

M/WBE PROFESSIONAL ENGINEERING AVAILABILITY IN NEW YORK

January 2016

EXECUTIVE SUMMARY

The American Council of Engineering Companies of New York (ACEC New York), a business association of professional engineering and related firms, has historically promoted programs to support and encourage women and minorities to enter and succeed in the field of consulting engineering.

ACEC New York supports the implementation of a state minority- and women-owned business enterprise (MWBE) program that recognizes the importance of maximizing the participation of minorities and women in our field. In fact, in 1996, ACEC New York helped NYS DOT adopt the first MWBE goal – 18%. The success of such a program rests on the development of optimal participation goals: they must be consistent, meaningful, achievable, and in compliance with all state and federal laws. We recognize that if such goals are set too low, the business climate could discourage the growth of MWBE firms. Conversely, if the goals are set too high, the result could be significant market disruptions and negative impacts to non-MWBE and MWBE firms alike.

In order to better understand these issues and help create a viable approach moving forward, the ACEC New York ad-hoc MWBE committee has undertaken research to verify the current availability and capacity of New York State-licensed MWBE firms, as a percentage of the entire industry. Based on data from the New York State Department of Education and ACEC New York membership, it is estimated that 15-20% of consulting engineering and related firms in New York are owned by minorities or women and that these firms represent 7-10% of the employee capacity in this field. New York is unique in that there are four licensed design professions: engineering, architecture, landscape architecture and land surveying. This will increase to five with the addition of geology next year. With few very exceptions, licensed engineering and related design services firms must have a Certificate of Authorization (CoA) to practice in New York. These CoAs are issued by the New York State Department of Education.

Other than a limited number of grandfathered corporations (businesses established prior to 1935), design firms licensed in New York must be structured to have ownership by licensed professionals at a minimum level of 75%. Ownership is restricted to only those licensees within the appropriate design profession(s). This barrier to ownership was created intentionally by the State of New York to protect public safety, health and welfare. Given the state's unique licensing and ownership requirements for design professionals, unique goals should be established for certified professional design firms. In the following analysis, ACEC New York identifies a series of best practices that, if implemented, will stimulate growth and strengthen the skillsets and credentials of MWBE firms, allow all firms in our industry to operate more effectively, and promote more efficient program operations for public agencies charged with administering these programs.

“As a Principal Associate with a large upstate engineering and architectural firm, I recognize the importance of promoting workplace equality. In addition to supporting MWBE programs, ACEC New York provides training and other programs that enable women and minority engineers to become leaders in their firms.”

— Jennifer Michniewicz, PE, CPL &
ACEC New York Executive Committee

LEGAL BACKGROUND

The US Supreme Court, in *City of Richmond v. J. A. Croson Co.* 488 U.S. 469 (1989) stated that a legislative or municipal enactment that discriminates based on race, such as race-conscious preferences, will be subject to strict scrutiny unless the municipality or legislature has strong evidence of persistent discrimination. Mere conclusory statements or assumptions about possible discrimination do not meet this standard. Accordingly, to pass constitutional muster, a government entity wishing to create a program that sets goals and standards for minority participation must gather an accurate picture of how much work is available, and the shortfall, if any, in participation by groups that are subject to discrimination.

Article 15-A of the New York State Executive Law sets out requirements for the evaluation, in the form of a disparity study, of the state's progress in achieving specific MWBE

business participation goals. Article 312-a of the Executive Law states: "The director of the division of minority- and women-owned business development in the department of economic development is authorized and directed to recommission a statewide disparity study regarding the participation of minority- and women-owned business enterprises in state contracts since the amendment of this article to be delivered to the governor and legislature no later than August fifteenth, two thousand sixteen." Section 312-a further describes the intent of such a study, specifically to "...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."

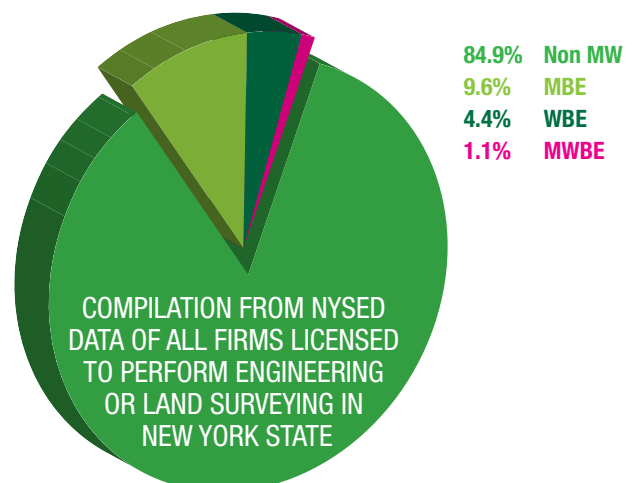
DATA ANALYSIS AND REVIEW

The New York State Department of Education provided ACEC New York with a database of professional design firms. Professional engineering firms and multi-disciplinary firms are much larger than stand-alone firms that only provide one of the three other design services: architecture, landscape architecture or land surveying. The engineering, land surveying and multi-disciplinary firms were then combined into a single database. All of the certified MWBE firms identified in the Empire State Development Corporation's (ESDC) NYS Directory of Certified Firms and in the current rosters of NYS Department of Transportation (NYSDOT) and The Port Authority of NY & NJ (PANY&NJ) were included in this database. While ESDC is tasked with certifying and maintaining a list of approved MWBE firms, to maximize the identification of MWBE firms in our research, all three sources were used, since the other two agencies had additional approved MWBE firms on their lists.

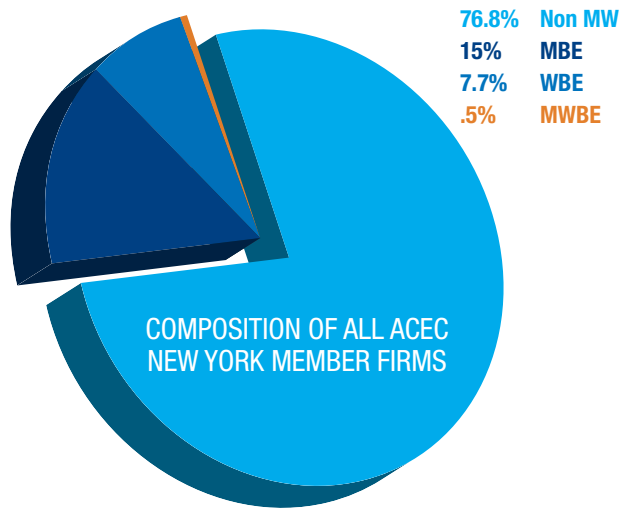
The data indicates that agencies may aggregate some minority- and women-owned firms into a single category: minority women-owned ("MW"), most likely because specific ownership is unclear. While that percentage is small and may raise the percentage of minority or women-owned slightly at the expense of the other, the overall percentage of minority- and women-owned firms remains the same. There are also two firms in the database for which certification is either pending or undetermined by an approving agency. These were added to the MW category as well, even though they may not end up qualifying as either a minority or women-owned firm. The overall number of firms with CoAs from the NY State Department Education was 2567. 247 of those firms were MBEs (9.6%), 113 were WBEs (4.4%) and 28 were MWBEs or undetermined MWs (1.1%), for a total of 388 firms (15.1%).

ACEC New York also examined the demographics of its own membership. While this sample encompasses a smaller number of firms, membership is open to all eligible firms that are licensed to perform engineering or land surveying services. As the only barrier to membership is paying dues, and new firms receive a discount, the composition of ACEC New York should be analogous to the entire population of eligible firms in New York State.

When comparing all available data, it is likely that ACEC New York attracts more MWBE firms, as a percentage, than is represented in the general population of firms. This is most likely due to ACEC New York's networking opportunities, as well as promotion of its membership and access to public clients; these benefits provide enhanced business opportunities and visibility for MWBE member firms. The overall percentage of MWBE firms in the State Ed database reflects all firms, including those MWBE firms which only work in the private sector and have no need to go through the New York State certification process.

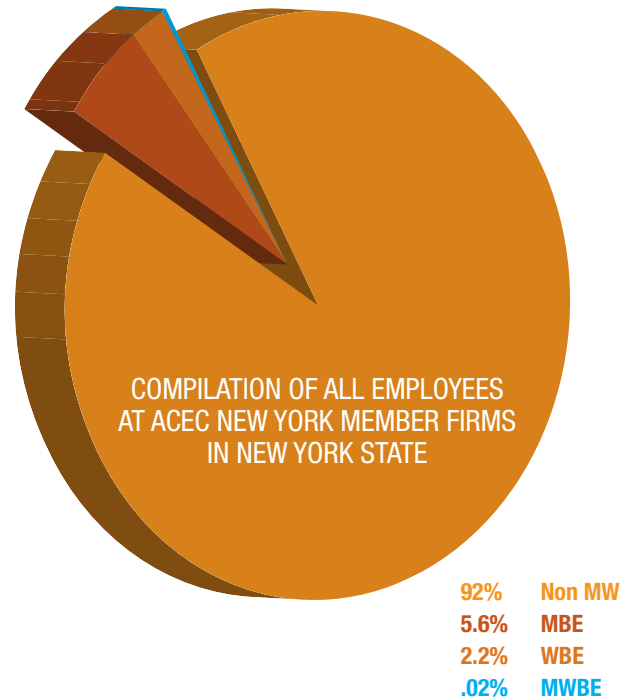


At the time of the study, 23.2% of ACEC New York's 220 engineering member firms were MWBEs: 33 MBEs, 17 WBEs, and 1 MWBE, for a total of 51.



Capacity can be an important component in establishing MWBE goals as noted in Croson. If the participation goals are set too low and the percent of work being performed by MWBE firms is consistency lower than their respective market share, the program will not meet its intent. If the goals are set too high, there is insufficient capacity in the MWBE community to meet them. The result is that ultimately, prime consultants will be unable to meet the stated goals and will be subject to penalties. The capacity issue is further complicated by the shortage of MWBE firms in certain key disciplines, such as geotechnical engineering, making compliance with goals even more difficult. Further challenges may result when there is a change order to an existing contract and the new scope of work is not covered by MBE subcontractors already engaged on the project. Because the professional design industry is so labor intensive, using firm employee counts is an accurate way of determining current capacity. If a firm has too many employees for its booked workload, it will lose money; if it has too few employees to meet workload demands, it will lose business to competitors.

Within ACEC New York's 220 engineering member firms, total employment in New York is 18,909. The employment breakdown is 1,060 (5.6%) for MBEs, 383 (2.0%) for WBEs and 32 (0.2%) for MWBEs; 1,475 individuals (7.8%) are employed by the state's MWBEs. The average firm in our database employs 86 people. The average for MWBEs firms is 29 employees (32 for MBEs, 23 for WBEs and 32 for MWBEs). The average for non-MWBE firms is 103 employees.



Note on data reported by state agencies: As noted previously, some firms just have an 'MW' designation. In cases where firms were not determined to be a minority or women-owned firm, they were listed as an MW. This percentage is quite small and still qualifies as an MWBE firm under the state process. The capacity numbers within ACEC New York membership had no unknowns as all firms report ownership status and employee counts directly to the association.

Having achievable goals is critical to the success of the program. If goals are set too low, MWBE firms will not meet their potential. Goals set too high become unattainable and can encourage fraud or other program abuses.

BEST PRACTICES

ACEC New York recommends that going forward, unique, achievable MWBE goals be set for the professional design industry. The successful implementation of a program intended to align business opportunities with disadvantaged but otherwise qualified providers rests on the goals reflecting the reality and practicality of the industry. A basic set of rules that support all firms and allow for easy administration and compliance reporting is a fundamental need for the private sector and government to succeed. The ACEC New York ad-hoc MWBE committee strongly recommends the implementation of the following practices to best achieve success in a way that is economically sustainable for both MWBE and non-MWBE firms, whether as a prime design contractor or as a design subcontractor.

OVERALL GOALS: Having agency-wide goals, rather than specific project goals, are far more efficient and better for all firms.

- Public owners will be able to better address project challenges due to lack of certain services within the MWBE community, as well as geographic or workload/availability issues.
- If change orders are added and the subcontractor for that particular work is not an MWBE, adding a small percent to that extra work is inefficient and will cost the public owner more to administer.
- Small projects may force MWBE firms into narrow work areas that are not 'commercially useful' and do not provide opportunities to gain meaningful experience.
- Overarching goals give public owners the flexibility to provide targeted projects aimed at giving MWBE firms experience as prime consultant to help them grow.
- Agency-wide goals allow for projects that change in scope to avoid unnecessary additional costs or oversight.
- MWBE firms selected as prime consultants will be able to operate with greater flexibility.

COMPLIANCE/ENFORCEMENT: Use compliance as an evaluative, not punitive, tool. Bringing lawyers and additional appeals into the process will delay work, as well as encourage the use of MWBE firms for narrowly tailored work solely to meet goals.

- Augment the existing project review process to include status reports and projections of overall project compliance with MWBE goals and give the prime contractor the ability to meet with agency staff when necessary.

- Deny future work to firms that are consistently non-compliant in the absence of a waiver or other agency approval.
- Eliminate the requirement for MWBE firms to have an individual licensee who is a minority or woman for all appropriate professions.

CONSISTENCY/EFFICIENCY: Make program compliance 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.

- Compliance with a complicated and sensitive program like this can be costly, and the penalties for noncompliance can be damaging, both financially and with regard to reputation. The various New York State agencies should make their monitoring processes transparent so as to allow the design community to more efficiently maintain and produce the requisite records.
- Include, when applicable and appropriate, administrative overhead for managing multiple subconsultants. Increased subconsultant coordination requires more work on the part of the prime consultant to have these services mesh properly. Prime consultants are also responsible for the subconsultants, including correcting deficient work and verifying that the timing and delivery of all services meets all project deadlines.
- Agencies should work to reduce paperwork related to this process, rather than increase administrative overhead.

CONCLUSION

Having meaningful, appropriate and achievable goals are the cornerstone of a successful MWBE program. Because of licensure limitations within New York, having unique goals for licensed design professionals is crucial for success. Based on the data provided by NYSED and comparing this to the member database at ACEC New York, the available percentage of MWBE firms is about 15-20% and the available capacity within those firms is about 7- 10% of industry-wide totals in the state.

In order to encourage all businesses to succeed in MWBE programs, the entity administering the program can take a number of steps to provide systematic support. The single biggest impact will come from looking at the overall program. This will help all firms, MWBE and non-MWBE, as well as the agencies themselves, streamline the process and more easily achieve and identify success. ***A series of best practices will allow the program to operate more efficiently and promote the goals that were intended: benefitting all firms and the administering public entities.***

ACEC New York
American Council of
Engineering Companies of New York

6 Airline Drive
Albany, NY 12205-1022
Tel 518.452.8611

8 West 38th Street, Suite 1101
New York, NY 10018
Tel 212.682.6336