

Board Agenda Approved: _____
Date: _____

Agenda Item V1-0
Enclosure _____

**BOARD OF TRUSTEES
AGENDA TRANSMITTAL SHEET**

To: President


Date: November 4, 2008

From: Mr. William D. Pennell, Chief Financial Officer


Issue: Request Approval of Miller3 Consulting, Inc. Agreement for Consultant Services to Complete Availability Analysis to support Small Disadvantaged Business Enterprise (SDBE) Program

Background/Analysis: Miller3 Consulting, Inc. developed the Broward College Small Disadvantaged Business (SDB) program, which the Board of Trustees reviewed and approved on August 26, 2008. To guide and support the College's organizational performance as related to the SDB program, Miller 3 will assist in developing targets and goals to ensure participation and utilization of the available SDB and M/WBE vendors. Miller3 Consulting, Inc. will conduct an analysis to include availability, utilization, and a determination of areas of disparity. Miller3 will recommend to the College its findings for establishing goals for the SDB program.

Fiscal Impact: \$80,290.00



Initiating Official
Alex Denis, AVP
Procurement Services



Vice President/Provost
William D. Pennell,
Chief Financial Officer

Staff Position: Recommend Approval

THIS RECOMMENDED ACTION MEETS THE FOLLOWING ELEMENT(S) OF THE COLLEGE'S MISSION STATEMENT:

___ Providing high quality educational programs	<u> X </u>	___ Providing high quality services
___ Providing for affordability to a diverse community of learners	<u> X </u>	___ Providing for accessibility to a diverse community of learners
___ Commitment to student achievement	___	___ Commitment to lifelong learning
___ Commitment to academic excellence	___	___ Providing use of current technology

BRIEFLY DESCRIBE HOW THIS RECOMMENDATION ACHIEVES THE ABOVE ELEMENT(S) IN THE COLLEGE'S MISSION STATEMENT:

Minority Firm: Yes X No ___ N/A ___

Broward Firm: Yes ___ No X N/A ___

MILLER³ CONSULTING, INC.
CONSULTANT SERVICES FOR AVAILABILITY ANALYSIS

EXECUTIVE SUMMARY

Miller³ Consulting, Inc. developed the Broward College Small Disadvantaged Business (SDB) program, which the Board of Trustees reviewed and approved on August 26, 2008. Success of the SDB program will be determined largely by the level of commitment of the College's Board of Trustees, President and senior management. Adhering to DJMA's supplier diversity recommendations in 2004 and Miller³'s recent recommendations, Broward College's senior administrators are the key stakeholders in the outcome of this supplier diversity initiative.

The inclusion of SDB and M/WBE vendors in College procurement activities will be accomplished by the SDB program. This Availability Analysis will provide Broward College with its methods, targets and goals to ensure participation and utilization of the available SDB and M/WBE vendors.

The College will therefore review organizational performance by establishing utilization goals. Those goals will be based on "targeted procurement areas where there is a statistically significant disparity by size and race/gender groups" and vendor "availability by procurement area" (i.e., construction, architectural/engineering services, commodities and other contractual services).

Miller³ Consulting, Inc. will conduct an analysis to include availability, utilization, and determine areas of disparity. Miller³ will then recommend to the College its findings for establishing goals for its SDB program.

Policies and procedures to administer the SDB program will be forthcoming.

Components of the availability analysis will include:

- Data Collection – Data sources include bidders, subbidders from bid tabulations, hard copy contract files, prime contractors, awardees and subawardees, payments, purchase orders, accounts payable data covering all commercial transactions, etc.
- Relevant Market Analysis – Determines the geographic boundaries within which the College performs the substantial part of its business activities.
- Availability Analysis – Determines the available small/minority/women/disadvantaged business enterprise (S/M/W/DBE) and non-S/M/W/DBE firms who are available to do business with the College within the determined relevant market.
- Availability Projection Analysis – Broward County anticipates significant shifts in its demographics over the next five to ten years. To ensure that the availability analysis remains applicable as the demographics shift, Miller³ Consulting will develop availability projections for a five-year period.
- Goal-Setting Methodology - Miller³ will use current legal trends (*Croson, Adarand*, etc.) to establish a permissible goal setting formula for the College. Miller³ Consulting's goals would be based on demonstrated evidence of the College's relevant market. Miller³ will also provide guidance to the College for the establishment of overall organizational S/M/W/DBE goals as well as provide a mechanism for establishing project-by-project goals.

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- Utilization Analysis – Miller³ Consulting anticipates reporting contracting/purchasing activity by S/M/W/DBE category and by procurement type, data permitting.
 - The number and percentage of non-S/M/W/DBEs and S/M/W/DBEs awarded contracts, payments, or purchase orders, as prime and subcontractors; and, designers/consultants and sub-consultants.
 - The percentage of contracts received by prime and sub contractors and designers/consultants and sub-consultants.
 - The percentage of dollars invoiced or disbursed to prime and sub contractors and designers/consultants and sub-consultants.
- Disparity Analysis – The Miller³ team will calculate disparity ratios to compare the availability of S/M/W/DBEs with their utilization to assess any statistically significant over-utilization or under-utilization of these groups.

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AGREEMENT

For

SMALL BUSINESS PROGRAM CONSULTANT SERVICES

THIS AGREEMENT is made and entered into as of this _____ day of _____, 2008, by and between

BROWARD COLLEGE

(hereinafter referred to as "BC"),
whose principal place of business is
225 East Las Olas Boulevard, Fort Lauderdale, Florida 33301

and

MILLER³ CONSULTING, INC.

(hereinafter referred to as "SERVICE PROVIDER"),
whose principal place of business is
84 Peachtree Street, Suite 1000, Atlanta, GA 30303

BC and **SERVICE PROVIDER** are referred to collectively herein as the "**Parties.**"

WHEREAS, BC seeks an availability/utilization/disparity analysis to support the SDBE program developed by Miller³ Consulting, Inc; and

WHEREAS, Miller³ Consulting, Inc. provides the expertise and experience to provide said availability/utilization/disparity analysis; and

NOW, THEREFORE, in consideration of the premises and of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

ARTICLE 1 - RECITALS

1.01 Recitals

The Parties agree that the foregoing recitals are true and correct and that such recitals are incorporated herein by reference.

ARTICLE 2 - SPECIAL CONDITIONS

2.01 Scope of Agreement

a. SERVICE PROVIDER will provide BC with services as detailed in Appendix A, Statement of Work, of this agreement, and herein. All staff provided by SERVICE PROVIDER shall be employees or agents of SERVICE PROVIDER and not of BC. SERVICE PROVIDER shall be responsible for all matters relative to its employees/agents including, but not limited to wages, payment of all applicable taxes, workers compensation coverage, adhering to all applicable statutes, regulations, and requirements, all applicable licenses, insurances and coverages, all employee-related responsibilities and liabilities, as well as non-obligatory employee fringe benefit programs. SERVICE PROVIDER agrees to hold BC harmless from any expense or liability which may result from SERVICE PROVIDER's failure to withhold these taxes, failure to provide benefits for their

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employees, failure to comply with all contracts, promises or agreements with its agents or conduct itself in accordance with all applicable statutes, regulations and requirements. BC's sole responsibility shall be limited to providing payment to SERVICE PROVIDER for services rendered in accordance with this Agreement.

2.02 Term

This Agreement, as described herein, shall remain in effect until all deliverables are complete as outlined in Appendix A, incorporated herein by reference.

2.03 Cost of Services

SERVICE PROVIDER shall guarantee all-inclusive rates that shall not exceed the rates outlined in Appendix A, Statement of Work.

2.04 Payment Terms

BC will make payments based on the amounts stipulated in Appendix A, Statement of Work, to SERVICE PROVIDER within forty-five (45) days from the date of invoice. Payments will be based on completion of each deliverable outlined in Appendix A, as provided below:

Deliverable 1	Data Collection Plan
Deliverable 2	Completion of Data Collection
Deliverable 3	Preliminary Tables
Deliverable 4	Drafts Relevant Market, Availability, Utilization Report
Deliverable 5	Draft Disparity Report
Deliverable 6	Final Report

Invoices will be supported by appropriate documentation of work performed to date. Only one payment will be made per month.

2.05 Additional Expenses

All travel and additional expenses must be approved by BC. Approved travel expenses shall be reimbursed in accordance with Florida law.

2.06 Indemnification

1) By BC:

BC agrees to be fully responsible for its acts of negligence or its agent's acts of negligence when acting within the scope of their employment and agrees to be liable for any damages resulting from said negligence.

2) By SERVICE PROVIDER:

a. SERVICE PROVIDER agrees to indemnify, hold harmless and defend BC, its agents, servants, trustees and employees from any and all claims, judgments costs and expenses including, but not limited to, reasonable attorney's fees, reasonable investigative and discovery costs, court costs and all other sums which BC, its agents, servants, trustees and employees may pay or become obligated to pay on account of any, all and every claim or demand, or assertion of liability, or any claim or action founded thereon, arising or alleged to have arisen out of the products, goods or services furnished by SERVICE PROVIDER, its agents, servants, trustees and employees; the equipment of SERVICE PROVIDER, its agents, servants, trustees and employees while such equipment is on premises owned or

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controlled by BC; or the negligence of SERVICE PROVIDER or the negligence of SERVICE PROVIDER's agents when acting within the scope of their employment, whether such claims, judgments, costs and expenses be for damages, damage to property including BC's property, and injury or death of any person whether employed by SERVICE PROVIDER, BC or otherwise.

b. Patent or Copyright Infringement Indemnity - SERVICE PROVIDER shall hold harmless and defend BC against any and all suits based on any claim that the use by BC of the deliverables provided under this Agreement by SERVICE PROVIDER infringes on any United States patent right or copyright, provided SERVICE PROVIDER is promptly notified in writing of any such suit or claim against BC, and further provided that BC permits SERVICE PROVIDER to defend, compromise or settle the same, and gives SERVICE PROVIDER all available information, reasonable assistance, and authority to enable SERVICE PROVIDER to do so. This indemnity shall not apply to any infringement arising out of: (i) the alteration or modification of the deliverables by BC; (ii) any use of the deliverables which is not authorized herein; or (iii) use of the deliverables with any computer hardware or software not supplied or approved by SERVICE PROVIDER. This provision sets forth SERVICE PROVIDER's sole obligation and liability and BC's exclusive remedy for any proprietary rights infringement by the deliverables.

ARTICLE 3 - GENERAL CONDITIONS

3.01 Termination

This Agreement may be canceled by BC during the term hereof upon thirty (30) days written notice to SERVICE PROVIDER of its desire to terminate this Agreement. Payment for deliverables received and accepted prior to notice of termination will be due to SERVICE PROVIDER.

3.02 Records

Each Party shall maintain its own respective records and documents associated with this Agreement in accordance with the records retention requirements applicable to public records. Each Party shall be responsible for compliance with any public documents request served upon it pursuant to Section 119.07, Florida Statutes, and any resultant award of attorney's fees for non-compliance with that law.

3.03 Entire Agreement

This document incorporates and includes all prior negotiations, correspondence, conversations, agreements and understandings applicable to the matters contained herein and the Parties agree that there are no commitments, agreements or understandings concerning the subject matter of this Agreement that are not contained in this document. Accordingly, the Parties agree that no deviation from the terms hereof shall be predicated upon any prior representations or agreements, whether oral or written.

3.04 Amendments

No modification, amendment, or alteration in the terms or conditions contained herein shall be effective unless contained in a written document prepared with the same or similar formality as this Agreement and executed by each party hereto.

3.05 Preparation of Agreement

The Parties acknowledge that they have sought and obtained whatever competent advice and counsel as was necessary for them to form a full and complete understanding of all rights and obligations herein and that the preparation of this Agreement has been their joint effort. The language agreed to herein expresses their mutual intent and the resulting document shall not, solely as a matter of judicial construction, be construed more severely against one of the parties than the other.

3.06 Waiver

The parties agree that each requirement, duty and obligation set forth herein is substantial and important to the formation of this Agreement and, therefore, is a material term hereof. Any party's failure to enforce any provision of this Agreement shall not be deemed a waiver of such provision or modification of this Agreement. A waiver of any breach of a provision of this Agreement shall not be deemed a waiver of any subsequent breach and shall not be construed to be a modification of the terms of this Agreement.

3.07 Compliance with Laws

Each party shall comply with all applicable federal and state laws, codes, rules and regulations in performing its duties, responsibilities and obligations pursuant to this Agreement.

3.08 Governing Law

This Agreement shall be interpreted and construed in accordance with and governed by the laws of the State of Florida. Any controversies or legal problems arising out of this Agreement and any action involving the enforcement or interpretation of any rights hereunder shall be submitted to the jurisdiction of the State courts of the Seventeenth Judicial Circuit of Broward County, Florida. By entering into this Agreement, each party hereby expressly waives any rights either party may have to a trial by jury of any civil litigation related to, or arising out of this Agreement.

3.09 Binding Effect

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

3.10 Assignment and Subcontracting

Neither this Agreement or any interest herein may be assigned, transferred or encumbered by any party without the prior written consent of the other party. There shall be no partial assignments of this Agreement including, without limitation, the partial assignment of any right to receive payments from BC. Subcontracting will not be allowed without the prior written consent of BC.

3.11 Force Majeure

Neither party shall be obligated to perform any duty, requirement or obligation under this Agreement if such performance is prevented by fire, hurricane, earthquake, explosion, wars, sabotage, accident, flood, acts of God, strikes, or other labor disputes, riot or civil commotions, or by reason of any other matter or condition beyond the control of either party, and which cannot be overcome by reasonable diligence and without unusual expense ("Force Majeure"). In no event shall a lack of funds on the part of either party be deemed Force Majeure.

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3.12 Place of Performance

All obligations of BC under the terms of this Agreement are reasonably susceptible of being performed in Broward County, Florida and shall be payable and performable in Broward County, Florida.

3.13 Severability

In case any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal, unlawful, unenforceable or void in any respect, the invalidity, illegality, unenforceability or unlawful or void nature of that provision shall not effect any other provision and this Agreement shall be considered as if such invalid, illegal, unlawful, unenforceable or void provision had never been included herein.

3.14 Notice

When any of the parties desire to give notice to the other, such notice must be in writing, sent by U.S. Mail, postage prepaid, addressed to the party for whom it is intended at the place last specified; the place for giving notice shall remain such until it is changed by written notice in compliance with the provisions of this paragraph. For the present, the Parties designate the following as the respective places for giving notice:

To BC: Alex Denis, CPPO, Associate VP - Procurement and Material Services
Broward College
225 East Las Olas Boulevard
Fort Lauderdale, Florida 33301

With a Copy to: Kevin Fernander, College Attorney
Broward College
FAU/BC Higher Education Complex
111 E. Las Olas Blvd.
Fort Lauderdale, Florida 33301

To SERVICE PROVIDER: Sherry J. Williams
Miller³ Consulting, Inc.
84 Peachtree Street, Suite 1000
Atlanta, GA 30303

3.15 Captions

The captions, section numbers, article numbers, title and headings appearing in this Agreement are inserted only as a matter of convenience and in no way define, limit, construe or describe the scope or intent of such articles or sections of this Agreement, nor in any way effect this Agreement and shall not be construed to create a conflict with the provisions of this Agreement.

3.16 No Waiver of Sovereign Immunity.

Nothing contained in this Agreement is intended to serve as a waiver of sovereign immunity by any agency to which sovereign immunity may be applicable.

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3.17 **Authority**

Each person signing this Agreement on behalf of either party individually warrants that he or she has full legal power to execute this Agreement on behalf of the party for whom he or she is signing, and to bind and obligate such party with respect to all provisions contained in this Agreement.

IN WITNESS WHEREOF, the Parties hereto have made and executed this Agreement on the date first above written.

For Miller ³ Consulting, Inc. <u>Sherry J. Williams-Miller</u> 11/4/08 SIGNATURE DATE <u>Sherry J. Williams-Miller, President/CEO</u> PRINT NAME/TITLE Attest: <u>Dave J. Miller, Jr.</u> 11/4/08 SIGNATURE DATE <u>Dave J. Miller, Jr., Senior Associate</u> PRINT NAME/TITLE	For BC <u>J. David Armstrong, President</u> SIGNATURE DATE PRINT NAME/TITLE Approved as to Form and Legality: <u>Kevin Fernander</u> SIGNATURE DATE <u>Kevin Fernander, College Attorney</u> PRINT NAME/TITLE
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**APPENDIX A
SCOPE OF WORK**

INTRODUCTION

Broward College is undertaking efforts to increase the participation of small businesses in its procurement and contracting opportunities. The College is particularly interested in the participation of minority and woman owned businesses and is aggressively seeking ways to improve its track record in utilizing MWBEs.

The College staff has begun to address the issue of MWBE participation by hiring Miller³ Consulting, Inc. to design a Small Disadvantaged Business Program. To ensure that the SDB program is properly tailored and goals are properly established, the College desires an availability analysis of S/M/W/DBEs in the Broward County and Tri-County areas. Below are the tasks for conducting an availability analysis for the College.

1. Data Collection

A formal data assessment is necessary in order to develop a practical approach for collecting contracting, purchasing data, payments, and vendor/bidder and subcontractor data for the study period, FY 2003 – FY 2008. M³ Consulting expects that the data will be in either electronic or hard copy format, with the information in hard copy more intensive in time and personnel to transcribe into a format usable for analysis. This includes vendors, bidders and sub-bidders with address and cost information, awardees and subcontractors with address and cost information, payees with address and cost information.

The data collection task is performed in three parts:

- A detailed **data request** will be submitted after the notice to proceed is issued, outlining all data elements and documents required for analysis;
- At the onset of the study, M³ Consulting will conduct a **formal data assessment** in order to develop a practical actionable approach for collecting contracting, purchasing, payments, vendor/bidder and subcontractor/subbidder data for the study period for construction and design services in the categories of non-M/W/DBE, Black, Hispanic, Asian, Native American, and Woman. Based on the data assessment, **a detailed data collection plan** will be submitted to the College for approval, containing findings of the assessment, a plan for collecting data and a schedule of activity.
- Upon receipt of approval of the data collection plan, M³ Consulting will conduct **data collection**, using the data collection plan as the roadmap.

M³ Consulting begins the availability analysis with the collection of data, including contract and purchasing data, payments, and vendor/bidder and subcontractor data for the study period. M³ Consulting expects that the data will be in either electronic or hard copy format, with the information in hard copy more intensive in time and personnel to transcribe into a format usable for analysis. This includes vendors, bidders and sub-bidders with address and cost information, awardees and

subcontractors with address and cost information, payees with address and cost information. Below is a listing of the required data elements for the availability analysis.

REQUIRED DATA ELEMENTS

Summary of Data Sources		
Availability	Utilization	Master S/M/W/DBE Listing
Bidder and Subbidders from Bid Tabulations, Hard Copy Contract Files and Prime Contractors	Contract and subcontract award data from hard copy contract files, especially for Construction and Professional Services	The College's S/M/W/DBE List
Awardees and Subawardees from Payments, Purchase Order and Hard Copy Contract Files	Census of Purchase Order Data for the study period if in electronic formats; sample of PO data if in hard copy formats	All Public Entity Certified S/M/W/DBE Lists Within the Relevant Market
Vendors List for Current Year, preferable purged	Accounts Payable Data for the study period, covering all commercial transactions and excluding employees, government and non-profit transaction	Other Organizations' S/M/W/DBE Listings, such as Chambers of Commerce; Minority and Women Trade Organizations
The College's S/M/W/DBE List		
Census Data for FY 2002		

- Deliverable 1: Data Collection Plan
- Deliverable 2: Completion of Data Collection

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2. Relevant Market Analysis

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The relevant market analysis determines the geographic boundaries within which the College performs the substantial part of its business activities. The identification of the bounds is also guided by legal criterion that the College must refine its efforts to impact S/M/W/DBE business activity to its political jurisdiction.

Regarding the geographic boundaries of the relevant market, M³ Consulting will test the assumption that the relevant market for the College is the vendors, payees, and contractors who have their principal place of business in the Broward MSA. The identification of the relevant market will be tested, using data from the College's contract, purchase orders, vendor registration, and payments files. By determining the location of bidders, vendors, and contract award winners for each category of procurement, M³ Consulting can test the accuracy of the assumption.

The calculation of relevant market geography is performed by acquiring data that contains the addresses (at least zip code) of, respectively, bidders, vendors, and contract award winners. Then a percentage distribution of firms is calculated based on geographical location, starting with the College region and then moving outward in a concentric fashion. While case law does not specify a minimum threshold percentage of bidders or vendors, it is reasonable to require from 60 percent to 75 percent as a minimum. In addition, there are also practical jurisdictional concerns in extending the relevant market too far out. Results will be reported by local (Broward MSA), regional (tri-County area) and State/outside of State.

- Deliverable 3: Preliminary Tables
(Preliminary Tables are tables produced from the hard copy and electronic data collected during data collection. These tables are reviewed by BC to assist M³ Consulting to affirm that all available contracting activity has been reviewed and properly analyzed prior to proceeding to the report writing stage. If no changes to preliminary tables are required, M³ Consulting will proceed to the report writing stage. If changes are required, tables will be adjusted and resubmitted to the College, if desired.)
- Deliverable 4: Draft Relevant Market Report (part of Availability Analysis)

3. Availability Analysis

The availability analysis determines the available S/M/W/DBE and non-S/M/W/DBE firms who are available to do business with the College within the determined relevant market.

Availability is the most problematic aspect of the statistical analysis of disparity. It is intrinsically difficult to estimate the number of businesses in the marketplace that are ready, willing and able to perform contracts or provide services. In addition to determining an accurate head count of firms, the concomitant issues of capacity, qualification, willingness, and ability complicate the production of accurate availability estimates.

M³ Consulting Availability Model

The M³ Consulting team will generally employ two general approaches to measuring availability: the Ready, Willing and Able (RWASM) Model, and the Census Based Model. Public Sector Availability, Dun & Bradstreet and Reed Construction Availability are also discussed, but generally the first two are performed only upon client request. In summary, the Availability measures fall into the following categories:

- **RWASM**—Those firms who are ready, willing and able to do business with the College;
- **Public Sector AvailabilitySM**—Those firms who are ready, willing and able to do business with similar public sector agencies within the College’s marketplace;
- **Marketplace Availability**—All firms available in the College’s marketplace as measured by either Census, Dun & Bradstreet or Reed Construction.

The Availability Matrix below outlines our Availability Model. The matrix starts with the legally optimum availability measure of those firms “ready, willing and able” to do business with the College and cascades down to less optimum measures. *Factors that determine which level of availability best suits the College environment include quality of available data, legal environment, and previous levels of inclusion of DBEs in bidding and contracting activity.*

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Availability Model

RWASM Availability

1. Prime and subbidders by contract category for each year of study period

2. Prime and subbidders by contract category

3. Prime bidders + subawardees + prime awardees (informal purchases) for each year of study period

4. Prime bidders + subawardees + prime awardees (informal purchases)

5. Prime bidders + subawardees + prime awardees (informal purchases) + Vendors + certified MWBEs

Public Sector Availability

6. Agency RWASM measure+ similar public entity prime and subbidders

7. Agency RWASM measure + similar public entity prime and sub awardees

8. Agency RWASM measure + similar public entity prime, sub awardees and vendors +
Master MWBEs List

Market place Availability

9. Census

10. Dun & Bradstreet

11. Reed Construction Data

M³ Consulting

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RWASM Availability

The RWASM estimate, developed by M³ Consulting, is motivated by the *Croson* requirement of measuring “the number of qualified minority contractors willing and able to perform a particular service” (availability) and comparing that with “the number of such contractors actually engaged by the locality or the locality’s prime contractors” (utilization). RWASM is a “term of art” that covers estimates of M/W/DBE availability that specifically recognizes the enumerated firms’ *interest* in doing business with the public entity in question, in contradistinction to Census estimates, which simply provide gross counts of firms regardless of their interest.

The basic assumption underpinning RWASM estimates is that a business must exist and actively seek to do business with a particular entity in order to be included in the pool of businesses available to perform on entity contracts. In its *Croson* decision, the U.S. Supreme Court criticized the City of Richmond because it “does not even know how many MBEs *in the relevant market* are qualified to undertake prime or subcontracting work in public construction projects” [emphasis added.] M³ Consulting has developed an alternative model that incorporates the Court’s intentions. The RWASM

estimate considers as available those minority and women contractors that are *ready, willing, and able* to provide products and services to an entity. The RWASM estimates are drawn from the Court's guidance that qualified contractors be "willing and able" to perform.

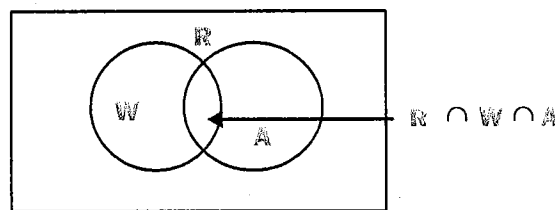
Again, the first component of the model, *ready*, simply means that a business exists. The second component, *willing*, suggests that a business understands the requirements of the work being requested, and wants to perform the work. The third component, *able*, defines the group of firms with capacity to do the job.

Since *ready* is defined as existing, the Census Bureau's estimate of the number of firms in a particular area is appropriate. Thus, the Census Bureau estimate of the available minority firms in the entity's relevant market area defines availability in terms of those firms that are *ready*.

Not all existing firms may want to contract in the public sector. It is conventionally recognized that the population of firms *ready, willing, and able* to do business with the public sector is actually a subset of the universe of firms in the general marketplace. RWASM attempts to capture 'actually available' with most importance given to firms that actually sought work via bids/proposals to work with the College at prime and sub contractor levels.

Venn Diagram

The RWA Firms



Source: M³ Consulting

A broader measure would look at 'potentially available' firms i.e., at various lists from other entities in the area and most broadly at Census data, which is a 'phone book' count of firms in the College and other cities and counties within Broward MSA. Thus, the RWASM Model more closely accounts for those firms that actively seek work with the College. In principle, this approach to measuring availability is potentially more accurate than other approaches because both S/M/W/DBEs and non-S/M/W/DBEs must have met minimum standards of interest in and willingness to conduct business with the College, and this approach identifies such firms.

Subcontractor Availability Estimates

A specific feature of the availability estimates produced by M³ Consulting is the development of separate measures of prime availability and subcontractor availability. RWASM estimates will produce prime contractor availability estimates based on counts of bidders (S/M/W/DBE and non-S/M/W/DBEs), vendors, and prime contractors. RWASM estimates of subcontractor availability often are limited by absence of data on non-S/M/W/DBE subcontractors, and may be otherwise biased by the usual lack of data on potential subcontractors that provided bids or quotes to primes but were not used.

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Alternatively, Census-based estimates of prime contractor availability will not reflect firms with specific interest in doing public sector work, and will suffer from the absence of C-corporations in the Census samples (resulting in the absence of firms capable of performing large contracts). This latter shortcoming, interestingly, may result in the Census estimates providing more reasonable subcontractor availability estimates, since only proprietorships, partnerships and S-corporations are included in the counts.

Master S/M/W/DBE Listing

In order to correctly identify S/M/W/DBEs, M³ Consulting creates a Master S/M/W/DBE listing that compiles various local, state and agency specific listings including but not limited to certifications, licensing, professional organization listings. The purpose of this listing is not to use these to measure availability (since there is no corresponding non-S/M/W/DBE listing), but to validate and correct, where necessary the race/gender and ethnicity of the bidders and vendors listings obtained that are used to measure availability. This helps in the issue of under or over counting or miscounting S/M/W/DBEs without substantially adding costs.

Public Sector AvailabilitySM

Many firms work almost exclusively in the public sector, as private sector opportunities are limited in accessibility for a myriad of reasons, including discrimination. Understanding that a firm may perform similar work for several public entities, M³ Consulting developed Public Sector AvailabilitySM. This potential availability measure is broader than RWASM, but does not include all firms in the marketplace. As such, it reflects those firms who are ready, willing and able to perform public sector work.

Public Sector AvailabilitySM includes lists of available firms known to various public sector agencies, especially those tied to construction and construction related projects, including but not limited to the College (such as the City, the County, among others). These firms are closer to RWASM having expressed an interest in contracting opportunities with other public sector agencies with similar standards and limitations as the College. The list may include: (i) lists of public agencies' bidders, vendors and awardees; (ii) Lists of firms certified by these agencies. To conduct this analysis requires intergovernmental cooperation.

Marketplace Availability

Census Model

Census data provide a gross head count of businesses that exist in the identified relevant market. This approach utilizes data from the Bureau of the Census *Survey of Minority Business Enterprise (SMOBE)* and *Survey of Women Business (SWOB)*.

Census-based estimates also have the advantage of providing counts of non-M/W/DBEs and M/W/DBEs. However, the data have several serious limitations that make Census estimates less preferred than estimates based on other approaches that recognize issues of qualifications and interest in doing business with the College:

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- A Florida District Court in *Phillips and Jordan v. FDOT* critiqued the sole use of a Census-based approach to analyze availability.
- Census counts of firms include “all” firms, not simply those that have taken affirmative steps to work on the College’s projects.
- Census counts do not measure business owners’ qualifications or willingness to do business with public contracting entities.
- SMOBE data excludes counts of “C” corporations (as defined by subchapter C of the Internal Revenue Service Code) at the metropolitan level, which include many firms with the capacity to perform on major projects.¹

These reservations notwithstanding, some courts favorably consider Census estimates of business availability in their evaluation of claims of disparities in contracting.

Dun & Bradstreet

Often Dun and Bradstreet (D&B) data from their database (the Marketplace) is used to capture ‘potential availability’ listings data within the relevant market. While Dun & Bradstreet is a valid listing that captures businesses in the relevant market, it suffers from some of the same limitations that Census does. These limitations make this listing less attractive as a measure of availability.

1. D&B list includes a count of firms but not those that have shown any inclination to work on the College’s projects and are thus ready, but not ‘willing’. This does not allow for ‘narrow tailoring’ that is required based on *Croson*. It does not represent actual availability, but potential availability.
2. The value-add does not justify the high cost of the list.
3. D&B is not necessarily more inclusive than an entity’s vendor list, because firms may not register with D&B due to the registration fee.
4. D&B listing often undercounts M/W/DBEs and therefore the D&B list must be augmented utilizing other M/W/DBE lists.
5. While D&B provides strong capacity information, it is not clear whether the entity’s vendors will be represented in enough quantity to make it “agency specific”. Therefore, the D&B list may show M/W/DBEs as more capable or less capable than those M/W/DBEs that bid with the entity.

M³ Consulting performs this analysis upon request.

Reed Construction

Reed Elsevier publishes construction activity data across the country and selected areas outside the United States. The data includes construction projects in the planning phase, with the following information:

- Owner of Project with Address
- Description of Project
- Value of Project
- Location of Project

¹SWOB includes “C” corporations in its summary findings but only at the national level.

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If the project goes to fruition, the general contractor, subcontractors, and the architect and engineer that bid are listed with the project. In the market under review, Reed Construction data provides data on both public and private sector projects, providing a comparison of availability and utilization of DBEs on projects for various public sectors agencies and private sector organizations. The availability analysis will provide insight into those firms who are available to the College on similar projects. The utilization analysis of Reed Construction data provides comparative analysis of entities with and without the requirements of federal, state and local M/W/DBE participation requirements. This gives an "actual" picture of what is occurring in the marketplace where there is no goal requirements, as opposed to a statistical "estimate" of what would occur if an agency had no goals in place.

M³ Consulting performs this analysis as part of both the availability and private sector analysis and highly recommends it to compare public and private sector projects.

Given imperfect data, the most reasonable approach is to use multiple data sources. M³ Consulting implements this strategy. Our experience has shown that relying on multiple data sources is the most prudent way to buttress statistical findings.

RWASM Availability and the Issue of Capacity

The RWASM availability analysis has the benefit of a naturally occurring capacity adjustment. As such, on the M³ Consulting Availability Model, Levels 1-4 do not require any adjustment for capacity. Level 5 may require some other consideration of capacity, depending on the vendor registration and S/M/W/DBE certification requirements of the College. Most clients' data permits a Level 2 to Level 4 RWASM availability analysis for construction and professional services.²

During the bidding and procurement process, the issue of capacity is automatically addressed. Only those firms that are deemed non-responsive and non-responsible by the buyers or selection committee do not meet the capacity requirements for the College's opportunities. This is normally a very small number of bidders and subbidders, which can be identified in contract files. All other bidders, subbidders and of course, awardees have been deemed to have the capacity by the College to provide the goods or services being procured. They simply did not win. As such, adjusting RWASM availability measures further produces a false picture of those firms truly ready, willing and able to provide goods and services to the College. This natural consideration of capacity distinguishes RWASM from other methods of measuring availability, because the potentially available firms may not have undergone the rigorous review process of the College or any other public agency. Thus, some "proxy" of this natural procurement process must be devised. The natural capacity adjustment and the conservative nature of the RWASM measure strengthen these measures' reliability and defensibility.

However, given that, in this case, M³ Consulting recommends using potential availability measures to capture firms that may be available but have not previously bid, the discussion of capacity may be relevant.

- Deliverable 3: Preliminary Tables
- Deliverable 4: Draft Availability Report

² Because availability is measured by the *percentage* of available M/W/DBE firms, not the count of available firms, typically RWASM measures are similar to or in many cases, exceed the percentage of available M/W/DBE firms as measured by the marketplace availability measures. This is particularly the case for construction and design, because public entities usually are more aggressive in outreach to M/W/DBEs than the private sector.

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4. Availability Projection Analysis

Broward County anticipates significant shifts in its demographics over the next five to ten years. To ensure that the availability analysis remains applicable as the demographics shift, M³ Consulting will develop availability projections for a five-year period. Census County Business Patterns will be utilized to determine changes in demographics over the last ten to 20 years (or the time period available from Census). Using this data, M³ Consulting will develop a multiplier to project anticipated changes in availability by race and gender and contract category (to the degree the information is available).

Deliverable 4: Draft Availability Projection Report

5. Goal-setting Methodology

Croson, Adarand and 49 CFR Part 26 may serve to provide some guidance as to development of a permissible goal setting formula for the College. M³ Consulting's goals would be based on demonstrated evidence of the College's relevant market. M³ Consulting will also provide guidance to the College for the establishment of overall organizational S/M/W/DBE goals that may be achieved using either race/gender-neutral or race/gender-conscious measures, as well as provide a mechanism for establishing project-by-project goals.

There are four types of goal setting methodologies that M³ Consulting can recommend:

- **Algorithm Target (ATM) MethodologySM**—The ATMSM formula, developed exclusively by M³ Consulting, allows entities to develop goals based on both market conditions (availability) and actual levels of participation by the College (utilization). The ATMSM formula also allows the College to forecast the necessary S/M/W/DBE participation levels to achieve the desired outcome, correcting for stated disparity, by an established date. This methodology has been designed to assist the College to determine its goals through a realistic and statistically valid model.

The calculation of ATMSM is a two-step process:

1. A weighted availability measure is developed by using Sum of the Year's Digits method which results in a higher amount of weight being given to an availability measure which is ranked higher or deemed more reliable or important than other weighted availability used to calculate an average. The following formula: $\{N*(N + 1)\}/2$, will calculate the sum of the number of availability measures being averaged.
2. This weighted availability measure is then used in the computation process to establish the actual target goal.

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ATM Formula Matrix
Policy Goal/Program Target
Total Utilization-Construction-Relevant Market

African-American	Availability					
	Weighted	Vendor	Bidders	Subs	Primes	Census
Program Length	5.3%	5.4%	2.4%	12.4%	1.5%	2.6%
1	32.4%	33.1%	12.1%	82.1%	5.8%	13.5%
3	14.3%	14.6%	5.6%	35.6%	2.9%	6.2%
5	10.7%	10.9%	4.3%	26.3%	2.4%	4.8%
7	9.2%	9.4%	3.8%	22.4%	2.1%	4.2%
9	8.3%	8.5%	3.5%	20.1%	2.0%	3.8%
10	8.0%	8.2%	3.4%	19.4%	1.9%	3.7%

Source: M³ Consulting

- **DOT/EPA DBE Type Calculation**—M³ Consulting has developed goal-setting methodologies consistent with the requirements of these federal government agencies. Our methodologies have been approved by these agencies in goal setting that we have performed for several of our clients.
- **Point System**—This type of participation measure is not predicated upon actual goals, but instead provides for a maximum number of points that can be obtained by a contractor in a proposal for the participation of S/M/W/DBEs. The point system functions best in RFP and design/build type contractor selection processes. The primary benefit of the point system is that S/M/W/DBE participation becomes a factor (such as price and qualifications) in the selection process, as opposed to a measure of bid responsiveness, thereby shifting the focus away from MWBE participation as the reason for not awarding a bid to a particular contractor. Again, drawing on our considerable experience in designing and implementing such contract selection schemes, M³ Consulting is quite prepared to explore a Point system with the College. M³ Consulting's point system will take into consideration the U.S. Supreme Court's recent decisions in *Grutter v. Bollinger* and *Gratz v. Bollinger*.
- **Benchmarking**—A benchmark is simply a percentage level of procurement tied to some measure of percentage of S/M/W/DBE availability. A properly crafted benchmarking program exhausts race/gender-neutral alternatives in the first instance to achieve the benchmarks and employ race/gender-conscious goals, if at all, in a limited, moderate and occasional manner. A benchmarking program also provides for a neutral mechanism for transition to a purely race/gender neutral procurement environment. A benchmark is not a quota, but serves as a function in the annual tracking of the College performance. The benchmark is presented as a range of percentage goals by procurement category by race/gender. These ranges would be applied, at the contract level, relative to an overall dollar goal for the College in a particular procurement category. M³ Consulting is prepared to provide a complete benchmarking methodology appropriately tailored to the College' particular circumstances, if desired.

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Project-by-Project Goals and ATMSM Formula

It is important to note that embedded within this overall goal should exist a flexible project-by-project goal mechanism. The administrators of any particular goal must carefully monitor the relationship between the nature of work for a given project and the availability of S/M/W/DBEs. This implies that the College must examine each project for its 'work content' and determine a set of skills needed for completion, not merely use the standard capacity measures, such as years of experience or bonding. This is because capacity is an elastic measure that can be increased or decreased for a firm based on needs. If S/M/W/DBEs exist that have the core competencies of this predetermined 'content examination', project goals may be set higher on these projects than that of the goals representing a percentage of the contracting category on an annual basis. By a similar reasoning, when such firms do not exist, the project goals may be lowered. The College must, in other words, determine the correlation between the 'content or needs' of a project and the availability of S/M/W/DBEs and adjust goals accordingly. Therefore, hypothetically, while the overall goal may be set at 12 percent, six different projects may have goals as follows:

Project I:	12.5 percent;
Project II:	31 percent;
Project III:	15 percent;
Project IV:	2.5 percent;
Project V:	8.5 percent; and
Project VI:	2.5 percent.

This would result in an overall goal of 12 percent, but be different at the project level. This project-by-project goal must be used on an on-going basis to achieve an overall goal and not the other way around. In other words, if the first four projects were high enough to meet the goal of 12 percent, then the next two projects should not automatically have zero goals. The overall goal should be a minimum achievable standard for S/M/W/DBEs inclusion and not a maximum barometer of exclusion.

M³ Consulting's ATMSM Formula assists the College in computing project-by-project goals. Because the ATM formula actually corrects for identified disparity, the calculation automatically identifies 1) the level of utilization to be achieved to make the correction, 2) the level of utilization to be achieved through race/gender-conscious means (actual availability) and 3) the level of utilization to be achieved through race/gender-neutral means (ATM target minus actual availability).

Deliverable 5: Recommended Goal-setting Methodology
Recommended Goals (included in Draft Conclusions Report)

Deliverable 5: Draft Disparity Report

6. Utilization Analysis

The analysis of utilization will include a full discussion of the appropriate base for determining S/M/W/DBE utilization (i.e., what types of agency spending are typically excluded from the College's calculation of S/M/W/DBE utilization). Sole source, emergency purchases, and limited source equipment purchases will be treated as well.

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M³ Consulting anticipates being able to report the following contracting/purchasing activity by S/M/W/DBE category and by procurement type, data permitting:

- The number and percentage of non-S/M/W/DBEs and S/M/W/DBEs awarded contracts, payments, or POs, as prime and subcontractors; and, designers/consultants and sub-consultants.
- The percentage of contracts received by prime and sub contractors and designers/consultants and sub-consultants.
- The percentage of dollars invoiced or disbursed to prime and sub contractors and designers/consultants and sub-consultants.

Presenting these different measures of utilization will facilitate the interpretation of disparity ratios by illuminating potential reasons for disparity that may also point to nondiscriminatory factors.³

To the degree allowable, M³ Consulting will further present the data in the following manner:

- Competitive and non-competitive thresholds;
- Federally-supported contracting versus contracting supported by nonfederal sources;
- By race/ethnic group and by gender;
- By prime and subcontract utilization separately;
- By specialties; and,
- By relevant market.

The disaggregating of procurement data by race/ethnic group will be pursued given adequate detail on S/M/W/DBE status. For instance, the essential categories of M/W/DBE groups will be Black, Hispanic, Asian, Native American, and women.

M³ Consulting is prepared to provide even finer breakdowns of utilization measures, depending on the level of detail discovered in the College's data.

Generally, payments data and contracts data is used to analyze M/W/DBE utilization in construction and design, while payments and purchase order data alone will be used for the other procurement categories. To the degree allowable, this data will be subdivided by NAICs code into sub-specialty areas

In addition, separate tables denoting prime and subcontractor utilization will be presented, whenever available.

Deliverable 3: Preliminary Tables
Deliverable 4: Draft Utilization Report

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³ *Prior Tire*, at 21. In *Prior Tire Enterprises, Inc. v. Atlanta Public School District* [Civil NO. 1: 95-CV-825-JEC], the Court criticized the Atlanta Public School District's disparity study for limiting its utilization measures to the percentage of contract dollars received by minorities. The Court agreed with the Plaintiff's expert witness that "[if minorities were unable to supply high-ticket [i.e., expensive] items to the School Board, minorities would likely receive a disproportionately low share of contracting dollars even in the absence of discrimination."

7. Disparity Analysis

The M³ Consulting team will calculate disparity ratios to compare the availability of S/M/W/DBEs with their utilization to assess any statistically significant over-utilization or under-utilization of these groups. The disparity ratio will be calculated by year, procurement category, prime and subcontractor status, race, ethnicity and gender status and source of contract funding (if data permits). A disparity ratio equaling 1.0 would be nominal evidence of a balance between percentage availability and percentage utilization, i.e., "parity."

M³ Consulting will calculate three different disparity ratios for each procurement category by dividing the availability percentage by the utilization percentage calculated as:

- The percentage of contracts (both count and dollars) awarded to firms owned by each group (based on hardcopy prime and subcontracts data; and,
- The percentage of POs invoiced (count and dollars) by each group (based on PO data); and,
- The percentage of dollars actually paid to firms owned by each group (based on accounts payable data).

These disparity ratios can be further calculated for RWASM, Public Sector AvailabilitySM, and Marketplace Availability, providing the College with a complete picture of the level of effort required to include S/M/W/DBEs in its upcoming opportunities.

Ideally, M³ Consulting would prefer to do this by specialty trade. However, due to the availability numbers significantly reducing within each specialty, disparity ratios while calculated may not be testable for statistical significance.

The M³ Consulting team has developed a model to determine the statistical significance of the calculated ratios with an acceptable confidence level of 95 percent, thus providing a strong measure of assurance that differences from 1.0 are not a result of chance occurrences.

Some courts have questioned the appropriateness of the assumptions underlying some tests of significance used in previous disparity studies. The most common approach is to use the Binomial or Hyper-geometric distributions as the bases for tests of significance of disparity ratios. However, these distributions depend critically upon assumptions that involve use of the Normal distribution.

Since there is no absolute consensus on the appropriate distribution to use, M³ Consulting presents tests of significance based on the Binomial distribution.

Deliverable 3: Preliminary Tables
Deliverable 5: Draft Disparity Report

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8. Final Report

Upon BC's review the draft availability, utilization and disparity reports and submission of comments, M³ Consulting will submit a Final Report (with executive summary) that incorporates comments received on the draft reports. M³ Consulting team's Final Report will be designed so that it may be

used as a basis for future policy development. Material will be presented in a clear style aimed to facilitate ease of comprehension and documentation of the main issues raised in the course of the study. Elements that reinforce themes or point out singular findings will be highlighted.

Within 30 days of submission of the Final Report, the M³ Consulting project team will be available to make a formal presentation before the BC Board of Trustees to present the findings of our report and our recommendations.

Another important deliverable is the database of contracting data compiled from BC. The database will be submitted to BC in a file format readable by Microsoft Access and Microsoft Excel, with necessary documentation that will allow BC to manipulate the data for their own internal uses.

Deliverable 6: Final Report

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Deliverables Pricing Summary

<u>Deliverable</u>	<u>Completion Date</u>	<u>Cost</u>
1 - Data Collection Plan	Dec 8 - Dec 18, 2008	\$7,426.50
2 - Completion of Data Collection	Jan 5 - Jan 30, 2009	\$21,041.75
3 - Preliminary Tables		\$21,041.75
Relevant Market Analysis	Feb 2 - Feb 20, 2009	
Availability Analysis	Feb 2 - Feb 20, 2009	
Utilization Analysis	Feb 2 - Feb 20, 2009	
Disparity Analysis	Feb 23 - Feb 27, 2009	
4 - Draft Relevant Market, Availability, Utilization Report		\$21,041.75
Draft Relevant market Report	Mar 2 - Mar 27, 2009	
Draft Availability Report	Mar 2 - Mar 27, 2009	
Draft Availability Projection Report	Mar 2 - Mar 27, 2009	
Draft Utilization Report	Mar 2 - Mar 27, 2009	
5 - Draft Disparity Report	Mar 30 - Apr 3, 2009	\$6,025.00
6 - Final Report	Apr 6 - Apr 30, 2009	\$3,713.25
Total		\$80,290.00

Timeline for Completion

	December	January	February	March	April
Data Collection	█				
Relevant Market			█		
Availability			█		
Goal Setting			█		
Utilization			█		
Disparity				█	
Final Report					█

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