

Legislative Budget Testimony on Behalf of



Building Industry Employers
Of New York State



CONSTRUCTION INDUSTRY
ASSOCIATION OF ROCHESTER
GOOD PEOPLE. GREAT WORK.



STBA
southern tier builders'
association

Re: Part Q of the Proposed Executive Budget

The 3,000-member firms of the Builders Exchange of Rochester, Building Industry Employers Association, Eastern Contractors Association, Contractors Association of the Hudson Valley, and Sothern Tier Contractors Association support New York State's efforts to increase MWBE participation on construction projects and agree that the goal of increasing minority, women and service disabled veteran participation is commendable and worthwhile. We have grave concerns, however, with the manner in which the program is currently being administered. Additionally, we are concerned about the proposed changes to the state's MWBE program and the imposition of new workforce requirements. All the associations and our members are supportive of a well-functioning MWBE program; however, we believe the Governor's proposal puts the entire program at risk.

Currently, under Article 15-A of the Executive Law, MWBE goals adopted by State agencies should be based on the geographic location of the project and availability of certified MWBEs. In recent years, however, the State has set the same goals on all agency projects regardless of location or availability of certified MWBEs. It should go without saying that the availability of certified MWBEs varies widely in regions across our great State. For example, the number of certified MWBEs in the New York City metropolitan area is much greater than in Upstate communities. The State has made no effort to account for these regional differences, despite a requirement in the statute that the goals of each contract be tailored to the available MWBE resources. As such, this failure has placed undue burdens on contractors who have been forced, time and again, to attempt to comply with impossible goals and are then, despite their good faith, reasonable and, ultimately, fruitless efforts, all of which occur at significant cost, to seek waivers. Another State-wide problem with the current MWBE program is that the list of

certified MWBEs includes hundreds of entities that are either no longer in business or non-responsive to solicitations for work. Although the lack of response by these entities is repetitively logged and provided to State agencies by contractors who are mandated to reach out to these entities as components of their good faith efforts, the State does not appear to be doing anything to monitor these nonresponsive participants and ensure that the entities on its approved list of certified MWBEs are ready, willing and able to perform public work that encompasses a commercially useful function.

The proposed budget amendments make a significant group of changes to this already difficult system. First, rather than referencing specific goals, or even a specific disparity study, the amendment instead references the “most recent” study obtained by the Director of Empire State Development – which study need not be adopted by the Legislature or even be put into regulation. On its surface, the amendment sounds reasonable, but has the net effect of creating a process that is opaque and completely subject to the whim of the Executive chamber. Notably, the amendments remove all transparency from the current MWBE program, including the timing of studies, the imposition of specific statewide goals and the actual documentation on specific projects, including public disclosure as to utilization plans and the grants of waivers.

Second, the amendments dramatically expand the NYS program into all municipal projects that have state funding. This inappropriately preempts local MWBE programs, such as those in the cities of Rochester, Buffalo, Syracuse and Albany. It also dramatically increases the need for MWBE contractors to bid on projects. For instance, SED supports on average about \$4 billion in school construction annually. Currently there are no requirements for MWBE contracting (unless self-imposed) on these projects. This change potentially creates one to two billion dollars in new demand for MWBE contractors which there is little likelihood to meet in short term. The Mason Tillman study that the state is relying on (although not mentioning except in the brief related to the amendment) did not do any analysis of municipal projects, in terms of critically evaluating disparity or capacity. This expansion of the program, along with the failure to study these projects, sets the entire program up for failure.

The expansion of the program also imposes additional costs, essentially unfunded mandates, on local government and schools. The current MWBE requirements create between a ten and fifteen percent cost load on projects. Applying the existing 30 percent requirement to school construction projects at the volume noted above, could add between \$400 and \$600 million in costs to projects. About 64 percent of school construction costs are paid for in local share, which means local school tax payers should expect an additional bill totaling \$250 to \$380 million each year. Since we are stretching the available pool of contractors by expanding the program, it is likely that these cost estimates are on the low end due to MWBE firms seeking to charge rates significantly above market to meet the new demand. It also does not take into account the higher requirements the flawed Mason Tillman study supports (over 53 percent), which would add even more cost if imposed. Those additional costs would also be experienced by local municipalities, further adding to the taxpayer’s burden.

Third, the budget amendments create an entire new role for Empire State Development (ESD). ESD, which is not party to local municipal or school district contracts, will now have an oversight role in those contracts. While the contract reporting and enforcement as to these local units is uncertain, this will certainly add delay to contract awards, impact

construction schedules and create payment delays. All those items increase cost to the taxpayer and will require a substantial increase in staffing at ESD.

Finally, the amendments create workforce hiring requirements that could be as high as 50 percent, assuming the Mason Tillman study is followed – since it is the most recent. We are generally supportive of workforce requirements and feel they are the best way to build a diverse workforce and MWBE contractors. The approach here, however, is incorrect and unworkable. Workforce goals, including specific percentage participation requirements by gender and ethnicity, are to be established by the Director of ESD for every project. Contractors must either certify their, and their subcontractors', ability to comply with the goals or to obtain a waiver pre-award using the highly restrictive process in the amendment. Compliance is to be tracked narrowly, by hours for specific ethnic and gender groups. It is highly unlikely that any given contractor can specifically identify the right racial and gender characteristics to meet requirements on individual projects. Obviously, we cannot legally ignore our state and federal obligations to advertise and make hiring decisions on a nondiscriminatory basis in order to recruit for workers of specific gender or ethnicity – such as advertising for male American Indian masons or female Hispanic pipefitters. On large job sites, reviewing total employment on the sites is an effective way to view the workforce. It is basically impossible for a single employer with an average size crew on an individual project to achieve the demanded diversity that includes men and women in nine (or more) categories. Additionally, the Executive Branch's recent comments seem to indicate that anyone who meets the proposed racial or gender requirements can/should simply be able to be employed in the industry, completely ignoring the fact that these are skilled construction trades and much of those skills take years to acquire.

The amendment also make ESD the sole arbiter of good faith efforts for hiring, without usable specifics on what would constitute a "good faith effort." Is it expected that existing workers be laid off to hire other workers? Are advertisements for employment that stress non-discrimination, which are already required by state and federal law, appropriate? We simply do not know and are concerned about other legal problems that may arise in attempting to comply. In any event, ESD will be able, in its discretion, to determine if a contractor is "non-compliant" and if so prevent the contractor from bidding on state-funded contracts indefinitely. This is a substantial departure from the due process requirements relating to debarment (which this effectively results in) and specified time periods. This change has the clear potential to be abused – especially with the complete lack of transparency and substitution of the discretion vested in the Director of ESD for formerly specific standards and public processes, as created by these amendments. Contractors may never know why they were "non-compliant," nor can they be certain that all firms were held to the same standards.

We urge you to oppose the budget amendments and engage with us in a discussion to create a strong MWBE program that is properly grounded in law, transparent and beneficial for the tax payers. The rush to announcing a new MWBE and workforce participation programs in the absence of a credible supporting study does more harm than good to the industry and the MWBE firms it intends to protect.