

CONNECTICUT DISPARITY STUDY: PHASE I

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This study was initiated at the request of the Connecticut General Assembly on September 19, 2012. The project was conducted by an Academy Study Committee with the support of staff of the Connecticut Economic Resource Center, Inc. serving as the study management team with assistance from Evolution Enterprises, LLC. The content of this report lies within the province of the Academy's Economic Development, Education and Human Resources, and Technology Technical Boards. The report has been reviewed by Academy Members Peter G. Cable, PhD, and Gale F. Hoffnagle. Martha Sherman, the Academy's Managing Editor, edited the report. The report is hereby released with the approval of the Academy Council

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PHASE I**

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EXECUTIVE SUMMARY

STUDY PURPOSE

At the request of the Connecticut General Assembly, the Connecticut Academy of Science and Engineering (CASE), in accordance with legislation adopted in the 2012 legislative session, Public Act 12-1 and Public Act 12-104, shall conduct a disparity study of the state's Small and Minority Business Enterprise Set-Aside Program ("Set-Aside Program"). Public Act 12-1 provides an overview of the scope of work to be included in the study, and Public Act 12-104 provides for the funding of the project

Public Act 12-1, Section 110 stated that *"The study shall provide an analysis of existing statistical data concerning the state's current set-aside program, established under section 4a-60g of the general statutes, to determine whether its current form achieves the goal of facilitating the participation in state contracts of small contractors and minority business enterprises."*

STUDY PHASING

Findings from the study's initial research and analysis of Connecticut's current Set-Aside Program identified that:

- The state's executive branch agencies and the other branches of state government that are responsible for awarding state contracts and overseeing the Set-Aside Program do not uniformly collect subcontractor contracting data, including payment information.
- A review of the legal issues and case law, including presentations to the CASE Study Committee by experts on matters of race-based and gender-based programs, identified that subcontractor data and financial information is a critical component of conducting a valid disparity study. Additionally, it was noted that unless quality data are collected and available for analysis, the results of the disparity study could be challenged in court, which would negate the purpose of conducting the study.

Therefore, it is recommended that the disparity study be divided into four distinct phases:

- Phase 1: Connecticut's Set-Aside Program Review and Analysis, Legal Issues, and Stakeholder Anecdotal Information/Analysis
- 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
- Phase 3: Diversity Data Management System Testing, Econometric Model Acquisition and Testing, Legal Issues Update, Agency Progress and Race-Neutral Measures Implementation Review, and MBE/WBE Company Survey.
- Phase 4: Data Analysis and Goal Setting, Anecdotal Information/Analysis, and Final Project Report

This report is the final report for Phase 1 of the disparity study, including findings and recommendations that provide a foundation the remainder of the disparity study outlined in the stated phases.

METHODOLOGY

The following quantitative and qualitative methods were utilized to determine key findings and study recommendations:

- A legal review discussing *Croson (City of Richmond v. J.A. Croson Co.; 1989)* and subsequent case law and legal standards.
- A review of legislation regarding Connecticut's Set-Aside Program.
- An assessment of Connecticut's Set-Aside Program as related to case law and legal standards.
- A review of existing policies and procedures related to Connecticut's Set-Aside Program by interviewing key state agency personnel who are involved in set-aside goal setting for contracts, and procurement and contracting processes. In addition, a review of public hearings and prior reports was conducted.
- An introduction to supplier diversity data management systems for use in managing MBE programs by interviewing contacts in other states that implemented data management systems in order to track MBE spending. Additionally, for background purposes two supplier diversity data management system vendors were interviewed to gain an understanding of the functionality of these types of programs for use in managing the state's MBE program and for use in conducting the analysis aspect of the state's disparity study.
- A summary of qualitative evidence from the Connecticut Department of Administrative Services (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. This anecdotal evidence was gathered through: online surveys of state agency contacts involved in Set-Aside Program goal setting and procurement processes; online surveys of business chambers that offer small or minority business enterprise programs or that have information from member businesses about the marketplace; online survey of DAS-certified companies; interviews of various stakeholders, such as business leaders; participation at small and minority business enterprise forums to gather additional information; and a series of focus groups conducted throughout the state to gather additional input.

BRIEF STATEMENT OF PRIMARY CONCLUSION

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. 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, by ensuring program flexibility to achieve program goals, and 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.

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.

SUMMARY OF FINDINGS

The themes of the findings revolve around legal issues, data collection, process enhancements, and business support. The key findings clarify the objectives of the state's Set-Aside Program with the recommendations then suggesting how these objectives can best be met.

Legal Review

- With the review of several legal cases that specifically addressed minority- and women-based programs it is evident that Connecticut's Set-Aside Program statute, C.G.S. §4a-60g, will not be upheld in the Second Circuit Court or any court of law, if challenged. Connecticut's statute does not meet the *strict scrutiny* standard of review used for evaluating race-based programs in the courts, as set forth by the US Supreme Court in *City of Richmond v. J.A. Croson (1989)*. Although Connecticut may be able to prove that it possesses a *compelling interest*, the first prong of *strict scrutiny*, in establishing and continuing its Set-Aside Program, it will not be able to prove that the program is *narrowly tailored*.
- Connecticut's Set-Aside Program is limited to MBEs located in Connecticut, yet the market for contracting services often extends beyond state borders. MBE program eligibility needs to be based on availability of companies located within the market area for contracting services that are *ready, able, and willing* to provide such services. Therefore, *ready, able, and willing* firms outside of Connecticut, need to be eligible for certification as MBE/WBEs. The disparity study statistical analysis will reflect this measure of *ready, able, and willing* firms in the relevant market area as well.

- The goal for a race-based program must be adjusted to show the effects of discrimination. Connecticut's statute states that 25% of contracting dollars must be awarded to small business enterprises (SBEs), and 25% of contracting dollars awarded to SBEs must be awarded to MBEs.¹ However, the set-aside appears to have been set arbitrarily without a statistical determination of whether there is a disparity in the state contracting market, and hence discrimination.
- Connecticut's Set-Aside Program is structured as a *rigid* quota system. State agencies are required to set aside a portion of contract dollars to MBEs. However, racial quotas have been consistently struck down in courts. Accordingly, if challenged, Connecticut's program would be struck down in court. Race-based programs that have been deemed constitutional by courts use a "goals" method instead of a quota system.
- The MBE/WBE Opportunities Program must be subject to periodic evaluation to determine if there is a continuing need for the program. This means that program leadership must continually evaluate whether race-conscious measures on state contracts are contributing to eliminating discrimination in the market. This can be evaluated by comparing the portion of a goal that is met through race-neutral means to the portion of the goal that is met through race-conscious means. If a goal is met solely through race-neutral means, it signals that the MBE/WBE Opportunities Program is no longer needed.

Additionally, to be *narrowly tailored a race-based program*:

- Must not penalize recipients of contract dollars for not meeting MBE goals, if *good faith efforts* were used by a prime contractor to identify eligible MBEs. For example, if a contractor can demonstrate that they reached out to MBEs to achieve a goal and were not able to retain a MBE for work, then the contractor must be allowed to request a waiver. Connecticut grants waivers for *good faith efforts*; however the state does not have a specific standard for what documentation appropriately constitutes a *good faith effort*.
- Must limit the types of companies that are eligible for the preference. The aim of the program is to correct discrimination that has placed minority business enterprises at an economic disadvantage. A *narrowly tailored* program cannot give preference to companies that have significant economic advantages, regardless of race.
- It is noted that the SBE program is not based on race; therefore it is not held to *strict scrutiny* review. Thus, the two programs cannot be intertwined.

Further, if the program is ever legally challenged, Connecticut must be prepared to specifically address the issue of *capacity* in a disparity study. Some courts look for a measure of *capacity* in disparity studies because they consider the argument that firm disparities, that might show an inference of discrimination, may be distorted by the firm's ability to perform the requirements outlined in state contracts.

Additionally, based on legal case review, it is evident that programs based on disparity studies that included comprehensive anecdotal evidence were more likely to be upheld in courts.

1. PA 76-185 initially established the SBE program. PA 82-358 initially established the minority business percentage.

Data Collection

- Quality data collection and the application of appropriate analytical techniques are crucial aspects of designing a legally defensible disparity study and providing evidence justifying that any goals that are established are in fact necessary. Collecting full and complete and timely prime contract and associated subcontract awards and actual payment is also critical to effective program implementation and monitoring.
- Connecticut's current recordkeeping system presents a significant challenge to assessing the SBE and MBE programs. The application and approval of budget exclusions plays a significant role in whether an agency is successful in meeting their SBE and MBE goals.
- The following data elements must be systematically collected and available in order to conduct a valid disparity study: subcontractors and payment data to subcontractors; P-card purchases; and consistent accounting methods (cash versus accrual) across branches of state government.

Certification Processes

- There is some confusion among a variety of stakeholders about what it means to be SBE/MBE "certified" with the state, including the expectation of results. There are multiple programs for which a company can apply for special distinction in the state contracting process, which can add to the confusion and expectation of results.
- The level of paperwork to become certified at the state level is perceived as cumbersome by some contractors. However, it is important to have both a rigorous evaluation as well as a program that allows many businesses to participate.
- The bid documentation that is required by the state far exceeds what is required for any private sector bid, according to focus group participants, and smaller companies do not have extra staff to handle the paperwork and reporting requirements.
- The revenue size standard for SBE/MBE certification eligibility can have the impact of limiting these businesses from growing, as some businesses may purposefully decide not to exceed the standard to remain eligible for the program. The revenue size standard also does not take into account industry differences; for example, industries that require large equipment purchases such as heavy construction may warrant a larger revenue cap than a service industry with lower equipment requirements.

Agency Processes

- Under Connecticut's current Set-Aside Program, all state agencies are required to establish small and minority business enterprise goals in their budgets. Although required, not every agency reports their goals to DAS and CHRO. There are also no penalties for an agency not reporting its annual goals, quarterly status updates, or for failing to meet its goals.
- Although there is an established process for determining agency or political subdivision goals, the specific contracts that are to have a set-aside component are decided by the individual procurement managers, rendering the goal-setting process arbitrary.

- When companies are required to submit an affirmative action plan through CHRO and conduct a *good faith effort* to contract with minority-owned businesses, 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—have their own municipal programs.
- If any awarding authority has reason to believe that any contractor or subcontractor awarded a set-aside contract has violated any of the terms of the set-aside process through misrepresentation or through other means, the awarding authority, after a hearing process, can suspend contract payments as well as order a civil penalty of up to \$10,000 for each violation. Since this can be a time-consuming process, and one that utilizes staff resources, it is not expected that many agencies utilize this statutory authority unless absolutely necessary. Monitoring is on a “paper” basis only, with little or no field work that would help to assess penalties to agencies or to contractors for noncompliance.

Barriers for Small and Minority Business Enterprises

- Some of the challenges that SBE/MBEs face when starting or operating their business include access to capital and bonding, recordkeeping, strategic planning, and marketing.
- The state’s inconsistency with managing and enforcing its Set-Aside Program compliance rules and requirements was another often mentioned barrier to growth.
- In addition, the \$15 million threshold for SBE/MBE certification was generally considered too high, which some focus group participants indicated puts the smaller SBE/MBEs at a disadvantage competitively.
- Paperwork, bonding, and insurance requirements for state jobs were generally seen as barriers to growth.
- The difficulty of small businesses “getting their foot in the door” for state contracts was mentioned by both small companies and prime contractors in focus groups.
- Even though there are a number of programs that support SBE/MBEs in Connecticut, and DAS and CHRO conduct various workshops about doing business with the state, there was a general sentiment among companies that processes and resources could be better streamlined so that companies that need support services can efficiently receive them. In addition, many companies do not know about or understand how to obtain state certification so that they can bid on state projects.

RECOMMENDATIONS

Legal Issues

Establishing *compelling interest* requires a state to demonstrate that there is strong evidence of discrimination that creates a continuing disadvantage for certain groups, thus justifying a need

for a race-based program. However, a program must also be *narrowly tailored* to remedy only the discrimination in the market. Therefore, Connecticut's statute must be changed in the following manner:

- 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 geographical areas fall under Connecticut's state agency contracting market. Once the geographical area 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.
- Eliminate the quota system present within the current MBE Program and instead institute a goal-based program that allows for flexibility by encouraging, rather than requiring, contractors to use MBEs and WBEs, and providing waivers to contractors who are unable to meet the goal but can substantiate their *good faith efforts*.

In addition, the following recommendations set additional standards for a *narrowly tailored* race-based program that do not have to be included in a revised 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. The committee should comprise persons involved in the MBE program process to ensure familiarity with program rules. However, the committee should not comprise persons in the department that initially contended with the opposing party that a *good faith effort* was, in fact, made.
- Establish business size limits that are representative of industry trends, so that the program applies to MBEs that also have some aspect of disadvantage (such as being small), while having distinct limits for different sub-industries.
- Based on the disparity study's econometric analysis, an overall MBE annual goal will be determined. The overall MBE goal will be a reflection of discrimination experienced by minority groups, if applicable. In addition, based on the Disparity Study's econometric analysis, a total goal for women-owned businesses should be created if it is found that they suffer from discrimination in the contracting market.
- If a particular minority group is found to experience discrimination in the contracting market, but is still underutilized despite the establishment of an overall MBE goal, then additional methods should be explored and employed to mitigate discrimination.
- State agencies should consider reaching as much 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. This means that program leadership must continually evaluate whether race-conscious measures on state

contracts are contributing to eliminating discrimination in the market. This can be evaluated by comparing the portion of a goal that is met through race-neutral means to the portion of the goal that is met through race-conscious means. If a goal is met solely through race-neutral means, it signals that the MBE/WBE Opportunities Program is no longer needed. State legislation should require a start and completion date for a subsequent disparity study with a sunset date for the MBE/WBE Opportunities Program to coincide with completion of the subsequent study, providing time for the General Assembly to reset the program period, if necessary, based on the results of the study.

In the data gathering and analysis phase of the report, it is recommended that researchers 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.

Data Collection

The current Connecticut Set-Aside Program can be improved significantly by revising the method and manner the state uses to evaluate marketplace discrimination, calculate availability, establish goals, and monitor performance. Each of these aspects necessitates a transition by the state to a more dynamic and detailed process of procurement tracking and data collection.

Gathering sufficient and comprehensive data will enable a valid statistical analysis to be conducted:

- Collect data regarding actual payments to subcontractors categorized as MBE/WBEs, as well as non-MBE/WBEs, for all contracts. Also, collect payment data to prime contractors and subcontractors (MBE/non-MBE) by distinct NAICS industry codes.
- Acquire access to and implement the use of a statewide supplier diversity data management system, which can be provided by an outside vendor, for the state's MBE/WBE Opportunities Program that allows program administrators to accurately set goals, monitor performance, and evaluate program participation. The system should also be web-accessible to the public and interested parties for program monitoring and identification of contracting opportunities, in addition to providing safeguards to protect proprietary information. Data required for program management from all financial systems utilized by state branches of government and agencies will be integrated and incorporated into the diversity management system including, but not limited to, the following: prime contractor payments, subcontractor payments, list of companies bidding on and awarded contracts, company data (such as race, ethnicity, and gender of principal owner; years of experience; a score that rates the contractor's bonding ability) on bidders and companies awarded contracts (including subcontractors engaged by prime contractors), P-card payments, and a consistent accounting method (cash versus accrual).
- Additionally, the system should have the capability to track pass-through funding to municipalities for state-funded projects and grants for MBE/WBE Opportunities Program eligible expenditures. This system should also have the capability for generating annual reports at various levels of state government to provide for overall

program accomplishments, as well as agency performance, with the functionality to examine contracting by individual MBE/WBE groups as well as by sub-industry. Additionally, ensure that the supplier diversity data management system has the functionality to include data on the contracts that are race-neutral, as well as contracts that have MBE/WBE goals.

- The first phase of the disparity study collected and reported on findings from anecdotal evidence regarding issues of possible discrimination in state contracting. The next phase of the study should further gather comprehensive anecdotal evidence to corroborate the inference of discrimination if founded. Anecdotal evidence should be gathered not only from minority groups, but all stakeholders in the contracting process. This will provide a better understanding of what is transpiring in the market and effective remedial action can be implemented, if necessary.

Deciding which data sources and methods are best suited to calculate potential availability and capacity and disparities for MBE/WBE owners in business earnings, wages, access to credit, and rates of business formation, will enable the evaluation of statistical discrimination in the marketplace. Recommendations include:

- Use the US Census Bureau's American Community Survey (ACS) Public Use Microdata Sample (PUMS) to establish marketplace discrimination and evaluate, as needed.
- Determine the best dataset to evaluate the current availability based on the appropriate geography of the market, such as the business listing from D&B, along with the D&B Supplier Diversity Solutions database.
- Calculate availability of small, women- and minority-owned businesses for each distinct industry sector to enable valid statistical analyses of disparity in the marketplace and to determine a method for measuring *capacity*.

Monitoring agency processes for setting goals includes the following recommendation:

- Determine if low MBE availability should continue to be addressed using exclusions. 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, with actual performance evaluated using actual spending amounts at the end of the fiscal year.

Certification Processes

Streamlining the SBE/MBE certification and bidding processes would help encourage program participation and may increase competition for state contracts. Suggestions for streamlining the process include:

- Adopt either a (1) uniform certification process using the federal DBE requirements, or (2) have a portal where companies can apply for certifications that interest them. Using the federal DBE certification process as the state's certification process would provide for a single certification system to reduce the number of forms required for certification processing for companies interested in dual certification. However, since the DBE process is more stringent than the state's program requirements, it is likely that revised

SBE and MBE/WBE certification processes will require more effort than that which current SBE and MBE/WBE program certified companies are familiar with, and some currently SBE and MBE/WBE certified companies may not be eligible for the modified program. Additionally, it is noted that ConnDOT's certification process compliance practices, such as on-site unannounced visits to companies seeking certification, are utilized to enforce certification requirements.

- An alternative to adopting a uniform certification process would be to have a one-stop portal where companies could apply for the types of certification that are of interest to them. Also, companies could be made aware of certification program options as part of registration with the Secretary of the State, Connecticut's Licensing Info Center, Department of Labor (DOL), and the Department of Revenue Services (DRS), among others.
- Develop a single online database of companies with all certifications listed (including SBE, MBE, WBE, DisBE, DBE, prequalified, municipal, etc.) so that agencies do not have to search multiple lists to check for the appropriate qualifications. This comprehensive listing would also provide companies with easily accessible information for developing business relationships for bidding on state contracts. In addition, the database could be used to update and manage companies that become de-certified for any reason, as well as companies whose certifications expire.

Educating certified companies about the next steps that are involved in obtaining state contracts will help to manage expectations about the results of the SBE and MBE/WBE programs:

- Once a company receives a certification, the company should be made aware of the business resources that are available to them, suggestions about how to receive notices regarding state bids and RFPs and other proactive measures that can be taken to expand networks and gain related experience. This information can be standardized and provided via email or mail upon certification, as well as in program literature available to companies interested in applying for certification.

Remove the Connecticut location requirement for MBE program certification. This will provide an opportunity for companies that are located outside of Connecticut that are *ready, willing and able* to apply for MBE/WBE certification. Additionally, Connecticut should consider developing reciprocity agreements with other states for MBE program certification.

Change the certification requirements that are related to business size limitations so that the program is specifically tailored to assist businesses that are economically disadvantaged:

- Consider revising the definition of "small" for the certification programs (refer to Appendix H for additional information on size standard methods).
 - o Connecticut should conduct an industry analysis of its geographic market area to determine how it should measure a "small business." To conduct the industry analysis, Connecticut should consider different industry and regional factors that might determine business size.
 - o Connecticut should research applying multiple levels of business size rather than just a bifurcated model of "small business" and "large business" as business sizes, and those of affiliate companies, vary significantly across industry and

geography. Utilizing multiple levels of business size can also assist businesses that may be “graduating” or transitioning out of the program because of a series of successful state contracts.

- o If a revenue standard is used to measure business size, then it should be indexed to inflation.
- Additionally, revenue limits create the potential for MBE/WBE companies to graduate out of the program. Consideration should be given to developing alternatives that would enable companies that exceed the revenue limit of the program under certain conditions to maintain their MBE/WBE certification eligibility.

Examine the federal DBE program for guidance on certification requirements that often create confusion for applying companies. For example, should the owner of the company also be licensed in the industry or is control of daily operations enough (one example involves whether the owner of a company of electricians should also be a licensed electrician)? Enable more legitimate SBEs and MBE/WBEs to be utilized for state contracts:

- Increase the number of unannounced on-site visits conducted by DAS to companies to ensure compliance with state certification requirements. If a company misrepresents information provided in its certification application or its certification, then the company should be fined and removed from the list for a period of time (under §4a-63, the suspension period of disqualification from bidding on contracts is three months) under the statutory authority of the awarding agency. In certain cases where submitting false information is involved, consider prosecution. Consider additional measures that the federal program includes, such as looking for significant outside non-related payments on tax returns that might indicate an absentee owner, a front, or a company that is not really an operating company.
- Match company certification categories with the online database of companies with certifications. For example, describe which minority group is represented through a certification rather than just noting it as an MBE-certified company. This will help agencies to better understand which minority-owned businesses are obtaining state contracting and increase the diversity of companies used.

Agency Processes

Centrally managing the certification programs across branches of government, each with different financial systems and reporting requirements, will provide more effective oversight and review of agency performance and program result, as well as providing businesses with enhanced program transparency and contract opportunities:

- Create a working group of key agency leaders and program implementers, representing all branches of government and financial systems. The working group should be co-chaired by the DAS commissioner and CHRO’s executive director. The purpose of the proposed working group, assuming that the state’s certification process will continue to be different from the federal DBE program, is to create an all-government forum to consolidate the management and oversight of the SBE Set-Aside Program and MBE/WBE Opportunities Program including organizational structure and leadership, procurement and certification processes, budget exclusion practices, appropriate

race-neutral measures, standards for *good faith efforts*, compliance and enforcement practices, interpretations of commercially useful functions,² and program performance and reporting review and analysis. If the federal DBE program is adopted as the state's program, then the scope of the working group would focus on race-neutral measures and collecting appropriate data, since the federal program would provide much of the other guidance.

Collaboration among the two lead entities, DAS and CHRO, will lead to increased resource efficiencies:

- Conduct joint workshops for agencies about the goal-setting procedures.
- Conduct joint workshops for companies about what is needed to effectively work on state contracts.
- Utilize the diversity data management system to:
 - o maintain agency goal-setting and MBE/WBE utilization plan (currently the affirmative action plans that are administered by CHRO) information
 - o analyze agency performance in meeting their goals (both agency-wide and contract-specific)
 - o identify minority firms by various sub-categorizations that bid on or were awarded contracts, etc.
 - o develop annual agency and statewide MBE/WBE program performance reports that would be issued jointly by DAS and CHRO through the proposed working group. This reporting process would eliminate the current requirement for DAS and CHRO to issue reports separately that can potentially result in having reports produced with differing statistics. Additionally, the requirement for each agency to produce an annual report will be eliminated, as periodic and annual reporting will be accomplished directly through the reporting functionality of the diversity data management system.

Effectively monitoring and utilizing compliance enforcement procedures after assessing agency staff resources will provide added quality to the SBE Set-Aside Program and MBE/WBE Opportunities Program:

- Monitor agency budget exclusions to make sure that they are reasonable and consistent. Consider creating a mechanism through the working group under the leadership of DAS and CHRO that ensures that agencies routinely report their goals and make their best efforts to reach them.
- More actively review MBE/WBE utilization plans to make sure that *good faith efforts* are being utilized and conduct an analysis of the results of such efforts. Utilize the CHRO action of holding back 2% of the contracted budget amount from a company if their MBE/WBE utilization plan is not approved. Another method to consider involves requiring an approved utilization plan prior to contract execution.

2. Under 49 CFR §26.55, a firm performs a commercially useful function when it is: "Responsible for execution of the work of the contract or a distinct element of the work . . . by actually performing, managing, and supervising the work involved."

- Utilize the statutory authority that awarding agencies have to fine or deny companies that misrepresent information provided on SBE and MBE/WBE certification applications (in some instances legal action may also be necessary). Various techniques to assure company compliance with certification requirements should be utilized, including unannounced on-site visits that have been recommended.
- If a certified MBE/WBE receives a contract, but subcontracts a portion of that contract to a non-certified business, then the only portion of that contract that can be counted toward the MBE/WBE contract goal is the portion performed by the MBE/WBE. The subcontract to the non-certified business cannot be counted towards the goal.

Support for Small and Minority Companies

Implementing race-neutral measures to assist all small businesses with issues that have been identified as obstacles for participation in state contracting is a necessary component of and ongoing requirement for any race-based and gender-based program, as well as for the purpose of enabling more companies to be successful in obtaining state contracts and to thrive in the marketplace:

- The following race-neutral measures should be considered based on anecdotal information gathered in this study:
 - o Provide technical assistance and develop programs to aid companies in obtaining audited financial statements, bonding, computer skills, profit estimating, and cash flow timing to make payroll
 - o Provide support for relationship building (networking) among prime contractors and subcontractors
 - o Provide educational programs to build capacity and awareness of the SBE and MBE/WBE programs that are designed to explain the difference between the various certifications in Connecticut
 - o Provide educational programs about starting a business
 - o Provide guidance and information on developing bids and responses to RFPs and how to get involved in the state procurement process through events, outreach, conferences, and website, among others
 - o Offer education programs on current business topics

Simplifying contracting processes reduces paperwork and improves efficiencies for all involved:

- Educate businesses about the resources and support services that are already available as part of a company's registration with the Secretary of the State, Connecticut's Licensing Info Center, DOL, and DRS, among others.
- Reduce paperwork needed to fulfill state contracting requirements, such as when a company is awarded a contract, having all required paperwork be submitted electronically (through the diversity data management system or through a central point of contact), with distribution to the appropriate staff at the agencies responsible for the review and processing of the submitted information.

- Reduce the complexity of the contracting process by providing boilerplate common terms and conditions for bids, RFPs and contracts online that can be referenced electronically on the state's contracting portal where possible.
- Clearly 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. Goals should be identified in all advertisements and bidding documents for which a contract goal has been set.

TIMELINE FOR SELECTED RECOMMENDATIONS

Actions to Be Taken As Soon as Possible

- Establish a Working Group with representation from all state agencies/branches of government, co-chaired by the commissioner of the Department of Administrative Services and the executive director of the Commission on Human Rights and Opportunities to oversee and coordinate the MBE/WBE and SBE programs.
- Separate the SBE Set-Aside Program from the MBE/WBE Opportunities Program by amending the applicable state statute(s).
- Consider the current MBE/WBE business goals to be interim goals until the statistical analysis of the disparity study is completed.
- Remove the Connecticut location requirement for MBE/WBE businesses and allow for reciprocity among other states by amending applicable state statute(s) and/or regulations.

Short-Term Actions

- Collect comprehensive data for all state agencies and across multiple financial systems through a statewide diversity data management system.
- Conduct an initial statistical analysis, after collection of one year of comprehensive data with a statistically significant sample size, to determine new interim goals based on the results of the analysis, including separating MBE and WBE goals, and sub-goals by race and ethnicity, where needed, based on the data.
- Coordinate existing race-neutral and capacity-building programs for small businesses and add additional programming support to fill in the gaps in need. These programs help all small companies, and furthermore, a legally defensible program must demonstrate it has achieved as much parity as possible using race-neutral measures.
- Streamline certification processes; and improve and simplify the state's contracting processes.
- Strengthen the certification process by increasing unannounced site visits to certified companies and monitoring and compliance enforcement of utilization plans to create more trust among subcontractors and prime contractors.

- Standardize the agency budget exclusion and exemption process.
- Eliminate the statutory municipal exclusion legislation for all state-funded projects and procurement, and require municipalities to use the state's diversity data management system for tracking and reporting on all state-funded municipal projects and procurement.

Future Actions

- Complete the econometric analysis of the Disparity Study, based on three years of comprehensive data, to determine if there is a persistence of discrimination in state contracting, and if so, to establish specific goals for individual racial groups and gender, and for industry types of contracting and procurement. Additionally, to support the statistical analysis and the *compelling interest*, continue to gather anecdotal information so as to customize race-neutral and race-conscious measures and initiatives to better address identified disparities.

CONCLUDING REMARKS

What are the objectives of the proposed Connecticut SBE Set-Aside Program and MBE/WBE Opportunities Program? Providing opportunities for these companies to succeed in the marketplace through state contracts is a noble pursuit, and one that can be facilitated through a number of race-neutral programs and initiatives such as technical business training and increased access to capital. Actions that make it easier for companies to work with the state, allow small companies more access to financial opportunities, and provide technical business assistance, for example, are all actions that can help small businesses, regardless of race ownership, to succeed. It is also necessary to implement these measures before legislation can be adopted that clearly states the goals of an MBE/WBE program.

The purpose and intent of a formal MBE/WBE Opportunities Program that is established by state statute should be to correct for current discrimination. It is a remedy that is intended to be used after race-neutral measures are implemented and when discrimination still exists. Therefore, offering race-neutral measures of business support services is a useful way to initially provide businesses with opportunities. Streamlining agency processes and the certification process are also useful for every business 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 subcontractors, is an essential precursor to conducting the statistical disparity analysis. Based on the results of periodic statistical analyses, if discrimination exists, then a formal, legislatively mandated MBE/WBE Opportunities Program can be implemented that takes into account all of the legal requirements as set forth in relevant case law. Conversely, if the statistical analysis finds that discrimination is not present in the purchasing practices of the state, the MBE/WBE Opportunities Program would be eliminated.