



STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

DAVID A. PATERSON
GOVERNOR

May 5, 2010

Dear New Yorkers:

In 2006, the New York State Department of Economic Development commissioned a study, as required by Executive Law § 312-a, to determine "whether there is a disparity between the number of qualified minority and women-owned businesses ready, willing and able to perform state contracts for commodities, services and construction, and the number of such contractors actually engaged to perform such contracts, and to determine what changes, if any, should be made to state policies affecting minority and women-owned business enterprises."

In accordance with that statute, NERA Economic Consulting performed an extensive statistical analysis and survey of anecdotal evidence concerning the place of minority and women's business enterprises (MWBEs) in the New York market, including state contracting. The study concludes that MWBEs are present in substantially lower numbers and were substantially more likely to be denied access to credit than would have been the case if the market operated in a race and gender neutral manner. It further found that during the period April 2004 to March 2008, MWBEs were utilized in state contracting at rates far lower than their availability would indicate. The authors of the study determined that the statistical and anecdotal evidence support the conclusion that these outcomes are the result of discrimination.

In short, the study powerfully demonstrates the need for a robust New York State program to ensure a level playing field for MWBEs.

Since becoming Governor, and indeed even before, I have pledged to usher in a new era of equal opportunity in contracting for minority and women owned businesses. This study provides the factual foundation upon which to build a comprehensive program to advance that goal. I am committed to working with the Legislature towards putting such a program in place this legislative session.

Very truly yours,

David A. Paterson

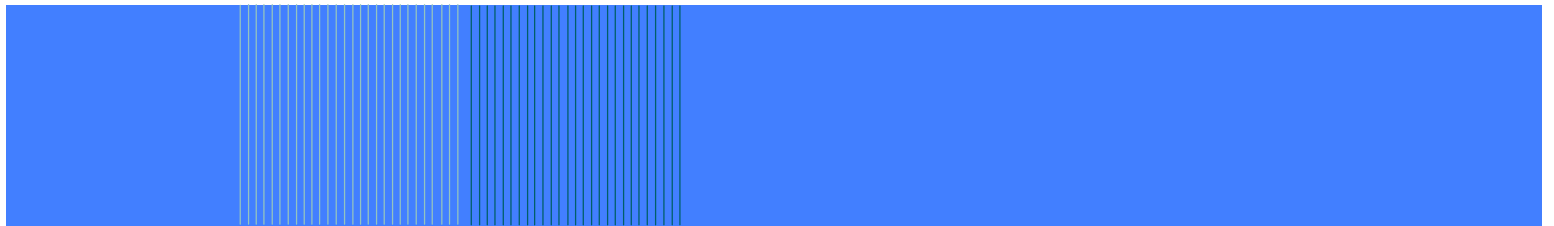
David A. Paterson

April 29, 2010

**The State of Minority- and Woman-Owned
Business Enterprise: Evidence from New York**

PROGRAM RECOMMENDATIONS

Prepared for the New York State Department of Economic
Development



NERA
Economic Consulting

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Acknowledgments

This Study would not have been possible without the assistance of personnel throughout New York State government, especially at the Department of Economic Development. Special thanks go to the State's project manager for this study, Jeff Metzler, Vice President for Economic Empowerment, Empire State Development Corporation.

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About the Project Team—NERA Economic Consulting

NERA Economic Consulting is a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. For half a century, NERA's economists have been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world's leading law firms and corporations. We bring academic rigor, objectivity, and real world industry experience to bear on issues arising from competition, regulation, public policy, strategy, finance, and litigation.

NERA's clients value our ability to apply and communicate state-of-the-art approaches clearly and convincingly, our commitment to deliver unbiased findings, and our reputation for quality and independence. Our clients rely on the integrity and skills of our unparalleled team of economists and other experts backed by the resources and reliability of one of the world's largest economic consultancies. With its main office in New York City, NERA serves clients from over 20 offices across North America, Europe, and Asia Pacific.

NERA's employment and labor experts advise clients on a wide range of issues both inside and outside the courtroom. We have provided expert testimony on statistical issues both at the class certification phase (on issues of commonality and typicality) and at the liability phase (for class or pattern-and-practice cases). Our experts have extensive experience examining issues of statistical liability in discrimination and other wrongful termination claims. We also provide detailed statistical analyses of workforce composition to identify potential disparities in hiring, layoffs, promotions, pay, and performance assessments and have conducted studies on labor union issues and on affirmative action programs for historically disadvantaged business enterprises.

NERA Vice President Dr. Jon Wainwright led the NERA project team for this Study. Dr. Wainwright heads NERA's disparity study practice and is a nationally recognized expert on business discrimination and affirmative action. He has authored books, papers, and numerous research studies on the subject, and has been repeatedly qualified to testify on these and other issues as an expert in state and federal courts. At NERA, Dr. Wainwright directs and conducts economic and statistical studies of discrimination for attorneys, corporations, governments, and non-profit organizations. He also directs and conducts research and provides clients with advice on adverse impact and economic damage matters arising from their hiring, performance assessment, compensation, promotion, termination, or contracting activities.

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About the Project Team—NERA Research Partners

Colette Holt & Associates is a Chicago-based law practice specializing in public sector affirmative action programs. The firm provides legal and consulting services to governments and businesses relating to procurement and contracting; employment discrimination; regulatory compliance; organizational change; program development, evaluation and implementation; and issues relating to inclusion, diversity and affirmative action. Colette Holt, J.D. is a nationally recognized expert in designing and implementing legally defensible affirmative action programs and is a frequent author and media commentator in this area. On this Study, Colette Holt served as legal counsel for NERA, providing advice and recommendations for the study's design and implementation, conducting interviews with business owners and state procurement officials, and drafting key study findings, among other duties.

Abt SRBI is a New York-based business with a national reputation for excellence in computer assisted telephone interviewing. Abt SRBI provides analysis in the rapidly evolving markets and public policy areas of communications, financial services, utilities, transportation, media, health and business services. The firm was founded in 1981 with the explicit purpose of combining high quality analytic capabilities with in-house control of the research implementation to ensure accurate, timely and actionable research use by decision makers working in rapidly changing environments. Abt SRBI clients include the Eagleton Institute at Rutgers, the Annenberg Institute at the University of Pennsylvania, and the major networks. Abt SRBI has conducted numerous surveys of M/WBEs and non-M/WBEs on behalf of the NERA team. On this Study, Abt SRBI conducted telephone surveys of race and gender misclassification and of mail survey non-response under the supervision of Abt SRBI Project Manager Andrew Evans.

J&D Data Services is a small business enterprise owned by Mr. Joe Deegan and based in Plano, Texas. After a long career with ScanTron, Mr. Deegan started his own business to offer a solid and proven alternative to the time consuming and expensive job of key data entry long associated with mail surveys. The firm helps its clients conserve their surveying resources by designing and delivering survey instruments that can be electronically and automatically scanned upon return and sent directly to electronic format. J&D Data Services has conducted numerous surveys of M/WBEs and non-M/WBEs on behalf of the NERA team. On this assignment they provided printing, postage, mail-out and mail-back service for the subcontract data collection, the mail survey, and the business owner interview invitations.

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About the Project Team—NERA Research Partners

RMBDC, Inc. is a small business with offices in Rochester and Albany. The firm's primary focus is the design and implementation of programs and services that provide meaningful economic participation for enterprises owned by minorities and women in public and private sectors. RMBDC is certified as a M/WBE and DBE with New York State and the NYS Dormitory Authority and is also a certified SBA 8(a) business. Previous clients include the City of Rochester, Dormitory Authority of the State of New York, and the New York State Department of Transportation. On this assignment RMBDC provided outreach and support to populate the business owner interview sessions in Albany, Rochester, and Buffalo.

Spectrum Personal Communications Corp. is a small business founded in 1994 as a diversified business consulting firm and is located in New York City. The firm is a certified MBE with the State of New York, New York City, New York City School Construction Authority, the Port Authority of NY and NJ, and the Metropolitan Transit Authority. CEO Mark O'Luck has over 20 years experience as a consultant to major corporations and governments. Mr. O'Luck is a graduate of Norfolk University and holds an Honorary Doctor of Law degree from St. Joseph's College. Spectrum offers its clients advisory, development, implementation and support services on a wide array of business topics including Local/Small/Disadvantaged/Minority/Women-Owned business consulting services. On this assignment, Spectrum provided outreach and support to populate the business owner interview sessions in New York City, Long Island, and Westchester.

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The opinions expressed in this report are valid only for the purpose stated herein and as of the date of this report. No obligation is assumed to revise this report to reflect changes, events or conditions, which occur subsequent to the date hereof.

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Recommendations for a Revised Minority- and Women-Owned Business Enterprise Program

As detailed in this Report, we conducted a thorough examination of the evidence regarding the experiences of minority- and women-owned firms in the State of New York's geographic and procurement marketplaces. As required by strict scrutiny, we have analyzed evidence of such firms' utilization by NYS on its prime contracts and subcontracts, as well as M/WBEs' experiences in obtaining contracts in the public and private sectors. We gathered statistical and anecdotal data to provide New York with the evidence necessary to consider whether it has a compelling interest in remedying identified discrimination in its marketplace. We have further presented evidence relevant to the narrow tailoring of race- and gender-based remedies. Based upon our results, we make the following recommendations.

A. Race- and Gender-Neutral Initiatives

1. Increase Vendor Communication and Outreach

An overarching theme of the comments from M/WBEs and non-certified firms alike was the need for increased communication and outreach. Owners of all types of firms reported difficulties in accessing information about particular solicitations, as well as State contracting policies and procedures. Transparency and access to information must become critical objectives of the M/WBE Program.

Concrete suggestions included:

- Conducting regular vendor fairs, to introduce M/WBEs and other small firms to agency buyers, end users and prime vendors. It is critical that such sessions include agency personnel with actual contracting authority. Agencies should be required to host at a minimum semi-annual meetings to provide information on upcoming opportunities and introduce prime vendors to M/WBEs. The fairs should be publicized on the agency's and the M/WBE Program's site, as well as through e mails to certified firms.
- Conducting doing business seminars for newly certified firms to enhance the utility of becoming certified.
- Creating a firm profile for certified firms that provides accurate NAICS codes and describes the firm's history, key personnel and core work areas. This would also address the limitation of the NAICS codes, which, although industry specific, often do not capture the detail needed for agency buyers and prime vendors to conduct effective outreach to M/WBEs.
- Making greater use of the internet to facilitate access to information and building relationships between M/WBEs and potential partners, as well as NYS buyers.

Recommendations included:

- Posting the list of contracting officials for each agency on the website.

Recommendations for a Revised Minority- and Women-Owned Business Enterprise Program

- Providing links from the Program website to agencies' bid notices lists of pre-qualified firms.
- Posting attendance lists from pre-bid and pre-proposal meetings.
- Posting information on awards on the agency's website, including utilization plans.
- Posting agency payments to prime contractors on the website.
- Mandating that buyers include certified firms in the solicitation lists for informal procurements to ensure that M/WBEs and other small firms have access to these opportunities. While the State has recently increased its efforts to utilize M/WBEs on small contracts, requiring outreach will solidify these efforts.
- Publicizing existing programs, such as the Capital Access Pilot Program, to increase participation. Very few business owners were aware of ongoing initiatives to provide support.
- Increasing outreach efforts to encourage businesses to apply for certification. The Master Directory created for this Study can serve as a useful source of potential applicants.

2. Increase Contract “Unbundling”

The size and complexity of the State's contracts is a major impediment to M/WBEs and other small firms in obtaining work as prime contractors. “Unbundling” contracts was endorsed by M/WBEs and non-minority prime contractors as one method to provide fair access to State projects. In conjunction with reduced insurance and bonding requirements, smaller contracts should permit firms to move from quoting solely as subcontractors to bidding as prime contractors. Unbundling must be conducted, however, within the constraints of the need to ensure efficiency and limit costs to taxpayers.

3. Review Surety Bonding and Insurance Requirements

The State should review surety bonding and insurance requirements to ensure that amounts are no greater than necessary to protect its interests. This might include reducing or eliminating insurance requirements on smaller contracts, adopting standard professional liability insurance limits, and removing the cost of the surety bonds from the calculation of lowest apparent bidder on appropriate solicitations. There was widespread agreement amongst M/WBEs, non-M/WBEs and State staff that more particularized requirements would greatly assist all firms. There was also support for owner controlled insurance programs on large construction projects, wherein the State would purchase an insurance policy that would provide umbrella coverage for all businesses working on that project.

4. Ensure Prompt Payments on New York’s Prime Contracts and Subcontracts

Firms of all sizes and composition complained about slow payment by the State. Subcontractors complained about slow payment by prime vendors. An electronic contract tracking system, whereby contractors and subcontractors could see where the prime contractor’s invoice is in the process, would be helpful. “Off the shelf” software programs are available to meet this need.

5. Adopt a New York Small Business Target Market Program

If permitted by state law, the State should consider adopting a New York Small Business Target Market for small, New York-based firms seeking work as prime contactors or consultants. Contracts subject to this market would be reserved for bidding solely by such firms. This approach will permit small firms to compete on a more level playing field with firms of comparable size, thereby somewhat equalizing some of the barriers faced by M/WBEs to obtaining bonding, financing, access to networks, etc., without resort to race- and gender-based preferences.

A size- and location-based setaside will not be subject to the constitutional strictures of *Croson*, since business size and location are not suspect classifications subject to Equal Protection analysis. All that is required is that the ordinance has a “rational basis” to pass judicial muster. Given the judicial prohibition on race-based contract setasides, this is a critical race- and gender-neutral tool to provide opportunities for M/WBEs and other small firms to compete for prime contracts. Providing preferences to small firms on a race- and gender-neutral basis will also reduce the State’s reliance on race- and gender-conscious subcontracting goals to meet the overall annual goals, as most M/WBEs are likely to qualify. This approach would further address the narrow tailoring requirement to reduce the burden on non-certified firms to the greatest feasible extent.

Program elements should include eligibility criteria for participation, including the size of the firm¹ and its location; the size of the contracts to be included; the type of work; the availability of at least five eligible businesses to perform the work of the contract, to create adequate competition; and the agency’s progress towards meeting the annual MBE and WBE goals. There might also be limits on the number of contracts a certified business could be awarded per designated time period.

To support SBEs’ success as prime vendors, New York should provide additional support with payment issues, increased mobilization payments to SBE prime contractors, and additional programs for access to capital.

¹ To define “small,” NYS could adopt the size standards of the U.S. Small Business Administration contained at 13 C.F.R. Part 121, until more targeted limitations can be developed.

Recommendations for a Revised Minority- and Women-Owned Business Enterprise Program

6. Adopt a Guaranteed Surety Bonding and Financing Program

A key component of a race- and gender-neutral initiative is a bonding and contract financing program for SBEs seeking work as prime contractors. These firms find it difficult to obtain bonding or financing, or cannot obtaining bonding or financing at reasonable rates.

The Division of Minority- and Women-Owned Business Enterprise has a pilot program that assists firms to access the SBA Guaranteed Bond Program, wherein the SBA guarantees 80% of the bond's coverage. However, the limitations of the SBA program need not constrain New York. In addition to that effort, a program that ensures that participants who successfully complete the diagnostic process will receive bonding is needed.

This approach has proven to be successful in other jurisdictions in increasing the capacity of small businesses to perform as prime contractors. Necessary participants would be a surety company, a lender, and an experienced construction business development specialist to evaluate each firm's capabilities, financials and other criteria relevant to obtaining bonding and financing. Firms that successfully complete the evaluation and development phase would be guaranteed to receive bonding and contract financing.

7. Implement the Mentor-Protégé Program Statute

The legislature recently amended Article 15-A to require every agency that made over \$10 million in awards the prior year to implement a Mentor-Protégé Program.

The mentor-protégé relationship should be based upon a State-approved written development plan, including criteria for graduation from the Program, which clearly sets forth the parties' objectives and roles, the duration of the arrangement and the services and resources to be provided by the mentor to the protégé. Generally, mentors provide the protégé with financial assistance, assistance with subcontracts, assistance in performing prime contracts, management assistance, and technical assistance. Protégés should be viable firms and in a business that either is similar to the mentor firm's or is a component of the mentor firm. Mentors would receive credit towards meeting M/WBE goals, and protégés would have greater access to contracts and increased opportunities to grow into prime contractors. Additional incentives, such as reimbursement for participation costs, would greatly increase the attractiveness of a Program to potential mentors. The mentor-protégé agreement may include a fee schedule to cover direct and indirect costs for the services rendered by the mentor to train the small business.

Finally, it is critical that race and sex data be collected on firms participating in the Program. This will facilitate the next study, which should include review of the effectiveness of the Mentor-Protégé Program in remedying disparities on a race- and gender-neutral basis.

8. Expand the Capital Access Pilot Program

Equal access to capital is central to equal opportunities to compete for State work. All the evidence considered for the Study supports the conclusion that minorities and women continue to face barriers to financing and growing their businesses in part because of race or gender. M/WBEs also want to participate as prime contractors.

Recommendations for a Revised Minority- and Women-Owned Business Enterprise Program

The Division operates a Capital Access Pilot Program, in collaboration with the New York Business Development Corporation, to provide capital in connection with a specific contract. Increased opportunities can be created by making available loans to M/WBEs and SBEs at favorable interest rates on lines of credit at participating State depository institutions, using their State contracts as collateral.

9. Improve Contracting and Procurement Data Collection and Retention Procedures

a. Prime Contracting and Purchasing Activity

Not all State contract records contained all the information necessary for more efficient and comprehensive monitoring of M/WBE activity. Examples include:

- Office of State Comptroller (OSC) payment data cannot readily be linked to contract award data. Ideally both award and payment data should be jointly available for future disparity analyses.
- OSC does not maintain phone numbers for vendors in its files;
- The relationship in OSC's data between contract start and end dates and various "audit" dates is complex and sometimes results in difficulties determining when a given contract truly started or ended. An effort should be made to make these relationships more transparent in the data.
- Data concerning change orders, contract renewals, and similar circumstances were not tracked completely or consistently and often could not be linked back to the original unique contract identification number.
- Occasionally data fields such as vendor ID were populated with dummy data, reflecting poor data entry. This situation could be improved through increased training and guidance for state contracting and purchasing personnel and by introducing additional controls into the financial and contract management information systems to encourage data entry personnel to provide all the requisite information for any given contract or purchase.

b. First-Tier Subcontractor, Subconsultant, and Supplier Activity

New York's ability to track subcontractor, subconsultant, and supplier activity is limited, not only for non-M/WBEs but also for M/WBEs. It is important to understand that non-M/WBE subcontracting records are equally as important as M/WBE subcontracting records for purposes of evaluating contracting affirmative action at the level of detail specified by *Croson* and *Adarand*. This is because narrow tailoring requires the allocation of contracting and procurement dollars by industry category and it has been demonstrated that expenditures with M/WBE subcontractors are likely to be distributed differently across industry categories than expenditures with non-M/WBE subcontractors.

Recommendations for a Revised Minority- and Women-Owned Business Enterprise Program

B. Continue and Revise Race- and Gender-Conscious Policies and Procedures

Based upon this Study, NYS has a firm basis in evidence to continue to implement its M/WBE Program. This record establishes that M/WBEs in the State's marketplace continue to experience statistically significant disparities in their access to private and public sector contracts and to those factors necessary for business success, leading to the inference that discrimination is a significant cause of those disparities. Further, individuals recounted their experiences with discriminatory barriers to their full and fair participation in the State's contracting activities. The Study provides the statistical and anecdotal evidence to answer in the affirmative the question whether there is strong qualitative evidence that establishes New York's compelling interest in remedying race and gender discrimination, because absent government remedial intervention, the State will be a passive participant in a discriminatory marketplace. There is ample evidence that New York can choose to affirmatively intervene to reduce racial and gender barriers to participation in its locally-funded contracting opportunities. We make the following suggestions for revising the current Program to more narrowly tailor its scope and operations

1. Increase Program Authority and Operational Resources

A legally defensible and administratively successful Program cannot be implemented without additional resources. The Division will require more staff to conduct outreach, certify applicants, set goals, review bids, monitor contractor performance and provide supportive services. Further, it is essential that other departments become responsible for meeting the Program objectives. It will be less successful if it is seen as "the M/WBE Program," rather than a Statewide initiative for which all agency and authority heads will be held responsible. Job descriptions should reflect this priority, with meeting Program objectives one evaluation criterion for raises and promotions.

Every agency should have, at a minimum, a person solely dedicated to outreach and compliance. These staff members should be trained in best practices for contracting affirmative action programs; there are national organizations that provide certification in contract compliance. Large agencies such as OGS, NYDOT, SUNY Construction, etc. will require more resources to do more.

It would be useful to create a M/WBE officers task force or forum. This group should meet regularly to share ideas and problems, as well as advocate for sufficient resources to effect the Program's mission. Collaboration and communication would also help to standardize procedures across agencies, the lack of which is a major barrier for prime contractors and subcontractors alike.

The State should further consider making the M/WBE Program a separate agency that directly reports to the Governor. Many M/WBEs commented on what they perceive to be a lack of authority for the Program, in part because it is not a function significant enough to be a stand-alone agency. While it makes sense to think of the Program as an economic development tool, the nature of deeply entrenched and systemic barriers based on race and gender suggests that full and fair access to State contracts is more than an economic development problem. Raising the profile of the Program and the authority of the office will send the strong signal that the State is serious about remedying discrimination. It further mirrors the best practices of successful

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programs, such as the U.S. Department of Transportation's Disadvantaged Business Enterprise Program, which require that the function report directly to the chief decision-maker.²

2. Adopt Narrowly Tailored Program Eligibility Standards

Article 15-A does not impose any graduation requirements on certified firms. Firms may be of any size and located anywhere, and there is no requirement that the owner be economically disadvantaged. We recommend that New York more narrowly tailor its Program by adopting a limitation on the size of the business; a requirement that it be located within the State's contracting marketplace; and a personal net worth test for the owner relied upon for Program eligibility. These types of restrictions have been critical to the judicial holdings that the DBE Program is constitutional and to opinions that programs that lack these features are not.

One approach would be to adopt the DBE Program's eligibility requirements that the firm must be owned, managed and controlled by socially disadvantaged individuals, which are members of the presumptive groups for which the Study found evidence of discrimination; the owner must be economically disadvantaged, as evidenced by a personal net worth under \$750,00, exclusive of equity in the principal residence and the firm seeking certification; and the business must be small, as defined by the Small Business Administration standards.³

Adopting the DBE Program's requirements provides two important benefits. First, it creates uniformity in certification requirements and processes with the New York Unified Certification Program,⁴ which lessens the burden on applicants and the State. Second, the eligibility standards of Part 26 have been unanimously upheld by the federal courts, so New York would be confident that its program is narrowly tailored to only benefit individuals who have clearly suffered social and economic disadvantage and whose firms are small.

Two exceptions should be considered. Part 26 provides that an applicant can be located anywhere; there is no location requirement for a federally funded contract. In contrast, case law suggests that a state government, unlike the national legislature, can only remedy discrimination in its contracting marketplace. While this does not mean New York's Program eligibility must be limited to only the boundaries of the jurisdiction, we have generally counseled clients to limit automatic geographic eligibility to firms located within the market area established by the Study. As developed in Chapter III, the State's geographic market is the State of New York plus the balance of the New York-Northern New Jersey-Long Island CMSA. However, while this reflects the location of the vast majority of firms that have done business with the State, there is no evidence to suggest that a disadvantaged firm seeking to do business with New York is somehow less likely to suffer the effects of discrimination in the market because its principal office or facility is outside the State's marketplace. If anything, the "old boys network" could be even more impenetrable to a minority or female "outsider." Therefore, New York could permit firms

² 49 C.F. R § 26.25.

³ 49 C.F.R. §§ 26.61-73.

⁴ 49 C.F.R. § 26.81.

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outside the marketplace to make an individual showing of efforts to do business in the New York marketplace (*e.g.*, contracts received, quotes provided, marketing efforts, etc.).

Next, the State should consider adopting the Small Business Administration size standards,⁵ but without the statutory size cap embodied in 49 CFR § 26.65(b). This will permit firms to grow, without deviating from the national standards.

However, it is important to consider that the DBE Program’s standards are national, and reflect Congress’ judgment about how best to create a uniform approach. It may well be that these criteria are too low for New York. A multiple of the DBE criteria could be used, *e.g.*, 200 percent of the size standard and /or personal net worth limit. What is important is that some size, location and wealth limits be placed on Program eligibility and that these are rational and fact-based.

3. Adopt Overall, Annual M/WBE Agency Goals

The Study’s estimates of the availability of M/WBEs in the State’s marketplace are provided in Chapter IV. These form the starting point for consideration of setting overall, annual targets for each agency and authority’s spending with M/WBEs. However, this snapshot of firms doing business in the State’s geographic and procurement marketplace does not *per se* set the level of M/WBE utilization to which New York should aspire. As discussed in Chapter V, current M/WBE availability is depressed by the effects of discrimination. A case can be made for setting a goal that reflects a discrimination-free marketplace rather than the results of a discrimination infected marketplace.⁶ Using the disparities in the business formation of M/WBEs compared to non-M/WBEs can provide a quantitative basis for such a determination.

The Study provides current, detailed estimates of the availability of M/WBEs in the State’s geographic and procurement marketplaces for construction, CRS, services, and commodities. These estimates can form the bases for setting agency -wide and contract-specific goals for MBE and WBE utilization. These results are contained in Table 4.17, reproduced below:

Table 4.17. Estimated Availability—Overall and By Procurement Category

Detailed Industry	African-American	Hispanic	Asian	Native American	MBE	Non-minority Female	M/WBE	Non-M/WBE
CONSTRUCTION	4.00	6.94	3.18	0.21	14.33	8.41	22.74	77.26
CRS	3.19	4.66	4.46	0.90	13.21	11.32	24.53	75.47
SERVICES	3.50	4.19	11.56	0.35	19.60	17.44	37.04	62.96
COMMODITIES	3.66	4.64	7.45	0.37	16.12	10.93	27.05	72.95

⁵ 13 CFR Part 121.

⁶ See, *e.g.*, 49 CFR §26.45(d) (DBE goal must reflect the recipient’s “determination of the level of DBE participation you would expect absent the effects of discrimination”).

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Detailed Industry	African-American	Hispanic	Asian	Native American	MBE	Non-minority Female	M/WBE	Non-M/WBE
TOTAL	3.71	5.41	7.08	0.33	16.53	12.39	28.92	71.08

Source: See Table 4.1.

Agencies should annually review their progress towards the annual M/WBE goals. The State should further determine whether race- and gender-conscious remedies continue to be necessary to meet the previously established goals, or whether subcontracting goals should no longer be set for some types of contracts. However, there is no legal requirement to set new goals every year; indeed, there will not be new availability data until the next disparity study, and the Census Bureau conducts the *Survey of Business Owners* only every five years. Thus, the annual goals adopted based upon the current evidence should continue until full and accurate data are analyzed in a future study.

4. Set Contract Specific Goals

This Study’s detailed industry and group availability estimates provide an objective starting point for contract goal setting. A contract goal should reflect the availability of firms to perform the anticipated scopes of the contract, weighted by the extent those scopes represent of the total contract price.

We also recommend that the minimum number of available M/WBEs be at least five to set a contract goal. This will ensure that there is adequate competition within those industry sectors and reduce the burden on non-certified firms—a key component of narrow tailoring.

We recommend that the State allow M/WBEs to count their own participation towards the contract goal. This permits the firms to grow and enhance their capabilities. It also mirrors the practice in the USDOT DBE program.⁷

New York should bid some contracts it determines have significant opportunities for M/WBE participation without goals. These “control contracts” will illuminate whether M/WBEs are used or even solicited in the absence of goals. Such unremediated markets data will be probative of whether the State still needs to implement M/WBE contract goals to level the playing field for its contracts.

Business owners and staff noted the broad reach of Article 15-A and strongly supported expanding contract goals to all contracts with significant subcontracting opportunities. This includes centralized State contracts administered by OGS, as well as Preferred Source contracts to the extent that those providers subcontract work to for-profit entities or purchase materials or supplies from for-profit companies. Also, grants to not-for-profit agencies above a certain threshold should be reviewed for subcontracting opportunities with for-profit companies on which goals can be established.

⁷ 49 C.F.R. § 26.55(a).

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5. Review Policies and Procedures for Good Faith Efforts Reviews and Waivers of Contract Goals

The courts have categorically held that narrow tailoring requires that waivers of goals be available to a bidder that made good faith efforts. A bidder that made good faith efforts must also be treated the same as one that met the goals. To do otherwise- that is, to favor utilization above good faith efforts- will undoubtedly be held to be an impermissible race- and gender-based quota. That so few waivers were granted by the City of Chicago was a major cause of its M/WBE Program's constitutional infirmity. Uniform standards for demonstrating good faith efforts must be adopted, so that bidders and State staff have clear guidelines about when good faith efforts have been met. Participants from all groups expressed strong concerns that lack of standardization created confusion, errors and resentments.

We recommend the outlines of the good faith efforts provisions of Part 26 CFR §26.53 as a guide for standardizing and implementing good faith efforts reviews for all agencies and authorities. Additional elements should include documenting good faith efforts to meet goals; the minimum time for subcontractors to submit quotes or proposals; the time for submission and the content of utilization plans; and the requirement that listed subcontractors, subconsultants and suppliers sign the utilization plan that describes their quote or scope of work and, if applicable, price.

The good faith efforts policy and the waiver procedure should be widely disseminated, as many interviewees had no information on how to obtain waivers and doubted that waivers would be granted, regardless of the merits. Training should be provided to State personnel and prime contractors on how to complete compliance forms.

6. Increase Monitoring of Contract Performance

Once a contract with M/WBE commitments has been awarded, it is crucial that those commitments be monitored and that sanctions for non-conformance with the contract be available. Contract closeout is very late in the process to determine that a prime contractor has failed to utilize M/WBEs or that firms have not been paid. As previously discussed, the implementation of a comprehensive data tracking and monitoring system is a necessary element of a successful Program, as well as prompt payment and prohibitions on unauthorized substitutions of subcontractors. It is also obviously preferable to correct problems rather than sanction firms after the fact. In addition, the standards and processes for substituting subcontractors should be clarified and documented. Training to all parties to the process should be provided. Finally, where contractors have breached their agreements or otherwise violated Program rules, the State should consider the imposition of liquidated damages and debarment.

7. Develop Performance Measures for Program Success

While recognizing the systemic barriers faced by minorities and women in competing for New York contracts and subcontracts on a full and fair basis, developing quantitative performance measures for certified firms and overall Program success would provide measures for evaluating the Program. Possible benchmarks are the achievement of business development plans similar to those used in the Small Business Administration's 8(a) Program; revenue targets for certified firms; increased prime contracting by M/WBEs; and graduation rates. It will be important to

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track the progress of graduated firms to evaluate whether they succeed without the Program, and if not, why not. Further, data should be kept on requests for waivers of goals, to determine the accuracy of goal setting and areas for additional M/WBE outreach.

8. Review Guidelines and Procedures for Program Violations

Contract terms and conditions should be reviewed to ensure that the State has the maximum legal ability to enforce the Program's provisions and the contractual commitments of contractors.

9. Mandate Program Review and Sunset

To meet the requirements of strict constitutional scrutiny, New York should require that the evidentiary basis for the Program be reviewed at least every five years, and that only if there is strong evidence of discrimination should it be reauthorized. The Program's goals and operations must also be evaluated to ensure that they remain narrowly tailored to current evidence. A sunset date for the Program, when it will end unless reauthorized, is required to meet the constitutional requirement of narrow tailoring that race-conscious measures be used only when necessary.

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