



**WRITTEN TESTIMONY**

**NYS COMMITTEE ON ECONOMIC DEVELOPMENT  
AND  
NYS COMMITTEE ON LABOR**

**MINORITY & WOMEN-OWNED  
BUSINESS ENTERPRISES**

**May 30, 2018  
Hearing Room A  
Legislative Office Building  
198 State Street  
Albany, New York 12247**

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Executive Director  
Empire State Subcontractors Association, Inc.**

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**Members of the Economic Development and Labor Committees, my name is Michael Misenhimer. I am the Executive Director of the Empire State Subcontractors Association, Inc. (ESSA), representing approximately 1,000 commercial, industrial and public works subcontractors, specialty prime contractors and material supply firms statewide. ESSA is the largest statewide association of subcontractors in the country, and our members represent companies performing work in virtually all trade categories, from plumbing & HVAC, to steel fabrication & erection, to concrete and masonry.**

**I very much appreciate the opportunity to present the views of this association to the Committees on the issue of Minority & Women-Owned Business Enterprises, particularly as it relates to subcontractors.**

**ESSA has a long history of supporting the development of MWBE in the construction industry. As far back as 1980, ESSA was involved and active in the Alliance of Majority and Minority Contractors Internship Program, a program that placed emerging minority contractors in internship relationships with host majority construction companies. ESSA also supported the enactment of Article 15-A of the Executive Law in 1988.**

**That said, ESSA began to develop serious concerns about the State's MWBE program with the release of the 2010 Disparity Study conducted by NERA Economic Consulting. This particular disparity study led to the establishment of a 22.75% statewide MWBE goal for construction contracts let by New York**

State agencies. Regarding the establishment of MWBE goals in general, it is important to note that the U.S. Supreme Court decision in *City of Richmond v. Croson* declared that disparity ratios should be based on comparisons of MWBE and non-MWBE firms that are “qualified, willing and able” to perform a particular service for government. Unfortunately, the NERA study based its calculations of MWBE and non-MWBE availability on a simple headcount derived from Dun & Bradstreet data. The NERA study ignored legal precedents such as *Croson*, and made no attempt to measure which construction firms were qualified, willing and able to perform public contracts in New York. In addition, the NERA study did not measure the capacity of MWBE companies to perform up to 22.75% of the total volume of public work let by the State. Within the construction industry, there is enormous variety among construction firms in terms of their specialties, qualifications, financial capacities, employees and interest in public work. The Dun & Bradstreet data used in the NERA study merely represented a compendium of all firms that exist within a specific geographical area, and did not take into consideration any of these variables.

Backing up this perspective, after the United States Commission on Civil Rights reviewed contracting disparity studies in 2006, it specifically recommended:

“Analysts should use measures of available firms that account for the business’ capacity to perform the work. At a minimum, they should examine disparity indexes by size of business. For example, instead of contrasting

**small minority businesses with all other firms, researchers should compare them to other small businesses....The research should attempt to include additional and more-finely tuned measures of capacity, such as revenue, number of employees or the firm's payroll."**

**When setting MWBE goals, it is important for there to be an accurate assessment of qualified, willing and able MWBE companies and their capacity to fulfill those goals. The Dun & Bradstreet headcount compiled by NERA totaled 89,892 MWBE construction companies located in New York State and in the NY-NJ-CT-PA Consolidated Metropolitan Statistical Area, and yet, when the disparity study was commissioned, there were only slightly more than 2,000 MWBE construction-related firms certified by Empire State Development. That means more than 87,000 of the 89,892 MWBE construction companies (over 96%) identified by NERA using Dun & Bradstreet data were NOT certified by the State of New York. Since only firms certified by Empire State Development count toward fulfilling contract goals, a firm's participation in the certification process should be a key indicator of the firm's willingness to perform public work. Logic would dictate that only MWBE firms who have received certification should be considered when calculating the capacity of and the number of firms willing and able to participate in NYS public work contracts, and the resulting MWBE goals should be established accordingly.**

**In 2014, things got far more difficult for the construction industry when, despite the fact a new disparity study had not been conducted, and absent**

legislative approval, Governor Cuomo unilaterally increased the statewide MWBE goal to 30%. Setting aside the question of the Governor's authority to increase the goal to 30%, given the relatively low number of certified MWBE companies in given geographic areas around the State (particularly upstate), it is certainly questionable whether there are sufficient numbers of certified MWBE companies encompassing the full range of construction trades with the capacity to perform 20%, let alone 30% of the State's public work volume in those geographic areas. For example, a recent search of Empire State Development's Directory of Certified Firms showed a total of 524 certified MBE construction businesses listed in the "Capital Region", and yet, only 32 of these MBE construction businesses (6%) are actually located in the Capital Region. Of these 32 companies, more than half (17) indicated a total annual business volume of less than \$500,000. The vast majority of the "Capital Region" certified MBE are actually located in other areas of the State, predominantly in and around the City of New York. Over 62% (more than 325) of the firms listed as "Capital Region" MBE are located in the New York City metropolitan area. Generally, MBE and non-MBE construction companies alike are not prone to traveling from the City of New York to the Capital Region to perform construction subcontracts. Indeed, most construction companies have a much smaller travel radius than 150 miles.

Since 2014, New York State and its various contracting agencies have consistently violated Article 15-A of the Executive Law through imposition of an "across the board" 30% goal on all construction contracts. Section 313, Subdivision 2-a(b) of the Executive Law specifically requires that "each

**contract solicitation set forth the expected degree of minority and women-owned business enterprise participation based, in part, on:**

- (i) the potential subcontract opportunities available in the prime procurement contract; and**
- (ii) the availability, as contained within the study, of certified minority and women-owned business enterprises to respond competitively to the potential subcontract opportunities.”**

**Further, 5 NYCRR 142.2(d) requires the establishment of contract-specific goals based in large part on ten factors, including factors such as: the contract and subcontract scope(s) of work; the potential subcontract opportunities available in the prime contract; the number and types of certified minority and women-owned business enterprises found in the directory available to perform the State contract work; and the geographic location of the contract performance. The State has regularly failed to adhere to either the law or the implementing regulations which require an analysis and establishment of MWBE goals on a contract by contract basis.**

**The most recent NYS disparity study, conducted by Mason Tillman Associates and released in July 2017, is also severely flawed in both its design and execution. Among the most dubious claims contained in the study is that MWBEs account for 56.68% of all construction prime contractors and 50.42% of all subcontractors in New York State. This is clearly inaccurate. Unfortunately, the State could use this faulty data to justify the establishment**

of future MWBE goals of more than 50%. Further, the Mason Tillman study fails to establish that contracting and subcontracting disparities have been caused by discrimination. For example, Mason Tillman concluded that there was a racial and gender disparity in the award of prime construction contracts by New York State agencies, and recommended as a remedy that the State apply a 10% bid preference to MWBE on prime contracts for bid evaluation purposes. However, what Mason Tillman failed to recognize is that most prime construction contracts are awarded by the State pursuant to the State's competitive bidding statutes, an inherently race and gender neutral method of awarding contracts. This should lead to the conclusion that a disparity in the award of competitively bid prime contracts may result from some other non-discriminatory reasons such as experience and capacity. In other words, before concluding that disparities result from bias, other non-discriminatory explanations for the disparities must be tested.

Resulting in large part from the flawed conclusions of the Mason Tillman study, earlier this year the Governor proposed (Part Q of Budget Bill S.7508/A.9508) a vast expansion in scope of the State's MWBE program to include, among other things, application of the State program to all local government contracts, a 10% bid preference to MWBE on all prime contracts valued at less than \$1.4 million, new MWBE fraud provisions, a heightened exposure of contractors and subcontractors to liquidated damages for failing to reach MWBE goals, and new (and unworkable) workforce participation goals. These proposed amendments to Article 15-A of the Executive Law would have had a severely damaging impact on contractors and

**subcontractors seeking to perform contracts in the NYS public works marketplace. We very much appreciate the Senate's rejection of Part Q.**

**Over many years, ESSA has supported efforts to increase the number of and capacity of legitimate minority and women-owned construction businesses in New York State. Unfortunately, the State has focused its efforts on the imposition of ever-increasing MWBE goals with little regard for MWBE capacity or how the MWBE program impacts the construction industry. From the perspective of non-MWBE subcontractors, because goals are based on the entire value of a prime contract, and many prime contractors self-perform a portion of the work with their own forces (in the case of the Department of Transportation general contractors are required to self-perform at least 50% of the contract), a 30% MWBE goal on a given project means that a prime contractor must award 60% or more of the total value of all subcontracts to MWBE in order to reach the 30% project goal. It is fundamentally unfair to non-MWBE subcontractors to have 60-70% of all subcontracting opportunities essentially reserved for MWBE companies. Further, general contractors often fulfill their subcontracting goal requirements in certain trades where they can find a higher number of certified MWBE, such as painting and sheet rocking. As such, many non-MWBE subcontractors in those trades no longer bid State projects because they know the general contractor will, out of necessity, award those subcontracts to MWBE in order to meet the project goal.**



**Mechanical and electrical contractors who often bid as prime contractors on state projects have their own unique challenges with the MWBE program. Most mechanical and electrical contracts have few subcontracting opportunities. Therefore, beyond partially reaching the MWBE goal through the use of MWBE suppliers, mechanical and electrical contractors are often forced to break off a portion of the work they normally self-perform and award that work to MWBEs, usually at a higher price. A recent change by Empire State Development, whereby the credit applied toward the meeting of MWBE goals through the use of suppliers has been reduced to 60% of the value of the supply contract, has made reaching a 30% project goal even more difficult for these companies.**

**New York State's MWBE program is in serious need of correction. The Empire State Subcontractors Association has joined with other construction industry organizations across the state in the endorsement of the following proposals for the improvement of New York State's MWBE program:**

- 1. New York State should procure a new disparity study compliant with the Constitutional standards set forth by the U.S. Supreme Court in *City of Richmond v. Croson*.**
- 2. Legislation must be enacted to clarify that contract-specific goal setting analyses required by law and regulation must be made available pre-bid and included in project specifications.**

**3. A significant appropriation should be made to fund the establishment of mentor/protégé and other programs designed to grow and develop MWBE capacity statewide.**

**Finally, as a general proposition, it is the position of the Empire State Subcontractors Association that New York State must adhere to the *Croson* decision in the administration of its MWBE program, whereby the use of racial and gender classifications in State contracting is justifiable only in the extreme case where some form of narrowly tailored remedy might be necessary to break down patterns of deliberate exclusion. In recent years, New York State's MWBE program has been anything but narrowly tailored.**

**Thank you very much for this opportunity to present our views.**