



OPPOSE A.8414 (Bichotte)/S.6575 (Sanders) MWBE Program Reauthorization

The American Council of Engineering Companies of New York (ACEC New York), an organization representing over 300 engineering and related firms totaling more than 20,000 employees in New York State, opposes bill number **A.8414 (Bichotte) and S.6575 (Sanders)**. We believe that if this legislation is enacted as written, it will place the program outside of established constitutional boundaries established by the United States Supreme Court and expose it to grave risk in the likely event of judicial review.

Article 15-A is set to expire in 2019, and it is critical that the program be renewed in order to avoid uncertainty and chaos among parties contracting with New York State. However, this legislation goes far beyond reauthorizing the program and changes critical elements of it, including the expansion of the program to entities working on behalf of the State, relying on a demonstrably inaccurate disparity study, and imposing an unworkable workforce diversity program.

ACEC New York prides itself on a diverse and forward-looking membership and has supported Executive Law Article 15-A since its inception. In the mid-1990s, we worked with NYSDOT to help them establish goals, and through this partnership, they were able to establish an 18% MWBE goal for engineering and related design services. This was accomplished through careful analysis of our membership data and other information about licensed non-members, as well as a robust dialogue between our MWBE and non-MWBE members. This analysis was objective, fair and data based.

Engineering and the allied design professions (architecture, landscape architecture, land surveying and geology) are all closely regulated. With few exceptions, only licensed individuals can own a professional design firm in New York, and in all cases, a licensee must be the President. To legally practice, engineering firms must have a certificate of authorization from the NYS Department of Education. This information, along with our internal analysis of the industry in 2015, showed conclusively that the percentage of MWBE firms in the engineering and professional design industry hovered around 20%; the capacity of these firms, which are smaller in size, is less. The disparity study published on June 30, 2017 suggests a much higher MWBE firm capacity than is supported by New York State Education Department records and ACEC New York analysis.

Given that this accurate and complete data is so readily available through a state entity, the imposition of the goal numbers in the 2017 disparity study contradicts the objective demographics of our industry, making the achievement of these goal numbers an impossibility.

The legislation's proposed goal numbers also run counter to the Constitutional boundaries set by the United States Supreme Court in the *City of Richmond v. J.A. Croson* case. For a program to impose specific goals, it must periodically conduct a "disparity study" to assess whether a disparity exists, determine if that disparity results from discrimination, and, if so, identify proper, *narrowly tailored* remedies to reduce and eliminate it. Key to this is the accuracy and integrity of the identification and measurement of the target industry and the demographics therein.

The imposition of an unreasonable goal on a tightly regulated industry for which accurate demographic data is readily available is incompatible with established Constitutional boundaries. Since a flawed study cannot fulfill the Constitutional mandate of determining any current discrimination-caused disparity, the measures taken in reliance cannot be considered a narrowly tailored mitigation of any such disparity.

The expansion of Article 15-A to any “state-funded entity” or entities party to a “state contract” – in the absence of a disparity study focused on these relevant local markets – is a yet another step outside of the allowable contours of the program. For a locality or party to a state contract to Constitutionally operate a goal-setting program, they would have to procure their own disparity study at significant cost.

ACEC New York believes that the workforce diversity element of this bill adds an unnecessary layer of complexity, uncertainty and complication to an already challenging compliance environment. Under the program, the ESD Director will impose Workforce Participation Goals for each county and for such municipalities as the ESD Director deems necessary. These goals seek to mandate specific proportions of gender and ethnic representation in subject contracts. Contracting parties unable to meet such numbers would have to seek a waiver by proving good faith efforts, “numerical evidence,” and documentation from its subcontractors.

As explained above, the men and women working in engineering and the other licensed design professions are not commodities and cannot be easily replaced and substituted simply to meet an aspirational race and gender representation. The manner by which engineering and professional design services are procured is based on the qualifications of the proposing firms. The *specific individuals* and their professional credentials and experience are fundamental criteria for selection of an engineering firm by a public client. Adjusting this roster mid-project would be a violation of State procurement law and, in some cases, a material change in the terms of the contract. This could be an extreme hardship for smaller firms, including MWBE firms.

We believe that instead of pursuing this problematic legislation, the program should be renewed, and other additional steps be taken to strengthen the program. These include:

- Commission a new disparity study, with the associated data and analysis publicly available
- Provide for at least a five-year extension
- Establish a commission to examine, evaluate and make recommendations to the program and its operations
- Encourage and expand the MWBE contracting universe through such avenues as SUNY-sponsored industry training programs, such as those sponsored in the Capital region
- Ensure that narrowly tailored goal-setting analysis, as currently required under law, is always available at the pre-bid phase of a project