

ACEC New York and its over 270 member firms represent the consulting engineering profession in New York State. Our membership reflects the composition of the State's consulting engineering community and the diversity therein. ACEC New York Member firms practice all professional engineering disciplines in all regions of the state. Since the inception of the program, ACEC New York has worked to support the State's MWBE program and has made recommendations on how to improve it.

Summary: ACEC New York supports the ideals advanced by the MWBE program but believes the program can only succeed when administered in a fair, transparent and rational manner, which requires accurate, objective and defensible data. The Association supports the issuance of a high-quality, independent disparity study that accounts for all relevant factors, including capacity. ACEC New York encourages the program to evolve in a way that reflects the commercial and regulatory differences between the construction and professional design industries, as well as the different challenges each group faces. We support a program that approaches goal-setting in a way that takes regional variation in demographics into account, accommodates appropriate waiver requests, and is enforced and administered uniformly across all agencies and public entities. Finally, we encourage the streamlining of the certification process for prospective firms while ensuring appropriate oversight.

Disparity Study. The MWBE program's intent is implemented by Executive Law section 313, which sets specific numerical goals for State agencies in procuring a host of goods and services, including engineering services. These goal numbers are at the heart of the State's MWBE program and are derived from a disparity study. The disparity study is intended to, among other things, "determine whether there is a disparity between the number of qualified minority- and women-owned businesses ready, willing and able to perform state contracts for commodities, services and construction, and the number of such contractors actually engaged to perform such contracts, and to determine what changes, if any, should be made to state policies affecting minority- and women-owned business enterprises."

A valid disparity study is a necessary part of any race- or gender-conscious law, affecting the very Constitutionality of such a program. The United States Supreme Court set out this jurisprudential framework in *City of Richmond v. J.A. Croson Co.* (488 U.S. 469) and made clear that state or local governments seeking to develop such a program must periodically conduct properly performed "disparity studies" to assess the existence of a disparity, determine if that disparity results from discrimination and, if so, identify proper, narrowly- tailored remedies to

reduce and eliminate it. “Narrowly-tailored” goals must be based on both the capacity and availability of MWBE firms relative to the services or goods being procured.

The goals established under such a program must be goals and cannot be quotas which fall outside the bounds of constitutionality.

The most recent disparity study, which was to be delivered to the Governor and Legislature on August 15, 2016 (and was made available in July 2017), reportedly identifies disparities in the state procurement system.

In anticipation of this updated disparity study, ACEC New York undertook a close examination of its membership, as well as the consulting engineering industry in the State. Because engineering is a licensed profession, it is regulated by the New York State Department of Education’s Office of the Professions.

No engineer or other design professional can practice in New York without a license, and with few exceptions, no engineering firm can practice without a Certificate of Authorization granted by the State Department of Education. Accordingly, the data on engineers and other licensed professionals is accurate and completely available in New York as compared to non-regulated industries.

Given that accurate and complete data is so readily available, we are surprised at the difference in numbers between that which was provided via the State education website and the Mason Tillman study numbers. Further, within that data, the breakdown of minority-owned firms also has little resemblance to what is reflected in our membership and the State Education Department’s data.

Our analysis of our membership shows that up to 20-25% of our member firms are women or minority owned. The sizes of these firms vary, but in most cases, they are small-to-midsize firms. The capacity to perform work is related to the size of their firm as measured by employee counts. Given the intersection of the number of MWBE firms and their firm size, these firms represent between 8 and 10% of the available capacity of design work statewide. The more comprehensive state license data shows a slightly lower number, with 15-20% of all licensed engineering firms being women or minority owned, and the relative capacity would be lower than the 8-10% that exists within our membership. The data is constantly changing slightly as firms open and close, and merger and acquisition activity reorders the ownership of existing firms.

ACEC New York provided this information, as well as links to supporting data, to Mason Tillman Associates at the start of this process. In addition to providing this information, ACEC New York (both its Albany and New York City offices) participated in anecdotal data collection sessions.

The 2016 study suggests a much higher MWBE firm capacity than is supported by ACEC New York analysis and State Education Department records.

These differences are all the more confounding in light of the fact that throughout the process, ACEC New York attempted to initiate dialogue with Mason Tillman and Empire State Development regarding the consulting engineering industry and the data being used to develop the study. Despite this repeated outreach, we did not receive any substantive replies to these requests, and to date, the source of the data about establishing the conclusions of the study remains unknown.

The lack of transparency regarding the data underpinning the study, as well as the difference between the conclusions of ACEC New York's report, invites questions about the structure, design and methodology of the Mason Tillman study. Further, the combining of construction-related services of non-licensed firms with licensed firms completely ignores the legal and intentional barrier that exists in the professional design world. Ignoring these unique qualifications provides a report that is factually wrong.

Ownership Structure: The design of the MWBE program privileges certain business forms over others. To take advantage of the program's benefits, a firm must be at least 51% owned by a minority or woman. This requirement benefits firms with ownership structures that recognize individual shareholders, such as professional corporations, LLPs and DPCs. There are a number of entities that provide engineering services in corporate forms, such as grandfathered general business corporations, that would be nearly impossible to certify, regardless of the diversity within their employment, management and ownership ranks. The structure of the program rewards a firm with a single MWBE owner and a non-diverse workforce at the expense of firms with employee demographics more aligned with the programs goals, but the incorrect corporate structure.

Further, it limits existing MWBE firms from expanding or evolving because ownership can only be sold to certain employees or partners who meet these limitations. For example, a firm that is 67% owned by a woman or women engineers could sell as much of their interests to up and coming women engineers in the firm. But they can't sell 28% of the shares to minority men because they would lose their ownership status. In the long run, this can devalue an mwbe firm looking to evolve through sale or other transition to new ownership.

Engineering licensure. As described above, the practice of engineering, both by individual engineers and corporate entities, is closely-regulated and restricted. An engineering firm, regardless of corporate form, must be owned by licensed professional engineers or other licensed design professionals. An individual can only become a licensed professional engineer (P.E.) following the successful completion of a rigorous set of educational and experiential requirements and passing a professional examination. This high bar to practice is intentional

and serves to protect the public. Incompetently or amateurishly designed bridges, water systems and buildings pose grave danger to the public and the environment. Regardless of the immediate demand for engineers, there is a finite and inherently slowly-changing pool of qualified engineers and engineering firms available to perform work. The stated and constitutionally-permissible goals of the program are to reduce past and ongoing discrimination against target groups, as measured by the disparities between expected and observed participation. In practice, the ever-increasing aspirational goals flowing from the program encourages the creation of new businesses in the target sectors, which is a challenging strategy for the reasons explained above.

Market Imbalances: When responding to normal market signals, professional services firms grow at a rate aligned with their ability to meet commercial demand in the short and long term. A program with goal numbers that reflect the true composition of the engineering industry gives opportunity to the subject firms and encourages them to grow at a sustainable rate, and positions them for long-term participation in a competitive industry. Unrealistic program goals encourage rapid and unsustainable growth. Firms responding to the artificial market signals sent by unrealistic goals often incur debt to take on staff for work that cannot be sustained in the long run. This impairment of cash flow is frequently the first step in a professional services firm's decline. In markets where unrealistic goals create a shortage of certified firms to handle work, economics dictate that such firms charge much more than typical rates. This not only inflates project costs but squeezes out participation by other certified firms – for example, on a \$100,000 job with a 30% goal, a firm that charges \$30,000 to complete work typically costing \$20,000 diminishes other certified firm opportunities.

Higher goals can also lead to work assignments that are less professional and can limit the experience of the MWBE subcontracting engineering firm. If a large firm is responsible for a higher goal and has the responsibility for the delivery of the work, they may look to find more routine work that is less skillful but easier to manage. The subcontracting firm isn't gaining the experience they need to build their work resume and can be stuck in a subcontractor role.

Delay in Certification: The current process for granting certification to MWBE firms is slow, uncertain and complicated to a degree that many prospective firms forego the process. By discouraging minority- and women-owned firms from becoming certified MWBE program participants, non-MWBE prime contractors are forced to draw from an artificially restricted pool of subcontractors increasing the difficulty of making goal numbers.

Best practices: If this program is to be successful, the underlying data must be accurate, and the program's regulations need to address the unique needs of both the MWBE community and the typically larger non-MWBE firms that often employ smaller firms as subcontractors. One of the best practices identified in ACEC New York's MWBE white paper (attached) is having an

overall program goal that is flexible, with specific project goals that are market-driven. It is possible that the projects identified in a given year may have higher (or lower) individual goals because of the nature or location of the work. Trying to force projects into certain goals to achieve the year-end target could have severe negative consequences.

Flexibility is also needed as projects change. If changes are made after a project is designated and teams selected, the new work may be in a specialty area that didn't include MWBE firms. The only way to force a set goal is to change the entire project allocations, hire an MWBE firm for an area where they don't have expertise or qualifications, or add new work for MWBE firms. In all cases, costs rise and the project budget is strained.

Using compliance as an evaluative, not punitive, tool is also a far better way to improve the program and have candid feedback from all parties involved. Bringing lawyers and additional appeals into the process will delay work, increase costs and encourage the use of MWBE firms for narrowly tailored work solely to meet goals while providing limited opportunities for growth.

Program compliance should be consistent across all agencies. Having different requirements, waiver procedures or processes, and reporting procedures makes all firms susceptible to unintended oversights. A single process will also be more efficient for public owners

One additional item that needs to be recognized is cost. Adding subcontractors to projects, regardless of whether they are mwbe owned or not, will add costs. This is not an MWBE issue but a rather contractual burden issue though it is related to these goals. If work can be performed by the prime contractor or by fewer subcontractors, the oversight and management is more efficient and cost-effective. The more subcontractors required, the higher the cost to monitor and ensure compliance. Given the limited resources that the State has, and the massive infrastructure needs we have all recognized, this factor should be considered.

As noted previously, ACEC New York has worked to support this program and provide other encouragement to bring more women and minorities into the engineering profession through scholarships, networking and other means. We believe that by encouraging more women and minorities to enter our field, the number of firms will grow organically. We have included a copy of our report for review and we look forward to working with all stakeholders to realize a fair and transparent program.