



MEMORANDUM OF OPPOSITION

BILL: A.10713 (Peoples-Stokes) / S.8880 (Sanders)

SUBJECT: M/WBE Extender, Blue Ribbon Commission, Mentor-Protégé

DATE: June 4, 2018

The Associated General Contractors of New York State, (AGC NYS) the leading statewide trade association representing union and non-union construction companies opposes A.10713 (Peoples-Stokes) / S.8880 (Sanders) which extends article 15-A of the executive law for five years, establishes a blue ribbon commission to study the minority-and women-owned business enterprise program (M/WBE), and establishes a fund for mentor-protégé training and labor transition training programs.

The New York State Minority and Women-Owned Business Enterprise Program (M/WBE), is an important program—one which AGC NYS and its predecessor organizations have a long history of supporting and working to improve. AGC NYS played a significant role in crafting the original Article 15-A, which created the M/WBE program in New York. We have also enjoyed a decades-long partnership with groups like the Association of Minority Enterprises of New York (AMENY).

For decades, the emphasis of M/WBE legislative efforts in New York State and around the country have been on setting utilization goals for public contracts including subcontracting to minority and women-owned construction and supplier firms. AGC NYS believes that after all of these decades, with many initiatives, we are little to no better off today than we were before those initiatives began because these programs do not address root issues and do not meaningfully increase capacity. As we look at the construction industry today, we see very few new firms entering into the industry or firms that have managed to sustain themselves and grow over the long-term and into future generations. The fact that there are far too few multi-generational construction contractors and an insufficient number of minority-owned general contractors and risk-taking construction managers of any size doing business in New York State is indicative of this flawed approach.

While well intentioned, this bill has some flaws and AGC NYS offers the following commentary and proposed recommendations.

Five-Year Extension May Expose Program to Legal Challenge: Section 1 of the bill would extend article 15-A of the executive law for five years under the 2010 NYS Disparity Study. Extending the M/WBE program for five years under the outdated 2010 NYS Disparity Study would expose the entire program to a potential legal challenge, because following the strictures of the United States Supreme Court's landmark 1989 *City of Richmond v. J.A. Croson Co.* decision, state or local governments seeking to develop such a program must periodically conduct properly performed "disparity studies". A proper disparity study must assess whether a disparity exists, determine if that disparity results from discrimination, and, if so, identify proper, narrow tailored remedies to reduce and eliminate it. Contract goals to remedy such a disparity resulting from such a properly established program must also be narrowly tailored and based on both the capacity and availability of M/WBE firms relative to the services or goods being procured. The 2010 Disparity Study relies upon data that is more than a decade old. Precedent exists for these programs to be successfully challenged solely on the basis of the staleness of the underlying data. We believe that the 2016 Disparity Study is irreparably flawed and defective. Any extension of the current law and program based on the 2010 Study must be coupled with an appropriation for procurement of a new, proper Disparity Study to protect against a staleness challenge which would jeopardize the entire program.

Blue Ribbon Commission Needs Construction Industry Representative: Section 2 of the bill would establish an M/WBE blue ribbon commission to examine, evaluate, and make recommendations on the M/WBE program. We believe this Commission has significant merit. However, as currently framed, the commission would be entirely dominated by appointees of the Executive Chamber and does not statutorily include representatives of the construction industry. Due to the complexity of construction projects, the commission would benefit from the perspective of general contractors and/or their representatives that possess an extensive array of contractual, technical, regulatory, safety and other issues.

Mentor-Protégé Effort Requires Industry Expertise and Leadership Along With Strong Educational Component: Sections 3 and 4 of the bill create a \$25 million fund to promote, establish, and support mentor-protégé training programs, union transition training programs, and a framework for distribution of such funds. AGC NYS strongly supports the funding and creation of mentor-protégé training programs that help to build M/WBE capacity. Recently, AGC NYS kicked off an exciting new effort with AMENY, the City of Schenectady and the State University of New York's Schenectady County Community College to launch a Workforce Initiative for the Construction Industry, a free training and employment program to build M/WBE capacity and workforce diversity in our industry that we hope will be a model to be replicated statewide. The Construction Management Training/Mentor-Protégé Program, which is part of this effort, was developed to assist small and emerging M/WBE contractors by providing industry-specific business skills and mentoring from successful industry leaders.

The mentor-protégé and union transition provisions of this bill would not actually develop and build M/WBE capacity in New York. The bill would appropriate \$25 million to Empire State Development and other unnamed organizations, which have repeatedly demonstrated the inability to properly administer and develop the M/WBE program. AGC NYS recommends funding and establishing mentor-protégé programs through the State University of New York or community colleges which are better equipped to educate and develop contractors and subcontractors. Such funding must also be competitively and transparently administered.

Union Transition Provisions Are Misguided: Included in this section of the bill is a union transition training program to assist non-union minority and women-owned business enterprises to perform as union contractors. The sponsors of this bill improperly assume that M/WBE contractors want to join a labor union. To the contrary, many M/WBE contractors are opting to do work in the private sector because it does not have the daunting bureaucratic and legal pitfalls as public work or strict union rules. This provision indicates a geographic, political and market bias that is ill-suited to properly serving the needs of M/WBE's. This provision belies a presumption that the construction market throughout NYS is like that of New York City. It presumes that M/WBE's should place all the eggs in the NYS public work basket and that the only probable choice is to be signatory to union agreements. Government should be neutral on the question of a firm or individual's decision whether or not to affiliate with a labor union. It should not intervene to tip the scales in either direction, neither hindering nor promoting such a choice.

AGC NYS urges the sponsors to amend specific sections of the bill and include the following:

- Amend the Executive Law and underlying regulations to mandate that the currently required, project specific goal setting analysis be made available to bidders pre-bid. This is designed to make certain that project goals are being set according to law and would serve to protect both M/WBE and non-M/WBE firms.
- Procure a proper, new disparity study that meets the standards of *Croson* and providing an appropriation for the same.
- Establish and fund a mentor-protégé program at the State University of New York or community colleges.

As previously stated, AGC NYS has a long history of supporting and working to improve the NYS M/WBE Program. This bill is an important first step towards rebuilding an M/WBE program that requires specific goal setting analysis pre-bid, procures a new disparity study that meets the *Croson* standard, and establishes a mentor-protégé program. We are hopeful that industry can work with the sponsors and M/WBE advocates to produce final legislation that all parties can support and which will protect and improve this important program.