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State of Minnesota Disparity Study
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Re: 2017 Minnesota Joint Disparity Study

We appreciate the good efforts of 2017 Minnesota Joint Disparity Study, particularly in surveying businesses to better understand availability statistics and in recommending continued efforts to combat discrimination. Sharing our experience hopefully will add to this progress.

The Study appears to recommend that stakeholders try harder and do better to improve results. This recommendation sounds hollow in light of the years of hard effort that has yielded disappointing results. The chief flaw of the Study is how it overlooks the impactful role the State's processes and laws contribute to the lack of meaningful performance. Without addressing the underlying question, we believe that harder efforts applied in the same patterns will yield similar soft results.

Agency should not impose payment schedules that increase the risk and cost of MBEs

First, we believe that economic factors inhibit change, particularly in the construction industry which has higher barriers to entry than other market sectors. The construction discipline is a capital intensive, highly competitive, low profit margin and high-risk market sector. Start-up and smaller businesses who struggle with cash flow may fail, compromise performance, or become recalcitrant when they are not paid timely for their work.

Prime contractors cannot afford to serve as the bank to fund agency projects. The Study recommends paying MBE subcontractors immediately upon completion of work without

question or condition, including whether or not the contractor has received payment from the agency. This recommendation makes working with MBEs financially unsound. We believe the Study should recommend that the agency pay the prime contractor and subs as work is completed and then rely upon existing laws (pay when paid) to compel the prime to pay its subcontractors.

We recommend these compulsory payments extend to the public owner, requiring the owner's release of payment to both prime and MBE subs once a scope of work is completed and approved as accepted work by the owner. When applied more broadly, we believe this change has capacity to meaningfully affect one of the most common problems of any emerging small business – timely payment for work.

Agency should provide meaningful information to find available MBEs

Second, agencies should be compelled to provide more helpful and accurate information concerning eligible MBEs in the marketplace. We appreciate and support the Study's recommendation that non-accredited MBEs be recognized in reaching the MBE goal, and are conscious of numerous cases where contractors struggle to find accredited MBEs capable and available to perform subcontract work. Recognizing non-accredited MBEs will increase the pool of available subcontractors to mirror how the Study and agencies consider "availability."

It would further help to have the agencies provide vetted lists of contractors that include the contractor's available scopes of work, available project size capacity, and MBE accreditation (if any). We have worked with contractors and trade unions who struggle to find capable and available MBE subcontractors. Current available agency information is often meaningless and unhelpful in managing this task.

Additionally, tracking and measuring performance outside of the goal-based programs is worth pursuing and should be part of the responsibility of the administering agencies. We fully support this undertaking as it provides a more complete picture of the level of commitment by majority owned firms to increase engagement and market opportunity for MBEs and WBEs.

Agency should clarify bidding requirements that conflict with MBE program

Third, the State has conflicting laws that often work at cross-purposes and frustrate greater attainment of the MBE goals. For instance, the State favors low-cost bidding, provides a MBE goal, and permits no transparency in the process to resolve the conflicting standards. The bidder understands that the lowest cost and responsive bid generally will prevail. To win the contract, the bidder must strike a balance between selecting the reliable, low-cost subcontractors and material suppliers, and engaging MBEs that may be less cost competitive but are required to attain the MBE goal.

In short, the low-cost standard has the effect of undermining the MBE goal. The Study should recommend transparency by asking public owners to disclose the percentage of MBE subcontracts and any added cost beyond market established prices for using MBE subcontractors, and permitting alternative bids that would raise the bid price and increase the MBE percentage. This process would help alleviate the disincentive to consider often higher than market priced MBE bids.

The 'best value procurement method' has infrequently been used in Minnesota as a tool to encourage diversity and inclusion in a low bid project model. In addition to recognizing that marrying these two concepts is a contradiction in terms, we observe that the State of Minnesota's use of best value for diversity and inclusion has not followed best practices intended to optimize results. The State's approach has encouraged an increase in activities related to inclusion, like networking receptions and educational programs, but has not demonstrated sustainable results. Best value criteria should be objective and measurable. We would encourage the Study results to expressly recommend to public owners who use the best value option to adopt defensible, objective and measurable criteria for scoring best value procurements.

Agency should be transparent and build support for its seemingly arbitrary 6% bid preference

Fourth, we believe that additional transparency would be helpful when considering adjusting the six percent bid preference standard. The six percent (6%) bid preference standard is inherently arbitrary and works at cross-purposes to the lowest responsible bidder standard.

We have additional questions regarding the pretext under which 6% is the established preference amount and why the draft report suggests increasing that amount. In the event the preferences are increased, there needs to be a full and transparent policy discussion regarding the merits of cost not being the predominant factor in spending taxpayer dollars.

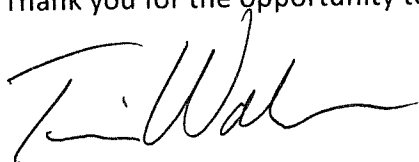
Agency should resolve conflict between labor requirements and MBE program

Fifth, the State's MBE requirements also conflict with laws regarding labor unions. The law permits labor contracts to require union affiliated contractors to use only union signatory subcontractors. A contractor who uses a non-union subcontractor subsequently faces liability with the respective union, or, if the contractor complies with the union subcontracting provision, the contractor limits its access to only signatory union MBEs, which many times are not available. In short, the unions have a legitimate right under the NLRA to protect its work by requiring union only subcontractors, and the State MBE requirements conflict with this right and provide no mechanism to resolve the conflict. Signatory prime contractors are left at risk with both decisions.

Agency should track actual availability going forward

Finally, better and more accurate information should be shared to build credibility and support for the MBE program. Most significantly, agencies should collect data to understand the MBE availability numbers. For instance, in several cases this past summer, a contractor sought MBE subcontractors and was stymied because the MBE subcontractors were too busy. As part of the agencies' vetted list of MBEs, the agencies should track the number of contracts MBE subcontractors bid, number of contractors the MBE decided to not bid, if the MBE subcontractor was awarded the bid, and if the MBE subcontractor's bid was within six percent (6%) of the low bid.

Thank you for the opportunity to comment and for your attention to this important issue.



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