

February 17, 2021

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U.S. Department of Justice, Civil Rights Division
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Christine Stoneman
Principal Deputy Chief
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Federal Coordination and Compliance Section
950 Pennsylvania Avenue, NW
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Irene Marion
Director, Departmental Office of Civil Rights
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

Dear Principal Deputy Assistant Attorney General Karlan, Principal Deputy Chief Stoneman, and Director Marion:

Enclosed please find our Title VI complaint filed on behalf of the Black Economic Council of Massachusetts, Greater Boston Latino Network, and Amplify Latinx with the U.S. Department of Justice and the U.S. Department of Transportation against the City of Boston for its creation and maintenance of a City contracting system that unfairly and unlawfully excludes Black- and Latinx-owned businesses from participation in the City's public contracting. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, prohibits discrimination in federally assisted programs on account of race, color, or national origin. This complaint falls within the jurisdiction of the DOJ and DOT because the City is a recipient of considerable grant funding from both departments.

Lawyers for Civil Rights, our clients, and their membership stand ready to assist in this investigation. For further information, please contact us at 617-988-0624.

Sincerely,

Iván Espinoza-Madrigal, Esq.
Erin Fowler, Esq.
Priya Lane, Esq.
Srish Khakurel, Esq.
Oren Sellstrom, Esq.
Counsel for Complainants

cc: City of Boston
Boston City Councilors
Black Economic Council of Massachusetts
Greater Boston Latino Network
Amplify Latinx

BEFORE THE UNITED STATES DEPARTMENT OF JUSTICE

AND THE UNITED STATES DEPARTMENT OF TRANSPORTATION

BLACK ECONOMIC COUNCIL OF
MASSACHUSETTS, INC.,
GREATER BOSTON LATINO NETWORK,
and AMPLIFY LATINX, non-profit
organizations,

Complainants,

vs.

CITY OF BOSTON,

Respondent.

**COMPLAINT UNDER TITLE VI OF
THE CIVIL RIGHTS ACT OF 1964**

I. Introduction

The City of Boston (“the City”) is one of the most economically stratified cities in the nation—and communities of color bear the brunt of this wealth gap. Indeed, a report by the Federal Reserve Bank of Boston described “the net worth of whites as compared with nonwhites [as] staggeringly divergent.”¹ Business ownership is one of the primary ways that families of color can build generational wealth and start to close this gap.² And yet, the City has created and maintained a public contracting system that disproportionately funnels taxpayer dollars into an exclusionary system that shuts Black- and Latinx-owned businesses out of contracting opportunities almost entirely. Between 2014 and 2019, less than 2% of the \$600 million of taxpayer dollars the City spends annually on public contracting went to Black- and Latinx-owned businesses—far less than their availability to do the work required by the City.³

Put simply, this is discriminatory. Every day that the City fails to act, it perpetuates a public contracting system that excludes qualified minority business enterprises (MBEs) from equal opportunity. Moreover, the ways to dismantle “old boys’ networks” that unlawfully exclude MBEs are well known and have been effectively implemented by other municipalities, state governments, and the federal government for years. In Boston, advocates have continually pointed out to the City these readily available alternative practices that would help halt and remedy discrimination in

¹ See *The Color of Wealth in Boston*, FEDERAL RESERVE BANK OF BOSTON 1 (2015), available at <https://www.bostonfed.org/publications/one-time-pubs/color-of-wealth.aspx> (“While white households have a median wealth of \$247,500, Dominicans and U.S. blacks have a median wealth of close to zero.”).

² See *Bigger Than You Think: The Economic Impact of Microbusiness in the United States*, ASSOCIATION FOR ENTERPRISE OPPORTUNITY 8 (2013), available at http://www.aeoworks.org/wp-content/uploads/2019/03/Bigger-than-You-Think-Report_FINAL_AEO_11.10.13.pdf.

³ BBC RESEARCH & CONSULTING, 2020 CITY OF BOSTON DISPARITY STUDY Ch. ES at 3-4 (Feb. 2021) [hereinafter “2020 DISPARITY STUDY”].

Boston's contracting.⁴ Yet, the City has continually failed to act, contenting itself with issuing meaningless executive orders and statements that have done nothing to actually change circumstances on the ground. The City's inaction amply demonstrates discriminatory impact and intent. By allowing barriers to equal contracting opportunity to exist, the City perpetuates the enormous wealth gap that plagues Boston. It also deprives the City of the skills and talents of the many MBEs that are ready, willing, and able to contract and harms taxpayers by inhibiting competition.

The City's discriminatory contracting practices are shameful—and a direct violation of well-established federal law. Specifically, these practices fly in the face of Title VI of the Civil Rights Act of 1964 and its accompanying regulations, which prohibit federal funding recipients from engaging in unjustified practices that create a disparate impact and exclude minorities.

In calling for the enactment of Title VI, President John F. Kennedy identified “simple justice” as its justification.⁵ He stated, “[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.”⁶ Here, Complainants ask for just that. Complainants respectfully request the Department of Justice (“DOJ”) and the Department of Transportation (“DOT”) intervene to halt the City's discriminatory public contracting practices and remedy the deeply entrenched racism that has plagued Boston's contracting system. In light of the egregious disparities

⁴ See Appendix A.

⁵ CIVIL RIGHTS DIVISION, U.S. DEP'T OF JUSTICE, TITLE VI LEGAL MANUAL, Sec. II at 1, available at <https://www.justice.gov/crt/book/file/1364106/download> (last updated, Feb. 3, 2021) [hereinafter “DOJ TITLE VI MANUAL”].

⁶ *Id.*

and the longstanding failure of the City to rectify the discrimination in its midst, race-conscious remedial steps are both necessary and appropriate.

II. Factual Background

a. The City's Actions and Inactions

Until 2003, the City of Boston used race-conscious measures to ensure equity in its contracting program.⁷ Specifically, the Minority and Women Business Enterprise Program (“MWBE Program”) “required city departments to make best-faith efforts to contract a minimum of 15 percent of their business with certified [MBEs].” However, over the objections of MBE firms and community organizations, the City discontinued the program in 2003, after 25 years of operation.⁸

In 2003, a disparity study conducted by Mason Tillman Associates, Ltd. (“Mason Tillman Study”) found that “the statistical evidence indicates that a disparity exists between the use of [MBEs] and their availability.”⁹ It also reported that “businesses owned by white males won 98 percent of the dollar amount of available contracts.”¹⁰ Nonetheless, claiming the results were inconclusive, the City disbanded its program.¹¹

Following the City's abolition of the MWBE Program, community leaders reacted with outrage, predicting that MBE utilization would sharply decrease and noting that it was “premature for the administration to abandon the city's commitment to assuring that all people can participate on a level playing field—particularly in light of the

⁷ Jin-ah Kim, City to Boost Biz Deals for Minorities, Women, BAY STATE BANNER (May 1, 2008), available at <http://www.baystate-banner.com/issues/2008/05/01/news/local05010812.htm>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Jule Pattison-Gordon, Walsh Unveils Minority & Women Business Spending Goals, BAY STATE BANNER (Mar. 2, 2016), available at <https://www.baystatebanner.com/2016/03/02/walsh-unveils-minority-women-business-spending-goals/>.

horrendous disparities in prime contracting based on race and gender.”¹² As predicted, in the years after the MBWE Program’s abolition, there was “a dramatic reduction in the utilization of minority-owned or women-owned companies.”¹³

In the face of this marked decrease in the City’s contracting with MBE firms, the City did not produce another disparity study—which would have supported reinstatement of the MWBE program—for nearly two decades. Instead, the City issued a series of statements and executive orders acknowledging the systemic problem, setting aspirational goals for MBE-participation, but doing nothing to actually change the status quo.¹⁴ In other words, the City did precious little to back up its meaningless verbiage with concrete actions that would actually change anything on the ground. The exceedingly minor steps that the City has taken are insufficient and ineffective—as the bottom line numbers dramatically show.

In 2017, the Boston City Council passed the Equity in City of Boston Contracts Ordinance.¹⁵ This ordinance revised the City’s Municipal Code to require the City to:

- “Develop a supplier diversity program...designed to achieve meaningful participation of minority- and women-owned businesses in City contracting and procurement;
- Establish affirmative marketing policies to more effectively solicit minority- and woman-owned businesses for bids and quotes for certain types of City contracts and procurements, if appropriate; and
- Include minority- and women-owned business participation as criterion in the evaluation of certain proposals; if appropriate.”¹⁶

¹² Peter Smith, Boston Halts Affirmative Action Program, THE COWL (Feb. 13, 2003), available at <https://www.thecowl.com/uncategorized/boston-halts-affirmative-action-program>.

¹³ Jin-ah Kim, City to Boost Biz Deals for Minorities, Women, *supra* note 7.

¹⁴ *See, e.g.*, Interim Exec. Order Promoting Equity in Public Procurement, Exec. Order of Mayor Martin J. Walsh (2016), Art. I(D) (recognizing that the City has engaged in “demonstrated and significant underutilization of [MBE] firms....”); Exec. Order in Support of Equitable Procurement Procedures, Exec. Order of Mayor Martin J. Walsh (2019); 2020 DISPARITY STUDY, *supra* note 3, Ch. 2 at 2 (describing the City’s Equity and Inclusion Unit, which only uses race-neutral measures to do MBE outreach).

¹⁵ Boston, Mass., Code of Ordinances, An Ordinance Promoting Equity in City of Boston Contracts (2017), available at https://www.boston.gov/sites/default/files/file/document_files/2017/12/1325.pdf.

¹⁶ 2020 DISPARITY STUDY, *supra* note 3, Ch. 8 at 4.

The ordinance also authorized the City to adopt contract-specific MBE business goals and develop language to ensure meaningful participation of MBE firms in public contracting. To date, the City has failed to answer the call to action set forth in this ordinance. Indeed, despite the authority—and urgent need—to use race-conscious criteria, the City still only uses race-neutral criteria in assessing potential contractors.

b. The City’s Egregious Under-Utilization of MBEs

The City’s failure to address the systemic exclusion of MBEs has led to alarming and disastrous results. Despite repeated assertions that the City is committed to diversity, Boston’s public contracting statistics are abysmal. This is confirmed by the results of a recent study by BBC Research & Consulting (“BBC”).¹⁷ In order to assess the efficacy of its diversity efforts, in 2016 the City retained BBC to conduct a disparity study (“2020 Disparity Study”).¹⁸ At 703 pages, this study is the most rigorous and extensive study of Boston’s contracting system to date. Its results compellingly demonstrate what many community members have long known: Boston’s contracting system discriminates against Black and Latinx business owners.

As part of the 2020 Disparity study, BBC assessed disparities between the City’s *utilization* of MBEs, or “[t]he percentage of contract and procurement dollars that the City awarded to minority- and woman-owned businesses,” and the *availability* of MBE contracts, or the percentage of these dollars “that minority- and woman-owned businesses might be expected to receive based on their availability to perform specific

¹⁷ 2020 DISPARITY STUDY, *supra* note 3, Ch. ES at 1-11. BBC is also doing a disparity study for the quasi-public agencies, including Boston Planning & Development Agency (BPDA), the Boston Housing Authority (BHA), and the Boston Water and Sewer Commission (BWSC). Those may reveal similar disparities for minority owned businesses. Complainants respectfully request an opportunity to supplement this complaint with additional evidence of racial disparity as data and information becomes available.

¹⁸ 2020 DISPARITY STUDY, *supra* note 3, Ch. ES at 1.

types and sizes of city prime contracts and subcontracts.”¹⁹ BBC also assessed the SLBE’s legal framework, local marketplace conditions, and currently existing contracting practices and business assistance programs.²⁰

For utilization, BBC analyzed 47,801 contracts and subcontracts—all of those that the City entered into between July 1, 2014, and June 30, 2019.²¹ To determine which of those were MBEs, BBC looked not only to those MBEs that were certified with the City, but also to MBEs that were not certified.²² This is particularly important, as many MBEs are deterred from certifying due to the onerous process it entails.²³ To analyze availability, BBC used a “custom census” approach, in which it systematically analyzed information from surveys BBC’s team conducted with potentially available businesses and information about the contracts and procurements the City awarded.²⁴ Through this approach, BBC developed a “representative, unbiased, and statistically-valid database of relevant businesses to estimate the availability of [MBEs] for City work.”²⁵ BBC then compared the utilization and availability results to create a disparity index.²⁶

The results of the disparity analysis confirm dramatic under-utilization of Black- and Latinx-owned businesses.²⁷ Specifically, the study found that just 1.2% of the City’s

¹⁹ *Id.*

²⁰ *Id.*

²¹ Shirley Leung, *City of Boston Spent \$2.1 Billion in Contracts Over Five Years. Only 1.2 Percent Went to Black-owned and Latino-owned Businesses*, BOSTON GLOBE (Feb. 5, 2021), available at <https://www.bostonglobe.com/2021/02/05/business/city-boston-spent-21-billion-contracts-over-five-years-less-than-1-percent-went-black-owned-or-latino-owned-businesses/>.

²² 2020 DISPARITY STUDY, *supra* note 3, Ch. 6 at 1.

²³ 2020 DISPARITY STUDY, *supra* note 3, App’x. D at 35-40.

²⁴ 2020 DISPARITY STUDY, *supra* note 3, Ch. ES at 3.

²⁵ *Id.*

²⁶ 2020 DISPARITY STUDY, *supra* note 3, Ch. 7 at 1.

²⁷ This complaint focuses on the City’s exclusion of Black- and Latinx-owned businesses from equal contracting opportunity, which is where BBC found the most dramatic disparities between utilization and availability. Complainants respectfully submit that BBC’s analysis under-estimates MBE availability and that, under a less conservative analysis, the disparities for Black and Latinx-owned businesses would be even more staggering. For similar reasons, Complainants assert that under a less conservative analysis, disparities would be confirmed for other MBE groups as well. In fact, even BBC’s methodology shows

\$2.1 billion spent in municipal contracts over a 5-year period went to Black- and Latinx-owned businesses.²⁸ This shameful statistic is even more stark when compared to the availability of Black- and Latinx-owned businesses. In fact, according to the 2020 Disparity Study, the City could have awarded at least 4.8% of its procurement dollars to Black- and Latinx-owned businesses.²⁹

The City could have spent over twice the amount it did on Black- and Latinx-owned businesses that were ready, willing and able to do the work that the City required. This is a difference of almost \$76 million that should have been spent supporting MBE firms. Black- and Latinx-owned businesses are available to perform the type of work that the City needs, but the City is simply not contracting with them. Instead, the City's discriminatory contracting system perpetuates and exacerbates the racial wealth gap that plagues Boston.

III. Jurisdictional Facts

a. The Complainants

Complainants respectfully submit this complaint on behalf of their members and constituents, including Black and Latinx business owners against whom the City has systematically discriminated for decades. Despite years of the Complainants' advocacy, the City has refused to remedy the racism and discrimination of its public contracting practices.³⁰ Complainants submit this complaint to make their voices heard and seek justice through federal oversight and remediation.

disparities for Asian-American- and Native American-owned businesses in certain industries/types of contracts.

²⁸ 2020 DISPARITY STUDY, *supra* note 3, Ch. 6 at 1.

²⁹ 2020 DISPARITY STUDY, *supra* note 3, Ch. 5 at 5. This represents businesses that have previously submitted contracts and does not include businesses that are deterred based on the City's historical results.

³⁰ See Appendix A.

The Black Economic Council of Massachusetts (“BECMA”) is a non-profit organization whose mission is to advance the economic well-being of Black businesses and organizations that serve the Black community and Black residents of Massachusetts. BECMA does so by convening important conversations that seek solutions to persistent racial and economic issues; advocating on behalf of its business members at the state and local levels for policies that help grow and sustain the Black economy; and connecting its members to business opportunities in the public and private sectors. Due to the City’s discriminatory contracting practices, BECMA attracts fewer resources and contributions from Black-owned businesses who are not successful under the City’s procurement practices. Furthermore, BECMA has to expend significant time and resources advocating with City officials to put forth policies that would increase City investment in minority-owned businesses.

The Greater Boston Latino Network (GBLN) is a coalition of Latinx-led and Latinx-serving community-based organizations whose goal is to increase the visibility, impact, and voice of the Latinx community. As part of this work, GBLN seeks to ensure the fair and proportionate representation of Latinx community members in the City’s government and public contracts. GBLN’s members serve minority business owners who are willing and able to contract with the City—but have been shut out instead. As a result of the City’s discriminatory contracting practices, GBLN and its members have been forced to pour extensive resources into advocating for small businesses and working to lift Latinx families out of poverty.

Amplify Latinx is a Boston based non-profit whose mission is to build Latinx economic and political power in Massachusetts. Its PowerUp Latino Business Program is focused on increasing growth and economic opportunity for Latinx-owned businesses.

Amplify Latinx provides technical assistance, education and information on contracting opportunities to its extensive network of Latinx-owned businesses. Amplify Latinx works with small businesses who are able and willing to contract with the City of Boston, but have been unable to because of the City's discriminatory practices. Amplify Latinx has been required to expand resources into supporting these businesses in an attempt to make up for these lost opportunities.

BECMA, GBLN, and Amplify Latinx are leading figures in the struggle for racial justice and economic justice in Massachusetts. Since the City's contracting practices have discriminated against Complainants' members and constituents, they have been systemically forced to divert their limited resources to advocate against these practices. In this manner, Complainants have been directly harmed by the City's failure to contract in a fair and equitable manner.

b. Timeliness

As with any application for federal funding, the recipient, the City of Boston, is required to submit an assurance that it will comply with all requirements for funding.³¹ Importantly, the recipient is expected to adhere to all regulations, such as the non-discrimination requirements mandated by Title VI, throughout the duration of the project in which federal funds are used.³² The complaint here is timely, in that the violations are continuous and ongoing, and thus fall within the applicable 180-day period to bring a claim.³³

c. The City's Receipt of Federal Funding

³¹ See 49 C.F.R. § 21.7 (DOT); 28 C.F.R. § 42.105 (DOJ).

³² See 49 C.F.R. § 21.7 (DOT); 28 C.F.R. § 42.105 (DOJ).

³³ See 49 C.F.R. § 21.11(b) (DOT); 28 CFR § 42.107(b) (DOJ).

This complaint falls within the jurisdiction of the U.S. Department of Justice because the City is a recipient of considerable grant funding from the DOJ. For example, on January 1, 2020, the City of Boston received a grant of \$248,500 in conjunction with the DNA Backlog Reduction Program.³⁴

This complaint is also within the jurisdiction of the U.S. Department of Transportation because the City is a recipient of grant funding from DOT. For example, the City's Capital Plan for Fiscal Years 2021-25 lists as a source of funding the Transportation Improvement Plan, which is a statewide road and bridge construction advertisement program developed under the management of the Massachusetts Department of Transportation ("MassDOT").³⁵ The Transportation Improvement Plan's funding sources include State-issued general obligation bonds and "[f]ederal funds made available through the Federal Highway Administration and other Department of Transportation agencies."³⁶ The City of Boston also received a grant in December 2018 under the Community Transit Grant Program, which "distributes both Federal Transit Administration (FTA) Section 5310: Enhanced Mobility of Seniors & Individuals with Disabilities funds" and State Mobility Assistance Program funds.³⁷

These grants—and many others—place the City under the obligations of Title VI and its accompanying regulations, and squarely within the jurisdiction of the DOJ and DOT.

³⁴ DNA Backlog Reduction Grant, USA SPENDING (last visited Feb. 13), available at https://www.usaspending.gov/award/ASST_NON_2019DNBX0112_1550.

³⁵ Martin J. Walsh, *Operating Budget Fiscal Year 2021; Capital Plan Fiscal Years 2021-2025*, CITY OF BOSTON 82 (2020) (PDF p. 100), available at [https://www.boston.gov/sites/default/files/file/2020/11/Full%20Budget%20Document%20\(2\)_1.pdf](https://www.boston.gov/sites/default/files/file/2020/11/Full%20Budget%20Document%20(2)_1.pdf).

³⁶ *Id.*

³⁷ *Baker-Polito Administration Announces Total of \$10.2 Million For Communities in Transit Grant Program Awards*, MASSDOT (2018), available at <https://www.mass.gov/news/baker-polito-administration-announces-total-of-102-million-for-communities-in-transit-grant>.

IV. Legal Analysis

a. Title VI and its Accompany Regulations Prohibit Discrimination Against Minority Populations in Contracting.

Title VI of the Civil Rights Act of 1964 prohibits discrimination against minority populations. Specifically, it provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”³⁸ As outlined in the DOJ’s Title VI guidance, “recipient” refers to any “political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization ... to whom Federal finance assistance is extended, directly or through another recipient” for any program.³⁹ Thus, both direct and indirect recipients are prohibited from engaging in discrimination.

While Title VI prohibits intentional discrimination, most federal agencies—including the DOJ and DOT—have promulgated regulations that prohibit actions that have a discriminatory impact on people of color. DOJ and DOT regulations provide that a recipient of federal funds may not “utilize criteria or methods of administration *which have the effect* of subjecting [individuals] to discrimination...or *have the effect* of defeating or substantially impairing accomplishment of the objectives of the program” with respect to minority populations.⁴⁰ In doing so, the DOJ and DOT prohibit

³⁸ 42 U.S.C. § 2000d.

³⁹ DOJ TITLE VI MANUAL, *supra* note 5, Sec. V at 13.

⁴⁰ 28 C.F.R. § 42.104(b)(2) (DOJ); 49 C.F.R. § 21.5(b)(2) (DOT) (emphasis added).

recipients of its funds from engaging in disparate-impact discrimination—regardless of intent.⁴¹

Furthermore, the DOJ and DOT have mandated that recipients must take affirmative steps to overcome past practices that excluded minorities. In particular, DOJ and DOT regulations instruct recipients that “[i]n administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.”⁴² Moreover, the DOJ regulations provide that “[*e*]ven in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.”⁴³ In an analogous provision, DOT regulations imply an affirmative responsibility to act, stating that even when no previous discrimination exists, “a recipient...is *expected* to take affirmative action....”⁴⁴ These regulations empower and encourage recipients of DOJ and DOT funds to remedy discrimination in all programs.

Title VI’s reach is broad. Indeed, it covers not only the particular items funded by federal dollars, but *all of the operations of any entity* receiving federal funding.⁴⁵ When the U.S. Supreme Court construed this coverage narrowly, Congress re-affirmed Title

⁴¹ *Lau v. Nichols*, 414 U.S. 563, 568 (1974) (noting “discrimination is barred which has that *effect* even though no purposeful design is present...”); *see also Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 592 (1983) (noting, “under these circumstances, it must be concluded that Title VI reaches unintentional, disparate-impact discrimination as well as deliberate racial discrimination.”).

⁴² 28 C.F.R. § 42.104(b)(6)(i) (DOJ) (emphasis added). DOT regulations have a similar effect: “Where prior discriminatory practice or usage tends, on the grounds of race, color, or national origin to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this part applies, the applicant or recipient must take affirmative action to remove or overcome the effects of the prior discriminatory practice or usage.” 49 C.F.R. § 21.5(b)(7).

⁴³ 28 C.F.R. § 42.104(b)(6)(ii) (emphasis added).

⁴⁴ 49 C.F.R. § 21.5(b)(7) (emphasis added).

⁴⁵ DOJ TITLE VI MANUAL, *supra* note 5, Sec. V at 24.

VI's "institution-wide coverage," explaining that "eliminating discrimination from institutions which receive financial assistance [can] only be accomplished if civil rights statutes [are] given the broadest interpretation."⁴⁶ Likewise, the types of activities covered are far-reaching, and DOT regulations specifically cite contracting as an activity that falls within Title VI's broad purview.⁴⁷

From the moment recipients agree to accept federal funds, they are bound by Title VI and its accompanying regulations. Indeed, to receive federal funding, applicants must sign assurances of compliance with federal laws and regulations.⁴⁸ Under Title VI, "Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision."⁴⁹ Thus, Title VI's nondiscrimination protections begin immediately upon a recipient's agreement to accept funds.

**b. The City of Boston is in Violation of Title VI and its
Accompanying Regulations Because it Discriminates Against
Black and Latinx Business Owners.**

To establish that the City's actions constitute discrimination under a disparate impact analysis, three non-exclusive elements are considered: (1) the practice

⁴⁶ In 1984 the Supreme Court decided *Grove City College v. Bell*, which severely limited the application of Title VI. 465 U.S. 555 (1984). In response, Congress swiftly enacted the Civil Rights Restoration Act of 1987 ("CRRRA"). The CRRRA was passed to restore broad interpretations, consistent with original congressional intent, and to reverse the Supreme Court's narrow ruling in *Grove City*. Civil Rights Restoration Act of 1987, S. Rep. No. 64, 100th Cong. § 5 (1st Sess. 1987) (stating, "The legislative history of the statutes in question shows Congress intended institution-wide coverage. In enacting the four civil rights statutes, Congress intended that each be broadly interpreted to provide effective remedies against discrimination. The debates emphasized both the anticipated breadth of coverage as well as the important and fundamental aims these statutes would achieve. This was clear not only in connection with Title VI, but also with the other civil rights statutes which were modeled on Title VI with respect to both language and intended effect.... It was understood at the outset that the task of eliminating discrimination from institutions which receive federal financial assistance could only be accomplished if the civil rights statutes were given the broadest interpretation.").

⁴⁷ 49 C.F.R pt. 21 app. C § a(1)(x).

⁴⁸ 28 C.F.R § 42.105.

⁴⁹ *U.S. Dep't of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597, 605 (1986).

disproportionately affects members of a group protected by Title VI; (2) the practice has no substantial legitimate justification; and (3) there is an alternative that would achieve the same legitimate objective but with less of a discriminatory effect.⁵⁰ Here, these elements are easily satisfied. In spite of readily available alternatives that could remedy discrimination, the City of Boston's contracting practices disproportionately and unjustifiably harm Black and Latinx business owners.

The City's current contracting system is a practice that disproportionately harms Black and Latinx-owned businesses. The exclusionary system that the City perpetuates has a disparate impact on MBEs, by excluding them—without justification—from equal contracting opportunity. The City's *laissez-faire* contracting system, with its meaningless admonitions, merely maintains the discriminatory status-quo.

As the statistics cited above demonstrate, the City's contracting system—while facially neutral—has a vast disproportionate impact on minority business owners. There is no doubt the City's contracting system—including its failure to take race-conscious steps to eliminate longstanding exclusion—is the cause of the abysmal numbers of MBE contracts. Indeed, research demonstrates that if a city does not take proactive steps to ensure equal contracting opportunity, then MBEs will be systemically excluded.⁵¹

⁵⁰ DOJ TITLE VI MANUAL, *supra* note 5, Sec. VII at 6.

⁵¹ See e.g., *Contracting for Equity: Best Local Government Practices that Advance Racial Equity in Government Contracting and Procurement*, INSIGHT CENTER FOR COMMUNITY ECONOMIC DEVELOPMENT, GOVERNMENT ALLIANCE ON RACE AND EQUITY 6-8 (2017), available at http://haasinstitute.berkeley.edu/sites/default/files/gare-contract_for_equity_o.pdf; see also Minority Business Development Program Reform Act of 1987: Hearings on S. 1993 & H.R. 1807 Before the Senate Comm. on Small Bus., 100th Cong. 127 (1988) (statement of Parren Mitchell, Chairman, Minority Business Enterprise Legal Defense and Education Fund (noting the 'harsh reality' of the 'old-boy network' that prevents minority-owned firms from breaking into the private sector; H.R. Rep. No. 103-870 15 & n.36 (1994) (discussing evidence of discriminatory exclusion of minority firms from business networks); *The Compelling Interest*, 61 Fed. Reg. at 26,057 & nn.82-82 (citing studies explaining minorities' exclusion from the construction trades as a result of the lack of familial connections).

The mechanisms that exclude MBEs depend on the type of contract at issue. For example, for prime contracts, city officials often limit MBE participation through conscious or unconscious bias, or simply because they prefer to contract with firms they have contracted with in the past. If proactive steps are not taken to disrupt this status quo, the problem builds on itself, and business relationships become more and more entrenched.⁵² Prime contracts often contain unnecessary qualifications that preclude newer or smaller firms—which MBEs tend to be—from participating.⁵³ Without proactive action, this problem replicates itself over time. Furthermore, many prime contracts include subcontracting opportunities. Without affirmative steps to address bias and exclusion in subcontracting, MBEs are frequently denied equal subcontracting opportunities. Prime contractors tend to go back to subcontractors they have previously used, perpetuating an “old boys’ network” that excludes MBEs.⁵⁴

Given this tendency towards bias and discrimination, the City’s race-neutral contracting practices foment rampant discrimination, and in doing so, the system perpetuates racism. As the 2020 Disparity Study demonstrates, the City’s *laissez faire* attitude has led directly to the exclusion of Black- and Latinx-owned businesses.

This discrimination is well understood by people of color who attempt to contract with the City, as demonstrated by the numerous interviews BBC conducted with MBE

⁵² *Boston Awarded \$664m in Contracts. Less Than 1% Went to Women- and Minority-Owned Businesses*, BOSTON GLOBE (May 2, 2019), available at <https://www.bostonglobe.com/metro/2019/05/02/the-city-awarded-million-contracts-last-year-only-percent-went-minority-owned-businesses/K4Tto4GndWBF1MHdvpcNP/story.html> (describing poll of BECMA members citing concerns that city contracting process is “cumbersome, expensive, and geared toward large companies....”).

⁵³ For example, a purchasing contract may require a firm to bid for an entire year’s worth of supplies, rather than breaking down the contract into smaller components. Or an architectural contract may require that a firm have 20+ years of experience in a particular type of design, even though other skills and abilities of a newer firm might be transferable. *Id.*

⁵⁴ *Id.*

business owners for the 2020 Disparity Study.⁵⁵ For example, a Black business owner described his experience of racism: “The challenge initially, it was when you show up on a job, they first look at you like, ‘Can this guy even do what we ask him to do?’ Because of color.”⁵⁶ Similar frustrations were highlighted by a Black and Native American female business owner, who explained her skepticism of the City’s diversity efforts, stating:

The City makes you think they're [including minorities] but they're not. They try to go out and do the marketing and bringing in the minority's companies, but it shows in the number, it shows in the monies and the allocations. And then they only have a certain group of companies that they're familiar with. They don't allow no one to get in.... Meanwhile, you have a list of 2020 [MBEs]...that don't get nothing. They're trying but they're not going to get a chance at the apple.⁵⁷

A Hispanic female owner of a MBE-certified firm, when asked about her efforts to work with the City, summarized the problem succinctly: “I have attempted, but I have not been successful...I have not worked for any of them. It's very hard.”⁵⁸

As these interviewees know all too well, the City’s status quo contracting system makes it virtually impossible for Black and Latinx business owners to win its contracts. This exclusion is discrimination. Indeed, the 2020 Disparity Study recognized so, explaining that “the existence of barriers in the marketplace indicates that government agencies in the region may be *passively participating in discrimination* that makes it more difficult for minority- and woman-owned businesses to successfully compete for their contracts.”⁵⁹ When the status quo is allowed to exist for years, with insufficient remedial steps taken and a vanishingly small number of contracts awarded to MBEs

⁵⁵ See 2020 DISPARITY STUDY, *supra* note 3, App’x D.

⁵⁶ 2020 DISPARITY STUDY, *supra* note 3, App’x D at 144.

⁵⁷ 2020 DISPARITY STUDY, *supra* note 3, App’x D at 150.

⁵⁸ 2020 DISPARITY STUDY, *supra* note 3, App’x D at 73.

⁵⁹ 2020 DISPARITY STUDY, *supra* note 3, Ch. 3 at 14 (emphasis added).

year after year, this discrimination goes from being passive to being active—and in any event is more than sufficient to demonstrate disparate impact discrimination.

This exclusion is unjustifiable in light of the ample number of available Black- and Latinx- owned businesses that are willing and able to contract with the City. As discussed above, the BBC study assessed all local MBEs' availability, regardless of whether they were certified by the City or not. BBC also analyzed all 47,801 contracts the City entered into over a 5-year period and compared the utilization of MBEs to their availability. Through these rigorous methods, BBC founds that the City could have spent double the amount of procurement dollars it did contracting with Black and Latinx- owned businesses—a difference of almost \$76 million. More than enough Black and Latinx-owned businesses are available, and there is no substantial legitimate justification for the City to not contract with them.⁶⁰

Moreover, the problem is directly within the City's power to fix. Alternative contracting practices that remedy discrimination are available, and many cities have shown success in removing unnecessary barriers and actively engaging MBE firms. For this reason, Boston lags far behind other cities in Minority & Women Business Enterprises (MWBEs) inclusion. For example, the following cities have all attained substantially higher levels of MWBE participation compared to Boston:

- New York City, NY: achieved 19% MWBE participation as reported in October 2018.⁶¹

⁶⁰ It is the City's burden to explain their justification—not complainants. But here, it is simple to address the City's justification given the results of the study, and complainants do so preemptively. This should be in no way construed as alleviating the City's burden or limiting the justifications the City may attempt to provide.

⁶¹ CITY & STATE OF NEW YORK, *Momentum Builds Behind MWBEs* (Oct. 29, 2018), available at <https://www.cityandstateny.com/articles/policy/diversity/mwbe-momentum-builds.html>.

- Cook County (Chicago), IL: achieved 29% MWBE participation in FY 2017.⁶²
- Philadelphia, PA: achieved 31% MWBE participation in FY 2019.⁶³
- Charlotte, NC: achieved 23.9% MWBE participation for direct discretionary spends in FY 2019.⁶⁴
- Memphis, TN: achieved 18% MWBE participation in FY 2018.⁶⁵

And closer to home, there are excellent examples of public projects in the Greater Boston area where proactive steps have led to significant MBE participation, including the Massachusetts Port Authority’s (“MassPort”) progressive inclusion efforts for the Omni Hotel Project in the Seaport District.⁶⁶ For the Omni Hotel Project, MassPort “considered the development team’s diversity as a factor — one-fourth of the scoring — in picking a winning bidder for its site.”⁶⁷ MassPort used this race-conscious scoring system for other projects in the Seaport as well.⁶⁸

From these and other examples, best practices are readily available—and indeed have been for decades. The most successful MBE-inclusion programs are those that directly target the problem of MBE under-utilization through race-conscious programs. At the prime contracting level, cities may set goals for MBE participation; provide bid preferences or bid discounts for MBE firms; or otherwise promote diversity in the

⁶² COOK COUNTY GOVERNMENT, *Cook County Government Annual Business Diversity Report* (2017), available at https://www.cookcountyil.gov/sites/default/files/cook_county_government_annual_business_diversity_report_fy_2017.pdf.

⁶³ CITY OF PHILADELPHIA, *Annual Disparity Study* (2019) at 2, available at: <https://www.phila.gov/media/20200826084552/OEO-FY19-Disparity-Study.pdf>.

⁶⁴ CITY OF CHARLOTTE, *Annual Report: Minority, Women, Small Business Enterprise* (2019) at 4, 11, available at <https://charlottenc.gov/GS/procurement/cbi/Documents/FY2019-City-Annual-Report-Digital.pdf>.

⁶⁵ *Gains in City’s MWBE Spend Based on Incorrect Data*, MEMPHIS BUSINESS JOURNAL (2019), available at <https://www.bizjournals.com/memphis/news/2019/03/14/gains-in-citys-mwbe-spend-based-on-incorrect-data.html>.

⁶⁶ *See MassPort Offers Model for Inclusion with Omni Hotel Project in the Seaport*, BOSTON GLOBE (May 22, 2018), available at <https://www.bostonglobe.com/business/talking-points/2018/05/22/massport-offers-model-for-inclusion-with-omni-hotel-project-seaport/3D2TJqWMTiQUhKGXkHLUGO/story.html>.

⁶⁷ *Id.*

⁶⁸ *Id.*

selection process.⁶⁹ At the subcontracting level, many cities set goals on construction (and other) contracts, requiring that prime contractors either meet those goals or demonstrate that they made good-faith efforts to do so.⁷⁰ Where a disparity study provides the needed factual predicate, courts have routinely upheld such programs as a permitted way to break down entrenched discriminatory contracting systems.⁷¹

The best practices to remedy discrimination in MBE contracting are available, simple, and within the City's power to enact. Yet, the City of Boston's exclusionary contracting system persists—directly harming Black- and Latinx-owned businesses in particular. The City's low contracting rate is entirely unjustified given the ample amount of Black-and Latinx-owned businesses available to contract. Thus, the City's discrimination against Black-and Latinx-owned businesses directly contravenes its obligations under Title VI and its accompanying regulations.

V. Relief Requested

In light of the City of Boston's repeated violations of Title VI's antidiscrimination protections, Complainants respectfully request that DOJ and DOT:

1. Conduct a formal investigation of the City's contracting practices;
2. As part of the remediation process, facilitate a community-centered process convening BECMA, GBLN, Amplify Latinx, and MBEs to articulate solutions;

⁶⁹ See *Contracting for Equity*, supra note 51.

⁷⁰ See e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491–92 (1989) (explaining that states and municipalities have the authority to eradicate the effects of private discrimination within their own legislative jurisdiction); *Kossmann Contracting Co. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. Mar. 22, 2016), aff'd 2016 WL 11473826 (S.D. Tex. Feb. 17, 2016).

⁷¹ See, e.g., *North Shore Concrete and Associates, Inc. v. City of New York*, 1998 U.S. Dist. Lexis 6785 at *28-29 (E.D.N.Y. 1998) ("There is no indication that the statistical analysis performed by [the consultant] in the present case, which does contain statistics regarding minority contractors in New York City, is not sufficient as a matter of law under Croson."); see also *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 61-62 (2d Cir. 1992); *Concrete Works of Colorado, Inc. v. County of Denver*, 36 F. 3d 1513, 1528 (10th Cir. 1994).

3. Secure the City's compliance with federal civil rights laws, and engage BECMA, GBLN, Amplify Latinx, and MBEs as part of this process;
4. Compel the City to adopt specific contracting goals and race-conscious remedial efforts;
5. Suspend federal disbursements until compliance is assured; and
6. Provide all other necessary and appropriate relief that justice may require.

VI. Conclusion

The City of Boston's contracting system has long discriminated against its most vulnerable residents. Federal intervention is necessary to stop this shameful inequity and to ensure that the City of Boston does not continue to funnel billions of dollars into a racist and exclusionary public contracting system.

Dated: February 17, 2021

Respectfully submitted,



Erin Fowler, Esq.
Priya Lane, Esq.
Srish Khakurel, Esq.
Oren Sellstrom, Esq.
Iván Espinoza-Madrigal, Esq.

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Appendix

A

[View in browser](#)

Amplify Latinx Response to WGBH report on Declining Minority Contracting in Boston and the Commonwealth of MA

As our community gathers today to honor the legacy of Dr. Martin Luther King Jr., Amplify Latinx is calling on state and local leaders to take immediate action to address the long-standing decline in minority business participation in public contracting. The recent WGBH investigative series, "[The Color of Public Money](#)," confirms that minority owned businesses have long been left out from state and local contracting opportunities, perpetuating the widening income and wealth inequality in the Commonwealth.

There are 90,000 minority-owned businesses in the Commonwealth, making up 15% of all MA businesses, according to the [2012 Census](#). More than 30,000 of these businesses are Latino/Hispanic-owned, generate \$3.8 billion in revenue and employ over 18,500 residents. Yet, less than 3,000 of all minority businesses are certified by the state according to the [MA Office of Supplier Diversity](#), limiting access to large contracting opportunities that are critical to helping smaller firms scale.

As reported in the WGBH series, the annual value of government contracts awarded to black-owned businesses has decreased by over \$135 million in the last 20 years. Contributing to the decline is the lack of specific goals for minority business participation, spotty enforcement of compliance efforts, inefficient data reporting systems and failure of the larger business community to foster the inclusion of minority businesses.

The WGBH report should be a wake-up call for our entire business and government community. Our partners - [Black Economic Council of MA](#) (BECMA) and [Lawyers for Civil Rights](#) (LCR) - have issued statements calling upon Mayor Walsh, Governor Baker and other MA leaders to immediately implement a set of actions to increase the number of contracts being awarded to minority-owned businesses, and provide funding and technical assistance to increase growth and job creation for

minority owned businesses. We stand united with BECMA and LCR in support of their recommendations.

We also demand a focused commitment by our entire business, civic and government community to work together to create an inclusive economic ecosystem where all residents and businesses have an opportunity to participate and thrive. It is not enough to set goals and create policies if they lack transparency, enforcement and accountability. We call upon our corporate and government leaders, business associations and civic institutions to adopt policies that remove the systemic barriers to participation. We further recommend that there be an immediate integration of proven methods to increase minority business contracting, such as the Massport model.

On this day where we recognize Dr. Martin Luther King's dream and shared vision of inclusion and economic prosperity, we expect more from our corporate and elected leaders. Our economic future depends upon full and equitable participation of all of the Commonwealth's residents. We look forward to a robust dialogue that will once and for all set an inclusive economic agenda for Massachusetts.

THREE WAYS TO AMPLIFY IN 2020

SHOP LOCAL



BUSINESS DIRECTORY

BE COUNTED



2020 CENSUS INFORMATION



February 9, 2021

Mayor Martin Walsh
1 City Hall Square, Suite 500
Boston, MA 02201-2013

John Barros, Chief of Economic Development
1 City Hall Square, Room 717
Boston, MA 02201

**Re: Concerns Regarding Outgoing Administration's Attempts to Unilaterally
Roll-out Changes to Municipal Contracting Program Without Public Input**

Dear Mayor Walsh and Chief Barros:

On behalf of the many minority-owned businesses that we serve, Lawyers for Civil Rights (LCR) requests that the City publicly release its recently-completed Disparity Study immediately. We further request that the City cease and desist from making any changes – via executive order or otherwise – to its municipal contracting program impacting minority- and women-owned business enterprises (MWBEs) until directly affected communities of color are allowed to see the Study and weigh in on necessary reforms.

As you are aware a City-commissioned Disparity Study has been released to some media outlets, but not made available to the public. According to media reports, the Disparity Study shows egregious under-utilization of Black- and Latinx-owned businesses on municipal contracts. Under the Walsh Administration, only 1.2% of the \$2.1 billion spent on municipal contracts over a 5-year period went to Black- and Latinx-owned businesses. According to the Study, the City spent less than half a percent on Black-owned businesses despite the fact that the City could easily have awarded at least 3.6% of its procurement dollars to Black-owned businesses – roughly \$70 million.

As astounding as these statistical racial disparities are, LCR is deeply concerned that the outgoing administration may be preparing to roll-out changes to the City's contracting program before those who are directly affected – and harmed – by the City's discriminatory practices are able to see the Study and provide meaningful input into necessary remedial efforts. Such a move would be highly inappropriate and would represent a continuation of the type of behind-closed-doors practices that have caused these gross disparities in the first place. Failing to provide an opportunity for minority engagement in the remedial process compounds the injury to MWBEs – and is itself further evidence of discriminatory intent. We urge you not to do so, but instead to allow robust community input into needed remedial measures – following public release of the Disparity Study.

Enclosed, please find a public records request for the Disparity Study.

Sincerely,

Iván Espinoza-Madrigal, Esq.
Executive Director

Oren Sellstrom, Esq.
Litigation Director

61 BATTERYMARCH STREET • 5TH FLOOR • BOSTON, MA 02110
(617) 482-1145 (TELEPHONE) • (617) 482-4392 (FACSIMILE)
WWW.LAWYERSFORCIVILRIGHTS.ORG

February 9, 2021

Shawn Williams
Public Records Access Officer
City of Boston
1 City Hall Square
Room 615
Boston, MA 02201

RE: Public Records Request—Disparity Study

Dear Mr. Williams:

This request (“Request”), submitted pursuant to the Public Records Act, G.L. c. 66, § 10 (“Public Records Act”), seeks information regarding a disparity study commissioned by the City of Boston. As used in this Request, “public records” is defined as in the Public Records Act.

I hereby request a copy of the following public record in the custody of the City:

1. The *full* report Disparity Study commissioned by the City of Boston and conducted by BBC Research & Consulting, analyzing minority and women-owned business participation in city contracting.
2. Any Study or Report or portions thereof provided to the Boston Globe, or any other non-City entity or individual, that analyzes minority and women-owned business participation in city contracting.¹

The purpose of this Request is to gain information about racial and gender disparities in city contracting, and to enhance public accountability and transparency on such matters. The information will not be used for any commercial purpose. As this Request involves a matter of public concern, we ask that all fees associated with this Request be waived pursuant to 950 C.M.R. 32.06(5). If the waiver is denied and you expect the fee to exceed ten (10) dollars, please provide a detailed fee estimate.

The Public Records Law requires that you comply with this Request within ten (10) days following receipt. If your response to any portion of the Request is that any record or portion of it is not public, please set forth in writing the specific reasons for such denial, including which specific exemption you believe applies.

¹ Shirley Leung, City of Boston spent \$2.1 billion in contracts over five years. Only 1.2 percent went to Black-owned and Latino-owned businesses, available at: <https://www.bostonglobe.com/2021/02/05/business/city-boston-spent-21-billion-contracts-over-five-years-less-than-1-percent-went-black-owned-or-latino-owned-businesses/> (citing a “703-page report obtained by the Globe”).

If possible, please provide the document electronically. Should you have any questions about the scope of this Request, please contact me via email at skhakurel@lawyersforcivilrights.org or by phone at 617-371-7506 so that we may resolve any outstanding issues quickly. Thank you for your prompt attention to this matter.

Sincerely,

/s/ Srish Khakurel
Srish Khakurel, Esq.

[LOGIN OR SIGNUP](#)[START ORGANIZING:](#) [ACTIONS](#) [PEOPLE](#) [SUPPORT](#)

Establish equitable city contracting policies

 **MAYOR MARTIN J. WALSH**

On Friday, February 5, 2021, *GBH News* and the *Boston Globe* shared the results of a yet-to-be-released disparity study, which was commissioned by the City of Boston in 2018. The results are disturbing, however unsurprising.

The study reveals what BECMA members and community leaders have been saying for decades: The City of Boston does not value Black businesses or the Black community. The 703-page report lays out in stark detail that despite the pronouncements, public statements, executive orders, and policies, Mayor Martin J. Walsh and his administration have failed to deliver fair and equitable procurement for Black-owned businesses, as well as for other minority- and women-owned businesses. Bold leadership is required to immediately correct this systemic problem.

According to the *Boston Globe*, the study analyzed over 47,000 contracts awarded by the City over a five-year period (2014 - 2019) worth over \$2.1 billion. Of those contracts, 11% were awarded to minority- and women-owned businesses. Only 0.4% -- or \$9.4 million -- reached Black businesses. This puts Boston, which only recently committed itself to defeating racism, far below its counterparts in public spending with minority- and

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800

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women-owned businesses like New York City (19%), Chicago (29%), and Philadelphia (31%).

We must urgently address this issue. We know that public contracts are key to stabilizing small businesses and helping them scale so they can hire more people at better wages with more comprehensive benefits. Every public dollar spent must be an investment in our collective future.

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BECMA
Boston, MA

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To: Mayor Martin J. Walsh

From: [Your Name]

Mayor Walsh,

Last week, I read about the results of the city's disparity study, which you commissioned in 2018. I found the results alarming. What I read made it clear that despite all of the talk you have given over the years, you and your administration have failed to deliver fair and equitable procurement for Black- and other minority-owned businesses. I believe the time is now for bold leadership in addressing this long-standing issue.

I was appalled to read that out of \$2.1 billion in contracts over a five-year period, only \$9.4 million reached Black businesses and \$238 million was

awarded to minority- and women-owned businesses overall. This does not reflect my values or my vision for a city committed to equitable access to opportunities for all. That's why I support BECMA's demands for the city to:

- Immediately set spending goals of 15% for Black-owned businesses and a combined 40% for women- and minority-owned businesses.
- Immediately remove from their positions the Chief Financial Officer and Corporation Counsel, all who have been stumbling blocks to progress.
- Immediately enact policy tying performance evaluations, compensation, bonuses, and future employment for all cabinet-level positions, department heads, procurement officers, and other staff across citywide departments to achieving equity and diversity goals.
- Immediately direct all City departments and quasi-city agencies to unbundle large contracts that are set to become available in 2021 and beyond.
- Immediately make the Equity and Inclusion Unit an independent entity with strong enforcement and oversight powers and a full staff that allows the monitoring of all projects across the city and spending across all departments, including quasi-city agencies.

I believe that swift action in following through on these demands will set our city in a better direction. I urge you to immediately address this issue.

August 6, 2019

Mayor Martin Walsh
1 City Hall Square, Suite 500
Boston, MA 02201-2013

John Barros
Chief of Economic Development
1 City Hall Square, Room 717
Boston, MA 02201

Boston City Council
1 City Hall Square, Room 550
Boston, MA 02201

Re: Eliminating Barriers to M/WBE Participation in City Contracts

Dear Mayor Walsh, Chief Barros, and Boston City Councilors:

Lawyers for Civil Rights, its undersigned Board Members, the Massachusetts Minority Contractors Association (MMCA), and the Greater Boston Latino Network (GBLN) respectfully write concerning the alarmingly low rate of Minority and Women Business Enterprise (M/WBE) participation in City of Boston contracting. The City expends more than \$600 million of taxpayer dollars annually on contracting, providing an enormous opportunity to economically empower communities of color. We are deeply concerned that this opportunity is being lost – and that the City is losing out on the talents of M/WBE firms in the process.

As the City has recognized, it has engaged in “demonstrated and significant underutilization of M/WBE firms. . .”¹ Indeed, Boston lags far behind other cities in M/WBE inclusion. As explained more fully below, cities such as New York City, Charlotte, Memphis, and Philadelphia have all attained exponentially higher levels of M/WBE participation compared to Boston.

This problem is directly within the City’s power to fix – provided that the political will exists to do so – and would be consistent with the Mayor’s public statements on diversity and equity. To that end, this letter outlines best practices that Boston can adopt to affirmatively ensure that M/WBEs are not frozen out of City contracting opportunities. We understand that the City has been working closely with several stakeholders over the past few months, including the Boston Branch of the NAACP and the Black Economic Council of Massachusetts, Inc. (BECMA), to develop and implement solutions designed to address this critical issue. The policy solutions outlined here are designed to affirm, complement, and expand this important ongoing work. Adoption of these policies will create a healthier, more vibrant economy for communities of color – and for the City of Boston as a whole. It will also lead to greater transparency in

¹ See *Executive Order of Mayor Martin J. Walsh* (2016), Art. I(D) (retrieved from <http://files.ctctcdn.com/e7a569b1501/462c83b0-224f-4439-98cb-c8bcaecbd54d.pdf>.)

contracting and greater representation and inclusion of minority businesses, including Black, Latinx, and Asian contractors and vendors.

I. Minority and Women Business Enterprises Are Dramatically Under-Utilized in City of Boston Contracts

In May, the *Boston Globe* reported that less than 1% of the \$664 million awarded annually for city contracts goes to M/WBEs.² Even accounting for the fact that this figure may not capture every single M/WBE contract with the City, the numbers are extraordinarily low. Other available data makes clear that by any measure, rates of participation by M/WBEs in City of Boston contracting are extremely low – and have been for many years. For example, a statewide “disparity study” conducted in 2017 analyzed three City departments that performed the largest amount of direct construction contracting during 2010-2015 and found that MBEs received only 1.13% and WBEs received only 4.35% of all such contracts.³

Notably, the issue is not that M/WBEs are not available to contract with the City. To the contrary, as the City has acknowledged in setting goals of 10%-30% depending on the particular industry, many M/WBEs are ready, willing, and able to do the work required by the City.⁴ The City is just not contracting with them.

The impact of the City’s ongoing under-utilization of M/WBEs cannot be overstated. Boston is one of the most economically stratified cities in the nation, with communities of color in particular suffering from this wealth gap. A report by the Federal Reserve Bank of Boston, for example, documented how “the net worth of whites as compared with nonwhites is staggeringly divergent.”⁵ Business ownership is one of the primary ways in which families accumulate, and pass along, wealth from generation to generation.⁶ By allowing barriers to equal contracting

² *Boston Awarded \$664m in Contracts. Less Than 1% Went to Women- and Minority-Owned Businesses*, BOSTON GLOBE (May 2, 2019) (retrieved from <https://www.bostonglobe.com/metro/2019/05/02/the-city-awarded-million-contracts-last-year-only-percent-went-minority-owned-businesses/K4Tt04GndWBF1MHdvipcNP/story.html>)).

³ See *Business Disparities in the DCAMM Construction and Design Market Area*, NERA ECONOMIC CONSULTING (2017) at 181-182 (retrieved from <https://www.mass.gov/files/documents/2017/12/29/business-disparities-in-the-dcamm-construction-and-design-market-area-study.pdf>). Disparity studies are commissioned by governmental entities to determine whether a disparity exists between their utilization of M/WBEs and the availability of M/WBEs in the market area to do the work needed by the governmental entity. These studies are typically highly sophisticated, analyzing precisely the type of work needed by the governmental entity, the relevant market area, and the corresponding availability of M/WBEs in each relevant industry.

⁴ See Walsh Executive Order, *supra* n.1, at Art. I(D).

⁵ See *The Color of Wealth in Boston*, FEDERAL RESERVE BANK OF BOSTON (2015) at 1 (retrieved from <https://www.bostonfed.org/publications/one-time-pubs/color-of-wealth.aspx>).

⁶ See *Bigger Than You Think: The Economic Impact of Microbusiness in the United States*, ASSOCIATION FOR ENTERPRISE OPPORTUNITY (2013) at 8 (retrieved from

opportunity to persist, the City directly contributes to and perpetuates the enormous wealth gap in Boston. It also deprives the City of the skills and talents of the many M/WBE firms that are ready, willing, and able to contract with the City.

II. Disparities Exist Because Boston Is Not Taking Sufficiently Aggressive Steps To Ensure Equal Contracting Opportunity.

The reasons why M/WBEs are systematically under-utilized in government contracting are well-known, having been studied and analyzed for years. Although observed disparities may vary slightly from jurisdiction to jurisdiction, one theme is consistent: if a city does not take proactive steps to ensure equal contracting opportunity, then M/WBEs will be systematically excluded.⁷ For example:

- For prime contracts, particularly those that are discretionary, city officials making contracting decisions often limit M/WBE participation – either through conscious or unconscious bias, or simply because they prefer to contract with firms they have always contracted with in the past. If proactive steps are not taken to disrupt this *status quo*, then the problem builds on itself, as business relationships become more and more entrenched.⁸
- Prime contracts also often contain unnecessary qualifications that preclude newer or smaller firms (which M/WBEs tend to be) from participating. For example, a purchasing contract may require a firm to bid for an entire year’s worth of supplies, rather than breaking down the contract into smaller components. Or an architectural contract may require that a firm have 20+ years of experience in a particular type of design, even though other skills and abilities of a newer firm might be transferable. Without proactive steps to eliminate this type of exclusionary practice, the problem continues to replicate itself over the years.
- Many prime contracts also include subcontracting opportunities. Without affirmative steps to address bias and exclusion in subcontracting, M/WBEs are too often denied equal subcontracting opportunities. Prime contractors tend to simply go back to subcontractors they have used in the past – an “old boys network” that excludes M/WBEs. With

http://www.aeoworks.org/wp-content/uploads/2019/03/Bigger-than-You-Think-Report_FINAL_AEO_11.10.13.pdf).

⁷ See *Contracting for Equity: Best Local Government Practices that Advance Racial Equity in Government Contracting and Procurement*, INSIGHT CENTER FOR COMMUNITY ECONOMIC DEVELOPMENT, GOVERNMENT ALLIANCE ON RACE AND EQUITY (2017) at 6-8 (retrieved from http://haasinstitute.berkeley.edu/sites/default/files/gare-contract_for_equity_0.pdf).

⁸ See *Boston Awarded \$664m in Contracts*, *supra* n. 2 (describing poll of Black Economic Council of Massachusetts members citing concerns that city contracting process is “cumbersome, expensive, and geared toward large companies....”).

taxpayer funds at issue, cities cannot allow this type of subcontractor exclusion to go unchecked.⁹

Cities that take insufficient steps to address the issue of M/WBE exclusion head on become a part of the problem, funneling taxpayer dollars into a system that unfairly excludes M/WBEs from equal opportunity. A *laissez faire* attitude leads directly to M/WBE exclusion.

III. Solutions to Increase Diversity and Equity in City Contracting

Fortunately, proactive solutions are available, and many cities have shown great success in removing unnecessary barriers and actively engaging M/WBE firms. For example:

- **New York City, NY** – achieved 19% M/WBE participation as reported in October 2018.¹⁰
- **Cook County (Chicago), IL** – achieved 29% M/WBE participation in FY 2017.¹¹
- **Philadelphia, PA** – achieved 30.7% M/WBE participation in FY 2016.¹²
- **Memphis, TN** – achieved 18% M/WBE participation in FY 2018.¹³
- **Charlotte, NC** – achieved 18.54% M/WBE participation for direct discretionary spends in FY 2018.¹⁴

⁹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1978) (“It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.”).

¹⁰ See *Momentum Builds Behind MWBEs*, CITY & STATE NEW YORK (Oct. 29, 2018) (retrieved from <https://www.cityandstateny.com/articles/policy/diversity/mwbe-momentum-builds.html>).

¹¹ See *Cook County Government Annual Business Diversity Report*, COOK COUNTY GOVERNMENT (2017) (retrieved from https://www.cookcountyil.gov/sites/default/files/cook_county_government_annual_business_diversity_report_fy_2017.pdf).

¹² See FY16 Disparity Study (2016), OFFICE OF ECONOMIC OPPORTUNITY, OFFICE OF THE MAYOR (retrieved from <https://www.phila.gov/press-releases/department-of-commerce/office-of-economic-opportunity-releases-fy16-disparity-study/>).

¹³ See *Gains in City’s MWBE Spend Based On Incorrect Data*, MEMPHIS BUSINESS JOURNAL (retrieved from <https://www.bizjournals.com/memphis/news/2019/03/14/gains-in-citys-mwbe-spend-based-on-incorrect-data.html>).

¹⁴ See *Annual Report | Minority, Women, Small Business Enterprise*, CITY OF CHARLOTTE (2018) (retrieved from <https://charlottenc.gov/finance/procurement/cbi/CBI%20Document%20Library/FY%202018%20Annual%20Report%20Final.pdf>).

Closer to home, there are excellent examples of public projects in the Boston area where proactive steps have led to significant M/WBE participation, including Massport's progressive inclusion efforts for the Omni Hotel Project in the Seaport.¹⁵ Since Massport's innovative model does not depend on a disparity study, it amply demonstrates that meaningful initiatives can be successfully and immediately implemented without legal or bureaucratic red tape.

From these and other examples, best practices are well known. The most successful M/WBE programs are those that directly target the problem of M/WBE under-utilization, through race- and gender-conscious programs. Where a disparity study provides the needed factual predicate, courts have routinely upheld such programs.¹⁶ At the prime contracting level, cities may set goals for M/WBE participation; provide bid preferences or bid discounts for M/WBE firms; or otherwise promote diversity in the selection process.¹⁷ At the subcontracting level, many cities set goals on construction (and other) contracts, requiring that prime contractors either meet those goals or demonstrate that they made good-faith efforts to do so.¹⁸

There are also a wide variety of race-neutral elements that cities across the country have adopted to bolster M/WBE participation – either alone or in conjunction with race-conscious programs.¹⁹

¹⁵ See *Massport Offers Model for Inclusion with Omni Hotel Project in the Seaport*, BOSTON GLOBE (May 22, 2018) (retrieved from <https://www.bostonglobe.com/business/talking-points/2018/05/22/massport-offers-model-for-inclusion-with-omni-hotel-project-seaport/3D2TJqWMTiQUhKGXkHLUgO/story.html>).

¹⁶ See, e.g., *North Shore Concrete and Associates, Inc. v. City of New York*, 1998 U.S. Dist. Lexis 6785 at *28-29 (E.D.N.Y. 1998) (“There is no indication that the statistical analysis performed by [the consultant] in the present case, which does contain statistics regarding minority contractors in New York City, is not sufficient as a matter of law under *Croson*.”); see also *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 61-62 (2d Cir. 1992); *Concrete Works of Colorado, Inc. v. County of Denver*, 36 F. 3d 1513, 1528 (10th Cir. 1994).

¹⁷ See *Contracting for Equity: Best Local Government Practices*, *supra* note 7. To encourage inclusion efforts amongst prime contractors, some local governments utilize a grading system, in which prime contractors are given an ‘A’ to ‘F’ grade for their inclusion of M/WBE firms in their sub-contracting. These grades are then published online. See *State Policies and Programs for Minority- and Women-Business Development*, INSIGHT CENTER FOR COMMUNITY ECONOMIC DEVELOPMENT (2007) (Retrieved from <http://www1.insightcced.org/uploads/publications/assets/50%20state%20inclusive%20business%20policy%20scan.pdf>).

¹⁸ For example, in Seattle, bidders for prime contracts are required to have an inclusion plan. If the prime contractor does not implement its inclusion plan, payment can be withheld and the City could decide not to use them again indefinitely, or could debar them from doing business with the City for ten years. *Contracting for Equity*, *supra* note 7, at 11.

¹⁹ Race-conscious programs always have race-neutral components as well, since a governmental entity that wishes to adopt a race-conscious program must demonstrate that race-neutral efforts alone are insufficient. See, e.g. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1178-79 (10th Cir. 2000).

Race-neutral efforts include:

1. Breaking down large prime contracts into smaller pieces that smaller companies can successfully compete for. This also has the advantage of increasing competition, thus resulting in better prices for the City.
2. Establishing small or local business programs that provide incentives and/or subcontracting requirements for all small or local businesses. Since M/WBEs are disproportionately small, a small or local business program will often increase M/WBE participation.
3. Requiring each city department to conduct a regular assessment of future needs for goods and services, and proactively communicating these future needs in outreach efforts to small businesses.
4. Enacting prompt payment programs, to ensure that prime contractors pay their subcontractors in a timely fashion.
5. Regular public reporting of M/WBE participation, disaggregated to reflect MBE and WBE participation separately, as a means for city officials, the M/WBE community, and the public to see where progress is being made and where more work needs to be done.
6. Performance measures for Department heads that include success at meeting M/WBE participation goals.
7. Eliminating unnecessary RFP/RFQ and other bid criteria to ensure that overly-stringent requirements do not unnecessarily inhibit competition and limit the ability of M/WBE firms to compete.
8. Providing bonding assistance by playing a brokering role between M/WBEs and financial institutions and bonding companies to help secure a required loan or bond.²⁰
9. Creating a publicly accessible dashboard and scorecard for transparency and accountability with respect to progress on M/WBEs.
10. Streamlining certification processes to ensure they are not cumbersome or inaccessible to small businesses.

²⁰ A bond essentially constitutes a legal guarantee that a particular project will be completed as expected. In instances where a bonded contractor fails to perform, the bonding company will provide some form of restitution. States such as Rhode Island, South Dakota, Washington, and Wisconsin play a brokering role between M/WBEs and financial institutions and bonding companies to help obtain a loan or bond.

Finally, it is essential that any city regularly conduct – and act upon – disparity studies, since such studies provide the factual predicate needed to institute and refine any strong contracting equity program. New York City, for example, which attained a M/WBE utilization rate of 19% in contracts subject to its M/WBE program, *see supra*, has regularly updated its M/WBE program in response to disparity studies conducted every 7 years beginning in 2005—making adjustments in goals for each race/ethnicity by gender for each type of city spending that reflect the results of each study.²¹ In contrast, more than 16 years have passed since Boston’s last disparity study, making it extremely difficult to establish the type of aggressive contracting program that the City clearly needs.

It is our understanding that the City is currently conducting a disparity study, which is a positive step. However, we urge the City not to wait until that study is complete before strengthening its current efforts. Given the data that already exists, it is clear that the disparities between M/WBE utilization and availability are of a magnitude that would easily support much more aggressive measures to ensure M/WBE inclusion.²² Such measures can then be augmented when the disparity study is complete.

IV. Working in Partnership

It is alarmingly clear that disparity in City contracting has affected Boston’s diverse business community for far too long, and will continue to persist unless the City takes more proactive steps to eliminate existing barriers. The amount of wealth being lost each year in communities of color as a result is astounding. If Boston were to achieve a similar level of M/WBE participation as Philadelphia, for example, that would mean nearly \$200 million additional dollars flowing to Boston’s M/WBE community each year. Put another way, by allowing the *status quo* to persist, the City is diverting hundreds of millions of dollars away from M/WBEs on an ongoing basis.

We respectfully request a meeting with you, so that we can coordinate efforts and explore these issues in greater detail and come up with a concrete plan to strengthen the City’s contracting equity efforts – starting immediately and continuing until the disparities that currently exist are erased. Please feel free to follow-up directly with the team at Lawyers for Civil Rights, including Iván Espinoza-Madrigal, Priya Lane, and Oren Sellstrom, at (617) 988-0624. We stand ready to assist in this effort in any way that we can.

Sincerely,

Massachusetts Minority Contractors Association (MMCA)

Greater Boston Latino Network (GBLN)

²¹ See *City of New York Disparity Study*, MGT CONSULTING GROUP (2018) at 2-2.

²² See *Coral Construction Co. v. Kings County*, 941 F.2d 910, 919-20 (9th Cir. 1991) (local government must have “some evidence” to support remedial program before enacting it and may rely on post-enactment evidence if challenged).

Inquilinos Boricuas en Acción (IBA)

Sociedad Latina

Collaborative Parent Leadership Action Network (CPLAN)

East Boston Ecumenical Community Council (EBECC)

Higher Education Resource Center

Hyde Square Task Force

La Alianza Hispana

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