



LEGISLATIVE MEMO
CONTACT: WALTER PACHOLCZAK
VICE PRESIDENT OF GOVERNMENT AFFAIRS
T (518) 456-1134
WPACHOLCZAK@AGCNYS.ORG
WWW.AGCNYS.ORG

MEMORANDUM OF OPPOSITION

BILL: S.6141 (Sanders) / A.7814 (Bichotte)

SUBJECT: Unconstitutional Reauthorization of the Minority and Women-Owned Enterprise Program

DATE: June 11, 2019

The Associated General Contractors of New York State (AGC NYS), the leading statewide trade association representing union and open-shop construction companies, strongly opposes S.6141 (Sanders) / A.7814 (Bichotte) because it threatens the very existence of New York State's M/WBE program by ignoring and exceeding clear constitutional limitations and standards imposed by the Supreme Court of the United States.

The bill would unconstitutionally reauthorize the minority and women-owned business enterprise program (M/WBE) by eliminating required narrow tailoring of goals and instead imposing generic and arbitrary blanket goals without regard for disparity, capacity or opportunity for utilization. It would expand the definition of "contracting agency" to include any "state funded entity," thus impermissibly extending state M/WBE goals to local governments and school districts. It would add an unworkable workforce diversity program, debar contractors deemed "non-compliant" and, disturbingly, replace references to any specific disparity study with the "most recent disparity study."

AGC NYS and its predecessor organizations have a long history of supporting and working to improve the M/WBE program. AGC NYS played a significant role in crafting the original Article 15-A and has also enjoyed a decades-long partnership with groups like the Association of Minority Enterprises of New York (AMENY), recently teaming up to form a Construction Management Training/Mentor-Protégé Program and the new AGC America program "Building a Foundation for Our Future" to grow diversity in the construction industry.

While well intentioned, S.6141/A.7814 has significant constitutional flaws and, if enacted, poses an existential threat to the M/WBE program in that it would be unlikely to withstand judicial review. AGC NYS provides the following comments constructively and is committed to continuing to stand in defense of the program and not against it.

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" to 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. New York's Statewide industry-specific M/WBE goals, as derived from successive adopted studies have always been incorporated via amendment in Executive Law Article 15-A with the force of law.

Based on the *Croson* decision, 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. This legislation replaces that constitutionally required narrow tailoring with arbitrary and blanket 30% goals that will likely be both unachievable in many instances, as the current extralegal implementation of 30% goals has demonstrated, while also jeopardizing the entire program. Indeed, ironically, in the *Croson* case, it was the City of Richmond's attempt to impose blanket 30% goals on all their contracts which lead the Supreme Court to strike down their statute and program.

The bill expands the definition of "contracting agency" 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 including a county, city, town, village, or school district that is paid pursuant to an appropriation in any state fiscal year." "State-funded entities" were not evaluated by the 2016 Disparity Study and therefore extension of goals to them would constitute an unconstitutional and unassessed expansion of the M/WBE program; would impose a significant unfunded mandate on local governments; and would further diminish the availability of certified M/WBE contractors. Furthermore, expansion of state M/WBE goals to local governments and school districts would represent both a substantial new unfunded mandate,

*A Chapter of the Associated General Contractors of America
10 Airline Drive, Suite 203 Albany, NY 12205*

putting additional burdens on property tax payers, and would encroach on the prerogative of school districts and local governments to effectively manage their own projects.

The bill adds an unworkable new workforce diversity program to the Executive Law, mirroring the M/WBE contract goals in its definitions. Workforce participation goals (“WPG”) are proposed 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 will be established for each county and for such municipalities as the ESD Director deems “necessary.” Putting aside the fact that construction skills take many years to accrue and that specialized safety and other training is required, it is highly unlikely that any contractor will be able to specifically identify the right ethnic and gender “mix” to meet the WPG for each particular contract. This proposal would also place union contractors at a distinct disadvantage, as they are precluded from hiring from outside their signatory trades if the trades are unable to provide the correct makeup of workers dictated by the WPG.

Moreover, public contractors are mandated to comply with all EEO regulations. 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 goal cannot be achieved met in the contract. Documentation of contractor and subcontractor good faith efforts to meet the goals by promoting inclusion must also be provided. If the waiver is denied, then the contractor is “noncompliant.” The ESD Director may discretionarily determine how long the “noncompliance” determination will endure and deem the contractor or subcontractor ineligible to participate on any state contract.

The construction industry faces a workforce shortage across New York. It is an industry that presents excellent career opportunities. Workforce participation goals are unnecessary; what is needed is a strong workforce development program, particularly one that will connect individuals and communities in need of opportunities with this industry that has them in abundance.

The bill removes references to any specific disparity study from the law, instead referencing the “most recent study” obtained in the discretion of the Director of Empire State Development. If adopted, the Legislature will be surrendering and forfeiting its own authority and prerogative to review and adopt future disparity studies to the Executive Branch. The Legislature will also have no ability to modify, or even assess any such study prior to implementation. M/WBE goals could increase or decrease at any time as a new study could be procured and implemented at any time and without notice. This bill would shift the Legislature’s focus from the defective 2016 Study and permit what amounts to ongoing amendment of statute via policy.

AGC NYS respectfully suggests the following approach to reauthorization of the M/WBE program and has been advancing these ideas, supported by a broad coalition of industry and business organizations since the last Legislative session:

- Provide a five-year extension of Article 15-A of the Executive Law;
- Create the MWBE Blue Ribbon Commission to examine, evaluate and make recommendations on the operation and implementation of the MWBE program;
- Establish a program for the development and maintenance by SUNY to train and support MWBEs throughout the State and to work toward greater diversity in the construction industry and provide an appropriation of \$25 million for the same;
- Modify Executive Law §312-a to provide for the recommissioning of a new disparity study; and
- Clarify that contract-specific goal setting analyses currently required by law and regulation must be available pre-bid and included in project specifications. The narrow tailoring of contract goals is essential to ensure that New York’s MWBE program meets constitutional standards. Transparency in terms of the currently required contract goal setting analysis will remove unnecessary barriers to M/WBE utilization, provide a clear roadmap for bidders to engage in their good faith efforts and provide clarity that goals are being narrowly tailored.

The AGC NYS approach represents an opportunity to continue New York’s M/WBE program in a manner that meets constitutional standards. It would also enact reforms and improvements that strengthen New York’s workforce as a whole and make the program more effective, particularly when it comes to targeted capacity building, workforce development and increasing diversity in the construction industry. This is an approach that AGC NYS believes would garner bipartisan support, as well as broad support from the contracting and business communities.

AGC NYS has a long history of supporting and working to sustain and improve the M/WBE program but remains strongly opposed to S.6141 (Sanders) / A.7814 (Bichotte) and urges the Senate and Assembly to reject this proposal.