

ResearchBrief

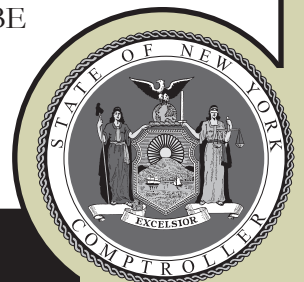
OFFICE OF THE NEW YORK STATE COMPTROLLER

DIVISION OF STATE GOVERNMENT ACCOUNTABILITY

Taking Affirmative Action to Improve New York State's MWBE Program

Summary

- Procurement can be a potentially powerful tool for governments to promote equal economic opportunities and to counteract discrimination in the marketplace. Over the last several decades, federal, state and local governments throughout the nation have developed programs with the express intent of increasing the number and value of government contracts awarded to minority-owned business enterprises (MBEs) and women-owned business enterprises (WBEs).
- Despite the collective efforts of minority- and women-owned business enterprise (MWBE) programs at the federal, state and local levels, minorities and women are still significantly disadvantaged in both the workplace and the marketplace. U.S. Census Bureau data show that minorities and women earn substantially less from their labor – both as employees and as entrepreneurs – than their non-minority male counterparts. This is true both in New York and in the nation as a whole.
- The Office of the State Comptroller (OSC) has demonstrated its commitment to improving the State's MWBE program through various agency activities and has taken a leadership role in promoting MWBE businesses. In 2009, OSC developed a new approach to examining the statewide program which concentrated on promoting communication and providing agencies with more information about performance; conducting focused audits of program activities and results at the agency level; and identifying best practices and common obstacles that affect program success.
- While New York's MWBE program has given targeted businesses access to opportunities that may not otherwise have been available to them, there are persistent problems with vendor certification, goal setting, program results, reporting, program oversight and outreach efforts.
- Agency performance data over the last three years show that utilization of MWBE firms continues to be relatively stagnant. The combined percentage of MWBE utilization increased only 1.5 percentage points from 8.1 percent of agency expenditures in State fiscal year 2007-08 to 9.6 percent in 2009-10.



Thomas P. DiNapoli • State Comptroller

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- Specific findings in recently completed audits indicate that agencies tend to set low goals on only a portion of their expenditures, fail to meet even those minimum goals, lack coordinated outreach efforts to identify and utilize certified MWBE firms, and poorly monitor contractor compliance.
 - New York recently completed a disparity study – a study to examine the difference between the availability of MWBEs and their utilization in government procurement – which concluded that MWBEs in New York State are present in substantially lower numbers, earn substantially less and are substantially more likely to be denied access to credit than would be the case if the market operated in a neutral manner with respect to race and gender.
 - Although 29 percent of firms were identified as MWBEs in the disparity study, only 5 percent of New York’s contracting and purchasing dollars were spent with MWBE firms from State fiscal years 2004 through 2008. The study concluded that the statistical and anecdotal evidence supports the conclusion that these outcomes are the result of discrimination.
 - Recommendations included in this report focus on a two-pronged approach to improving the State’s MWBE program. This approach first seeks to strengthen the State’s race- and gender-neutral initiatives to improve economic opportunities for all small businesses, and then to tailor race- and gender-based initiatives narrowly to remedy any remaining imbalances in economic opportunities for minorities and women. While some of these recommendations were partially addressed in State legislation enacted in July 2010 (Chapters 173, 174 and 175 of the Laws of 2010), some others can be implemented administratively without legislative change.

Introduction

Over the last several decades, affirmative action programs in the United States have focused on the relative success of minorities and women in three main areas: employment, education and economic opportunity. Government programs have attempted to create and enhance economic opportunities by providing general support for small businesses and targeted support for minority- and women-owned businesses through various means, including government procurement. As such, government procurement is seen as a potentially powerful tool for governments to promote equal economic opportunities and to counteract discrimination in the marketplace.

As a result, the federal government and state and local governments throughout the nation have developed programs with the express intent of increasing the number and value of government contracts awarded to minority-owned business enterprises and women-owned business enterprises. These programs are intended to provide direct economic benefit to MWBE firms, as well as to increase the presence of these firms in the government contracting process, thereby reversing the effects of direct or passive discriminatory practices present in many aspects of government procurement.

National Background

Nationally, it is estimated that government procurement represents about 10 percent of the Gross National Product (GNP), with state and local government spending accounting for more than half of all public procurement. In New York, annual State and local government contractual spending totals about \$70 billion, or about 6 percent of the Gross State Product, including about \$7 billion for State contractual spending on goods and services.

However, despite the collective efforts of MWBE programs at the federal, state and local levels, minorities and women are still significantly disadvantaged in both the workplace and the marketplace. U.S. Census Bureau data show that minorities and women earn substantially less from their labor – both as employees and as entrepreneurs – than their non-minority male counterparts. This is true both in New York and in the nation as a whole.

Nationwide, minority firms account for about 17 percent of total businesses in the country, but earn less than 3 percent of total sales and receipts. In New York, the pattern is even more pronounced, with the 25 percent of firms owned by minorities earning less than 3 percent of sales and receipts.

The situation is no better for women. Nationally, women own 28 percent of the businesses in the United States, but generate only 4 percent of the sales and receipts. In New York, the pattern is similar, with 30 percent of firms owned by women earning about 4 percent of sales and receipts. In comparison, men own 57 percent of businesses and account for 31 percent of sales and receipts nationally, while in New York men own 60 percent of businesses and earn 31 percent of revenues.

Other analyses also indicate that minority- and women-owned businesses receive less than their fair share in the public contracting arena. An oft-cited report produced by the Urban Institute in 1997 examined state and local government expenditures – utilizing dozens of disparity studies available at the time – and found that minority firms received far fewer government contract dollars than would be expected based on their availability. In fact, minority businesses as a group received only 57 cents of every dollar they would have been expected to receive from government contracting, based on their numbers and availability. This translated into a potential pool of more than \$20 billion in additional contract dollars.

National Trends

The federal government, most states and many large municipalities in the United States have programs designed to encourage economic opportunities for minority- and women-owned businesses through participation in government procurement of goods and services. Although the structures of such programs vary from one state to the next, at least 30 states currently have MWBE programs.

Several states have conducted disparity studies – studies which examine the difference between the availability of MWBEs and their utilization in government procurement – similar to one recently completed for New York State (see below). Generally, these studies have found evidence of continuing discrimination of minority- and women-owned firms in the marketplace as well as underutilization of such firms in state procurement activities. State legislation requiring disparity studies often provides that such studies be conducted periodically (for example, every five years) to ensure the availability of timely information upon which to evaluate programs.

Programs designed to encourage the economic growth of MWBEs in various states usually have some common elements, including:

- **Administration** – MWBE programs are usually administered by a state’s department of administration or general services, where centralized procurement is handled. Occasionally, a program is administered by a stand-alone agency (e.g., Virginia and South Carolina) or is located in the state’s commerce department or economic development agency, as it is in New York State.
- **Certification Process** – Procedures usually require businesses to first register with a state’s secretary of state or department of tax and finance prior to applying for MWBE certification. The certification process usually involves a lengthy application form (often submitted online) to collect information about a firm’s owner, products and services, finances, equipment, facilities and control of functions; supplemental documents to substantiate information represented in the application; and a scheduled site visit to verify information and to ascertain that the business is under the daily control of a minority or woman owner. Many states require MWBE firms to verify annually that they continue to meet the eligibility criteria of the program, without resubmitting full documentation.
- **Reciprocity** – Most state MWBE programs provide for reciprocal and/or accelerated certification with other programs. Dual certification is usually provided for firms certified under the federal Disadvantaged Business Enterprise (DBE) program for transportation contracts funded by the U.S. Department of Transportation. In addition, several states have reciprocal certification programs with municipalities in their jurisdictions (New York, Indiana and New Jersey), other states in their regions (Delaware, Maryland and Virginia) and/or statewide and national minority/women’s procurement organizations.

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- **Directory of Certified Firms** – States, including New York, usually maintain directories of certified MWBE firms to facilitate agency searches of available vendors. These directories vary in their ease of use, with those being most useful that include contact information and are searchable by types of products or services.
 - **Database of Contract Opportunities** – Many states provide centralized databases of contract opportunities which include specific information about the goods and services that agencies are interested in procuring. Although New York does not have a comprehensive centralized database, the New York State Contract Reporter publishes information on various procurement opportunities with State entities. In addition, the Office of General Services (OGS) offers online vendor registration for bidder notification services regarding OGS contract opportunities.
 - **Outreach** – States often provide a variety of outreach services to encourage MWBE firms to become certified, including workshops, training events and technical assistance with certification applications.
 - **Goals** – Some states have established overall goals, agency-specific goals or goals by product/ service type (Indiana) for procurement from certain firms. Statewide MWBE goals vary from 10 percent (Pennsylvania and Rhode Island) to 40 percent (Virginia) of procurement expenditures. Several states have goals for small business enterprises (SBEs), regardless of race or gender ownership, ranging from 10 percent (Iowa) to 25 percent (New Jersey). The North Carolina Department of Transportation has a small contractor goal of \$2 million for each of its 14 regional divisions.
 - **Compliance Monitoring** – Most states monitor compliance with MWBE goals by agencies and prime contractors. These efforts attempt to ensure that contractors do not discriminate in their employment and subcontracting business practices.

Federal Government Programs

The federal government has a number of programs to assist small and disadvantaged businesses (many of which are owned by minorities and women), including:

- **8(a) Business Development Program** – This program is administered by the Small Business Administration (SBA) and is intended to help small businesses owned by socially or economically disadvantaged individuals to access the federal procurement market and learn skills for continued business success. The program provides technical assistance to eligible firms in a structured process over a nine-year timeframe which results in the “graduation” of successful firms. Eligible 8(a) participant businesses can receive sole-source contracts up to a ceiling of \$3 million for goods and services. In addition, federal procurement policies encourage federal agencies to award a percentage of their contracts to 8(a) businesses and require that all federal purchases above \$3,000 but under \$100,000 must be reserved for small businesses.
- **Disadvantaged Business Enterprise (DBE) Program** – The federal DBE program certifies businesses owned by socially or economically disadvantaged individuals that wish to compete for federally funded contracts administered by the U.S. Department of Transportation. Many states, including New York, provide dual certification to businesses certified by the DBE program. The DBE program has eligibility requirements to ensure that firms which benefit from the program are owned and controlled by socially disadvantaged individuals who are also economically disadvantaged – as evidenced by having personal net worth below \$750,000 – and that the business is small according to SBA standards.

Until 2009, the federal government also had a program that certified small disadvantaged businesses for Department of Defense (DOD) contracts. The Small Disadvantaged Business (SDB) Program set an overall goal of 5 percent for DOD contracts with SDBs and authorized various race-conscious measures to meet that goal, including providing bid preferences of up to 10 percent in the evaluation of contract bids from SDBs. The program was struck down by the Federal Circuit Court of Appeals and was discontinued. This court case as well as other court decisions have forced preferential procurement programs to be more narrowly tailored.

New York State MWBE Program

New York State first authorized its Minority- and Women-Owned Business Enterprises program (Article 15-A of the Executive Law) in July 1988 to promote equality of economic opportunities for minorities and women and to eliminate barriers to their participation in State procurement activities. The program is administered within Empire State Development (ESD) by the Division of Minority and Women's Business Development, which performs three major functions: to encourage and assist State agencies to award a fair share of contracts to MWBEs, to certify MWBE businesses and to promote the development of MWBEs through capacity building and outreach efforts.

State Finance Law Section 163(6) provides a threshold below which State agencies may purchase goods and services from certified MWBE firms without formal competitive bids. This threshold was raised from \$100,000 to \$200,000 by the recently enacted Chapter 173 of the Laws of 2010.

State Agencies. Article 15-A requires State agencies and public authorities to actively promote the participation of MWBEs in State contracts and procurement activities. Specifically, State agencies and authorities must establish annual goals for participation (expressed as a percentage of the agency's total discretionary contract spending for the year), make a "good faith" effort to achieve these goals, and report to ESD on actual levels of MWBE participation in agency contracts and expenditures. ESD approves agency goal plans, monitors compliance and compiles reports on utilization.

MWBE Certification. ESD reviews applications by businesses and determines whether applicants meet the statutory qualifications for certification, namely that:

- Businesses must be at least 51 percent owned and controlled by minorities or women;
- Minority and/or women ownership must be real, substantial and continuing;
- Minority and/or women ownership must have and exercise the authority to independently control day-to-day business decisions;
- Businesses must be independently owned, operated and authorized to do business in New York State; and
- Businesses generally must be in operation for at least one year.

In addition, ESD maintains a database of certified MWBE firms which includes product and service industry codes to assist State agencies, private sector contractors and the general public in the utilization of MWBEs.

Outreach and Business Development. ESD conducts workshops and training sessions for: (1) State agencies, to promote the utilization of MWBEs in State contracts, and (2) MWBEs, to provide assistance with certification and contract opportunities. ESD also administers programs and services that promote business opportunities for MWBEs, such as conferences and vendor fairs, and facilitates capacity building through partnerships with organizations that offer in-depth technical assistance to MWBEs on various aspects of management and business.

New York State Disparity Study

As required by Article 15-A of the Executive Law (Section 312-a), ESD commissioned a study in 2007 to examine the participation of MWBEs in State contracts. The purpose of the study was to determine whether there is a disparity between the number of qualified MWBEs ready, willing and able to perform State contracts and the number actually engaged to perform such contracts. Recently released in April 2010, the study (known as a disparity study) is intended to assist the State in determining whether its current MWBE program is still necessary to remedy discrimination and to refine existing measures and “narrowly tailor” any new initiatives to that remedy.

Various U.S. Supreme Court cases have made it clear that in order to implement a race- or gender-based program that is effective, enforceable and legally defensible, a government must meet the test of “strict scrutiny.” Strict scrutiny requires current strong evidence of the persistence of discrimination and any measures adopted to remedy that discrimination must be “narrowly tailored” to that evidence.

New York’s disparity study concluded that MWBEs are present in substantially lower numbers, earn substantially less and are substantially more likely to be denied access to credit than would be the case if the market operated in a race- and gender-neutral manner. The study further found that during State fiscal years 2004 through 2008, MWBEs were utilized in State contracts at rates far lower than their availability would indicate. Although 29 percent of firms were identified as MWBEs in the study, only 5 percent of New York’s contracting and purchasing dollars were spent with MWBE firms from 2004 through 2008. The study concluded that the statistical and anecdotal evidence supports the conclusion that these outcomes are the result of discrimination.

New York State MWBE Performance Results and Audit Findings

Several previous audits of New York’s MWBE program have noted implementation problems both at the agency level and with ESD’s administration of the program. Between 2001 and 2004, OSC undertook a series of audits which found that while the program had given targeted businesses access to opportunities that may not otherwise have been available to them, there were persistent problems with goal setting, program results, reporting, program oversight and vendor certification.

In 2009, OSC took a leadership role in addressing these problems and developed a new approach to examining the State’s MWBE program to try to help it succeed. This approach concentrated on promoting communication and providing agencies with more information about performance; conducting focused audits of program activities and results at the agency level; and identifying best practices and common obstacles that affect program success.

Specifically, OSC gathered information from ESD in the form of self-reported agency data on program goals and performance for the past three years and developed this information into an objectively-oriented performance measurement system. OSC shared this performance data with agencies and promoted interagency comparisons and communication on agency results.

OSC Best Practices

As a procurement agency itself, the Office of the State Comptroller fully supports the State's MWBE program and has integrated its goals into the agency's procurement processes and practices. Specifically, OSC:

- Places primary responsibility for MWBE participation in its Finance Office, where it has been incorporated into the procurement processes and culture of the agency;
- Makes a concerted effort to raise agency goals and increase MWBE participation in discretionary purchases, particularly in the procurement of office furniture, software products and miscellaneous services;
- Includes information on its website concerning policies and resources that can be used by MWBEs for opportunities in State procurement opportunities, including links to other State government websites;
- Produces and distributes the annual Directory of Frequently Purchased Commodities and Services by New York State Agencies (the 20th edition of this publication was released in January 2010);
- Supports and manages a telephone line for sharing information regarding technical support for MWBE best practices; and
- Hosts and attends various vendor fairs and workshops to facilitate MWBE participation in procurement activities.

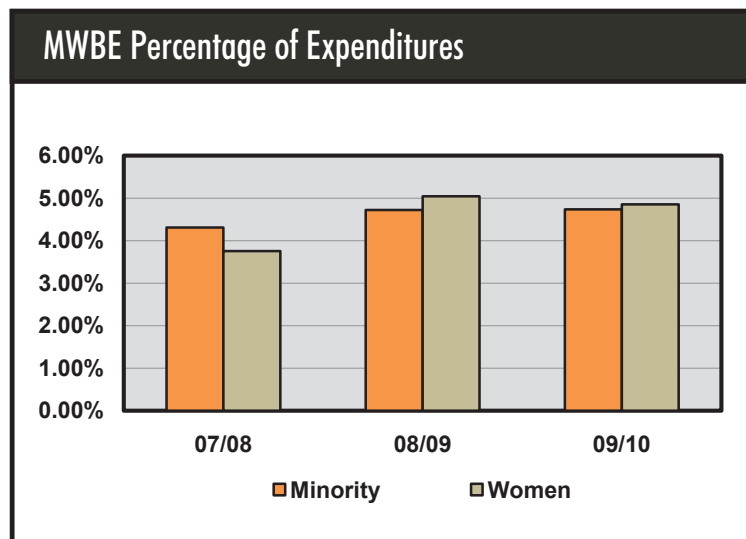
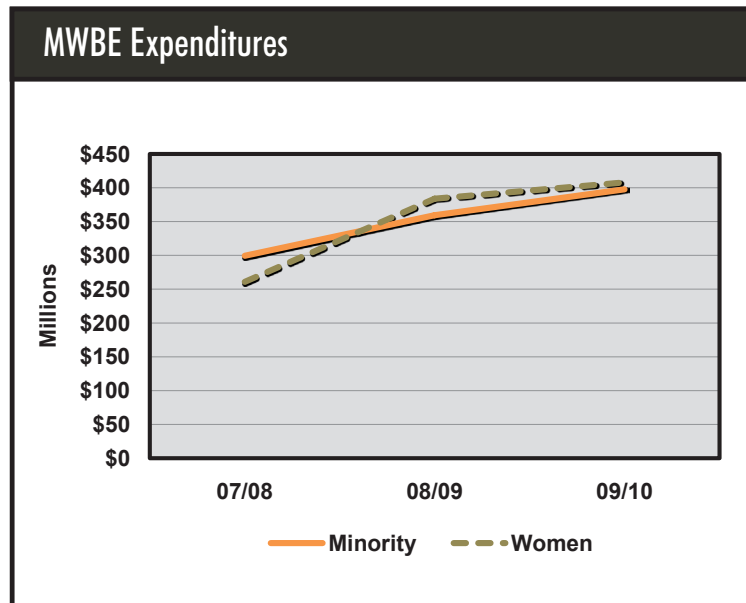
The Comptroller has also demonstrated his commitment to MWBEs as sole custodian of State pension fund assets in the Common Retirement Fund (CRF). In February 2008, the Comptroller launched the Emerging Manager Program for the purpose of investing some of the CRF's assets with small and upcoming firms, many of which are MWBEs, to support the development and expansion of such firms while earning attractive, risk-adjusted returns for the CRF. To date, OSC has committed to investing \$1 billion in private equity and \$600 million in domestic equities with emerging manager firms; in 2009-10 the Emerging Manager Program committed \$160 million to MWBEs. The CRF also has a small business lending program which has provided loans of approximately \$70 million (out of \$200 million) to small MWBEs in the State.

The Comptroller has been at the forefront of advocating for improvements to the statewide MWBE program and has been recognized for his personal commitment and efforts to support MWBE firms. He has participated in various statewide activities, including the Governor's MWBE Executive Leadership Council, and has provided constructive review and input, such as relevant comments on legislative proposals, to improve the statewide MWBE program.

In August 2009, OSC conducted an MWBE State Audit Review Session, in collaboration with ESD, for State agency fiscal officers and purchasing administrators. During this session, OSC reviewed agency performance data, discussed major areas for audit reviews and highlighted technical assistance resources available to agencies. Over 100 attendees from more than 40 different agencies were represented at the session and an additional 230 people viewed a rebroadcast of the session the following day.

Since that time, OSC has continued to monitor agency performance data and has concluded that, although there has been an increase in the dollar amount of MWBE contracts over the last three years, the percentage utilization of MWBE firms has been relatively stagnant. From State fiscal year 2007-08 to 2009-10, utilization of MWBE firms increased by \$245 million from \$560 million to \$805 million, an increase of 44 percent.

However, this increase must be viewed in light of total agency expenditures during that period, which increased by \$1.5 billion from \$6.9 billion to \$8.4 billion. As a result, the combined percentage of MWBE utilization increased only 1.5 percentage points from 8.1 percent to 9.6 percent of total agency expenditures.



In addition, OSC recently completed and released five separate audit reports on the following individual agencies: the Division of State Police, the Department of Tax and Finance, the Office of Children and Family Services (OCFS), the Office of Temporary and Disability Assistance (OTDA) and the Office for Technology (OFT). An audit of the Metropolitan Transportation Authority (MTA) is still in progress.

As a result of these efforts, continuing problems have been found with ESD's oversight of the MWBE program and agency results in the following areas:

- **Certification** – The MWBE certification process in New York is cumbersome and lengthy, often taking 6 months to a year to complete. Although not required, some firms hire attorneys to compile information and submit applications for certification due to its complexity. If filled out online, the application must be completed in order and all at once; any missing information results in rejection of the application. Supplemental documentation must be submitted and ESD staff reviews and onsite visits are conducted to ensure the accuracy and veracity of information. ESD indicates that there is a current backlog of initial application reviews of 3 to 6 months.

Eligible MWBE firms often question whether the certification process is worth the effort, given that the only tangible benefit of certification is inclusion in ESD's directory of certified MWBE firms and potential utilization in State-funded contracts.

As a result, only a fraction of eligible MWBE firms in New York are actually certified by ESD. The New York State disparity study examined 550,000 businesses in New York and identified 29 percent – about 160,000 firms – as MWBE firms. The U.S. Census Bureau's Survey of Business Owners indicates that more than 420,000 MBEs and more than 500,000 WBEs were counted in New York in 2002. In contrast, the directory of MWBE firms certified by ESD currently includes only 8,350 firms. Furthermore, the number of certified MWBE firms has not increased significantly since 1989, when 4,800 MWBEs were certified in New York. This means that an average of only 170 firms per year has been added to the list of certified MWBEs over the last 21 years.

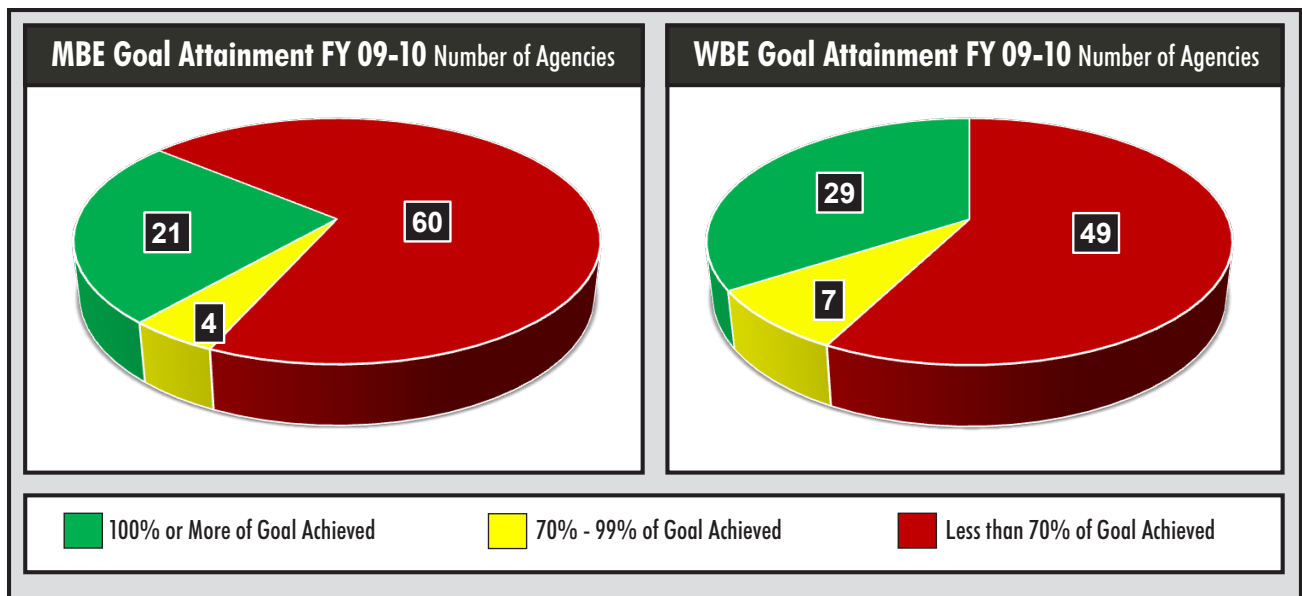
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- **Goal Setting** – Target goals for MWBE utilization in State contracts and expenditures are agency-specific, annually developed by individual agencies and submitted to ESD for review and approval. These goals are based on “discretionary” agency expenditures, that is, expenditures for goods and services over which the agency has some control and can make procurement decisions which result in contracts with MWBE firms. There are several aspects of this process that are problematic:
 - **Comparability.** Although there is central guidance on which expenditures are considered discretionary, agencies have wide discretion to interpret that guidance, resulting in goals and utilization percentages which are not generally comparable between agencies. Sometimes agencies change their expenditure bases from one period to the next, resulting in non-comparable outcomes within an individual agency. For example, the Office for Technology reduced its reported discretionary expenditure base by 95 percent from \$57.5 million in the third quarter of 2009-10 to \$3.3 million in the fourth quarter. This change resulted in an increase in OFT’s reported MWBE participation rate from 1.1 percent to 14.1 percent while actual MWBE expenditures dropped.
 - **Low Goals.** About 60 percent of State agencies (51 out of 85 agencies) set their MBE goals at 5 percent or less of discretionary expenditures in 2009-10, with more than half of those agencies (26 agencies) setting goals of 1 percent or less. Similarly, 72 percent of State agencies (61 out of 85 agencies) set their WBE goals at 5 percent or less in 2009-10. Even the higher goals established by some agencies must be viewed in light of the fraction of total expenditures which discretionary expenditures represent. For example, although OCFS set a combined MWBE goal of 12 percent for 2009-10, that goal was based on a very small pool of eligible discretionary costs totaling about \$11.9 million, or less than 1 percent of OCFS’ \$3.5 billion annual non-personal services expenditures.
 - **Goal Plans.** Some agencies do not regularly file goal plans with ESD (OFT), while others do not have adequate bases to support that their goals are reasonable and attainable (OTDA). Furthermore, ESD does not have adequate means to ensure that goal plans are filed and supportable with objective data.

- **Performance Tracking** – Due to the issues with goal setting, it is difficult to determine if agencies are setting realistic and attainable goals and making good faith efforts to reach those goals. Management needs to have data systems that provide complete, accurate and reliable information to facilitate monitoring and decision making. Issues and problems were identified in this aspect of program compliance as follows:

- **Reporting.** Reporting and data accuracy on MWBE utilization varies by agency, with some agencies adequately tracking, verifying and reporting information (State Police and OTDA). However, other agencies were regularly deficient in reporting or documenting required information; audits cited agencies for not collecting required contractor compliance reports (OFT), not filing required utilization reports (OCFS), and not providing adequate supporting documentation for reported discretionary expenditures (Tax and Finance). Although aware of these missing reports, ESD did not take action to enforce compliance.

Furthermore, audits have shown that MWBE subcontracting expenditures were often not reported by either prime contractors or not-for-profit organizations that hired them. Although not-for-profits are not required to report this information, agencies can include such expenditures in measuring actual MWBE utilization.

- **Utilization.** Actual utilization of MWBE firms varies by agency, but most agencies fall short of meeting their established goals. In fact, more than two-thirds (60 agencies, or 70 percent) of State agencies met less than 70 percent of their MBE goals in 2009-10, while more than half (49 agencies, or 58 percent) met less than 70 percent of their WBE goals. These outcomes are troubling, especially given that agency goals are set low and are often based on only a small portion of overall expenditures.



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- **Communication and Outreach** – Agencies are expected to help existing vendors with MWBE program certification if eligible, to seek out new qualifying vendors for potential certification and to encourage certified vendors to compete for procurement opportunities. Issues identified in this aspect of the program include:
 - **Agency Outreach Efforts.** Agency efforts to identify potentially eligible vendors are varied, with some agencies doing a better job with outreach than others. For example, OFT has made significant efforts to increase awareness and promote participation in the State’s MWBE program, including hosting various MWBE-focused events, providing extensive information for MWBEs on its website and maintaining a comprehensive list of MWBE vendors that it makes available to IT companies looking to form partnerships with MWBEs. Other agencies need to improve their outreach efforts, having few if any systems in place to identify newly certified vendors or help qualified vendors with certification (OCFS and OTDA).
 - **Procurement Opportunities.** OSC annually publishes a Directory of Frequently Purchased Commodities and Services by New York State Agencies which provides ranges of agency expenditures for various types of expenditures within categories, such as supplies, equipment and information technology. However, there is currently no comprehensive statewide database of procurement opportunities that MWBE firms can use to identify specific purchases of goods and services for which they can compete.
 - **Vendor Awareness.** The New York State disparity study indicated that many potential MWBE firms do not know how to become certified or what types of opportunities exist for them in the public sector. They believe that both ESD and individual agencies can do a better outreach job through vendor fairs and other means to provide this information to potential firms.
 - **MWBE Directory.** ESD’s directory of certified MWBE firms does not contain links to vendor websites which agencies and private sector firms could use when seeking qualified firms for specific purchases of goods or services. In addition, many of the email addresses included in the directory are non-functioning, making it difficult to contact firms directly.

Recommendations to Consider

Based on various U.S. Supreme Court decisions, the statistical and anecdotal evidence presented in the New York State disparity study and the best practices identified in numerous governmental MWBE programs, there are several recommendations that should be considered to improve New York's MWBE program and address the shortcomings found in its performance data and OSC's recently completed audits. While some of these recommendations were partially addressed in State legislation enacted in July 2010 (Chapters 173, 174 and 175 of the Laws of 2010), some others can be implemented administratively without legislative change.

These recommendations focus on a two-pronged approach which seeks first to strengthen the State's race- and gender-neutral initiatives to improve economic opportunities for all small businesses, and then to narrowly tailor race- and gender-based initiatives to remedy any remaining imbalances in economic opportunities. All of these recommendations are consistent with recommendations advanced in the New York State disparity study and with national best practices, and can be summarized as follows:

- **Race- and Gender-Neutral Initiatives**

- **Adopt a Small Business Target Market Program.** The State should consider adopting a program targeted to small business firms seeking to work as prime contractors or consultants for the State. Contracts subject to this program would be reserved for bidding solely by such firms. This approach would permit small firms to compete on a more level playing field with firms of comparable size, thereby equalizing some of the barriers faced by MWBEs such as obtaining bonding, financing and accessing business networks, without resorting to race- and gender-based preferences that might not withstand legal challenge. This should also reduce the State's reliance on race- and gender-conscious subcontracting goals to meet overall annual MWBE goals.

Program elements should include eligibility criteria for participation, including limiting the size of a firm (usually based on the number of employees or the amount of annual revenue), its location, the size of contracts to be included and the type of work to be performed.

Many other governments currently have programs which set aside percentages or levels of contracts which are only available to certain firms, usually small businesses. For example, the federal government sets aside all purchases above \$3,000 but under \$100,000 for small businesses.

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- **Expand Programs to Increase Access to Capital.** Increased access to capital is fundamental to ensuring equal opportunities for businesses to compete for State contracts. All the statistical and anecdotal evidence included in the New York State disparity study supported the conclusion that minorities and women continue to face barriers to financing and growing their businesses in part because of race or gender discrimination.

ESD currently operates a Capital Access Pilot Program, in collaboration with the New York Business Development Corporation, to provide capital in connection with specific contracts. In addition, the Common Retirement Fund has a small business lending program; to date approximately \$70 million of the \$200 million in loans completed have been made to MWBE firms. These programs could be expanded to provide more capital to small businesses through existing avenues.

Another way of expanding access to capital would be to make loans available to SBEs at favorable interest rates on lines of credit at participating lending institutions, using their State contracts as collateral.

- **Increase Contract Unbundling.** It is believed that the size and complexity of the State's contracts are major impediments to small firms (including MWBEs) obtaining work as prime contractors on State projects. Unbundling contracts – breaking them into smaller, more manageable pieces – is viewed as one method to increase access to State projects by smaller businesses. Smaller contracts should permit firms to move from quoting solely as subcontractors to bidding as prime contractors. However, unbundling must be considered carefully in light of potentially higher State costs which can be associated with coordinating several smaller contracts rather than one comprehensive contract (e.g., construction projects).
- **Implement the Business Mentor-Protégé Program Statute.** The State Legislature recently amended State Finance Law (Section 147) to require every agency that awards more than \$10 million in projects in the prior year to implement a business mentor-protégé program. Mentor-protégé partnerships are usually based on written development plans which clearly set forth the objectives and roles for both firms. Generally, mentors provide protégés with assistance with financing, management and technical advice. Protégés should be viable firms which are in a line of work that is similar to the mentor firm's business or one of its components. Through these partnerships, mentors receive credit toward MWBE goals and protégés gain greater access to contracts and increased opportunities to grow into prime contractors.

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- **Increase Vendor Communication and Outreach.** Owners of all types of firms have reported difficulties in accessing information about particular contract opportunities, as well as State contracting policies and procedures. The State should consider ways to make it easier for businesses to search for relevant contracting opportunities without having to contact individual agencies. Many states provide centralized databases of contract opportunities which include specific information about the goods and services that agencies are interested in procuring. New York needs similar “one-stop shopping” access.

Other specific suggestions include conducting regular vendor fairs, holding business seminars for newly certified firms, creating a database of business profiles that describes the key products and services from MWBE firms, simplifying and coordinating information on State policies and procedures, and posting payments to prime contractors on agency websites.

In addition, communication with vendors could be improved by forming groups of State agencies with similar procurement needs to encourage information sharing and vendor contacts. Such a shared services approach to MWBE and small business procurement could help spread best practices and improve vendor access.

- **Analyze Systems to Enhance the Availability of Relevant Data.** Not all State contract records contain all the information necessary for efficient and comprehensive monitoring of MWBE activity. This situation could be greatly improved through an analysis and review of data systems, and increased training and guidance for State agency contracting and purchasing personnel. Such efforts would enhance the quality of relevant data available for the State’s next disparity study.

- **Race- and Gender-Conscious Policies and Procedures**

- **Adopt Narrowly Tailored Program Eligibility Standards.** Currently there are no size, location or wealth standards placed on businesses and their owners which participate in the State's MWBE program. Firms may be of any size and located anywhere, and owners are not required to be economically disadvantaged. In order to ensure that New York's program is legally defensible, the State should consider adopting narrowly tailored program eligibility standards, possibly linked to the federal DBE program's eligibility requirements, including:

- **Limitation on the size of a business**, which can be based on the number of employees or annual revenues and can vary by industry type;
- **Limitation on the personal net worth of business owners**; for example, a limit of \$750,000 is used by the DBE program; and
- **Requirement that businesses be located within New York.**

Chapter 175 of the Laws of 2010 enacted in July 2010 amended the definitions of MBE and WBE included in Article 15-A to restrict such enterprises to small businesses and to limit their ownership to individuals whose net worth does not exceed \$3.5 million, adjusted annually for inflation. These amendments become effective 90 days after enactment in October 2010.

- **Adopt Overall Annual MWBE Agency Goals.** Agency goal-setting should be standardized, taking into consideration the following:

- **Clarification of guidance on agency expenditure bases** to ensure consistency between and within agencies;
- **Availability of MWBE firms** by industry and geographic marketplace as reflected in the State disparity study;
- **Determination of potential MWBE availability** that would be present in a discrimination-free marketplace; and
- **Development of multiyear plans** to move agencies toward long-term procurement goals.

Chapter 175 of the Laws of 2010 establishes statewide goals and requires agencies to establish agency-specific goals for contracting with certified MWBEs based on the 2010 disparity study.

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- **Expand Use of Contract Goals.** The State should consider expanding MWBE goals to all contracts with significant subcontracting opportunities, including centralized State contracts administered by the Office of General Services and contracts with not-for-profits.
 - **Adopt Uniform Standards for Demonstrating Good Faith Efforts.** Uniform standards for demonstrating good faith efforts should be applied to prime contractors seeking to utilize MWBEs, including standard procedures for obtaining waivers. The current lack of standardization creates confusion, errors and resentment among interested firms.
 - **Enhance Reporting by State Agencies and ESD.** Agencies should be required to report at least annually regarding their compliance with the provisions of Article 15-A, and ESD should annually compile a report to summarize and compare agency results. Such reports would increase the transparency of agency procurement operations and promote compliance.

Chapter 175 adds requirements for annual agency reports and ESD summary reports, as well as new requirements for agencies which fail to meet their agency-specific goals to develop remedial action plans to address how such goals would be met in the future.

- **Streamline the Certification Process.** Many states, including New York, currently use lengthy certification applications and processes to ensure the eligibility of MWBE firms. However, New York's process involves a particularly lengthy approval process that should be reviewed for potential streamlining. Although it is important to avoid certification of ineligible firms, a protracted and overly complex approval process does not effectively serve legitimate MWBE firms which are discouraged from participating due to the complexity of the process.

Specific suggestions have been made about ways to improve the process, including allowing for partial online completion of applications which would permit saving entered information and returning at a later time to complete the application. Consideration could also be given to a "post-audit" approach to certification, which would rely on targeted reviews of a sampling of firms to provide assurance of the validity of information provided on certification applications.

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- **Encourage Executive and Agency Commitment.** Experience has shown that a program's success is highly dependent on the commitment of its leadership. Chapter 175 creates a new statewide position of Chief Diversity Officer, who will be appointed by the Governor to provide advice on policies relating to workforce diversity and MWBEs, and who will serve on the New York State Procurement Council.

Each New York State agency should be encouraged to place responsibility for its MWBE program in its finance office, where program priorities can be integrated into the procurement processes of the agency, and require agency staff to participate in annual training on MWBE utilization.

Finally, the program would benefit from specific connections to OGS where central procurement is handled for the State.

- **Increase Monitoring of Contract Performance.** After contracts with MWBE commitments have been awarded, it is essential that those commitments are monitored and that sanctions for noncompliance are available, including prohibitions on unauthorized substitutions of subcontractors. This would strengthen compliance and help erase the perception among MWBE firms that the State does not take its program seriously.

Chapter 175 provides for enhanced penalties for contractors that willfully or intentionally disregard their responsibilities to utilize MWBE firms.

Conclusion

As New York State struggles to meet the challenges of its current fiscal crisis, State policy makers must find ways to encourage growth in various sectors of the State's economy to ensure the long-term fiscal health of the State. Small businesses – including those owned by minorities and women – are a vital part of that economy. More than 400,000 small businesses in the State employ nearly 4 million New Yorkers, make annual payrolls in excess of \$130 billion and generate revenues of nearly \$700 billion each year. Supporting small businesses in New York is good economic policy as well as good social policy. New York can help these businesses continue to grow by removing impediments to their participation in the State procurement process and by creating an atmosphere that fosters healthy competition and efficiency. The recommendations included in this report can help strengthen and improve the State's current MWBE program and ultimately accomplish both these goals.

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