



MEMORANDUM OF OPPOSITION

BILL: S.7508-A (Budget) / A.9508-A (Budget) – Part Q

SUBJECT: M/WBE and Workplace Participation Revisions to Executive Law

DATE: February 20, 2018

The Associated General Contractors of New York State, (AGC NYS) the leading statewide trade association representing union and non-union construction companies strongly opposes S.7508-A (Budget – Part Q) / A.9508-A (Budget – Part Q), which dramatically changes the M/WBE program, placing the program itself at risk, and adds unworkable workforce participation mandates to the Executive Law.

AGC NYS--and before it the General Building Contractors--have a long history of working to increase long-term capacity and removing impediments to M/WBE success. More recently, AGC NYS has teamed up to form a "Diversity Council" to explore ways to deal with the myriad issues and actually build capacity. Members of the Diversity Council include the leading construction industry organizations and many minority and majority firms.

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.

Since the 1990s, New York has had a program creating goals for the use M/WBEs. Establishing a M/WBE program is based on a disparity study to investigate whether there is identifiable discrimination in state procurements providing a "compelling interest" and, if such discrimination is found, to recommend legislative remedies specifically and narrowly targeted to remediating the identified discrimination. The present NYS M/WBE program is legally founded upon the 2010 Disparity Study.

AGC NYS is gravely concerned about defective methodology and unrealistic conclusions of the deeply flawed 2016 M/WBE Disparity Study (The 2016 Study). The 2016 Study is supposed to be the legal basis for S.7508-A (Budget) / A.9508-A (Budget) – Part Q of the Governor's Executive Budget proposal, but it ignores reality and longstanding case law therefore jeopardizing the entire M/WBE program.

The 2016 Study's defects were apparent when its' RFP (improperly, but perhaps accurately, stating its purpose as "increasing participation of M/WBEs on the State's contracts") was issued. More egregiously, the 2016 Study failed to identify any NYS procurement discrimination during the five-year period examined and its race- and gender-based policies are not narrowly tailored.

Consistent with its RFP, the Study assumed discrimination and did not even attempt to evaluate whether:

- Discrimination connected with any specific contract/subcontractor award had occurred;
- The actions of any agency, state employee or contractor were discriminatory; or
- Lenders, sureties or insurers engaged in discrimination.

The 2016 Study failed to consider relevant and available state documents, provide opportunity for meaningful public input, or properly and fully assess the characteristics of similarly qualified, willing and able firms.

Following its defective analysis, the 2016 Study concluded, contrary to evidence, history and reality within our industry, that M/WBEs comprise the majority (53.05% of available prime construction contractors, and 53.48% of available construction subcontractors) of those who are “willing and able” to perform public work in New York State. To be clear, adoption of the 2016 Study this would allow for M/WBE contract goals in excess of 50%. It is reasonable to expect that this would likely result in the blanket imposition of this goal on contracts across the State, since AGC NYS has demonstrated goals are already being arbitrarily set to the Governor’s goal of 30%, regardless of the location or specifics of the contract and in contradiction of existing state law - which sets the statewide construction goal at 22.75% - and regulation. Our FOIL efforts and subsequent Article 78 action have proven that agencies have been directed to set goals at 30%, unless they receive Executive Chamber approval to proceed with a lower goal. These efforts have also evidenced that agencies are either not conducting the required goal setting analysis to establish a contract specific goal, or, when they are doing so, it is discarded in favor of the mandated 30% goal. We believe this situation would only worsen with amendments to the law that would result in a goal even more disconnected from reality.

If, in fact, the Study’s conclusion that more than 50% of firms in construction are M/WBEs it raises a number of interesting questions. For example, if accurate, why have contractors had such difficulty achieving 30% goals statewide and why was it necessary for so many waivers to be issued if capacity is actually more than almost double the current goals unilaterally imposed by the Administration? If accurate, it would suggest that there has been a substantial increase in the presence of M/WBE firms in the industry over the last decade. Where is the evidence of this? Has the number of New York State certified M/WBE firms in construction shown a similar increase? No, it has not. What is the basis for this calculation? No one can say, because the underlying data upon which the 2016 Disparity Study relied to make these conclusions is unavailable.

New York’s statewide industry-specific MWBE goals, as derived from successive adopted studies, have always been incorporated via amendment to Executive Law Article 15-A. The Executive Budget proposal would delete all goals from the statute, excise all references to any specific disparity study from the law, and instead reference the “most recent study” obtained in the discretion of the Director of Empire State Development (ESD). The Director must only “transmit” such a study to the Legislature. If the Executive Budget proposal is adopted, the Legislature will have no ability to modify any such study prior to implementation and permit what amounts to ongoing amendment of statute via policy. Disturbingly, the substance of the program could radically change simply as the result of the delivery of a new study, with no public notice, no involvement on the part of the Legislature, no SAPA protections and no protection for both M/WBE and non-M/WBE firms.

A new workforce diversity program would be added to the Executive Law, mirroring the MWBE contract goals in its definitions. Workforce participation goals (WPG) will be established for state contracts based on the “most recent” diversity study and the last US census. The WPG will be based on total hours worked within each trade, profession, and occupation, with separate levels for each males and females within each minority group and for Caucasian women. Separate WPG would be established for each county and for such municipalities as the ESD Director deems necessary. ESD has stated that “available minority group members and women are “68.48% of the workforce,” and although goals will differ for different areas, at least in theory, it is this figure that will drive the WPG. If a contractor cannot meet the goals and cannot certify its good faith efforts to do so, then a waiver will be necessary. In order to attain a waiver, a contractor must prove with “numerical evidence” why the WPG cannot be met in the contract. Putting aside the fact that construction skills take many years to accrue, it is highly unlikely that any nondiscriminating contractor will be able to specifically identify the right ethnic and gender employee “mix” to meet the WPG. Moreover, public contractors are already mandated to comply with all Equal Employment Opportunity regulations. If the waiver is denied, then the contractor is deemed “noncompliant” and the Director can discretionarily determine how long the “noncompliance” determination will endure and may debar a contractor or subcontractor. This provision is

unworkable and would present insurmountable challenges for both signatory union contractors and open-shop firms alike. It would also upend existing collective bargaining agreements between contractors and the building trades.

The Executive Budget proposal drastically lowers the “Good Faith Efforts” evaluation standard for contractors. Executive Law §316-a formerly mandated that every state contract provides that any contractor who “willfully and intentionally fails to comply” with the M/WBE requirements shall be liable for liquidated damages and other remedies. The proposal changes this to provide that any contractor that “fails to make a good faith effort” to comply is now subject to such penalties. This change represents an improper shift from a legal standard to one that is discretionary. A “narrowly tailored” program cannot penalize recipients of contract dollars for not meeting M/WBE goals, if good faith efforts were used by a prime contractor to identify eligible M/WBEs.

Within the Executive Budget proposal, M/WBE false statements and omissions would be criminalized. The proposal criminalizes the knowing provision of materially false information or the “omission of material information” concerning the “use or identification” of an M/WBE for the purpose of being awarded or demonstrating compliance with M/WBE participation requirements: in any state contract – class A misdemeanor; in a state contract over \$50,000 – class E felony; and in a state contract over \$1,000,000 – class D felony. This significant and unwarranted expansion of the Penal Law conflicts with the provisions of the New York False Claims act.

The Executive Budget proposal also eliminates lowest lump sum bidding for certain public contracts of less than \$1,400,000. The proposal provides that an M/WBE bid on such a contract (as adjusted annually for inflation) “shall be deemed the lowest bid unless it exceeds the bid of any other bid by more than 10%.” Aside from its clear conflict with the State Finance Law mandating competitive bidding, this provision will increase state spending and perhaps local unit spending on this increment of contracts by at least 10%. It is also important to note that a prime-contractor change like this to a race- and gender-neutral system, which competitive bidding ensures, can only occur if the letting agency itself is actively discriminating. In essence, by implementing this measure, the State is admitting that its own agencies have actively been discriminating in the evaluation and award of prime contracts.

The Executive Budget proposal impermissibly expands M/WBE goals to local governments and school district procurements resulting in an unfunded mandate. The definition of “contracting agency” will be expanded to include any “state-funded entity” which is a party or a proposed party to a “state contract.” “State funded entity” is to be defined as “any unit of local government that is paid pursuant to an appropriation in any state fiscal year.” A “state contract” will include grants for acquisition or construction of real property and also any agreements providing for an expenditure of over \$50,000, where a “state funded entity” is committed to expend funds paid to it by the state “for any product or service.” Therefore, contracts by towns, villages, counties and school districts, for which there is any State funding, have been captured as “state contracts” to which all the M/WBE requirements of Article 15-A, to be administered by the State are applicable. There are a host of defects in this approach, including the fact that contracts let by these local units and school districts were not evaluated by the 2016 Study and therefore its application is defective. Local governments and school districts would effectively lose control of their procurements, with the State establishing M/WBE goals for their contracts and the State determining when and if a good faith effort has been made to meet those goals. It would also supersede the properly established local M/WBE programs in existence, most notably in the City of New York. The 10% bid preference for M/WBE bidders on contracts of less than \$1,400,000 would represent a significant cost increase for local governments and school districts, since many of their procurements would fall under this limit.

Finally, the Executive Budget proposal mandates that M/WBE utilization plans and waivers will no longer be publicly posted. Presently, state agencies must post utilization plans and waivers on their websites. The Executive Budget proposal removes this requirement and reduces transparency of important contractor and taxpayer resources and strips accountability away from both M/WBE and non-M/WBE contractors with an interest in the administration of the program. One must ask, what is the compelling public interest behind this change? It is certainly not discernible in the amendment, which strips powers from the Legislature renders information that is supposed to be publicly available “interagency documents”, and therefore partially obscured from view, and focuses an extreme amount of discretionary power in an appointed official.

AGC NYS does not take issue with the idea of the M/WBE program or of the goal of increasing capacity and opportunity both for contractors and minority and women in the workforce at all levels. AGC NYS fully supports such an effort if not for philosophical reasons, certainly for practical reasons as the construction industry faces significant shortages of workers from craft labor to management. It is time that government and the construction industry work together again as we once did. Unfortunately, the Executive Budget proposal removes the legislature and construction industry out of the process. It is time that we spend more time building and ensuring a strong foundation as opposed to only focusing on the roof. It is our view that the current foundation is very weak if it exists at all.

AGC NYS is strongly opposed to S.7508-A (Budget – Part Q) / A.9508-A (Budget – Part Q) which establishes significant M/WBE and workforce participation revisions to the Executive Law. Simple logic dictates that if the New York State M/WBE program was successful, then the disparity in state contracting should be decreasing. Unfortunately, the Executive Budget proposal states that the disparity in state contracting is increasing, therefore deeming the current New York State M/WBE program a failure.

AGC NYS urges the Legislature to reject this proposal and temporarily extend the existing law until a factual and methodically sound M/WBE disparity study is conducted.