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Raised Bill No. 452: AAC Implementing the Initial Findings of the Disparity Study Concerning the Minority Business Set-Aside Program

Committee on Government Administration and Elections

March 17, 2014

CCIA Position: Opposes as drafted

The Connecticut Construction Industries Association is comprised of a number of substantial firms in various sectors of the construction industry who have a long history of providing quality work for the public benefit and a great deal of experience performing under a variety of contractor and workforce training goal provisions on public and private projects. Those firms include building contractors, heavy civil contractors, environmental contractors, utility contractors, and transportation contractors that engage in large and commercial sector contracting as their core business.

CCIA strongly supports the "Connecticut Disparity Study: Phase 1," report published by the Connecticut Academy of Science and Engineering (August 2013) and its recommendations, however CCIA does not support Raised Bill No 452 in its current form, because Bill No. 452 does not accurately reflect the findings and conclusions in the C.A.S.E. Phase 1 report.

The purpose of Bill No. 452, referred to Government Administration and Elections, is spelled out as, "To implement the results of the first phase of the disparity study concerning the minority business set aside program." The most basic reason Phase 1 cannot serve as support for the legislation is that Phase 1 merely lays a foundation for the implementation of the data collection and statistical analysis phases of a disparity study.

Disparity Studies, Phase 1 and Bill No. 452

The disparity study industry began in January 1989 when the United States Supreme Court decided *City of Richmond v. Croson*. (488 US 469) At the heart of a disparity study is the *Croson* "qualified, willing and able" test: "Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise."

Without establishing statistically significant disparity, no preference in public contracting, such as the MWBE goal proposed in Bill No. 452, is permitted. To be clear: If Connecticut is to ever have a constitutionally permissible MWBE preference on its state contracts, a comprehensive disparity study must be completed first.



The Phase 1 study merely evaluated Connecticut's current statutes and, includes NO availability measure of qualified, willing and able minority and women owned businesses (MWBEs). Nor does it contain any measure of qualified, willing and able non-MWBEs. Nor are these measures compared in disparity ratios to determine the MWBE availability percentage. Disparity ratios (discussed more below) are at the core of any disparity study. Phase 1, which has no disparity ratios, is simply not a complete disparity study. Phase 1 was not intended as such. What Phase 1 does is provide the necessary foundation for a future disparity study.

Disparity ratios will ultimately be computed once there is data generated by a study. This is scheduled to happen in Phase 4, which is projected to occur in fiscal year 2016 at the earliest. When that does finally happen, the statistical analysis will be done following this guideline: "Contracting goals established for the [MWBE] program need to be related to a current assessment of whether there are disparities in state contracting in the market area among different groups." Until that assessment of potential disparities is complete, and presently it is not, there is insufficient justification for Bill No. 452.

This is not to imply Phase 1 has no value in evaluating whether Connecticut can have a constitutionally sound MWBE program. To the contrary, Phase 1 is not a complete disparity study but it does contain this accurate assessment of the state's current MWBE program (section 4a-60g of the 2014 Supplement): "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."

Part of what makes the current MWBE program unconstitutional is that it is a true set aside with exclusive bidding by certified small minority-owned businesses. Non-MWBE firms are not even permitted to compete for these contracts. A set aside, even one supported by a properly done disparity study, is virtually impossible to defend in court.

The Proposed MWBE Goal

Bill No. 452 contains language mandating that each state agency "shall also have the goal of reserving contracts or portions thereof having a value of not less than twenty-five per cent of the total value of all contracts for awards to women's business enterprises and minority business enterprises whenever feasible."

Where does this goal come from? As Phase 1 explains, when the Connecticut Small Business Enterprise (SBE) program first started there was a 25% SBE goal. It is "unclear how the original 25% Small Business Enterprise (SBE) goal was established." That is not a constitutional problem. Because the SBE program benefited all small business owners, regardless of race, ethnicity, and gender, goal setting precision was not required.

However, thirty two years ago, the SBE program was modified so that of the 25% set aside, one-fourth (6.25% of the total project value) was to go to minorities. It was no longer a race neutral SBE program. It had become a race conscious program with a race conscious goal. Race conscious goals must be determined with precision.

So why did the program choose one-fourth of one fourth? Why a 6.25% MWBE goal as opposed to any other percentage? The answer is not clear. Phase 1 states that the 6.25% figure was not reality based but that "the set-aside appears to have been set arbitrarily without a statistical determination of whether there is a disparity in the state contracting market..."

The current 6.25% MWBE goal is certainly arbitrary. Any arbitrarily set goal, such as the one proposed in this bill, would not survive a court challenge. Such a challenge would be, as Phase 1 states, judged under strict scrutiny, which is the most difficult standard of constitutional review for a government to meet.

Rather than arbitrarily selecting the percentage figure, the legislation should follow the mandate of Phase 1 that; "The overall goal must be based on ready, willing and able firms." Phase 1 does not supply an availability percentage of MWBEs ready, willing and able to complete state contracts. Consequently, any proposed MWBE goal is arbitrary and likely to be struck down if challenged.

Capacity

Even if the proposed MWBE goal in Bill No. 452 were a demonstrably accurate assessment of MWBE headcount availability (which it is not), as Phase 1 points out: "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."

Capacity is the third *Croson* component, the "able" of "qualified, willing and able." Capacity examines whether a firm is capable of performing the contracts awarded by the state. Capacity must be measured because, as one federal circuit court has observed, "bigger firms have a bigger chance to win bigger contracts." (*Engineering Contractors v. Dade County*, 122 F.3d at 895)

The United States Commission on Civil Rights has addressed this need to consider capacity. In its May 2006 report, the Commission insisted that disparity studies: "should use measures of available firms that account for the business' capacity to perform the work." ("Disparities as Evidence of Discrimination in Federal Contracting," p.77)

Phase 1 is correct that capacity must be accounted for, but capacity has been ignored by the proposed legislation. Phase 1 includes a very practical suggestion which should be adopted when a disparity study for state contracting is eventually conducted. "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..." Such a measure might be annual firm revenue, state prequalification rating, number of employees, or largest project bid on.

How to Compute MWBE and non-MWBE Availability

The proposed MWBE goal is supposed to be based on MWBE availability. Clearly it is not. How then should the state disparity study, whenever it is done, determine what

percentage on MWBE and non-MWBE firms are qualified, willing and able to perform state contracts?

The best availability measure is whether a firm makes the effort to bid on public jobs. Bidding costs time and money and entails the risk of having to complete the contract. No construction firm would bid unless it was serious about doing the work. Obviously the state has the data showing which prime contractors bid and for what amounts on Connecticut contracts. For subcontractors the availability source would be subcontractor quotes to primes, information which the state should start retaining as quickly as practical.

For guidance, Connecticut should look to the federal Disadvantaged Business Enterprise regulations (49 Code of Federal Regulations part 26) for the United States Department of Transportation. As the USDOT regulations suggest, availability can be determined by the use of a bidders list: "Determine the number of DBEs that have bid or quoted on your DOT-assisted prime contracts or subcontracts in the previous year. Determine the number of all businesses that have bid or quoted on prime or subcontracts in the same period. Divide the number of DBE bidders and quotes by the number for all businesses..." (49 CFR 26.45)

Compute Disparity Ratios for Prime and Subcontractors separately

Disparity ratios compare the utilization and availability of each MWBE group. Disparity ratios are the most important statistical analysis in any disparity study. Phase 1 has no disparity ratios and therefore is not a complete disparity study.

Phase 1 does at least contain the poignant observation that "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."

Collecting the data, though, is not enough. Disparity ratios for prime contracting must be maintained separate from disparity ratios for subcontracting. This means prime and sub availability data must not be mixed. Nor should prime and sub utilization data be mixed. Otherwise it is not possible to determine where in the public construction contracting process (prime contracts are awarded by the state, while subcontracts are awarded by the prime) discrimination, if present, is occurring. Without that knowledge, it is not possible to craft an effective remedy for discrimination. When the Connecticut disparity study is eventually performed, it must keep prime contract and subcontract data separate.

To have an MWBE Preference Group and Industry Specific Underutilization must be Shown

Since *Croson*, discrimination against an MWBE group has been statistically measured through disparity ratios comparing that group's availability and utilization. Unless a group's industry-specific disparity ratio (Asians in construction subcontracts, as an example) shows statistically significant under-utilization, the group-based remedy of preferences for that group in that industry is not permissible.

Phase 1 cannot support Bill No. 452 on either of *Croson's* group specific or industry specific standards. The bill defines minorities, but Phase 1 has no group specific

statistical evidence of discrimination against any of the minority groups it defines. The bill lists industries, but there is no industry specific statistical evidence of discrimination in any of these industries.

Separate the MWBE and the SBE Programs

Phase 1 includes the eminently sensible advice that proposed legislation, "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."

Unfortunately, Bill 452 does exactly that: "It is found that there is a serious need to help small contractors, minority business enterprises, women's business enterprises, nonprofit organizations, veterans and individuals with disabilities to be considered for and awarded state contracts..." This is clearly a mixed jumble of groups that should not have been lumped in a single piece of legislation.

For these reasons and more, CCIA opposes this bill in its current form. CCIA strongly suggests that this legislation be amended to comply the components of a legally defensible program to create opportunities and increase participation of selected classes in state contracting.

Please contact Don Shubert, CCIA President, at 860-529-6855 or dshubert@ctconstruction.org for more information.