Testimony for the Record
Committee on Contracts - October 10, 2018
Oversight Hearing – Update on the Administration’s Efforts to Expand Contracting with Minority and Women-Owned Businesses

The American Council of Engineering Companies of New York (ACEC New York) is an association representing 270 consulting engineering and affiliate firms throughout New York State, collectively employing over 30,000 people statewide, with a concentrated presence of firms located in New York City.

We thank Chair Brannan and the Committee on Contracts for this opportunity to share the following testimony regarding the Administration’s efforts to expand contracting with Minority and Women-Owned Businesses (M/WBE).

We believe a strong, diverse, broad talent pool ensures projects are performed by the most qualified professionals available. Our association and member firms have historically supported initiatives seeking to increase the number of women and minorities entering the engineering profession; to maximize the participation of M/WBEs firms in the engineering industry; to increase the capacity of M/WBE firms; and to remove barriers to participation on City contracts.

We applaud the City Council’s and Mayor Administration’s recent initiatives to reduce barriers to participation on City contracts by streamlining City procurement processes. Recent efforts include Local Law 192 of 2017, requiring City agencies to implement electronic invoicing, and the launch of the PASSPort procurement webportal. Most M/WBE firms in the engineering industry are small-to-midsized. When procurement processes make it financially or administratively difficult to participate on City contracts, these burdens have a disproportionate impact on small-to-midsized firms. For example, when the City delays payment for engineering services rendered, small- and midsized firms have less access to capital to sustain their businesses as they wait for payment, causing them financial distress. For this reason, procurement reform is critically important to the health of small-to-midsized firms, including M/WBE engineering firms in the metropolitan area.

We additionally support the ideals and intent of the City’s M/WBE program. The success of the program rests on having rightsized M/WBE participation goals. Goals must be thoughtful and meaningful. If the goals are too low, they will not support the utilization and growth of M/WBE firms. If goals are too high, they may have negative impacts by setting the procuring agency and majority consultant up for failure when unreachable goals are not reached. Considering this, we supported the City’s commissioning of MGT Consulting Group to provide an independent and fact-based study.

Unfortunately, the 2018 “City of New York Disparity Study” released in May does not appear to provide an accurate assessment of the demographics of the engineering industry. Therefore, the study does not provide a sound and defensible basis on which the City can establish updated M/WBE goals for the industry.
The 2018 Disparity Study is methodologically flawed in the way it assessed the availability of M/WBE firms in the engineering industry. We will not detail all the study’s issues in this testimony but have attached two letters hereto, which we have sent to the Mayor’s Office of M/WBEs and Department of Small Business Services (SBS), providing deeper analysis of the study.

The Disparity Study found that M/WBEs represent 51.84% of available firms within the Architecture & Engineering category. While we cannot speak for architects, we can tell you that this finding simply does not comport with reality in the engineering industry. ACEC New York recently undertook a close examination of its own membership, as well as the consulting engineering industry in the State. Because engineering is a licensed profession, regulated by the New York State Department of Education’s Office of the Professions, no engineer 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. Thus, data on engineers is accurate and completely available in New York as compared to other, non-regulated industries. Apparently MGT did not use this readily available and 100% accurate data.

An analysis of our membership data shows 20-25% of firms are M/WBEs. When you take employee count into consideration, M/WBEs represent 8-10% of available capacity of engineering work statewide. The more comprehensive state license data shows a lower number, with 15-20% of all licensed engineering firms being M/WBEs. Given that this accurate and complete data is readily available for the engineering industry, we are at a loss to understand the difference in numbers between that which was provided via the State education website and the Disparity Study’s numbers.

On September 5, our association leaders met with the Mayor’s Office of M/WBEs and SBS to explain these and some related issues with the Disparity Study’s findings. The Mayor’s Office and SBS have engaged us in an open and constructive manner. We look forward to the administration’s response to these issues. We also offered to coordinate meetings between the Administration and M/WBE member firms to discuss how the City can help build capacity of M/WBE engineering firms.

We know the Council will want to make sure that any legislative action it takes is based on sound methodology and analysis.

We look forward to continuing to work with the City toward a well-designed and successful M/WBE program.

Attachments:
   1) 6/28/18 letter to Mayor’s Office and SBS re: Disparity Study
   2) 9/12/18 letter to Mayor’s Office and SBS re: Data Request

For further information please contact:
Hannah O’Grady  
Vice President, ACEC New York  
8 West 38 Street, Ste 1101, New York, NY 10018  
P: 212-682-6336  
hannah@acecny.org

Bill Murray  
NYC Director of Government Relations, ACEC New York  
bill@acecny.org
June 26, 2018

Hon. Gregg Bishop  
Commissioner, NYC Department of Small Business Services  
110 William Street, 7th Floor  
New York, NY 10038

Mr. Jonnel Doris  
Senior Advisor and Director, Mayor’s Office of Minority and Women Owned Businesses  
City Hall  
New York, NY 10007

Re: 2018 City of New York Disparity Study

Dear Commissioner Bishop and Mr. Doris:

The American Council of Engineering Companies of New York (ACEC New York) is an association representing over 280 consulting engineering and affiliate firms throughout New York State, collectively employing close to 25,000 people statewide, with a concentrated presence of firms located in New York City.

Our association opposes unfair and discriminatory barriers to licensed professional engineers’ participation in the engineering industry and their utilization on public works projects. We believe that a strong, diverse and broad talent pool ensures projects are performed by the most qualified professionals available, strengthening our industry. For this reason, our association and member firms have historically supported numerous initiatives seeking to ensure fair and equitable MWBE representation in the engineering industry.

We support the ideals and intent of the City’s M/WBE program and its administration in a fair and rational manner. Accordingly, we welcomed an independent and fact-based disparity study to serve as the legal basis for the City’s M/WBE program. Unfortunately, we believe that the recently released Study does not accurately reflect the demographics of our industry, and therefore does not provide a sound and defensible basis upon which the City can act.

MGT Consulting Group’s “City of New York Disparity Study” issued in May 2018 is methodologically flawed and draws inaccurate conclusions. The method of data collection used in the Study is neither transparent nor accurate as it relates to measuring the “availability” of M/WBE certified firms within the Engineering sector. This undermines the validity of the Study and could potentially jeopardize the M/WBE program if its goals were to be adopted according to the Study’s numbers.

As stated on page 4-1 of the Study, to determine the availability of M/WBEs, “MGT will concentrate on the willingness of the vendors and not adjust availability due to capacity.”
As we have communicated to the City in the past through in-person meetings, letters and testimony, it is imperative for the disparity study to evaluate firms’ capacity in terms of their size and areas of engineering expertise. Capacity roughly relates to the type as well as volume of work a firm can produce. Comparing the sheer number of MWBE versus non-MWBE firms does not accurately measure the volume of business conducted by the firms in either category. Past court cases have criticized and rejected studies that overlook this critical aspect. As the Study did not account for capacity as described above, its data is badly flawed in the exact way we have cautioned the City about, and its findings with respect to the availability of M/WBE firms cannot be considered accurate or credible.

Furthermore, the Study states on page 4-1 that “Able, or capability to perform work, is more loosely defined [...] Therefore, the measure of “ability” used to cull the universe of available vendors is that they have a presence within the defined market area.” By this definition, an engineering firm’s “capability” to perform engineering tasks of all scales and sizes is determined simply by virtue of whether such firm has a presence near the City and ignores even whether the firm is legally authorized to practice in the State.

It is a fundamental flaw of the Study to have placed Architectural and Engineering services in one category. Simply put, they do different work and must hold different licenses. An architect cannot practice engineering nor may an engineer practice architecture without violating the state Education Law. Combining these two related, but different, professions distorts the analysis of how many eligible firms are competing for the same work. By way of analogy, one would not calculate health provider capacity by combining medical doctors and dentists.

The process of becoming a professional engineer includes technical education, real-world experience and examinations. This is for good reason. The work of professional engineers affects the life and safety of the public. Due to the variety in types, sizes and scale of engineering tasks, not all licensed engineers are capable of performing all engineering work. For example, an engineer capable of designing an air conditioning system in a firehouse may not have the expertise or capacity necessary to design a large bridge, and vice versa. An engineer’s capacity is an essential factor in determining their availability to complete a particular engineering task and to participate on particular City contracts.

The New York City Department of Small Business Services (SBS) “NYC Online Directory of Certified Businesses” is illustrative of MGT’s flawed way of analyzing engineering firms. The SBS Directory lists M/WBEs firms and includes National Institute of Governmental Purchasing (NIGP) Codes to show their areas of expertise. In one specific example, the Directory lists a WBE firm with expertise in: Air Conditioning, Heating and Ventilating Engineering; Drainage Engineering; Electrical Engineering; Fire Protection Engineering; Gas Systems Engineering; Mechanical Engineering; Sanitary Engineering; Value Engineering and Value Analysis, Professional; Utilities/Engineering and gives some idea of their recent project size. This firm does not have expertise in other engineering disciplines, including Civil Engineering; Concrete Engineering; Geological Engineering; Highways and Streets Engineering; Rapid Transit Engineering; Structural Engineering; Traffic and Transportation Engineering; Tunnels Engineering and Subways Engineering. The SBS Directory is maintained this way in recognition that not all firms are qualified to do all work. By contrast, under the MGT’s Study’s methodology, this firm would be counted as “available” to design a highway interchange notwithstanding the fact that it does not have expertise in this engineering discipline.

We should note that we had shared this concern with each of your organizations on numerous occasions during the Study process in an attempt to prevent exactly this situation.
MGT’s study estimates that M/WBEs represent 51.84% of available vendors within the Architecture & Engineering category. While we cannot opine on the number of certified architects, we do note that many architectural professionals are solo practitioners or in small firms, while engineering firms which do public works tend to be on the larger side. In any event, the stated percentage is not an accurate representation of the engineering profession.

In anticipation of this updated disparity study, ACEC New York undertook a close examination of its own 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. Apparently MGT did not use this readily available and 100% accurate data, which also shows a lack of appropriate attention to available data.

An analysis of our own 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-midsized. 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 M/WBE 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, as a result, the relative capacity would be lower than the 8-10% capacity level that we have documented within our association’s membership. 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 MGT Study numbers. We note the data is constantly changing slightly as firms open and close, and merger and acquisition activity reorders the ownership of existing firms, but this does not account for the over-counting. If the high percentage is attributable to the inclusion of certified architectural firms, it all the more demonstrates the flaw in lumping the two professions together.

We respectfully request, therefore, that the data be revisited and that a more accurate and specific analysis of engineering “availability” and capacity be conducted prior to the use of this study to establish goals for any construction related design services. On a specific personal note from the study, MGT identified Native American design professionals being under-represented. We would like to have their information to share with our members as we have not been able to locate a single Native American owned engineering firm in New York.

We would like to commend some of the ideas in MGT’s study — such as recommendations related to M/WBE capacity building and removing barriers to participation — which we hear frequently from member firms, both M/WBEs and non-M/WBEs alike.

In closing, we would like to point out that goals that are not practical or achievable harm all firms. If goals are too low, certified firms will be underutilized. If goals are too high, certified firms can be pigeonholed into narrow areas that won’t allow them to gain the expertise to grow. It can also limit their use to less commercially useful functions solely to get a percentage of work. Forcing small firms to grow too quickly can also lead to quality control problems, further harming their reputation and long-term viability.
We would welcome the opportunity to discuss this matter with you. Thank you for your consideration.

Sincerely,

Jay Simson  
President

Hannah O'Grady  
Vice President

cc:  
Laura Anglin, NYC Deputy Mayor for Operations  
Dan Symon, Acting Director, NYC Mayor's Office of Contract Services  
Council Member Justin Brannan, chair, Committee on Contracts, NYC Council
September 12, 2018

Hon. Gregg Bishop  
Commissioner, NYC Department of Small Business Services  
110 William Street, 7th Floor  
New York, NY 10038

Mr. Jonnel Doris  
Senior Advisor and Director, Mayor’s Office of Minority and Women Owned Businesses  
City Hall  
New York, NY 10007

Re: NYC 2018 Disparity Study

Dear Commissioner Bishop and Mr. Doris:

Thank you for meeting with us on September 5th. We appreciated the opportunity to share thoughts about the City’s M/WBE program and to discuss the questions and concerns we had raised in our letter to you on June 26th. We also appreciated your candor and willingness to share information and maintain a transparent process.

It was helpful to understand that, in the Architecture & Engineering category, Asian-American firms will be included for the purpose of crediting their utilization towards A&E M/WBE goals because the study recommendation referenced professional services more broadly. We respectfully request that this clarification be documented to us so we can share with our membership. We appreciate that the study’s recommendations will not be implemented until Local Law 1 is amended.

As reflected in our letter and our comments at the meeting, we continue to be concerned that the study did not distinguish between architecture and engineering, which are related but nonetheless different services provided under different licenses, and that the universe of qualified M/WBE available firms did not reflect which firms can perform which services, or the need for experience for particular types of work. It is with this in mind, that we requested the additional information outlined below:

- Can you share the breakdown of M/WBE engineering firms and, separately, M/WBE architectural firms found to be available in the study?

- Can you confirm that available M/WBE engineering firms considered in the report have a Certificate of Authorization and license issued by the State Education Department? Please know on page 4-1, the study’s definition of “ability” and “availability” do not recognize these requirements, which must be met by all engineering firms in order to perform engineering services in New York State, and as we mentioned, sometimes unlicensed firms have names suggesting a status that may not necessarily be the case.
- Table 4-2 lists the availability of firms within the Architecture & Engineering category for each business ownership classification. Can MGT provide us with the list of all of the firms that were used as the basis for the percentages listed in Table 4-2, including their designation as an M or W (or both) and the specific minority category where applicable?

- Table 3-3 in the study states that, in the Architecture & Engineering category, utilization of M/WBE firms is 4.03%. Can MGT provide the data behind this finding? Does the non-M/WBE contract listed amount mean that none of those dollars were subcontracted to M/WBE firms? Or are these prime contract amounts only (without subcontractor amounts)?

- Finally, can you advise whether the $13.6 billion for A&E services referenced in the report was analyzed to determine which M/WBE firms might be qualified for the various subcategories of work which are captured in the SBS database of certified firms? We understand that the general methodology was based on self-reporting of availability by the firms, but hope that the amendments to Local Law 1 will reflect the classifications used by SBS in providing direction to agencies on the establishment of goals.

We also wanted to reiterate our offer to schedule meetings with both certified and majority member firms to offer some insight into how goals are currently met and obstacles to broader participation.

Thank you, again, for meeting with us and for considering this request for additional information.

Sincerely,

Jay Simson, CBE
President & CEO

Hannah O'Grady
Vice President

cc:
Laura Anglin, NYC Deputy Mayor for Operations
Dan Symon, Acting Director, NYC Mayor's Office of Contract Services
Council Member Justin Brannan, chair, Committee on Contracts, NYC Council