the Atlanta Metropolitan Area. Keen Independent analyzed different approaches as part of this study. When considering the model most appropriate for Fulton County, Keen Independent examined:

1. The types and geographic distribution of Fulton County procurement;
2. Alternative definitions of small business enterprises;
3. Small business participation as prime contractors and subcontractors in County contracts in recent years;
4. The current market area availability of small businesses for County contracts;
5. Any barriers for small business participation in County procurement and contracting;
6. Small business program element of the Federal DBE Program;

7. Legal issues surrounding small business programs and similar efforts;
8. Input from small business owners;
9. Small business certification options; and
10. How a small business program might affect the County's goal of non-discrimination in contracting for minority- and women-owned firms.

This Summary Report briefly explores each of these issues and then presents a recommended small business program for the County. Eight appendices provide supporting information.

**1. Types and geographic distribution of County prime contracts and subcontracts.** The utilization analysis examined contracts awarded from 2011 through 2014. Keen Independent compiled data about thousands of Fulton County public works prime contracts and subcontracts, and the firms used as prime and subcontractors on those contracts. This analysis does not include regulated utilities, procurements made on a national basis and other special types of contracts.

The study team identified the primary type of work performed under each prime contract and subcontract using information from the County's Historical Reports and other sources as necessary. Generally, each contract was grouped into construction, professional services, goods or other services. Dollars of contracts were fairly evenly divided among these four industries, as discussed in Appendix B.

About two-thirds of the County procurement dollars studied went to firms within the Atlanta Metropolitan Area. More than 80 percent of construction dollars went to local firms. The study team determined that the 20-county Atlanta Metropolitan Area was the local market area for County procurement. Appendix B presents these results.

**2. Alternative definitions of a "small business."** The study team performed a number of analyses concerning small businesses that required a working definition of a small business. The study team chose the Small Business Administration (SBA) small business size standards.<sup>1</sup> It is the standard small business definition for federal agencies and programs such as the U.S. Small Business Administration 8(a) Business Development Program and the Federal DBE Program (49 CFR Section 26.65 (a)). The City of Atlanta also uses these size standards to define small businesses for its SBE program. The SBA regularly updates the definitions.

The current SBA small business size standard for businesses from specialty contracting to engineering, in-home aging services and local transportation services is \$15 million in annual revenue at the time of this report. Size standards for non-agricultural businesses were as low as \$5.5 million and as high as \$38.5 million in annual revenue. Goods suppliers are typically defined as small businesses based on number of employees (often under 500).<sup>2</sup>

Although Keen Independent considered lower size standards for defining a small business, the statistics on small business participation presented in this report are for the SBA definition.

---

<sup>1</sup> Size standards can be found at <https://www.sba.gov/content/small-business-size-standards>.

<sup>2</sup> Title 13 Code of Federal Regulations (CFR) Section 121.406.

**3. Small business utilization in County procurement and contracting.** Keen Independent examined the characteristics of businesses receiving County prime contracts and subcontracts from 2011 through 2014 and coded firms as “small businesses” if it appeared they were beneath the U.S. Small Business Administration revenue or number employee limits to be classified as a small business. The study team compiled size information for companies through telephone interviews with those firms, U.S. Small Business Administration directories and Dun & Bradstreet data.

About 54 percent of Fulton County contract dollars examined went to small businesses. This was highest for construction (72%) and lowest for other services (43%). Small businesses obtained about 45 percent of County prime contract dollars and 86 percent of subcontract dollars. Appendix B provides these results.

**4. Availability of small businesses for County procurement and contracting.** In summer 2015, Keen Independent conducted telephone interviews with a stratified random sample of businesses in the 20-county Atlanta Metropolitan Area that performed work within the types of construction, professional services, goods and other services subindustries that represented the most dollars of County work. Of the firms qualified and interested in County work, 88 percent of businesses in the Atlanta Metropolitan Area that are qualified and interested to perform work for the County are small businesses. There was substantial availability of small businesses in each of the major categories of County procurement. Appendix C provides the methodology and results of this availability research.

**5. Any barriers for small business participation in County procurement and contracting.** Keen Independent asked small business owners and managers interviewed in the availability survey for input regarding any barriers to working with the County, particularly for small businesses. The study team also conducted two focus groups with small business owners.

Some participants did not report barriers to working with Fulton County. Among those who did, barriers included:

- Difficulty reaching County procurement staff by telephone. (One person commented, “Answer the phone so we can do business with you.”);
- Learning about bidding opportunities;
- Time-consuming bidding process;
- Bonding requirements;
- High insurance requirements; and
- Slow payment.

There were also positive comments about Fulton County. Appendix D presents input from the telephone interviews and focus groups.

**6. Small business element of the Federal DBE Program.** The Federal DBE Program requires agencies such as the County to develop a small business component when it receives U.S. Department of Transportation funds. “You must actively implement your program elements to foster small business participation. Doing so is a requirement of good faith implementation of your

DBE program.”<sup>3</sup> The County might incorporate any small business program elements into its plan to operate the Federal DBE Program on Federal Aviation Administration-funded contracts at Fulton County Airport-Brown Field. Appendix E provides additional information about small businesses and the Federal DBE Program.

**7. Legal issues surrounding small business programs.** Holland & Knight examined legal issues pertaining to small business programs and analogous economic-based programs in government procurement, in Georgia and throughout the country. Holland & Knight researched existing Georgia law and Fulton County Code, and legal challenges to analogous programs. Appendix A presents Holland & Knight’s analysis, which is summarized below.

**Existing Georgia law and Fulton County Code.** At present, the provisions governing procurement in the Fulton County Code do not expressly permit the consideration of a bidder’s small business enterprise status in the award of government contracts. Based on precedent in Georgia case law holding invalid procurement programs that provide for consideration of factors other than those expressly permitted by legislation, Fulton County may need to enact specific legislation in its Code and possibly obtain state legislation permitting the consideration of small business preferences or a bidder’s or proposer’s small business status in the award of County contracts. This is especially important if Fulton County enacted a small business set-aside or goals program.

**Legal challenges to analogous programs.** There do not appear to be recent reported decisions specifically involving challenges to the validity of local or state small business programs. Therefore, the following points are examples from Holland & Knight’s analysis of challenges to analogous programs.

- It is important that any County small business program and the criteria for participation be based upon economic research and market data such as provided in this report. This information is helpful to Fulton County to assist it in determining whether there is a rational basis to support implementation of such a program. Program eligibility criteria should bear a rational relationship to a legitimate governmental purpose.
- There are legal issues raised if a durational residency requirement is utilized when determining eligibility for a small business program, and thus it is recommended such requirement be avoided to minimize risk of a legal challenge to a Program. For example, it might be best that the County not require that a business be located within a certain area for at least a year before becoming eligible for the program, which might be an impermissible durational residency requirement.
- To avoid other constitutional issues, it must be clear that the program is limited to contracts that the County itself awards (including any associated subcontracts), and not contracts made by others within county limits.

---

<sup>3</sup> 49 CFR Section 26.39.

**Georgia Small Business Assistance Act.** Georgia adopted the Small Business Assistance Act in 1975 to promote use of small businesses in state procurement.<sup>4</sup> As discussed in Appendix A, the codified legislative intent for the Small Business Assistance Act is an indication that the State recognizes the importance of small business participation in the award of government contracts. Further, the declared legislative policy of the Small Business Assistance Act appears to indicate that the state recognizes a rational basis for the implementation of economic programs that promote and strengthen small business participation in government procurement. The State in the Georgia Small Business Assistance Act indicates that the utilization of small businesses for purchases and contracts or subcontracts in a “fair proportion” is a legitimate government policy and objective.

**8. Input on program design from local small business owners.** The two focus groups held with owners and managers of small businesses indicated strong support for a Fulton County small business program. The consensus of the participants was that a small business program could support growth of local businesses, create jobs, keep money in the county and support the local community.

Their input on size definitions for a small business varied, with some arguing that it would be as small as \$500,000 in revenue or just two to three employees. Others said that businesses of \$5-6 million might still be a small business. Many said that the definition of a small business depends on the type of work for a business.

Small business owners were also concerned about whether the program would have any strength and identified the need for close monitoring to prevent abuse.

- Some of the focus groups participants were minority- and women-owned firms, and some reported that certification as an MBE or FBE gave very little benefit. They suggested that a small business program would only be successful if there are reasons for firms to pursue SBE certification. Some recommended reciprocity with other SBE programs.
- A number of business owners were not familiar with Fulton County bid opportunities and did not know how to bid on County work. They recommended training for companies that were new to County procurement.
- Some small business owners reported that outreach, technical assistance, and help with access to capital and bonding were also small business needs. Some recommended mentor-protégé programs. Providing subcontracting opportunities for small businesses where they can learn from a larger prime contractor was a plus.
- SBE contract goals are often one element of small business programs. An SBE goal specifies the percentage of the dollars of the overall contract that would go to SBEs. Prime contractors must meet the goal in their bids or proposals, or show good faith efforts to do so. Small business owners had positive comments about encouraging subcontracting opportunities for small businesses where they can learn from a larger prime contractor.

---

<sup>4</sup> O.C.G.A. Section 50-5-122 (1975, 1982, 2012, 2015).



- Small business owners recommended that the County monitor the success of its efforts by tracking the number and dollars of contracts with small businesses, the amount of outreach it does, and the amount of training or mentorship programs it has for small businesses. However, one focus group participant indicated that programs are weak if they only involve tracking small business participation with no real benefit. Small business owners urged the County to have program staff who are passionate about helping small businesses and also have the time to assist small companies.

Appendix D provides more information about the input given by small business owners as part of this study.

**9. Small business certification options.** Keen Independent examined examples of small business programs from:

- The Atlanta Metropolitan Area (City of Atlanta, DeKalb County, and Clayton County);
- Large metropolitan counties across the country (Los Angeles County, San Francisco and Broward County); and
- Cities where the study team had some experience with the program (City of Portland, Oregon, City of Madison and New York City).

Appendix F examines the attributes of each program.

**Self-certification versus formal certification.** Most strong SBE programs require formal certification to avoid abuse of the program. Until it changed its SBE program in late 2015, the City of Atlanta allowed SBEs to self-certify on the City website (i.e., attest that they are a small business without in-depth City review). In December 2015, the City changed its SBE program to require documentation of small business status that receives a desk review sometimes followed by a site visit. (See Appendix F for more discussion of this issue.)

**Revenue limits.** Both the City of Atlanta and the Clayton County programs use U.S. Small Business Administration (SBA) size standards for defining small business status. Businesses as large as \$38.5 million in annual revenue can participate depending on their primary line of work. More typical size limits are in the range of \$7.5 to \$15 million. San Francisco uses SBA size standards as well, but has separate certifications for micro businesses and other smaller businesses.

Federal programs also apply SBA small business size standards, including the Federal DBE Program, the SBA 8(a) Program and the HUBZone program (see Appendix F). Keen Independent did not identify any small business programs using size limits higher than the SBA standards.

Other state and local governments restrict programs to much smaller businesses. DeKalb County has one of the lowest size standards for small business eligibility: \$3 million for construction, \$2 million for professional services and \$1 million for suppliers.

**Personal net worth.** Some programs, including Clayton County and DeKalb County, limit eligibility to companies whose owners are below personal net worth (PNW) limits. PNW pertains to the wealth of the individual business owner. Calculation of personal net worth sometimes excludes the equity in the business and primary residence. The City of Atlanta does not apply a PNW limit.

**Geographic limitations.** Some counties and cities, including DeKalb County, Los Angeles County, San Francisco, Broward County and New York City, require that businesses have a location within that jurisdiction to be eligible for the small business program. Others use a metropolitan area definition.

Examples of geographic areas include the following:

- Clayton County uses a 6-county definition of the Atlanta Metropolitan Area;<sup>5</sup>
- The City of Atlanta uses a 20-county definition of the Atlanta Metropolitan Area;<sup>6</sup> and
- DeKalb County has an “MSA” local program that includes businesses within a 10-county definition of the Atlanta Metropolitan Area.<sup>7</sup>

Each of these definitions includes Fulton County.

Other programs allow participation based on location within anywhere in the state (e.g., City of Portland, Oregon) or have no geographic limit at all (e.g., City of Madison, Wisconsin).

Some programs require a minimum length of time in the local area for certification, which might be deemed a “durational requirement” discussed under the legal analysis portion of this summary report.

**Commercially useful function (CUF).** Some agencies require a firm to certify within certain types of work. For example, the City of Atlanta certifies small businesses within up to three NAICS codes.<sup>8</sup> The intent of such requirements is that a company performs a “commercially useful function” when included as a participant in a contract and is not used for work outside of its normal scope of business. This is similar to Fulton County’s current practice when implementing the County’s Service Disabled Veterans Business Enterprise preference and the Federal DBE Program.

**Length of certification before re-certification is required.** Jurisdictions certify companies as eligible for SBE programs for different lengths of time. For example, both the City Atlanta and DeKalb County require small businesses to re-certify every two years.

**10. How a small business program might affect the County’s goal of non-discrimination in contracting for minority- and women-owned firms.** The County has a policy of encouraging participation of minority- and women-owned firms in its procurement. Keen Independent examined

---

<sup>5</sup> Clayton, DeKalb, Fayette, Fulton, Henry and Spalding counties.

<sup>6</sup> Barrow, Bartow, Carroll, Cherokee, Clayton, Coweta, Cobb, DeKalb, Douglas, Fayette, Forsyth, Fulton, Gwinnett, Henry, Newton, Paulding, Pickens, Rockdale, Spalding and Walton counties.

<sup>7</sup> Cherokee, Clayton, Cobb, DeKalb, Douglas, Fayette, Fulton, Henry, Gwinnett and Rockdale counties.

<sup>8</sup> North American Industry Classification System codes.

whether a small business program would have a positive or negative effect on minority- and women-owned firms.

The 2014 participation of minority- and women-owned firms in Fulton County contracting was about 20 percent, which appears to be substantially below the availability of those firms to perform County work (see Appendix G).

- From July 2009 through December 2014, the City of Atlanta SBE program achieved more than 40 percent participation of minority- and women-owned firms. About one-half of firms certified as SBEs with the City were also certified as MBEs or FBEs.
- DeKalb County's SBE program also had high participation of minority- and women-owned firms.

Based on City of Atlanta and DeKalb County experience (see Appendix G), an SBE program can encourage utilization of minority- and women-owned firms.

### **Recommendations for a Fulton County Program**

Based on the research summarized above, the Keen Independent study team recommends that Fulton County create a small business program for County-funded procurement that can also be incorporated into its implementation of the Federal DBE Program.

- a. The County might consider provisions similar to the new City of Atlanta SBE program.
- b. The County should establish an overall policy encouraging small business participation.
- c. The County should not adopt a separate policy or program elements that provide preferences or requirements for "local" businesses due to legal issues with such programs.
- d. Firms meeting U.S. Small Business Administration size standards should be eligible for the Fulton County program.
- e. The County should consider other reasonable restrictions (independence from large businesses is an example) and include a commercially useful function review, but should not adopt a personal net worth limit or time limit on participation. Other state and local governments referenced in the study, including the City of Atlanta SBE program, provide examples of reasonable restrictions.
- f. The SBE program should include SBE subcontracting goals as well as outreach and other efforts to encourage SBE participation as prime contractors and vendors.
- g. On substantial contracts that also appear to have subcontracting opportunities, the County would consider setting SBE contract goals. If goals are used, they should be set on a contract-by-contract basis, as described in Appendix H. This means that contracts with substantial subcontracting might have high SBE contract goals (50% for example) and some might have low subcontracting goals (10% for example). Prime contractors can comply by meeting the contract goal or showing good faith efforts to do so. This

requirement would extend to SBE prime contractors in the same way as non-SBE prime contracts (i.e., no “self-performance” by an SBE prime contractor to meet a goal).

- h. The County should increase the number of training sessions for new potential vendors from what it offered in 2015. The County should also encourage telephone and other communication from prospective bidders prior to advertisement dates. In addition to in-person training on how to do business with the County, Fulton County should provide more assistance on its Purchasing website.
- i. The County can serve as a referral source for technical assistance, financing and bonding programs, and other local small business assistance. For example, the County could create a new small business assistance page on its website that provides links to other organizations and programs.
- j. The County should create its own SBE certification process. Only firms that have been formally certified as an SBE would be eligible for the program. The County should require re-certification every two years. The County should not require registration in Vendor Self Service before starting the SBE certification process, but can encourage that registration.
- k. The County should accept SBE certification by other jurisdictions for which it deems certification to meet its standards. This will likely include:
  - ▶ SBE certification by the City of Atlanta;
  - ▶ SBE certification by other local counties such as Clayton County and DeKalb County;
  - ▶ DBE certification under the Georgia Uniform Certification Program as long as the firm has a location within the 20-county Atlanta Metropolitan Area;
  - ▶ SBA 8(a) Program certification as long as the firm has a location within the 20-county Atlanta Metropolitan Area; and
  - ▶ HUBZone certification as long as the firm has a location within the 20-county Atlanta Metropolitan Area.

Eligibility criteria under each of these programs are either identical to the recommended Fulton County SBE Program or more restrictive than the proposed program for the County.

- l. The County will need to track SBE participation as prime contractors and subcontractors and provide annual reports on SBE utilization as well as MBE and FBE participation. The County might monitor the extent to which SBEs participating in the program are also minority- or women-owned firms.

- m. The outreach and training, SBE certification, contract compliance and reporting functions associated with a County SBE program will place additional time demands on County Purchasing and Compliance staff. It may be necessary to add or reallocate resources to address these demands.

# **APPENDIX A.**

## **LEGAL FRAMEWORK AND ANALYSIS**

### **Prepared by Holland & Knight LLP**

#### **A. Introduction**

In this Appendix, Holland & Knight LLP analyzes recent cases and statutes regarding small business programs and programs analogous to a proposed small business program to provide a summary of the legal framework for the small business study as applicable to Fulton County.

The legal framework analyzes and reviews court decisions, statutes and authorities that are applicable or instructive to Fulton County's small business study. The analysis also reviews cases including challenges to analogous programs that are instructive to a small business program. The analysis reviews cases under Georgia law, Georgia statutes, the Fulton County Code, and recent decisions from other jurisdictions and federal courts in this area of the law.

In addition, to the extent Fulton County is a recipient of federal funds, and thus required to implement the Federal Disadvantaged Business Enterprise ("DBE") Program (49 C.F.R. Part 26), the analysis provides an overview of the small business element requirement of the Federal DBE Program and official guidance for fulfilling that requirement. The Federal DBE Program's provisions for fostering small business participation are instructive to the County's study.

#### **B. Existing Georgia Law on Small Business Programs**

It appears there is no specific Georgia statutory procurement law that expressly prohibits or authorizes implementation of a small business program in connection with the award of contracts. Georgia statutes and the Fulton County Code, however, do have specific requirements providing factors that may be considered in determining the "lowest responsible bidder" for the purpose of awarding a government contract:

##### **1. Fulton County Code**

Fulton County Code Section 2-316 provides certain guidelines for awarding a government contract and outlines factors which may be considered in determining the "lowest responsible bidder":

In awarding any contract or determining the lowest responsible bidder for purpose of awarding a contract, the agency awarding the contract may consider the vendor or bidder's quality of work, general reputation in the community, financial responsibility, previous experience in sales to the public, compliance with a female business enterprise participation plan as adopted by the governing authority of the county or making a good faith effort to comply with the goals of such a plan, compliance with a minority business enterprise participation plan as adopted by the governing authority of the county or making a good faith effort to comply with the goals of such a plan, and compliance with nondiscrimination and equal employment opportunity provisions as adopted by the governing authority of the county.

Fulton County Code Section 2-320 provides an exception to this competitive bidding requirement:

When the county manager and the purchasing agent, upon written recommendation of the user department, determine that the use of competitive sealed bidding is not practicable or is not advantageous to the county, a contract may be entered into by the board of commissioners based on competitive sealed proposals, as subject to the following conditions:

....

(7) The award shall be made by the board of commissioners to the responsible offeror whose proposal is determined, upon written recommendation by the county manager, the purchasing agent and the user department, to be in the best interest of the county, taking into consideration price and the evaluation factors set forth in the request for proposal.

## **2. Georgia competitive bidding statute**

O.C.G.A. § 36-10-2.1 also provides requirements for determining the lowest responsible bidder applicable to Fulton County:

In any county of this state having a population of 800,000 or more according to the United States decennial census of 2000 or any future such census, contracts for building or repairing any courthouse or other public building, jail, bridge, causeway, or other public works or public property shall be let to the lowest responsible bidder, but the governing authority of any such county shall have the right to reject any or all bids for any such contract. The governing authority of any such county, in considering whether a bidder is responsible, may consider the bidder's quality of work, general reputation in the community, financial responsibility, previous employment on public works, and compliance with a minority business enterprise participation plan or making a good faith effort to comply with the goals of such a plan.

Although neither the Fulton County Code nor O.C.G.A. § 36-10-2.1 expressly define “lowest responsible bidder,” Georgia courts have interpreted similar legislation requiring that contracts be awarded to the “lowest and/or best bidder” to have the purpose of ensuring that public contracts are awarded without favoritism and at the lowest price consistent with the reasonable quality and expectation of completion.<sup>1</sup> Additionally, Georgia courts have held statutes requiring that contracts be awarded to the lowest responsible bidder do not permit consideration of any other factors in the award of such contracts, which may potentially include providing preference in the award of certain contracts to small businesses.<sup>2</sup>

## **3. Legislation to expressly permit consideration of small business status in awarding contracts**

Georgia courts have held that the consideration of criteria in awarding government contracts based on factors other than those specified in existing legislation is not permitted. In *Georgia Branch*

---

<sup>1</sup> See *Ga. Branch Associated Gen. Contractors of Am., Inc. v. City of Atlanta*, 253 Ga. 397, 399, 321 S.E.2d 325, 327 (1984).

<sup>2</sup> See *id.* See also *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752 (11th Cir. 1991).

*Associated General Contractors of America, Inc. v. City of Atlanta*, the Georgia Supreme Court held that the City of Atlanta’s minority and female business enterprise ordinance was void since its implementation would directly conflict with the City Charter requirement that contracts go to “lowest and/or best bidder,” when the Charter requirement did not expressly provide for consideration of the fact that a bidder was a minority or female business enterprise in awarding contracts.<sup>3</sup>

Likewise, in *S.J. Groves & Sons Co. v. Fulton County*, the court held that the County’s minority business enterprise program violated Georgia’s low-bid statute when that statute did not expressly provide for consideration of a bidder’s minority business enterprise status in awarding government contracts.<sup>4</sup> The court held the County’s consideration of any factor other than whether a contractor was the lowest responsible bidder violated the state regulatory scheme governing such procurements.<sup>5</sup>

In *Hilton Construction Co. v. Rockdale County Board of Education*,<sup>6</sup> the court held that under state school board regulations providing that projects using state funds will be awarded to the responsible bidder submitting the lowest acceptable bid, the county board of education was not authorized to reject a construction contractor’s bid on the basis that contractor was “unknown.” Based on the state school board regulations, whether the proposed bidder was “known” or “unknown” was not a factor expressly permitted to be considered in the award of contracts to the lowest responsible bidder.

At present, the provisions governing procurement in the Fulton County Code do not expressly permit the consideration of a bidder’s small business enterprise status in the award of government contracts. Based on the precedent in Georgia case law holding invalid procurement programs that provide for consideration of factors other than those expressly permitted by legislation, Fulton County may need to enact specific legislation in its Code and possibly obtain state legislation permitting the consideration of small business preferences or a bidder’s or proposer’s small business status in the award of County contracts.

#### **4. Small business programs that may be interpreted as restraints on competition**

Although small business programs appear to be legally defensible with appropriate legislation, it is important to note that the implementation of a small business *set-aside* program may face legal challenges on the ground that such a program constitutes a restraint on competition. For example, a 1980 Georgia Attorney General opinion concluded that the Georgia Department of Transportation (GDOT) could not establish a set-aside program whereby certain jobs or parts of jobs were reserved to be bid upon exclusively by a designated class of contractors because of the restraint on competition.<sup>7</sup>

In the opinion, GDOT requested advice from the Office of the Attorney General regarding the establishment of a “set-aside program.” GDOT desired to establish a program whereby certain jobs or parts of jobs would be reserved to be bid upon exclusively by a “designated class of contractors.”

---

<sup>3</sup> 253 Ga. 397, 399, 321 S.E.2d 325, 328 (1984).

<sup>4</sup> 920 F.2d 752 (11th Cir. 1991). This decision led to the legislation referenced above: O.C.G.A. § 36-10-2.1.

<sup>5</sup> *Id.* at 762-63.

<sup>6</sup> 245 Ga. 533, 266 S.E.2d 157 (1980).

<sup>7</sup> Ga. Att’y Gen Op. No. 80-2, 1980 WL 26286 (Jan. 4, 1980).



As used in the opinion, the term “designated class of contractors” means a category of contractors established by criteria which were not job related.

The Office of the Attorney General responded that Article III, Section VIII, Paragraph VIII of the Georgia Constitution declares illegal and void all contracts and agreements which may have the effect, or be intended to have the effect, of defeating or lessening competition or encouraging monopoly.<sup>8</sup> Thus, the Attorney General found GDOT’s proposed set-aside program would likewise tend to defeat or lessen competition and any contract entered into pursuant to such a program would be null and void.

The Attorney General opinion also stated that because the General Assembly could not bestow upon GDOT powers, that are withheld from it by the Constitution, the General Assembly, consequently, would have no power to authorize any such contract or agreement. The Attorney General said that GDOT was created by the General Assembly and received its powers from the body. One of the powers provided was the power to contract for the construction or maintenance of public roads in such manner as provided by law, and under the law the contract must be awarded to the lowest reliable bidder. The Attorney General noted that where the government offers contracts for public works to the lowest bidder, the public is deeply interested in free competition in the bidding.

The Attorney General opinion also relied upon *City of Atlanta v. Stein*,<sup>9</sup> in which the court invalidated a city ordinance prescribing that all printing work done for or by the city would be given exclusively to printers who belonged to a particular union. The court found that the ordinance was illegal because it tended to encourage monopoly and defeat competition. The Attorney General concluded that the same reasoning would apply to GDOT’s proposed “set-aside program” in which certain jobs would be reserved to be bid upon exclusively by a designated class of contractors.

It is important to note that while opinions of the Attorney General are persuasive authority, they do not constitute “controlling authority,” on the appellate courts.<sup>10</sup> Nonetheless, according to this 1980 Attorney General opinion, the implementation of a small business set-aside program arguably may require an amendment to the Georgia Constitution that permits a set-aside program to the extent the program is construed to violate art. III, § 6, ¶ V of the Georgia Constitution.

---

<sup>8</sup> This provision is now found at art. III, § VI, ¶ V of the Georgia Constitution, which was last amended in 1983. In addition to the limitations on the General Assembly, this provision provides that the General Assembly shall have the power to authorize and provide by general law for judicial enforcement of contracts or agreements restricting or regulating competitive activities between or among: (a) employers and employees; (b) distributors and manufacturers; (c) lessors and lessees; (d) partnerships and partners; (e) franchisors and franchisees; (f) sellers and purchasers of a business or commercial enterprise; or (g) two or more employers. However, the language from the Georgia Constitution of 1976 regarding the lessening of competition which was central to the 1980 Attorney General opinion remains largely unchanged: “the General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessening competition, which is hereby declared to be unlawful and void.” See GA. CONST. art. III, § VI, ¶ V (1983). Compare GA. CONST. art. III, § VIII, ¶ VIII (1976) (“All contracts and agreements, which may have the effect, or be intended to have the effect, to defeat or lessen competition, or to encourage monopoly, shall be illegal and void. The General Assembly of this State shall have no power to authorize any such contract or agreement.”)

<sup>9</sup> 111 Ga. 789, 793 (1900).

<sup>10</sup> *Synovus Bank v. Griner*, 321 Ga. App. 359, 369-70, 739 S.E.2d 504, 513 (2013).

### **C. Georgia’s Small Business Assistance Act**

Georgia adopted The Small Business Assistance Act in 1975 to promote use of small businesses in state procurement.<sup>11</sup> The legislative intent of the Small Business Assistance Act was declared as follows:

The most important element of the American economic system of private enterprise is free and vigorous competition. Only through the existence of free and vigorous competition can free entry into business and opportunities for personal initiative and individual achievement be assured. The preservation and expansion of such competition is essential for our economic well-being. In order to encourage such competition, it is the declared policy of the state to ensure that a fair proportion of the total purchases and contracts or subcontracts for property, commodities, and services for the state be placed with small businesses so long as the commodities and services of small businesses are competitive as to price and quality.<sup>12</sup>

This codified legislative intent is an indication that the state recognizes the importance of small business participation in the award of government contracts. Further, the legislative intent of the Small Business Assistance Act appears to provide a source to assist in establishing a rational basis for the implementation of economic programs that promote and strengthen small business participation in government procurement.

The statutory language provides that it is the “declared policy of the state to ensure that a fair proportion of the total purchases and contracts or subcontracts ... be placed with small businesses ....” Thus, the state appears to make a general finding that the utilization of small businesses in a “fair proportion” is a legitimate government objective.

Under the Small Business Assistance Act, until July 1, 2015, the term “small business” meant a Georgia resident business that is independently owned and operated. In addition, a small business was defined as having either fewer than 399 employees or less than \$30 million in gross receipts per year.<sup>13</sup> Effective on and after July 1, 2015, the term “small business” as defined by the Small Business Act now means a business that is independently owned and operated and has fewer than 100 employees or less than \$1 million in gross receipts per year.<sup>14</sup>

It also should be noted that the new definition of “small business” under the Department of Administrative Services Procurement Code, effective after July 1, 2015, removes the requirement of “Georgia resident” for an entity to be considered a “small business” for purposes of the Small Business Assistance Act.

Pursuant to O.C.G.A. § 50-5-123 (1975, 1982) of the Small Business Assistance Act, an advisory council is established as follows:

---

<sup>11</sup> O.C.G.A. § 50-5-120.

<sup>12</sup> O.C.G.A. § 50-5-122 (1975).

<sup>13</sup> O.C.G.A. § 50-5-121 (1975, 1982, 2012).

<sup>14</sup> O.C.G.A. § 50-5-121 (1975, 1982, 2012).

[t]here is created an advisory council to the [Department of Administrative Services] to be composed of representatives of designated small business enterprises to be named as follows: five by the Governor, two each by the President of the Senate and the Speaker of the House of Representatives, and one by the commissioner of administrative services to serve ex officio as chairman of the council. The members of the council shall serve without compensation. The council shall meet at least once monthly, or more often when necessary, at the call of the chairman in consultation with the commissioner of administrative services or his designee who shall also serve without additional compensation as executive director of the council.<sup>15</sup>

The advisory council's duties include making a written report to the Governor, the President of the Senate, the Speaker of the House of Representatives, and the chairmen of the Senate Committee on Insurance and Labor and the House Economic Development and Tourism Committee at least once each year, no later than December 1. The report shall advise the Governor, the Speaker, the President, and the designated chairmen concerning progress toward achieving the legislative intent as set forth in Code Section 50-5-122 and shall contain such recommendations for legislation as the council provided for deems proper.<sup>16</sup>

At present, based on research at the time of this report, it appears that the statutorily created advisory council has not produced a written report to the Governor or the State Assembly regarding the State's progress in fostering small business participation in state procurement.

#### **D. Summary of Georgia Authority**

In summary, in Georgia there does not appear to be an express prohibition or authorization by statute or case law for a small business program that is used in determining the award of contracts or purchases.

The structure and criteria of a small business program is important from a legal perspective. For example, there are issues with adopting a small business set aside program, including without specific legislation or possibly a Georgia Constitutional amendment.

In addition, there are Georgia cases that hold it is invalid to consider factors in determining the award of contracts that are not provided by statute or legislation in competitive bidding or potentially competitive sealed proposals (RFPs), including socio-economic factors or programs.

Also, it is significant to note that the state has declared a policy in promoting small business participation in state contracts, and the policy is meant to ensure that a "fair proportion" of the total purchasers and contracts or subcontracts of the State go to small businesses.

The state definition of "small business" has changed on July 1, 2015 to a business that has fewer than 100 employees or less than \$1 million in gross receipts. The new definition removes the requirement of being a "Georgia resident."

---

<sup>15</sup> O.C.G.A. § 50-5-123 (1975, 1982).

<sup>16</sup> O.C.G.A. § 50-5-124 (1975, 1982, 1986, 1992, 2009).

## **E. Other Jurisdictions Have Provided For Small Business Programs by Statute**

It is instructive to review and analyze examples of other states that have established and provided for small business programs.

There are states and counties that have enacted legislation expressly providing for the consideration of a bidder's small business status in the award of government contracts. Below are a few examples of some states and counties which have implemented legislation authorizing small business programs. It does not appear at this time that there are reported cases in which these or any other small business programs have been challenged on statutory or constitutional grounds.

### **1. Examples of jurisdictions that have enacted legislation authorizing small business programs**

#### ***Iowa***

Pursuant to I.C.A. § 73.16(1), notwithstanding any provision of law or rule relating to competitive bidding procedures, “[e]very agency, department, commission, board, committee, officer, or other governing body of the state shall purchase goods and services supplied by small businesses and targeted small businesses in Iowa.”<sup>17</sup> Furthermore, “all purchasing authorities shall assure that a proportionate share of small businesses and targeted small businesses identified under the uniform small business vendor application program of the economic development authority are given the opportunity to bid on all solicitations issued by agencies and departments of state government.”<sup>18</sup>

Under I.C.A. § 73.16(2), prior to the commencement of a fiscal year, the director of each agency or department of state government having purchasing authority, shall establish for the fiscal year a procurement goal from certified targeted small businesses.<sup>19</sup> *See* Exhibit A to Appendix.

The statute defines a small business as “any enterprise which is located in this state, which is operated for profit and under a single management, and which has either fewer than twenty employees or an annual gross income of less than four million dollars computed as the average of the three preceding fiscal years. This definition does not apply to any program or activity for which a definition for small business is provided for the program or activity by federal law or regulation or other state law.”<sup>20</sup>

#### ***Hawaii***

The Assistance to Small Businesses Part of the Hawaii Public Procurement Code<sup>21</sup> provides the Chief Procurement Officer is vested with the authority to establish the goal that twenty percent of the state's annual purchasing expenditures be awarded to small business.<sup>22</sup> The Code also provides the Officer is to impose mandatory evaluation criteria designed to encourage the use of small

---

<sup>17</sup> I.C.A. § 73.16(1).

<sup>18</sup> *Id.*

<sup>19</sup> I.C.A. § 73.16(2).

<sup>20</sup> I.C.A. § 15.102(8).

<sup>21</sup> H.R.S. § 103D-903(c).

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

business as subcontractors on large contracts not susceptible to performance by small business.<sup>23</sup> See Exhibit B to Appendix.

The statute defines a small business as “a business that is independently owned and defined by detailed criteria pursuant to rules adopted by the policy board. The policy board shall adopt rules defining “small business” through detailed criteria that may include the number of employees and similar factors used by the United States Small Business Administration.”<sup>24</sup>

### ***New Jersey***

N.J.S.A. § 52:32-21(a) provides that “[t]here are established the goals that contracting agencies award at least 15% of their contracts for small businesses . . .” Each contracting agency shall make a good faith effort to attain the goals established in this section, which “may, where appropriate, be attained by the direct designation of prime contracts for small business . . .” See Exhibit C to Appendix.<sup>25</sup>

The statute defines small businesses as “a business which has its principal place of business in the State, is independently owned and operated and meets all other qualifications as may be established by the Department of Commerce and Economic Development.”<sup>26</sup>

### ***Nevada***

The State of Nevada’s Outreach Program for Local Emerging Small Business provides that the office, “shall establish goals for the submission of bids or proposals by local emerging small businesses for state purchasing contracts and for the awarding of those contracts to local emerging small businesses.”<sup>27</sup> The statute also provides that the office “encourages local governments to establish goals for the awarding of local purchasing contracts and contracts for public works of the local government to local emerging small businesses.”<sup>28</sup> See Exhibit D to Appendix.

To qualify as a small business under Nevada’s Outreach Program for Local Emerging Small Business, a business must: “be in existence, operational and operated for a profit; maintain its principal place of business in [Nevada]; be in compliance with all applicable licensing and registration requirements in [Nevada]; not be a subsidiary or parent company belonging to a group of firms that are owned or controlled by the same persons if, in the aggregate, the group of firms does not qualify pursuant to subsection 2 or 3 for designation as a tier 1 firm or a tier 2 firm; and qualify for designation as a tier 1 firm or a tier 2 firm.”<sup>29</sup>

To be designated a tier 1 firm, a business must not employ more than 20 full-time or full-time equivalent employees.<sup>30</sup> If the business is involved in providing construction services, the average annual gross receipts for the business must not exceed \$1.7 million for the three years immediately

---

<sup>23</sup> H.R.S. § 103D-901.

<sup>24</sup> *Id.*

<sup>25</sup> N.J.S.A. § 52:32-21(a)

<sup>26</sup> N.J.S.A. § 52:32-19(e).

<sup>27</sup> N.R.S. § 231.1407(1)(a), (2)(b).

<sup>28</sup> *Id.*

<sup>29</sup> N.R.S. § 231.1405.

<sup>30</sup> *Id.*

preceding the date of application for certification as a local emerging small business; or if the business is involved in the sale of goods or in providing services other than construction services, the average annual gross receipts for the business must not exceed \$700,000 for the three years immediately preceding the date of application for certification as a local emerging small business.<sup>31</sup>

To be designated a tier 2 firm, a business must not employ more than 30 full-time or full-time equivalent employees.<sup>32</sup> If the business is involved in providing construction services, the average annual gross receipts for the business must not exceed \$3.5 million for the three years immediately preceding the date of application for certification as a local emerging small business; or if the business is involved in the sale of goods or in providing services other than construction services, the average annual gross receipts for the business must not exceed \$1.3 million for the three years immediately preceding the date of application for certification as a local emerging small business.<sup>33</sup>

### ***District of Columbia***

In the District of Columbia, “[e]ach agency, including an agency that contracts or procures in whole or in part through the Office of Contracting and Procurement, shall exercise its contracting and procurement authority so as to meet, on an annual basis, the goal of procuring and contracting 50% of the dollar volume of its expendable budget to qualified small business enterprises.<sup>34</sup> See Exhibit E to Appendix.

The District Code defines a small business as a local business enterprise that is independently owned, operated, and controlled; and is certified by the United States Small Business Administration as a small business concern or meets the definition of a small business concern under the Small Business Act, approved July 18, 1958, 15 U.S.C. § 631 *et seq.*; or has had averaged annualized gross receipts for the three years preceding certification not exceeding the limits established by the District of Columbia City Council’s rulemaking authority.<sup>35</sup>

### ***California***

Under California’s Small Business Procurement and Contract Act, “in order to facilitate the participation of small business,” directors of the Department of General Services and other state agencies may establish goals for the extent of participation of small businesses and provide for small business preference in the award of contracts for goods, information technology, and services to the state, and in the construction of state facilities.<sup>36</sup> A small business means “an independently owned and operated business that is not dominant in its field of operation, the principal office of which is located in California, the officers of which are domiciled in California, and which, together with affiliates, has 100 or fewer employees, and average annual gross receipts of ten million dollars (\$10,000,000) or less over the previous three years, or is a manufacturer (primarily engaged in the chemical or mechanical transformation of raw materials or processed substances into to new

---

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> D.C. St. § 2-218.41(a).

<sup>35</sup> D.C. St. § 2-218.32

<sup>36</sup> CAL. GOV. CODE § 14838.

products and classified between Codes 31 to 33 of the North American Industry Classification System) ... with 100 or fewer employees.”<sup>37</sup> See Exhibit F to Appendix.

### ***Miami-Dade County***

Miami-Dade County has implemented a Small Business Enterprise Construction Services Program to ensure that not less than ten percent of the County’s total annual expenditures for construction are expended with small business enterprises.<sup>38</sup> Forty percent of this ten percent objective may be accomplished through set-aside for smaller prime contracts and use of subcontractors on larger prime contracts falling within Standard Industrial Classification code 15; forty percent of this ten percent objective may be accomplished through set-aside for smaller prime contracts and use of subcontractors on larger prime contracts falling within Standard Industrial Classification code 16; and twenty percent of this ten percent objective may be accomplished through set-aside for smaller prime contracts and use of subcontractors on larger prime contracts falling within Standard Industrial Classification code 17.<sup>39</sup> Under this program, a small business enterprise means a construction related enterprise which has an actual place of business in Miami-Dade County and whose average gross revenues for the last three years do not exceed \$10 million for SIC 15- Building Construction, General Contractors and Operative Builders; \$6 million for SIC 16- Heavy Construction, other than Building Construction; or \$5 million for SIC 17- Specialty Trade Contractors.<sup>40</sup> See Exhibit G to Appendix.

### ***Cuyahoga County***

Cuyahoga County, Ohio has also established a Small Business Enterprise Program to “insure that all businesses participate fully and fairly in Cuyahoga County’s procurement and contract awards.”<sup>41</sup> The County has established an overall thirty percent subcontracting goal for small business participation in county procurements.<sup>42</sup> To establish a revised overall small business participation goal, the county is required to conduct an analysis of the small business participation in county purchasing activities. To become eligible for the program, a small business must “demonstrate that it has been in continuous operation in the category or the related category for which it is requesting certification for one year, that majority ownership has at least one (1) year of work experience relevant to the business’ certification category, and that its annual gross revenues or its total workforce are at or less than the amounts established by the Small Business Administration.”<sup>43</sup> See Exhibit H to Appendix.

---

<sup>37</sup> CAL. GOV. CODE § 14837.

<sup>38</sup> Miami-Dade County Code of Ordinances § 10-33.02.

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

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

<sup>41</sup> Cuyahoga County Code § 503.01.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

## 2. Summary of statutory key elements for small business programs

These samples of statutes are instructive as to how other jurisdictions have established small business programs. Certain key elements provided in the legislation for these programs include:

- Provide in legislation that the government is authorized to have a small business program, and that it may use small business status as a factor in competitive bidding on procurement;
- Authorize the use of goals for small business participation;
- Provide for flexibility and use of waivers;
- Authorize consideration of good faith efforts by the bidder or proposer to achieve any goal;
- Use objective, economic criteria to define a small business;
- Provide a specific definition for small businesses that limits and restricts which businesses are eligible, including limitations on gross receipts and number of employees, independently owned and operated, and operated for profit;
- Provide for graduation of small businesses from the program;
- Establish detailed criteria and rules for implementing program; and
- Establish incentives and enforcement provisions for contractors and vendors to utilize small businesses, including meeting goals or exercising good faith efforts to meet goals.

### F. The Small Business Element Requirements for the Federal DBE Program

The Federal DBE Program regulations require that recipients of federal funds include an element in their DBE Program that promotes small business participation. 49 C.F.R. § 26.39 provides requirements and recommendations for fostering small business participation. These federal regulations must be followed by Fulton County to the extent it is receiving federal funds. It is understood the County receives federal funds from the U.S. D.O.T./F.A.A. in connection with the operations at the County Brown Field Airport.

In addition, the federal regulations are instructive to Fulton County in its consideration of implementing a small business program. 49 C.F.R. § 26.39 provides, in relevant part, as follows:

- (a) The DBE program must include an element to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors.
- (b) As part of this small business program, the small business element may include, but is not limited to, the following strategies:

...



- (2) In multi-year design-build contracts or other large contracts (*e.g.*, for “megaprojects”) requiring bidders on the prime contract to specify elements of the contract or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform.
- (3) On prime contracts not having DBE contract goals, requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved.
- (4) Identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures consisting of small businesses, including DBEs, to compete for and perform prime contracts.
- (5) To meet the portion of the overall DBE goal a recipient projects to meet through race-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform.

The “strategies” provided in 49 C.F.R. § 26.39 may be considered by Fulton County in developing a small business program. The federal regulations and official US DOT guidance on fostering small business participation are also instructive in suggesting parameters for implementation of a small business program.

For example, in evaluating whether a business meets the size standards for a small business concern under the Federal DBE Program, the United States Small Business Administration considers the following:

[e]conomic characteristics comprising the structure of an industry, including degree of competition, average firm size, start-up costs and entry barriers, and distribution of firms by size. It also considers technological changes, competition from other industries, growth trends, historical activity within an industry, unique factors occurring in the industry which may distinguish small firms from other firms, and the objectives of its programs and the impact on those programs of different size standard levels.”<sup>44</sup>

Notably, Georgia’s definition of “small business” under the Georgia Small Business Assistance Act does not mirror the federal definition.<sup>45</sup> However, this definition provides objective economic criteria that may be considered by the County to establish eligibility for participation in a small business program.

The Official Questions and Answers Guidance for the Federal DBE Program points out that using one definition for small businesses will ensure that all small businesses allowed to participate in the program are subject to the same standards, and consequently, compete with similarly-sized businesses.<sup>46</sup>

---

<sup>44</sup> 13 C.F.R. § 121.102(a).

<sup>45</sup> O.C.G.A. § 50-5-121 (1975, 1982, 2012, 2015).

<sup>46</sup> Official Questions and Answers (Q&A’s) Disadvantaged Business Enterprise Program Regulation (49 C.F.R. Part 26), Dep’t of Transportation (Dec 2015).

The Federal DBE Program also provides that any small business element include a verification requirement to minimize fraud and abuse; the recipients' program should not allow firms to self-certify/verify as a small business.<sup>47</sup>

The small business element requirement in the federal regulations provides that any measure used in implementing the Federal DBE Program must be authorized, permitted and not prohibited by state law.<sup>48</sup> However, a small business component used by a recipient of federal funds in implementing the Federal DBE Program may not be approved to the extent it conflicts with federal law.<sup>49</sup>

## **G. Challenges to Analogous Programs that are Instructive to a Small Business Program**

Since it appears at this time there are no reported decisions specifically involving rulings as to the validity of local or state small business programs, it is instructive to review and analyze issues that have arisen and constitutional challenges to analogous programs, which have been ruled upon by the courts. Below are examples of some cases that may demonstrate potential issues and challenges regarding a small business program, and provide illustrative factors that may be helpful in structuring a small business program.

### **1. Equal protection**

A small business program may be challenged on the ground that it violates equal protection by treating similarly situated businesses differently based on their size. “The Equal Protection Clause provides a basis for challenging legislative classifications that treat one group of persons as inferior or superior to others, and for contending that general rules are being applied in an arbitrary or discriminatory way.”<sup>50</sup> However, because such an economic program would involve a classification implicating neither a suspect class (*e.g.*, race, gender, ethnicity) nor a fundamental right (*e.g.*, freedom of speech, religion, right to privacy), it appears courts would apply a rational basis test in evaluating the constitutionality of a small business program.

If a law distinguishes among groups on the basis of a suspect classification or burdens the exercise of a fundamental right, the government must demonstrate that the regulation is necessary to further a compelling state or governmental interest and is the least drastic means available to further that interest under the strict scrutiny test.<sup>51</sup>

But “[a] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”<sup>52</sup>

---

<sup>47</sup> *See id.*

<sup>48</sup> *See id.*

<sup>49</sup> *See id.*

<sup>50</sup> *Jones v. Helms*, 452 U.S. 412, 423-24, 101 S.Ct. 2434 (1981).

<sup>51</sup> *Dunn v. Blumstein*, 405 U.S. 330, 342-43, 92 S. Ct. 995, 1003 (1972); *see City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Engineering Contractors Ass'n of S. Florida v. Metro Dade County*, 122 F.3d 895 (11th Cir. 1997).

<sup>52</sup> *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir. 2012).

The Georgia Supreme Court has held that under “the rational basis test, a court will uphold the statute if, under any conceivable set of facts, the classifications drawn in the statute bear a rational relationship to a legitimate end of government not prohibited by the Constitution.”<sup>53</sup> Georgia courts have applied the rational basis test to economic regulations when no fundamental right and no suspect class was involved. Below are some examples of Georgia court decisions applying the rational basis test and analysis.

***Allied Chemical Corp. v. Ga. Power Co.*, 236 Ga. 548, 224 S.E.2d 396 (1976)**

In *Allied Chemical Corp.*, certain industrial consumers of electrical energy brought an action challenging the restructuring of electrical rates to charge industrial consumers at a higher rate than residential consumers.<sup>54</sup> The plaintiffs contended that the new rates unjustifiably discriminated against industrial consumers in violation of the equal protection guarantees of the state and federal constitutions.<sup>55</sup>

The court held that “[b]ecause rate making is a legislative act, our test under an equal protection analysis of this economic regulation matter is whether there was a rational basis for the differing rate treatment . . . and the rate must be approved unless we find it to be without a rational basis.”<sup>56</sup> The court concluded that Georgia Power’s evidence regarding increased costs of providing electrical energy to industrial consumers and other market research provided a rational basis to justify the differential rates.<sup>57</sup>

***Ga. Dep’t of Human Resources v. Sweat*, 276 Ga. 627, 580 S.E.2d 206 (2003)**

In *Sweat*, the plaintiff challenged Georgia’s statutory child support guidelines on the ground that they violated equal protection guarantees by placing different burdens on individuals who, “but for the award of child custody,” are similarly situated.<sup>58</sup> The court held that because the statutory support guidelines did not infringe upon a fundamental right and the complaining party was not a member of a suspect class, such guidelines were evaluated under the rational basis test.<sup>59</sup>

The court noted, “[i]n the arena of social welfare and economics, a statute is not rendered unconstitutional merely because its classifications are imperfect; if the classification has some ‘reasonable basis,’ it does not offend the Constitution simply because the classification ‘is not made with mathematical nicety or because in practice it results in some inequality.’”<sup>60</sup> Only if the means adopted, or the resultant classifications, are not relevant to the government’s reasonable objective, or altogether arbitrary, does the statute offend due process.<sup>61</sup>

---

<sup>53</sup> *Ga. Dep’t of Human Resources v. Sweat*, 276 Ga. 627, 580 S.E.2d 206 (2003).

<sup>54</sup> 236 Ga. 548, 224 S.E.2d 396 (1976).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> 276 Ga. 627, 580 S.E.2d 206 (2003).

<sup>59</sup> *Id.*

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

<sup>61</sup> *Id.*

The court found the guidelines did not violate equal protection when they were designed to further the important and highly reasonable objective of ensuring that adequate support is provided to Georgia's children whose parents have divorced or separated.<sup>62</sup> Also, the court concluded the guidelines' means of determining the amount of support to be paid were not arbitrary and capricious, but based on the non-custodial parent's income.<sup>63</sup>

***Metro. Washington Chapter, Assoc. Builders and Contractors, Inc. v. District of Columbia*, No. 12-853 (EGS), 2014 WL 3400569 (D.D.C. July 14, 2014)**

Local preference programs have also been challenged on equal protection grounds on the basis that they impermissibly discriminate against individuals who do not reside locally. In *Metro. Washington Chapter, Associated Builders and Contracts, Inc. v. District of Columbia*, the plaintiffs brought an equal protection challenge against the District of Columbia with respect to a local preference program.<sup>64</sup> The plaintiffs argued that the program, authorized by the District's First Source Act, impermissibly discriminated against individual plaintiffs who did not reside in the District.<sup>65</sup> They were therefore treated differently than similarly situated individuals on the basis of their state of residency.<sup>66</sup> The plaintiffs conceded that a classification based on state residency should be scrutinized under a rational basis review because it involved neither a fundamental right nor a suspect classification.<sup>67</sup>

The District contended that the plaintiffs could not bring an equal protection challenge because they could not overcome the presumption of rationality.<sup>68</sup> The District pointed out that resident preferences similar to those embodied in the First Source Act had been upheld by other Courts.

***Chance Mgmt., Inc. v. South Dakota*, 97 F.3d 1107, 1115 (8th Cir. 1996)**

As an example, in *Chance Mgmt., Inc. v. South Dakota*,<sup>69</sup> the court applied a rational basis review to uphold a residency requirement for obtaining a license as a video lottery machine operator, explaining that "the state has a legitimate interest in insuring that the state's substantial investment in its video lottery business ultimately benefits the South Dakota taxpayers. The legislature could have rationally concluded that a residency requirement would further this interest."<sup>70</sup>

***Smith Setzer & Sons, Inc. v. S.C. Procurement Review Panel*, 20 F.3d 1311, 1322-24 (4th Cir. 1994)**

Likewise, in *Smith Setzer & Sons, Inc. v. S.C. Procurement Review Panel*,<sup>71</sup> the court affirmed the decision of a district court upholding two South Carolina statutes that provided for resident preferences requiring that state educational and administrative bodies purchase South Carolina goods if available

---

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> 2014 WL 3400569, at \*19 (D.D.C. July 14, 2014).

<sup>65</sup> *Id.* at \*18.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at \*19.

<sup>69</sup> 97 F.3d 1107, 1115 (8th Cir. 1996).

<sup>70</sup> *Id.*

<sup>71</sup> 20 F.3d 1311, 1322-24 (4th Cir. 1994).

because the statute was rationally related to the state’s interest in “channeling tax dollars back into the community.”<sup>72</sup>

**Summary.** These cases demonstrate that any small business program challenged on equal protection grounds will likely be evaluated under the rational basis standard to the extent such program does not implicate a suspect class or a fundamental right. Therefore, under the rational basis standard, it is important that a small business program and the criteria for participation be based upon robust, objective, economic research and market data so that Fulton County may demonstrate that it has a rational basis to justify implementation of such a program, and that the program classifications bear a rational relationship to a legitimate end of government.

### ***Durational Residency Requirement May Potentially Trigger Equal Protection Challenge Subject to Strict Scrutiny***

It is important to note, however, that imposing a durational residency requirement on any small business program may potentially trigger an equal protection challenge. Durational residency requirements have been challenged on the basis that they directly impinge upon the right to travel, which has been held to be a fundamental right.<sup>73</sup> Durational residency requirements have been held to violate equal protection under a strict scrutiny analysis that requires a program be narrowly tailored to address a legitimate, government interest.<sup>74</sup>

In *Hicklin v. Orbeck*, an Alaska local hire law that defined a resident as a person who had physically been present in the state for a period of one year prior to the determination of his residency status was held to violate the Equal Protection Clause of the federal and state constitutions.<sup>75</sup> The plaintiffs who were not residents of Alaska brought suit challenging the constitutionality of the “Alaska Hire” law which limited petroleum and pipeline jobs to residents of Alaska. The law provided that oil and gas leases, easements or right-of-way permits for oil or gas pipelines, unitization agreements or any renegotiations of any of those to which the state was a party, contain a requirement that qualified Alaska residents be hired in preference to nonresidents.<sup>76</sup> The law defined a resident to include a person who had been physically present in the state for a period of one year immediately before the time his status was determined.<sup>77</sup>

The plaintiffs argued that the residency requirement violated the state and federal equal protection clauses.<sup>78</sup> The court concluded that such a durational residency requirement was subject to strict scrutiny under the equal protection clauses of the state and federal constitutions because it penalized individuals who have exercised their fundamental right of interstate migration.<sup>79</sup> Under strict scrutiny, the law needed to be struck down unless the state could demonstrate that it was necessary to further a compelling state interest, and the least drastic means available to further that interest.<sup>80</sup>

---

<sup>72</sup> *Id.*

<sup>73</sup> *Dunn*, 405 U.S. at 334-35, 338, 342.

<sup>74</sup> *Id.*

<sup>75</sup> *Hicklin v. Orbeck*, 565 P.2d 159 (Alaska 1977).

<sup>76</sup> *Id.* at 161.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 162.

<sup>79</sup> *Id.* at 163.

<sup>80</sup> *Id.*

The court held that the law was not the least drastic means available to meet its goals of reduced unemployment and a stabilized economy.<sup>81</sup> The court noted that unemployment in Alaska was caused in large part by lack of education and vocational training, and as it had held before in *State v. Wylie*,<sup>82</sup> job training rather than a durational residency requirement was probably a more effective way to reduce unemployment.<sup>83</sup>

Although it appears that published equal protection challenges to durational residency programs in the context of local hire and local business programs have been limited, in other cases, courts have held that durational residency requirements in the administration of government programs or benefits are constitutionally infirm under an equal protection analysis because they impinge on the fundamental right to travel.

As an example, in *Memorial Hospital v. Maricopa County*, the Supreme Court held that a statute imposing a durational residency requirement as a condition to receiving nonemergency medical care at a county hospital violated the Equal Protection Clause and directly impeded the right of interstate travel.<sup>84</sup> The county argued that such a program was necessary to preserve the public purse and for budget predictability, but did not meet its burden of showing that such action was justified by a compelling government interest when the record was devoid of any evidence that the county used its one-year residency requirement “as a means to predict the number of people who will require assistance in the budget year ... the appellees do not take ... a census of new residents ... nor are new residents required to give advance notice of their need for ... assistance.”<sup>85</sup>

Also, in *Dunn*, the Supreme Court held that a state law requiring would-be voters to have been a resident for a year in the state and three months in a county did not further any compelling state interest and violated the Equal Protection Clause of the Fourteenth Amendment.<sup>86</sup> Such a durational residency requirement implicated the fundamental right to travel and the right to vote, and did not further any compelling state interest.<sup>87</sup>

## **2. Instructive federal court decision involving small business participation goal requirements for federal procurement**

A recent federal court decision involved a challenge to and the application of a small business goal in a pre-bid process for a federal procurement.

*Firstline Transportation Security, Inc. v. United States*,<sup>88</sup> involved an SBA goal, which is instructive and analogous to some of the issues in a small business program. The case does not involve the Federal DBE Program or 49 CFR Part 26, but it is informative as to the use, estimation and determination of goals (small business goals) in a procurement under the Federal Acquisition Regulations (“FAR”),

---

<sup>81</sup> *Id.*

<sup>82</sup> 516 P.2d 142 (Alaska 1973).

<sup>83</sup> *Id.* at 164.

<sup>84</sup> 415 U.S. 250, 269, 94 S. Ct. 1076, 1087 (1974).

<sup>85</sup> *Id.*

<sup>86</sup> 405 U.S. at 360.

<sup>87</sup> *Id.*

<sup>88</sup> 107 Fed. Cl. 189 (2012).

including information to support a goal of estimated participation and the consideration of a goal being applied to subcontracting dollars versus total contract price.

*Firstline* involved a solicitation that established a small business subcontracting goal requirement. In *Firstline*, the Transportation Security Administration (“TSA”) issued a solicitation for security screening services at the Kansas City Airport. The solicitation stated that the: “Government anticipates an overall Small Business goal of 40 percent,” and that “[w]ithin that goal, the government anticipates further small business goals of: Small, Disadvantaged business[:] 14.5%; Woman Owned[:] 5 percent; HUBZone[:] 3 percent; Service Disabled, Veteran Owned[:] 3 percent.”

In response to pre-proposal questions about this requirement, TSA responded that the subcontracting goal represents “40% of the total contract price” and not 40% of the total subcontracting dollars. When asked in a Q and A how the 40% goal would be factored into an offeror’s overall evaluation and score, the agency responded: “if the successful offeror fails to negotiate a subcontracting plan acceptable to the contracting officer . . . the offeror will be ineligible for award.” TSA referred prospective offerors to this answer when asked “[w]ill offerors with less than 40% be disqualified?”

After the plaintiff, Firstline Transportation Security, Inc. (“Firstline”), filed a bid protest, TSA amended its response and clarified that “[f]ailure to meet the stated 40% small business participation goal would not necessarily render a proposal ineligible for award” and cited to the TSA’s commitment to “ensuring that the government-wide goal for participation of small business concerns . . .” is met. FirstLine argued that this “goal is a requirement in disguise” because the solicitation mentioned the subcontracting plan under the heading of “Compliance/Responsiveness.”

FirstLine raised multiple challenges to the solicitation in its complaint, but narrowed its protest essentially to two arguments, of which the following is most pertinent for Fulton County: that TSA’s establishment of a 40 percent small business participation goal is unlawful and irrational. TSA’s 40 percent goal for small business participation was calculated as a percentage of the offeror’s total contract price, not as a percentage of the offeror’s proposed subcontracting plan. FirstLine objected to such a goal, arguing that a calculation based upon the contract price is not in accord with Part 19 of the Federal Acquisition Regulation (“FAR”), and that it is not aware of the existence of qualified small businesses who could even approach the performance of 40 percent of the contract work.

The Court stated:

For reasons that will be explained, if the Court were in the shoes of the agency, it would not structure the small business objectives for this procurement as the agency has done. However, after careful consideration, the Court cannot say that the agency’s approach is clearly unlawful, or that the approach lacks a rational basis. As Defendant’s counsel has emphasized, the 40 percent small business objective is merely a solicitation goal, not a requirement. The agency will be free to negotiate the best small business arrangement it can prior to contract award. This is a case where the Court must stay its hand and refrain from interfering with the procurement process.

FirstLine challenged the terms of the solicitation, including: the allegedly improper establishment of a small business subcontracting goal of 40 percent of the total contract value, with certain additional sub-goals for subcontracting to specific categories of small businesses.

TSA stated that the “goal represents 40% of the total contract value.” TSA also answered affirmatively the question “[i]s it the TSA’s intent that all large businesses [be] mandated to have, as a minimum, 40% small business participation ... as part of their overall bid?” In response to the question “[h]ow will the 40% goal be factored into the offeror’s overall evaluation and score ... ?” the agency stated that plans “will be reviewed for adequacy .... [I]f the successful offeror fails to negotiate a subcontracting plan acceptable to the contracting officer ... the offeror will be ineligible for award.” Finally, in response to the question “[w]ill offerors with less than 40% be disqualified?,” TSA referred prospective offerors to its answer to the prior question.

After Plaintiff initiated this bid protest, TSA amended its responses to several of these questions. Specifically, in response to the Question, that asked whether 40 percent small business participation, as a percent of total contract value, was “mandatory,” TSA amended its answer to state:

“Failure to meet the stated 40% small business participation goal would not necessarily render a proposal ineligible for award. TSA Contracting Officer will review any proposed subcontracting plan to ensure that the offeror has demonstrated due diligence in its efforts to meet the stated goals.”

FirstLine contended that the small business goal was unlawful because it “improperly uses the FAR’s subcontracting provisions to impose, in effect, a partial set-aside of 40 percent of the contract without complying with the set-aside requirements set forth in FAR[.]” FirstLine argued that TSA’s failure to analyze adequately either the feasibility of the 40 percent standard or its impact on cost and the quality of performance was both (1) contrary to FAR and (2) evidence that the goal is arbitrary and capricious.

With respect to the first of these arguments, FirstLine asserted that relevant provisions of the FAR “obligate” TSA to conduct market research that specifically identifies sufficient qualified small businesses prior to establishing any small business participation goals. FirstLine intended that “[t]aken together,” these provisions impose an affirmative obligation on TSA to “ascertain whether sufficient qualified small businesses exist prior to establishing the [small business subcontracting] ‘goals.’” FirstLine also argued that the dearth of evidence showing whether TSA conducted any inquiry into small business participation in screening services establishes that this goal is irrational.

The TSA countered that the 40 percent small business goal is lawful, rational, and an appropriate application of the express “policy of the Government to provide maximum practicable opportunities in its acquisitions to small business [concerns].” Although the Government acknowledges that certain FAR regulations speak of small business goals in terms of a percentage of total subcontracting dollars (as opposed to total contract dollars), it argued that nothing in the FAR prohibits an agency from setting a small business goal expressed as a percentage of total contract price.

Emphasizing that the 40 percent standard is a “goal,” not a requirement, TSA also rejected Plaintiff’s contention that this term constitutes a “set-aside,” and argued that “[i]f anything, the FAR’s provisions permitting an agency to set-aside an entire contract, or portion of a contract, for exclusive



small business participation bolsters an agency's discretion to set small business subcontracting goals as it deems appropriate."

Moreover, with respect to FirstLine's irrationality argument, the TSA quoted FAR 19.201(a) for the proposition that:

"It is the policy of the Government to provide maximum practicable opportunities in its acquisitions to small business, veteran-owned small business, service-disabled veteran small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. Such concerns must also have the maximum practicable opportunity to participate as subcontractors in the contracts awarded by an executive agency, consistent with efficient contract performance."

The Court said:

"If the court were issuing this solicitation instead of this agency, it may well have based the rather aggressive small business goals on more robust market research, and it likely would have stated the goals as a percentage of subcontracting dollars, as FAR Part 19 authorizes. In this way, the prime contract offerors would have had the discretion to determine on their own how much of the work they were prepared to subcontract, and the desired level of subcontracting would not have been dictated by the federal agency."

The court found that the 40 percent standard is a goal, not a requirement.

"The Court is satisfied that TSA's amendment adequately addresses FirstLine's concern that the 40 percent standard will operate as a bright-line requirement or "set-aside." That amendment clearly states that "[f]ailure to meet the stated 40% small business participation goal would not necessarily render a proposal ineligible for award," and also expresses the agency's expectation that prospective offerors "aggressively support ... small business participation" by "demonstrat[ing] due diligence in [their] effort[s] to meet the stated goals."

The court disagreed with FirstLine's assertion that a Section of the specifications "provides that an offeror that fails to meet the 'small business goals' will be 'ineligible for award.' The court stated by its plain terms, the Section is simply not that draconian: it does not speak in terms of failing to meet a bright-line threshold, but rather in terms of "fail[ing] to negotiate a subcontracting plan acceptable to the contracting officer before contract award[.]"

The court pointed out the factors that may be evaluated:

"To the contrary, FAR 19.705-4 lists a number of factors that a contracting officer must take into consideration in evaluating (and negotiating) an offeror's proposed subcontracting plan. As FirstLine pointed out at oral argument, many of these considerations run, in essence, to both the reasonableness and feasibility of subcontracting at given levels within a given procurement. They include, for example, the "[p]revious involvement of small business concerns as prime contractors or subcontractors in similar acquisitions," and "[p]roven methods of involving small

business concerns as subcontractors in similar acquisitions.” FAR 19.705-4(a)(1), (2). Moreover, under subsection (d)(2), the contracting officer must:

[E]nsure that the goals offered are attainable in relation to—

(i) The subcontracting opportunities available to the contractor, commensurate with the efficient and economical performance of the contract;

(ii) The pool of eligible subcontractors available to fulfill the subcontracting opportunities; and

(iii) The actual performance of such contractor in fulfilling the subcontracting goals specified in prior plans.

And, under subsection (5), when evaluating subcontracting potential, the contracting officer must also take into account “the known availability of small business, veteran owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns in the geographical area where the work will be performed, and the potential contractor’s long-standing contractual relationship with its suppliers.”

The court noted that FAR 19.705-4 provides a structural safeguard for proposed plans that may fall short of the 40 percent goal. By requiring the contracting officer to take such ameliorating factors into consideration when evaluating proposed plans for adequacy, FAR 19.705-4 ensures that a proposal falling short of the subcontracting goal must nonetheless be given due consideration before being rejected as non-responsive.

The court found that the provision counsels that “[n]o goal should be negotiated upward if it is apparent that a higher goal will significantly increase the Government’s cost or seriously impede the attainment of acquisition objectives.” Thus, neither the Section in the specifications nor FAR 19.705-4 converted the 40 percent goal into a bright-line requirement.

The court also held that the 40 percent goal was national and lawful, and required the government to take into account “Market Realities.”

The Court finds that an agency may rationally establish aspirational small business subcontracting goals for prospective offerors, even without specifically identifying small businesses that would be qualified to perform the subcontracted work. To the extent that such goals may overestimate the size and abilities of a given small business community, FAR 19.705-4 can reasonably be read as providing a “backstop” that requires the agency to take into account market realities in evaluating proposed subcontracting plans before rejecting such plans as non-responsive.

The court agreed with the Government that its decision to structure the solicitation in this manner is within its discretion. Nothing in the FAR either prohibits such an approach or affirmatively requires an agency to specifically identify particular small business concerns capable of performing subcontracted services. Consequently, the Court held one rational method by which the Government may attempt to maximize small business participation is to establish a rough subcontracting goal for a

given contract, and then allow potential contractors to compete in designing innovative ways to structure and maximize small business subcontracting within their proposals.

The court, in an exercise of judicial restraint, found the “40 percent goal is a rational expression of the Government’s policy of affording small business concerns ... the maximum practicable opportunity to participate as subcontractors ....”

This decision of the United States Court of Federal Claims illustrates the importance of gathering market research and evidence to ensure that any small business program is rationally related to a legitimate government interest. In *Firstline*, TSA had, in fact, conducted market research and produced a market research report prior to issuing the challenged solicitation. TSA specifically researched thirteen firms to determine size, capabilities, past performance, and special business practices prior to establishing its small business participation goal.

### **3. Commerce Clause challenges to local business preference statutes**

The Commerce Clause grants Congress authority to regulate commerce among the States, but limits the power of the States to discriminate against interstate commerce. This limitation on state power is called the “Dormant Commerce Clause” and prohibits economic protectionism—regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. However, activities which may appear to be in violation of the Commerce Clause may be permitted if the “market participant exception” applies.

The market participant exception provides that if a state is acting as a market participant, rather than as a market regulator, the Dormant Commerce Clause places no limitation on its activities.<sup>89</sup> Under the market participant exception, the court examines whether the state or local government has imposed restrictions that reach beyond the immediate parties with which government transacts business.<sup>90</sup>

Below are examples of analogous local business preference programs triggering Commerce Clause challenges.

#### ***Big Country Foods, Inc. v. Bd. of Ed. Of Anchorage School Dist.*, 952 F.2d 1173 (9th Cir. 1992)**

In *Big Country Foods, Inc.*, a disappointed bidder for a contract to supply milk for a school district used the Commerce Clause to challenge Alaska’s statutory preference requiring schools receiving state funds to buy dairy products harvested in state if prices were no more than seven percent higher than products of like quality harvested outside the state.<sup>91</sup> The court held that the market participation exception to the Dormant Commerce Clause’s limitation on state power applied to permit Alaska’s

---

<sup>89</sup> See *Big Country Foods, Inc. v. Bd. of Ed. Of Anchorage School Dist.*, 952 F.2d 1173 (9th Cir. 1992).

<sup>90</sup> See *id.*

<sup>91</sup> See *id.*

statutory preference program when the state was acting as a market participant in purchasing milk product rather than as a regulator of the program.<sup>92</sup>

***J.F. Shea Co., Inc. v. City of Chicago*, 992 F.2d 745 (7th Cir. 1993)**

In *J.F. Shea Co., Inc.*, an out-of-state contractor and its employee brought an action against the City of Chicago challenging the City’s local business preference rule for the award of City contracts on the ground that such a program violated the Commerce Clause. The court held that the market participant exception applied since the City would be a party to any contracts it awarded and was using its own funds to hire contractors.<sup>93</sup>

***Metro. Washington Chapter, Assoc. Builders and Contractors, Inc. v. District of Columbia*, No. 12-853 (EGS), 2014 WL 3400569 (D.D.C. July 14, 2014)**

In *Metro Washington Chapter*, contractors brought suit challenging a residential preference statute mandating that certain percentages of construction jobs on projects funded in whole or in part, or administered by the District of Columbia, be filled by District residents.<sup>94</sup> The court held that such a program did not violate the Commerce Clause because the market participant exception applied with respect to city-funded construction projects.<sup>95</sup>

**Summary.** The above-mentioned cases illustrate that a small business program, similar to local business preference programs, may withstand a challenge under the Commerce Clause if the program only applies to contracts to which the County is a party. In such a challenge, it appears the market participant exception would apply. To the extent such a program intends to impose a small business requirement or preference on all contracts awarded within the County, making the County a market *regulator*, the Commerce Clause may be used to prohibit such practices.

#### **4. Privileges and Immunities Clause**

The Privileges and Immunities Clause of the United States Constitution (art. IV, §II, cl. I) gives constitutional assurance to the citizens of each state that they are entitled to all privileges and immunities of the citizens in several states. To the extent small business programs may disadvantage out-of-state residents as a class, such programs may potentially violate the Privileges and Immunities Clause.

Courts typically employ a two-step test to determine whether a statute violates the Privileges and Immunities Clause of the United State Constitution: (1) Does the ordinance burden one of those privileges and immunities protected by the clause? (2) Is there a substantial reason for treating classes of citizens differently? Nonresidents must somehow be shown to “constitute a peculiar source of the evil at which the statute is aimed.”<sup>96</sup>

---

<sup>92</sup> *Id.*

<sup>93</sup> 2014 WL 3400569 (D.D.C. July 14, 2014).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *United Bldg. and Constr. Trades Council of Camden Cnty. and Vicinity v. Mayor and Council of the City of Camden*, 465 U.S. 208, 104 S.Ct. 1020 (1984); *Metro. Washington Chapter, Assoc. Builders and Contractors, Inc. v. District of Columbia*,

In some instances, the right to pursue a common calling or compete for contracts has been recognized by courts as a right protected by the Privileges and Immunities Clause.<sup>97</sup> Thus, it is arguable whether a small business program that is limited to Georgia resident businesses could withstand legal challenges based on the Privileges and Immunities Clause. It again is noteworthy that the Georgia Small Business Assistance Act changed the definition of a “small business” to not require Georgia residence.

Although out-of-state residents may present challenges to residential preference programs, in-state residents have been held to *not* have standing to challenge such programs under the United States Privileges and Immunities Clause.<sup>98</sup>

Challenges to the Georgia Constitution Privileges and Immunities Clause<sup>99</sup> are evaluated by using an equal protection analysis.<sup>100</sup>

In *Ambles v. State*, the State challenged the constitutionality of statutes that limited the rights of the mentally handicapped and children to testify in criminal trials under the Privileges and Immunities Clause of the State Constitution. Because the statutes implicated neither a suspect class (children and mentally handicapped) nor a fundamental right (the right to testify), the court held that the legitimate government purpose of protecting the integrity of the fact-finding process provided a rational basis for the statute. Though Georgia courts have not addressed Privileges and Immunities Clause challenges in the context of government programs, it is likely that a rational basis analysis would be applied to the extent a fundamental right or suspect class is not implicated by the implementation of such program.

Below are examples of legislation that have triggered challenges under the Privileges and Immunities Clause.

***United Bldg. and Constr. Trades Council of Camden Cnty. and Vicinity v. Mayor and Council of the City of Camden*, 465 U.S. 208, 104 S. Ct. 1020 (1984)**

The Supreme Court held that a city ordinance requiring that at least 40% of employees of contractors and subcontractors working on city construction projects be city residents was properly subject to the strictures of the Privileges and Immunities Clause.<sup>101</sup> The out-of-state residents’ interest in employment on public works projects in another state was sufficiently fundamental to promotion of

---

No. 12-853 (EGS), 2014 WL 3400569, at \*16 (D.D.C. July 14, 2014) (stating court must consider (1) whether the activity purportedly threatened by classification is a fundamental right protected by the Privileges and Immunities Clause, and (2) if the challenged restriction deprives nonresidents of a protected privilege, whether the restriction is “closely related to the advancement of a substantial state interest.”)

<sup>97</sup> *Hicklin v. Orbeck*, 437 U.S. 518, 524, 98 S.Ct. 2482 (1978); *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 280, 105 S.Ct. 1272 (1985).

<sup>98</sup> *J.F. Shea Co., Inc. v. City of Chicago*, 992 F.2d 745 (7th Cir. 1993).

<sup>99</sup> “All citizens of the United States, resident in this state, are hereby declared citizens of this state; and it shall be the duty of the General Assembly to enact such laws as will protect them in the full enjoyment of the rights, privileges, and immunities due to such citizenship.” GA. CONST. art. I, §I, ¶VII

<sup>100</sup> See *Ambles v. State*, 259 Ga. 406, 383 S.E.2d 555 (1989).

<sup>101</sup> 465 U.S. 208, 104 S. Ct. 1020 (1984).

interstate harmony and sufficiently basic to the livelihood of the nation as to fall within the purview of the Privileges and Immunities Clause.<sup>102</sup>

The City of Camden claimed that its ordinance was necessary to counteract grave economic and social ills: spiraling unemployment, a sharp decline in population, and a dramatic reduction in the number of businesses located in the city, which eroded property values and depleted the city's tax base.<sup>103</sup> The City argued that all non-Camden residents employed on city public works projects, constituted a "source of the evil at which the statute is aimed" because they "lived off" Camden without "living in" Camden.<sup>104</sup> But, because there was no record evidence to support the City's assertion, the Privileges and Immunities Clause was triggered, and the case remanded to provide the City an opportunity to provide evidentiary support for its discrimination against non-Camden residents.

The Court noted that the Privileges and Immunities Clause does not preclude discrimination against citizens of another state when there is a substantial reason for difference in treatment.<sup>105</sup> Since it was impossible to evaluate whether there was evidence to support the city's justification for the ordinance, the case was remanded to the state Supreme Court.<sup>106</sup>

***Utility Contractors Ass'n of New England, Inc., 236 F. Supp. 2d 113 (D. Mass 2002)***

A contractor's association brought suit challenging the City of Worcester's Residency Requirement Ordinance that mandated all private contractors or subcontractors on city public works projects allocate 50 percent of their total employee work hours to Worcester residents. The court held that such a program violated the Privileges and Immunities Clause because it discriminated against out-of-state residents.<sup>107</sup>

The court also held the City's assertion of high unemployment as a basis for the program did not demonstrate a substantial reason for discrimination.<sup>108</sup> The court imposed an injunction prohibiting the implementation of the program.<sup>109</sup>

***Big D. Constr. Corp. v. Court of Appeals, 789 P.2d 1061 (Ariz. 1990)***

A Utah construction corporation brought suit challenging an Arizona bid preference statute that granted preference to resident businesses for public works projects. The court held that the local preference program violated the Privileges and Immunities Clause when privileges it conferred were not rationally related to any legitimate state purpose.<sup>110</sup>

---

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> 236 F. Supp. 2d 113 (D. Mass 2002).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> 789 P.2d 1061 (Ariz. 1990).

***Metro. Washington Chapter, Assoc. Builders and Contractors, Inc. v. District of Columbia, No. 12-853 (EGS), 2014 WL 3400569 (D.D.C. July 14, 2014)***

A contractor’s association brought suit challenging the District of Columbia’s residential preference statute, alleging violation of the Privileges and Immunities Clause.<sup>111</sup> The statute provided that certain percentages of construction jobs funded in whole or in part, or administered by the city, be filled by District residents.<sup>112</sup> The District of Columbia filed a motion to dismiss.

The court denied in part the District of Columbia’s motion to dismiss the contractors’ claim that the District’s residential preference statute violated the Privileges and Immunities Clause.<sup>113</sup> The court held that because there were no findings of fact (i.e. sufficient evidence) to demonstrate the District’s program was narrowly tailored to address the unique evil of the District’s inability to levy a commuter tax on non-residents, the District’s motion was dismissed without prejudice.<sup>114</sup>

The court left open the possibility the District could re-assert the motion if it had sufficient evidence to show the preference program was “narrowly tailored.”<sup>115</sup>

## **H. Summary of Challenges**

These cases are instructive in illustrating that any small business program which discriminates against nonresidents must establish a specific “evil” that is in need of being remedied, and be narrowly tailored to address the specific identified “evil” caused by nonresidents working on County funded and administered contracts.

There needs to be a substantial reason for difference in treatment to the extent the County considers residency requirements for contractors. The County should examine market research to determine whether there are issues unique to the County, including but not limited to, unemployment, depreciating property values, or depleted tax bases that could be remedied by a program that limits participation to County residents.

The cases outlining the potential legal challenges to a small business program and its structure, terms, limitations, and preferences, demonstrate it is important that any governmental agency establish a rational basis for such programs. Conducting an economic study or analysis that considers whether there is a legitimate government need and purpose, and identifies such a need is helpful to address equal protection challenges. Fulton County may need to consider adopting legislation to expressly provide for the consideration of a bidder’s small business status in the award of government contracts.

---

<sup>111</sup> 2014 WL 3400569 (D.D.C. July 14, 2014).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

Any program implemented to increase small business participation should be tailored to remedy the identified legitimate government need or purpose. Furthermore, small businesses should be defined using objective, economic criteria that have a rational basis reasonably related to a legitimate government purpose (i.e. size, revenue, personal net worth of owner, etc.). In addition, to avoid potential challenges, including under the Privileges and Immunities Clause, or potentially triggering strict scrutiny, the County should consider not imposing a durational residency requirement.



## **APPENDIX B.**

### **Fulton County Contract Data Collection and Analysis**

Keen Independent compiled data about 2,502 Fulton County prime contracts and subcontracts amounting to \$726 million from 2011 through 2014. Of these prime contracts and subcontracts, 423 (\$76 million) were types of procurements outside the scope of the small business study (procurements with other public agencies, not-for-profit organizations, regulated utilities or other vendors outside normal procurement). The discussion below describes data sources, research methods and results related to the \$650 million in County contract dollars examined in this study.

Appendix B provides the following information:

- A. Source of County contract data;
- B. Methods used to identify location, type of work and firm size; and
- C. Results of the analysis of County contracts.

#### **A. Sources of County Contract Data**

Keen Independent collected data on County contracts awarded from January 2011 through December 2014 and the subcontracts associated with those contracts.

The County Contractor's Historical Reports were the primary source used to identify dollars awarded to prime and subcontractors for each project. The County provided monthly, quarterly and annual reports including information such as:

- Board of Commissioners (BOC) reporting period;
- Department;
- BOC approval number;
- Purchasing category;
- Service or commodity;
- Prime contractor name;
- Subcontractor name;
- Whether or not the vendor is located in Fulton County;
- Total contract value;
- Dollars going to primes and subs; and
- Total, prime and sub dollars going to certified and non-certified small businesses.

## **B. Methods Used to Identify Location, Type of Work and Firm Size**

Keen Independent attempted to determine the location of all firms participating in County contracting during the study period. The study team used several sources, including:

- Fulton County MFBE directory;
- Fulton County Local Business Vendor Directory;
- Fulton County Board of Commissioners Agenda Item Summaries; and
- Information from Dun & Bradstreet/Hoovers.

For each firm identified as working on a County contract, Keen Independent attempted to collect business characteristics, including firm size. The study team compiled company information from multiple sources, including:

- Study team telephone interviews with firm owners and managers;
- Small Business Administration directories; and
- Information from Dun & Bradstreet/Hoovers.

The study team categorized each firm as either “large” or “small” based on SBA size guidelines for a firm’s main line of business. Firms determined to be subsidiaries, affiliates and branch offices were categorized based on the size of their parent firm. Figure B-1 shows the SBA size limits for small businesses doing most of the types of construction, professional services and other services work involved in County contracts. The size standard for goods firms is generally employment-based (500 employees for purposes of certifying firms providing goods to the public sector).

Figure B-1.  
 U.S. Small Business Administration small business size standards  
 for types of construction, professional services and other services  
 accounting for most dollars of County contracts

	Annual revenue (millions)
<b>Construction</b>	
Specialty trades	\$ 15.0
Water, sewer pipeline and utilities	36.5
Public building construction	36.5
Asphalt paving	36.5
Concrete work	15.0
Excavation and demolition	15.0
Landscaping	7.5
<b>Professional services</b>	
Inmate health services	\$ 11.0
Architecture and engineering	15.0
IT services	27.5
Construction management	15.0
Environmental consulting	15.0
In-home aging services	15.0
<b>Other services</b>	
Telecommunications	\$ 32.5
Jail operation and maintenance	38.5
Local transportation services	15.0
Security services	20.5
Employee benefits	38.5
Janitorial services	18.0
Water treatment facility operation and maintenance	20.5
Repair services	7.5

Note: Size standard for goods firms typically 500 employees when determining small business status for companies providing goods to public sector.

Source: U.S. Small Business Administration. Table of Small Business Size Standards Matched to North American Industry Classification Systems Codes, effective July 14, 2014.

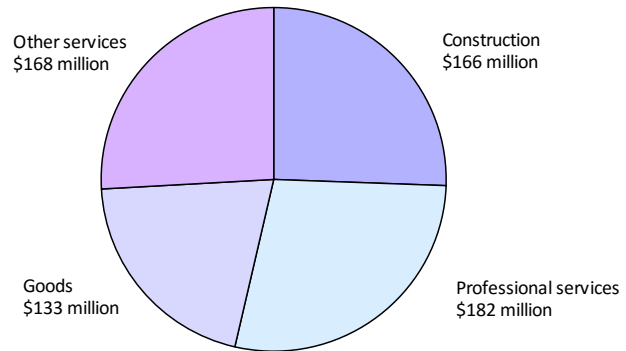
### C. Results of the Analysis of County Contracts

Keen Independent examined the types of work involved in County contracts, location of firms receiving County work and the share of County contract dollars going to small businesses.

**Types of work accounting for most County contract dollars.** Keen Independent coded the types of work involved in each County prime contract and subcontract during the study period. The study team then grouped these contracts into four general types of work: construction, professional services, goods and other services. Figure B-2 shows total contract dollars for each general type of work.

Figure B-2.  
Dollars of County construction, professional services, goods and other services contracts, 2011-2014

Source: Keen Independent from County contract records, 2011-2014



**Construction.** Figure B-3 examines dollars by type of work for County construction contracts from 2011 through 2014. In terms of total dollars, County construction work was distributed between public building construction and associated specialty trades, water and sewer work, paving and other work.

Figure B-3.  
Types of work involved in County construction contracts, 2011-2014

Construction	Dollars (millions)	Percent
Specialty trades	\$ 50.9	30.6 %
Water, sewer pipeline and utilities	43.4	26.1
Public building construction	40.6	24.4
Asphalt paving	9.9	5.9
Concrete work	8.0	4.8
Excavation and demolition	5.7	3.4
Landscaping	4.7	2.8
Other construction	3.2	2.0
<b>Total</b>	<b>\$ 166.4</b>	<b>100.0 %</b>

Note: Numbers may not add to 100.0% due to rounding.

Source: Keen Independent from County contract records, 2011-2014.

Professional services. Inmate health services accounted for the most County professional services contract dollars from 2011 through 2014.

Figure B-4.

Types of work involved in County professional services contracts, 2011-2014

Professional services	Dollars (millions)	Percent
Inmate health services	\$ 73.0	40.2 %
Architecture and engineering	33.6	18.5
IT services	25.5	14
Construction management	19.0	10.4
Environmental consulting	14.7	8.1
In-home aging services	4.0	2.2
Other professional services	<u>12.1</u>	<u>6.6</u>
Total	\$ 181.8	100.0 %

Note: Numbers may not add to 100.0% due to rounding.

Source: Keen Independent from County contract records, 2011-2014.

Goods. Petroleum products and food were the largest types of primarily local goods purchases from 2011 through 2014. There was more than \$50 million in expenditures for a variety of nationally-sourced goods.

Figure B-5.

Types of work involved in County goods contracts, 2011-2014

Goods	Dollars (millions)	Percent
Petroleum products	\$ 22.8	17.1 %
Food	21.1	15.8
Plumbing and HVAC equipment	9.6	7.2
Water meters	7.9	5.9
Furniture	3.6	2.7
Uniforms	3.2	2.4
Miscellaneous non-local goods	51.8	38.9
Other goods	<u>13.1</u>	<u>9.8</u>
Total	\$ 133.1	100.0 %

Note: Numbers may not add to 100.0% due to rounding.

Source: Keen Independent from County contract records, 2011-2014.

**Other services.** Telecommunications services and jail operations represented the largest areas of County contracts for other services. Figure B-6 shows these results.

Figure B-6.  
Types of work involved in County other services contracts,  
2011-2014

Other services	Dollars (millions)	Percent
Telecommunications	\$ 36.1	21.5 %
Jail operation and maintenance	23.6	14.1
Local transportation services	21.9	13.0
Security services	16.8	10.0
Employee benefits	13.4	7.9
Janitorial services	10.6	6.3
Water treatment facility operation and maintenance	9.6	5.7
Repair services	4.9	2.9
Other services	<u>31.3</u>	<u>18.6</u>
<b>Total</b>	<b>\$ 168.1</b>	<b>100.0 %</b>

Note: Numbers may not add to 100.0% due to rounding.

Source: Keen Independent from County contract records, 2011-2014.

**Location of firms receiving County contract dollars.** Firms with locations within the 20-county Atlanta Metropolitan Area received two-thirds of County contract dollars from 2011 through 2014. More than 80 percent of construction contract dollars went to companies with Atlanta area locations. Figure B-7 examines these results.

The share of dollars going to Atlanta Metropolitan Area establishments might understate the actual dollars since some firms with non-local billing addresses may also have local offices.<sup>1</sup>

---

<sup>1</sup> Keen Independent examined alternative addresses in County vendor records and coded a firm as within the Atlanta Metropolitan Area if any of the addresses were within that area. However, there still may be some firms that have local addresses that were not identified in County data.

Figure B-7.

Location of firms receiving County prime contract and subcontract dollars, 2011-2014

	<b>Procurement dollars (millions)</b>	<b>Percent in Georgia</b>	<b>Percent in Atlanta MSA</b>
Construction	\$ 166	87 %	81 %
Professional services	182	58	57
Goods	133	73	64
Other services	<u>168</u>	72	71
Total	\$ 650	72 %	68 %

Note: Numbers may not add to 100.0% due to rounding.

Source: Keen Independent from County contract records, 2011-2014.

Overall, firms that appeared to meet U.S. SBA small business size standards received 54 percent of County contract dollars from 2011 through 2014. The share going to small businesses was highest for construction (72%) and lowest for goods and other services (47% and 43%, respectively). Figure B-8 shows these results.

After separating subcontract dollars, it is clear that small businesses were awarded most of the County subcontract dollars.

Figure B-8.

Percentage of County contract dollars going to small businesses, 2011-2014

<b>Type of contract</b>	<b>Total dollars (millions)</b>	<b>Percent to small businesses</b>	<b>Prime dollars (millions)</b>	<b>Percent to small businesses</b>	<b>Subcontract dollars (millions)</b>	<b>Percent to small businesses</b>
Construction	\$ 166	72 %	\$ 108	64 %	\$ 59	87 %
Professional services	182	55	140	38	41	78
Goods	133	47	111	49	22	85
Other services	<u>168</u>	43	<u>142</u>	33	<u>26</u>	96
Total	\$ 649	54 %	\$ 500	45 %	\$ 149	86 %

Note: Numbers may not add to 100.0% due to rounding.

Source: Keen Independent from County contract records, 2011-2014.

Each of the subindustries within construction, professional services, goods and other services contracts examined in the study except for water treatment plan operation and maintenance had small business participation.

**Proportion of total contract dollars going to subcontractors.** Keen Independent analyzed the proportion of dollars for different types of County contracts going to subcontractors. To do so, the study team first classified subcontracts according to the type of work for the associated prime contract (for example, a specialty trade construction subcontract for a construction management company was examined under professional services). In dollars, the percentage of County contracts that went to subcontractors identified in County records was:

- 24 percent for construction contracts;
- 30 percent for professional services contracts;
- 8 percent for goods contracts; and
- 25 percent for other services contracts.

There were only 50 subcontracts identified in procurement records for the 169 County goods contracts examined. This demonstrates that relatively fewer County goods contracts might be appropriate for any type of subcontract goals program compared with construction, professional services and other services contracts.



## **APPENDIX C.**

### **Small Business Availability Analysis**

The study team examined the availability of small businesses for Fulton County construction, professional services, goods and other services prime contracts and subcontracts. Keen Independent also analyzed the availability of minority- and women-owned firms for Fulton County contracts. Appendix C discusses the availability methodology and results.

Appendix C describes the study team's utilization data collection processes in five parts:

- A. Purpose of the availability analysis;
- B. General approach to collecting availability information;
- C. Development of the interview instrument;
- D. Businesses included in the availability database; and
- E. Availability interview instrument used in this study.

#### **A. Purpose of the Availability Analysis**

From examining a sample of firms available for Fulton County contracts, Keen Independent was able to assess the industries demonstrating sufficient small business availability for possible inclusion in a small business program.

The study team also developed benchmarks for the percentage of contract dollars that might go to SBEs based on the relative availability of businesses for specific types and sizes of County prime contracts and subcontracts. This information is also relevant for setting overall goals for SBE participation. Keen Independent also performed this availability analysis for minority- and women-owned firms (of all sizes).

## B. General Approach to Collecting Availability Information

The study team performed availability surveys with businesses within the relevant geographic market area (Atlanta Metropolitan Area) to determine small business availability among a broader group of potential bidders.

Keen Independent began by developing a sample of businesses within the relevant geographic market area and industries from Dun & Bradstreet. The study team then developed a telephone interview instrument to be used in the survey. Customer Research International contacted those firms by telephone to identify businesses qualified, willing and able to provide specific types of construction, goods, professional services and other services for the County, as a prime contractor or subcontractor.

Keen Independent used those results to determine “head count” availability of small businesses. The study team then analyzed availability on a contract-by-contract, subcontract-by-subcontract basis, and dollar-weighted the results. Appendix C provides results on this “dollar-weighted” basis as well.

Figure C-1 summarizes characteristics of Keen Independent’s approach to examining availability.

**Dun & Bradstreet Hoover’s database.** Dun & Bradstreet’s Hoover’s affiliate maintains the largest commercially-available database of businesses in the United States. Keen Independent determined the types of work involved in Fulton County contract elements by reviewing prime contract and subcontract dollars that went to different types of businesses during the study period. D&B classifies types of work by 8-digit Standard Industrial Classification (SIC) codes.<sup>1</sup> Figure C-2 identifies the SIC codes the study team determined were the most related to the County contract dollars in the study.

### Figure C-1. Summary of the strengths of Keen Independent’s approach

Compared with some other previous court-reviewed approaches, Keen Independent added several layers of screening to determine which businesses are potentially available for work on Fulton County contracts.

For example, the Keen Independent analysis included discussions with businesses about interest in Fulton County work, which has not been included in some of the previous court-reviewed approaches.

---

<sup>1</sup> D&B has developed 8-digit industry codes to provide more precise definitions of firm specializations than the 4-digit SIC codes or the NAICS codes that the federal government has prepared.

Figure C-2.  
D&B 8-digit SIC codes for availability list source

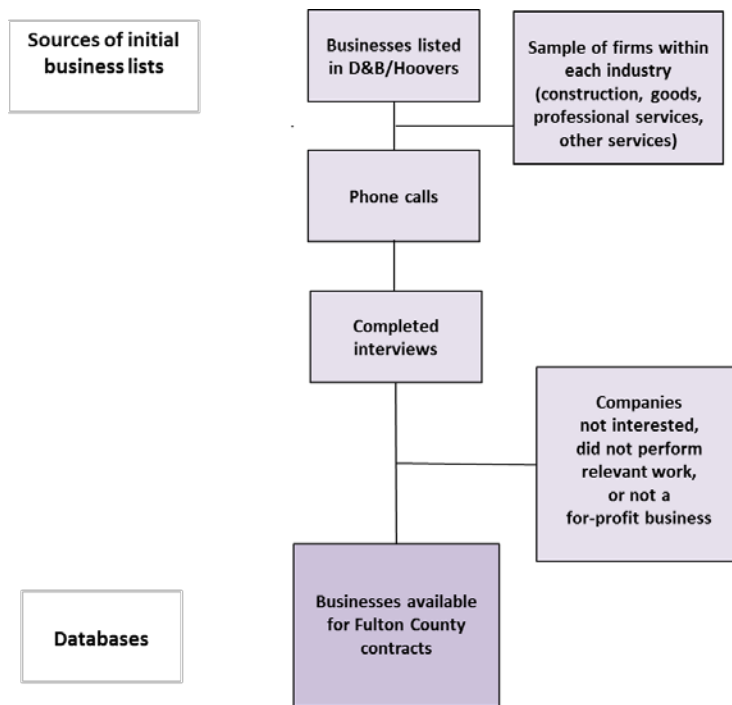
Code	Description	Code	Description	Code	Description
16110205	Resurfacing contractor	15420000	Nonresidential construction	80110100	Internal medicine practitioners
17710301	Blacktop (asphalt) work	16290505	Wastewater and sewage treatment plant construct	80110402	Psychiatrist
17210303	Parking lot construction	16230000	Water, sewer and utility line construction	80490401	Clinical psychologist
17930000	Glass and glazing work	51729902	Fuel oil	80110513	Ophthalmologist
17510000	Carpentry work	51729903	Kerosene	80990100	Blood related health services
17410000	Masonry and other stonework	51729905	Petroleum brokers	87419902	Construction management
17210000	Painting and paper hanging	49240000	Natural gas distribution	87420402	Construction project management consultant
17520000	Floor laying and floor work	50740000	Plumbing and hydronic heating supplies	87440000	Facilities support services
17610000	Roofing, siding and sheet metal work	50750100	HVAC equipment and supplies	49520000	Sewerage systems
17990200	Coating, caulking, weather, water and fireproofin	34910000	Industrial valves	73490100	Building and office cleaning services
17999924	Ornamental metal work	38240117	Water meters	73499902	Cleaning services, industrial or commercial
17410100	Foundation building	51419901	Food brokers	73499903	Maid services, contract or fee
17910000	Structural steel erection	50210100	Office furniture	48120000	Radiotelephone communication
17310000	Electrical work	23260100	Work uniforms	48130000	Telephone communication
17110000	Plumbing and HVAC	23110300	Men's and boy's uniforms	41410000	Local bus charter service
17710000	Concrete work	23379901	Women's and misses uniforms	41110000	Local and suburban transit
17710200	Curb and sidewalk contractors	87110000	Engineering services	41190000	Local passenger transportation
17940000	Excavation work	87120000	Architecture services	73810000	Detective armored car service
17950000	Wrecking and demolition work	73710000	Custom computer programming services	73820000	Security systems service
07810200	Landscape services	73730000	Computer integrated systems design	76990500	Industrial equipment service
07820200	Lawn services	73790200	Computer related consulting services	76990104	Mechanical instrument repair
07829902	Highway lawn and garden maintenance services	87489905	Environmental consultant	76290200	Electrical equipment repair
07829903	Landscape contractors	87310302	Environmental research	76299904	Generator repair
07830100	Planting, pruning and trimming services	80829902	Visiting nurse service	76992501	Elevator inspection, service and repair
07839902	Removal services, bush and tree	83220100	Geriatric social service	76990504	Industrial machinery and equipment repair
15410000	Industrial building and warehouse construction				

**Survey sample.** Keen Independent identified about 30,000 businesses potentially available for Fulton County work within the Atlanta Metropolitan Area using data from the Dun & Bradstreet Hoover's database. The study team then took a random sample of 400 companies per worktype from the D&B database. (If there were fewer than 400 firms in a work type, the study team included the entire list.) From this list, the study team developed a stratified random sample of 800 firms per industry (construction, goods, other services and professional services), ensuring that a representative sample of each worktype was included. The final sample list included 3,200 firms of varying industries and work types.

**Telephone interviews.** Keen Independent retained Customer Research International (CRI) to conduct telephone interviews with listed businesses. CRI has extensive experience performing similar interviews for disparity studies throughout the country. After receiving the list described above, CRI used the following steps to complete telephone interviews with business establishments:

Figure C-3 outlines the process Keen Independent used to complete interviews with large and small businesses possibly available for County work.

Figure C-3.  
Availability interview process



In June of 2015, CRI contacted firms by telephone to ask them to participate in the interviews (identifying Fulton County as the organization requesting the information). Firms indicating over the phone that they were not interested or not involved in County work were not asked to complete the other interview questions.

CRI identified and attempted to interview an available company representative such as the owner, manager or other key official who could provide accurate and detailed responses to the questions included in the interview.

CRI completed 125 interviews per industry, including firms indicating they were not interested in providing information to Fulton County about their company. Keen Independent used those results to determine small business availability within those industries.

### **C. Development of the Interview Instrument**

Keen Independent developed the interview instruments with Fulton County staff review. The final telephone interview instrument is presented at the end of this appendix.

The availability surveys assessed various topics, including:

- Interest in working with the County;
- Primary line(s) of work (based on industry codes);
- Relative bid capacity, as measured by the largest contract or subcontract bid on or performed within the recent past;
- Number of employees; and
- Gross revenue.

### **D. Businesses Included in the Availability Database**

There were 172 business establishments in the final availability database that indicated interest in Fulton County work. As shown in Figure C-4, most of the firms in the final availability database were small businesses (as defined under U.S. Small Business Administration size standards). Small businesses were only 78 percent of the goods firms interviewed. All of the other services firms interviewed in the availability analysis were small businesses.

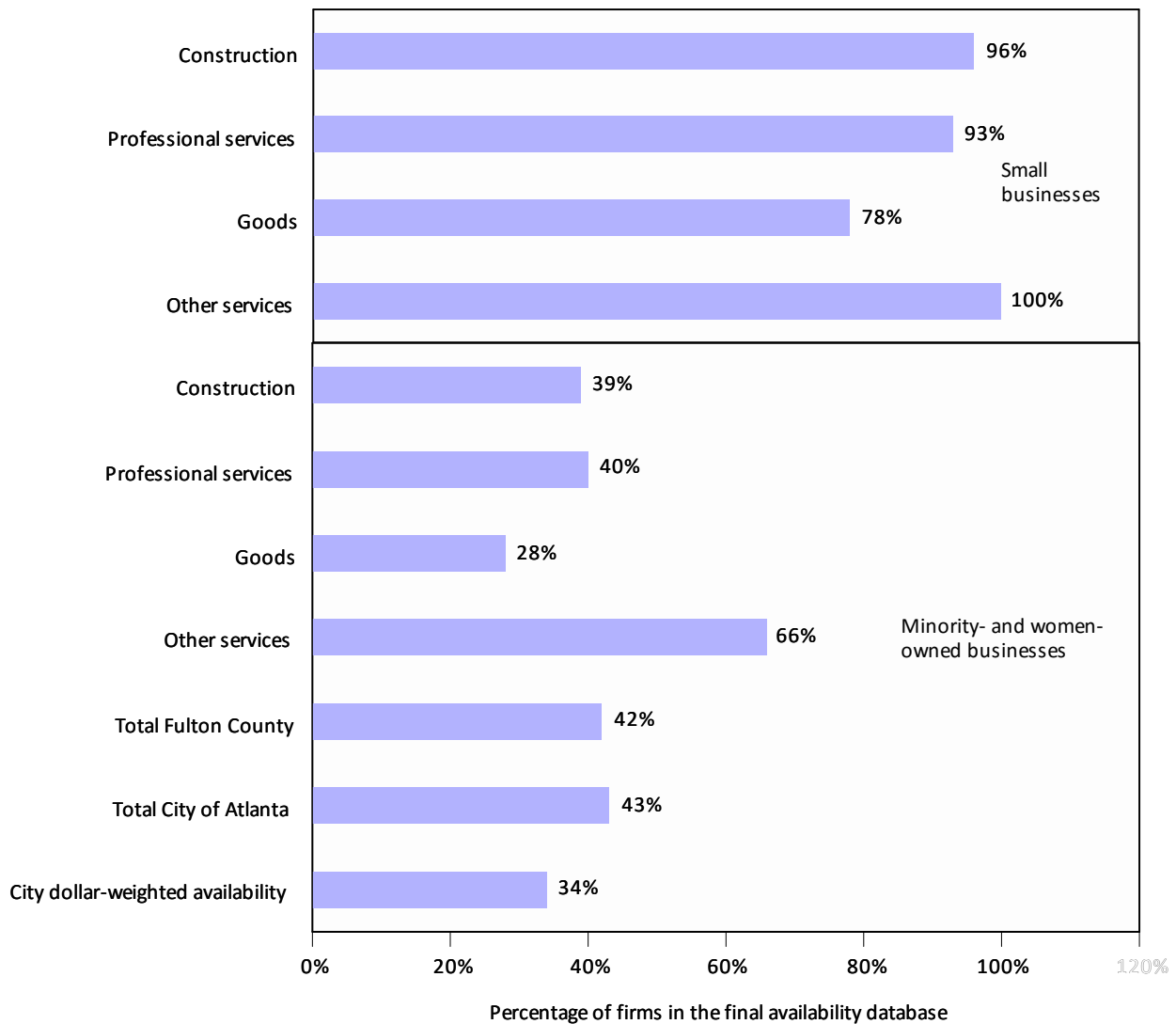
Keen Independent also examined the relative availability of minority- and women-owned firms. Overall, MBE/WBEs, including non-certified firms, were 42 percent of the firms interested in Fulton County work.

Figure C-4 also shows results of a much larger availability analyses from a disparity study Keen Independent recently completed for the City of Atlanta. These results are informative, as the general types of procurements are similar between the two organizations and the relevant geographic market area is the same (the 20-county Atlanta Metropolitan Area). As a percentage of all businesses available for City of Atlanta contracts, 43 percent were minority- and women-owned businesses, about the same results as for Fulton County contracts.

Because of the larger set of availability data for MBEs, WBEs and majority-owned firms compiled in the City of Atlanta study, Keen Independent was also able to conduct a dollar-weighted analysis of availability. In this analysis, Keen Independent determined availability for each City prime contract and subcontract and then dollar-weighted the results. The resulting value, 34 percent, represents the percentage of City contract dollars that might be expected to go to MBE/WBEs if there were a level playing field for those firms when competing for City work.

Due to the limited MBE/WBE availability information for Fulton County, Keen Independent could not perform a similar analysis for County contracts. However, Fulton County might reasonably expect a similar result from a dollar-weighted availability analysis. This might provide the County a rough benchmark to evaluate the percentage of County prime contract and subcontract dollars going to minority- and women-owned firms. A definitive analysis of MBE/WBE availability for the County would require additional research, and the discussion presented here does not constitute a disparity analysis for the County.

Figure C-4.  
Small businesses and minority- and women-owned businesses as a percentage of firms in the final availability database



### E. Availability Interview Instrument

The study team developed a short telephone questionnaire to be used in the survey.

## Fulton County Availability Interview Instrument

Hello. My name is [*interviewer name*]. We are calling on behalf of the Fulton County Purchasing Department. This is not a sales call. Fulton County is researching how many local businesses are interested in providing construction, goods and services to the County, including as a subcontractor.

Who can I speak with to get the information we need from your firm?

[After reaching THE OWNER OR an appropriately senior staff member, the interviewer should re-introduce the purpose of the interview and begin with questions]

[IF NEEDED ... We are contacting hundreds of contractors, services providers, suppliers and other types of businesses in the Atlanta area.]

[IF INTERVIEWEE REQUESTS ADDITIONAL INFORMATION ... You can call Felicia Strong-Whitaker at the County at 404-612-5800.]

[IF ASKED, THE INFORMATION DEVELOPED IN THESE INTERVIEWS WILL ADD TO THE COUNTY'S DATA ON COMPANIES INTERESTED IN WORKING WITH THE COUNTY]

X1. I have a few basic questions about your company and the type of work you do. Can you confirm that this is [*firm name*]?

1=RIGHT COMPANY – SKIP TO A1

2=NOT RIGHT COMPANY – SKIP TO Y1

3=REFUSE TO GIVE INFORMATION – TERMINATE

Y1. Can you give me any information about [*firm name*]?

1=Yes, same owner doing business under a different name – SKIP TO Y4

2=Yes, can give information about named company – SKIP TO Y2

3=Company bought/sold/changed ownership – SKIP TO Y4

4=No, does not have information – END, INTERVIEW COMPLETE

5=Refused to give information – END, INTERVIEW COMPLETE

Y1. ENTER NEW NAME

1=VERBATIM

Y2. Can you give me the phone number of *[firm name]*?

(ENTER UPDATED PHONE OF NAMED COMPANY)

1=VERBATIM

Y3. Can you give me the complete address or city for *[firm name]*?

(NOTE TO INTERVIEWER - RECORD IN THE FOLLOWING FORMAT:

. STREET ADDRESS

. CITY

. STATE

. ZIP)

1=VERBATIM

Y4. And what is the new name of the business that used to be *[firm name]*?

(ENTER UPDATED NAME)

1=VERBATIM

Y5. Can you give me the name of the owner or manager of the new business?

(ENTER UPDATED NAME)

1=VERBATIM

Y6. Can I have a telephone number for them?

(ENTER UPDATED PHONE)

1=VERBATIM

Y7. Can you give me the complete address or city for *[new firm name]*?

1=VERBATIM

Y8. Do you work for this new company?

1=YES - CONTINUE

2=NO – END ... INTERVIEW COMPLETE



## A. Confirmation of Business and Commercial or Public Work

---

A1. Is your company interested in working with the County, providing construction, goods or services to the County, as a prime contractor, vendor or subcontractor?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

A2. [IF NO TO A1] Why not? [ENTER VERBATIM RESPONSE]

A3. Is your firm a business, as opposed to a non-profit organization, a foundation or a government office?

1=Yes

2=No ... END, INTERVIEW COMPLETE

98=(DON'T KNOW)

99=(REFUSED)

A4. Let me also confirm what kind of business this is. The information we have from Dun & Bradstreet indicates that your main line of business is [*SIC Code description*]. Is this correct?

(NOTE TO INTERVIEWER - IF ASKED, DUN & BRADSTREET OR D&B, IS A COMPANY THAT COMPILES BUSINESS INFORMATION THROUGHOUT THE COUNTRY)

1=Yes – SKIP TO A7

2=No

98=(DON'T KNOW)

99=(REFUSED)

A5. What would you say is the main line of business?

(ENTER VERBATIM RESPONSE)

1=VERBATIM

A6. Has your firm done any public sector work in the last four years, including as a subcontractor? [Public sector includes County, City, State or Federal government]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

A7. Has your firm done work with Fulton County in the last four years, including as a subcontractor?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

A8. Is this the sole location for your business, or do you have offices in other locations?

1=Sole location

2=Have other locations

98=(DON'T KNOW)

99=(REFUSED)

A9. Is your company a subsidiary or affiliate of another firm?

1=Independent – SKIP TO B1

2=Subsidiary or affiliate of another firm

98=(DON'T KNOW)

99=(REFUSED)

A10. What is the name of your parent company?

1=ENTER NAME

98=(DON'T KNOW)

99=(REFUSED)

A11. ENTER NAME OF PARENT COMPANY

1=VERBATIM

## B. Ownership

---

B1. My next questions are about the ownership of the business. A business is defined as woman-owned if more than half — that is, 51 percent or more — of the ownership and control is by women. By this definition, is your firm a woman-owned business?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

B2. A business is defined as minority-owned if more than half — that is, 51 percent or more — of the ownership and control is African American, Asian, Hispanic, Native American or another minority group. By this definition, is your firm a minority-owned business?

1=Yes

2=No – SKIP TO C1

3=(OTHER GROUP - SPECIFY)

98=(DON'T KNOW)

99=(REFUSED)

B2. OTHER GROUP - SPECIFY

1=VERBATIM

B3. Would you say that the minority group ownership is mostly African American, Asian-Pacific American, Subcontinent Asian American, Hispanic American, or Native American?

1=African-American (persons having origins in any of the Black racial groups of Africa)

2=Asian Pacific American (persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia(Kampuchea),Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong)

3=Hispanic American (persons of Spanish or Portuguese culture with origins in Mexico, South or Central America or the Caribbean Islands, regardless of race)

4=Native American (American Indians, Eskimos, Aleuts, or Native Hawaiians)

5=Subcontinent Asian American (persons whose Origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka)

6=(OTHER - SPECIFY)

98=(DON'T KNOW)

99=(REFUSED)

## C. Business Background

---

- C1. My next questions pertain to annual averages for your company for 2012 through 2014 [OR JUST YEARS IN BUSINESS IF FORMED AFTER 2012]. Dun & Bradstreet indicates that your company has about [number] employees working out of just your location. Is that an accurate estimate of your company's average employees from 2012 through 2014?

[NOTE TO INTERVIEWER - INCLUDES EMPLOYEES WHO WORK AT THAT LOCATION AND THOSE WHO WORK FROM THAT LOCATION]

1=Yes – SKIP TO C3

2=No

98=(DON'T KNOW)

99=(REFUSED) – SKIP TO C3

- C2. About how many employees did you have working out of just your location, on average, from 2012 through 2014?

(RECORD NUMBER OF EMPLOYEES)

1=NUMERIC (1-999999999)

- C3. Dun & Bradstreet lists the annual gross revenue of your company, just considering your location, to be about [dollar amount]. Is that an accurate estimate for your company's average annual gross revenue from 2012 through 2014? [Or for the years your company was in business if started after 2012].

1=Yes – SKIP TO C5

2=No

98=(DON'T KNOW)

99=(REFUSED) – SKIP TO C5

- C4. Roughly, what was the average annual gross revenue of your company, just considering your location, from 2012 through 2014? Would you say . . . [READ LIST]

1=Up to \$0.5 million

8=\$10.1 million to \$15 million

2=\$0.6 million to \$1 million

9=\$15.1 million to \$24 million

3=\$1.1 million to \$2 million

10=\$24.1 million to \$36.5 million

4=\$2.1 million to \$3 million

11=\$36.6 million or more

5=\$3.1 million to \$5 million

98=(DON'T KNOW)

6=\$5.1 to \$7.5 million

99=(REFUSED)

7=\$7.6 million to \$10 million

C5. [IF ANSWER THAT HAVE OTHER LOCATIONS IN #A5] About how many employees did you have, on average, for all of your locations from 2012 through 2014?

1=(ENTER RESPONSE)

98=(DON'T KNOW)

99=(REFUSED)

C6. [IF ANSWER THAT HAVE OTHER LOCATIONS IN #A5] Roughly, what was the average annual gross revenue of your company for all of your locations from 2012 through 2014? [Or for the years your company was in business if started after 2012] Would you say . . . [READ LIST]

1=Up to \$0.5 million

8=\$10.1 million to \$15 million

2=\$0.6 million to \$1 million

9=\$15.1 million to \$24 million

3=\$1.1 million to \$2 million

10=\$24.1 million to \$36.5 million

4=\$2.1 million to \$3 million

11=\$36.6 million or more

5=\$3.1 million to \$5 million

98=(DON'T KNOW)

6=\$5.1 to \$7.5 million

99=(REFUSED)

7=\$7.6 million to \$10 million

C7. In rough dollar terms, what was the largest contract or subcontract your company was awarded in the Atlanta area from 2012 through 2014?

[NOTE TO INTERVIEWER - INCLUDES CONTRACTS NOT YET COMPLETE- READ CATEGORIES IF NECESSARY]

1=Less than \$100,000

7= \$10 million up to \$20 million

2= \$100,000 up to \$500,000

8= \$20 million up to \$100 million

3= \$500,000 up to \$1 million

9=\$100 million or more

4= \$1 million up to \$2 million

97=(NONE)

5= \$2 million up to \$5 million

98=(DON'T KNOW)

6= \$5 million up to \$10 million

99=(REFUSED)

C8. Was this the largest contract or subcontract that your company bid on or submitted quotes for in the Atlanta area from 2012 through 2014?

1=Yes – SKIP TO D1

2=No

98=(DON'T KNOW) – SKIP TO D1

99=(REFUSED) – SKIP TO D1

C9. What was the largest contract or subcontract that your company bid on or submitted quotes for in the Atlanta area from 2012 through 2014? [NOTE TO INTERVIEWER - INCLUDES CONTRACTS NOT YET COMPLETE- READ CATEGORIES IF NECESSARY]

1=Less than \$100,000

2= \$100,000 up to \$500,000

3= \$500,000 up to \$1 million

4= \$1 million up to \$2 million

5= \$2 million up to \$5 million

6= \$5 million up to \$10 million

7= \$10 million up to \$20 million

8= \$20 million up to \$100 million

9=\$100 million or more

97=(NONE)

98=(DON'T KNOW)

99=(REFUSED)

## D. Interviewee and other Contact Information

---

- D1. We are interested in learning about how companies would find out about County bid or proposal opportunities, including subcontract opportunities. How might you normally find out about them? [Don't ask, record all that apply]
- 1=Fulton County website
  - 2=Fulton County emails
  - 3=Paid bid notification system (email alerts, website, other from private vendors such as BidSync)
  - 4=Newspapers
  - 5=Membership associations
  - 6=Prime contractors
  - 7=Word of mouth
  - 8=Don't currently learn about them
  - 9=(OTHER - SPECIFY)
  - 98=(DON'T KNOW)
  - 99=(REFUSED)
- D2. OTHER - SPECIFY
- 1=VERBATIM
- D3. Fulton County is interested in learning whether there are any barriers to working with the County, particularly for small businesses? Do you have any feedback?
- 1=VERBATIM
- D4. Do you know if you are registered with Fulton County as a potential vendor or contractor to receive County bid notices?
- 1=Yes [Skip to D6]
  - 2=No
  - 98=(DON'T KNOW)
- D5. [If not] I can give you the County's web address to sign up, or send an email to you. [get name and email address, or just tell them that it is [fultoncountygov/fcpcdd-home](http://fultoncountygov/fcpcdd-home)]

- D6. [For all respondents] What is your name and position at [*firm name / new firm name*]?  
 (RECORD FULL NAME)  
 1=VERBATIM
- D7. What is your position?  
 1=Receptionist  
 2=Owner  
 3=Manager  
 4=CFO  
 5=CEO  
 6=Assistant to Owner/CEO  
 7=Sales manager  
 8=Office manager  
 9=President  
 10=(OTHER - SPECIFY)  
 99=(REFUSED)
- D8. OTHER - SPECIFY  
 1=VERBATIM
- D9. What e-mail address could the County use to get any materials to you?  
 1=ENTER E-MAIL  
 97=(NO EMAIL ADDRESS)  
 98=(DON'T KNOW)  
 99=(REFUSED)
- D10. (RECORD EMAIL ADDRESS) (VERIFY ADDRESS LETTER BY LETTER: EXAMPLE: 'John@CRI-RESEARCH.COM' SHOULD BE VERIFIED AS: J-O-H-N-at-C-R-I-hyphen-R-E-S-E-A-R-C-H-dot-com )  
 1=VERBATIM



D11. Would you be willing to participate in a one-hour focus group in the Atlanta area in mid-June? Focus group participants will discuss whether any County practices present barriers for small business participation in County procurement. Different options for small business programs will also be discussed.

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

**End of survey message:** Thank you for your time. This is very helpful for the County.

## **APPENDIX D.**

### **Focus Groups and other Public Input**

As part of the study, Keen Independent conducted qualitative research including from small businesses and others. This appendix:

- A. Explains the qualitative research process
- B. Outlines County procurement practices as background for the small business owner input (includes a case study of a past County professional services RFP);
- C. Examines input from a focus group with small businesses that had experience bidding on County procurements or otherwise working with the County
- D. Reviews input from a focus group with small business that had little to no experience working with the County;
- E. Analyzes input from businesses' comments provided in the telephone availability survey.

#### **A. Qualitative Research Process**

The study team held two focus group sessions with small businesses on June 16 and June 18, 2015 at the Fulton County Department of Purchasing & Contract Compliance office in Atlanta. Nine participants, all who were business owners or senior staff, were in one of two sessions:

- Five participants were in Focus Group 1, having had experience working with Fulton County Department of Purchasing & Contract Compliance or a similar public agency; and
- Four were in Focus Group 2, having had no such contracting experience.

The focus group participants, recruited by TCG Consulting, included representatives from local area minority- (3) and women-owned firms (2), and veteran-owned (1) and majority owned (3) firms. All firms were small businesses. TCG Consulting facilitated both discussions.

At each focus group, TCG Consulting introduced the study and explained the typical components of a focus group. Moderators encouraged focus group participants to speak candidly and discuss what about the study was important to their businesses. Each focus group spanned about two and a half hours. Questions focused on:

- Current County practices and potential barriers for small business participation in County procurement; and
- Options for small business programs and certification criteria.

Keen Independent also collected and analyzed input from the following open-ended question in the availability telephone interviews:

*“Fulton County is interested in learning whether there are any barriers to working with the County, particularly for small businesses. Do you have any feedback?”*

Keen Independent discusses input from the availability telephone interviews this appendix.

Availability telephone interviews included input on certification, bidding, securing work, perceived corruption and reliance on a “good ol’ boy” network, and payment. Keen Independent also analyzed input on ways respondents learn about County bid or proposal opportunities.

## **B. Background on County Procurement Practices**

Background on Fulton County procurement practices provides some context when examining small business owners.

**Bid opportunities.** The County lists all bid opportunities on its webpage at <http://fultoncountyga.gov/county/bidss/>. There are links to all current projects, bids, RFPs, sole source and quotes, in addition to projects that have been awarded, cancelled or are under review. Firms can download requests for quotes, bids and RFPs and related documents. Companies can also view tab sheets, recommendations and awards. The site also provides links to subcontracting opportunities on the Library project.

Vendors register in the Vendor Self Service (VSS) system select commodity codes for goods or services they provide. They then automatically receive email notifications when the County is seeking bids for those goods or services. Vendors can respond to open quotes online and keep track of their own quotes.

**Online bidding.** The Department of Purchasing & Contract Compliance only accepts electronic responses to requests for quotes and invitations to bid for commodities (ITBCs) using its VSS system. A firm must be a registered vendor in order to respond to quotes or ITBCs.

**No contact policy.** Fulton County has a no contact policy governing communications between potential bidders and County staff or officials. It prohibits any person or firm that obtains a copy of a solicitation or is responding to a solicitation to have verbal or written communication regarding the solicitation with the County except as provided for in the solicitation. In general, this means that the County staff person responsible for the procurement is the individual who can answer questions, and does so via written communication.

**Vendor training.** The Department of Purchasing and Contract Compliance offers free one-on-one technical assistance regarding insurance and bonding, and access to all the tools and training necessary to secure a first time bond and to increase current bonding capacity.

In 2016, the Department will provide “hands-on” vendor training workshops on a monthly basis. Different training sessions include:

- Vendor orientation;
- Vendor on-line bidding;
- Requests for proposals; and
- Bonding and insurance assistance.

**Case study of a County procurement.** Also as context for small business owners’ comments, Keen Independent conducted a review of the difficulty of responding to a typical bid or proposal opportunity with the County. County staff also requested this review and agreed that the RFP for this Small Business Market Availability Study might provide a case study. (Keen Independent is a small business and had not previously participated in a Fulton County procurement process.)

- The RFP was 111 pages long and Keen Independent’s response was more than 80 pages long.
- In addition to the technical and price proposal, the submission required completing 29 different County procurement forms or exhibits, some of which required notarized signatures. Subcontractors were required to complete several of these forms. It also included certificates of insurance for workers compensation, general liability, automobile liability and professional liability, a State of Georgia Certificate of Authority, and other forms regarding acknowledgement of addendums and insurance and risk management provisions. Other types of forms are sometimes required (e.g., Georgia utility license number and professional license), but did not apply to the procurement.
- The County required a hard copy submission and six copies of CDs of the technical proposal as well as hard copies of forms, exhibits, financial information and the cost proposal.
- The required financial information included company balance sheets; the firm’s most recent credit report; from a financial institution, evidence of access to a line or letter of credit; and a sworn, notarized statement that the firm has not filed petitions for federal bankruptcy or state insolvency.

The principal author of this Small Business Study has reviewed more than 1,000 state and local government RFPs for similar types of professional services assignments and has helped local governments develop procurement policies and procedures. In his experience, the case study of a Fulton County RFP described above would place the County as high in terms of difficulty of response placed on the potential proposer for a similar size and type of professional services procurement. Other aspects of the process were similar to other state and local governments.

- The County’s requirements for a technical proposal and cost proposal were very similar to other local and state governments.

- The amount of time the County provided to respond to the RFP was also typical.
- Requirements for the technical and cost proposals were clear and straightforward.
- Evaluation criteria clearly explained in the RFP were typical of other public agencies.
- The no unauthorized contact policy during the procurement process except as authorized in the RFP was typical of other government agencies.
- Many public agencies are not requiring as many hard copies as required by the County (or any hard copies at all). The request for multiple CDs with electronic copies of the report is also becoming unusual. Many local and state governments are now requiring one electronic submission via email electronic bidding system.
- The amount of forms, exhibits and other documentation and the difficulty in completing and submitting that information were what made responding to the County unusually burdensome, especially for a small business.

This case study provides additional context for comments of small business owners analyzed in this appendix.

### **C. Input from Focus Group 1: Small Businesses with County Experience**

Focus Group 1 participants had experience working as prime contractors or subcontractors with Fulton County or similar public agencies. A mix of business types was included in the focus group.

**Type of certification.** Focus group participants discussed their firms’ certifications and motivations for securing those certifications.

- A male focus group participant reported working for a woman-owned firm having WBE and FBE certification. He indicated not knowing if certification has helped the firm, but it has not hurt the firm.
- A veteran business owner stated that his only advantage is his veteran-owned business status. He reported that there are two types of veteran-owned businesses: veteran-owned and service disabled veteran-owned. He commented that a firm can self-certify across federal agencies and many states.
- Another male participant responded that his firm is woman-owned. He indicated that WBE/FBE certification increases contract and networking opportunities, as certification is a benefit to those who value it. He concluded, however, that certification does not necessarily benefit this firm.

**Doing business with Fulton County.** TCG Consulting asked each focus group participant to rank (from “1” lowest to “10” highest) his or her experience with the County process. The participants’ overall ranking of the process was roughly “7.”

When asked about the scores the participants gave the Fulton County process, one male participant reported not knowing how to “actually set up” to bid on a contract. He explained, “It’s somewhat discouraging, but every county is that way.”

- A male participant, having experience working with Fulton County, indicated that the County approached him for emergency work. It was simple to get the contract, as there was no formal bidding process employed by the County.
- Another experienced participant added that his firm does not have to bid projects with the County and “it seems fine.” He reported that, to secure work, his firm relies on relationships and outreach with the County. He added that he gave the county a score of “7,” because his experience is “not exceptional and it’s not bad — it’s just average.” The same participant commented that one representative of Fulton County helps small businesses explore opportunities within the County.
- A minority male participant indicated that the work his firm performs with Fulton County is in response to RFPs. He indicated that the RFP defines the bidding process. When asked if he had ever been unsuccessful when bidding a contract with the County, this focus group participant reported repeated success and no failures.

When asked if Fulton County’s procurement process was supportive of local business or small businesses, focus group participants reported barriers such as accessing information, receiving “boilerplate” RFPs and poor communications from Fulton County. One commented that large businesses have little incentive to include small businesses on County contracts.

- “Most of us don’t know how to work the system.”
- “Fulton County used to do surveys when business opportunities became available. I haven’t seen it happen in a while.”
- “Sometimes the RFPs seem to be ‘boilerplate’ and they’ll include things that aren’t relevant to scope of work, like bonding requirements.”
- A participant who provides supplies to Fulton County commented that if he could change one thing with the county it would be to make it easier to have discussions with County departments. He stated, “For us, personally, it is answer the phone so we can do business with you.”
- “Fulton’s program is ‘kinda’ watered down. Majority firms don’t have an incentive to work with small companies. There are no teeth to the program ... we just recently lost a bid — an RFP, specifically — against [a large firm] .... The large firm didn’t have any partners, and their bid was \$400,000 higher than ours [was]. And they won it.”
- A minority business owner reported concerns that certification is helpful except in Fulton County, explaining that this is a “thorn in his side.”

**How Fulton County compares with other public agencies.** When asked how other public agencies compare to Fulton County:

- A participant responded that they are all the same. However, he added that when he had a very short time to meet a certain deadline, a representative from Fulton County was helpful “walking him through the paperwork.” When asked if relationships like these are important, he responded that they are “very important.”
- Another male participant reported that although the quality of each agency’s website varies, Fulton County’s website is easier to navigate than other agency websites.
- One focus group participant from a construction firm indicated having done work for a nearby county that had a bid process that was not online. He reported liking “the old way” as “it was more personal.”
- A male minority participant commented that Fulton County’s programs work against small businesses. He indicated a need for change, adding that in Fulton County, primes receive points for being local, but not when using local subcontractors.

**Barriers to working with public agencies.** Perceived barriers ranged from meeting bonding requirements (reported as number 1) to “working the system.” Some of these barriers were specific to Fulton County.

**Bidding.** Some discussed their frustrations with the bidding processes.

- One participant remarked that his construction firm is used to writing specifications. He commented that, at times, specifications written by less experienced individuals are a barrier. He explained that terminology in the field and in the office are not the same. “The little joke out in the contracting world is that if you got the job, you screwed up something.”
- A minority male participant commented that RFPs are “cut and pasted boilerplates from different RFPs” with incorrect information included. For example, he reported that bonding requirements are included in RFPs for consulting contracts that do not require bonding.

**Timely information.** A minority male representative of a small business indicated that a barrier to working with public agencies is accessing timely information. He stated, “Receiving timely information and access to information is a barrier to participation.”

**Bonding.** When working with public agencies, another focus group participant indicated that his firm has trouble bonding for public agency work. He reported bonding as difficult to obtain and costly.

**Registration and certification.** Participants discussed their opinions of Fulton County’s and others’ registration and certification processes. Some reported difficulty or changes that made the process less user-friendly. One reported that the process gets easier each time.

- “It’s just hard to figure out the procurement process online.”
- “[The process] is in place to benefit the County workers. They want to make it so that we can understand, but if you have more process in place, then you actually have to figure out what that process is.”
- “The vendor registration process has been fine, but there were changes to the EEV numbers and now we have to get new EEV numbers ... there was no communication about the change in the law.”
- “It’s the attitude; once you get over the paperwork for government work, it’s not too bad .... You’ve got to be willing to sit through and ask a bunch of questions.”
- “The more you do it, the easier it becomes.”

Some indicated that some counties have easier, simpler registration processes. For example:

- “Smaller counties have an easier process because they have less volume.”
- “Non-metro counties have a much simpler process.”

When asked about the value of certification, a number of focus group participants mentioned benefits; others reported few or no benefits. For example a minority business representative reported “access and opportunity” as a benefit to certification. Another minority small business representative added that when working as a subcontractor, knowledge passes down from the larger firm.

- “We utilize certification for more than 50 percent of the opportunities we pursue.”
- “I can’t say certification has helped us, but it definitely hasn’t hurt us.”
- Certification is of value until you come to Fulton County ... no support of local businesses.”

**Small business programs.** Focus group participants were asked for their input on small business programs. They reported a need for inclusive, fair, streamlined protocols including reciprocity with other small business programs. They began by defining what it means to be a small business.

- For one focus group participant, small business is about “revenue and number of employees.” Another agreed.



- A minority male focus group participant discussed DeKalb County’s definition for small business enterprise. In construction, a firm cannot go over an average of \$3,000,000 revenue in the past two years. In professional services, it is \$2,500,000 in the last two years and it is \$1,000,000 for supply firms. His firm no longer qualifies as a local SBE in DeKalb County; however, he “mentors” SBEs by acting as a second tier sub. This enables the SBE firm to go after subcontracts that they could not perform alone.
- Another focus group participant commented that the federal government defines small businesses by NAICS codes. He gave the example that by one NAICS code, a firm averaging \$4,500,000 in revenue is a small business. That recently changed to \$15,000,000. “It’s just like a bomb has exploded.” He remarked, “There is no way in this world that averaging over three years, \$15 million dollars in revenue, is a small business. I’m writing a proposal right now, and my heart is not in it because I think I’m ‘gonna’ get trampled.”

The same participant commented that the Department of Energy uses headcount to define a small business. It considers a business with fewer than 500 employees a small business. He commented that it is easy to determine revenue from tax returns, but employee headcount is difficult to determine with any certainty.

- One participant pointed out that city programs and federal programs have different requirements than counties. He added that the Federal DBE Program has an entirely different set of requirements.
- Focus group participants suggested that small business revenue should be between \$500,000 and \$1,000,000 and up to \$5,000,000. A minority participant suggested that revenue limits might differ by industry.

**Importance of a small business programs for Fulton County.** Focus group participants discussed the value of small business programs. Some commented on ways to improve them.

- A male participant commented that he does not know how any entrepreneur would get started without small business programs. He added that bonding, insurance and other factors are a challenge for small businesses without the benefit of a small business program.
- When asked why a small business program is important to Fulton County, one participant responded that if the overall mission of a small business program is to create jobs, small businesses create many more jobs than large businesses.
- One reported that small business programs keep taxpayer dollars within the county. “Then you have an incentive [for large businesses] — we’re not ‘gonna’ win this bid if we don’t involve somebody as a sub, and then at least the sub is getting some portion ... and when the sub gets it, Fulton County gets it.”

**Other small business programs.** The focus group participants reported experiences with other small business programs. One stated that at the federal and state level, sub-par staff administers the programs. He explained that when meeting with small business staff at federal or state governments, assistance is repetitive and largely ineffective.

However, another participant commented that on the federal level, small business programs offer ombudsman and direct outreach. This same participant reported that at the county level, programs tend to focus on monitoring rather than outreach.

**Suggestions for Fulton County.** Focus group participants gave their recommendations for the optimal small business program for Fulton County. Focus group participants identified the need for highly trained, focused staff. Other recommendations spanned from programming to incentives.

- Focus group participants indicated that the optimal small business program employed passionate, focused staff with excellent customer service skills (perhaps a former small business owner), and made navigation of the certification process “short and simple.”
- Another participant added that when developing a small business program, leadership should create a strategic plan to inform staff of the mission of the program.
- A minority participant reported a need for reciprocity of certification with other government entities granting small business certification.
- One minority focus group participant suggested that Fulton County replicate the Atlanta program demographic fairness; he explained that the City of Atlanta combines a race-conscious program with race-neutral programming like SBE.
- Another minority business owner suggested that a small business program should be reflective of the demographics indicating that most programs should be race-neutral. One focus group participant suggested that quality of work be a benchmark for small business certification.
- Another participant recommended a point system for incentivizing utilization of local subcontractors.
- Some suggested relaxing unnecessarily restrictive retainage requirements for earlier payment.
- Focus group participants summarized the most important supportive services: financial (including expanding access to capital) and bonding assistance, training and business development assistance, set-asides, and proactive outreach and vendor expos. They also suggested the need to incentivize mentor-protégé relationships, highlighting State of Georgia as a good model.

## D. Input from Focus Group 2: Small Businesses without County Experience

Focus Group 2 participants reported no experience working with Fulton County or similar public agencies.

**Type of certification.** Focus group participants discussed their firms' certifications and motivations for becoming certified. Some reported advantages; others reported limited benefits.

- One focus group participant commented that certification is not important for his firm.
- Another participant indicated that certification adds value to a business. He remarked that the County awards contracts to MBEs and FBEs, without regard to price.
- A female focus group participant responded that her firm held minority- and woman-owned certification. As a result, she received emails for potential bidding opportunities, but she said that certifications were not that valuable for her firm.
- Another female participant remarked that the firm holds minority- and woman-owned certifications. She commented that in her industry, certifications add limited value. She concluded that only construction firms receive benefits from certifying.
- When asked why her firm applied for certification, a minority female business owner responded that the firm expected greater opportunity. Since certifying she has learned that the category of services offered by a business is “what counts.”
- A male participant reported that when doing government work, veteran-owned status is important. He added that city and county work in the south is “pretty much ‘good ol’ boy.’”

**Doing business with public agencies.** Although no focus group participants reported working with Fulton County, some reported their knowledge of or experiences with other public agencies.

- A minority- and woman-business owner reported being a subcontractor at the City of Atlanta airport. She conveyed that the prime contractor on the job changed her contract award; the City allowed him to do so. She commented, “They [Atlanta] do things for their conveniences.” She added, “They [Atlanta] are in control of the process, so they do what they want.”
- Another minority woman reported trying to secure an airport contract and being unable to do so.
- One business owner reported having knowledge that the City of Atlanta bought a water pump from a high bidder rather than purchasing it from the low bidder who had priced the same pump significantly lower. He concluded that being the lowest bidder is not a guarantee of work.

**How Fulton County compares with other public agencies.** One focus group participant reported that most public agencies are similar in their administration of procurement programs. Some suggested that Fulton County should be more locally focused.

**Barriers to working with public agencies.** The participants discussed barriers to doing business with public agencies including Fulton County.

**Bidding.** All focus group participants reported failed attempts to work with Fulton County when asked if they had ever tried to work for the County.

- One participant responded that he had attempted to work with the County, but found no relevant work. He added that consulting services are a more difficult sell to the County (i.e., more challenging a sell than a vendor might encounter).
- A minority female business owner commented that when the County releases RFPs, they do not relate to her line of work.
- Another minority female business owner reported that she tried to work with the County in the early 2000s. She said that she bid a contract believing she had a chance to win. After not receiving any bid results, she concluded that she had no opportunity and, more importantly, could not learn from the loss.

**Timely information.** A focus group participant remarked that his firm registered with Fulton County, but does not have a password to access the website. This barrier prevented him from finding timely bidding information.

Focus group participants reported wanting regular “push” notices of opportunities emailed by category or industry. Some wanted more information of preferred bidders lists.

**Bonding.** A male focus group participant reported that the Veteran’s Affairs office has goals-based projects. He indicated that his firm would like to take advantage of that work; however, it would need to provide a bond for his firm and any minority subcontractors.

**Registration and certification.** Some focus group participants who had certified their companies reported the process as “not difficult.” Others reported that it was.

- One woman reported the experience as a “challenge.” This focus group participant feared repeating the process.
- Another reported trial and error when navigating “the system.”
- One focus group participant described registration and certification as follows, “It’s like beating your head against the wall!”

**Relationships.** The focus group participants agreed that they encounter pre-established relationships that create barriers to their working with local governments. For example when asked to describe any concerns about implementing a small business program, one business owner answered, “... the ‘good ol’ boy’ network!”

**Small business programs.** Focus group participants reported staff count, business revenue and location as factors for qualifying as a small business. Industry context also played a part in defining eligibility parameters for a small business program.

- A female business owner reported that revenue and staff size should define whether a firm qualifies as a small business. She offered that a system of industry-specific tiers, for size and revenue, would be helpful in defining small businesses. In her industry, for example, a small business' revenue would be less than \$1,000,000.
- A male participant, whose business is a local branch of a larger corporation, indicated that his type of business should qualify as a small business. He stated the importance of including a geographical indicator as small businesses pay local taxes and employ local staff. He suggested “fewer than 30 employees” as a size limit. By industry standards, his business (with revenue of \$2,000,000) qualifies as a small business.
- A minority female business owner reported that in her industry, a small business determination would include fewer than ten employees. A male participant in the consulting services industry remarked that no more than two or three employees and under \$200,000 revenue would define a small business.

**Importance of a small business programs for Fulton County.** Focus group participants discussed the value of small business programs. Some commented on ways to improve them.

- One male participant reported “community support” as the primary value of a Fulton County small business program. He indicated that a small business program supports local employment and returns tax dollars to the community.
- Another male participant indicated that a small business program could save the County money. He reported that small businesses typically have low overhead and billable rates when compared with larger firms in their industry. Agreeing, two owners of minority- and women-owned businesses commented that keeping money in Fulton County is a benefit of a small business program.
- One reported the importance of mentor-protégé programs and high standards for vetting small businesses.
- A focus group participant reported a need for scrutiny including avoidance of a “good ol’ boy” network.
- By consensus, the top three goals of a small business program were: (a) encourage establishment and growth of local businesses, (b) keep money in the County, and (c) support the local community. Focus group participants also encouraged a spread of contract dollars across many industries, and trained personnel designated for program administration.

**Other small business programs.** One participant named Columbus, Georgia as a good example of a local small business program. He reported that small business programs encourage local business participation, explaining that non-local, large “low-price leaders” force closures of small local businesses when they open in a community.

**Suggestions for Fulton County.** Focus group participants answered how Fulton County could help small businesses.

- One participant encouraged the County to make information easily accessible.
- Another participant reported a need for credit and bonding assistance.
- Education and resources were important to a female minority business owner. She reported a need for the County to help small businesses access capital, and secure tax incentives that encourage hiring and training of dislocated or disabled workers. She added that offering business operations and contract training is also important.
- A representative of a minority- and woman-owned business remarked that a small business program must specialize in serving small businesses, not just collecting data.
- One focus group participant suggested that the County employ an “auditor general” to provide program oversight. He added that small business political contributions should be limited.

## **E. Input from Availability Telephone Interviews**

The study team obtained input about availability for County work from 172 businesses as part of the availability analysis completed in this study. One question was as follows:

*“Fulton County is interested in learning whether there are any barriers to working with the County, particularly for small businesses. Do you have any feedback?”*

The majority of availability telephone interview respondents gave no response or answered, “No,” “None,” “No difficulties,” “No barriers,” “Nothing,” or other similar comments. A number of other availability interview respondents reported issues with certification, bidding, securing work, corruption and reliance on a “good ol’ boy” network, or delayed payment. One reported difficulty getting through to Fulton County staff by phone: “The people I deal with, it’s hard to get hold of a person on the phone so you have to be persistent.”

**Certification.** One respondent reported difficulty with the certification process: “The certification process is very cumbersome for the County.”

Another said: “The ... certification process has been a barrier; the time it takes to get certified along with the number of documents needed is overwhelming.”

**Bidding.** Some respondents who provided responses to this question reported difficulty finding out about bidding opportunities.

- “Finding out about contracts out for bid; I don’t know how that works.”
- “It is difficult; I don’t hear about many bids; minority firms seem to have an advantage with counties.”
- “We want more access to see how we can get more work.”

When bidding on projects or conducting work, some respondents indicated time and paperwork as barriers.

- “I find working with public agencies very time consuming.”
- “[The] ‘PO’ [purchase order] process is really difficult for the managers that have to produce the work orders ... there’s only one person who can produce those ‘POs’ and we can’t bill without those ....”
- “The bidding process can be difficult (reading blueprints); [for example,] the architect could do a better job explaining what needs to be painted and what materials to use ....”

**Securing work.** A few reported challenges securing contracts with Fulton County.

- “Difficulty finding work if you’re not a male-owned business.”
- “It is difficult to get a contract with Fulton County for my company.”
- “[Have] to be bonded to be qualified to work with them [Fulton County].”
- “Outfitted by larger companies with bigger workforce.”
- “Stop letting big business in first.”

Some availability telephone interviewees reported no attempt to work with Fulton County, or never having had any success finding work with the County.

- “... I have never tried for any contract ....”
- “We have never done anything with the County.”
- “We have had very little success in getting jobs because we are not a minority-owned business.”

A few reported limited incentives for working with minority-owned businesses, or set-asides affecting their ability to work with Fulton County.

- “No incentives for large companies to partner with minority business due to the lack of evaluation points for large firms at the prime level.”
- “Sometimes the requirements are too stringent; I’m a small business and they require me to give 30 [percent] of my workload to a minority firm; the other minority company would probably be my competitor.”
- “Things are set aside for small businesses; restricts us sometimes.”

For one, location is a barrier to doing work with Fulton County: “Biggest challenge for Fulton County is the location; there are a lot of restrictions.”

**Perceived corruption and reliance on a “good ol’ boy” network.** For some, perceived corruption is an issue including reliance on a “good ol’ boy” network.

- “I [feel] they [Fulton County] are corrupt; using hand-outs to certain businesses.”
- “Yes, working with any of the local counties, too much corruption. Not like real businesses; too much reliance on the ‘good ole boy’ network.”

**Delayed payments.** A number reported issues with delayed payments.

- “It takes a long time for them [Fulton County] to pay.”
- “Don’t pay on time.”
- “They [Fulton County] take forever to pay.”
- “Only drawback is that we have problems getting paid in less than 90 days; we can hold for 60 but after that it is [a] problem for our cash flow.”

**County bid or proposal opportunities, including subcontract opportunities.** Availability telephone interview respondents also answered the following question:

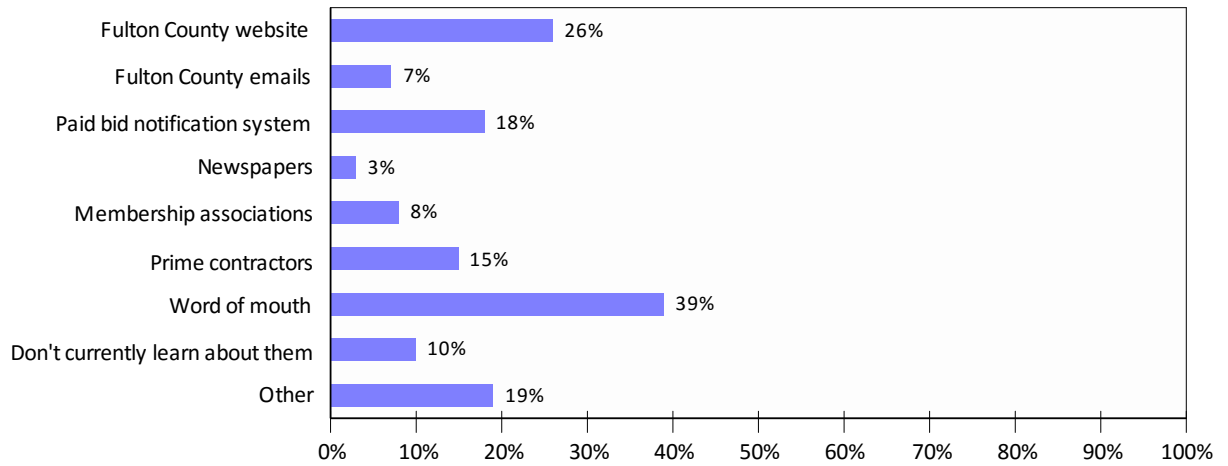
*“We are interested in learning about how companies would find out about County bid or proposal opportunities, including subcontract opportunities. How might you normally find out about them?”*

Figure D-1 on the next page demonstrates that nearly 40 percent of availability interview respondents reported “word of mouth” as the way they normally find out about County bid or proposal opportunities, including subcontract opportunities.

About one-quarter mentioned the Fulton County website as a source. About one-fifth find out about opportunities through “paid bid notification” and a nearly equal amount reported “other” sources. Fifteen percent responded “prime contractor” as a source. Only 3 percent said that they identified County bid or proposal opportunities, including subcontract opportunities, through the newspaper.



Figure D-1.  
How companies find out about County bid or proposal opportunities.



Source: Keen Independent from 2015 Availability Telephone Interviews.

## APPENDIX E.

### Small Business Element of the Federal DBE Program

The Federal DBE Program applies to contracts using funds provided to state and local governments by the U.S. Department of Transportation (USDOT).

Fulton County has highway and road-related contracts using Federal Highway Administration funds that are administered through the Georgia Department of Transportation (GDOT). Therefore, GDOT's operation of the Federal DBE Program applies to those contracts.

Fulton County also directly receives funds related to airport operations from the Federal Aviation Administration (FAA). Because it directly receives FAA funds, the County must develop its own plan to implement the Federal DBE program on FAA-funded contracts. The Federal DBE Program requires agencies such as the County to develop a small business component. "You must actively implement your program elements to foster small business participation. Doing so is a requirement of good faith implementation of your DBE program."

Your DBE program must include an element to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors. (49 CFR Section 26.39)

Under the federal regulations small business program measures may include, but are not limited to, the following:

1. Establishing a race-neutral small business set-aside for prime contracts under a stated amount (*e.g.*, \$1 million).
2. In multi-year design-build contracts or other large contracts (*e.g.*, for "megaprojects") requiring bidders on the prime contract to specify elements of the contract or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform.
3. On prime contracts not having DBE contract goals, requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved.
4. Identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures consisting of small businesses, including DBEs, to compete for and perform prime contracts.

5. To meet the portion of your overall goal you project to meet through race-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform.

Use of SBE contract goals might be another part of an agency's small business program, however, agencies do not typically combined DBE and SBE goals on the same contract.

## APPENDIX F.

### Examples of Small Business Programs

Keen Independent examined examples of city and county small business programs from Georgia and other states. These programs may be named Local Small Business Enterprise (LSBE) or Emerging Small Business (ESB) programs as well as Small Business Enterprise (SBE) programs. Appendix F focuses on the following representative programs:

- The Atlanta Metropolitan Area (City of Atlanta, DeKalb County, and Clayton County);
- Large metropolitan counties across the country (Los Angeles County, San Francisco and Broward County); and
- Cities where the study team had some experience with the program (City of Portland, Oregon, City of Madison and New York City).

Keen Independent examined program structure, eligibility for the program and certification approaches.

#### Program Structure

Small business programs for procurement typically incorporate the following means to encourage SBE participation:

- **SBE contract goals**, where a prime contractor must meet the SBE goal with SBE subcontractors, or show good faith efforts to do so (City of Atlanta, DeKalb County and Clayton County each have this feature).
- **Bid preference or preference points**. DeKalb County, Los Angeles County, San Francisco and Broward County have bid preferences and Clayton County has preference points. Under these programs, a small business that is not the low bidder can still be awarded a procurement if its bid is within a certain percentage of the low bid. Preference points systems apply to professional services and other procurements that evaluate qualifications (in whole or in part) to determine awards. Proposals from small businesses are awarded a certain number of points for SBE status in those evaluations.
- **Sheltered market**, where the local government can solicit bids for certain procurements (sometimes below a certain dollar level) solely from small businesses (City of Atlanta has this provision, as does the City and County of San Francisco, Broward County and City of Portland).
- **Required solicitation for bids**. Agencies with this program element require that SBEs certified with the organization receive bid solicitations (City of Atlanta has this provision).

- **Business assistance.** Some SBE programs include technical assistance, mentor-protégé programs and other business development components.

**SBE contract goals.** SBE contract goals programs typically require that a specified percentage of the dollars of an overall contract go to SBEs. In some cases, the program requirements can be met if the prime contractor is an SBE.

Agencies such as DeKalb County set a uniform percentage requirement on any contract subject to the program (20 percent in the case of DeKalb County).

Other jurisdictions set goals for each contract after examining the subcontracting opportunities for that contract, availability of SBEs for those opportunities and any other unique attributes of the contract. The City of Atlanta's SBE program will be implemented in that fashion beginning in 2016. This process is similar to how any other state or local government (including Fulton County) is required to set DBE contract goals under the Federal DBE Program.

Jurisdictions implementing SBE contract goals programs must have a compliance function in place to monitor actual participation of the SBEs on each goals contract. Prime contractors are typically required to submit monthly SBE utilization reports to the jurisdiction. Documentation of payment may include verification of payment.

SBE contract goals programs also need a substitution provision to allow prime contractors to remove a listed SBE from the project and substitute another SBE or expand work of SBEs already on the project in order to meet the overall SBE goal.

In sum, agencies need contract provisions pertaining to compliance with the SBE contract goals program and remedies and penalties for non-compliance. Bidders and end user departments at a city or county must also be educated about all aspects of SBE program compliance.

**Preferences.** Under a bid preference program, certified SBEs are awarded a bid if they are within a certain percentage of the low-priced non-SBE bidder. Price preferences are typically a few percentage points.

For qualifications-based awards, SBE preference programs award points to SBE proposers (for example 5 points out of 100.)

**Sheltered market programs.** Only SBEs are solicited for bids for certain types of procurements under an SBE sheltered market program.

**Required solicitation for bid.** This program element ensures that SBEs are among the firms receiving notices of or solicited for bids or proposals.

Figure F-1 summarizes program structures for each of the nine SBE programs examined in this appendix.

Figure F-1. Summary of program structure for SBE program examples

Jurisdiction	Contract goals	Bid preference	Preference points	Sheltered market	Required solicitation	Eligible contracts
<b>City of Atlanta, GA</b> Small Business Enterprise (SBE) Program	Yes	No	No	Yes	Yes	All
<b>DeKalb County, GA</b> Local Small Business Enterprise (LSBE) Program	Yes	Yes	No	No	No	All
<b>Clayton County, GA</b> Small Local Business Enterprise (SLBE) Program	Yes	No	Yes	No	No	All
<b>Los Angeles County, CA</b> Local Small Business Enterprise Preference	No	Yes	No	No	No	All City contracts
<b>San Francisco, CA</b> Local Business Enterprise Program	No	Yes	No	Yes	No	All City/County contracts
<b>Broward County, FL</b> Small Business/County Business Enterprise	Yes	No	No	Yes	No	All projects < \$250,000
<b>City of Portland, OR</b> Emerging Small Business Program	No	No	No	No	No	Construction and Professional services
<b>City of Madison, WI</b> Public Works SBE Program	Yes	No	No	No	No	Construction > \$100,000
<b>New York City, NY</b> Locally Based Enterprise Program	Yes	No	No	No	No	Construction and Professional services

## Eligibility for the Program

Firms must be under a certain size to participate in an SBE program, and other criteria often apply.

**Size standards.** Both the City of Atlanta and the Clayton County programs use U.S. Small Business Administration (SBA) size standards for defining small business status. Businesses as large as \$36.5 million in annual revenue can participate depending on their primary line of work. More typical SBA size limits for subindustries are in the range of \$7.5 to \$15 million. San Francisco uses SBE size standards as well, but has separate certifications for micro businesses (e.g., \$7 million for general construction) and for “small” businesses (e.g., \$14 million for general construction).

Other agencies use lower size standards. DeKalb County has one of the lowest size standards: \$3 million for construction, \$2 million for professional services and \$1 million for suppliers. Broward County uses similar size limits, with an even lower limit for professional services (\$0.5 million).

**Size limits specific to primary line of business.** Any small business program using U.S. SBA size standards employs different size limits depending upon the primary line of business of the firm. Therefore, any assessment of whether a firm is a small business also requires review of its primary line of business. (SBA uses NAICS codes to categorize companies by type of work they perform.)

Determining primary line of business is somewhat subjective, as a firm might fit multiple categories of work. This creates the potential for disagreements about primary line of work between the program applicant and the certifying agency. For example, a construction company that is too large to be eligible as a concrete contractor (\$15 million annual revenue size limit at the time of this report) may assert that it also performs heavy construction work (\$36.5 million size limit). The size limit for an engineering company (\$15 million) is twice that of an architecture firm (\$7.5 million).

This issue may occur even with small business programs for which size standards only differ based on general categories such as construction, professional services and goods. For example, a construction management firm that exceeds the size standard for a professional services NAICS code may argue that it also performs heavy construction, which has a higher size limit.

**Additional rules concerning affiliates.** Some business establishments are branches, subsidiaries or affiliates of another organization. When the combined organization is too large to qualify as a small business, the individual establishment is not eligible to participate in the program.

**Personal net worth.** Personal net worth pertains to the wealth of the individual business owner(s). It sometimes excludes the equity in the business and primary residence.

- Clayton County requires that small business owners have a personal net worth (PNW) less than \$750,000. Until February 28, 2011, this mirrored the PNW cap for certification of disadvantaged businesses enterprises under the Federal DBE Program.
- The City of Madison, Wisconsin also has a PNW cap that mirrors DBE certification (\$1.32 million at the time of this report).
- DeKalb County uses a PNW limit of \$1 million.

**Geographic limitations.** Some cities and counties, including DeKalb County, Los Angeles County, San Francisco, Broward County and New York City, require that businesses have a location within that jurisdiction to be eligible for the small business program. Others use a metropolitan area definition.

- Clayton County uses a 6-county definition of the Atlanta Metropolitan Area;<sup>1</sup>
- The City of Atlanta uses a 20-county definition of the Atlanta Metropolitan Area;<sup>2</sup> and
- DeKalb County has an “MSA” local program that includes businesses within a 10-county definition of the Atlanta Metropolitan Area.<sup>3</sup>

Each of these definitions includes Fulton County.

Other programs allow participation based on location within anywhere in the state (e.g., City of Portland, Oregon) or have no geographic limit at all (e.g., City of Madison, Wisconsin).

When a jurisdiction requires an applicant to provide it is located within the applicable geographic area, it might do so by producing a business license and/or lease or deed for the business property. Because many businesses are home-based, the lease or deed requirement can cause difficulties.

**Duration within the local area.** Some programs require a minimum length of time within the local area for certification. For example, DeKalb County requires that the business license be for the current and the prior year, which might be deemed “durational requirement” discussed under the legal analysis portion of this summary report.

**Citizenship.** DeKalb County is one example of a jurisdiction to require that the firm owner must be a citizen or lawfully admitted permanent resident of the United States.

**Commercially useful function (CUF).** Some agencies require a firm to certify within certain types of work. For example, the City of Atlanta certifies small businesses within up to three NAICS codes.<sup>4</sup> The intent of such requirements is that a company performs a “commercially useful function” when included as a participant in a contract and is not used for work outside of its normal scope of business.

Fulton County currently applies CUF requirements when implementing the County’s Service Disabled Veterans Business Enterprise preference and the Federal DBE Program.

---

<sup>1</sup> Clayton, DeKalb, Fayette, Fulton, Henry and Spalding counties.

<sup>2</sup> Barrow, Bartow, Carroll, Cherokee, Clayton, Coweta, Cobb, DeKalb, Douglas, Fayette, Forsyth, Fulton, Gwinnett, Henry, Newton, Paulding, Pickens, Rockdale, Spalding and Walton counties.

<sup>3</sup> Cherokee, Clayton, Cobb, DeKalb, Douglas, Fayette, Fulton, Henry, Gwinnett and Rockdale counties.

<sup>4</sup> North American Industry Classification System codes.



**Time limit for participation.** Neither the City of Atlanta nor Clayton County has a maximum amount of time for participation in the program. DeKalb County limits a firm's participation in the program to 10 years. The City of Portland has a 12-year time limit on overall participation in the program.

One of the largest small business programs in the country is the Federal 8(a) Business Development Program. Once approved for the program, there is a maximum time limit of nine years for a firm's participation in the program. It can also graduate earlier.<sup>5</sup>

**Length of certification before re-certification is required.** Jurisdictions certify companies as eligible for SBE programs for different lengths of time. For example, both the City Atlanta and DeKalb County require small businesses to re-certify every two years.

**Other requirements.** As the State of California also has a small business program, Los Angeles County requires that the small business be certified as such by the State (thus minimizing certification burden on the County).

New York City requires that the small business have either (a) 25 percent of its workforce in an economically depressed area of New York City or (b) 25 percent of its workforce be economically disadvantaged.

Figure F-2 summarizes key eligibility criteria for the nine SBE programs reviewed in this appendix.

## Certification Approaches

Cities, counties and states typically use one of two approaches to identifying a company as a small business that is eligible for its programs:

- **Self-certification.** The firm simply attests that it meets the eligibility criteria with little or no further action required. (The local government might simply confirm that the business is located within the relevant local area.)
- **Formal certification.** The business must submit tax returns and other documents providing proof of the size of the business and other aspects of the business operation.

**Self-certification.** Some small business programs allow the business to simply assert that it meets the program guidelines without submitting any documentation or requiring any certifying agency review. Until it changed its SBE program in late 2015, the City of Atlanta allowed SBEs to self-certify on the City website.

**Largest SBE bidder pool.** Because of the ease of certification, this approach can generate the greatest pool of SBEs eligible for the program. This factor is important as any programs that limit bidding to SBEs or require SBE participation as subcontractors benefit from a pool of SBEs large enough to not only span different types of construction, goods and services but to also create competition within the SBE pool.

---

<sup>5</sup> 13 CFR Section 124.2.

Figure F-2. Summary of eligibility criteria for SBE program examples

Jurisdiction	DeKalb County, GA	Clayton County, GA	City of Atlanta, GA
<b>Size</b>			
3-year gross receipts			
Construction	< \$3 million		
Professional services	< \$2 million	Federal SBA limits	Federal SBA limits
Suppliers	< \$1 million		
<b>Personal net worth</b>	< \$1 million	< \$750,000	None
<b>Geography (counties)</b>	DeKalb, Cherokee, Clayton, Cobb, Douglas, Fayette, Fulton, Henry, Gwinnett, Rockdale	Clayton, Dekalb, Fayette, Fulton, Henry, Spalding	Barrow, Bartow, Carroll, Cherokee, Clayton, Coweta, Cobb, DeKalb, Douglas, Fayette, Forsyth, Fulton, Gwinnett, Henry, Newton, Paulding, Pickens, Rockdale, Spalding, Walton
<b>Other</b>	Participation limited to 10 years	N/A	N/A
Jurisdiction	Los Angeles County, CA	San Francisco, CA	Broward County, FL
<b>Size</b>			
3-year gross receipts	< \$14 million	Micro Small SBA	
General construction	N/A	\$ 7 \$ 14 \$ 34	< \$3 million
Professional Services	N/A	1.3 2.5 7	< \$500,000
General service provide	N/A	3.5 7 17	< \$1 million
Specialty construction	N/A	3.5 7 17	N/A
Trucking	N/A	1.8 3.5 8.5	N/A
Materials	N/A	3.5 7 17	N/A
		(in Millions )	
<b>Personal net worth</b>	None	None	None
<b>Geography</b>	Los Angeles County	San Francisco	Broward County
<b>Other</b>	Must be state SBE certified Employees <100	N/A	N/A
Jurisdiction	City of Portland, OR	City of Madison, WI	New York City, NY
<b>Size</b>			
3-year gross receipts	Tier 1 < \$1,846,996 Tier 2 < \$3,693,991	< \$4 million	< \$2 million
<b>Personal net worth</b>	None	< \$1.32 million	None
<b>Geography</b>	Oregon	Not limited	New York City
<b>Other</b>	Participation limited to 12 years  Employees Tier 1 <19 Tier 2 <29	N/A	25% work in an economically depressed area in NYC or 25% economically disadvantaged workforce

**No lag between becoming an SBE and bidding on a contract (or participating as a proposed subcontractor).** Self-certification systems generally allow a bidder to self-certify as a small business and be eligible for the program up to the point that they bid on a procurement or are listed as a subcontractor to meet an SBE contract goal. This again expands the pool of potential SBE bidders and subcontractors.

**Minimum agency resources required for certification.** A company owner or manager typically self-certifies for an SBE program online. Other than setting up the web page for certification, there is minimal staff time needed to operate the certification portion of the program. It is also easy to firms to re-certify as a small business once their certifications expire (they receive an email notification and are sent to the appropriate web page).

**Disadvantages of self-certification.** Self-certification increases the opportunity of abuse of the program:

- Firms may not meet the size guidelines;
- Companies might be an affiliate of another larger business;
- The company might not be qualified to provide the type of goods or services for which it is being used in a contract (e.g., not providing a commercially useful function).

**Formal certification.** It is more common for agencies to require formal certification, especially for stronger programs.

- The Federal DBE Program and most MBE/WBE programs require companies to fill out an application and submit appropriate documentation in order to be certified.
- The City of Atlanta will discontinue self-certification starting in 2016. Its new process will be similar to certification as an MBE or FBE.
- DeKalb County now has a program that requires a desk review of submitted information followed by a site visit.

It is important to note that there has been past criticism of DeKalb County regarding lack of standard operating procedures to ensure uniformity in its LSBE certification process.<sup>6</sup>

**Streamlined or reciprocal certification.** The City of Atlanta SBE Program offers streamlined certification for firms already certified under the U.S. Small Business Administration 8(a) Program or the Federal HUBZone Program. Firms already certified as a DBE also have streamlined certification as an SBE.

Clayton County provides for provisional certification as a small business if the firm has applied for County SBE certification and is currently certified as a small business by the Small Business Administration, GDOT or DeKalb County. The firm must eventually be certified by Clayton County.

---

<sup>6</sup> DeKalb County Finance Department, Internal Audit & Licensing LSBE Review Memorandum, September 24, 2013.

## **APPENDIX G.**

### **MFBE Participation in Fulton County and Other Jurisdictions' Contracts**

Keen Independent examined the County's MFBE efforts and reviewed County-reported utilization of minority- and women-owned firms in County contracts. The study team also examined participation of minority- and women-owned firms (MBE/WBEs) under the City of Atlanta SBE Program and the DeKalb County LSBE Program.

#### **Fulton County MFBE Program**

The Fulton County MFBE program requires that all County departments and divisions of County government "encourage" MFBE participation in all contracting.

**Certification.** Firms can self-certify as MFBEs and renew certifications using the County website. An MFBE must be:

- At least 51 percent owned and controlled by one or more minorities.
- Registered as a place of business in official documents filed with the Secretary of State, State of Georgia; and
- Hold a valid business or occupational tax license.

**Good faith efforts to include MFBEs.** In order to comply with the County MFBE program, any entity seeking to do business with the County is encouraged to exercise good faith efforts to encourage MFBEs as subcontractors in their bids or proposals. The County sometimes requires submission of an Equal Business Opportunity (EBO) Plan as part of the bids or proposals. EBO Plans must identify potential opportunities for minority- and women-owned business participation in the bid or proposal and the bidder's or proposer's efforts to encourage and solicit that participation in the bid or proposal.

**Department of Purchasing and Contract Compliance.** The Department of Purchasing and Contract Compliance has the responsibility of soliciting and encouraging MFBEs to bid on County contracts through "aggressive outreach." Outreach efforts include:

- Bid opportunity alerts to MFBEs and service disabled veterans-owned businesses (SDVBEs) regarding upcoming contracts;
- Advertisement of upcoming County contracts in the appropriate media, including minority newspapers or publications; the County's website, public television, if appropriate; and other media;

- Seminars to familiarize MFBEs/SDVBEs with County procurement and bidding procedures and with upcoming business opportunities;
- A website where contractors and vendors can access information on bids or certification;
- Encouragement of MFBEs/SDVBEs to apply for certification and to bid on County contracts;
- A website that prime contractors can use to identify subcontracting opportunities for Fulton County projects; and
- Technical assistance through the County as well as information about other technical assistance providers in the Atlanta market area.

The Department of Purchasing and Contract Compliance also offers other technical assistance and “hands-on” vendor training workshops to its potential vendors.

### **Results of Fulton County Efforts to Encourage Utilization of Minority- and Women-owned Firms**

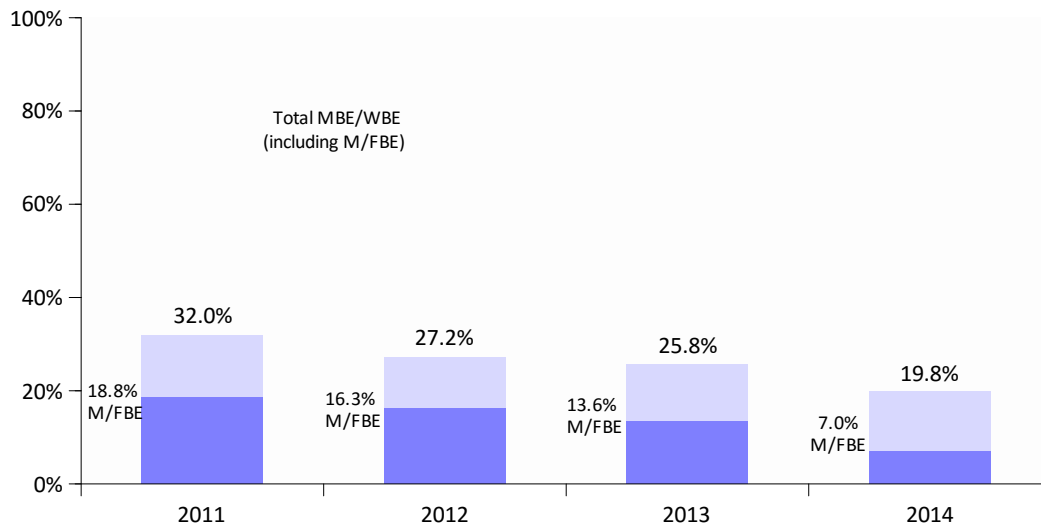
Keen Independent examined County reports on MBE/WBE utilization in light of the MBE/WBE availability information prepared in this study.

**Utilization of minority- and women-owned firms in County contracts.** The County prepares reports examining the percentage of County contract dollars going to certified MFBEs and non-certified minority- and women-owned firms. Figure G-1 summarizes reported utilization for 2011 through 2014. The top figure in each bar indicates the proportion of County contract dollars going to minority- and women-owned firms as a whole, combining certified and non-certified firms. Each bar has two portions:

- The darker portion of each bar details the results for certified MFBEs; and
- The lighter, top portion shows the portion of total utilization coming from non-certified firms.

Figure G-1 suggests that the share of County contract dollars has declined from about one-third of those dollars in 2011 to about 20 percent in 2014.

Figure G-1. County-reported MBE/WBE participation in Fulton County contracts, 2011-2014



Source: Fulton County Department of Procurement & Compliance spreadsheets for 2011, 2012, 2013 and 2014.

**Availability of minority- and women-owned firms for County contracts.** As with small businesses as a whole, Keen Independent examined MBE/WBE availability after analyzing the relative number of MBE/WBEs and non-MBE/WBEs available for County contracts and subcontracts during the study period (see Appendix C). Minority- and women-owned firms represented 42 percent of the businesses available for County procurement within the 20-county Atlanta Metropolitan Area.

However, Keen Independent’s experience suggests that not all of these firms will be available for the largest County contracts; availability considering the sizes of County contracts might be lower. Keen Independent’s recent availability analysis as part of the 2015 Disparity Study for the City of Atlanta illustrates this point:

- About 43 percent of businesses available for City of Atlanta work within the 20-county Atlanta Metropolitan Area were minority- or women-owned. This overall percentage is very similar to what was found for Fulton County
- After controlling for types and sizes of prime contracts and subcontracts, and the dollar-weighting the results, 34 percent of City contract dollars might be expected to go to minority- and women-owned firms if there were a level playing field for these firms in the local marketplace.

Based on these results and experience with similar availability analyses for other jurisdictions, Keen Independent considers a benchmark of about one-third of County contract dollars going to MBE/WBEs to be more accurate than the 42 percent availability reported above.

**Comparison of utilization and availability on County contracts.** Although Keen Independent did not perform a disparity analysis based on these data, results suggest that overall County utilization of minority- and women-owned firms in 2014 may be less than what might be expected based on the availability of minority- and women-owned firms for this work.

## **Utilization of MBE/WBEs by other Local Governments with SBE Programs**

Keen Independent examined whether the current City of Atlanta and the DeKalb County SBE programs encourage participation of minority- and women-owned firms in those contracts.

**City of Atlanta SBE program.** As previously discussed in this Summary Report, the City of Atlanta has had its current Small Business Opportunity (SBO) ordinance in place since 2009. The City can set SBE contract goals on City-funded contracts as part of that program. In December 2015, the City modified and extended this program.

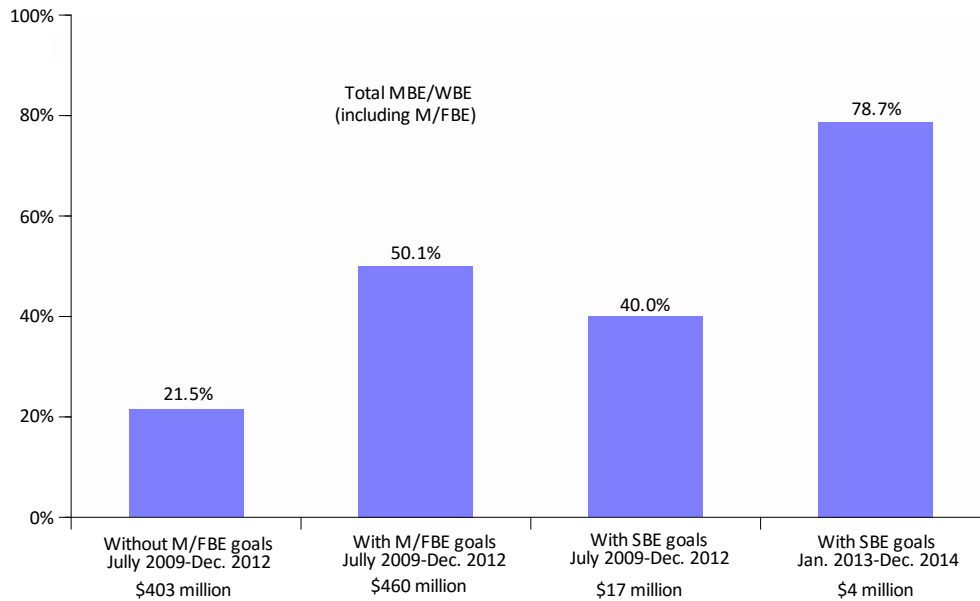
In the disparity study completed for the City in November 2015, Keen Independent identified 13 City contracts from July 2009 through December 2012 that had SBE goals applied (\$17 million of contracts). Keen Independent also analyzed City information for SBE goals contracts awarded in 2013 and 2014.

As illustrated in Figure G-2, about 40 percent of SBE goals contract dollars for July 2009 through December 2012 went to minority- and women-owned firms (including M/FBE-certified firms and non-certified firms). Based on data for \$4 million of SBE goals contracts for 2013 and 2014, 79 percent of those dollars went to minority- and women-owned firms. Overall MBE/WBE participation in City contracts with M/FBE contract goals was 50 percent from July 2009 through December 2012 (also shown in Figure G-2).

In contrast, MBE/WBE utilization in City of Atlanta contracts without any goals was 21.5 percent.

These results suggest that an SBE contract goals program, in combination with other efforts, appears to encourage participation of minority- and women-owned firms in City of Atlanta contracts compared with results when no program is applied at all.

Figure G-2. MBE/WBE share of City of Atlanta-funded contracts without goals, with M/FBE goals and with SBE goals, July 2009-Dec. 2012, 2013-2014



Source: Keen Independent 2015 City of Atlanta Disparity Study.

**DeKalb County SBE program.** As described previously in this report, DeKalb County operates a Local Small Business Enterprise (LSBE) program. Based on Keen Independent review concerning the 53 LSBE firms that DeKalb County reported being used as part of the program from 2006 through summer 2013, all or almost all of the SBE firms were minority- or women-owned firms (ownership status could not be determined for one firm).<sup>1</sup> It appeared that the DeKalb County LSBE program had a positive impact on MBE/WBEs.

It is less clear from DeKalb County report how the LSBE Program contributed to the overall dollars of LSBE or associated MBE/WBE participation in DeKalb County contracts. One report from Watershed indicated 20 percent of \$205 million in Department of Watershed contract dollars from January 2012 through November 2015 were projected to go to LSBEs.<sup>2</sup>

Keen Independent’s analysis of DeKalb County’s 2013 MBE/WBE/LSBE Supplier List found that three-quarters of LSBEs were also certified as MBEs or WBEs.

<sup>1</sup> Keen Independent from analysis of data in Exhibit 1 of DeKalb County Finance Department LSBE Review Memorandum to Zachary Williams, Chief Operating Officer, September 24, 2013.

<sup>2</sup> DeKalb County Department of Watershed Management. Capital Improvement Projects Status Report, January 20, 2015.



## APPENDIX H.

### Overview of Contract Goal-Setting Process

State and local governments that operate goals programs usually set project-specific goals contracts (i.e., a 35% SBE contract for one contract and a 10% SBE contract goal for a different contract). A typical goal-setting process involves the following steps:

1. Obtain information about the contract, including types of work involved and estimated dollars for each type of work (e.g., from detailed engineer's estimate for a construction contract or based on past experience for a professional services contract).
2. Determine the types of work identified in Step 1 that are typically subcontracted or potentially could be subcontracted (through past experience, consultation with end-user department and/or industry input).
3. For each type of work determined in Step 2 to be potentially subcontracted, determine whether or not there is availability of certified firms to perform that work based on information in the certification directory or other resources. Some agencies require that there be more than one certified firm able to perform that work to count that work type toward a goal.
4. From the "yes/no" assessment in Step 3, add up the dollar amounts of the work potentially performed by SBE subcontractors and suppliers. For example, that calculation might show that about \$10 million of a contract expected to total \$20 million could be performed by certified firms, or 50 percent of the contract total. This determines the maximum potential goal.
5. Apply an adjustment to the maximum potential goal developed in Step 4 that considers the likelihood that not all potential work for certified firms would reasonably go to such firms and recognizes that there might be participation of some non-certified firms as subcontractors. This adjustment factor is often developed through experience with what has been met on similar projects. In this hypothetical example, applying a discount factor of two-thirds would result in a contract goal of 2/3 times 50 percent equals 33.5 percent.

Contract-specific goal-setting has been favorably reviewed by the courts and adopted in the Federal DBE Program regulations. For example, 49 CFR Section 26.51(e)(2) includes the following instructions when calculating a DBE contract goal: "The goal for a specific contract may be higher or lower than that percentage level of the overall [DBE] goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract."

The Federal Highway Administration’s guide to local agencies concerning DBE contract goals gives an illustration of this approach. Using the numbering of steps above, FHWA’s example of project-specific goal-setting is as follows:

1. There is a local public agency contract to widen a one-mile stretch of city street estimated to value \$2 million.
2. The local public agency identifies several subcontracting possibilities, including striping, trucking and traffic control, totaling \$220,000, or 11 percent of the contract value.
3. The agency searches the database of certified firms and identifies several certified firms that can perform these work items.
- 4-5. After considering any unique factors such as location of the project, and the availability of certified firms to do the work, the agency determines that a contract goal of 9.5 percent is appropriate.