



DISPARITY STUDY – PHASE 1

STUDY BRIEFING

September 18, 2013

What is a Disparity Study?

- **A disparity study refers to an analysis of whether a disparity, or a difference, exists between the number of specified companies or groups that are available to participate in certain opportunities, and those that are actually utilized in those areas**
- **A disparity study helps to determine whether the environment is fair and equitable to all parties involved**

Objectives of a Disparity Study

- **Provide a litigation defense**
 - ✓ Studies aren't challenged; programs are challenged

- **Meet regulatory & administrative requirements**
 - ✓ Set overall, annual D/M/WBE goal
 - ✓ Develop D/M/WBE contract goals

- **Make administrative improvements**
 - ✓ Obtain confidential customer feedback
 - ✓ Create a focus on data collection & monitoring
 - ✓ Recommend initiatives to reduce barriers

Study Committee

Myron Genel, MD (*Academy Member*), Professor Emeritus Pediatrics and Senior Research Scientist, Yale School of Medicine

Shantè Hanks, Director of Constituent Services, Office of Congressman Jim Himes

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Study Research Team

➤ Connecticut Economic Resource Center, Inc.

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- **Peter Cable**, Principal Scientist, Applied Physical Sciences Corporation
- **Gale Hoffnagle**, Senior Vice President & Technical Director, Air Quality Practice, TRC Environmental Corporation

Study Background

This study was conducted on behalf of the General Assembly in accordance with the legislation authorizing the study

Committee of Cognizance

- ✓ **Government Administration and Elections**

This study was conducted in consultation with:

- ✓ **Commission on Human Rights and Opportunities**
- ✓ **Department of Administrative Services**
- ✓ **Other State Agencies/Branches of State Government**
- ✓ ***Co-Chairs, Appropriations Committee***

Study Background (*continued*)

- **Other Agencies/Branches of State Government “in consultation with”:**
 - ConnDOT
 - Judicial Branch
 - Legislative Branch: Office of Legislative Management
 - Public Universities: Board of Regents (Connecticut State Colleges/Universities) and the University of Connecticut
- **Others aware of and kept informed of study progress (*‘contacts’*):**
 - Black and Puerto Rican Caucus of the General Assembly
 - Legislative Commissioners’ Office
 - Office of the Comptroller
 - Office of the Secretary of State
 - Commissions: African-American Affairs Commission, Asian Pacific American Affairs Commission, Latino and Puerto Rican Affairs Commission, and Permanent Commission on the Status of Women

Study Background (*continued*)

Purpose of this study:

In accordance with legislation adopted in the 2012 legislative session, Public Act 12-1 and Public Act 12-104, conduct a Disparity Study of the state's Small and Minority Business Enterprise Set-Aside Program ("Set-Aside Program")

- ✓ Public Act 12-1 provides for the study's scope of work
- ✓ Public Act 12-104 provides for project funding

Study Approach

- **A legal review of *Croson* (*City of Richmond v. J.A. Croson Co.*; 1989) and subsequent case law and legal standards**
 - **A review of legislation regarding the Set-Aside Program**
 - **An assessment of the Set-Aside Program as related to case law and legal standards**
 - **A review of existing policies and procedures related to the Set-Aside Program**

Study Approach (*continued*)

- **Introduction to supplier diversity data management systems for use in managing minority business enterprise (MBE) programs by interviewing contacts in other states that implemented data management systems to track MBE spending**
 - **Two supplier diversity data management system vendors were interviewed to gain an understanding of the functionality of these types of programs and for conducting the analysis of the state's disparity study**

Study Approach (*continued*)

- **Qualitative information from DAS certified and non-certified companies concerning experiences doing business or attempting to do business in the relevant marketplace, including experiences of institutionalized discrimination and/or individual disparate treatment**
- **Surveys, interviews, and focus group sessions with members of business chambers, DAS-certified companies, non-certified contractors, state agencies, and other stakeholders**
- **Participation at small and minority business enterprise forums to gather additional information**
- **Guest speaker and forum presentations to the CASE Study Committee**

Study Report – Table of Contents

- ✓ Executive Summary
- ✓ Introduction and Methodology
- ✓ Legal Review
- ✓ Legislative History
- ✓ Process Review
- ✓ Analysis of State Agency Budgets for Set-Aside Goals
- ✓ Programs for Small/Minority/Women/Disabled Business Enterprises
- ✓ Analysis of Survey of DAS-Certified Companies
- ✓ Summary of Focus Group Proceedings
- ✓ Summary of Agency Surveys
- ✓ Findings
- ✓ Recommendations
- ✓ Timeline for Selected Recommendations
- ✓ Concluding Remarks

Study Report – Table of Contents (*continued*)

✓ Appendices

- **Appendix A: “The New Connecticut: Toward Equal Opportunity in State Contracting,” August 1992**
- **Appendix B: “Fact-finding Hearings Report on Equal Opportunity and Economic Development in the State of Connecticut”**
- **Appendix C: Survey of DAS-Certified Companies**
- **Appendix D: Surveys of Agencies**
- **Appendix E: Data Sources and Methods for Disparity Studies**
- **Appendix F: Anecdotal Comments from the Focus Groups Sessions**
- **Appendix G: Comparison of States’ Certification Requirements**
- **Appendix H: Defining a “Small Business” in Connecticut**
- **Appendix I: Study Committee Meetings and Guest Speakers**

SAMPLE GUEST SPEAKER PRESENTATIONS

- Transportation Research Board of the National Academy of Sciences, National Model Disparity Study Project
Colette Holt, Attorney at Law, Holt & Associates
- Maureen Berner, Professor of Public Administration and Government, School of Government, University of North Carolina
- New York State: Disparity Study - Data Management System, RFP, and Implementation

Brief Statement of Primary Conclusion (1 of 3)

The purpose of a minority business enterprise program should be to eliminate discrimination in state contracting in the market area

Although Connecticut's current program was intended to achieve this objective, it was not designed as a *narrowly tailored* program and does not meet the *strict scrutiny* judicial standard for justifying a race-based program

Brief Statement of Primary Conclusion (2 of 3)

To meet this standard:

- Contracting goals established for the program need to be related to a current assessment of whether there are disparities in state contracting in the market area among different groups
- The state must show, through inference by utilizing econometric modeling, that discrimination is present in state contracting in the market area to justify a program
- The program must be *narrowly tailored* to eliminate the persistence of discrimination by:
 - ✓ Specifically identifying which groups are experiencing discrimination
 - ✓ Ensuring program flexibility to achieve program goals
 - ✓ Separating the MBE program from the SBE program
- Connecticut must collect data on contractors by acquiring and implementing a diversity data management system. Detailed contracting information including certified subcontractors that are utilized to meet program goals must be available for econometric analysis to establish, monitor, and modify program goals on an ongoing basis

Brief Statement of Primary Conclusion (3 of 3)

- Also, MBE and WBE companies located outside of Connecticut that are *ready, able, and willing* to provide services to the state need to have the opportunity to apply for certification

These actions will set in place a program structure that will meet the requirements for having a legally defensible program

- It is suggested that this program be titled the Connecticut MBE/WBE Opportunities Program

Findings: Legal Review (1 of 2)

- **In order for a race and gender-based program to be effective, enforceable, and legally defensible it must meet the judicial test of ‘strict scrutiny’: the government must have a ‘compelling interest’ to create a program and the program must be ‘narrowly tailored’**
- **For a program to be ‘narrowly tailored’ it must have the following components**
 - **Overall goal must be based on ready, willing, and able firms**
 - **Goal must be adjusted to account for the effects of discrimination**
 - **Maximum feasible goal portion must be met with race-neutral measures**
 - **Use of quotas is not permitted**
 - **Recipient is not penalized for not meeting goal if using good faith efforts**
 - **Firms that exceed certain revenue sizes cannot qualify for the program**
 - **Program must be evaluated periodically to determine continuing need**

Findings: Legal Review (2 of 2)

- **Connecticut's Set-Aside Program is not 'narrowly tailored.'**
 - It is not based on 'ready, willing, and able' firms
 - The program appears to have been set arbitrarily without a statistical determination of whether there is a disparity or discrimination in the state contracting market
 - It is constructed as a 'rigid' quota system
 - Connecticut does not have a specific standard for determining a 'good faith effort'
 - Asian American, Black American, Indian American, Pacific American, Iberian Peninsula and women are all in the same 'minority business' category

Recommendations: Legal Review (1 of 2)

- **Connecticut's statute must be changed by the following:**
- **On an interim basis, until completion of the disparity study, adopt legislation to separate the state's SBE Set-Aside Program from the MBE Program. The SBE Program is not based on race or gender, therefore it is not held to strict scrutiny or intermediate scrutiny review. Thus, the programs should not be intertwined.**
 - **Assess what geographies fall under Connecticut's state agency contracting market. Once the geography is identified, identify all ready, willing, and able firms in this market.**
 - **Until completion of the disparity study's econometric analysis, set the current statutory goal, 25% of the 25% of the SBE program contracting dollars (6.25% of total eligible contracting dollars), as the MBE program interim goal**
 - **Institute a goal-based MBE program that allows for flexibility by encouraging, rather than requiring, contractors to use MBEs, and providing waivers to contractors who are unable to meet the goals but can substantiate good faith efforts**

Recommendations: Legal Review (2 of 2)

- **The following recommendations set additional standards for a narrowly tailored race-based program that do not have to be revised in statute:**
 - **If a dispute arises about whether a good faith effort was made by a party, the party should have the option of appealing to a committee that can hear the dispute and decide a reasonable outcome**
 - **Establish business size limits that are representative of industry trends, so that the program applies for MBEs that also have some aspect of disadvantage (such as being small), while having distinct limits for different sub-industries**
 - **State agencies should consider reaching as many of their established goals as possible through race-neutral means**
 - **The MBE/WBE Opportunities Program must be subject to periodic evaluation to determine if there is a continuing need for the program. Program leadership must continually evaluate whether race-conscious measures on state contracts are contributing to eliminating discrimination in the market**

Findings: Data Collection

- **Data elements must be systematically collected and available in order to conduct a valid disparity study:**
 - Subcontractors and payment data to subcontractors
 - Recording of P-card purchases
 - Accounting methods (cash versus accrual)
- **A legally defensible disparity study that identifies a need for an MBE program requires statistical evidence that there is discrimination occurring in the marketplace**
 - The disparity study could use a variety of datasets to statistically evaluate the extent, if any, of discrimination in the Connecticut marketplace and provide the justification for MBE/WBE goals
- **The establishment of MBE and WBE goals requires an estimate of the current availability and capacity of businesses owned by a discriminated party, or parties, within the marketplace**

Recommendations: Data Collection

- **Collect actual payments to subcontractors for all contracts**
- **Acquire access to and implement the use of a statewide diversity data management system – include subcontractor information, bidders and award winners, and P-card purchases**
- **Anecdotal evidence should be gathered not only from minority groups, but all stakeholders in the contracting process**
- **Calculate availability of small and minority businesses for each industry**
- **Rather than having the agencies utilize a process of budget exclusions to determine goals — consider setting goals according to the number of certified firms and industry sector availability**
- **Examine the capacity of firms by**
 1. **Finding a measure of capacity that is appropriate, if any; and**
 2. **Conducting a separate analysis of what variables affect the capacity of a firm**

If researchers find that discrimination impacts capacity, then it should not be controlled for in the econometric model

Findings: Certification Processes

- **The level of paperwork to become certified and to bid on a state contract is perceived to be cumbersome**
- **The expectation of results once a company is certified is confusing for some companies**
- **The revenue cap for eligibility as a certified SBE/MBE has the impact of limiting these businesses from growing, while still remaining eligible for the program**
- **The quality of the state's contractor certification list is frequently questioned, which makes it difficult for prime contractors and agencies to find legitimate SBE/MBEs with whom to partner and build relationships**

Recommendations: Certification Process

- **Adopt either:**
 1. A uniform certification process using federal DBE requirements; or
 2. A portal where companies apply for multiple certifications
- **Develop a single online database of companies with all certifications listed (SBE, MBE, WBE, DisBE, DBE, prequalified, municipal, etc.) so agencies do not have to search multiple lists to check for appropriate qualifications**
- **Once a company receives a certification, the company should be made aware of business resources that are available, suggestions about how to receive notices regarding state bids and RFPs, and other proactive measures to expand networks and gain related experience**
- **Remove the Connecticut location requirement for MBE program certification, and Connecticut should consider developing reciprocity agreements with other states for MBE program certification**
- **Increase the number of unannounced on-site company visits conducted by DAS to ensure compliance with state certification requirements**

Findings: Agency Processes

- **Specific contracts that have a set-aside component are decided by the individual procurement managers**
- **There is sometimes confusion among contractors regarding what constitutes a good faith effort**
- **Funding that is passed through to municipalities is statutorily exempt from the Set-Aside Program. Only three cities (Bridgeport, New Haven, and Hartford) voluntarily participate.**
- **Agencies are required to submit all reports to DAS, while CHRO administers the affirmative action plans of companies. DAS and CHRO often hold separate workshops for state agencies or companies to inform audiences about conducting business with the state.**
- **DAS does not verify company compliance with program requirements once they become SBE/MBE certified because they do not have the staff to do so. CHRO does not have the staff necessary to effectively monitor and enforce compliance with SBE/MBE program requirements among state agencies and companies and has limited ability to take action against repeat offenders.**

Recommendations: Agency Process

- **Create a working group of agency leaders and program implementers, representing all branches of government and financial systems**
- **Conduct joint (DAS and CHRO) workshops for agencies about the goal setting procedures, and conduct workshops for companies about what is needed to effectively work on state contracts**
- **Monitor agency budget exclusions to make sure they are reasonable and consistent**
- **Actively review MBE/WBE utilization plans to make sure that good faith efforts are utilized and conduct an analysis of the results of such efforts**
- **Utilize the statutory authority that awarding agencies have to fine or deny companies that misrepresent information provided on SBE and MBE certification applications (in some instances legal action may also be necessary)**
- **If a certified MBE/WBE receives a contract, and subcontracts a portion of that contract to a non-certified business, then only the portion of that contract counted toward the MBE/WBE goal is the work performed by the MBE/WBE. The subcontract to the non-certified business cannot be counted towards the goal**

Findings: Barriers to Small & Minority Companies

- **Access to capital and bonding, recordkeeping, strategic planning, and marketing are consistently seen as challenges to small businesses**
- **Receiving prompt payment from a prime contractor is often seen as a difficulty for subcontractors**
- **The process of getting certified is seen as cumbersome, and the processes of submitting a bid or quoting a price as a subcontractor for a prime contractor are seen as time-consuming and complicated**
- **Companies that are successful at state contracting are not always able to diversify their income sources, and rely exclusively on the set-aside program as a source of income; they often fail when they “outgrow” the program**

Recommendations: Support for Small & Minority Companies

- **Implement race-neutral measures to assist all small businesses with issues that have been identified as obstacles for participation in state contracting**
- **Educate businesses about the resources and support services that are already available as part of a company's certification**
- **Reduce paperwork needed to fulfill state contracting requirements**
- **Reduce the complexity of the contracting process by providing boilerplate common terms and conditions for bids**
- **Articulate the importance of the goal in the RFP criteria (versus price and other factors), and add a level of transparency to the bid and contract awarding process**

Phased Work Scope to Allow for Data Collection

- **Phase 1: Review and analysis of Connecticut's Set-Aside and Minority Business Enterprise Program; Legal Issues, and Stakeholder Anecdotal Information/Analysis - COMPLETED**
- **Phase 2: Diversity Data Management System Specification and Review of Agency Procedures and Practices Related to System Implementation, Best Practices Review and Analysis, and Establishing MBE/WBE Program Requirements – FY14 (In-Process)**
- **Phase 3: Diversity Data Management System Testing, Econometric Model Acquisition and Testing, Legal Issues Update, Agency Progress and Race-Neutral Measures Implementation Review, MBE/WBE Company Survey (Tentative: FY15)**
- **Phase 4: Data Analysis and Goal Setting, Anecdotal Information/Analysis, and Final Project Report (Tentative: FY16, FY17, FY18)**

Concluding Remarks

- **The purpose of a legislatively mandated MBE program is to correct for current discrimination. It is a remedy used after race-neutral measures are implemented and discrimination still exists.**
- **Offering race-neutral measures of business support services is a way to initially provide business with opportunities. Streamlining agency and certification processes are useful because they make the program more efficient and enhance the state's contracting processes, encouraging more companies to participate.**
- **Collecting comprehensive data about contracts and all payments made to all contractors, whether prime or sub, is an essential precursor to conducting the statistical disparity analysis.**
- **Based on the statistical analysis results, if discrimination exists, then a legislatively mandated MBE program can be implemented that includes all of the legal requirements as set forth in case law.**

Thank You

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