



# EMPOWERING CITIES TO ACCELERATE EQUITABLE GROWTH

- A State Policy Blueprint for Inclusive Municipal Contracting

## Acknowledgments

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### About MassINC

Founded in 1996, MassINC's mission is to provide the people of Massachusetts with the information they need to participate fully in our democracy. We are a nonpartisan 501(c)(3) and achieve impact through independent research, nonprofit journalism, and civic engagement.

### About Lawyers for Civil Rights

Lawyers for Civil Rights (LCR) works with communities of color and immigrants to fight discrimination and foster equity through creative and courageous legal advocacy, education, and economic empowerment. In partnership with law firms and community allies, we provide free, life-changing legal support to individuals, families, and small businesses. LCR's economic justice initiative, BizGrow, provides free legal representation, business support, and technical assistance to business owners. Learn more at <http://lawyersforcivilrights.org/BizGrow>.

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Dear Friends:

Last year, MassINC published *Unleashing the Potential of Entrepreneurs of Color in Massachusetts*. Prepared in partnership with the Coalition for an Equitable Economy, the report challenged leaders in Massachusetts to work together to close large racial and ethnic gaps in business ownership by the end of the decade. In furtherance of this goal, the study presented high-level strategies to help entrepreneurs of color build skills and relationships, access capital, and penetrate new markets.

Developing targeted policy responses in these three areas requires more detailed research. The Boston Foundation's May 2021 report, *The Color of the Capital Gap*, expertly unpacked the financial component. To help entrepreneurs of color penetrate new markets, this study examines the legal landscape for municipal public contracting.

While in-depth research on supplier diversity from the state and private sector perspective is also needed, the municipal level takes precedence. Cities around the country have long sought to make public contracting more equitable. These efforts have spawned a large body of research. However, inclusive procurement policy is heavily influenced by state law, and nobody has shed light on where this leaves Massachusetts' municipalities. How smaller Gateway Cities effectively implement inclusive procurement policies is even less well understood.

These regional economic centers in Massachusetts house an increasingly disproportionate share of people of color and their burgeoning business enterprises. Over the next few years, Gateway City governments will be responsible for spending billions of dollars from the federal American Rescue Plan Act (ARPA) and the Bipartisan Infrastructure Law (BIL).

This timely look at how we help municipalities in Massachusetts create equitable access to an unprecedented volume of public spending was my last major undertaking at MassINC. As the daughter, sister, and niece of small business owners struggling to gain toeholds in the Merrimack Valley economy, I appreciate the urgent need to gain a better understanding of these complex issues. I will be forever grateful to Nancy Stager and the Eastern Bank Foundation for making this research possible. We are also deeply indebted to our valued partners at Lawyers for Civil Rights (LCR). Ivan Espinoza-Madrigal, Oren Sellstrom, Priya Lane, and Angelia Heimsoth brought deep and invaluable expertise to this project. Over the past six months, we witnessed firsthand the commitment and dedication that has enabled their small but mighty organization to achieve unparalleled success advancing the cause of equity across our commonwealth.

Whether you are reading this report as a municipal official, policymaker, or concerned citizen, we hope that you find real value in our research. As always, we welcome your feedback and ideas, and encourage you to do all that you can to help us advance productive dialogue and systemic change on these important issues.

In service,

Juana Matias  
Former Chief Operating Officer, MassINC

# Executive Summary

Combined, the American Rescue Plan Act (ARPA) and the federal Bipartisan Infrastructure Law (BIL) will send nearly \$17 billion to Massachusetts over the next five years. These funds will reshape the state's communities, laying the infrastructure of the future and building resiliency in the face of climate change. A significant portion of this money will flow through local governments.

While local governments will be under intense pressure to deploy these resources quickly and invest them well, relying on familiar contracting practices will not get the job done. This report shows how municipal governments need new approaches to ensure that all residents of the commonwealth contribute to the building of our future. The analysis highlights large disparities in public contracting, describes the major categories of ARPA and BIL funding that municipalities will receive, and surfaces changes in state law that are urgently required so that municipalities can implement effective supplier diversity efforts in these areas. The key findings and recommendations can be summarized as follows:

## Key Findings

- Racial and ethnic earnings gaps for Massachusetts residents who are self-employed in incorporated construction businesses are extremely large. On average, people of color who own a construction business earn \$62,000 annually, compared to \$103,000 for White residents. This 65 percent gap is significantly larger than the 52 percent differential across all other sectors.
- Limited access to public construction spending helps explain these large earnings gaps. Certification from the state's Division of Capital Management and Maintenance (DCAMM) is required to participate in most public construction projects. At present, just 27 individual businesses with Minority Business Enterprise (MBE) designation have the requisite DCAMM certification. This amounts to less than 1 percent of the approximately 3,000 incorporated minority-owned construction businesses in Massachusetts. White-owned construction businesses are four times more likely to have DCAMM certification.
- Gateway Cities are home to 42 percent of Massachusetts' non-White population. They will also receive a disproportionate share of funding from ARPA and BIL. However, two-thirds (17 of 26) of these cities lack a single DCAMM certified MBE, including Fall River, Haverhill, New Bedford, Quincy, and Worcester.
- Public works investment is the largest bucket of infrastructure spending that will flow to municipalities through both ARPA and BIL. Unfortunately, this is the area where state procurement law is most limiting. Municipalities in Massachusetts cannot implement the inclusive procurement programs that cities throughout the US leverage to increase diversity in public works contracts. To a lesser degree, state laws establishing procedures for the purchase of goods and services also impose constraints on the use of inclusive procurement tools.
- Changes to state procurement law are necessary, but on their own they are not sufficient to ensure equitable access to public contracts. Massachusetts law empowers municipalities to aggressively pursue supplier diversity when designing and building school facilities, and the Supplier Diversity Office tracks spending on these projects. Yet, the most recent data for, FY 2020, shows that just 1.4 percent of school building design and construction contracts went to MBEs.

## Recommendations

### **1. Expand the existing sheltered market program to include public building and public works construction.**

Many cities set aside a small number of contracts just for competition among underrepresented businesses. This “sheltered market” approach helps them learn the process and build capacity to compete for public construction contracts on a level playing field. Sheltered markets are an especially valuable tool for construction because they give the many smaller MBEs in the sector vital experience serving as prime contractors.

### **2. Expand the existing sheltered market program to include small and local businesses.**

Across the US, most cities with sheltered market programs utilize “race-neutral” designs that create opportunity for underrepresented business by setting aside contracts for small or local businesses. This approach does not require disparity studies that are difficult for smaller cities to undertake. By following the practice of other states and adding small and local businesses to sheltered market provisions for good and services, buildings, and public works contracts, the legislature can give municipalities more flexibility when designing programs to grow underrepresented businesses.

### **3. Create underutilized business provisions for public buildings and public works construction.**

Sheltered markets are a powerful, but limited tool. They are labor intensive to administer, and in many areas of purchasing, there may not be enough MBEs to create a competitive pool. Massachusetts can complement the sheltered market provisions by providing municipalities with more flexibility to consider both race-conscious and race-neutral contracting goals as criteria when evaluating Requests for Proposals (RFPs) and to create subcontracting equity programs.

### **4. Confirm that unbundling large contracts is a permissible way to meet inclusive procurement goals.**

Breaking contracts up into smaller components to make them more accessible to disadvantaged businesses with limited financial capacity is widely recognized as an inclusive procurement best practice. Procurement officers in Massachusetts, however, are sometimes concerned that this could be considered impermissible “bid splitting.” By amending state procurement law, the legislature can confirm that unbundling contracts to provide opportunities to disadvantaged businesses is not only fully permissible, but encouraged.

### **5. Create a grant program to help municipalities collect and publicly report MBE participation in procurement.**

Very few cities and towns in Massachusetts systematically track contracts issued to disadvantaged businesses or identify changing patterns over time. These data are crucial if communities want to undertake disparity studies. Equally important, these data are necessary to ensure that inclusive procurement policies lead to equitable outcomes. The state can encourage and support communities with a modest grant program administered by the Supplier Diversity Office in consultation with Executive Office of Technology Services and Security.



# I. Introduction

Together, the American Rescue Plan Act (ARPA) and the federal Bipartisan Infrastructure Law (BIL) will channel a torrent of public investment to cities throughout the commonwealth over the next five years. From the smallest to the largest, these communities are not prepared to maximize this once-in-a-century opportunity. With the little time left to come to their aid, state leaders must prioritize efforts to help ensure that minority-owned businesses have equitable access to these dollars.

The arguments for focusing on inclusive procurement at the municipal level are threefold:

First, the legacy of inequitable public spending on infrastructure creates a powerful moral obligation. Not only were people of color in Massachusetts historically deprived of opportunities to win public construction contracts, but major infrastructure projects in Boston and the Gateway Cities cut through communities of color, taking homes, decimating small business districts, and jeopardizing public health.<sup>1</sup> Without affirmative steps towards inclusion, these past injustices and the current barriers to inclusivity will be perpetuated.

Public investments that could help offset the lasting impact of these wrongs have been scarce. From maintaining public housing to modernizing K-12 schools, cities have not had the funding necessary to improve the well-being of their residents. In the few instances where significant public resources have been made available, people of color still face major barriers to winning contracts. The Great Recession stimulus package is particularly notable. The American Recovery and Reinvestment Act's (ARRA) "shovel ready" requirements shut out many minority-owned businesses, a particularly egregious lapse, given that the predatory home lending that precipitated the Great Recession disparately impacted minority neighborhoods.<sup>2</sup>

Beyond the moral arguments, there are also multiple economic rationales for prioritizing inclusive municipal procurement efforts. With the state's population becoming more diverse, Massachusetts needs people of color to own more small- to medium-sized businesses to counter consolidation trends and keep local and regional economies strong. Increasing the number of businesses owned by people of color will also contribute to the state's economic vitality by reducing inequality, which has become an especially heavy drag on economic growth. More businesses of color will also mean more competition for government contracts, which will in turn make public spending more efficient and effective (see box p. 12 for more on these economic arguments).

Finally, Massachusetts trails other states that provide municipalities with more latitude to ensure that disadvantaged businesses have equal access to public procurement. The longer the state continues to lag behind, the more difficult it will be to prevent entrepreneurs of color from migrating. Failure to act on inclusive procurement now could also set Massachusetts back decades because minority-owned businesses will not have equal opportunity to enter new markets, such as clean energy and other cutting-edge technologies, seeded by ARPA and BIL.

Inclusive procurement is not a new concept. For decades, the federal government, cities, and states have experimented with various approaches. While some have struggled in the face of legal challenges and political opposition, compelling evidence shows that these policies work.<sup>3</sup> Well-crafted programs could have even greater impact today, given the far more favorable conditions for businesses owned by people of color in Massachusetts.

Across the commonwealth, cities have increasingly diverse leadership, and there is general recognition that the community is strongest when municipal policies foster a

welcoming and inclusive culture, particularly for entrepreneurs. A growing number of community development financial institutions, including the Boston Impact Initiative, the Business Equity Initiative, Local Initiatives Support Corporation (LISC), and Mill Cities Community Investments, are working to connect entrepreneurs of color to growth capital and high-quality small business development services. Anchor collaboratives are organizing large private institutions to help businesses owned by people of color access new markets. The state is lending increasingly strong financial assistance to small businesses through the Mass Growth Capital Corporation.

A 2021 report prepared jointly by MassINC and the Coalition for an Equitable Economy highlighted the various ways that entrepreneurs of color are tapping into these opportunities and launching new enterprises at increasingly higher rates.<sup>4</sup> At the same time, the report argued that Massachusetts must continue to kindle this energy by providing greater access to public contracts. Municipalities are key to this endeavor: A sizeable share of the federal funding will flow through their agencies. More importantly, local governments in cities with diverse populations can

often build trust and relationships more nimbly than state and federal agencies, due to proximity.

Over the past six months, MassINC and Lawyers for Civil Rights have come together to examine steps that the state can take to empower municipalities at this critical juncture. The ideas presented in this report are informed by a thorough review of the state's existing procurement laws, conversations with municipal leaders, a scan of supplier diversity efforts currently underway in different communities and sectors of our economy, and guidance from inclusive procurement experts around the country, including the National League of Cities and the National Conference of State Legislatures.

The pages that follow make the case for immediate action by quantifying the economic benefits of inclusive municipal procurement efforts for regions across the state and sizing up the flow of federal funds set to inundate municipal governments. The second half of the report provides substantive strategies for policymakers by assessing the current legal landscape for inclusive municipal procurement policies in Massachusetts and setting forth recom-

### **Inclusive Municipal Procurement Is Building Momentum**

Across the state, municipalities are seeking to gain a better understanding of how they can diversify their spending. Working with the Black Economic Council of Massachusetts' (BECMA) Vendor Advisory Council and the Supplier Diversity Office, procurement officers from the cities of Brookline, Malden, Newton, and Somerville have been coming together to examine practices and collaboratively develop strategies that will lead to greater supplier diversity.

In December 2021, Cambridge issued an RFP for a disparity study with the stated intention of creating a sheltered market program, just weeks after Boston Mayor Michelle Wu announced Boston would be the first city in the commonwealth to utilize this inclusive procurement tool. Through its sheltered market pilot program, Boston will award six contracts for a range of goods and services purchased by the city. Bidding for the first two contracts closed in May (cleaning services and downtown event management).

In 2019, Worcester launched a Diverse Business Directory, which lists businesses owned by people who self-identify as minority, LGBTQ+, women, veterans, immigrants, or individuals with disabilities. The city is also working with the UMass Donahue Institute to develop a better understanding of the availability and capabilities of diverse businesses, to help with goal setting and policy development. The final report will be released later this summer, but the city is already actively working to recruit staff and build capacity to implement new inclusive procurement programs. It is also partnering with UMass Memorial Health Care and other local anchor institutions to align supplier diversity efforts.

Numerous recent reports are available to help cities, including City Accelerator's 2019 Inclusive Procurement Implementation Guide, the National League of Cities' 2020 Municipal Action Guide, and the Massachusetts Supplier Diversity Office's 2021 Municipal Supplier Diversity Playbook. These reports cover how cities plan and track programs, conduct outreach to businesses, foster relationships between businesses, and build partnerships. However, Massachusetts municipalities have access to very little information on how they can structure inclusive procurement policies within the limitations of the state's procurement law.

# II. Inclusive Procurement and Regional Economic Growth

■ State and local leaders must recognize the degree to which people of color are underrepresented in business ownership in Massachusetts, and how this is a reflection of uneven access to public procurement. This section synthesizes available data to quantify these patterns, estimates the considerable regional economic benefits that more equitable access to public procurement will generate, and draws attention to the need for special emphasis on Gateway Cities.

## Disparities in Business Ownership and Earnings

People of color in Massachusetts are far less likely than White residents to own a business, and when they do their earnings are significantly lower (Figure 1). The latest Census figures show that just 1.1 percent of Black workers and 1.7 percent of Hispanic workers are self-employed in an incorporated business, compared to 3.2 percent of White workers in Massachusetts.

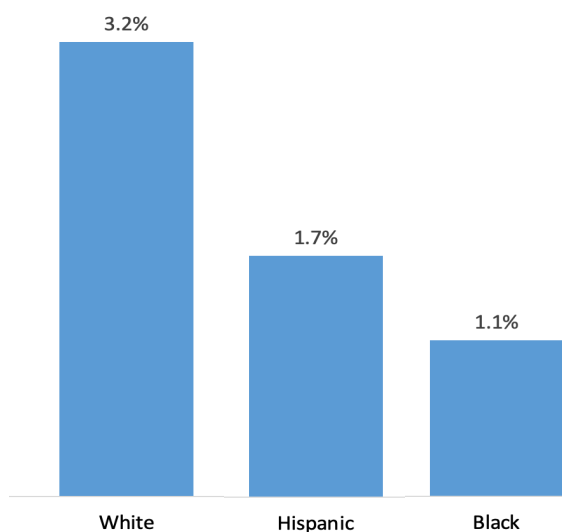
Moreover, among those who do own businesses, stark disparities exist in annual earnings. On average, White workers with an incorporated business earn more than \$122,000 annually, while Black and Hispanic business owners only earn around \$63,500 and \$73,500, respectively (Figure 2). Racial and ethnic earnings gaps are significantly larger for businesses in construction industries, where access to public contracts is especially important. White-owned construction businesses earn 65 percent more income annually than construction businesses owned by people of color. In comparison, the earnings differential is 52 percent across all other sectors.

Limited data makes it difficult to gauge how business ownership varies for people of color across regions. However, an area's share of the state's non-White population compared to its share of the state's roughly 1,200 designated Minority Business Enterprises (MBEs) provides a reference point. Barnstable's share of MBEs is 45 percent larger than its share of Massachusetts' non-White population. The Boston, Peabody, Brockton, and Taunton regions also appear to have relatively large concentrations of MBEs. On the other hand, Lawrence, Lynn, New Bedford, Pittsfield, Springfield, and Worcester have significantly fewer MBEs relative to their shares of the state's non-White population (Figure 3).

Closing these wealth and opportunity gaps will require more equitable access to public procurement. The state and federal funds that flow through municipal governments represent a sizeable share of the overall economy. Even more importantly, features of this public spending make it potent fuel for business growth. Municipal contracts often provide a stable source of revenue that companies can plan around and leverage to build new relationships, gain experience, and increase operational efficiencies. Firms with public contracts also gain reputational advantages.

Municipal governments are often the first to purchase new technologies. Firms that partner with city agencies gain know-how from staff members who collaborate and share knowledge, and public contracts for new undertakings are often favorably structured to insulate private companies from risk. Businesses who receive contracts to deploy new technologies invariably reap significant advantages in emerging markets. For businesses engaging in Massachusetts' innovation economy, these opportunities are especially vital.

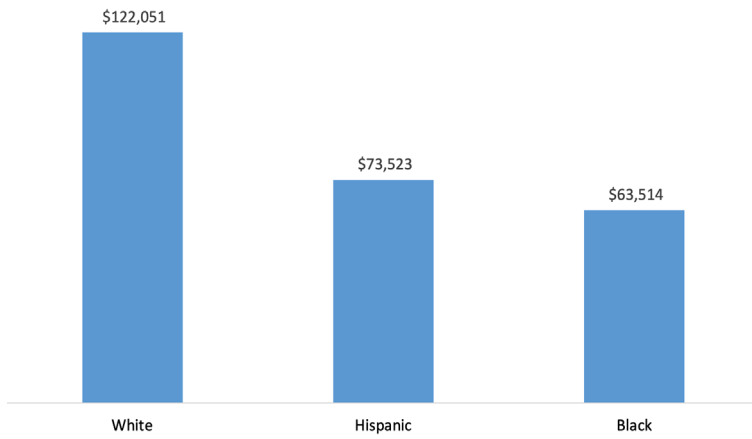
Figure 1: Share of Massachusetts Workers Self-Employed in Their Own Incorporated Business



Source: Authors' analysis of 2020 ACS PUMS (five-year sample)

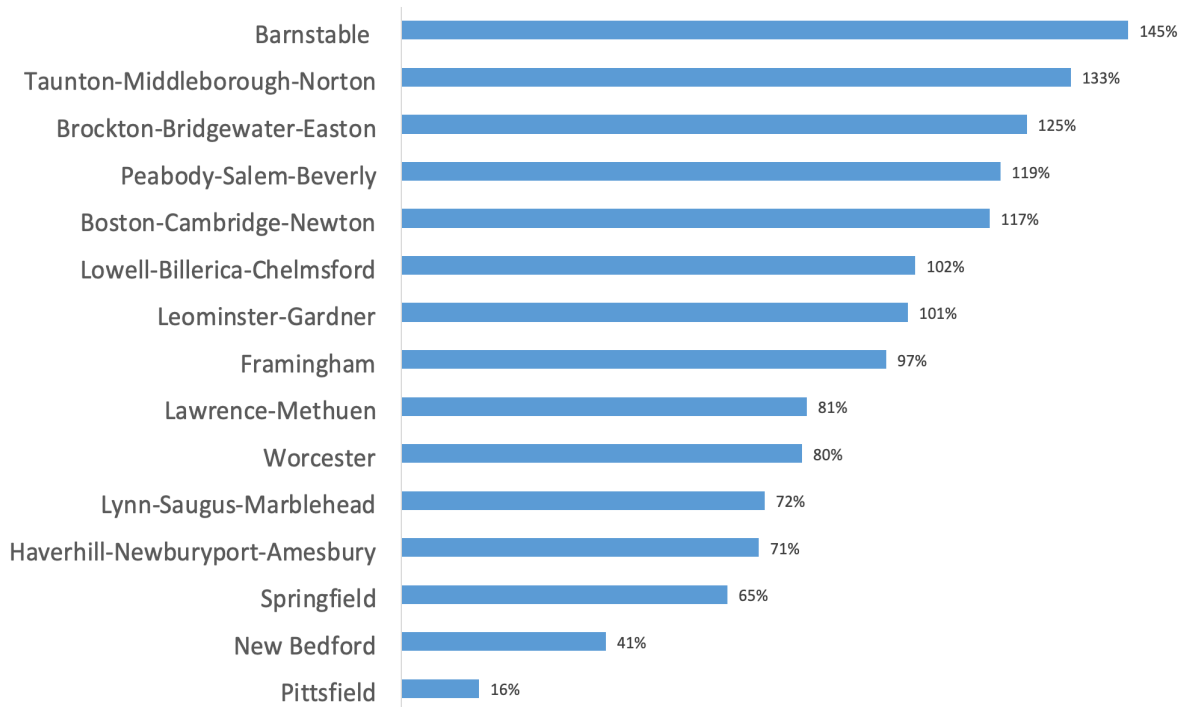


**Figure 2: Average Annual Earnings of Massachusetts Workers Self-Employed in Their Own Incorporated Business**



Source: Authors' analysis of 2020 ACS PUMS (five-year sample)

**Figure 3: Regional Share of State MBEs Relative to State Non-White Population**



Source: : US Census Bureau, 2019 Annual Surveys of State and Local Government Finances

**Underutilization of Minority-Owned Firms in Public Procurement**

Lower rates of business ownership for people of color may give the impression that they are underrepresented in public procurement simply because Massachusetts lacks minority-owned firms that can meet the needs of municipal governments. However, substantial evidence contradicts this commonly held position. Studies repeatedly find that businesses owned by people of color receive less local government spending than econometric models would predict based on their availability and capabilities.<sup>5</sup>

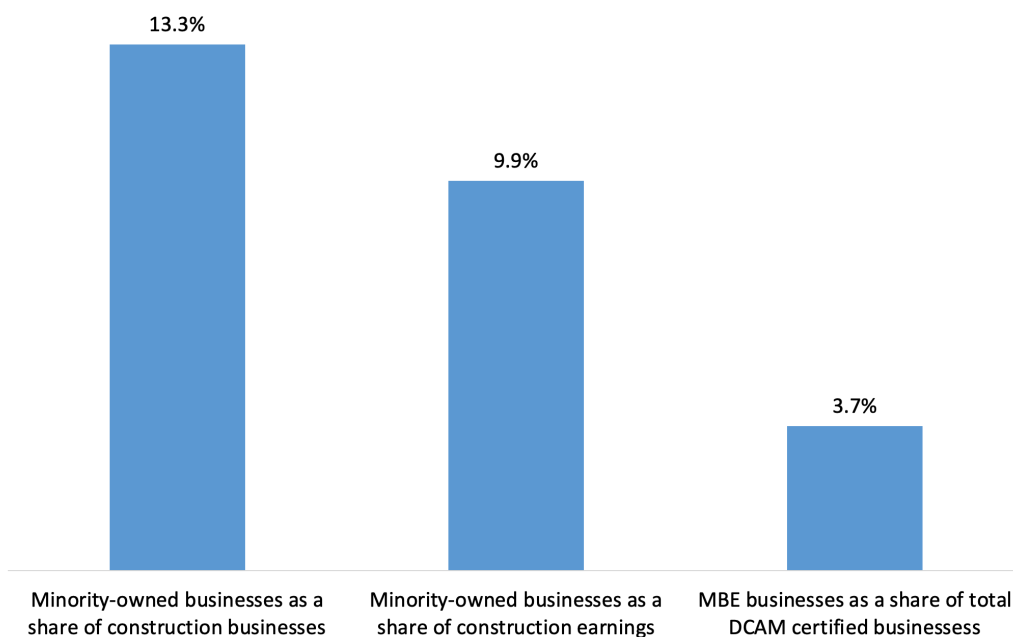
While various factors explain these disparities, discriminatory practices are a significant component. Such practices include using overly restrictive requirements in contract announcements, providing limited information or late notice to bidders, awarding contracts to majority firms with low bids and then amending contracts to increase payments, and making late payments.

When minority-owned firms do not feel as if public procurement is accessible, they simply will not seek contracts or the certifications required to access them. This pattern is particularly apparent in the data on minority-owned construction companies certified by the state's Division

of Capital Management and Maintenance (DCAMM). This certification is required to undertake work on public facilities. At present, just 27 individual businesses with MBE certifications hold DCAMM certification. This amounts to less than 1 percent of the approximately 3,000 incorporated minority-owned construction businesses in Massachusetts. In comparison, 3.8 percent of White-owned construction businesses have DCAMM certification. Viewed another way, people of color own more than 13 percent of construction businesses in Massachusetts, but MBEs make up just 3.7 percent of the 379 DCAMM certified businesses in the state (Figure 4).

Most municipalities in Massachusetts do not track the volume of public contracts that minority-owned businesses receive. However, school construction is the largest category of municipal capital spending, and these expenditures are captured by the Municipal Construction Affirmative Marketing Program. In FY 2020, just 1.4 percent of school building design and construction contracts awarded by cities and towns in Massachusetts went to MBEs. The share of expenditure to MBEs is extremely low even in diverse communities. For example, the report includes details on the \$65 million Brightwood-Lincoln Elementary School in Springfield; MBEs received just 1.2 percent of spending on the project.<sup>6</sup>

**Figure 4: Underrepresentation of Massachusetts' Minority-Owned Businesses in Construction**



Source: Authors' analysis of 2020 ACS PUMS (five-year sample), ES-202 establishment data, and DCAM and SDO directory data

### Regional Economic Benefits of Inclusive Entrepreneurship

Closing racial and ethnic gaps in business ownership and earnings would generate significant economic development and income for regional economies throughout the state. If people of color owned businesses at the same rate as White residents, Massachusetts would have nearly 15,000 additional incorporated businesses generating approximately \$1.2 billion in additional income. If people of color owned businesses at the same rate and these businesses produced similar incomes, the net income benefit would exceed \$2.7 billion annually.

This estimate is extremely conservative because the Census Bureau top codes business income in Massachusetts at \$428,000 to protect privacy; a significant percentage of businesses income is generated by privately held firms that exceed this threshold. A larger number of businesses owned by people of color will create more competition for White businesses, which could lower their profits and earnings. However, this scenario is extremely unlikely because it will take time to create more equal access to entrepreneurship, and, as this occurs, the competitive impacts will likely be more than offset by the economy-wide growth that greater business ownership among people of color will produce through higher

labor productivity and efficiency.

Limited data makes it difficult to estimate the impact of equitable entrepreneurship at a regional level. However, it is possible to approximate by distributing the statewide net income gains to regions based on their shares of the state’s non-White population (**Table 1**). For instance, greater Lawrence would see almost 750 new businesses and approximately \$140 million in additional business income. The Worcester region would gain 1,100 new businesses and over \$200 million in additional net income.

**Table 1: Estimated Annual Regional Income Generated by Equal Rates of Business Ownership and Earnings**

Region	New Businesses	Additional Earnings
Barnstable	196	\$36,572,106
Boston-Cambridge-Newton	6,969	\$1,302,594,142
Brockton-Bridgewater-Easton	544	\$101,632,699
Framingham	587	\$109,655,335
Haverhill-Newburyport-Amesbury	242	\$45,237,094
Lawrence-Methuen-Salem	747	\$139,658,907
Leominster-Gardner	305	\$57,052,865
Lowell-Billerica-Chelmsford	638	\$119,179,504
Lynn-Saugus-Marblehead	511	\$95,443,615
New Bedford	333	\$62,183,557
Peabody-Salem-Beverly	196	\$36,649,351
Pittsfield	79	\$14,837,810
Springfield, MA-CT	1,688	\$315,461,686
Taunton-Middleborough-Norton	166	\$31,076,871
Worcester, MA-CT	1,127	\$210,573,856

Source: Authors’ analysis of 2020 ACS PUMS (five-year sample) and SDO directory data

### The Challenge for Gateway Cities

Gateway Cities are home to 42 percent of the state’s non-White population but just 29 percent of MBE-designated firms. Three-quarters of Gateway Cities have fewer than a dozen MBEs. The challenge Gateway Cities face with regard to public construction is even more acute. Two-thirds (17 of 26) of Gateway Cities lack a single DCAMM-certified MBE, including Fall River, Haverhill, New Bedford, and Quincy. The absence of a single DCAMM-certified MBE in the city of Worcester, the second-most populous city in New England, is particularly notable (**Table 2**).

Some Gateway City regions have a larger number of MBE firms located in the suburbs than in their far more diverse cities. For example, fewer than half of the 73 MBEs in the Worcester region are located in the city. In greater Lowell, 80 percent are located outside of the city, with Billerica, Chelmsford, Tyngsborough, and Westford each home to nearly as many MBEs as Lowell. While Lawrence, Lynn, and Springfield all have a large majority of the MBEs in their region, these metro areas have significantly fewer MBEs than expected, given their shares of the state’s non-White population.

**Table 2: Businesses Located in Gateway Cities with DBE, MBE, and DCAMM Certification**

CITY	DBE	MBE	DCAMM Total	DCAMM DBE	DCAMM MBE
Attleboro	0	9	4	0	0
Barnstable	5	0	3	0	0
Brockton	10	37	7	0	1
Chelsea	1	9	1	0	0
Chicopee	2	1	13	0	0
Everett	2	6	2	0	0
Fall River	7	3	7	0	0
Fitchburg	12	10	5	0	1
Haverhill	2	7	2	0	0
Holyoke	4	16	7	0	1
Lawrence	6	32	7	0	3
Leominster	9	10	4	0	2
Lowell	5	11	10	1	1
Lynn	6	24	7	0	1
Malden	3	10	4	0	0
Methuen	5	11	4	0	0
New Bedford	5	10	5	0	0
Peabody	4	7	4	0	0
Pittsfield	1	0	14	0	0
Quincy	12	27	16	0	0
Revere	1	9	0	0	0
Salem	1	3	5	0	0
Springfield	16	57	20	0	5
Taunton	6	0	6	0	1
Westfield	2	2	9	0	0
Worcester	10	36	16	0	0
<b>Total</b>	<b>137</b>	<b>347</b>	<b>182</b>	<b>1</b>	<b>16</b>

Source: MA Supplier Diversity Office and MA Division of Capital Asset Management and Maintenance

### Municipalities Can Provide a Powerful Contribution to Anchor Collaboratives

Hospitals and universities have historically served as the “anchors” of anchor institution–led economic development initiatives. In most cities, “eds and meds” are the largest private employers and they have the biggest balance sheets, and the fact that they are fixed in place and have nonprofit missions means that they are especially committed to their host communities. How these institutions act has considerable influence on the economic trajectories of their regions both directly—through purchasing, hiring, and real estate development—and indirectly, by fostering the community’s business and civic culture.

Efforts to galvanize anchor institutions for collective action have been gaining traction since the mid-1990s. As these so-called anchor collaboratives have matured over the past decade, they are increasingly inviting municipal governments to the table. By participating, cities learn from the supplier diversity expertise that their private partners have developed, and they magnify the impact of the initiative with their considerable purchasing power.

With its world-class hospitals and universities, Massachusetts has a long history of anchor-led economic development efforts in various forms. In Western Massachusetts, for example, Baystate Health has been working for over a decade to develop a robust anchor collaborative, driven by the realization that community economic development is a powerful social determinant of health. With growing recognition that the private sector must work harder to address longstanding racial justice issues, more organizations are joining the effort. They bring C-suite determination to ensure that these collaborative efforts deliver meaningful results.

## Inclusive Procurement = Smart Economic Policy

Public procurement has long been seen as a tool to further public policy objectives. As noted in the introduction, there are at least four compelling arguments to prioritize efforts to further inclusive entrepreneurship through public procurement. They include:

**Combating inequality.** Large racial and ethnic disparities in business ownership are a major driver of inequality.<sup>7</sup> Research and hard-learned experience show how inequality sows division and distrust, imposing a major drag on economic growth and stability.<sup>8</sup> In addition to the moral obligation to counter discrimination, this has long been one of the primary justifications for inclusive procurement over the decades.

**Growing the number of small businesses in local economies.** Small businesses are central to job creation and keeping dollars circulating in local economies. The number of companies with employees formed annually in Massachusetts fell by nearly half between 2005 and 2018. This pattern is consistent with national data, which goes back further and shows the rate of new startups declining since the late 1970s. While industry consolidation and other macroeconomic trends are the primary forces behind this reduction in startup activity, demographic change is an increasingly significant component. The number of minority-owned businesses in Massachusetts has been rising as the state becomes more diverse. However, the share of Black and Hispanic workers with incorporated businesses barely budged between 2010 and 2018; White workers are still about 2.5 times more likely to own an incorporated business in Massachusetts.<sup>9</sup>

**Enhancing labor supply and productivity.** Incredibly tight labor markets will make it extremely difficult for Massachusetts to effectively spend the federal ARPA and BIL funds. In the first quarter of 2022, unemployment among skilled workers was below 2 percent, with labor force participation rates at historically high levels; MassINC projections suggest demographic and migration patterns will reduce the size of the state's college-educated labor force considerably in the coming years.<sup>10</sup> Supporting the growth of diverse businesses makes effective workforce strategy. Research shows firms owned by people of color hire more people of color, countering employment discrimination and boosting labor productivity. In this regard, studies show that inclusive procurement policies are particularly effective. Increasing city contracting with minority-owned businesses has had a greater impact on employment rates for people of color than hiring benchmarks on public projects.<sup>11</sup>

Growing diverse businesses can also help Massachusetts retain talent. The number of college-educated workers exiting the state is now larger than those entering, by a significant margin. This brain drain is at least partially related to the challenge Massachusetts faces, retaining the increasingly diverse students who come to the state for higher education. Many of these students are relocating to regions like Atlanta, which have built a strong Black middle class through a decades-long commitment to inclusive procurement.<sup>12</sup>

**Increasing the efficacy of government investment.** Inclusive procurement policies could increase the costs of goods and services purchased by government in the short term.<sup>13</sup> However, a well-designed program that works in concert with efforts to help grow minority-owned businesses should lead to a larger pool of potential bidders over time. Greater competition will lower costs and also stimulate more innovation in the delivery of public goods and services.<sup>14</sup>

# III. Preparing for the Unprecedented Infusion of Federal Funding

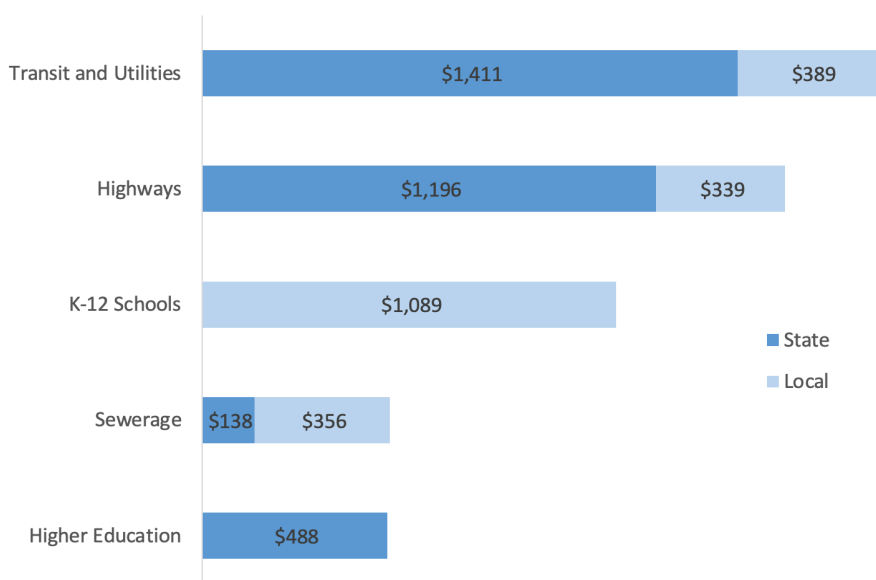
Exactly how much cities and towns will have to spend in the coming years and the eligible uses for these dollars remain somewhat unclear. Massachusetts still has half of its ARPA allotment to allocate, and a sizeable share of the funding Massachusetts will receive through BIL hinges on the state’s success with the competitive federal grant programs authorized by the law. However, information currently available offers perspective on what to expect both in terms of volume and general expenditure categories.

Data from the US Census Bureau’s Annual Survey of State and Local Government Finances provides a starting point. In a typical year, these figures show state and local governments in Massachusetts will spend more than \$5 billion on public construction projects. About two-thirds of this total is directed by the state, and one-third by local governments. The largest category of constructing spending in the Census data is a \$1.8 billion amalgam of transit plus utility infrastructure (i.e., gas, electricity, and water). This is followed by \$1.4 billion in highway construction. K–12 school projects make up about one-fifth of annual public construction spending in Massachusetts, and this \$1 billion stream flows almost entirely through municipalities, as does most of the \$500 million spent on sewers (Figure 5).

Combined, ARPA (state and local) and BIL will send nearly \$17 billion in federal funding to Massachusetts. If one-third of the economic activity generated by the ARPA state dollars and BIL similarly flow through municipalities, cities and towns will have nearly \$5 billion to expend, plus another \$2 billion that the federal government has provided directly through ARPA Local Fiscal Relief funds (Figure 6).<sup>15</sup> While cities will have several years to deploy these dollars, the demands will be heavily frontloaded. (The time pressure is especially intense for the ARPA state and local funds, which must be allocated to projects by the end of 2024.)

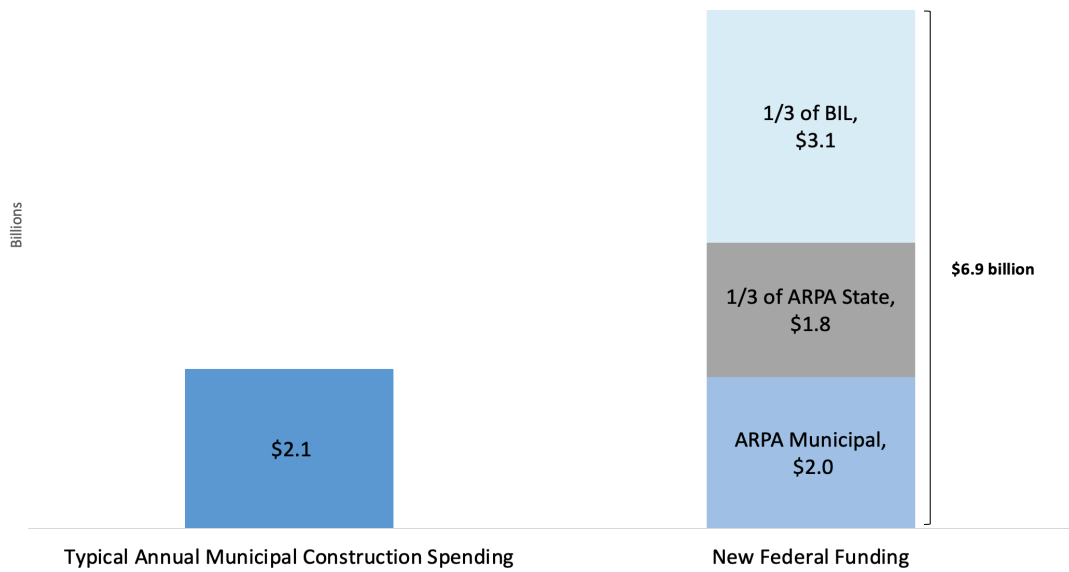
This suggests municipal procurement officers could see two to three times their typical workload over the next year or two. It is likely that a larger share of ARPA and BIL contracting will occur through the state relative to typical patterns. However, cities will undoubtedly be responsible for distributing a disproportionate share of the funding that does flow through municipal governments. Boston and the state’s 26 Gateway Cities received nearly two-thirds of the ARPA local recovery funds (Figure 7). The concentration of aging regional infrastructure in these communities means they will see a disproportionate share of BIL funds as well.

**Figure 5: State and Local Construction Expenditure by Category, 2019**



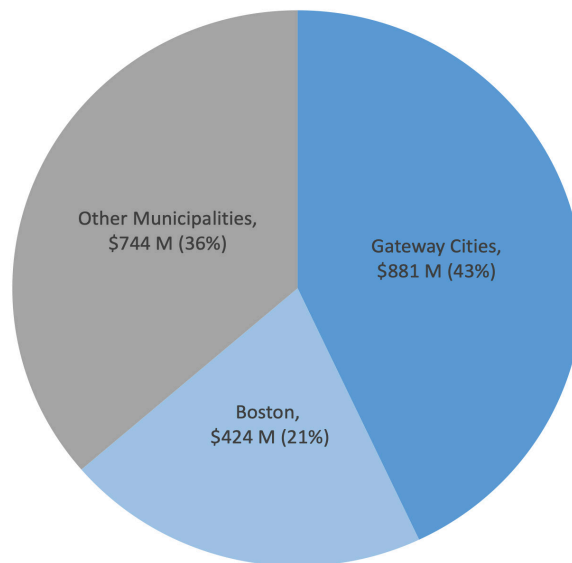
Source: US Census Bureau, 2019 Annual Surveys of State and Local Government Finances

**Figure 6: Typical Annual Municipal Construction Expenditure vs. Estimated Expenditure With New Federal Funds**



Source: : Authors' estimates from US Census Bureau, 2019 Annual Surveys of State and Local Government Finances

**Figure 7: Distribution of Local Fiscal Relief ARPA Funds by Location**



Source: National League of Cities

Some of these one-time federal funds will flow to typical categories for municipal procurement officers. For instance, water and sewer is one of the main categories of eligible infrastructure uses for the local ARPA funds. The state's first ARPA spending plan signed by Governor Baker included \$100 million for these upgrades, and the administration's proposal for the remaining funds includes another \$64 million for water and sewer (**Figure 8**).

However, many of the expenditure categories will be new to cities and towns, like the more than \$500 million for broadband infrastructure that will be available through a combination of local ARPA funds, state ARPA funds, and BIL. Massachusetts will also receive more than \$60 million to support the expansion of electric vehicle charging networks. While it is a small sum in relative terms, these expenditures will help establish a supply chain for this infrastructure of the future.

The competitive funding merits additional consideration, both because signs suggest federal agencies will consider inclusive contracting when evaluating proposals and because several grant programs relate directly to equity. This includes a new \$1 billion Reconnecting Communities Pilot Program, which will provide competitive grants to support planning, design, demolition, and reconstruction of street grids, parks, or other placemaking investments that help cities remediate the ill effects of previous federal infrastructure investments.

**Figure 8: Massachusetts Flexible State ARPA Allocations**



Source: Chapter 102 of the Acts of 2021 and H. 4720

## Federal Department of Transportation DBE Program

The United States Department of Transportation’s (USDOT) Disadvantaged Business Enterprise (DBE) program is widely regarded as the most aggressive and effective effort to address racial disparities in contracting at the federal level. Recipients of federal transportation funds must set an overall goal for DBE participation based on evidence of the availability of DBEs in the geographic market. Entities must use race-neutral means to meet these participation goals unless the past discrimination is so egregious that race-neutral means will not suffice.<sup>16</sup> More than 600 businesses across the state, including 137 in Gateway Cities, have DBE certification. However, MBE participation is difficult to gauge because this designation also includes women-owned businesses. BIL requires DBE to receive at least 10 percent of funding for highway and public transit improvements. The law also includes new prompt payment provisions for DBE subcontractors.



# IV. The Legal Landscape for Inclusive Municipal Procurement in Massachusetts

■ Depending on the source of funding and the type of contract, the processes that Massachusetts cities and towns employ to issue contracts may be governed by federal, state, or local law. Cities and towns that want to implement inclusive procurement policies must do so in a way that accounts for these underlying contracting laws—and that additionally complies with federal constitutional law. Beginning with the constitutional foundations in federal law and then digging deeper into state law, this section reveals where the commonwealth’s municipalities face significant legal obstacles and where they have greater latitude to implement practices that cities throughout the US have employed to achieve greater diversity in public procurement.

## Inclusive Procurement Practices and Federal Constitutional Law

Cities have long sought to remedy the persistent underutilization of minority-owned businesses in public contracting. Over time, a vast body of constitutional case law has emerged. The constraints the courts have imposed vary based on whether a government body is utilizing a “race-neutral” or “race-conscious” approach.<sup>17</sup>

Race-neutral policies do not explicitly advantage minority-owned firms; they simply create more equitable conditions for MBEs to compete. For example, a city could implement a small or local business program. Although many MBEs might benefit from the program, it would still be considered race-neutral. Courts analyze race-neutral measures under a “rational basis” standard, the lowest level of review. Any plan set forth must simply be rationally related to a legitimate government interest without governments needing to conclusively demonstrate such a need.<sup>18</sup>

Race-conscious contracting policies include elements that are geared specifically towards MBEs. These may include, for example, requirements that prime contractors conduct outreach to MBE subcontractors, or “sheltered market” contracts for which only MBEs can compete. The US Supreme Court has ruled that race-conscious procurement programs must meet the “strict scrutiny” standard, the most exacting test courts impose.<sup>19</sup> This means that a public entity must show a “compelling governmental interest” in the program, and that it is “narrowly tailored” to advance that interest.

Federal courts have consistently ruled that rectifying discrimination against MBEs is a compelling governmental interest that can support a race-conscious procurement policy. However, relying on past discrimination in society at large is not sufficient. Instead, public entities must demonstrate that discrimination against MBEs exists in the particular market area where they spend their contracting dollars. They must also show that race-neutral means are incapable of remedying the problem.<sup>20</sup>

Public entities instituting race-conscious measures typically establish these conditions through what is known as a disparity study. Disparity studies, usually conducted by third-party consultants, compile statistical evidence of underutilization of MBEs in a marketplace. In addition, they present anecdotal evidence of discriminatory practices.<sup>21</sup> The use of these studies evolved from the US Supreme Court’s landmark 1989 Croson decision, which found that a “significant statistical disparity” between available minority contractors and the volume of public contracts awarded to these firms could give rise to an inference of discrimination.<sup>22</sup> Ever since, courts nationwide have upheld rigorous disparity studies as adequate evidence to support race-conscious procurement policies.<sup>23</sup>

Yet, few municipalities in Massachusetts have conducted such studies in recent years. This may be simply due to the lack of political will or the expense cities must shoulder to complete a disparity study. However, it may also be influenced by the fact that Massachusetts procurement law limits what cities and towns can do, even if a disparity study shows evidence of discrimination in the market area. While Massachusetts does not explicitly prohibit race-conscious procurement policies, as a handful of states have, the commonwealth’s procurement laws do not always provide the flexibility necessary to implement robust inclusive procurement programs at the municipal level.

Massachusetts procurement law also limits communities’ ability to adopt many race-neutral approaches that cities throughout the country regularly employ to help disadvantaged businesses access public contracts.

## Massachusetts State Procurement Laws

To understand the ways in which Massachusetts cities and towns can currently implement inclusive procurement programs, and areas where more flexibility is needed, an overview of underlying Massachusetts procurement law is necessary. Different sections of state law address how municipalities must conduct procurement activities, according to what they are buying. While the procedures are often similar, subtle differences mean the ability of cities to implement inclusive procurement policies varies widely depending on whether they are purchasing goods and services, constructing buildings or public infrastructure, or paying for design services.

**Table 3: Summary of Massachusetts General Laws Governing Municipal Procurement**

Goods and Services (Ch. 30B)	Building Construction (Ch. 149, Secs. 44A-44)/ Ch. 30B, Sec. 16)	Public Works (Ch. 30, Sec. 39M)	Design Services (Ch. 7C)
Less than \$10,000: Procurement officer must award contract after exercising sound business practices	Identical to 30B for contracts under \$10,000	Identical to 30B for contracts under \$10,000	Municipal Buildings: Municipalities must follow Designer Selection Law, but there is no low-bid requirement, and the process provides discretion. Furthering MBE goals on state-funded building is required
\$10,000–\$50,000: Obtain written quotes from at least three bidders  Award contract to responsible bidder offering the needed quality at the lowest price	Identical to 30B for contracts between \$10,000 and \$50,000	Identical to 30B for contracts between \$10,000 and \$50,000	Design contracts for public works projects are exempt from state law
Above \$50,000: Competitive sealed bidding process  Public notice in conspicuous place at the governmental entity’s office and published at least once in a newspaper of general circulation  Award contract to lowest responsible and responsive bidder  OPTIONAL: Section 6 allows for competitive sealed proposals, if determined that selection of most advantageous offer requires additional factors beyond price	\$50,000–\$150,000: Award contract to lowest responsible and eligible bidder after publicly opened competitive bid process in accordance with Ch. 30, sec. 39M  Above \$150,000: Award contract to lowest responsible and eligible bidder after competitive bid process in accordance with 44A-44H	Award to lowest eligible and responsible bidder  Bidding must be publicly opened	
	State Funded Buildings (Ch. 7C, Sec. 6): On state-funded public facility projects, municipalities can include enforceable MBE participation goals in contracts		
	Disposition of Public Land and Buildings (Ch. 30B, Sec. 16): Communities have wide latitude to fashion RFPs for private redevelopment projects to meet public objectives, and may select offers below fair market		

## Goods and Services

In Massachusetts, a governmental body seeking to contract for goods and services must adhere to the requirements of the state's Uniform Procurement Act.<sup>24</sup> The rules vary according to the price of the contract:

- For **contracts of less than \$10,000**, a procurement officer must only exercise “sound business practices” to ensure that the municipality receives a favorable price.<sup>25</sup>
- For **contracts between \$10,000 and \$50,000**, the procurement officer must solicit written bids from at least three companies customarily offering the supplies or services sought. They must award the contract to the “responsible” bidder offering the needed quality at the lowest price.<sup>26</sup>
- For **contracts more than \$50,000**, the awarding authority must engage in competitive sealed bidding and award the contract to the lowest “responsible” and “responsive” bidder.<sup>27</sup> Alternatively, awarding authorities can implement a competitive sealed proposal procedure to consider factors in addition to price.<sup>28</sup>

For small purchases below \$10,000, municipalities are not required to competitively bid contracts or award them to the lowest bidder. This may leave them some room to advance inclusive procurement policy, although state law does not explicitly authorize such practices. For contracts between \$10,000 and \$50,000—a range that is both more financially meaningful while still very accessible to MBEs—state law imposes the greatest constraint. Under standard procurement procedures, cities must award contracts to the lowest responsible bidder, with no allowance for other considerations.

The **competitive sealed bidding process** for contracts over \$50,000 requires awarding authorities to issue both an invitation for bids and a public notice of the invitation. In the invitation, the procurement officer must provide information including the time and date for receipt of bids, the address to which bids should be delivered, the purchase description, evaluation criteria, and all contractual terms and conditions of the procurement.<sup>29</sup> The statute calls on procurement officers to evaluate bids based solely on the criteria set forth in the invitation as to “quality, workmanship, results of inspections and tests, and suitability for a particular purpose.”<sup>30</sup> However, price remains the determining factor. When bidders meet all criteria, municipalities must award contracts to the lowest responsible and responsive bidder.<sup>31</sup>

Communities have slightly more latitude if they issue a **Request for Proposals** (RFP).<sup>32</sup> Under this more time- and labor-intensive process, the procurement officer designates

a group of individuals to objectively evaluate the proposals solely based on the criteria in the RFP.<sup>33</sup> Once the evaluation is complete, the procurement officer must award the contract to the business that offered the most advantageous proposal based on price and the RFP's evaluation criteria.<sup>34</sup>

Cities and towns with a commitment to inclusive procurement are increasingly utilizing RFPs that include diversity, equity, and inclusion (DEI) criteria, particularly when DEI qualifications are central to the vendor's ability to deliver the required services (e.g., translation or community outreach in diverse settings).

Whether they utilize the competitive sealed bidding process or an RFP, the law does not specifically allow procurement officers to consider inclusive procurement goals in evaluating bids, either in a race-neutral manner (e.g., evaluating whether small or local businesses are included), or, for those jurisdictions that have disparity studies, in a race-conscious manner (e.g., MBE bid preferences).

However, Massachusetts law does offer a tool that municipalities can utilize to provide more equitable access to public contracts for goods and services. Provisions in Chapter 30B allow municipalities to set aside contracts exclusively for competition among MBEs in **sheltered markets**.<sup>35</sup> To utilize this mechanism, the procurement officer must approve written procedures for the program after notice and a public hearing, file the written procedures with both the Supplier Diversity Office and the Massachusetts Secretary of State, and publish the written procedures in a newspaper of general circulation within the area served by the government.<sup>36</sup>

A contract designated under a sheltered market program cannot be awarded on a sole source basis; municipalities must receive at least three bids, proposals, or quotations.<sup>37</sup> Additionally, a contract cannot extend for a term longer than three years or be awarded to a vendor who, at the time of the award, is a party to any other sheltered market program contract issued in Massachusetts.<sup>38</sup> Finally, MBEs cannot receive more than three sheltered market contracts in Massachusetts within a one-year period.<sup>39</sup>

Massachusetts enacted these sheltered market provisions in 2003. While sheltered markets are used by cities across the country to help minority-owned businesses build experience necessary to compete successfully outside of a sheltered market, nearly two decades elapsed before a municipality attempted to utilize this tool in Massachusetts. In April, following a disparity study that showed gross underutilization of MBEs, the city of Boston was the first community to let a contract in a sheltered market.

One other tool cities can utilize to provide more equitable access to public contracts for goods and services is a provi-

sion in Chapter 30B that allows municipalities to purchase from a vendor pursuant to a contract with the Commonwealth. In contrast with the low bid requirements that must be followed by municipalities in Chapter 30B, the laws and regulations that apply to Commonwealth agency goods and services procurements are much less prescriptive and allow for “best value” (as opposed to “low bid”).

### Building Construction

Massachusetts General Laws Chapter 149 governs the construction, reconstruction, installation, demolition, maintenance, or repair of a building.<sup>40</sup> The procedures largely mirror those of Chapter 30B. However, one major distinction is that Chapter 149 requires awarding authorities to prequalify both general contractors and subcontractors submitting filed sub-bids for projects worth more than \$10 million.<sup>41</sup> To prequalify, a general contractor must meet the minimum number of points in each of the four general evaluation categories and earn a minimum overall score of 70 points.<sup>42</sup>

Five points can be added to the total score if the contractor is an MBE.<sup>43</sup> However, the procedures outlined in Chapter 149 provide communities with no other mechanisms to further inclusive procurement goals. Contracts must be awarded to the lowest responsible and eligible bidder. There are no provisions in Massachusetts law allowing subcontracting equity programs, which are commonplace in other states, either on a race-conscious or race-neutral basis. Unlike for goods and services, municipalities do not currently have the option to employ sheltered markets to solicit bids for construction projects of any size. Not allowing sheltered markets for construction is particularly limiting because this is a powerful tool to help disadvantaged firms compete as prime contractors. In Austin, Portland, San Diego, and a number of smaller cities, both race-neutral and race-conscious sheltered market programs have been utilized effectively in this manner.<sup>44</sup>

Despite these restrictions, Massachusetts law does provide a major opening to increase inclusion on public building projects. When cities construct facilities with state funds, they are required (Chapter 7C, Section 6) to take steps to meet the commonwealth’s participation goals under the Affirmative Marketing Program (AMP). In this case, DCAMM’s 2017 disparity study applies and communities can negotiate enforceable MBE participation requirements with contractors selected to lead the project.<sup>45</sup> While these provisions have had limited impact on MBE participation to date, changes to the AMP program requiring projects to specify separate goals for MBE and WBE firms, and allowing these goals to vary by project and region, could lead to greater utilization of MBEs in the future.<sup>46</sup>

Communities also have autonomy to advance inclusive procurement goals when they dispose of public land or buildings for private redevelopment. While the procedures (Chapter 30B, Section 16) do not reference DEI considerations directly, they give municipalities flexibility to set terms and conditions to advance the public interest, even if these conditions lead to offers that fall below the public property’s fair market value. This is the framework under which Massport was able to ensure that MBEs had strong participation in recent developments in the Seaport (see box p. 22).

### Public Works Construction

Chapter 30, Section 39M applies to the construction of public works, including bridges, roads, and sewers. The procedures are similar to Chapters 30B and 149.

- **Contracts under \$10,000:** An awarding authority must use sound business practices.<sup>47</sup>
- **Contracts between \$10,000 and \$50,000:** A procurement officer shall seek written bids from at least three people and award the contract to the lowest responsible bidder.<sup>48</sup>
- **Contracts over \$50,000:** A procurement officer must award the contract to the lowest responsible and eligible bidder after a publicly opened competitive bid process.<sup>49</sup>

As noted in the previous section, water, sewers, and roads make up a large share of capital spending directed by municipal governments in Massachusetts. Municipal broadband investments, which will be a heavy focus of the federal infrastructure bill, will also fall under these public works provisions. Unfortunately, cities are most constrained in this area. With the exception of small contracts below \$10,000, communities must award the work to the lowest bidder, and they cannot establish any sort of sheltered market or subcontracting equity program.

### Design Services

For design services, which covers the preparation of master plans, surveys, drawings, specifications, and schematics, and work by designers, interior designers, construction managers, architects, and engineers, Massachusetts’ Designer Selection Law governs.<sup>50</sup> One large exception is design services on public works; no state procurement law applies when communities are routing water and sewer infrastructure, or reworking streets, sidewalks, and intersections. This gives them complete discretion to advance inclusion however they see fit, so long as they remain within the bounds of federal law.<sup>51</sup>

Though municipalities must follow the Design Selection

Law for public buildings, the chapter gives them considerable flexibility to craft selection procedures that will meet their needs, and there is no low-bid requirement. The Inspector General’s Office provides municipalities with model procedures, which many communities have adopted. These procedures note that any municipal design or construction project that includes funding provided by the commonwealth, in whole or in part, must incorporate MBE participation goals.<sup>52</sup>

While design services is a relatively small portion of construction spending, it is an area where communities should be able to make considerable gains diversifying their spending. Massachusetts law imposes no restraints on cities working to make designer selection more inclusive. In comparison to construction, which may require large up-front investment in heavy machinery, capitalization requirements are generally lower for design firms, which makes it easier for MBEs to enter the marketplace.

## Summarizing the Status of Municipal Inclusive Procurement in Massachusetts

The review of Massachusetts procurement law above suggests municipalities have more power to further inclusive procurement goals with building construction and design services than most cities and towns currently utilize. At the same time, it is also true that municipalities face severe constraints in areas where they spend the most. Public works is largely off the table. For goods and services, sheltered markets and purchases from commonwealth-issued cooperative contracts are really the only mechanism currently available, and smaller communities without disparity studies cannot meaningfully access the sheltered market option. With relatively minor adjustments, the state can empower and encourage all communities to increase supplier diversity.

**Table 4: Summary of Municipal Powers to Adopt Inclusive Procurement Policies in Massachusetts**

	Goods and Services	Building Construction	Public Works	Design Services
<b>Small or local business program</b>  <b>(Race-neutral)</b>	<p>For contracts below \$50,000, can ensure small or local businesses are among the bidders solicited</p> <p>For certain contracts above \$50,000 awarded through an RFP process, some ability to consider Diversity, Equity, and Inclusion criteria.</p> <p>No sheltered market program possible under existing law</p>	<p>For contracts below \$50,000, can ensure small or local businesses are among the bidders solicited</p> <p>For RFPs for disposition of public property, some ability to consider Diversity, Equity, and Inclusion criteria.</p> <p>No sheltered market program possible under existing law</p> <p>No subcontracting equity program possible under existing law</p>	<p>For contracts below \$50,000, can ensure small or local businesses are among the bidders solicited</p> <p>No sheltered market program possible under existing law</p> <p>No subcontracting equity program possible under existing law</p>	<p>Considerable flexibility to ensure small or local business inclusion</p>
<b>MBE program</b>  <b>(Race-conscious)</b>	<p>For contracts below \$10,000, can institute a sheltered market program, but only with a disparity study.</p> <p>For contracts below \$50,000, can ensure MBEs are among the bidders solicited</p> <p>For certain contracts above \$50,000 awarded through an RFP process, some ability to consider Diversity, Equity, and Inclusion criteria.</p>	<p>For contracts below \$50,000, can ensure MBEs are among the bidders solicited</p> <p>For State-funded projects, requirement to meet the Commonwealth’s MBE participation goals under the Affirmative Marketing Program (AMP)</p> <p>For RFPs for disposition of public property, some ability to consider Diversity, Equity, and Inclusion criteria.</p> <p>No sheltered market program possible under existing law</p> <p>No subcontracting equity program possible under existing law</p>	<p>For contracts below \$50,000, can ensure MBEs are among the bidders solicited</p> <p>No sheltered market program possible under existing law</p> <p>No subcontracting equity program possible under existing law</p>	<p>Municipal design projects that include state funding must incorporate MBE participation goals.</p>

## The Massport Model

The Massachusetts Port Authority (Massport), which owns and operates Logan Airport, is an independent public authority. However, it is subject to the same procurement laws as municipalities throughout the state.<sup>53</sup> In 2017, Massport tapped Omni Hotel and Resorts and New Boston Hospitality (NBH) to develop a hotel on land that it owns in Boston's Seaport neighborhood.<sup>54</sup> With this project, Massport added a diversity and inclusion element with the goal of increasing M/WBE participation in all aspects of the project.<sup>55</sup> Along with its three traditional criteria—ability to execute the project, financial capability, and architectural design and functionality—Massport stated that 25 percent of the points would focus on diversity and inclusion. With this heavy emphasis, bidders knew they would not have the ability to succeed without a strong DEI plan.<sup>56</sup>

Omni and NBH focused on four aspects of a comprehensive diversity and inclusion plan: (1) M/WBE compliance and capacity-building, (2) oversight and mentorship, (3) permitting, public relations, and community engagement, and (4) creative and operational support.<sup>57</sup> The team also planned on pairing established firms with smaller, M/WBE firms to ensure that M/WBE firms could access more resources.<sup>58</sup> Massport requires that bidders show a past and ongoing commitment to M/WBEs, and according to Massport's request for qualifications for Parcel D-2—the parcel where the Omni Hotel now sits—this commitment needs to be across all aspects of a project, including financing, development, ownership, design, and construction.<sup>59</sup>

On a later project in Boston's Seaport, Massport asked for examples of current and past projects of similar size and scope that would show a bidder's dedicated efforts to increase M/WBE participation.<sup>60</sup> Massport also requested that developers create a strategy to include local residents in its construction team, with the same requirement that bidders show that they have prior experience developing a local residents' program on similar projects.<sup>61</sup>

# V. Empowering Municipalities to Seize the Opportunity

■ To build a more equitable post-pandemic economy, Massachusetts has directed a large infusion of recovery resources to small businesses owned by people of color. These entrepreneurs are responding, seeking out grants and hands-on assistance to enter new markets and grow their enterprises. ARPA and BIL present a major opening to double-down on this momentum, but the state must act quickly to take advantage. The legislative changes outlined below are relatively straightforward and well-understood by municipal procurement officers, which means communities will be able to implement them without significant delay. In combination, these five action items will empower municipalities to seize the opportunity to support entrepreneurs of color and strengthen local and regional economies across the commonwealth.

## 1. Expand the existing sheltered market program to include public building and public works construction.

Construction represents a large share of municipal spending, and the volume will grow considerably as ARPA and BIL funds flow down to communities. Under current law, Massachusetts municipalities are unable to utilize sheltered markets to help MBEs build capacity to compete for construction contracts on a level playing field. Sheltered markets are an especially valuable tool for construction because there are many smaller MBEs in this sector; with opportunities to compete for contracts in a sheltered market, these businesses will gain vital experience serving as prime contractors. Over time, this will lead to a larger, more competitive bidding pool for public projects.

## 2. Expand the existing sheltered market program to include small and local businesses.

Across the US, most cities with sheltered market programs utilize race-neutral designs. Contracts are set aside for small, local businesses, for example, rather than for MBEs specifically. Because many MBEs are small, this race-neutral approach benefits MBEs. However, in Massachusetts, the current sheltered market law does not permit a race-neutral approach. By adding small and local businesses to sheltered market provisions for good and services, buildings, and public works contracts, the legislature can give Massachusetts communities greater flexibility to design programs to grow disadvantaged businesses in a manner that is best suited to their needs.<sup>62</sup> Because conducting disparity studies is a time-intensive and costly process, and Boston is the only community that currently has one in place, this change is essential to position municipalities to award ARPA and BIL funds through sheltered markets.

## 3. Create underutilized business provisions for public buildings and public works construction.

Sheltered markets are a powerful, but limited tool. They are labor intensive to administer and in many areas of purchasing, there may not be enough MBEs to create a competitive pool. Massachusetts can complement the sheltered market

provisions by providing municipalities with more flexibility to consider both race-conscious and race-neutral contracting goals as criteria when evaluating RFPs and to create subcontracting equity programs.

## 4. Confirm that unbundling large contracts is a permissible way to meet inclusive procurement goals.

Breaking contracts up into smaller components to make them more accessible to disadvantaged businesses with limited financial capacity is widely recognized as an inclusive procurement best practice. Procurement officers in Massachusetts, however, are sometimes concerned that this could be considered impermissible “bid splitting.”

When asked, the Attorney General’s Office assures municipalities that unbundling large contracts in order to advance inclusive procurement is not “bid splitting,” which is done for the purpose of evading bidding laws. However, there is no written policy to this effect, and procurement officers are understandably wary of running afoul of the law. By amending Chapters 30, 32, and 149, the legislature can confirm that unbundling contracts to provide opportunities to disadvantaged businesses is not only fully permissible under the law, but a practice to be encouraged.<sup>63</sup>

## 5. Create a grant program to help municipalities collect and publicly report MBE participation in procurement.

The Supplier Diversity Office’s Municipal Supplier Diversity Playbook urges cities and towns to track data.<sup>64</sup> Similarly, the first strategy in the National League of Cities’ Municipal Action Guide is “strengthen data collection practices and disaggregate by race.”<sup>65</sup> However, very few cities and towns in Massachusetts systematically track contracts issued to disadvantaged businesses or identify changing patterns over time.

These data are crucial if communities want to undertake disparity studies. Equally important, these data are necessary to ensure that race-neutral procurement policies lead to equitable outcomes. Experience shows that race-neutral policies are most effective when they are accompanied by rigorous data collection, to track progress over

time, flag areas where more attention is needed, and highlight practices that succeed.<sup>66</sup>

The state can encourage and support communities with a modest grant program to be administered by the Supplier Diversity Office in consultation with Executive Office of Technology Services and Security. This partnership will ensure that communities can turn to the state for both technical assistance and resources to purchase and deploy new information systems. A grant program can also help ensure that municipalities adopt consistent protocols for collecting and publicly reporting procurement data to the greatest extent possible.

## **The Dearth of Supplier Diversity Activity in Massachusetts Stands in Stark Contrast to Cities throughout the US**

Google “inclusive procurement” and the name of any major city, and you are likely to find that that city has made substantial efforts to increase supplier diversity. This suggests the state contracting laws where they operate offer far more latitude than Massachusetts provides its municipalities.

Cities in Pennsylvania, Maryland, New Jersey, and Illinois set aggressive goals for all forms of construction and goods and services purchases and they utilize sheltered markets, bid discounts, and other race-conscious tools to meet them. Several Texas cities, including Austin, Dallas, and Houston, have received recognition for their inclusive procurement efforts, utilizing both race-conscious and race-neutral designs. While race-conscious policies are not prohibited in most southern states, race-neutral approaches are far more common. Local governments in Florida, for instance, regularly utilize small business preferences to increase supplier diversity. Broward County has both goals to increase participation of small businesses in subcontracting and a sheltered market program to position small businesses to serve as prime contractors. Miami–Dade County gives bid discounts to small local businesses.

Municipalities in the handful of states that prohibit race-conscious contracting programs are frequently turning to race-neutral approaches. Los Angeles offers bid discounts to local, small businesses. San Francisco uses both bid discounts and sheltered markets to give small businesses the chance to serve as primary contractors. King County (Seattle), Washington, is highly regarded for its robust race-neutral MBE programs, which similarly include a combination of bid discounts and sheltered markets.<sup>67</sup>

These efforts have not all enjoyed success, but the record shows cities are improving through trial and error. Massachusetts cities are decades behind in implementing these approaches, but if the legislature empowers them to act, they can surely learn from other jurisdictions, and quickly move to the front of the pack.



# Notes

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3. David Blanchflower. “Minority Self-Employment in the United States and the Impact of Affirmative Action Programs.” *Annals of Finance* 5.3 (2009).
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5. Jon Wainwright and others. “*Business Disparities in the DCAMM Construction and Design Market Area.*” (Austin, TX: NERA Economic Consulting, 2017). Also see: Maria Enchautegui. “Do Minority-Owned Businesses Get a Fair Share of Government Contracts?” (Washington, DC: Urban Institute, 1997).
6. “Supplier Diversity Office Comprehensive Annual Report, Fiscal Year 2020.” (Boston, MA: Executive Office of Administration and Finance, 2021). Note: School construction spending through MBEs fell sharply between FY 16 and FY 17. The reports provide no explanation. It is unclear whether this is the result of a change to data reporting protocols or an actual decline.
7. Cedric Herring and Loren Henderson. “Wealth Inequality in Black and White: Cultural and Structural Sources of the Racial Wealth Gap.” *Race and Social Problems* 8.1 (2016).
8. For example, see: Brian Nolan and others. “Inequality and Prosperity in the Industrialized World.” (New York, NY: Citigroup, 2017).
9. Forman and others (2021).
10. Benjamin Forman. “Sizing Up Massachusetts’ Looming Skilled-Worker Shortage.” (Boston, MA: MassINC, 2022).
11. Aaron Chatterji and others. “The Impact of City Contracting Set-Asides on Black Self-Employment and Employment.” *Journal of Labor Economics* 32.3 (2014).
12. William Frey and Kao-Lee Liaw. “Interstate Migration of Hispanics, Asians and Blacks: Cultural Constraints and Middle Class Flight.” *Population Studies Center Research Report* 5 (2005).
13. Justin Marion. “Are Bid Preferences Benign? The Effect of Small Business Subsidies in Highway Procurement Auctions.” *Journal of Public Economics* 91.7-8 (2007).
14. Elvira Uyarra and Kieron Flanagan. “Understanding the Innovation Impacts of Public Procurement.” *European Planning Studies* 18.1 (2010).
15. This estimate is likely biased upward, given BIL’s focus on transportation infrastructure, which is generally led by the state. However, even when cities are not directly responsible for the contracting, they could still have influence on minority participation in the projects through planning and permitting.
16. 49 C.F.R. 26.43(a).
17. This report discusses race-conscious and race-neutral programs, but similar principles apply to gender-neutral and gender-conscious programs. However, gender-conscious programs must meet a less stringent standard, needing to have an “exceedingly persuasive justification.” *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).
18. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 433 (1985).
19. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 202 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).
20. *Cotter v. City of Boston*, 323 F.3d 160, 170 (1st Cir. 2003); 49 C.F.R. 26.51(f).

21. *Fed. Concrete, Inc. v. Exec. Office for Admin. and Fin.*, No. SUCV20160627H, 2018 WL 1995551, at \*6 (Mass. Sup. Ct. Feb. 27, 2018) (holding that the Executive Office for Administration and Finance could not certify Portuguese-owned businesses as MBEs until a disparity study showed a strong basis in evidence that Portuguese-owned businesses suffered discrimination). But see *W.H. Scott Const. Co., Inc. v. City of Jackson, Miss.*, 199 F.3d 206 (5th Cir. 1999) (finding that, because disparity study did not focus on the relevant pool of subcontractors and the city did not adopt the study, the city’s DBE program was not constitutionally supported). Note that if a race-conscious program is challenged in court, the municipality would have to prove that the program is narrowly tailored to a compelling government interest. See generally *Croson*, 488 U.S. 469. Anecdotal evidence is routinely gathered informally; *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977).
22. *Croson*, 488 U.S. at 509. “Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.”
23. *Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. Calif. Dep’t of Transp.*, 713 F.3d 1187 (9th Cir. 2013); *H.B. Rowe Co., Inc. v. Tippett*, 615 F.3d 233, 257 (4th Cir. 2010) (upholding a North Carolina statute that permitted DBE participation goals only if a disparity study—conducted at least every five years—supported a strong basis in evidence of past or present discrimination); *Concrete Works, Inc. v. City and County of Denver*, 321 F.3d 950, 980 (10th Cir. 2003).
24. M.G.L. Ch. 30B § 1. “Governmental body” is defined as any “city, town, district, regional school district, county, or agency, board, commission, authority, department or instrumentality of a city, town, district, regional school district or county.” M.G.L. Ch. 30B § 2.
25. M.G.L. Ch. 30B § 4(c). “Sound business practices” is merely defined as “ensuring the receipt of favorable prices by periodically soliciting price lists or quotes.” M.G.L. Ch. 30B § 2.
26. M.G.L. Ch. 30B § 4(a). M.G.L. Ch. 30B § 5(g). “Responsible” means a bidder with the capability to fully perform the contract and the integrity and reliability to assure good faith performance.
27. M.G.L. Ch. 30B § 2. “Responsive” means that the bidder complies with all requirements set forth in the specifications. M.G.L. Ch. 30B § 2; *Waste Stream Envtl., Inc. v. Lynn Water and Sewer Comm’n*, No. 00518D, 2003 WL 917086, at \*6 (Mass. Sup. Ct. Jan. 3, 2003).
28. M.G.L. Ch. 30B § 6(a).
29. M.G.L. Ch. 30B § 5(b)-(c).
30. M.G.L. Ch. 30B § 5(b).
31. M.G.L. Ch. 30B § 5(e). These criteria must be stated with “as much certainty and definiteness as practicable, so that bids may be submitted on a “common basis” and the awarding authority can fairly and meaningfully compare the bids. *White’s Farm Dairy, Inc. v. City of New Bedford*, No. CIV.A. B98-01481, 1999 WL 823885, at \*10 (Mass. Sup. Ct. Aug. 25, 1999).
32. McQuillin, *The Law of Municipal Corporations*, §29.31 (2021).
33. A procurement officer is not permitted to open proposals publicly, and the contents of each offeror’s proposal remain confidential until the completion of evaluations or proposal acceptance by the governmental body. M.G.L. Ch. 30B § 6(d). The individuals tasked with evaluation must rate each criteria for each offeror as either “highly advantageous,” “advantageous,” “not advantageous,” or “unacceptable.” M.G.L. Ch. 30B § 6(e)(1).
34. M.G.L. Ch. 30B § 6(g). The procurement officer must explain their reasoning if the contract is not awarded to the offeror proposing the lowest price. M.G.L. Ch. 30B § 6(h). If an evaluation criterion is not specifically required by the procurement statutes, then an awarding authority may waive nonadherence to the criterion at its discretion.

35. M.G.L. Ch. 30B § 18(a). Sheltered markets can also include women-owned or veteran-owned businesses. For example, the City of Boston has set aside six City contracts under Chapter 30B for procurement from M/WBEs. See *Executive Order of Mayor Michelle Wu, (2021)*, available at <https://www.boston.gov/sites/default/files/file/2021/12/Docket%20%231239%20Sheltered%20Market%20Program.pdf>.
36. M.G.L. Ch. 30B § 18(c).
37. M.G.L. Ch. 30B § 18(e).
38. M.G.L. Ch. 30B § 18(f).
39. *Id.*
40. M.G.L. Ch. 149 § 44A-44J.
41. The law requires that contractors submit construction bids in two phases. First, subcontractors must submit their bids to the awarding authority, which compiles a list of all sub-bids received. The awarding authority then sends the list to all interested general contractors. Interested contractors submit their bid including any filed sub-bidders that will be used on the work. Awarding authorities also have discretion to prequalify general contractors to submit bids for projects that are estimated to cost more than \$100,000 but less than \$10 million. M.G.L. Ch. 149 § 44D1/2(a). Under this prequalification process, the awarding authority must provide public notice of prequalification and issue a request for qualification M.G.L. Ch. 149 § 44D1/2(a).
42. M.G.L. Ch. 149 § 44D1/2(e). The four general categories are: (1) management experience, (2) references, (3) capacity to complete, and (4) satisfaction of all mandatory requirements.
43. M.G.L. c. 149A, § 8(a).
44. See: “Sheltered Market: Need for Clearer Focus and Stronger Management.” (Portland, OR: Office of the City Auditor, 2010).
45. In its 2017 disparity study, DCAMM found a statistical disparity between the availability and actual utilization of MBEs, particularly Black-owned and Native American-owned firms. Along with race-neutral best practices, this disparity finding provided the basis for the implementation of race-conscious measures. The full study can be found here: <https://www.mass.gov/doc/business-disparities-in-the-dcamm-construction-and-design-market-area-study/download>
46. See: <https://files.engineers.org/file/Important-2020-Changes-To-The-Affirmative-Marketing-Program-6-20.pdf>
47. M.G.L. Ch. 30 § 39M(a).
48. *Id.*
49. *Id.* Under this section, the “lowest responsible and eligible bidder” is one that has the “skill, ability and integrity necessary” to perform, can certify that they are able to furnish labor, can certify that all employees have successfully completed an OSHA construction safety and health course, is qualified, and can acquire the security by bond. M.G.L. Ch. 30 § 39M(c).
50. Local jurisdictions must follow the Designer Selection Law when the fee is \$30,000 or more and the estimated cost of the building construction project is \$300,000 or more. M.G.L. Ch. 7C § 54 (f).
51. M.G.L. Ch. 7C § 44(b); Massachusetts Office of the Inspector General, *Designing and Constructing Public Facilities, September 2021, at 29*, available at <https://www.mass.gov/doc/designing-and-constructing-public-facilities-september-2021/download>.
52. See: <https://www.mass.gov/service-details/model-designer-selection-procedures-for-municipalities-and-other-local-public-agencies>
53. *Overview of the Massachusetts Port Authority, Audit of the Massachusetts Port Authority*, Mass.gov, <https://www.mass.gov/info-details/overview-of-the-massachusetts-port-authority> (last visited March 28, 2022).
54. *Omni Hotels & Resorts, Massport Board Votes to Award Omni Hotels & Resorts and New Boston Hospitality as Developer for Boston’s New Hotel Adjacent to Convention Center (April 13, 2017)*, available at <https://www.omnihotels.com/media-center/recent-news/2017/05/08/16/170413-massport-awards-new-hotel-development-to-omni>.

55. Laura Winig. The Massport Model: Integrating Diversity and Inclusion into Public-Private Partnerships, Harvard Kennedy School Case Program, at 5-6 (Feb. 28, 2019).
56. *Id.* at 7.
57. *Id.* at 17.
58. *Id.* at 15.
59. Massachusetts Port Authority, *Amended and Restated Request for Qualifications, The Summer Street Development Project*, Nov. 9, 2015, at 3.
60. *Massachusetts Port Authority, Request for Proposals for the Parcel A-2 Development*, Mar. 12, 2018, at 14.
61. *Id.* at 21.
62. Johnson and others (2019).
63. See: <https://www.mass.gov/files/documents/2018/11/07/Newest%20Bid%20FAQs.pdf>
64. See: <https://www.mass.gov/doc/sdos-municipal-supplier-diversity-playbook/download>
65. See: [https://www.nlc.org/wp-content/uploads/2021/06/Inclusive-Procurement-Toolkit\\_NLC.pdf](https://www.nlc.org/wp-content/uploads/2021/06/Inclusive-Procurement-Toolkit_NLC.pdf)
66. For example, when the New Jersey Department of Transportation employed a race-neutral policy that created goals and a sheltered market for small businesses, spending shifted toward non-minority-owned business. See: Rodrigo Davila and others. “Affirmative Action Retrenchment in Public Procurement and Contracting.” *Applied Economics Letters* 19.18 (2012).
67. Tim Lohrentz and others. “Economic Development in Diverse Communities: Inclusive Procurement by Cities and Counties.” (Oakland, CA: Insight Center for Community Economic Development, 2014).