

August 7, 2017

## LEGAL UPDATE

### **NEW YORK STATE 2016 MWBE DISPARITY STUDY COMPLETED; STRONGLY SUPPORTS CONTINUATION OF THE STATE'S MWBE PROGRAM; QUESTIONS THE PERSONAL NET WORTH TEST**

The “*State of New York 2016 MWBE Disparity Study, Final Report, June 2017*” (the “2016 Disparity Study”) was released on June 30, 2017. The 2016 Disparity Study assesses New York State’s contracting environment for MWBEs between Fiscal Years 2010 and 2015. The 2016 Disparity Study analyzes data regarding MWBE prime contract and subcontract utilization to determine whether specific racial or gender groups experienced discrimination as evidenced by statistically significant disparities in contract participation and by anecdotal evidence from market participants. Under U.S. law, if statistically significant disparities are not explainable for other reasons, such disparities imply marketplace discrimination. Such findings support the implementation of remedial measures by governmental bodies such as the State’s MWBE program to redress the identified discrimination. Without such findings, state or local affirmative action programs are vulnerable to challenge because the racial or gender components of the programs would lack the required evidence of disparities in violation of the equal protection clause of the 14<sup>th</sup> Amendment.

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The 2016 Disparity Study was mandated by law in 2010 to assess the contracting environment for minority groups and women. The study was scheduled to review the State’s MWBE program after changes following the 2010 disparity study. Periodic reassessment is necessary to comply with the requirement that an affirmative action program only provides benefits where a disparity is found, which helps to establish that the program is narrowly tailored as discussed in the United States Supreme Court’s opinion *City of Richmond v. J.A. Croson Co.* (1989).<sup>1</sup>

The 2010 disparity study found “*both statistical and anecdotal evidence of business discrimination against M/WBEs in the State’s relevant market area.*”<sup>2</sup> Following the 2010 disparity study, the State passed laws intended to strengthen its MWBE program. Disparity and availability statistics were used to set contract goals in various categories of State contracts. Among other recommendations, the 2010 disparity study recommended the adoption of the Personal Net Worth test.

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<sup>1</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>2</sup> *The State of Minority- and Woman- Owned Business Enterprise: Evidence from New York*, 1 (April 29, 2010) (the “2010 disparity study”), [https://cdn.esd.ny.gov/mwbe/Data/NERA\\_NYS\\_Disparity\\_Study\\_Final\\_NEW.pdf](https://cdn.esd.ny.gov/mwbe/Data/NERA_NYS_Disparity_Study_Final_NEW.pdf).

## KEY FINDINGS

The 2016 Disparity Study is likely to result in modifications to the State's MWBE program both in terms of contract goals (based on more recent evidence of MWBE availability and utilization) and program operation. Its key findings may be summarized as follows:

*"MWBEs make up 53.05% of available prime contractors, and 53.48% of available subcontractors in New York State."*<sup>3</sup>;

*"Although MWBE participation in state contracting has increased significantly since the 2010 Study, MWBE utilization is disproportionately lower than MWBE availability in every category of state contracting. Disparities are greatest in the state's market for prime contractors; particularly MWBEs providing construction-related services, such as architects and engineers."*<sup>4</sup>; and

*"The Disparity Study recommends that the State continue to work to achieve Governor Cuomo's 30% MWBE participation goal and that New York State undertake new and more targeted efforts to support MWBE prime contractors."*<sup>5</sup>

Given these findings, the 2016 Disparity Study strongly supports the continuation of the State's MWBE program. The 2016 Disparity Study also raises a number of questions around policy matters such as the use of the Personal Net Worth test. The Personal Net Worth test disqualifies businesses whose "51%" owners have a personal net worth in excess of \$3,500,000<sup>6</sup> from receiving MWBE certification. This test has been highly controversial to many in the MWBE community who view it as an artificial barrier that penalizes success. The 2010 disparity study recommended the adoption of the Personal Net Worth test to make the State's program match other MWBE contracting programs that have withstood Constitutional challenges.

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<sup>3</sup> 2016 Disparity Study Fact Sheet, 2 (June 30, 2017), [https://esd.ny.gov/sites/default/files/final2016\\_MWBEDisparityStudy\\_FactSheet.pdf](https://esd.ny.gov/sites/default/files/final2016_MWBEDisparityStudy_FactSheet.pdf).

<sup>4</sup> *Id.* at 3.

<sup>5</sup> *Id.*

<sup>6</sup> New York State Executive Law, Article 15-A § 310.19, <http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO>: ("19. 'Personal net worth' shall mean the aggregate adjusted net value of the assets of an individual remaining after total liabilities are deducted. Personal net worth includes the individual's share of assets held jointly with said individual's spouse and does not include the individual's ownership interest in the certified minority and women-owned business enterprise, the individual's equity in his or her primary residence, or up to five hundred thousand dollars of the present cash value of any qualified retirement savings plan or individual retirement account held by the individual less any penalties for early withdrawal.").

## ***THE DISPARITY STUDY: CONTENTS AND APPROACH***

The 2016 Disparity Study is an approximately 465 page, four-volume report prepared by Mason Tillman Associates, Ltd. in collaboration with five local sub-consultants.

### *Volume I, Disparity Study*

Volume I of the 2016 Disparity Study analyzes “*whether or not a statistically significant disparity exists between the number of qualified minority and woman-owned business enterprises (‘MWBEs’) ready, willing, and able to provide goods and services that the State procures and the number of qualified MWBEs in the State that could provide goods and services.*”<sup>7</sup> Volume I focuses on the raw data compiled and analyzed and includes anecdotal evidence regarding the experiences of certified firms involved in State contracting. Volume I also includes recommendations to improve the program.

The 2016 Disparity Study analyzed New York State contracts issued in Fiscal Years 2010 to 2015 in the following categories:

- \*construction;
- \*construction-related services;
- \*non-construction-related services; and
- \*commodities.

For prime contract purposes, the contracts analyzed were a sample of all State contracts in the respective categories. In matching MWBE availability to contract utilization, Mason Tillman found that MWBEs were available to perform contracts with values of up to 75% of the largest State contracts. But, presumably because of business size, MWBEs were not available to perform the largest 25% of State contracts. Therefore, the contract sample used for the analysis was limited by excluding the top 25% of the State contracts by contract amount. Based on MWBE availability to perform, construction contracts in excess of \$1,400,000 were excluded, construction-related services contracts in excess of \$2,000,000 were eliminated, non-construction-related services contracts larger than \$500,000 were omitted, and commodities contracts in excess of \$275,000 were carved-out. The intent of the limitation was to isolate and analyze contracts by size to match MWBE firm availability to avoid distorted results.

The 2016 Disparity Study finds that a statistically significant disparity exists for certain groups identified in the study and makes recommendations to level the playing field by strengthening New York State’s MWBE program in ways consistent with Constitutional

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<sup>7</sup> *State of New York 2016 MWBE Disparity Study, Final Report, June 2017*, i (2017), [https://esd.ny.gov/sites/default/files/Vol\\_I\\_NYS\\_DisparityStudy.pdf](https://esd.ny.gov/sites/default/files/Vol_I_NYS_DisparityStudy.pdf).

requirements under *Croson*. The study reviews prime contracts and subcontracts entered into with MWBE certified businesses where the 51% owner(s) are classified as Asian-Indian Subcontinent, Asian-Pacific, Black, Hispanic, Native American or as Caucasian Female. Remarkably, the 2016 Disparity Study is inconclusive as it relates to Native Americans. In every prime contract category, with respect to Native Americans, it found “[t]oo few available firms to test statistical significance.”<sup>8</sup> In subcontracts, it provides no findings for Native Americans. Clearly, this is a problem given the goals of the State’s MWBE program.

The 2016 Disparity Study provides gender information for all minority groups, but singles out Caucasian Females as a general category of prime contractors or subcontractors in the analysis, remedy and recommendation discussions. The 2010 disparity study took a similar approach in analyzing data related to “non-minority females.” As Article 15-A certification for WBEs relates to *all female owned businesses without regard to race*, it remains to be seen how the findings of the 2016 Disparity Study will impact the design of remedies for WBEs as described in Article 15-A. Given that a similar approach was taken in 2010, despite the apparent focus on Caucasian Females, the State should be able to fashion remedies appropriate for all WBEs similar to the legislation that followed the 2010 disparity study.

#### *Volume II, Policy Review*

Volume II, the Policy Review Report, examines certain of the policies and practices involved in New York State’s MWBE program. The Policy Review Report “*assesses (1) the legality of contract goals, set-asides, price preferences, and mentor-protégé programs to remediate documented disparity, (2) the MWBE Program mandated by Article 15-A, (3) the State’s procurement methods that could unintentionally create barriers for MWBE participation, and (4) best-management practices implemented by other states.*”<sup>9</sup> Volume II provides a discussion of how these programs work generally and a specific discussion of their application under New York State’s MWBE program. Volume II also “*provides race- and gender-neutral recommendations to mitigate the disparities in MWBE participation on State contracts documented in the MWBE Disparity Study.*”<sup>10</sup>

#### *Volume III, Personal Net Worth*

Volume III, the Personal Net Worth (PNW) Report, examines the Personal Net Worth test and raises important questions about the suitability of the tests for New York State’s MWBE program. Volume III “*assesses the legal precedent for using PNW as a criterion in the*

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at iv.

<sup>10</sup> *Id.*

*State's MWBE Program's certification requirements. The Report reviews (1) the legislative history of PNW, (2) the precedent for application of PNW by state and municipal governments, and (3) a literature review analyzing the relationship between PNW, race, and access to credit."*<sup>11</sup>

Volume III questions whether a Personal Net Worth test should apply to New York State's MWBEs. It looks at other jurisdictions that have established Personal Net Worth tests and describes whether the tests were adopted to follow Federal policy such as the Disadvantaged Business Entity ("DBE") program, or as a result of other factors such as the completion of a disparity study that recommended the test. Volume III raises questions about the impact of a Personal Net Worth test in an environment where access to credit is a significant problem for MWBEs. Volume III does not advocate for the total repeal of the Personal Net Worth test, but it does imply that other methods should be considered to cause the State's MWBE Program to be narrowly tailored.

#### *Volume IV, Workforce Study*

Volume IV, the Workforce Study, examines the use of individuals from the minority groups identified above on State contracts as reported by contractors based on the U.S. Equal Employment Opportunity Commission ("EEOC") reporting categories. The Workforce Study *"assesses the employment of minorities and Caucasian females on construction and professional services contracts awarded by the State during the year January 1, 2016, to December 31, 2016. The purpose of the Workforce Study is to (1) assess the level of minority and Caucasian female employment on State contracts, (2) determine the availability of minorities and Caucasian females by Equal Employment Opportunity (EEO) category, as recorded in the United States Census Bureau, 2012 American Community Survey, and (3) compare the prime contractor and subcontractor workforce percentages to the percent of available minority and Caucasian female workers in the State by EEO category."*<sup>12</sup>

#### **MASON TILLMAN'S RECOMMENDATIONS**

Mason Tillman presented recommendations to address the underutilization of MWBEs, which were designed to maximize the participation of MWBEs in State contracts and to comply with affirmative action law as set by the Supreme Court opinion in *Croson*. The recommendations in the 2016 Disparity Study include the following:

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

**Evaluation Points for Prime Contracts.** The 2016 Disparity Study recommends assigning “evaluation points” to certified firms owned by groups disparately impacted by marketplace discrimination in prime contracting RFPs. This includes Blacks, Hispanics, and Caucasian Females. The proposal suggests that State contracting parties, i.e., State authorities or State agencies, identify the specific groups that are eligible for evaluation points and in assessing RFP responses issue points to such groups to remedy the disparities evidenced by statistically significant findings of underutilization. Certain groups would be excluded from receiving evaluation points where the group is either overutilized based on availability or underutilized but not to a statistically significant extent. The excluded groups would include:

*\*Asian-Pacific-owned Businesses on construction-related services contracts valued over \$25,000 and under \$50,000;*

*\*Asian-Indian Subcontinent-owned Businesses on construction-related services contracts valued over \$25,000 and under \$50,000;*

*\*Asian-Indian Subcontinent-owned Businesses on non-construction related services contracts valued \$50,000 to \$500,000;*

*\*Asian-Indian Subcontinent-owned Businesses on non-construction related services contracts valued over \$25,000 and under \$50,000; and*

*\*Native American-owned Businesses where the availability was found to be statistically insignificant.*

**For Subcontracts, Meet the State’s 30% MWBE Participation Goal.** Mason Tillman recommends requiring prime contractors with contracts between \$50,000 and \$3,000,000 to meet the State’s 30% MWBE participation goal in subcontracting. For contracts in excess of \$3,000,000, the State entity issuing the RFP should set MWBE participation goals based on the project’s scope.

On subcontracts, the recommendations were notable in that:

*\*Asian-Indian Subcontinent-owned Businesses are excluded from groups listed as having a documented disparity in the construction-related subcontracts category recommendations section, however,*

the discussion section of the report<sup>13</sup> indicates that the underutilization of Asian-Indian Subcontinent-owned Businesses is statistically significant. Interestingly, the discussion section of the report identifies the underutilization of Caucasian Females as being “not statistically significant” and Table 8.5 describes them as being underutilized, however, Table 10.10 identifies the group as having a documented disparity.;

\*Only Black Americans and Caucasian Females are identified in the recommendations as having a documented disparity in the construction-related services subcontracts category. However, the discussion of other groups identifies Hispanic-owned businesses and Asian-Pacific-owned businesses as suffering from statistically significant underutilization. Asian-Indian Subcontinent-owned Businesses are not found to have a documented disparity as they were found to represent 6.40% of the available subcontractors and the group received 9.63% of the subcontract dollars.<sup>14</sup>; and

\*All other groups are listed as having a documented disparity in the non-construction-related services subcontracts category recommendations section, Asian-Indian Subcontinent-owned Businesses are excluded as they were found to represent 4.97% of the available subcontractors and the group received 13.80% of the subcontract dollars.<sup>15</sup>

## *Volume II, Policy Study Recommendations*

**Streamline and Speed Up the Certification Process.** The 2016 Disparity Study recommends establishing a new definition to classify a business as “new” and requiring less information to certify new businesses as compared to mature businesses. The 2016 Disparity Study also encourages authorizing and training facilitators of the Entrepreneurial Assistance Program to certify certification applications as complete.

**Deepen MWBE Program Provisions Related to Best Value.** Best value contracting allows the decision maker to look beyond lowest cost in evaluating a bidder. Mason Tillman urges that the “*published criteria for a responsible and responsive offeror should include compliance with the MWBE requirements as a minimal*

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<sup>13</sup> *State of New York 2016 MWBE Disparity Study, Final Report, June 2017* (2017), *supra* note 7, at 8-3.

<sup>14</sup> *Id.* at 8-6.

<sup>15</sup> *Id.* at 8-9.

*condition to be considered responsible and responsive offeror. The technical evaluation of non-cost elements should include the assignment of preference points to certified MWBE professional services contractors. During the cost evaluation, which compares the price proposed to the prices and costs of other competing proposals, the MWBE bid discount should be applied. These modifications to the best value procurement process should make the evaluation procedure more transparent and incorporate the MWBE Program provisions.”<sup>16</sup>*

**Include MWBEs in the Preferred Source Program.** Under the Preferred Source Program, State agencies must purchase certain commodities and services from the *List of Preferred Source Offerings* when a preferred source offers the products or services that meet the form, function, and utility needed by the agency. Certain non-profit vendors and the Department of Correctional Services have “preferred source” status under the law. Mason Tillman recommends that the program should remove the barriers to MWBEs that provide the commodities and services currently in the exclusive domain of the Preferred Source Program.

**Best Management Practices Review.** While some State agencies and authorities have implemented variations of the proposed best management practices, Mason Tillman recommends that the practices adopted by the State should be uniformly implemented by all State agencies and authorities, and should include the following:

- \*Assess damages for failing to achieve contract goals;
- \*Unbundle large procurements into smaller contracts;
- \*Provide debriefing sessions for unsuccessful bidders;
- \*Enforce subcontractor substitution standards;
- \*Streamline payments and dispute resolution processes;
- \*Augment the Division of Minority and Women Business Development;
- and
- \*Enhance the Small Business Enterprise program.

*Volume III, Personal Net Worth Study Recommendations*

**Reconsider Use of a Personal Net Worth Test.** Mason Tillman concludes that the State’s “PNW certification criterion is excessive and requires MWBE applicants to provide a disproportionate amount of information to demonstrate their net worth.” Among other ideas, Mason Tillman recommends that the “*PNW criterion should be simplified and streamlined to lessen the burden on applicants seeking MWBE*

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<sup>16</sup> *State of New York 2016 MWBE Disparity Study, Policy Review Final Report, May 2017, 13 (2017), [https://esd.ny.gov/sites/default/files/Vol\\_II\\_NYS\\_PolicyStudy.pdf](https://esd.ny.gov/sites/default/files/Vol_II_NYS_PolicyStudy.pdf).*

*certification. Minimally, the life insurance, pension benefits, stock investments, and other personal property requirements should be removed from the PNW criterion.”<sup>17</sup>*

## **NEXT STEPS**

The completion of the 2016 Disparity Study allows for the forward movement of a deep and broad effort to engage MWBE businesses and industry groups with State representatives, including the Governor’s office, the Legislature, Empire State Development and other important State Authorities and constituents to strengthen and adjust the State’s MWBE program.

The MWBE community must analyze the various components of the 2016 Disparity Study and other MWBE related legislative efforts. Bryant Rabbino will hold a series of webinars to discuss the respective volumes of the 2016 Disparity Study and other important MWBE related legislative efforts in both New York State and The City of New York. Please go to our website [www.bryantrabbino.com](http://www.bryantrabbino.com) for more information.

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<sup>17</sup> *State of New York 2016 MWBE Disparity Study, Personal Net Worth Final Report, June 2017*, 19 (2017), [https://esd.ny.gov/sites/default/files/Vol\\_%20III\\_NYS\\_PersonalNetWorth.pdf](https://esd.ny.gov/sites/default/files/Vol_%20III_NYS_PersonalNetWorth.pdf).