
Barriers Facing Minority- and Women-Owned Businesses in Pennsylvania

**Pennsylvania Advisory Committee to
The U.S. Commission on Civil Rights**

August 2002

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Letter of Transmittal

Pennsylvania Advisory Committee to
the U.S. Commission on Civil Rights

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The Pennsylvania Advisory Committee submits this report, *Barriers Facing Minority- and Women-Owned Businesses in Pennsylvania*, as part of its responsibility to advise the Commission on civil rights issues in the commonwealth. The Committee approved this report in a vote of 10 to 0, with no abstentions.

In the 1980s and early 1990s, the U.S. Supreme Court's *Croson* and *Adarand* decisions resulted in the dismantling—either voluntarily or by court order—of state and local government-sponsored minority and women business enterprise programs. Many viewed these programs that used race and gender as factors in awarding contracts as ways to ensure a fair distribution of business opportunities to minority- and women-owned business enterprises (M/WBEs). Against this changing landscape, the Advisory Committee received allegations that M/WBEs continue to encounter practices in Pennsylvania that impede their ability to compete for and carry out contracts successfully. The Committee became concerned that commitments by public leaders for an increased share of business opportunities for M/WBEs would weaken, and that in the absence of remedial or substitute efforts, discriminatory practices would continue.

To address these concerns, the Committee held a one-day forum in January 1999 in Philadelphia with M/WBE owners, government officials, community leaders, and representatives from large prime contractors. To supplement the forum, the Committee reviewed data on M/WBE participation rates in state and local contracting, literature on barriers M/WBEs encounter, and the structure and operation of state and local monitoring agencies. It also held meetings with Philadelphia agency representatives to follow-up on the city's progress in revising its M/WBE program. Staff also closely monitored allegations of fraud and mismanagement in large-scale projects in Pittsburgh and Philadelphia for their adverse impact on M/WBE utilization. This report is based on information gathered from the forum and these subsequent follow-up efforts.

Extending the Advisory Committee's longstanding interest in fair employment and equal economic opportunity, this report assesses barriers M/WBE owners face and comes to the following conclusions:

- Limited available data suggest that M/WBEs receive a smaller share of state contracts and contract dollar amounts compared with majority-owned firms. State agencies charged with monitoring contracts are unable to provide comparison statistics between M/WBEs and majority-owned firms. This difficulty in monitoring M/WBE participation is in part exacerbated by understaffing at state agencies. The inadequate staffing at critical offices raises questions about the commitment of state leaders to M/WBE utilization and development.

- At least 10 barriers identifiable in both public and private contracting impede M/WBEs' chances for successful participation in contracts. The report makes 17 recommendations to address these barriers.
- Philadelphia leaders have delayed the completion and release of a contracting disparity report, which could, indeed was intended to, form the basis of new M/WBE programs capable of withstanding judicial scrutiny. This contrasts inexplicably with other cities such as Pittsburgh where leaders and public agencies have diligently pursued completion of disparity analyses to support their programs. The mayor, City Council, and public officials should renew their commitments to develop appropriate programs based on the findings of the disparity studies.
- Lacking a persistent effort to remedy longstanding barriers, M/WBEs may never gain a foothold in the marketplace. As illustrated by the three exemplary cases discussed in the report, coordinated and proactive leadership would greatly improve M/WBEs' chances to receive their fair share of contract opportunities. Committed leadership at the state and municipal levels is sorely needed because it can play a catalytic role in promoting contract opportunities for M/WBEs.

The overall tenor, as well as some specific findings in this report, is corroborated by a recently released audit by the Pennsylvania auditor general and a policy report by Philadelphia Councilman Angel Ortiz.

The Committee believes this report will help the general public better understand the barriers M/WBEs face and how established bureaucratic structures could be improved to remedy these barriers. The Committee also hopes its identification and analysis of barriers and ameliorative recommendations will be of value to state and local officials as well as trade and community organizations in their work to enhance M/WBE opportunities, and thereby improve the overall economic vitality within their respective jurisdictions.

Sincerely,

Mrs. Sieglinde A. Shapiro, *Chairperson*
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The Committee acknowledges Joseph Fisher, former chairperson and member of the Committee, and members Judy M. Hirsch and Oliver H.M. Jordan for their invaluable contribution during the planning and holding of the Committee's forum. Mr. Fisher died in 1999 after a long illness. Mr. Jordan, who frequently hosted the Committee's planning meetings and provided extensive assistance to the Committee during all phases of the project and report drafting, died in 2002.

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Preface

Pervasive segregation and discrimination have long prevented many minorities from achieving equal access to education and employment, some would argue throughout much of our country's history. By the 1950s and early '60s, it was clear that the mere prohibition of discrimination against minorities was not enough to remedy the cumulative effects of inequity. Calls from community leaders and the public for increased employment and educational opportunities for minorities ultimately succeeded in leading a nationwide effort to pass legislation across the broad spectrum of civil rights.

In the early 1960s, the Kennedy and Johnson administrations issued various executive orders requiring federal agencies to take "affirmative steps" to end discrimination and to consider race, national origin, and sex in their hiring policies. In 1967, during the Johnson administration, the Department of Labor's Office of Federal Contract Compliance (OFCC) issued a national affirmative action compliance program to be used in metropolitan areas across the country, selecting Cleveland, Philadelphia, San Francisco, and St. Louis as test sites. The program was designed to increase the number of minorities employed as laborers in federal construction projects.¹

As one of the selected sites, Philadelphia's program attempted to respond to the underutilization and exclusion of minorities from skilled trades and crafts by setting goals for a "representative number" of minority hires. Based on an assessment of local conditions, OFCC established a target range for minority hires in federally funded construction projects in the Philadelphia metropolitan area.² Arthur Fletcher, then assistant secretary of the Labor Department's Wage and Labor Standards Division,³ issued a revised Philadelphia Plan in June 1969 requiring bidders on federally assisted construction contracts in excess of \$500,000 to submit an acceptable affirmative action program with specific goals for minority manpower utilization.⁴

Between 1969 and 1970, trade associations, contractors, and unions opposed the plan both in Congress and in the courts. Ultimately, however, the Nixon administration and the Labor Department prevailed on both fronts.⁵ In early 1970, the Labor Department issued revised regulations extending the Philadelphia Plan's model of proportional representation in employment by race to all activities and facilities of all federal contractors.⁶ Under these regulations, an acceptable affirmative action program included an analysis of underutilization of minorities based on assessment of the minimum population of the minority work force compared with the total work force in the labor area, and a designation of specific goals and timetables to address deficiencies.⁷ Monitored by OFCC, contractors on federal projects would not be considered for bid opportunities unless they met the goals specified under the affirmative action program.⁸

¹ Joseph F. Fulton, "Equal Employment Opportunity in the Construction Industry: The Philadelphia Plan, with Related Documents," *Legislative Reference Service*, March 1970, p. 6.

² Hugh Davis Graham, *The Civil Rights Era, Origins and Development of National Policy 1960-1972* (Oxford University Press, 1990), p. 327.

³ Fletcher also served as chairperson of the U.S. Commission on Civil Rights from 1990 to 1993.

⁴ Fulton, "Equal Employment Opportunity in the Construction Industry," p. 9.

⁵ One example occurred in March 1970, when a federal district judge in Pennsylvania dismissed a suit filed against the Philadelphia Plan. See Graham, *The Civil Rights Era*, p. 341.

⁶ Ibid. That same year, Pittsburgh was also selected to implement an affirmative action policy for the construction industry.

⁷ Graham, *The Civil Rights Era*, p. 343.

⁸ Ibid.

The Nixon administration also attempted to strengthen the economic vitality in the minority community. In 1969 and again in 1971, President Nixon issued executive orders directing the secretary of commerce to promote minority business enterprises (MBEs) and to offer financial assistance to public and private organizations to render technical and management assistance to MBEs.⁹ Later administrations expanded the scope of assistance to include minority- and women-owned business enterprises (M/WBEs) in government contracting. For instance, the Public Works Employment Act of 1977, enacted under the Carter administration, called for 10 percent of federal funds for public works projects to be used to procure services and products from M/WBEs.¹⁰ Similar programs were developed by state and municipal agencies to help M/WBEs obtain capital, training, bonding, and licensing.¹¹ By 1989, approximately 234 jurisdictions had an MBE or M/WBE program in place to provide funding and training opportunities, or were setting aside a portion of public contracts for bidding by minority- and women-owned businesses.¹² These programs were thought to be necessary to remedy instances of current and past discrimination against minority businesses and to create new economic strength and competition in the minority community.¹³

The 1980s turned out to be a pivotal decade for affirmative action. The use of race-conscious measures as a means to address discrimination was challenged on many fronts, including the courts. Some members of the public and elected officials openly challenged the use of affirmative action measures to assist minorities. At the same time, court rulings in favor of limiting affirmative action narrowed the scope of race-conscious programs, reaching a critical turning point in 1989 with the U.S. Supreme Court's *City of Richmond v. J.A. Croson Co.* decision.¹⁴

In 1983, the Richmond City Council adopted a minority business utilization plan that required prime contractors in city-awarded construction contracts to subcontract at least 30 percent of the contract dollar amount to M/WBEs.¹⁵ This was thought necessary because of the low number of city contracts awarded to M/WBEs and their small membership in various contractors' associations.¹⁶ J.A. Croson, a construction contractor, was not awarded the contract because it was not within the city's set-aside coverage. The company challenged the plan under the 14th Amendment.¹⁷ The High Court struck down the plan. It ruled that a municipality must show a compelling interest to justify a race-based preference adopted as a remedy for identified present or past discrimination in which it engaged or was a passive participant.¹⁸ The Court found that the city had insufficient evidence to show that it or any prime contractors had intentionally discriminated against M/WBE subcontractors.¹⁹

⁹ See U.S. Commission on Civil Rights, "Federal Affirmative Action Programs and Policies," staff briefing paper, November 1995, p. 17, referencing Executive Orders 11458 and 11625.

¹⁰ George R. LaNoue, *Minority Business Programs and Disparity Studies; Responding to the Supreme Court's Mandate in City of Richmond v. Croson* (National League of Cities, 1994), p. 5.

¹¹ *Ibid.*

¹² *Ibid.*, pp. 6–7.

¹³ *Ibid.*

¹⁴ 488 U.S. 469 (1989). A later case, *Adarand Constructors Inc. v. Peña*, 515 U.S. 200 (1995), is frequently cited along with *Croson*. *Adarand* applies the *Croson* decision to federal racial classifications, which, like those of a state, must be narrowly tailored to meet a compelling government interest.

¹⁵ *Id.* at 477–88.

¹⁶ *Id.* at 480.

¹⁷ *Id.* at 482–84.

¹⁸ *Id.* at 507–11.

¹⁹ *Id.* at 469–70.

Since then, the *Croson* decision has been interpreted as offering the following guidelines for state and local set-aside programs:

- State and local governments may act to remedy direct, as well as indirect, contract discrimination for which they are responsible.²⁰ However, evidence of general societal discrimination or of past discrimination in an entire industry is not enough to justify racial classifications.²¹
- Finding discrimination in one market or against one minority group does not permit an assumption that discrimination exists in all markets or against all such groups. The proper test of contract discrimination is whether qualified, willing, and able minority firms that could perform a particular service are underutilized statistically by state and local governments or their prime contractors.²²
- If the state or local government can show it has a compelling government interest, for example, evidence of past discrimination against a particular minority group, then narrowly tailored race-based remedies can be used.²³

The *Croson* guidelines resulted in municipalities' commissioning "disparity studies" to evaluate their set-aside programs for statistical disparities and evidence of discrimination in anticipation of legal challenges to the programs.²⁴ The studies usually consisted of a historical context as well as anecdotal evidence of discrimination.²⁵ To determine whether disparity existed, these studies compared the number of municipal contracts awarded to minority and nonminority firms to determine whether minority firms received a disproportionately smaller share of awards (or payments based on existing contracts) in relation to their representation in the industries studied.²⁶

²⁰ "[I]f the city could identify past discrimination in the local construction industry with the particularity required by the Equal Protection Clause, it would have the power to adopt race-based legislation designed to eradicate the effects of that discrimination." *Croson*, 488 U.S. at 472.

²¹ "A generalized assertion that there has been past discrimination in the city's construction industry cannot justify the use of an unyielding racial quota, since it provides no guidance for the city's legislative body to determine the precise scope of the injury it seeks to remedy and would allow race-based decision-making essentially limitless in scope and duration." *Croson*, 488 U.S. at 470.

²² "Reliance on the disparity between the number of prime contracts awarded to minority businesses and the city's minority population is also misplaced, since the proper statistical evaluation would compare the percentage of MBE's in the relevant market that are qualified to undertake city subcontracting work with percentage of total city construction dollars that are presently awarded to minority subcontractors, neither of which is known to the city." *Croson*, 488 U.S. at 470-71.

²³ While the opinion of the Court as voiced by Judge O'Connor was that race-based measures could be used to remedy past discrimination if there was evidence of past discrimination, the Court was quick to say that even in the absence of evidence of discrimination, the city could use nonracial-based remedies. Indeed, the Court listed several examples:

"Even in the absence of evidence of discrimination in the local construction industry, the city has at its disposal an array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races who have suffered the effects of past societal discrimination, including simplification of bidding procedures, relaxation of bonding requirements, training, financial aid, elimination or modification of formal barriers caused by bureaucratic inertia, and the prohibition of discrimination in the provision of credit or bonding by local suppliers and banks." *Croson*, 488 U.S. at 473.

In *Croson*, the Court simply maintained, despite that only 0.67 percent of the prime contractors were awarded to minority-owned construction companies, that there was no evidence of past discrimination in the construction business. See LaNoue, *Minority Business Programs and Disparity Studies*, p. 5.

²⁴ LaNoue, *Minority Business Programs and Disparity Studies*, p. 5.

²⁵ Michelle D. Flamer, senior attorney, City of Philadelphia Law Department, written comments to the Pennsylvania Advisory Committee regarding draft report, submitted at the Committee's Aug. 17, 2000, planning meeting (hereafter cited as Flamer Comments).

²⁶ The Urban Institute, *Do Minority-Owned Businesses Get a Fair Share of Government Contracts?* 1997, p. 9.

As was true for many other municipalities, the *Croson* decision significantly affected Philadelphia's affirmative action efforts.²⁷ In setting numeric goals, the city's pre-*Croson* plan was designed to increase minority-, disabled-, and women-owned business participation in certain city contracts, in order to redress discrimination and perceived inequitable distribution of public contracts. The plan mandated that certain contracts with the city include goals for a specific percentage of business set-asides for M/WBEs. The city also created a sheltered market by setting aside certain contracts for bidding exclusively by certified M/WBEs. However, soon after the *Croson* decision, nine contractors' associations successfully challenged the constitutionality of the city's set-aside program, alleging that it did not sufficiently demonstrate past discrimination in contracting as required under the *Croson* standards. After a series of appeals, the city was permanently enjoined from administering its program to public works contracts, preventing it from reserving a percentage of business to M/WBEs in city contracting.²⁸ The city continued to apply the program to professional services contracts until the ordinance's sunset in 1998.²⁹ (For details, see section titled "Contracting with the City of Philadelphia" in chapter 2.)

The Pennsylvania Advisory Committee's Project

The U.S. Commission on Civil Rights and its advisory committees have had a long-standing interest in federal, state, and municipal affirmative action initiatives. At both the national and local levels, the Commission has monitored programs relating to equal employment, union membership for minority workers, and efforts to enhance economic opportunities of minority and women business owners, publishing reports on such topics as affirmative action at law and medical schools, business set-asides, equal employment opportunity, and regulatory obstacles faced by minority entrepreneurs.³⁰

In April 1995, the Pennsylvania Advisory Committee selected affirmative action as its project topic, proposing to conduct a review of the Philadelphia Plan, its role in the history of affirmative action, and its overall effectiveness in the Philadelphia area construction industry. As it began collecting historical information on the plan's development, the Committee soon discovered that although the plan played an integral part in the history of minority employment in the city, specific data necessary for analyzing employment trends and assessing the plan's effectiveness were difficult or impossible to obtain. In order to narrow the project's scope, the Committee held a series of planning meetings in 1996 and 1997 with affirmative action specialists and community organization representatives. Through these meetings and related information gathering, the Committee learned the following:³¹

²⁷ "By October 1993, more than 65 state and local jurisdictions had completed or commissioned disparity studies. . . ." LaNoue, *Minority Business Programs and Disparity Studies*, p. 3.

²⁸ Flamer Comments.

²⁹ Ibid.

³⁰ Some of the Commission's publications on these topics include *Statement on Affirmative Action for Equal Employment Opportunities*, 1973; *Toward Equal Educational Opportunity: Affirmative Admissions Programs at Law and Medical Schools*, clearinghouse publication 55, 1978; *Affirmative Action in the 1980's: Dismantling the Process of Discrimination*, clearinghouse publication 70, 1981; *Selected Affirmative Action Topics in Employment and Business Set-Asides*, vol. 2, Mar. 6-7, 1985; *Report of the United States Commission on Civil Rights on the Civil Rights Act of 1990*, July 1990; *Constructing Denver's New Airport: Are Minorities and Women Benefiting?* clearinghouse publication 97, July 1992; *Enforcement of Equal Employment and Economic Opportunity Laws and Programs to Federally Assisted Transportation Projects*, 1993; *Federal Affirmative Action Programs and Policies*, staff briefing paper, November 1995; *Briefing on Civil Rights Implications of Regulatory Obstacles Confronting Minority Entrepreneurs*, Executive Summary, Sept. 5, 1997.

³¹ The Committee also learned that across the country, the number of businesses owned by minorities and women had increased substantially, generating tremendous revenue in certain communities. Between 1987 and 1992, the number of minority-owned businesses increased 62 percent, to 2,149,184 minority-owned firms in 1992 generating \$210 billion in receipts. This compares with an increase of 26 percent for all U.S. firms during the same period. In 1994, women-owned firms represented 32.7 percent of all U.S. businesses. In summarizing the characteristics of 1,965,565 of the total number of minority businesses (2,149,184) surveyed, the U.S. Census Bureau found, "African American women owned the largest share (39 percent or 277,246) of firms owned by minority women, while Hispanic men

- As of 1997 (the most recent economic census data from the U.S. Department of Commerce), there were 50,242 minority-owned firms in Pennsylvania, employing almost 79,000 employees.³² The Philadelphia metropolitan area ranked fifth largest nationwide for women-owned firms, according to a 1996 survey, and seventh nationwide for new business starts in 1995.³³ In 1998, there were 140,000 self-employed women, representing 32.6 percent of the total self-employment in Pennsylvania.³⁴
- Despite progress (both nationwide and in Pennsylvania), barriers still exist that limit the inclusion of M/WBEs in the national and local economy. Minorities continue to experience problems establishing and maintaining a business and participating fully in business opportunities, which may be due to discriminatory treatment.³⁵
- As a result of the Supreme Court's *Croson* decision, some state and local programs have been dismantled or changed to such an extent as to be insufficient to help M/WBEs establish a foothold in their respective markets.

Based on this information, in June 1998 the Committee decided to reframe its project scope to examine difficulties M/WBEs faced in the marketplace as well as the status of Pennsylvania's (and Philadelphia's) efforts to assist these firms. More specifically, the project was to:

- identify existing barriers M/WBEs encounter to full participation and inclusion in business opportunities;
- identify and evaluate, in light of the *Croson* decision, state and local efforts (as well as private measures) to increase inclusion of both minority workers and minority business enterprises in contracting opportunities; and
- identify projects that have succeeded in utilizing a high percentage of minority- and women-owned firms that could serve as models for others.

As part of its planning activities, the Committee collected background information on state and city of Philadelphia M/WBE programs; reviewed federal, state, and local legislative guidelines and standards regarding these programs; and identified appropriate government officials, M/WBE owners, and community organization representatives who had pertinent information.

Guided by this background information, the Advisory Committee held a daylong forum on January 14, 1999, in Philadelphia, inviting Philadelphia Mayor Edward Rendell, State Representative Andrew Carn, local government officials, industry analysts, NAACP representa-

owned the largest share (42 percent or 525,330) of firms owned by minority men. . . . Firms owned by non-Hispanic white men had the highest average receipts with \$250,000. Asian Pacific Islander, American Indian, and Alaska Native men and women firms had average receipts of \$188,000 and \$119,000, respectively. These groups were followed by non-Hispanic white women-owned firms with \$115,000, Hispanic men with \$106,000, Hispanic women with \$70,000, African American men with \$69,000, and African American women with \$31,000." U.S. Department of Commerce, Bureau of the Census, "Number of Minority-Owned Businesses and Revenues Increase Substantially Between 1987 and 1992," press release, Nov. 18, 1996. See also U.S. House of Representatives, Committee on Small Business, "Small Business Facts," accessed at <www.house.gov/smbiz/facts/#womenandminorities>.

³² U.S. Department of Commerce, Bureau of the Census, *1997 Economic Census, Minority- and Women-Owned Businesses—Pennsylvania*, accessed at <<http://www.census.gov/epcd/mwb97/pa/pa.html>>.

³³ U.S. Department of Commerce, Bureau of the Census, "Number of Minority-Owned Businesses and Revenues Increase Substantially Between 1987 and 1992," press release, Nov. 18, 1996; National Foundation for Women Business Owners, "1996 Facts on Women-Owned Businesses: Trends in the Top 50 Metropolitan Areas," press release, 1997.

³⁴ U.S. Small Business Administration, Office of Advocacy, *1999 Small Business Profile: Pennsylvania*, p. 1.

³⁵ Additional barriers include limited access to capital, difficulties obtaining loans to start and maintain a business, regulations imposing qualifications or costs that bar entry into an industry, and arbitrary licensing and training requirements imposed by government entities. As background, see U.S. Commission on Civil Rights, *Briefing on Civil Rights Implications of Regulatory Obstacles Confronting Minority Entrepreneurs*, Executive Summary, Sept. 5, 1997.

tives, minority and women business owners, union leaders, and large contractor representatives. At the forum, panelists and members of the public discussed impediments to M/WBEs' ability to engage in business opportunities in Pennsylvania as well as details on how state and local programs could better assist these firms.³⁶ To supplement its inquiry, the Committee sought additional information from those unable to attend the January forum. In April 1999, the Committee held a briefing meeting with representatives from Kvaerner Philadelphia Shipyard Inc., a major industrial firm in Philadelphia, and the General Building Contractors Association, a construction industry trade group involved in the case challenging the city of Philadelphia's set-aside program. These representatives reviewed their organizations' efforts to increase M/WBE participation. The Philadelphia Building Trades Union was also invited to attend both the January forum and the April planning meeting, but declined the Committee's invitation and chose not to submit written remarks to the Committee. The Committee also met with representatives from the city attorney's office and the Minority Business Enterprise Council (see chapter 2).

Based on forum presentations and subsequent follow-up research, the report provides the following information in six chapters:

- An overview of how M/WBEs have fared in contract opportunities throughout the state and city of Philadelphia, presenting M/WBE participation data for both state and city contracts. It also notes monitoring difficulties and gaps in reporting data that make it difficult to interpret minority participation trends or provide meaningful comparisons between M/WBEs and nonminority firms (chapter 1).
- A description of how state and local agencies acquire supplies and services from M/WBEs and nonminority firms, including a description of the contracting procedures used by state agencies. It also provides an overview of the function, role, and staffing of four units within the Bureau of Contract Administration and Business Development, the primary state agency certifying M/WBE firms and monitoring their utilization, as well as other state offices within the governor's office. In addition, this chapter examines three topics: legal developments after the establishment of Philadelphia's set-aside program, disparity studies conducted to determine the level of discrimination in city contracting, and the efforts of the Minority Business Enterprise Council to assist M/WBEs (chapter 2).
- A summary of concerns reported by M/WBEs and community organizations (chapter 3).
- A discussion of three exemplary projects to determine ways they were able to overcome barriers and utilize a high number of M/WBEs (chapter 4).
- A description of three recent developments at the state and local levels: the redevelopment of the Philadelphia naval shipyard, Pittsburgh stadium construction, and a disparity analysis by the city of Pittsburgh (chapter 5).
- Conclusions and recommendations (chapter 6).

³⁶ A list of panelists participating in the forum is provided in appendix 1.

CHAPTER 1

Minority- and Women-Owned Business Participation in State and Philadelphia Contracts

Participation Rates in State Contracts

The Bureau of Contract Administration and Business Development (BCABD) (an agency within the Pennsylvania Department of General Services) is the designated monitoring agency of state contracts. In 1993, it began tracking state agency contracts to minority- and women-owned business enterprises (M/WBEs) and firms located in areas designated as enterprise zones.¹ BCABD measures contracting activity in “commitments” (referring to contracts entered into by state agencies during a given calendar year) and “payments” (actual dollar amounts paid by agencies to firms under existing contracts).²

The Advisory Committee notes the following limitations about BCABD data:

- Precise contracting figures cannot be produced.³ Although most state agencies are required to report to BCABD, currently only 21 of the state’s 35 agencies report.⁴ Some independent agencies are exempt from this reporting requirement and do not report data to BCABD.⁵ In addition, many agencies are late in reporting by one to three quarters, making it difficult for BCABD to provide accurate analyses of contract activity for any given period.⁶
- Agencies only report payments made to M/WBEs that are prime contractors, even though M/WBEs, being mostly small firms, participate in state contracts most often as subcontractors.⁷

¹ Enterprise zones are areas designated by the Pennsylvania Department of Community and Economic Development as financially disadvantaged communities. Enterprise zones receive grants to disperse to businesses as seed money and for public sector investment. Zones also receive priority consideration for state resources used for business investment and job creation. The Enterprise Zone Program was merged with the Main Street Program and is known as the Pennsylvania New Communities Program. David Messner, program manager, Pennsylvania Department of Community and Economic Development, Office of Community Development, Enterprise Zone Program, explanatory letter to interested persons, n.d. See also David Messner, e-mail to Marc Pentino, Eastern Regional Office, U.S. Commission on Civil Rights (USCCR), Oct. 15, 2001.

² Some agencies that are not under the governor’s jurisdiction may prepare their own contracting report. These agencies are not required to submit their report to the Bureau of Contract Administration and Business Development (BCABD). Gary N. Lee, director, BCABD, letter to Marc Pentino, Eastern Regional Office, USCCR, Oct. 11, 2001, in response to affected agency review request.

³ The Committee recently learned that the state plans to implement an “enterprise resource planning system” to establish an integrated administrative system to support procurement, personnel, payroll, accounting, and budgeting. When the new system is complete, statistical reports mentioned above will be available. Ibid.

⁴ Betty Miller, BCABD, telephone interview with Marc Pentino, Eastern Regional Office, USCCR, Apr. 15, 1999. The process of affected agency review by government agencies resulted in written communications between the Advisory Committee and Gary N. Lee, director, BCABD, regarding the accuracy of statements made by BCABD staff and attribution thereto. The reader can reconstruct the nature of this exchange by referring to appendices 5 and 6. Subsequent to this exchange the Eastern Regional Office received in March 2002 Mr. Lee’s response dated Dec. 17, 2001. The factual clarifications provided in this letter have been incorporated, but the letter is not appended in this report.

⁵ Zara Waters, BCABD, telephone interview with Marc Pentino, Eastern Regional Office, USCCR, Mar. 31, 1999.

⁶ Ibid.

⁷ BCABD, “Agency Contracting Activity Report for Years 1995–1997.”

- BCABD collects no information on contracts to nonminority firms, making comparative analyses impossible.

Set forth below are two charts. Figure 1 shows trends in state contract commitments to minority-owned business enterprises (MBEs) and women-owned business enterprises (WBEs) from 1993 to 1998. Figure 2 shows trends for approximately the same period (1994–1998) in payments made to such businesses.

For 1993–1998, MBEs received only \$8.13 million in commitments in 1993 and significantly less in all succeeding years. In 1996, they received a mere \$1.6 million. Total commitments to MBEs over this six-year period amounted to \$26.64 million. Over this period, commitments to WBEs far exceeded that of MBEs, totaling \$95.1 million.⁸ Every year, except in 1993, WBEs received far greater commitments than MBEs, sometimes as much as 10 times more, as in 1998. The year 1996 was exceptional in that there were hardly any commitments to MBEs or WBEs, reasons for which remain unclear.⁹

Although the commitment and payment charts are not intended to match dollar for dollar, figure 2 shows that payments to WBEs rose sharply, reaching a high of \$7.4 million in 1998. Payments to MBEs remained relatively constant (under \$1.1 million) through 1997. Both groups saw a sharp rise in payments in 1998.¹⁰

Several important facts are submerged in these data. For example:

- State agency purchases from MBEs and WBEs are a minuscule share of state business. These agencies purchase billions of dollars of goods and services annually—approximately \$4.5 billion in fiscal 1995.¹¹

⁸ Commitments to firms located in areas designated as enterprise zones over this six-year period totaled \$24.84 million (\$8.01 million in 1993, \$.45 million in 1994, \$11.72 million in 1995, \$.23 million in 1996, \$1.56 million in 1997, and \$2.87 million in 1998).

⁹ None of the official documents examined in preparation of this report reveals why commitments are low for these categories.

¹⁰ Payments to firms located in areas designated as enterprise zones remained under \$1.1 million for all five years, reaching a low of \$.11 million in 1996.

¹¹ See Gary E. Crowell and Gary F. Ankabrandt, Pennsylvania Department of General Services, *Commonwealth Procurement Code: Statutory Blueprint for Modernizing and*

However, as reflected in figure 1, combined actual state commitments to M/WBEs were a mere \$16.1 million in 1995 and \$1.37 million in 1996. By comparison, figures 3 and 4 show that the city of Philadelphia provided over twice that amount (\$43.5 million) to M/WBEs—representing 18.9 percent of the city’s total contracting dollars in 1995.

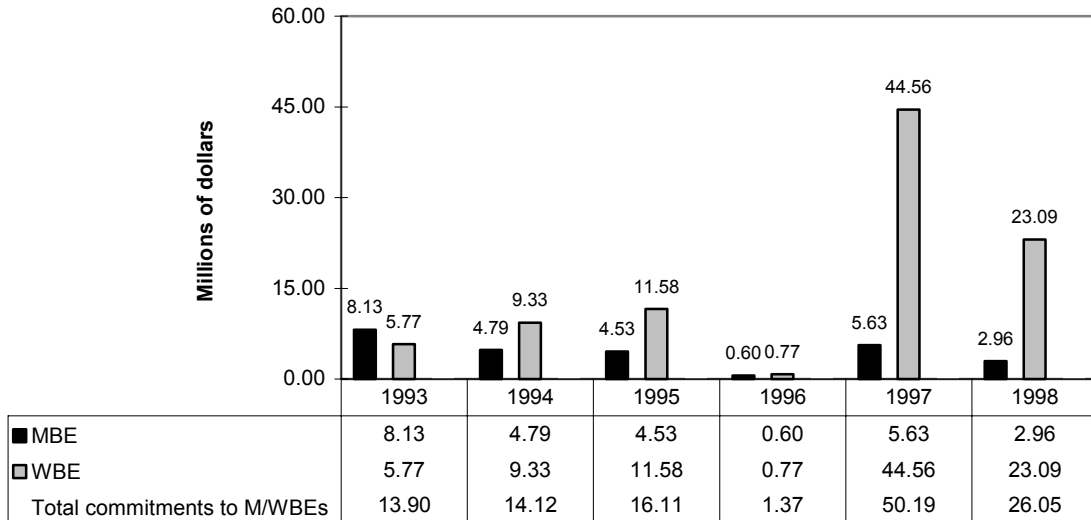
- A comparison of figures 1 and 2 shows that commitments do not match payments. For example, in 1997 over \$50 million in commitments were made to MBEs and WBEs. Yet, payment amounts were much lower (only \$7.28 million in 1997 and \$9.92 million in 1998). While payments for previous years’ commitments can be spread out over multiple years, it may also be possible that commitments, once made, can be scaled down or cancelled. Therefore, commitments might be a misleading measure of contracting to M/WBEs as opposed to payments. It is therefore necessary to determine whether this discrepancy between commitments and payments is due to poor data tracking or the cancellation of contracts to M/WBEs.
- State-prepared reports are conflicting and unreconciled. For example, appendix 2, which reflects agency by agency the specific number of contracts and amount paid to M/WBEs, conflicts with the report of combined agency payments to M/WBEs in figure 2. For example, appendix 2 shows over \$77 million paid to M/WBEs in 1997; however, figure 2 shows under \$8 million paid to M/WBEs for the same year.¹² Thus, the information provided by BCABD is incomplete, unclear, and subject to misleading interpretation.

Streamlining the Commonwealth’s Purchasing Practices, 1998, p. 4.

¹² A cautionary note should be made in interpreting payments to M/WBEs. The increase in the dollar amount alone does not necessarily mean an increase in the percentage share of state spending.

FIGURE 1

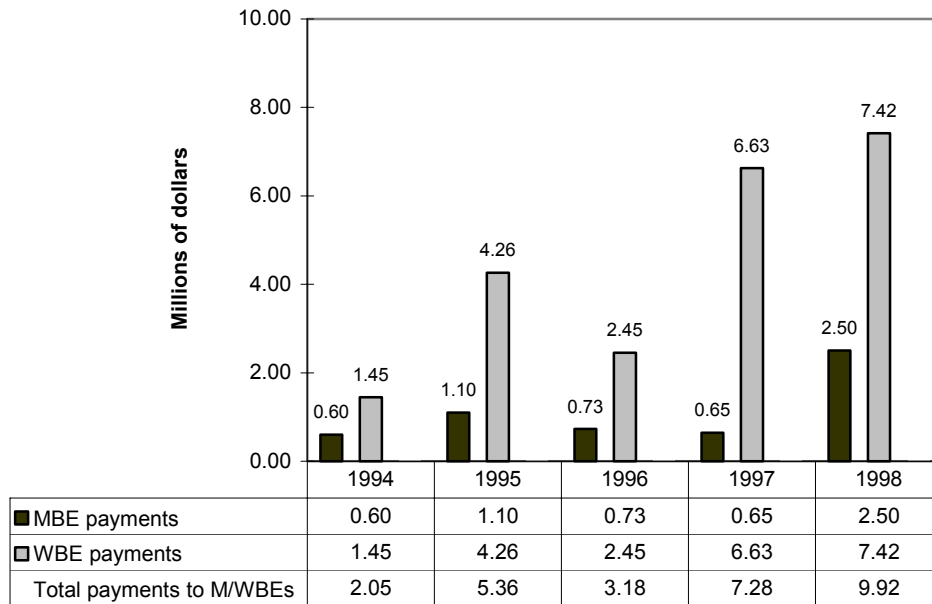
Commitments to MBEs and WBEs by State Agencies, 1993–98 (in millions of dollars)



SOURCE: Bureau of Contract Administration and Business Development, quarterly report totals since inception of tracking system.

FIGURE 2

Payments to MBEs and WBEs by State Agencies, 1994–98 (in millions of dollars)



SOURCE: Bureau of Contract Administration and Business Development, quarterly report totals since inception of tracking system.

Participation Rates in City of Philadelphia Contracts

The Minority Business Enterprise Council, an agency within the Philadelphia Department of Finance (see chapter 2), tracks all city contracts to firms owned by minorities and women that provide supplies, services, and equipment (SSE); public works (PW); and personnel and professional services.¹³ Figures 3 and 4 show total SSE and PW bid dollars to MBEs and WBEs for fiscal years 1992–1998.

As shown in figure 3, during this period total SSE bid dollars to WBEs remained under \$5 million, except in 1993 (\$6.8 million) and 1998 (\$10.6 million). Comparatively, MBEs received higher amounts during this same period, ranging from roughly \$9 million in 1992 and 1994 to \$11 million in 1993 and 1995. Combined, MBEs and WBEs received 12.07 percent of the total SSE bid dollars (\$939.2 million) awarded by the city during this period.

For public works contracts (figure 4), both MBEs and WBEs fared slightly better. Bid dollars to MBEs rose steadily between 1992 and 1994 (from \$14.3 million in 1992 to \$21.5 million in 1993 to \$30.4 million in 1994). MBEs saw their largest allotment in 1996 with \$40.8 million. In 1997 and 1998, however, bid dollars to MBEs remained under \$12 million.

A similar trend was reported for WBEs. Bid dollars to this group rose steadily during 1992 (\$13.3 million), 1993 (\$15.1 million), and 1994 (\$17.7 million), but dropped off during 1995 to \$12.5 million. In 1996, WBEs received \$16.5 million in bid dollars but saw a decline in 1997 and 1998 from \$7.4 million to \$4.2 million, respectively. As shown, MBEs received a higher percentage of public works bid dollars than WBEs.

Between 1992 and 1998, M/WBEs received 12 percent of all SSE contracts and 18 percent of all PW contracts. See table 1.

TABLE 1

Total SSE and PW Bid Dollars to M/WBEs by Philadelphia Agencies, Compared with Total, FY 1992–98 (in millions)

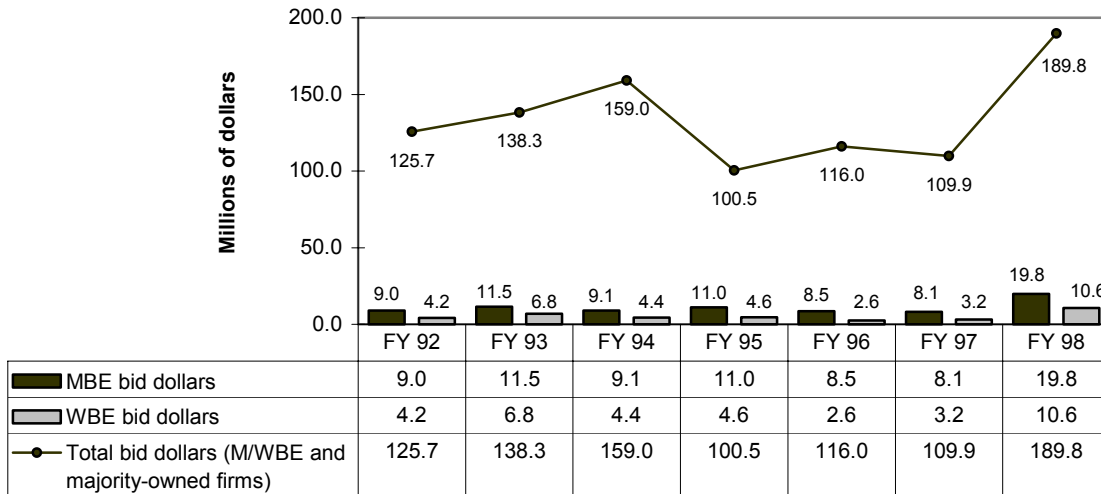
			Percentage of M/WBE bid dollars
Total SSE bid dollars (to minority and nonminority firms)	MBE SSE bid dollars	WBE SSE bid dollars	
\$939.2	\$77.0	\$36.4	12%
Total PW bid dollars (to minority and nonminority firms)	MBE PW bid dollars	WBE PW bid dollars	
\$1,305.6	\$145.9	\$86.7	18%

SOURCES: City of Philadelphia, Minority Business Enterprise Council, *Summary of Contract Activity Comparables for Six Years, FY 1992–97*; City of Philadelphia, *Five-Year Financial Plan (FY 2000–2004)*, Jan. 26, 1999, pp. 367–68.

¹³ The agency also tracks contracts to firms owned by persons with disabilities; however, participation rates for these firms were not provided. The office refers to minority-, women-, and disabled-owned disadvantaged business enterprises as “M/W/Ds-DBEs.” However, in this report M/W/Ds-DBEs will be referenced as MBE, WBE, or DBE where appropriate.

FIGURE 3

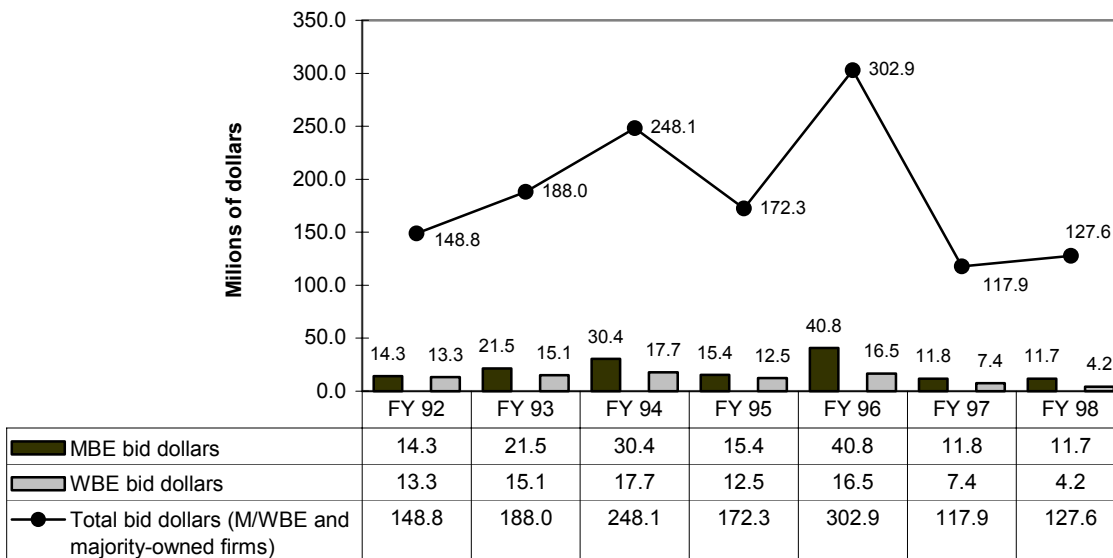
Supplies, Services, and Equipment Bid Dollars to MBEs and WBEs by Philadelphia Agencies, FY 1992–98 (in millions)



SOURCE: City of Philadelphia, *Five-Year Financial Plan (FY 2000–2004)*, Jan. 26, 1999, pp. 367–68.

FIGURE 4

Public Works Bid Dollars to MBEs and WBEs by Philadelphia Agencies, FY 1992–98 (in millions)



SOURCE: City of Philadelphia, *Five-Year Financial Plan (FY 2000–2004)*, Jan. 26, 1999, pp. 367–68.

CHAPTER 2

Contracting and Procurement of Goods and Services in Pennsylvania

Overview of the Contracting and Procurement Process

When a state or municipal agency wishes to obtain a particular product or service, the agency either buys the product directly or solicits the best price from supply companies. Frequently, the agency contracts with a prime contractor, who in turn subcontracts portions of the work to smaller firms. An agency, or a prime contractor hired for the job, will issue a “request for proposal” (RFP), which announces to the public that it wishes to receive bids from firms interested in performing the work. The RFP must be sufficiently detailed in describing the supply or service being sought so that bidders can submit responsive proposals and prices.

Each proposal or offer includes a proposed timeline for completing the job and may list a firm’s unique qualifications. Firms wanting to perform the work must meet prequalification requirements in addition to furnishing bid and performance bonds and other items.¹ Prequalification means a municipality has given a rating to a business regarding its ability to perform specified work.² Once ratings are issued, firms can bid on the projects.³

Most bidders must be bonded at the time of the bid. A “bid bond,” guarantees that the bidder

will enter into the contract if awarded.⁴ A “performance bond,” guarantees that a firm will complete the terms of the contract. Bonds are a necessary protection for the agency because they ensure that in the event firms cannot complete the project, the bonding company will reimburse the project owner for the portions of the job left undone. Virtually all firms include the bond cost in their bid. A project owner or municipality will issue a notice to the prime contractor to proceed; the prime contractor will advise subcontractors to begin work on their portions of the job.

Contractors are encouraged, but not required, to do business with M/WBEs. Additional procedures have been established to help prime contractors and municipal agencies identify and contract with M/WBEs. State and municipal governments certify businesses as minority- or women-owned or disadvantaged, a process known as “certification.”

In Pennsylvania, certification can be obtained either through the state Bureau of Contract Administration and Business Development (BCABD) or from local agencies such as the Minority Business Enterprise Council in Philadelphia (see below).⁵ Once certified, a firm is placed on a list of subcontractors, which is referred to the prime contractor, who can then direct bid opportunities to these firms. Municipal projects

¹ Additional required items include financial statements, a list of corporate officers, and references.

² Note that in city of Philadelphia contracts, prequalification is done project by project. See Michelle D. Flamer, senior attorney, City of Philadelphia Law Department, written comments to the Pennsylvania Advisory Committee regarding draft report, submitted at the Committee’s Aug. 17, 2000, planning meeting (hereafter cited as Flamer Comments).

³ Note that in city of Philadelphia contracts, subcontractors do not bid directly to the city. Ibid.

⁴ Ibid.

⁵ Certification can also be obtained through other state or federal agencies depending on the nature of the project. For instance, on transportation-related projects, certification can be issued by the South Eastern Pennsylvania Transit Authority or the U.S. Department of Transportation.

may include participation goals for minority workers on the project.⁶

Contracting with the State of Pennsylvania⁷

In 1998, the state revised the contract and procurement procedures that had been in place for 60 years on the grounds that they resulted in inefficiency, delay, and barriers to productive business.⁸ The new procedures consolidate various state agency practices into a unified method of procurement administered by the Pennsylvania Department of General Services. The department is the primary purchasing agency for executive and independent state agencies for supplies, services, and construction that exceed prescribed limits.⁹ BCABD is an agency of the Department of General Services and the primary state agency charged with assisting M/WBEs.¹⁰ It

⁶ Steven K. DiLiberto, "Setting Aside Set-Asides: The New Standard for Affirmative Action Programs in the Construction Industry," *Villanova Law Review*, vol. 42, 1997, p. 2054.

⁷ As part of its affected agency review, the Advisory Committee received useful suggestions and factual corrections to its report from Gary N. Lee, director, Bureau of Contract Administration and Business Development (BCABD). However, not every suggestion or issue raised was incorporated, and the unincorporated suggestions and issues are noted in the margins of appendix 6. Subsequent to this exchange, the Eastern Regional Office received in March 2002 Mr. Lee's response dated Dec. 17, 2001. The factual clarifications provided in this letter have been incorporated, but the letter is not appended in this report.

⁸ Gary E. Crowell and Gary F. Ankabrandt, Pennsylvania Department of General Services, *Commonwealth Procurement Code: Statutory Blueprint for Modernizing and Streamlining the Commonwealth's Purchasing Practices*, 1998, p. 4. Procurement is defined as "buying, purchasing, renting, leasing, licensing or otherwise acquiring any supply, service, or construction. The term also includes all functions that pertain to the obtaining of any supply, service, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract and all phases of contract administration." Pennsylvania Department of General Services, *Field Procurement Handbook*, 1998, p. 9.

⁹ 62 PA. CONS. STAT. § 301 (2001).

¹⁰ The Bureau of Purchases and the Bureau of Public Works also deal with state contracts. The Bureau of Purchases contracts for the sale of commodities, such as agricultural machinery, electric and electronic products, furniture, and lumber, and handles all open market purchases valued over \$10,000. The Bureau of Public Works administers the selection of architects and engineers, advertises projects for bids, obtains construction bids, executes construction contracts, manages budgets for construction projects, provides engineering and architectural services to state agencies, etc. See Pennsylvania Department of Community and Economic De-

velops the statewide M/WBE and contract compliance programs, provides training and consulting to M/WBEs, and investigates businesses and contracts to ensure fairness.¹¹

State agencies are required to purchase goods¹² and services through a competitive process using invitations for bid (IFB) or a request for proposal (RFP).¹³ An IFB is used when the supply, service, or construction is satisfactorily described and the price is the only factor in the award. Contracts are awarded to the qualified firm offering the lowest price. An RFP, on the other hand, is issued when an agency recognizes a need for a service and wants to determine the best way to secure the service. Contractors respond with a written proposal that recommends how the agency can best fulfill that need. Proposals are evaluated by a committee of experts.

Small purchase contracts—procurements for supplies, services, and construction under \$3,000—can proceed without soliciting bids. For goods under \$10,000, agencies can make their own procurements using an informal bid procedure. For contracts over \$10,000, the Department of General Services awards contracts to the lowest "responsible and responsive" bidder based on a competitive, sealed bid process—the IFBs are announced to the public.¹⁴

There is an expressed statewide commitment that state agencies are to use M/WBEs as suppliers of goods and services.¹⁵ The state encourages all contractors to recruit M/WBEs to serve as subcontractors on the project or use M/WBEs that have a substantial number of minority employees. No mandatory percentage of M/WBE

development, *How to Secure Contracts with Pennsylvania Agencies*, May 3, 1999, accessed at <<http://www.dced.state.pa.us>>.

¹¹ BCABD is also required to develop and maintain a list of certified M/WBEs, provide technical assistance, prepare reports, and develop a computerized management system.

¹² If goods are not available from a central warehouse, state agencies (through their purchasing agents) can solicit bids and make awards for purchases up to \$10,000. Firms must be on a bidders list maintained by the Bureau of Purchases.

¹³ Pennsylvania Department of Community and Economic Development, *How to Secure Contracts with Pennsylvania Agencies*.

¹⁴ See 62 PA. CONS. STAT. §§ 511, 512 (1999).

¹⁵ 62 PA. CONS. STAT. § 2101 (1999).

utilization is imposed.¹⁶ All state contracts include suggested minimum M/WBE participation levels specified in each IFB. Except for construction, the state standard for M/WBE participation is five minority- and three women-owned firms per project.¹⁷ For those IFBs where the total estimated amount is expected to exceed \$100,000, BCABD establishes recommended participation levels for M/WBEs.

In the RFP process, contracts are awarded according to a point system. Each proposal is evaluated, and points are assigned for the technical aspect of the proposal, cost, socially and economically restricted business (SERB) participation, and other possible factors.¹⁸ The total of these points determines which firm will be awarded the contract. Firms that qualify as SERBs or prime contractors that partner with a SERB—a small business with annual revenue not exceeding \$8 million, and whose economic growth and development have been restricted because of social or economic bias—in a joint venture or subcontracts to them are ranked ahead of other bidders for the job. BCABD-certifies such businesses as minority- and women-owned business enterprises, other disadvantaged businesses, or businesses with a primary headquarters facility within one of the state's 42 enterprise zones.¹⁹ Many SERB companies are too small to bid as prime contractors; however, they can serve as subcontractors and enter into joint ventures with other businesses.²⁰ The SERB program encourages prime contrac-

tors to consider SERBs when seeking supplies and services that the prime contractor cannot provide.²¹

Four units within BCABD support M/WBEs by offering certification, evaluation, investigation, and training services:

Certification Unit. This unit identifies and certifies M/WBE vendors for the state's procurement needs and forwards names of certified M/WBEs to federal, state, and local government agencies for possible contracting opportunities. The number of certified firms fluctuates. As of January 2000, there were 1,103 businesses (332 minority, 763 women) certified by BCABD as M/WBE vendors, a decline of 65 businesses since reported by the agency in December 1998.²² To be certified as an M/WBE, the firm must be one of the following:

- a sole proprietorship, owned and controlled by a minority or a woman;
- a partnership or joint venture with at least 51 percent of the interest controlled or held by minorities or women; or
- a corporation or other business entity controlled by minorities with at least 51 percent of the voting interest and 51 percent of the beneficial ownership interest held by minorities or women.²³

The Certification Unit maintains a list of certified M/WBEs and monitors state contract awards to ensure sufficient M/WBE utilization.

Evaluation Unit. This unit examines the participation of SERBs in state contracting and reviews firms applying for certification. Before issuing an RFP, the unit recommends a desired

¹⁶ Pennsylvania Department of General Services, "General Conditions and Instructions to Bidders," Feb. 17, 1999.

¹⁷ Betty Miller, BCABD, telephone interview with Marc Pentino, Eastern Regional Office, USCCR, Jan. 6, 2000.

¹⁸ Gary N. Lee, director, BCABD, letter to Marc Pentino, Eastern Regional Office, USCCR, Oct. 11, 2001, in response to affected agency review request.

¹⁹ Pennsylvania Department of General Services, *Field Procurement Handbook*, 1998, p. 11. The number of enterprise zones is expected to be reduced to 20 by July 1, 2004. One staff person is assigned as the enterprise zone coordinator. See David Messner, program manager, Pennsylvania Department of Community and Economic Development, Office of Community Development, Enterprise Zone Program, letter to Marc Pentino, Eastern Regional Office, USCCR, June 30, 2000; and Messner, telephone interview with Marc Pentino, Eastern Regional Office, USCCR, Jan. 4, 2000.

²⁰ Gary N. Lee, director, BCABD, letter to Marc Pentino, Eastern Regional Office, USCCR, Oct. 11, 2001, in response to affected agency review request.

²¹ *Ibid.*

²² Note that some businesses are counted as both a minority- and women-owned firm. Betty Miller, BCABD, telephone interview with Marc Pentino, Eastern Regional Office, USCCR, Jan. 6, 2000. For the 1998 total, see BCABD Summary Report, forwarded by Gary N. Lee, director, BCABD, to Marc Pentino, Eastern Regional Office, USCCR, Dec. 21, 1998.

²³ Pennsylvania Department of Community and Economic Development, *How to Secure Contracts with Pennsylvania Agencies*.

level of SERB participation.²⁴ The unit returns the RFP to the state agency, which then awards the contract to the bidder with the highest score. The score is based on points assigned for various technical aspects of each proposal, including SERB participation.²⁵

Investigation Unit. This unit performs on-site reviews of firms that apply for M/WBE certification, responds to complaints of discrimination in fulfilling state contracts, and investigates alleged fraud in programs involving M/WBEs.²⁶ As of December 2001, it was reported that the unit reviews four complaints a month.²⁷ The unit will initiate an on-site review if it is unclear whether minorities or women have a sufficient ownership interest and/or control in the firm. The unit recommends to a certification board that it rescind or deny certification. In 2000, the board denied 216 certification files.²⁸

Training and Development Unit. This unit provides free training programs, counseling, and resource material to certified M/WBEs and organizations that assist small businesses.²⁹ In 1999, the unit conducted more than 100 training workshops with approximately 1,000 participants. In 2000, the unit held 121 events, reaching 1,402 participants, 853 of whom were MBEs and WBEs.³⁰ Training is also provided to state agency purchasing agents, and referral lists of certified M/WBEs are given to state and local government agencies and private companies.³¹ The unit encourages business owners to

seek certification in order to compete for state government contracts.³²

Five other offices in state government provide financing and assistance to M/WBEs, and are located in the Department of Community and Economic Development and the governor's office:³³

Entrepreneurial Assistance Office. In 1995, then-Governor Tom Ridge created the Entrepreneurial Assistance Office to serve as the lead state agency for small-business development. The office encourages and supports entrepreneurs and small-business owners by offering technical assistance and services to promote the creation, expansion, and retention of successful small businesses. Through a toll-free number and Web site, small-business counselors provide information and answer questions about starting and operating a business in Pennsylvania, including licenses, permits, certification, and state and federal funding sources.

The office also serves as the state's coordinating office for 14 Procurement Technical Assistance Centers, which offer one-on-one technical assistance to businesses seeking to secure local, state, and federal procurement opportunities. The centers assist M/WBEs by offering certification assistance, introducing them to prime contractors, and conducting workshops.³⁴

²⁴ *Ibid.*, p. 90.

²⁵ Of the maximum number of points assignable, a company can earn up to 100 percent of the allowable points if the prime bidder qualifies as a SERB, up to 90 percent if the prime enters into a joint venture agreement with a SERB, or up to 50 percent if subcontracting to SERBs. *See* BCABD, "Socially and Economically Restricted Business Program (SERB)," fact sheet, n.d (hereafter cited as BCABD fact sheet).

²⁶ *Ibid.*

²⁷ Gary N. Lee, director, BCABD, letter to Marc Pentino, Eastern Regional Office, USCCR, Dec. 17, 2001.

²⁸ *Ibid.*

²⁹ BCABD fact sheet.

³⁰ "Annual Activities Statistics for 2000—BCABD Training and Development Unit," Gary N. Lee, director, BCABD, letter to Marc Pentino, Eastern Regional Office, Oct. 11, 2001, in response to affected agency review request.

³¹ Usha Hannigan, BCABD, telephone interview with Marc Pentino, Eastern Regional Office, USCCR, Jan. 6, 2000.

³² For additional unit services, *see* appendix 6. "Annual Activities Statistics for 2000—BCABD Training and Development Unit," Gary N. Lee, director, BCABD, letter to Marc Pentino, Eastern Regional Office, USCCR, Oct. 11, 2001, in response to affected agency review request.

³³ Additional offices not mentioned include the Office of Minority Lending, which provides loans and equity guarantees to disadvantaged firms, and the Governor's Action Team, which serves as a primary contact for Fortune 500, manufacturing, and high-tech business expansion in Pennsylvania. As part of the initiative, staff recruits M/WBEs to participate in international trade missions.

By filling out a single application through the Department of Community and Economic Development, businesses can apply for funding from the various agencies. The application is on the Internet at <www.esa.decd.state.pa.us/singleapp.nsf/home>.

³⁴ Joyce O'Brien, Entrepreneurial Assistance Office, Pennsylvania Department of Community and Economic Development, letter to Marc Pentino, Eastern Regional Office, USCCR, July 11, 2000.

Two advocate positions are housed within the Entrepreneurial Assistance Office, the minority business advocate and the women's business advocate, which plan and implement strategies and programs to attract, retain, and expand M/WBE activity. These two full-time advocates promote the interests of M/WBEs by consulting and intervening with other state and government agencies, and networking and partnering with public and private entities on behalf of M/WBEs. They address unique challenges of M/WBEs through conferences, workshops, and statewide training programs.³⁵

Coalition of Small Business Advocates.

In 1998, the Ridge administration created the Coalition of Small Business Advocates composed of representatives from the Governor's Advisory Commission on African American Affairs, the Governor's Advisory Commission on Latino Affairs, BCABD, Pennsylvania Weed and Seed, and the Pennsylvania Commission for Women.³⁶ The Coalition promotes the interests of small, minority, and women businesses and identifies

³⁵ In 1999–2000, “the Minority Business Advocate’s activities included a series of statewide ‘Practical Solutions’ seminars dealing with credit lines, low interest loans, technical assistance, and credit repair for minority business owners in six regions and a minority business plan competition held in Philadelphia which generated 84 business plans. Five winners received \$25,000 each from the EAO resource funds. The women’s business advocate partnered with numerous Small Business Development Centers, professional women’s organizations, banks and chambers of commerce to sponsor workshops, annual awards for women entrepreneurs, women business owners networking luncheons and Entrepreneurs Ahead: Annual Women Business Owners conference. The office also sponsored the 5th Annual Pennsylvania Best 50 Women in Business program to honor women who share a commitment to business growth, professional excellence and the community. In addition, both advocates participated in numerous SBA economic development tours to meet with and counsel small business owners one-on-one.” Joyce O’Brien, Entrepreneurial Assistance Office, Pennsylvania Department of Community and Economic Development, letter to Marc Pentino, Eastern Regional Office, USCCR, July 11, 2000.

The Committee acknowledges the contribution to this section by Joyce O’Brien, Entrepreneurial Assistance Office, Pennsylvania Department of Community and Economic Development. See O’Brien letter to Marc Pentino, Eastern Regional Office, USCCR, July 11, 2000.

³⁶ Pennsylvania Department of Community and Economic Development, Coalition of Small Business Advocates, “Ridge Administration’s Coalition of Small Business Advocates Hosts Community Roundtable in Philadelphia,” press release, Mar. 13, 2000, accessed at <<http://www.dced.state.pa.us>>.

common barriers to their success. Coalition members assist M/WBEs by sponsoring marketing counseling, conferences/workshops on business development, and in collaboration with public and private entities, training programs.

Pennsylvania Capital Access Program (PennCAP). PennCAP provides loan guarantees (up to \$500,000) to small businesses and nonprofit organizations that ordinarily might not qualify under traditional lending programs. Borrowers apply for the guaranteed loans through four participating banks. As of November 1999, the program had awarded 228 loans, totaling \$8.9 million.³⁷

Pennsylvania Minority Business Development Authority. The Authority provides loans (\$25,000 to \$750,000) to state residents who own or control a minority business enterprise. To be eligible for a loan, the funds must be intended to provide working capital, purchase machinery or equipment, or defray the cost of acquiring or renovating land or buildings.³⁸ For loans under \$100,000, all firms must (within three years) create or preserve at least one permanent, full-time job (or equivalent part-time jobs) for each \$15,000 in loan proceeds.³⁹ For instance, if a loan totaled \$30,000, two staff positions must be created.

Small Business First Fund. The Fund, established in 1998, provides economic development loans to small businesses located within distressed communities. Loans are offered at a 2 percent interest rate and can be used for working capital or to finance the purchase of land, buildings, and equipment.⁴⁰

Contracting with the City of Philadelphia

Philadelphia also uses a competitive bidding system for the acquisition of services, supplies,

³⁷ Cathy Onyeaka, program manager, Pennsylvania Economic Development Financing Authority, letters to Marc Pentino, Eastern Regional Office, USCCR, Jan. 4, 2000, and July 6, 2000. A one-time enrollment fee of 0.5 percent to 3 percent of the loan amount is charged.

³⁸ See generally PA. CONS. STAT. §§ 390.1–390.18 (2001).

³⁹ *Id.* Generally, the process to receive a loan takes approximately 120 days from the application to receipt of funds.

⁴⁰ The department publishes a list of area loan organizations where applicants can apply for a loan.

equipment, and construction.⁴¹ Eighty percent of the city's goods and services are competitively purchased.⁴² Procurements exceeding \$11,000, must be publicly advertised in local newspapers. For large or complex procurements, the Procurement Department may utilize a prequalification process to review a vendor's qualifications and ability to perform the job.⁴³ Bids must be "responsive" to the city's bid requirements and any requirements for M/WBE participation.⁴⁴ Goals and participation ranges are established for each bid to ensure participation of M/WBEs and businesses owned by people with disabilities.

The city created the Minority Business Enterprise Council (MBEC) to ensure the inclusion of businesses owned by minorities, women, and people with disabilities in city contracts for goods and services. In addition to implementing and monitoring the city's affirmative action policies, MBEC certifies minority-, women- and disabled-owned business enterprises,⁴⁵ evaluates bid packages and potential contract awards, and monitors these awards.⁴⁶

The average processing time for MBEC certification is four to six months.⁴⁷ Certified businesses are reviewed every three years, and MBEC publishes a directory of certified firms for use by prime contractors and developers of city agency projects. MBEC reviews purchase requisitions, bids and contract documents, compliance plans, and monthly compliance reports of 36 boards and agencies.⁴⁸ It also reviews all bids to ascertain whether discrimination had occurred in the solicitation of contractors, tracks M/WBE participation in city contracts, and performs in-

vestigations and site visits to uncover incidents of discrimination.⁴⁹ And since 1996, MBEC has provided sensitivity and diversity training to city and quasi-city agencies, and offered technical assistance and training to encourage the use of M/WBEs and small businesses. For M/WBEs, it has held one-on-one development sessions and conducted seminars and forums on contracting opportunities.⁵⁰

History of the Philadelphia Set-Aside Program

In 1982 the Philadelphia City Council enacted ordinance 17-500, which mandated specific set-aside goals for M/WBEs in all city contracts (15 percent for minority-owned, 10 percent for women-owned). In addition, the program created a sheltered market—designating a class of contracts on which only certified M/WBEs could apply.⁵¹ In the late 1980s, the ordinance was amended to require that participating businesses be disadvantaged⁵² and added a 2 percent contracting goal for businesses owned by persons with disabilities.⁵³

The Philadelphia program was soon affected by national developments in affirmative action. The U.S. Supreme Court's 1989 *Croson* decision, declaring the city of Richmond's set-aside program unconstitutional, ushered in a strict standard of review for all state and local set-aside programs.⁵⁴ That same year, nine Philadelphia area contractors' associations challenged the constitutionality of ordinance 17-500 in federal

⁴¹ Bids are designated under five classifications: advertised, public works bids, small order purchases, concession bids, and surplus property bids.

⁴² Minority Business Enterprise Council (MBEC), 1994 Annual Report, p. 3.

⁴³ City of Philadelphia Procurement Department, *Vendor's Guide, How to Do Business with the City of Philadelphia*, June 1999, p. 10.

⁴⁴ *Ibid.*, p. 25.

⁴⁵ MBEC uses the initials M/W/Ds-DBEs to refer to minority, women, disabled, and disadvantaged business enterprises.

⁴⁶ See City of Philadelphia Procurement Department, *Vendor's Guide*, pp. 35–36; Exec. Order No. I-93, PHILADELPHIA, PA. CODE § 17-500 (1999); City of Philadelphia, *Five-Year Financial Plan (FY 2000–2004)*, Jan. 26, 1999, p. 366.

⁴⁷ MBEC, 1994 Annual Report, p. 2.

⁴⁸ *Ibid.*

⁴⁹ Exec. Order No. I-93 § 4, PHILADELPHIA, PA.

⁵⁰ James Roundtree, director, MBEC, interview, MBEC office, Sept. 25, 2000. See also City of Philadelphia, *Five-Year Financial Plan (FY 2000–2004)*, Jan. 26, 1999, p. 369.

⁵¹ MBEC, 1994 Annual Report.

⁵² Disadvantaged business enterprises are businesses with at least 51 percent ownership by one or more socially and economically disadvantaged individuals. PHILADELPHIA, PA. CODE § 17-500 (1999).

⁵³ MBEC, 1994 Annual Report, p. 1. See also Flamer Comments.

⁵⁴ See Steven K. DiLiberto, "Setting Aside Set-Asides: The New Standard for Affirmative Action Programs in the Construction Industry," *Villanova Law Review*, vol. 42, 1997, p. 2039; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). See also Ohio Advisory Committee to the U.S. Commission on Civil Rights, *The Impact of the City of Richmond v. J.A. Croson Decision Upon Minority and Female Business Programs in Selected Cities of Ohio*, March 1997. See also Flamer Comments.

district court.⁵⁵ In defending the ordinance, the city claimed that private and city prime contractors and contractors' associations discriminated against minority- and women-owned businesses and that two prior programs—the early Philadelphia Plan and a Philadelphia Urban Coalition model—had failed to remedy past discrimination in the construction industry, thus justifying the need for ordinance 17-500.⁵⁶ The court ruled that the ordinance was unconstitutional. On appeal, the Third Circuit partially vacated the district court ruling. A new trial was ordered to determine if there was sufficient evidence of discrimination to support the city's use of goals for African American-owned business participation in city construction contracts.⁵⁷ The new trial, held in 1994, resulted in a ruling favoring the contractors' associations. The court found that the city failed to identify racial discrimination in the Philadelphia construction industry to warrant the use of a race-based remedy for African American construction firms.⁵⁸ The city appealed unsuccessfully to the Third Circuit and the U.S. Supreme Court.⁵⁹ (Appendix 3 provides a detailed timeline of court developments.)

The Brimmer Disparity Study

In response to the legal challenge by the contractors' associations in 1989, the city initiated a disparity study to support its argument that M/WBEs experienced discrimination in city contracting. The study conducted by Brimmer & Company Inc. (a financial and economic consulting firm) was completed in 1992 and was presented to the district court. Brimmer's analysis

compared the percentage of participation (in dollars) of minority groups in citywide public works contracts with their percentage composition in the Philadelphia area construction business to reach a disparity index.⁶⁰

From this analysis, Brimmer concluded that:

- A disparity existed between contracts awarded to white-owned firms and minority- and women-owned businesses (specifically African American construction company owners) for the years 1979–1981. This disparity was greater in the city and metropolitan area than in the nation at large.⁶¹
- Minorities (particularly African Americans and Hispanics) faced obstacles that impeded their ability to participate as workers and owners in the construction industry. Obstacles included discriminatory treatment by trade union membership practices and exclusion of minorities from apprenticeship programs.⁶²
- African American entrepreneurs continued to experience discrimination in bidding for Philadelphia public works contracts. Cited as corroborative evidence was the fact that city officials (a) changed negotiated contract terms upon discovering a contractor's racial identity so that the minority contractor could not profit from the job, thereby rejecting his contract offer; (b) utilized minority contractors in the initial stages of the contract, later switching to a majority contractor; and (c) informed minority contractors that they were not given the contract even though the firm was the lowest responsible bidder.⁶³
- Contracts awarded to minority- and women-owned businesses increased during the pe-

⁵⁵ See U.S. District Court for the Eastern District of Pennsylvania (D.C. Civil Action No. 89-CV-02737) (1989).

⁵⁶ Contractors Association of Eastern Pennsylvania Inc., et al. v. City of Philadelphia, et al., 91 F.3 at 586 (1996).

⁵⁷ "The Court of Appeals concluded that the city had not presented, at the summary judgment level, adequate evidence of discrimination against businesses owned by Hispanic, Native, Asian-American and female persons in the Philadelphia construction industry so the city remained enjoined from applying the goals program for these businesses on city construction contracts." Michelle D. Flamer, senior attorney, City of Philadelphia Law Department, timeline, submitted at the Committee's Aug. 17, 2000, planning meeting (hereafter cited as Flamer Timeline).

⁵⁸ Flamer Timeline. See also Joseph A. Slobodzian, "Judge Rejects Set-Aside Law for Third Time," *Philadelphia Inquirer*, Jan. 12, 1995, pp. B1, B4.

⁵⁹ Flamer Timeline.

⁶⁰ Contractors Association of Eastern Pennsylvania Inc., et al., v. City of Philadelphia, et al., 91 F.3 at 586, n.9 (1996). The disparity indices were calculated by "dividing the percentage participation in dollars of minority groups in the public works contracts awarded by the City of Philadelphia by their percentage availability or composition in the 'population' of Philadelphia area construction firms and multiplying the results by 100." Brimmer Affidavit I, App. at 3941. *Id.*

⁶¹ Brimmer & Company Inc., *Disparities and Discrimination in the Marketplace, Philadelphia, Pennsylvania* (Part One), 1992, p. 112.

⁶² Brimmer & Company Inc., *Disparities and Discrimination in the Marketplace, Philadelphia, Pennsylvania* (Part Two), 1992, p. 142.

⁶³ *Ibid.*, pp. 144–45.

riod the set-aside program was operating and declined once the program was challenged. In addition, because the set-aside program was not utilized while the suit was proceeding, majority construction contractors “reverted to their good old boy networks of white, male subcontractors.”⁶⁴

Ultimately, the U.S. Court of Appeals for the Third Circuit ruled in 1996 that the city’s set-aside program for minorities and women was unconstitutional based on the *Croson* standard.⁶⁵ The court noted that even with Brimmer’s findings, the city lacked evidence to prove that the ordinance (17-500) was passed with more than a generalized assertion of past discrimination, and that the city could have attempted to include race-neutral or less burdensome measures but chose not to. This ruling eliminated the city’s set-aside program and left the city to find new evidence that discrimination existed in city contracting for this class of minority- and women-owned businesses.

D.J. Miller & Associates—The Second Disparity Study

In September 1995, prior to the Third Circuit’s ruling, the city of Philadelphia and a group of quasi-public city agencies decided to conduct a business utilization study (covering the period 1983 to 1995) to determine if there was underutilization of M/WBEs that could be traced to discriminatory practices by the participants. The underlying rationale was that if the study were to conclude that discrimination did exist, this finding could be used to justify adopting a race- and gender-conscious preference program to correct discrimination in contracting, consistent with the *Croson* standards.⁶⁶ Under the terms of the request for proposal (RFP), the city sought a consultant who could:

- review and evaluate the city’s contracting and procurement practices to determine underutilization of M/WBEs;

- determine whether a disparity existed between the number of M/WBEs available (i.e., willing and able to do business with participants) and the number of these firms that had actually done business with participants as a prime contractor or subcontractor;
- determine the extent (and reasons for) any underutilization that was the result of discrimination by the city or within relevant industries; and
- research whether discriminatory practices existed within specific industries and trades, or procurement and service areas used by the city’s purchasing or contracting departments and whether such discriminatory practices had impeded the ability of M/WBEs to compete for and obtain city contracts and subcontracts.⁶⁷

D.J. Miller & Associates (a Georgia-based consulting firm) was selected in 1995 to complete the study within 12 months at an initial cost of nearly \$1 million.⁶⁸ Among other things, D.J. Miller contracted to:

- evaluate contracting and procurement history, policies, and procedures of the participants;
- determine the impact of the termination or suspension of the city’s affirmative action policies and requirements on M/WBEs;
- devise a model to identify any disparity between the city’s utilization of M/WBEs and their availability in the relevant geographic market;
- identify persons subjected to discrimination in the awarding of city contracts, and persons subjected to employment discrimination in the relevant geographic market;
- evaluate the effectiveness of any of the city’s race/gender-neutral initiatives to eliminate discrimination and/or increase M/WBE participation in public contracting;
- determine whether race/gender-neutral alternatives were available and determine if any such neutral alternatives would be as effective as a race/gender-conscious remedial

⁶⁴ *Ibid.*, pp. 146–47.

⁶⁵ The 1996 decision followed two appeals from lower courts.

⁶⁶ City of Philadelphia, Request for Proposal to Conduct Minority/Women Business Utilization Study for the City of Philadelphia and its Related Agencies, Sept. 15, 1995, pp. 3–4.

⁶⁷ *Ibid.*

⁶⁸ The contract, originally for \$987,950, was amended on Aug. 8, 1997, increasing the maximum compensation to \$1,064,312. See Standard Amendment, contract 9721775.

program in eliminating any underutilization of M/WBEs; and

- provide a computerized database of all data and records developed in connection with the contract.

To fulfill its contractual obligations, D.J. Miller agreed to interview city agency officials, prime contractors, M/WBE owners, and professional association and educational institution officials; analyze prior utilization studies and records held by public agencies as to allegations of discrimination made against contractors, subcontractors, vendors, consultants, and local government agencies; compile and analyze hiring and other employment data; and assist the city, if necessary, in revising its existing M/WBE programs.

Status of the D.J. Miller Disparity Study

Although the original target date for the completion of the D.J. Miller study was November 1996 (12 months from the date the contract was signed),⁶⁹ the current status of the study is unclear and its findings are not available to the public. In April 1999, the Advisory Committee was informed that the report was unavailable for distribution—two and a half years after the deadline—because the city did not “consider” the computerized database provided by D.J. Miller complete.⁷⁰ The Committee also learned that an outside consultant from the University of Pennsylvania was chosen to review the D.J. Miller study findings.

Concerned about the unexplained, prolonged delay, the Committee has worked diligently to

learn the reason for the delay in completing and releasing the study. The Advisory Committee encountered unusual difficulty from city officials in obtaining specifics of the D.J. Miller and Brimmer disparity studies, and the nature of the audit by the University of Pennsylvania consultant. The following observations are made to illustrate the Committee’s difficulty.

In April 1999, the Advisory Committee requested that MBEC provide a copy of the Brimmer report, public records concerning the D.J. Miller contract, and any initial findings given to the city.⁷¹ In June 1999, MBEC forwarded a copy of the RFP, D.J. Miller’s proposal, and the signed contract.⁷² However, MBEC elected not to furnish any initial findings by D.J. Miller, claiming that since the contract had not been completed, release of information relating the study would violate provisions of the contract.⁷³ MBEC also claimed that it was not the custodian of the Brimmer report and that the city of Philadelphia’s Law Department could not locate a copy.⁷⁴ When attempts were made to obtain a copy from Brimmer & Company directly, Commission staff was told the report could only be forwarded by the city. The Committee next turned to the Department of Records, the primary city agency charged with maintaining city records. The Department of Records advised staff that it also did not have a copy of the report. Because MBEC, the city’s Law Department, and the Philadelphia Department of Records could not locate the Brimmer report, the Advisory Committee resorted to contacting a witness in the contractors’ associations case, who forwarded a copy to staff.

This inability to locate a document key to the city raises concerns about the record keeping in both MBEC and the Law Department. Even though city records are required to be maintained for a specific time period and can be disposed of, the Brimmer report is central to MBEC’s historical record and should have been

⁶⁹ In October 1995, the parties agreed that portions of the study relating to city contracting to M/WBEs in its service, supply, and equipment contracts would be completed by Nov. 4, 1996. The revision established three phases for completion of the study in regard to city contracting to M/WBEs in its service, supply, and equipment contracts. This was in response to the Federal District Court for Eastern District of Pennsylvania’s order to the city for information in support of its MBE goal in its service, supply, and equipment contracts. City of Philadelphia contract with D.J. Miller & Associates to conduct a minority- and women-owned business utilization study, addendum 1, Oct. 12, 1995. Other amendments to the agreement were made in June 1996, June 1997, and August 1997.

⁷⁰ Michelle D. Flamer, senior attorney, City of Philadelphia Law Department, telephone interview with Marc Pentino, Eastern Regional Office, USCCR, Apr. 21, 1999.

⁷¹ Sieglinde A. Shapiro, chairperson, Pennsylvania Advisory Committee, letter to John W. Macklin, legislative/regulatory affairs monitor, MBEC, Apr. 1, 1999.

⁷² James Roundtree, director, MBEC, letter to Sieglinde A. Shapiro, chairperson, Pennsylvania Advisory Committee, June 14, 1999.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

retained and ultimately forwarded to the Department of Records for archiving.⁷⁵

Second, in early July 2000, the Advisory Committee solicited responses to its draft report from agencies mentioned in the report, including MBEC, and provided them an opportunity to comment on the draft sections. As part of this request, the Committee again posed detailed questions about the D.J. Miller study. Receiving no response, the Committee contacted Philadelphia Mayor John Street's office for assistance, inviting him to its July 2000 planning meeting. The Committee wanted his help to obtain details regarding the D.J. Miller report and invited him to make comments concerning his administration's efforts to assist M/WBEs.⁷⁶ Although the mayor could not attend, a representative from the office of the city attorney spoke with the Committee and suggested a meeting between the members and MBEC representatives.

In September 2000, staff and members of the Committee met with James Roundtree, director of MBEC, to seek clarification of MBEC's role and the current status of the D.J. Miller study.⁷⁷ Roundtree informed the Committee that MBEC expected the consultant to complete his review by January 2001. Once the disparity study was completed, Roundtree said he planned to request that City Council members conduct hearings in

winter 2001 on M/WBE development.⁷⁸ He believed hearings would set the stage for the city to assess what changes in procurement are necessary and discuss new programs that could be developed to assist M/WBEs.⁷⁹ Mr. Roundtree also made assurances that he would forward information to the Committee regarding the D.J. Miller study and the audit.

As follow-up to this meeting, staff wrote to MBEC in October 2000 requesting various documents that would describe MBEC's activities, future plans, and details concerning the audit of the D.J. Miller study.⁸⁰ The request noted the Committee's urgent need for this information so that it could timely complete its report. In fulfilling the request in November (almost two months after the Committee's meeting with Mr. Roundtree), MBEC forwarded financial plans and disadvantaged business enterprise utilization annual reports to the Committee. However, these documents merely reference the study and audit, and provide no details. Thus, once again, no adequate response was given to the Committee's request for information about the D.J. Miller study or audit (see chapter 6, findings and recommendations).⁸¹

⁷⁵ The Committee notes that in addition to a general citywide retention schedule, each city department is developing agency-specific record-keeping requirements. Marlyn Samson, Philadelphia Department of Records, telephone interview with Marc Pentino, Eastern Regional Office, USCCR, Aug. 22, 2001.

⁷⁶ Sieglinde Shapiro, chairperson, Pennsylvania Advisory Committee, letter to Mayor John Street, July 27, 2000.

⁷⁷ Other information obtained at this meeting is incorporated in earlier sections of this report.

⁷⁸ James Roundtree, interview, MBEC office, Sept. 25, 2000.

⁷⁹ A new program, he explained, would be based on a review of the D.J. Miller study, and other disparity reports in Pennsylvania and other metropolitan areas. *Ibid.*

⁸⁰ Items requested included past annual reports, strategic plans, and amendments to Philadelphia's prevailing wage laws. See Marc Pentino, Eastern Regional Office, USCCR, letter to James Roundtree, director, MBEC, Oct. 3, 2000.

⁸¹ The Committee made one last attempt on June 14, 2002, to acquire update information regarding the D.J. Miller study, the audit by the University of Pennsylvania consultant, and planned hearings. As of July 15, 2002, no information was received or forwarded to the Committee by MBEC.

CHAPTER 3

Barriers Facing Minority- and Women-Owned Businesses

To obtain information on obstacles M/WBEs face in bidding for and completing state and municipal contracts, the Advisory Committee held a daylong forum on January 14, 1999. The forum consisted of five panel sessions where M/WBE owners, state and city of Philadelphia agency representatives, public officials, community advocates, industry analysts, and large prime contractors spoke.¹ At the end of the forum was an open public session where seven members of the audience spoke of impediments to businesses in Pennsylvania. There was a general sense that for years, disparity existed between M/WBEs and white-owned firms, largely due to discrimination in the contracting process. Many of the obstacles cited were reminiscent of those referenced in the Brimmer report (chapter 2). M/WBE owners described difficulty gaining access to necessary information and capital, limited job training opportunities, unfair labor practices such as non-payment for work and job interference, and problems associated with the completion of municipal contracts. This chapter summarizes barriers discussed by the panelists and, where appropriate, incorporates information from other studies.²

¹ The panels were titled “Overview of Barriers to M/WBEs”; “Perspective of M/WBE Owners”; “Perspective of Union/Large Prime Contractors”; “Successful Initiatives, Solutions, and Exemplary Ventures”; and “State/Local Programs Assisting M/WBE Firms.” Panelists appearing at the forum are listed in appendix 1.

² The chapter cites the Commission’s Sept. 5, 1997, briefing, “Civil Rights Implications of Regulatory Obstacles Confronting Minority Entrepreneurs.” The briefing included presentations by Gerald A. Reynolds, Center for New Black Leadership; Taalib-Din Abdul Uqdah, Cornrows and Company; Marina Morales Laverdy, Latin American Management Association; Craig A. Thompson, Council for Economic and Business Opportunity Inc.; Nicole S. Garnett, Institute for

Negative Views

According to the panelists, majority contractors and vendors hold prejudicial views of M/WBEs’ ability to complete a job. They regard M/WBEs as unsophisticated, lacking necessary equipment and resources, and not having needed experience in or knowledge of contracting procedures.³ M/WBEs must make extra effort to prove their ability and worthiness to prime contractors in order to receive a contract. M/WBE owners believe that they are qualified, yet encounter perceptions that they lack necessary experience to handle a particular job.⁴ In the words of Floyd Alston, president of Beech Interplex Inc., a nonprofit community development corporation in north-central Philadelphia:

One of the obstacles that we run into most often is the assumption on the part of persons who we make our appeals, submit proposals, [or] make a pitch [to] . . . that because we are a minority, we don’t have the capacity or the capability. I can almost see it when we walk in the room. We really have a difficult time overcoming that assumption. There is an assumption that because we are relatively small, we can’t perform as well as large, sophisticated organizations. . . . Well, how do we overcome it? We overcome it by being very good at what we do and doing our homework. We are very

Justice; William J. Dennis, National Federation of Independent Business Education Foundation; and Dr. Margaret C. Simms, Joint Center for Political and Economic Studies.

³ Grace Gibson, president, Quality Heating & Sheet Metal Company, testimony before the Pennsylvania Advisory Committee to the U.S. Commission on Civil Rights, forum, Philadelphia, PA, Jan. 14, 1999, transcript, pp. 77–78 (hereafter cited as Transcript); Darcel McGee, president, Quality Mobile Hearing, testimony, Transcript, p. 82; Floyd Alston, president, Beech Interplex Inc., testimony, Transcript, p. 67.

⁴ Gibson testimony, Transcript, pp. 77–78.

professional in our presentations. We give quality documentation of what we can do and try to show them our sheer tenacity.⁵

Limited Access to Critical Information and Business Networks

M/WBE owners claimed that information regarding contracts is not disseminated effectively and that sometimes prime contractors fail to timely notify M/WBEs of bid opportunities.⁶ As a result, M/WBEs cannot prepare bid documents to the level of expertise required to secure the contract. For example, Clinton Connor, chairman of the Economic Development Committee of the Philadelphia NAACP, described his experiences:

One of our negotiating sessions took place on a Friday [with prime contractors]. The subject came up . . . how many contracts have you let? How many do you have going out in the near future? Friday [morning] . . . they informed us that they had nine contracts that were to be bid on at 8 o'clock Monday morning, which gave the contractors that we were representing . . . almost no time. But those contractors . . . worked throughout the entire weekend to have those bids submitted. . . . Needless to say, none of them were chosen for any of the projects.⁷

According to Lynn Claytor, president of Contract Compliance Inc., a company that monitors M/WBE participation in public contracts, Pennsylvania indeed has no system in place to distribute information to M/WBEs effectively.⁸ In its 1997 report summarizing disparities in government contracting in 58 states and localities, the Urban Institute stated that majority contractors reveal bids they received from M/WBEs to nonminority subcontractors, enabling them to underbid M/WBEs and secure the contract.⁹ The Urban Institute report also identified instances where bid notices were publicized through majority-business networks that minorities have

found difficult to penetrate.¹⁰ Without knowledge of bid and contract opportunities (and without the same business contacts as majority-owned firms), M/WBEs find it difficult to enter the marketplace, limiting the opportunity for their economic growth.¹¹ Floyd Alston refers to this as dealing with the inner circle—the “old boy” network that prevails. “In most instances, the deal is done before we walk in and we are given a courtesy interview or a courtesy kind of consideration,” he said.¹²

Limited Access to Capital

Small businesses, particularly M/WBEs, often lack sufficient funds to undertake medium-to large-scale projects. For M/WBEs, obtaining necessary funds to bid for and complete a job is a constant concern. In its 1998 survey of more than 650 women business owners, the National Foundation for Women Business Owners found that access to capital is a primary concern for women, particularly minority women business owners.¹³

Many owners begin their businesses with their own money, by using either personal savings or credit cards for part or all of their capital needs.¹⁴ Because of this, any possibility of discrimination in the lending process poses additional hurdles for M/WBEs to receive sufficient capital. The National Foundation for Women Business Owners found that African American and Native American women business owners were more likely to have been turned down for loans by a bank when starting their business and were less likely to have bank credit than Asian, Hispanic, or white women business owners.¹⁵ The 1997 Urban Institute study also iden-

⁵ Alston testimony, Transcript, pp. 67–68.

⁶ Lynn Claytor, president, Contract Compliance Inc., testimony, Transcript, pp. 24–25, 28; Clinton Connor, chairman, NAACP, Economic Development Committee, testimony, Transcript, p. 14; Gibson testimony, Transcript, p. 103.

⁷ Connor testimony, Transcript, p. 14.

⁸ Claytor testimony, Transcript, p. 25.

⁹ The Urban Institute, *Do Minority-Owned Businesses Get a Fair Share of Government Contracts?* 1997, p. 42.

¹⁰ Ibid.

¹¹ Ibid., p. 37. See also Carole Robinson, president, Robins Industrial & Building Supplies Inc., testimony, Transcript, p. 277; Conner testimony, Transcript, p. 13; Jihad Ali, United Minority Enterprise Association, testimony, Transcript, p. 48.

¹² Alston testimony, Transcript, pp. 67–68.

¹³ National Foundation for Women Business Owners, *Women Business Owners of Color—Challenges and Accomplishments*, April 1998, p. 20.

¹⁴ U.S. Small Business Administration, Office of Advocacy, *Minorities in Business*, 1999, p. 19. See also the Urban Institute, *Do Minority-Owned Businesses Get a Fair Share?* p. 34.

¹⁵ National Foundation for Women Business Owners, *Women Business Owners of Color*, p. 23.

tified factors that limit M/WBEs' access to financial resources, including limited experience in borrowing, difficulty demonstrating creditworthiness, low income and home ownership, and poor capital resources.¹⁶ Without these elements, it is difficult for M/WBEs to provide sufficient collateral to support a business loan. In addition, evidence points to possible discrimination in the loan process. For example, the Urban Institute references studies where African Americans with the same amount of capital as whites receive approximately half the loan dollars when seeking business loans.¹⁷ Even with the same borrowing credentials, minorities are less likely to obtain business loans than white owners.¹⁸

Because they have difficulty obtaining necessary capital, panelists claimed M/WBEs are sometimes precluded from bidding on contracts requiring a set amount of cash reserves or specific equipment. In addition, because M/WBEs are viewed as lacking the ability to complete a job, the banking industry becomes weary of entering into business with all other M/WBEs in the area if an M/WBE does not succeed.¹⁹ Floyd Alston believes such indiscriminate practices would not be adopted if the failed firms were majority-owned, because even when majority-owned firms file bankruptcy they are able to obtain financing.²⁰

Unlike prime contractors, who can receive mobilization funds from municipal agencies to enable them to begin work, subcontractors and M/WBEs do not receive money upfront and must frequently finance on their own what is needed to complete the job.²¹ Without sufficient funds, M/WBE owners said they are placed in the precarious position of pledging their own personal credit or obtaining additional mortgages on their homes or businesses.²² These circumstances limit available cash flow and frequently cause

businesses to default on their bonds and financial commitments.²³ Furthermore, without sufficient capital, M/WBEs cannot do volume buying to obtain the best prices from suppliers. This in turn makes them less competitive than majority-owned firms, and they might not win a future contract because of their higher price.²⁴

Unclear Contract Terms

In general, M/WBEs are smaller, with fewer employees than majority firms. Problems associated with being a small business can add to the difficulties already experienced by M/WBEs. When confronted with confusing contract terms related to billing arrangements, payments, and termination, small businesses sometimes do not have staff expertise to clarify or do what is needed. Because of the lack of in-house expertise or the rush to secure and begin working on a contract, M/WBEs often fail to review carefully the contract provisions or negotiate revisions to their benefit. The experience of Grace Gibson, an owner of a sheet metal installation firm, illustrates this point. When her firm submits bids and proposals, she frequently is asked to begin work without a signed contract. In place of a signed contract, she is often given the prime contractor's contract. Given the size and complexity of the prime contractor's contract, it is difficult for her to comprehend the intricacies of the contract, let alone negotiate revisions.²⁵

Difficulty Obtaining Bonding

In order to bid projects, most firms are required to obtain performance bonds, which guarantee that a contractor will fully perform the contract and offer protections against breach. Obtaining sufficient bonding (or bonding at all) is frequently cited as a major barrier to M/WBEs. Ambrose Chukwanenye, president of a minority-owned business, said only large contractors can afford bonding. Small businesses, he said, should not be asked to obtain bonding since they usually spend significant funds upfront just to perform the work in the contract

¹⁶ The Urban Institute, *Do Minority-Owned Businesses Get a Fair Share?* p. 36.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Alston testimony, Transcript, pp. 107–08.

²⁰ Ibid.

²¹ Marcellus Blair, president, Progressive Plastics Products Corporation, testimony, Transcript, p. 99.

²² Gibson testimony, Transcript, p. 104; McGee testimony, Transcript, p. 105.

²³ James Roundtree, director, Minority Business Enterprise Council (MBEC), testimony, Transcript, p. 223.

²⁴ Earl F. Callaway, C.E. Franklin Inc., letter to Marc Pentino, Eastern Regional Office, U.S. Commission on Civil Rights (USCCR), Jan. 11, 1999.

²⁵ Gibson testimony, Transcript, pp. 97–98.

(e.g., to obtain material and labor), and bonding requirements place additional heavy burdens on small-business owners. He told the Committee:

A lot of small contractors have their money held by the city or the [prime contractor on a previous job]. To me, it is enough that I am putting my money up first [to obtain] materials and labor [costs] up front. I don't know why I need [to pay] an insurance company 2½ percent of the contract value for doing nothing. [It is a practice that assumes] because [you are] rich, [you] can afford it. [But] if you are poor . . . ultimately you can't compete.²⁶

Minority firms often have difficulty obtaining bonding because they lack the experience bonding companies require. In addition, it is alleged that in some states bonding agencies are not bound by antidiscrimination laws and can arbitrarily choose whether or not to bond a firm.²⁷ No panelist at the forum was able to explain how bond requirements can be lowered or waived or identify a state or local office that could assist in obtaining bonds.

Difficulty Entering the Skilled Trades

In some industries, particularly construction-related crafts, membership in local unions has been a prerequisite for training and apprenticeships in specific trades. In the past, minorities were denied access to union membership, and consequently could not participate in their apprentice programs. According to Clinton Conner, chairman of the Economic Development Committee of the Philadelphia chapter of the NAACP, trade unions in the Philadelphia area have historically limited access to apprenticeships for African Americans.²⁸ This fact has been pointed out as far back as the late 1960s and was a primary impetus behind the original Philadelphia Plan, which was designed to remedy discrimination in the construction industry. Similar difficulty has also been reported in Pittsburgh, where community leaders have publicly voiced their concern that local construction trade unions have not actively recruited minori-

ties for their training programs.²⁹ Union organizations have responded by citing their participation in job fairs, their pre-apprenticeship training programs, and involvement in community organizations that assist minority applicants.³⁰

Prevailing Wage Laws

Prevailing wage laws, such as the Davis-Bacon Act and related state statutes, require private contractors working on public projects to pay wages and benefits to their workers that are "prevailing" for similar work in or near the locality in which the project is located.³¹ Using standardized pay scales in union and non-union contracts, Pennsylvania sets a minimum wage rate for each craft or classification of work for a public works contract.³² In the construction field, Pennsylvania uses union rates for state-funded projects when it determines that a majority of the workers in the area belong to the union.³³ Employers who are awarded public contracts must agree to pay the set wage.³⁴ For other projects, the state uses rates based on 1995 and 1996 employer surveys.³⁵ Frequently, M/WBEs do not have the financial resources to pay their workers the higher prevailing wages specified under the law. As a result, many M/WBEs choose to remain non-unionized, disqualifying them from competing in municipal projects, which call for prevailing wage rates among the project's labor force.³⁶

²⁹ See Jim McKay, "Pittsburgh Construction Unions Say They're Healing Rift with Blacks," *Pittsburgh Post-Gazette*, Apr. 12, 1999.

³⁰ *Ibid.*

³¹ Daniel P. Kessler and Lawrence F. Katz, "Prevailing Wage Laws and Construction Labor Markets," *Industrial & Labor Relations Review*, January 2001, p. 259. See also Beth Hermanson, "Pennsylvania's Prevailing Wage Act: An Appropriate Target for ERISA Preemption," *Dickinson Law Review*, vol. 100, Summer 1996, p. 924.

³² Prior to 1997, only union wages were used to calculate prevailing rates. See "Prevailing Wage Study Flawed, Labor and Industry Officials Say," *Pennsylvania Law Weekly*, Oct. 4, 1999, p. 9.

³³ Jim McKay, "Prevailing Wage Controversy at Ballpark," *Pittsburgh Post-Gazette*, Aug. 8, 1999.

³⁴ 43 P.S. § 165-5 (1999). "Not less than the prevailing minimum wages as determined hereunder shall be paid to all workmen employed on public work." *Id.*

³⁵ McKay, "Prevailing Wage Controversy at Ballpark."

³⁶ Remaining non-union may cause conflict with union firms on some job sites; see section below titled "Interference from Labor Unions."

²⁶ Ambrose Chukwanenye testimony, Transcript, p. 269.

²⁷ Dr. Margaret Simms, testimony before the U.S. Commission on Civil Rights, briefing, "Civil Rights Implications of Regulatory Obstacles Confronting Minority Entrepreneurs," Sept. 5, 1997, transcript, p. 83.

²⁸ Connor testimony, Transcript, p. 62.

M/WBEs also report that it is difficult to recruit employees because many belong to a union and many M/WBEs cannot afford to pay union wages.³⁷ Since unions provide a substantial portion of the training opportunities for skills in demand by employers in the state, most people entering a particular trade ultimately join a union, and it is difficult for M/WBEs to find workers who are willing to remain non-union.³⁸ At the same time, unions will pressure the firm into hiring their members.

Supporters of prevailing wage laws claim that without set wages, working-class and union members will receive lower pay, there will be a rise in the number of workers' compensation claims as safety will be reduced on the job, the construction industry will be destabilized, and apprenticeship programs that produce well-trained employees will decline.³⁹ Proponents additionally claim that by having prevailing wage laws, contractors are prevented from basing their bids for public works on wages that are lower than those in the area, and prevented from using cheaper labor from outside the area.⁴⁰

Project Labor Agreements in Philadelphia

Philadelphia Executive Order 5-95 (see appendix 4) encourages the use of project labor agreements between city agencies and labor organizations in public works projects over \$250,000. The order specifies that the city, the project manager, and any contractor shall have

the right to select qualified bidders for subcontracts regardless of a bidder's union status. Despite this protection, the Committee heard claims that project labor agreements effectively eliminate many M/WBEs from participating in these jobs because of the belief that only union firms are permitted to work on the job.⁴¹ These allegations may be the result of such misperception. According to MBEC's director, James Roundtree, the city has entered into three project labor agreements, two with the Philadelphia International Airport and one with the One Parkway Building.⁴² All three projects have non-union firms included.⁴³

Irregularities in Payment for Work Performed

M/WBE owners stated contractors intentionally delay payment for work they have completed, often waiting 60 days or more before compensating M/WBEs. When delays occur, M/WBEs are placed at financial risk, as they must now find other funds to pay their subcontractors while at the same time maintain resources to complete the original contract and other ongoing projects.⁴⁴ Faced with delayed payments, M/WBEs may request different pay schedules or ask to be paid earlier than specified under the contract. When this occurs, however, contractors are likely to assume that M/WBEs cannot handle the job.⁴⁵ Darcel McGee, a minority business owner, noted that such misattribution would not happen if it were a major corporation requesting a different payment schedule.⁴⁶

It is also claimed that prime contractors back charge M/WBEs (i.e., withhold a portion of the agreed upon payment) based on false allegations that M/WBEs delay the work schedule, leave the job site unsupervised, or create a safety hazard. Grace Gibson, president of a minority/women-owned sheet metal firm, explained how delays in payment and back charges can damage a firm's ability to compete in the marketplace:

³⁷ Alston testimony, Transcript, p. 66.

³⁸ In 1998, 827,000 people (or 16.3 percent of the work force) were members of a labor union or trade organization in Pennsylvania. See U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States*, 1999, p. 454.

³⁹ Jim McKay, "Public-Works Wage Battle: Who Will Prevail?" *Pittsburgh Post-Gazette*, May 12, 1996.

⁴⁰ Hermanson, "Pennsylvania's Prevailing Wage Act," p. 925, citing statement of Robert Georgine, president of the Building and Construction Trades Department of the AFL-CIO, ERISA Preemption of State Prevailing Wage Laws: Hearings on H.R. 1036 before the House Subcommittee on Labor-Management Relations of the Committee on Education and Labor, 103rd Congress, 1st Session (1993); and Local Union 598, Plumbers and Pipefitters. *Indus. Journeymen & Apprentices Training Fund v. J.A. Jones Construction Company*, 846 F.2d 1213, 1216 (9th Cir. 1988), *aff'd mem.*, 488 U.S. 881 (1998). See also Daniel P. Kessler and Lawrence F. Katz, "Prevailing Wage Laws and Construction Labor Markets," *Industrial & Labor Relations Review*, vol. 54, January 2001, p. 259.

⁴¹ Gibson testimony, Transcript, p. 77.

⁴² Roundtree testimony, Transcript, p. 232.

⁴³ *Ibid.*

⁴⁴ Blair testimony, Transcript, p. 99.

⁴⁵ McGee testimony, Transcript, pp. 98-99.

⁴⁶ *Ibid.*

Certified minority- and women-owned companies work very hard to bid a job, negotiate with general contractors, and begin to prepare to do the job. We work for 60 days supplying all our materials and labor before our first payment from the general contractor is made to us. We do not receive the full amount billed because 10 percent is held for retainage. That 10 percent is held every month on every invoice until the job is completed, and most times, long after the project is turned over to the owners. It can be as long as a year after the owner takes possession that that 10 percent is released. Dishonest general contractors or builders back charge us for false or unlawful charges. We can do nothing to convince these general contractors to release our 10 percent because they are holding our money. . . .

Some of the back charges are: we are delaying the work schedule, we don't lock gates, or we don't clean up. This happened to me and the general contractor not only held my 10 percent, but my regular contract money as well to the tune of \$165,000. I was held hostage. When this particular general contractor did not pay me \$165,000, I couldn't pay my suppliers. My credit was ruined. My credit is still ruined. I am still trying to come back from that. [In addition to holding 10 percent of the contract money,] general contractors also reduce my invoices without informing [me]. I knew nothing about it. There was no documentation that he was reducing it. And the reason he reduced it is because he didn't feel that I did that percentage of work. So, now you have an additional \$20,000 on top of the 10 percent that he controls.⁴⁷

According to Marcellus Blair, president of a minority-owned business, municipal agencies pay the prime contractor project start-up funds on a regular basis, but do not monitor whether M/WBEs (as subcontractors) are paid timely by the contractor. To make matters worse, further delays in paying M/WBEs occur when municipal agencies are late in paying the prime contractor.⁴⁸

In Philadelphia, it was alleged that city officials do not track whether M/WBEs are paid for completed work.⁴⁹ The experience of Marcellus Blair is illustrative. His company, MBA Enterprises Inc., was selected by a city agency to perform work on a housing project. As part of the agreement between the agency, prime contrac-

tor, and MBA, supplies and materials MBA required were to be paid by the prime contractor. During the course of the project, however, the prime contractor was consistently late in paying MBA for these charges, causing it to delay paying its employees for work performed, which in turn led them to stop work on the project.⁵⁰ Blair complained to the city agency but received no relief.⁵¹

Interference from Labor Unions

Concern was raised that unions interfere with valid contracts between prime contractors and M/WBEs. It was alleged that once union organizations discover that a non-union firm was selected for a particular job, the firm may be subjected to a variety of hostile acts: trespassing at its job site, picketing, and vandalism, or having untrue complaints filed against it with the National Labor Relations Board.⁵² It was also claimed that unions threaten prime contractors with violence or tell them to shut down unless they replace non-union subcontractors with unionized ones.⁵³ Projects can easily be shut down, because workers usually refuse to cross a picket line. Grace Gibson elaborated:

⁵⁰ *Ibid.*, p. 87.

⁵¹ *Ibid.*, p. 88. In the affected agency review of the Advisory Committee's report, Michelle Flamer, senior attorney, City of Philadelphia Law Department, provided two clarifications: First, the awarding agency identified in this paragraph is not revealed, but the contract is identified as a housing contract. Contracts for housing rehabilitation are not within MBEC's purview, as they are awarded by commonwealth agencies such as the Redevelopment Authority or independent quasi-public agencies such as the Philadelphia Housing Development Corporation. Second, MBEC conducts two contract monitoring phases—when bids are opened (MBEC verifies the scope and dollar amount of participation of M/WBEs named on the "Solicitation for Participation and Commitment Form")—and after award of the contract (MBEC requires submission of invoices and other documents showing achievement of participation). MBEC also serves as an advocate to the M/WBE community and functions as an intermediary in payment disputes between the prime contractor and M/WBEs. Michelle D. Flamer, senior attorney, letter to Marc Pentino, Eastern Regional Office, USCCR, Oct. 9, 2001. Note, the response does not address MBEC monitoring of reimbursements or timely payment.

⁵² Gibson testimony, Transcript, p. 76; Ali testimony, Transcript, p. 46.

⁵³ Gibson testimony, Transcript, pp. 75–76; Derrick Townes, president, Townes Mechanical Contractors Inc., testimony, Transcript, p. 262.

⁴⁷ Gibson testimony, Transcript, pp. 72, 94, 104.

⁴⁸ Blair testimony, Transcript, p. 99.

⁴⁹ *Ibid.*, p. 86.

I and another owner were recommended by the owners to work on a very large residential job. But, because of union interference, we were not awarded the job. The unions trespass on the job site, inspect our work, [or] disrupt our men from working. This kind of interference by the union interrupts our relationship with our customers. We lose work and cannot earn a living. Non-union companies, when awarded a job, find vandalism to our work and our materials stolen. Everyone knows that we are sabotaged and these acts are done to cost us money. Unions put a tremendous amount of pressure to either sign up the non-union company, or the union organizers try to strip us of our men and try to convince them to join the union, leaving us stranded. If that does not work, they file an untrue complaint with the National Labor Relations Board, costing us time and money to respond.⁵⁴

When a project is shut down, firms whose own work is dependent on the completion of a portion of the project by another subcontractor are forced to suspend their work on the job.⁵⁵ In addition, even if prime contractors elect to keep M/WBEs on the job, M/WBE owners stated they would most likely not be hired in the future regardless of the quality of work performed.⁵⁶ M/WBEs believe that prime contractors would fear another picket and thus choose a subcontractor that is unionized.

It has also been reported that unions threaten prime contractors when they choose non-union firms as subcontractors, often leading to the cancellation of signed or promised contracts.⁵⁷ One M/WBE owner reported that although a prime contractor verbally promised him that he was to receive a project contract, threats from the local union caused the prime contractor not to select him because his firm was non-union.⁵⁸ He later learned that the contract had been given to a union firm at a higher price than the one he quoted.⁵⁹ The following account

illustrates the experience of a non-union subcontractor:⁶⁰

In April 1999, North American Roofing & Sheet Metal Company (North American) and ANVI & Associates sued five union organizations, a general contractor, and the Philadelphia Housing Authority. North American and ANVI alleged that because they employed minority workers, the unions “walked off the job to force the general contractor to terminate” their contract.⁶¹ A representative from North American alleged that he was told by a representative of the general contractor that contracts were not awarded to other M/WBE subcontractors (despite their low bids) because union officials persuaded the property owner not to use non-union employees.⁶² North American and ANVI believe that the contractor knew of their non-union status prior to the contract being signed but decided to use them anyway. In preparing to work on the project, North American purchased new equipment and was required to subcontract 25 percent of its work to ANVI, a minority- and female-owned business.

North American successfully worked this project for four months; however upon arrival of its minority (Asian) subcontractor ANVI, union leaders immediately visited the site and inquired as to ANVI’s union status. Soon after, all of the unionized workers (approximately 296 of 300 who reported that day) left the job site, an action North American and ANVI believed was a protest to keeping non-union workers at the site.⁶³ Later, the general contractor suspended North American’s contract and ordered it to leave the property. After terminating the contract, the general contractor contracted with a union roofing company for a higher price than the original contract with North American.⁶⁴

⁵⁴ Gibson testimony, Transcript, pp. 76–77.

⁵⁵ *Ibid.*, p. 75.

⁵⁶ *Ibid.* See also Earl F. Callaway, C.E. Franklin Inc., letter to Marc Pentino, Eastern Regional Office, USCCR, Jan. 11, 1999.

⁵⁷ Gibson testimony, Transcript, p. 75.

⁵⁸ Townes letter. See also Townes testimony, Transcript, p. 262.

⁵⁹ Townes testimony, Transcript, p. 262.

⁶⁰ Account is based on plaintiff’s complaint in *North American Roofing & Sheet Metal Co. v. Building and Construction Trades Council of Philadelphia*, No. 99-2050, 2000 U.S. Dist. LEXIS 2040 (E.D. Pa. Feb. 29, 2000).

⁶¹ Todd Bishop and Thomas J. Walsh, “Race Suit Filed by Roofers; Battle Pits Non-Union Shops Against Philadelphia Organized Labor,” *Philadelphia Business Journal*, May 28–June 3, 1999, p. 1.

⁶² *Ibid.*

⁶³ *Ibid.* See also *North American Roofing & Sheet Metal Co. v. Building and Construction Trades Council of Philadelphia*, No. 99-2050, 2000 U.S. Dist. LEXIS 2040 (E.D. Pa. Feb. 29, 2000).

⁶⁴ *North American Roofing & Sheet Metal Co. v. Building and Construction Trades Council of Philadelphia*, No. 99-2050, 2000 U.S. Dist. LEXIS 2040 (E.D. Pa. Feb. 29, 2000).

Contractors' False Claims of M/WBE Solicitation and Utilization

At the U.S. Commission on Civil Rights' September 1997 briefing on obstacles confronting minority entrepreneurs, M/WBE representatives alleged that during the bid solicitation process for government contracts, some large contractors falsely claim they solicited M/WBEs as subcontractors and then include their names in the bid package to the municipal agency. It was claimed that the contractors report to the agency that they were unable to find M/WBEs. The problem is exacerbated when contractors apply for and receive "good faith waivers" from contracting agencies, which in essence permit their bid to proceed without M/WBEs being specified. It is alleged that agencies do not question the validity of a contractor's statements made to obtain the waiver.⁶⁵

Most organizations that participated in the Advisory Committee's January 1999 forum were from the Philadelphia area and had similar stories. In regard to city contracts, it was alleged that prime contractors list minority- and women-owned firms as subcontractors in their bid proposals to the city. However, once the contractor obtains the contract, they elect not to use the M/WBE or perform that portion of the contract themselves. Contractors fail to advise the agencies that M/WBEs were not used, and city officials do not monitor whether M/WBEs have worked on the job.⁶⁶ According to one panelist, the city awards contracts to prime contractors even though no subcontractors are named and prime contractors may wait until the project is near completion before naming subcontractors.⁶⁷ On this topic, the Urban Institute noted that these practices are common where there is little oversight by municipal agencies.⁶⁸ It noted, however, that little information is available concern-

ing the level of state and local government monitoring of subcontracting agreements.⁶⁹

Additional Barriers

Two additional barriers M/WBEs face—difficulty obtaining business experience and burdensome regulatory requirements—were referenced at the forum but not explored in depth. These are presented in a footnote for the reader.⁷⁰

⁶⁹ Ibid.

⁷⁰ Difficulty Obtaining Business Experience—Training in a particular business or trade is frequently the key to individuals one day starting their own business. Prior work experience and on-the-job training often give valuable insights into the workings of the business arena and essential access to business contacts for a business to survive. In a March 1999 hearing before the U.S. House of Representatives' Committee on Small Business (Subcommittee on Empowerment), panelists discussed obstacles to entrepreneur education for minority youth, noting a lack of entrepreneurship education at the national level. It was mentioned that too often insights into the free enterprise system are not shared or discussed with minority youth. Without this business acumen, minority and women business owners may find it difficult to conduct everyday business, such as managing cash flow, maintaining growth, and keeping qualified employees. *See also* Stella Horton, director of entrepreneurship, EDTEC, testimony, Hearing before the U.S. House of Representatives, Subcommittee on Empowerment of the Committee on Small Business, Mar. 23, 1999, transcript, pp. 4–5, 10.

Burdensome Regulatory Requirements—Most small-business owners, regardless of their characteristics, find it difficult to afford trained personnel who can competently address regulatory requirements and issues posed by federal, state, and local agencies. At the Commission's 1997 briefing, panelists addressed barriers M/WBEs encounter due to government regulations. They cited government paperwork and complex regulations as sources of frustration M/WBEs face within certain industries. Panelists at the Advisory Committee's January 1999 forum expressed similar comments, particularly in regard to the paperwork required for government contracts and various certification programs. One panelist said that burdensome paperwork requirements in Pennsylvania are problematic for small businesses and that completing the paperwork can be a long and complicated process. Mary Jo Schwab, women's business advocate, Department of Community and Economic Development, testimony, Transcript, pp. 209–10. *See also* Mariella Savidge, "Mother, Daughter Run Solid Business," *The Morning Call*, Apr. 10, 1998, p. B9. *See* U.S. Commission on Civil Rights, briefing, "Civil Rights Implications of Regulatory Obstacles Confronting Minority Entrepreneurs," Sept. 5, 1997, transcript.

See also Timothy F. Mancini, letter to Marc Pentino, Eastern Regional Office, USCCR, July 5, 2000.

⁶⁵ U.S. Commission on Civil Rights, briefing, "Civil Rights Implications of Regulatory Obstacles Confronting Minority Entrepreneurs," Sept. 5, 1997, transcript, p. 18.

⁶⁶ *See* section titled "Irregularities in Payment for Work Performed" above for a response to this claim by the city of Philadelphia.

⁶⁷ Ali testimony, Transcript, p. 42.

⁶⁸ The Urban Institute, *Do Minority-Owned Businesses Get a Fair Share?* p. 43.

CHAPTER 4

Successful Initiatives Using Minority- and Women-Owned Businesses

Because the Committee was interested in identifying initiatives that achieved high M/WBE participation as models for possible emulation, this chapter describes how large firms in Pennsylvania have successfully included M/WBEs as subcontractors by highlighting projects of three organizations: Turner Construction, the University of Pennsylvania, and the Southeastern Pennsylvania Transit Authority. By establishing M/WBE participation goals, including M/WBEs early in a project's formation stages, and ensuring that M/WBEs remain on the project, common barriers M/WBEs experience such as limited access to information, negative assumptions of M/WBE capability, and untimely payment have been reduced or eliminated. In so doing, the initiatives generated a substantial amount of business for minority- and women-owned firms. This section describes components of each company's initiatives.

Turner Construction

Turner Construction, the largest general construction firm in the country, actively seeks to incorporate M/WBEs into its contracts. In 1997, Turner spent more than \$331 million on minority- and women-owned businesses across the United States.¹ Combined with joint ventures, approximately 26 percent of total business went to M/WBEs (over \$792 million out of about \$3

billion worth of annual business).² Turner has achieved this level of M/WBE participation through a variety of measures, including:

- All of Turner's 42 offices (including those in Pittsburgh and Philadelphia) have a community affairs director who oversees M/WBE participation in major subcontracts. Each director is part of a team that reaches out to communities to identify M/WBEs that can either perform work for Turner or become suppliers for Turner in the future. Once major contractors are selected for a job, Turner invites M/WBE owners to pre-bid meetings with prime contractors and monitors M/WBEs that are chosen throughout the life of the project. M/WBE participation levels are reported semiannually to Turner's board of directors.³
- Turner arranges payments to firms on a two-week basis, particularly for those that are not well financed, and addresses the issue of contractors not paying small businesses timely. Ben Kaplan, purchasing manager for Turner, explained that normally contractors pay their subcontractors within 35 to 45 days after completion of the job. Arranging periodic payments to M/WBEs eases the cash flow problem many business owners face.⁴
- Turner sponsors programs to encourage young people to become interested in construction careers and offers training for M/WBE owners. Turner's elementary, middle, and high school program, Youth Force

¹ Valerie Ware, Turner Construction Company, corrections to affected agency review draft, Sept. 28, 2001. *See also* Herb Young, director of community affairs, Turner Construction, testimony before the Pennsylvania Advisory Committee to the U.S. Commission on Civil Rights, forum, Philadelphia, PA, Jan. 14, 1999, transcript, p. 131 (hereafter cited as Transcript).

² *Ibid.*; Ben Kaplan, purchasing manager, Turner Construction, testimony, Transcript, p. 132.

³ Kaplan testimony, Transcript, pp. 116, 127–28; Young testimony, Transcript, p. 114.

⁴ Kaplan testimony, Transcript, p. 119.

2020, raises interest in construction careers and enhances building expertise.

- In some cities, including Pittsburgh and Philadelphia, Turner offers a free eight- to 10-week construction management course for newly formed and established M/WBEs. Taught by experts in the field, M/WBE owners learn construction management techniques such as accounting, project management, negotiation, business planning, marketing, risk analysis, contractor-subcontractor relations, and ways their firms can enter into contracts with Turner. At most sites, an open session is provided for M/WBEs to discuss their experiences and techniques among themselves.⁵

University of Pennsylvania's Sansom Commons Project

Sansom Commons—a mixed commercial development project featuring large retail space, a bookstore, restaurants, and a hotel—is one of the University of Pennsylvania's first concerted efforts at building partnerships with M/WBE vendors, community organizations, and minority residents. Ultimately, \$19.6 million in construction awards were made to MBEs and WBEs, which represented nearly 45 percent of the contract value of the project.⁶ In addition, as of January 1999, minorities and women had worked over 33 percent of all hours worked on the job.⁷

The Sansom Commons project was guided by the university's early commitment that M/WBEs, local residents, and local businesses would benefit from the construction and employment opportunities the project created.⁸ University directors and project leaders sought to maximize M/WBE utilization and ensure that workers from the West Philadelphia area were

included in the construction and operation phases.⁹ This commitment was manifested in bid documents and solicitations that asked contractors to provide M/WBE and minority worker participation estimates. University staff then evaluated the bids submitted based on three criteria: price, responsiveness to the bid package, and economic opportunities for M/WBEs and West Philadelphia-based businesses and residents.¹⁰ If a contractor submitted a bid that did not include appropriate participation levels, the university, the builder, and developer met with the contractor to develop ways to include M/WBEs in that project phase.¹¹ This team approach proved effective in negotiating and committing to a set percentage of participation by M/WBEs. The university also developed advisory committees comprising elected officials, local pastors, university officials, Greater Philadelphia Urban Affairs Coalition representatives, and others who reviewed each contractor's performance by analyzing monthly employment reports.¹²

The university's pre-apprenticeship program provided on-the-job training for minorities and women in the building trades. Herb Young, a representative of Turner Construction, the primary contractor for the Sansom Commons project, noted that unions supported Turner by identifying workers in the West Philadelphia area along with apprentices who could serve as helpers on the job site. The apprenticeship program allowed Turner to provide training to apprentices whom, if successful on trade exams, were sponsored for membership in the union. As of February 2000, more than half of the 60 apprentices trained had become members of local unions.¹³

The university and the Urban Affairs Coalition monitored contractors' use of M/WBEs and minority workers by examining certified payrolls

⁵ Hilton Smith, vice president of community affairs, Turner Construction, telephone interview with Marc Pentino, Eastern Regional Office, U.S. Commission on Civil Rights (USCCR), Aug. 22, 2001.

⁶ Jack Shannon, director of economic development, University of Pennsylvania, fax to Marc Pentino, Eastern Regional Office, USCCR, July 31, 2001.

⁷ Jack Shannon, director of economic development, University of Pennsylvania, testimony, Transcript, p. 156.

⁸ John Fry, executive vice president, University of Pennsylvania, comments referenced in *Honors and Other Things—Almanac*, vol. 46, no. 6, Oct. 5, 1999, accessed at <<http://www.upenn.edu/almanac/v46/no06/honors.html>>.

⁹ Shannon testimony, Transcript, pp. 155–56.

¹⁰ *Ibid.*, pp. 190–91.

¹¹ Charles Soloman, director of economic development, Greater Philadelphia Urban Affairs Commission, testimony, Transcript, p. 163.

¹² *Ibid.*, p. 166. See also Jack Shannon, telephone interview with Marc Pentino, Eastern Regional Office, USCCR, Feb. 28, 2000.

¹³ Jack Shannon, telephone interview with Marc Pentino, Eastern Regional Office, USCCR, Feb. 28, 2000.

and monitoring the actual number of workers at the job site and the number of hours worked.¹⁴

Recognizing that the inability to obtain bonding prevents some M/WBEs from receiving contracts, the university linked prime contractors with M/WBEs to serve as an information resource on financing and bonding. In some instances, M/WBEs worked on the Sansom Commons project even if they did not have bonding, and ultimately were able to compete for other jobs throughout the city because of the initial opportunity the university provided. Jack Shannon, director of economic development for the University of Pennsylvania, cited an example of a fire protection contractor who came onto the job with no bonding capacity. “As a result of the work that her firm [did], . . . she now has sufficient bonding capacity where she successfully competed on other work, off the University of Pennsylvania campus and has successfully bid . . . on jobs involving the Redevelopment Authority,” he said.¹⁵

The university has since tried to replicate its program in other projects in the city and has seen M/WBEs return to participate in other university-related projects and former apprentices join local trade unions.¹⁶ Because Sansom Commons was so successful, the university has instituted an economic opportunity program for all construction projects on the UPenn campus with a value of over \$5 million.¹⁷ In this program, contractors selected for the job must agree to employ MBEs, WBEs, and local businesses and residents.

Southeastern Pennsylvania Transit Authority

Southeastern Pennsylvania Transit Authority (SEPTA) operates the nation’s fifth largest public transportation system, employing approximately 9,000 workers and purchasing about \$1 million per day in goods and services.¹⁸ SEPTA is ex-

pected to spend \$2 billion over the next five years in construction.¹⁹ Like the Sansom Commons project, SEPTA successfully included M/WBEs in the contracting process. It awarded an average of 44 percent of total prime contracts/procurements to disadvantaged business enterprises between fiscal years 1996 and 1999, representing over \$67 million in business. This is over 21 percent of SEPTA’s total contract/procurement dollars spent in this period (see table 2).

SEPTA’s accomplishments can be attributed to the following:

- It established a Small and Disadvantaged Business Utilization Department, which certifies firms as M/WBEs and monitors their participation in SEPTA contracts over \$50,000.²⁰ In accordance with U.S. Department of Transportation regulations, SEPTA must set an overall goal for disadvantaged business participation in transportation contracts. SEPTA established a 21 percent participation goal for M/WBEs using statistical information concerning availability of M/WBEs in the marketplace.²¹ Short of using set-asides to reach this goal, SEPTA is authorized to use various supportive measures to increase participation. Available options include arranging convenient times for bid meetings for M/WBEs, simplifying the bonding process or reducing bonding amounts, implementing an information program to announce contracting opportunities, offering supportive services to help businesses with record keeping and financial accounting, and distributing an M/WBE directory to potential prime contractors.²²

people with special needs. See SEPTA, “Message from General Manager John K. Leary,” accessed at <<http://www.septa.org/inside/gm.html>>.

¹⁹ Ibid. See also Charles Gillean, disadvantaged business utilization specialist, SEPTA, testimony, Transcript, p. 224.

²⁰ Gillean testimony, Transcript, p. 225. The department has a reciprocal certification process whereby firms certified by other transportation departments or transit authorities can be automatically granted their SEPTA certification. See 49 C.F.R. § 26.45 (2001).

²¹ Within each contract, individual goals are developed depending on the subcontracting elements described in the contract. Gillean testimony, Transcript, p. 228.

²² 49 C.F.R. § 26.51 (2001).

¹⁴ Solomon testimony, Transcript, p. 164.

¹⁵ Shannon testimony, Transcript, p. 157.

¹⁶ These projects include a movie theater and supermarket project on 40th Street and development of the Civic Center site and the Children’s Hospital of Philadelphia. See *ibid.*, p. 160.

¹⁷ Jack Shannon, telephone interview with Marc Pentino, Eastern Regional Office, USCCR, Aug. 6, 2001.

¹⁸ SEPTA serves the Philadelphia metropolitan area with multi-modal transit services, including buses, subways, commuter and light rail, trolleys, and customized services for

- SEPTA advertised M/WBE goals in local papers and Transit Association journals and distributed bid documents for free to interested firms and Small Business Development Centers.
- It provided bid documents to contract estimation classes held at Temple University to educate students about SEPTA's contracting needs and procedures.
- It recommended M/WBEs to other city agencies with similar requirements as SEPTA so that M/WBEs could increase their business opportunities across the region.²³
- Using a directory compiled by its Small and Disadvantaged Business Utilization Department, SEPTA contacted M/WBEs to participate in pre-bid meetings.²⁴

Charles Gillean, a disadvantaged business utilization specialist with SEPTA, observed that pre-bid meetings have been a useful way to link contractors with M/WBEs and a process whereby firms can describe their qualifications and interest in participating in a particular job. He said:

[At each] pre-bid meeting, we make a point of having every DBE [disadvantaged business enterprise] . . . identify themselves and talk about their

qualifications and their interest in participating in any particular job. I consider it to be a target-rich environment. Somebody in that room is going to get a multimillion dollar contract. And we make those DBEs stand up and talk about what they can do on [the project]. We don't let anybody leave at that point either. I found it has been very effective in getting these people together [and] talking about the jobs.²⁵

Contrary to allegations by some contractors, Gillean observed that including M/WBEs as subcontractors does not increase the cost of a contract. Gillean confirmed that not only does adding M/WBEs not increase costs, they are sometimes lower than SEPTA's own estimates. Once a contractor is selected, SEPTA monitors (on a monthly basis) ongoing contracts by tracking payments to M/WBEs and determining whether contractors achieve their promised goals for M/WBE participation. SEPTA requires contractors to provide copies of canceled checks to identify which M/WBEs are being paid. By routinely tracking payments to M/WBEs, the office is able to identify and rectify problems that arise. While the project progresses, SEPTA helps contractors locate additional disadvantaged businesses that could also participate in the project.²⁶

TABLE 2

SEPTA Disadvantaged Business Enterprise Awards and Goal Attainment Data, FY 1996–99

	Contracts/Procurements Awarded			Contract/Procurement Dollar Amounts			
	Total	Awards to DBEs	% to DBEs	Total	Dollars to DBEs	% to DBEs	Goal over/ (under) 21%
FY 99	271	144	51.98%	\$156,265,846	\$33,842,922	21.65%	.7%
FY 98	260	100	38.50%	\$40,543,434	\$7,816,475	19.27%	(1.7%)
FY 97	246	101	41.05%	\$50,796,027	\$12,710,815	25.02%	4.0%
FY 96	275	114	41.50%	\$61,271,606	\$12,848,574	21.00%	(0.0)
Total/average in four fiscal years	1,052	459	43.60%	\$308,876,913	\$67,218,786	21.76%	1.7%

SOURCE: Southeastern Pennsylvania Transportation Authority, *Report of DBE Awards and Commitments—DBE Awards and Goal Attainment Data, Quarterly and Year to Date Comparison Tables*.

²³ Gillean testimony, Transcript, p. 230.

²⁴ SEPTA's Disadvantaged Business Enterprise Directory lists each firm's services and contact information. The directory can be accessed at <<http://www.septa.org/business/dbbe/ddbe.cgi>>.

²⁵ Gillean testimony, Transcript, p. 225.

²⁶ *Ibid.*, p. 227.

Conclusion

Emerging from the above descriptions are common elements in all three projects that enhanced M/WBE utilization and development. First, corporate leaders stressed the inclusion of M/WBEs early in the project and incorporated this commitment into the mission of the company. This led project leaders to set goals for M/WBE participation among the ranks and periodically report their results to corporate officials

and persons in the field. Second, an adequate number of staff was allocated to work almost exclusively to enhance the company's outreach to M/WBEs and the community. One outreach method used was frequent meetings among M/WBEs, prime contractors, and vendors. These efforts resulted in high M/WBE utilization, and helped eliminate negative views of M/WBEs and their limited access to business networks—two barriers identified in chapter 3.

CHAPTER 5

Developments in Minority- and Women-Owned Business Utilization at the State and Local Levels

In addition to exemplary projects, the Advisory Committee also kept abreast of large-scale projects that have drawn considerable media attention: the redevelopment of the naval shipyard in Philadelphia by Kvaerner Group ASA and municipal construction projects in Pittsburgh. As mentioned in the preface, the Committee held a planning meeting with Kvaerner representatives to inquire into allegations that M/WBEs were not receiving a fair share of contracting opportunities. In following the funding and construction of municipal projects in Pittsburgh, the Committee contacted numerous public officials and community organizations to develop an understanding of the controversy in this area. These two projects were lauded as the largest projects in the state and raised hope of great opportunities for M/WBEs. Because of their size and importance, both undertakings are reviewed here for their effectiveness in meeting their M/WBE goals and overall completion of their objectives.

Philadelphia Naval Shipyard

The U.S. Navy's closure of the Philadelphia Naval Shipyard in 1995 ended a 195-year shipbuilding history in Philadelphia as well as careers for approximately 7,000 workers.¹ In 1996,

¹ In its affected agency review comments, the Philadelphia Shipyard Development Corporation and Kvaerner Philadelphia Shipyard noted, "The Naval Base, which included the shipyard, has had 11,000 or more employees at various points of time, but in 1991 at the time of the BRAC (closure) announcement, 7,371 workers were employed in the shipyard itself. Between the announcement and final closure in 1996, many people transferred to other government jobs, retired early, or left to find jobs in the private sector. In 1996 the remaining approximately 2,000 employees were laid off. Approximately 5,000 former Naval Shipyard workers submitted resumes for jobs at the new KPSI." Comments and requested

however, Europe's largest shipbuilder, Kvaerner Group ASA, and state and local officials announced the yard's redevelopment, signing a "master agreement" in December 1997. Touted as the single most important project in the state, the redevelopment was to revitalize American shipping with a modernized shipyard and significantly increase employment and revenue opportunity for local businesses. It was to receive \$429 million over five years from federal, state, and local government agencies.²

One primary objective of the project was to build a supplier/subcontractor infrastructure in the region.³ As for M/WBE utilization, Kvaerner agreed to use "good faith efforts" to include M/WBEs as part of its supplier/subcontractor network, setting utilization goals of 20 percent MBEs and 10 percent WBEs.⁴ The Minority Business Enterprise Council (MBEC), the Phila-

revisions to the Advisory Committee's report are attached to Frederick D. Strober, Saul Ewing LLP, letter to Marc Pentino, Eastern Regional Office, U.S. Commission on Civil Rights (USCCR), Nov. 2, 2001.

² Pennsylvania Department of Community and Economic Development, "Leading Site Selection Publication Names Kvaerner Philadelphia Shipyard 'Top Statewide Economic-Development Project in U.S.," accessed at <<http://www.dced.state.pa.us>>.

³ According to its legal representative, Kvaerner was required to use its best efforts to select regional contractors, subcontractors, and suppliers to provide shipbuilding components and services to the shipyard that were competitive in quality, service, delivery time, and price and obtain approval for such from the entity having placed the order for the ship. Comments and requested revisions to the Advisory Committee report are attached to Frederick D. Strober, Saul Ewing LLP, letter to Marc Pentino, Eastern Regional Office, USCCR, Nov. 2, 2001.

⁴ Tore Sjurson, vice president of yard development, Kvaerner Philadelphia Shipyard, remarks submitted to the Pennsylvania Advisory Committee, Apr. 23, 1999.

delphia Office of Housing and Community Development, and the Philadelphia Urban Affairs Coalition would monitor the utilization of M/WBEs and minority workers.

At the beginning of the project, however, contractors reported that Kvaerner was not providing bid and contracting information on a timely basis, particularly to M/WBEs. In October 1998, the Philadelphia City Council held hearings on this and other issues, receiving testimony from community organizations, Kvaerner representatives, and M/WBE owners. M/WBEs alleged that they did not have access to information and bidding opportunities at Kvaerner and that relations with the manufacturer needed improvement. These complaints prompted the City Council's Committee on Commerce and Economic Development to investigate the performance and compliance of Kvaerner Philadelphia Shipyard Inc. and the Philadelphia Shipyard Development Corporation (PSDC).⁵ In November 1998, the Commerce and Economic Development Committee held a half-day hearing, inquiring into (1) provisions in place to ensure participation of M/WBEs; (2) plans for training minorities, women, and displaced former shipyard workers; and (3) staffing at the various city/state agencies and private organizations monitoring these issues.

In April 1999, Kvaerner announced its intention to sell its shipyards across the world, including its interest in the Philadelphia yard. This was considered a major setback for the region, prompting state and local officials to insist that Kvaerner honor all existing contracts and continue its management of the yard until a new buyer was found.⁶ That same month, the Advisory Committee held a briefing meeting with Kvaerner representatives to discuss points raised at the City Council's November hearing and the impact of Kvaerner's announced depart-

⁵ The Philadelphia Shipyard Development Corporation is a nonprofit entity formed to disburse public funds to Kvaerner and monitor its performance.

⁶ These assurances ultimately took the form of a July 1999 amendment to the master agreement. The efficacy of the amendment in maintaining original commitments by Kvaerner is a contentious issue. For a discussion of the details of the amendment, see Pennsylvania Department of the Auditor General, *Performance Audit of Commonwealth Spending for the Kvaerner-Philadelphia Naval Shipyard Project Through January 14, 2000*, Aug. 9, 2000.

ture on local business. The Committee was most interested in learning how the company planned to ensure solicitation of bids and contracts from M/WBEs.⁷

Kvaerner representatives confirmed that the shipbuilder had difficulties responding to M/WBE requests for information in the early phases of the project. Kvaerner later established a computerized bid process and sent letters describing bid opportunities to local M/WBEs that had been identified by city and state agencies. Kvaerner also held job and informational fairs throughout the Philadelphia area to recruit minority firms and workers.⁸ It hired a compliance consultant, Productions bdc, to monitor its M/WBE program, provide information to the City Council, and submit monthly reports to the shipyard and city agencies. In its final report, for the period of June 1999 through January 2001, at the end of essentially all the shipyard construction, Productions bdc reported that Kvaerner's contractors and subcontractors included 32 MBE, 18 WBE, two DBE, and three minority women-owned companies.⁹ Because Kvaerner plans, when building ships, that 70 percent of the value of each ship will be provided by suppliers and contractors, it is actively developing its local supplier network to include M/WBEs.¹⁰

In August 2000, the Pennsylvania auditor general released a performance audit of compliance with the master agreement by Kvaerner, Philadelphia Shipyard Development Corpora-

⁷ Kvaerner representatives provided a written summary of Kvaerner's efforts to ensure M/WBE participation in yard development and operations.

⁸ Tore Sjursen, vice president of yard development, Kvaerner Philadelphia Shipyard, remarks submitted to the Pennsylvania Advisory Committee, Apr. 23, 1999.

⁹ Comments and requested revisions to USCCR report attached to Frederick D. Strober, Saul Ewing LLP, letter to Marc Pentino, Eastern Regional Office, USCCR, Nov. 2, 2001.

¹⁰ The supplier network is providing outreach to M/WBEs, as well as training and help in forming teams to participate in Kvaerner's special turnkey, complete system subcontracting. Since it takes time to develop a mature supplier network that can act as full partners in designing and building a ship in the collaborative Northern European manner, Kvaerner anticipated being able to use only approximately 35 percent U.S. suppliers for its first ship, growing to 80 percent by the end of the five-year transition period. However, with most of the material ordered and contracts let, the first ship total has grown to over 55 percent U.S. suppliers. *Ibid.*

tion, and the state. The assessment was based on data collected from December 16, 1997 (the date of the original master agreement) through January 24, 2000.¹¹ In addition to the project agreements and the respective costs incurred by the parties and taxpayers, the audit assessed Philadelphia Shipyard Development Corporation's monitoring of Kvaerner's performance and whether the state exercised due diligence in assuring that the shipyard would ultimately benefit Pennsylvania businesses and workers.

In short, the audit found that regional businesses and workers, particularly those in Pennsylvania, had not benefited from the shipyard project to the extent expected.¹² The report highlights instances of excessive, wasteful spending and poor monitoring by state government entities. PSDC and Kvaerner were highly critical of the audit and its findings, offering a detailed written response that was made a part of the audit report.¹³ According to the audit report:

- Many of the problems did not become known to government parties until late 1998 because of the Philadelphia Shipyard Development Corporation's failure to monitor Kvaerner's contractual obligations and its efforts to maximize the involvement of regional suppliers in the construction of the shipyard. This resulted in Pennsylvania companies' receiving less than half of the construction contract dollars as of October 1999, less than 2 percent of the equipment contract dollars as of November 1999, and none of the information technology contract dollars as of July 1999.
- Kvaerner failed to meet the goals set by the master agreement for the use of M/WBEs and the employment of female workers. The audit cites 9.5 percent of total contracts awarded to MBEs and 1.7 percent to WBEs. This is well below the 20 percent and 10 percent goals for

MBEs and WBEs set by the master agreement.¹⁴

During the affected agency review of the Advisory Committee's draft report, PSDC and Kvaerner submitted more recent employment data through January 2001. Their data showed the project exceeding goals both in contracts to women business enterprises (11 percent achieved versus 10 percent goal) and in minority employment (21 percent achieved versus 20 percent goal). In contrast, the project fell short of the goals set for contracts to minority business enterprises (15 percent achieved versus 20 percent goal) and in women employment (1 percent achieved versus 10 percent goal).¹⁵ PSDC and Kvaerner also note that approximately 68 percent of the total cost of shipyard construction—\$176.6 million of \$260 million—was paid to regional companies and workers. Even where certain equipment was not available locally, local companies and workers were often used to do the assembly and installation for that equipment.

The Advisory Committee is concerned that developments at Kvaerner may be indicative of how state and municipal leaders proceed with a publicly funded project without fully taking into consideration M/WBEs and without effective monitoring.

Large-Scale Construction in Pittsburgh

Large-scale projects create expectations of economic revitalization. As in Philadelphia, Pittsburgh has seen its share of projects that drew considerable attention to M/WBE utilization and development. Three projects in particular—PNC Park (the new Pittsburgh Pirates baseball stadium), Heinz Field (the new Pittsburgh Steelers football stadium), and expansion

¹¹ Pennsylvania Department of the Auditor General, *Performance Audit of Commonwealth Spending for the Kvaerner-Philadelphia Naval Shipyard Project Through January 14, 2000*, Aug. 9, 2000.

¹² *Ibid.*, p. 90.

¹³ See Philadelphia Shipyard Development Corporation and the governmental parties response to the auditor general's audit report, contained in the report, *Performance Audit of Commonwealth Spending for the Kvaerner-Philadelphia Naval Shipyard Project*, Office of the Auditor General.

¹⁴ The audit report also found that the master agreement imposed ambiguous obligations on Kvaerner and granted Kvaerner the right to abandon the project after having earned fees for constructing the yard at taxpayers' expense. The report also noted that the Philadelphia Shipyard Development Corporation provided unreasonable and excessive funds to Kvaerner executives for personal items.

¹⁵ Frederick D. Strober, Saul Ewing LLP, letter to Marc Pentino, Eastern Regional Office, USCCR, Nov. 2, 2001, citing Principal Production Inc.'s "Preliminary Final Economic Impact Report for Contract Compliance and Employment" of Mar. 29, 2001.

of the David L. Lawrence Convention Center—drew the most. Conceived in the late 1990s, they are easily the largest public works projects in city history, reaching almost \$1 billion in combined costs.¹⁶

As these projects proceeded, M/WBE owners, state legislators, and Pittsburgh City Council members raised concerns about M/WBE utilization and sought assurances for minority contractors and employees.¹⁷ Project managers and city officials committed to 25 percent MBE and 10 percent WBE participation goals for contractors and subcontractors on the sites.¹⁸

Beginning in 1999, events began to unfold attracting the Committee's attention. The Pittsburgh City Council passed resolutions establishing a city goal of 25 percent minority and 10 percent female participation on city contracts over \$250,000.¹⁹ In July 1999, members of the African American Workers Union picketed the Pirates stadium site, claiming the group was blocked from participating in opportunities for construction of PNC Park.²⁰ Nine union mem-

bers were arrested after having prevented access to a construction site.²¹ That same year, a common pleas court ruled that a contract for work on PNC Park was improperly awarded to a firm that was not the lowest responsive bidder as specified under state law. This was an indication of problems to come. In early 2000, a women-owned steel fabricating firm, Industrial Fabricating Systems Inc., filed state and federal lawsuits against the Sports & Exhibition Authority and two steel companies, alleging that it was asked to accept "pass-through" payments from providers for steel for the stadium in exchange for not working on the project.²²

Soon after, in June 2000, a three-month *Pittsburgh Post-Gazette* investigation uncovered allegations of wrongdoing on an even larger scale, namely that at least one-third of the \$117 million in contracts purportedly going to M/WBEs actually went to firms owned by whites or to firms that no longer qualified as disadvantaged.²³ The *Post-Gazette* reported that minority- and women-owned contractors were asked to accept token payments for construction work on stadium construction jobs and "pass through" this work to majority-owned contractors.²⁴ After the story was published, the paper reported that the Allegheny county executive asked the FBI to investigate the awarding of project contracts as well as the county agency that certifies M/WBEs. The Pittsburgh City Council held hearings in June 2000 on problems with the city's certification process. M/WBE owners, NAACP representatives, and other groups described difficulties in the bidding process for the stadiums, confusing certification procedures, and illegal business agreements.²⁵

In late June 2000, the City Council passed an ordinance radically changing the city's review

¹⁶ Sports & Exhibition Authority, "Mission Statement," accessed at <http://www.pgh-sea.com/the_authority/body_the_authority.htm>. See also Robert Dvorchak, "Opening Days Fast Closing in on Workers at New Stadiums," *Pittsburgh Post-Gazette*, Dec. 29, 2000.

¹⁷ In both the 1998 and 1999 sessions, several bills were introduced in the Pennsylvania House of Representatives to establish a sports authority board to oversee stadium construction and ensure inclusion of M/WBEs and laborers. Bills introduced on stadium-related topics include House bills 297–301 (1999–2000 session) and bills 2937–2943 and 2945 (1998–1999 session).

¹⁸ Tom Barnes, "Minority Firms Pitch in on New Stadiums," *Pittsburgh Post-Gazette*, Jan. 13, 1999; Ervin Dyer, "Robinson Backed in Bid to Get Stadium Contracts for Blacks," *Pittsburgh Post-Gazette*, Jan. 26, 1999.

¹⁹ Pittsburgh City Council Resolution 366, May 25, 1999. The City Council also passed resolutions directing the Mayor's Office of Business and Employment Opportunities to contract for technical assistance programs to support M/WBE owners who are residents of Pittsburgh; and require all contractors and subcontractors of major construction projects to submit monthly employee data sheets of all construction employees showing their name, address, race, gender, and skill/trade level. See Pittsburgh City Council Resolutions 511 and 385. Under Resolution 511, assistance would include support with bid preparation, bid and performance bond acquisition, and other management support matters.

²⁰ New football and baseball stadiums are worth an estimated \$233 million and \$228 million, respectively. Barnes, "Minority Firms Pitch in on New Stadiums." See also Jim McKinnon, "Black Workers Stage Protest at PNC Park," *Pittsburgh Post-Gazette*, July 14, 1999.

²¹ McKinnon, "Black Workers Stage Protest."

²² Timothy McNulty, "Job Quotas Prove Difficult to Enforce; Stadiums in Legal Area Spotlight," *Pittsburgh Post-Gazette*, Feb. 17, 2000.

²³ Bill Moushey, "Minority Goals Don't Add Up," *Pittsburgh Post-Gazette*, June 8, 2000.

²⁴ See The Associated Press, "Pittsburgh, Allegheny County to Merge Contract Oversight," June 16, 2000.

²⁵ Allison Schlesinger, "Public, Officials, Debate Contract Certification Process," The Associated Press, June 27, 2000.

and approval process for city contracts.²⁶ The prior ordinance mandated that all development proposals and all bids on city construction contracts over \$250,000 include a plan for participation of minorities and women, and M/WBEs as contractors, subcontractors, and suppliers. All plans were reviewed and approved by the city's Minority Business Enterprise Review Committee. The new ordinance created an Equal Opportunity Review Commission (EORC) to review and approve all construction contracts over \$200,000 as well as contractors' compliance with M/WBE policies.²⁷ The ordinance requires that 35 percent of all work performed on these contracts be performed by city residents and sets up mechanisms for contractors to report their compliance to the EORC. It also allows the EORC to impose monetary damages for noncompliance.

In September 2000, the Allegheny County controller released an audit of the certification and monitoring procedures of the county's Minority, Women and Disadvantaged Business Enterprise Department. The audit reviewed outreach efforts to include M/WBEs on construction of the stadiums and convention center renovations. In his review, the controller found that (1) monitoring procedures failed to ensure that county departments and contractors were making good faith efforts to meet the county's M/WBE goals, (2) the department did not follow up with contractors that failed to meet the county's 13 percent MBE and 2 percent WBE participation goals, (3) incomplete project information resulted in eligible firms being overlooked during the bid notification process, and (4) over \$900,000 was spent by other government agencies to provide similar M/WBE certification and monitoring functions.²⁸

²⁶ City Code Title I, art. VII, ch. 161, §§ 161.33–161.34 (2000), and Pittsburgh Home Rule Charter, art. V, §§ 515–516 (2000).

²⁷ According to Councilman Sala Udin, current members of the Minority Business Enterprise Review Committee have been asked if they wish to become members of the commission. However, as of July 15, 2002, no persons had been appointed to the commission by the mayor. Sala Udin, telephone interview with Marc Pentino, Eastern Regional Office, USCCR, July 12, 2002.

²⁸ Allegheny County, Office of the Controller, "M/W/DBE Audit Reveals Problems with County Department," press release, Sept. 20, 2000.

Mason Tillman Disparity Study²⁹

In 1995, the Pittsburgh City Council voted to undertake a disparity study and created the Disparity Study and Implementation Commission.³⁰ The commission was charged with reviewing plans for M/WBE participation, developing policy initiatives that could withstand legal challenges in the event the city chose race-conscious measures, and encouraging changes within the contracting process so that the city could achieve its 25 percent MBE and 10 percent WBE participation goals.³¹ Over the past 20 years, the city of Pittsburgh had attempted to eliminate discrimination in contracting and had instituted various programs to increase M/WBE participation in its construction and professional service contracts.³²

In 1999, the commission chose Mason Tillman Associates to conduct a disparity analysis of contracting by city agencies at a cost of \$449,000.³³ Mason Tillman examined whether between January 1996 and December 1998 M/WBEs were underutilized in city contracts as a result of discrimination in construction, architecture, and engineering, and professional service contracts awarded by the city and its five

²⁹ This section was edited by Dr. Eleanor Mason Ramsey, Mason Tillman Associates Ltd., during the affected agency review process. See Sharon Donahoe, Mason Tillman, e-mail to Marc Pentino, Eastern Regional Office, USCCR, enclosing Ramsey Comments, Oct. 17, 2001.

³⁰ The commission is composed of 11 members, two representatives appointed by the mayor and nine representatives from each council district. See City of Pittsburgh, Request for Proposal, "Contracting and Procurement Study," August 1998, p. 3. See also Pittsburgh City Council Resolutions 980, 982, 1009.

³¹ Currently, contractors are urged to provide 25 percent of their work to MBEs and 10 percent to WBEs; however, contractors are only required to use good faith in contracting with minority businesses. Timothy McNulty, "Job Quotas Prove Difficult to Enforce; Stadiums in Legal Area Spotlight," *Pittsburgh Post-Gazette*, Feb. 17, 2000. See also Jacqueline R. Morrow, city solicitor, memorandum to Minority Business/Women's Business Enterprise Review Committee, Sept. 18, 1996.

³² Jacqueline R. Morrow, city solicitor, memorandum to Minority Business/Women's Business Enterprise Review Committee, Sept. 18, 1996, p. 2.

³³ Agencies evaluated include the city of Pittsburgh, Urban Redevelopment Authority of Pittsburgh, Stadium Authority, Water and Sewer Authority, the Housing Authority, and Parking Authority.

authorities.³⁴ Mason Tillman studied the history of discrimination in the Pittsburgh construction industry, compiled statistics describing the utilization of minorities and women as contractors and subcontractors, and interviewed 32 business owners in an effort to explain the conditions represented by the statistical findings.

Mason Tillman's final report, released in September 2000,³⁵ showed that minority-owned businesses did not receive any construction contracts over \$250,000 from the city of Pittsburgh.³⁶ Additionally, not a single minority-owned business received an architectural or engineering contract from the city, while firms owned by Caucasian males received over 95 percent of the architectural and engineering contract dollars.³⁷ The report also described general discriminatory conditions and barriers for M/WBEs encountered from prime contractors and city authorities, including many of the barriers noted earlier in chapter 3. For example, the study found the use of front companies, reduced opportunities for bona fide M/WBEs, and pressure applied to M/WBEs by both prime contractors and public officials to force M/WBEs to lower their prices or to increase their amount of work without increasing their bid in order to commit to more work for the same price. With regard to city agency enforcement, the report noted that the city lacked a certification process

to verify the eligibility of businesses used to meet the minority and women business enterprise goals and that compliance measures were not strictly enforced, which contributed to the existence of a significant number of front companies.³⁸ The report also noted that the city's practice of bundling small projects under \$25,000 into a single large contract called a "B" contract reduced the contracting opportunities available to small businesses.

Mason Tillman recommended that agencies (1) establish a certification program and compliance monitoring, (2) track subcontractor awards and payments, (3) create sheltered market programs for local businesses and M/WBEs, (4) reduce the size of contracts for goods and services, (5) publish a list of contract opportunities in local media regularly and notify certified M/WBEs about upcoming opportunities, and (6) unbundle small construction contracts.

As of August 31, 2001, no action had been taken on the study by the Pittsburgh City Council. According to Councilman Udin, the city has contracted with Mason Tillman to complete two additional studies, one on employment in Pittsburgh city government and one on employment of minorities by construction contractors doing business with the city.³⁹

³⁴ See also City of Pittsburgh, Request for Proposal, "Contracting and Procurement Study," June 25, 1998, p. 4.

³⁵ Mason Tillman Associates Ltd., *City of Pittsburgh Contracting and Procurement Study*, September 2000. Note, Pittsburgh Councilman Sala Udin released the study's executive summary in July 2000.

³⁶ Minority-owned businesses received eight subcontracts over \$250,000 from the Urban Redevelopment Authority.

³⁷ Mason Tillman Associates Ltd., *City of Pittsburgh Contracting and Procurement Study*, vol. 8, September 2000, p. 4.

³⁸ Additional barriers cited include the following: staff responsible for the Minority and Women Business Enterprise Program is not adequate to ensure compliance with the program; staff members are not regularly trained and informed about program requirements and some are nonresponsive and uncooperative; confusing bureaucratic structure; absence of outreach; no system to track subcontracting payment and award data; late payments; difficulty obtaining bid information; contracts denied despite low bid; cancellation of contracts after award; reduction in scope of work; contracting network closed to MBE/WBEs; city authorities do not support MBE/WBE coordinators; and lack of minorities in city management positions. Mason Tillman Associates Ltd., *City of Pittsburgh Contracting and Procurement Study*, September 2000.

³⁹ Sala Udin, telephone interview with Marc Pentino, Eastern Regional Office, USCCR, July 12, 2002.

CHAPTER 6

Conclusions and Recommendations

In the preceding chapters, the Advisory Committee described low levels of participation by minority- and women-owned business enterprises (M/WBEs) in state and city of Philadelphia contracts (chapter 1), as well as efforts by state and Philadelphia agencies to assist M/WBEs and eliminate discrimination in the contracting process (chapter 2). Based on information gathered at the forum and subsequent research, the report identifies the types of barriers M/WBEs encounter (chapter 3) while highlighting exemplary cases that achieved greater inclusion of M/WBEs (chapter 4). The report also provides additional information on large-scale projects in Philadelphia and Pittsburgh that have drawn attention to the concerns of M/WBEs (chapter 5). In this chapter, the Committee summarizes the report's major conclusions regarding these topics and provides recommendations for state and municipal government agencies, business, and community leaders.

M/WBE Participation Rates in Public Contracting and Interpreting Contract Data

Conclusion 1

In Pennsylvania, M/WBEs participate only in a small share of the billions of dollars of goods and services purchased by state agencies. Their participation is minimal and M/WBEs continue to lag behind majority-owned firms that receive public contracts. The precise level of contracting to M/WBEs is difficult to determine due to non-uniform reporting procedures and the unavailability of contracting data from nonminority firms. State agencies do not report contracting figures to the Bureau of Contract Administration and Business Development (BCABD) in a way that permits meaningful interpretation of

the number of contracts in a given period to M/WBEs and nonminority-owned businesses. Without this information, it is impossible to see how M/WBEs fare in receiving contracts in comparison to similar nonminority firms. Total payments to M/WBEs by state agencies reporting to BCABD did not exceed \$30 million for the five-year period between 1994 and 1998. This is miniscule when compared with an annual estimated expenditure of approximately \$4.5 billion in goods and services (exact figure was not available). Philadelphia contracts to M/WBEs for supplies, services, equipment, and public works have remained under 17 percent of the total bid dollars going to all businesses between 1992 and 1997. However, Philadelphia's contracting level to M/WBEs is much higher than the state's.

Recommendation 1.1

To accurately compare M/WBE and nonminority firm participation, state and municipal officials must develop and implement accurate contract reporting mechanisms that continually track commitments and payments to M/WBEs. Further, BCABD must collect more detailed information to determine the number of nonminority-owned firms receiving contracts in comparison to M/WBEs and whether this is proportionate given their relative share in each industry. BCABD should take a leadership role in developing a computerized system so that individual agencies report to BCABD information such as M/WBE contracting data and payment information for all contractors and subcontractors in each project.¹

¹ The Committee recently learned that the state plans to implement an "enterprise resource planning system" to establish an integrated administrative system to support procurement, personnel, payroll, accounting, and budgeting.

Recommendation 1.2

BCABD and other state offices within the governor's office should jointly report annually to the governor and General Assembly on contracting to M/WBEs, enterprise zone firms, and nonminority firms by industry. The report should detail the agency's staffing needs, investigations of discrimination in the contracting process, barriers M/WBEs face, and efforts to improve M/WBE participation. BCABD should periodically survey M/WBE owners to help pinpoint additional problem areas not traditionally reported, such as limited funding sources, and the percentage of a firm's total business that relies on government contracts. BCABD should (1) compile information on whether nonminority businesses have a formal policy regarding M/WBE subcontractors that includes targeting bid solicitations and using goals for M/WBE utilization, (2) track M/WBE subcontracts, and (3) encourage and support M/WBE participation by having purchasing managers actively recruit M/WBE involvement and take part in various M/WBE trade fairs.²

Understaffing of State Agencies Assisting M/WBEs and Efficacy of State Programs

Conclusion 2

Staffing is insufficient at BCABD and various governor's advisory commissions tasked with assisting M/WBEs, making it difficult for state officials to track M/WBE development or provide meaningful assistance. BCABD's Investigation Unit, for example, is composed of a supervisor with no staff support, even though it was intended that the unit would have two offices across the state.³ This staffing shortage may make it difficult for the unit to review firms that

When the new system is complete, statistical reports mentioned above will be available. Gary N. Lee, director, Bureau of Contract Administration and Business Development (BCABD), letter to Marc Pentino, Eastern Regional Office, U.S. Commission on Civil Rights (USCCR), Oct. 11, 2001.

² See Carel Ketchum and Craig Carter, Center for Advanced Purchasing Studies, *Purchasing from Minority Business Enterprises: Best Practices*, Executive Summary, 1995, accessed at <<http://www.capresearch.org/research/focuses/mbe stud.html>>.

³ Melvin Johnson, BCABD, and Jack Shannon, University of Pennsylvania, telephone interview with Marc Pentino, Eastern Regional Office, USCCR, Dec. 4, 2000.

claim to be M/WBEs—leaving many firms, including front firms unchecked by state officials absent a complaint. For example, front companies in Pittsburgh (chapter 5) take business away from M/WBEs and erode trust in municipal contracting.

Similarly, BCABD's Training and Development Unit, staffed with five people (four business enterprise analysts and one support staff person), operates out of Harrisburg and has only one regional office in Pittsburgh.⁴ Because of understaffing, the unit is unable to follow-up with business owners it has trained to assess other training needs or get feedback on the state's business climate.⁵

Other statewide programs and offices identified in chapter 2 also have limited staff. Although their tasks are well defined on paper, the Advisory Committee believes it is difficult to get a clear sense of the actual impact of their efforts to help M/WBEs from available material. In addition, these offices have overlapping functions and responsibilities, with little coordination between offices to maximize the state's efforts.⁶

Recommendation 2

Understaffing at BCABD and various offices within the Department of Community and Economic Development should be corrected, possibly through increased funding.⁷ They should hire additional staff to enable them to accomplish their mandates. With increased staff, BCABD should help state agencies evaluate contracting

⁴ Usha Hannigan, BCABD, telephone interview with Marc Pentino, Eastern Regional Office, USCCR, Sept. 28, 2001.

⁵ Usha Hannigan, BCABD, telephone interview with Marc Pentino, Eastern Regional Office, USCCR, Jan. 6, 2000.

⁶ Similar findings were discussed in a performance audit of the Department of General Services released by the Pennsylvania state auditor general in April 2001. Pennsylvania Department of the Auditor General, "Audit Finds Weak State Commitment to Minority- and Women-Owned Businesses," press release, Apr. 24, 2001, accessed at <<http://www.auditorgen.state.pa.us/departments/press/mbe.html>>.

⁷ The process of affected agency review by government agencies resulted in written communications between the Advisory Committee and Gary N. Lee, director, BCABD, regarding the accuracy of statements made by BCABD staff. The reader can reconstruct the nature of this exchange by referring to appendices 5 and 6. Subsequent to this exchange the Eastern Regional Office received in March 2002 Mr. Lee's response dated Dec. 17, 2001. The factual clarifications provided in this letter have been incorporated, but the letter is not appended in this report.

for M/WBEs, determine the degree of satisfaction with an agency's service, and suggest needed changes. It should also help M/WBEs reach capital sources and help them link up with prime contractors to secure work. State staff should conduct more workshops and business seminars on financial and technical assistance topics such as starting a small business; keeping schedules, records, and payroll; contracting with state and local government agencies; preparing loan applications and accessing capital sources; and participating in large-scale projects. One suggested workshop model is a three-day bid simulation seminar sponsored by the Tennessee Department of Transportation. Using past bid documents, the department supervises and works with M/WBEs to complete a mock bid proposal and provides feedback on problems and issues that arose in the actual project.⁸

Commitment to M/WBE Development in Philadelphia

Conclusion 3

To meet the Supreme Court's *Croson* guidelines concerning valid race-conscious programs, the city of Philadelphia commissioned a second disparity study with D.J. Miller & Associates that it hoped could be used to justify new M/WBE programs. The study should have been released years ago. It has been over five years since the study was due for completion pursuant to the contract between the city and D.J. Miller, and even the study's preliminary findings have not been released to the public. To add to the delay, the city has contracted for an independent audit of the D.J. Miller study, the results of which also have not been released to the public. It is unclear what steps policymakers in city government will take once this review is complete and whether the D.J. Miller findings and analysis will fulfill the study's original purpose of supporting a race-conscious program. It is clear, however, that the longer the study results are withheld from the public, the stronger will

⁸ See BBC Research and Consulting, *A Guide to the Proper Consideration of MBE/WBE Programs, Nondiscrimination Program Development*, Issue 5, n.d., accessed at <<http://www.bbcresearch.com/practice/mbewbe/highroad.html>>.

be the public suspicion regarding the city's commitment to assisting M/WBEs.⁹

Recommendation 3.1

As part of due diligence of their leadership, city leaders should ensure that long-overdue disparity studies are completed as soon as possible and that their results are released to the public.

Recommendation 3.2

Since many cities have been creative in assisting M/WBEs, the city of Philadelphia should look to models from other cities that could be adapted for Philadelphia's needs. One example is the "incentive program" in Los Angeles, where small businesses (regardless of whether they are minority- or women-owned) are given five points on a bid over a larger contractor.¹⁰ Because it is reported that nonrace-conscious measures, such as assistance to all small business, can increase opportunities for M/WBEs, the mayor and Philadelphia City Council should explore other cities' exemplary efforts.¹¹

Record Keeping by City of Philadelphia Agencies

Conclusion 4

The city of Philadelphia's Minority Business Enterprise Council (MBEC) and the Law Department could not locate a copy of the Brimmer report, a pivotal document to the city's past affirmative action history—raising serious concerns about their record-keeping practices. The Brimmer report should be readily retrievable, given its legal significance, both as a source of data analysis and history of the city's affirmative action policy.

⁹ The Committee made one last attempt on June 14, 2002, to acquire update information regarding the D.J. Miller study, the audit by the University of Pennsylvania consultant, and planned hearings. As of July 15, 2002, no information was received or forwarded to the Committee by MBEC.

¹⁰ See Dion Nissenbaum, "California Hunts for Affirmative Action Alternatives," *Pittsburgh Post-Gazette*, Dec. 10, 2000.

¹¹ A similar recommendation was made by Philadelphia Councilman Angel Ortiz in his policy report released in February 2001. See Councilman Angel L. Ortiz, *The Illusion of Inclusion—Affirmative Action in Philadelphia*, February 2001.

Recommendation 4

MBEC and the Law Department should search diligently for the missing Brimmer report. To restore credibility, these agencies should adopt safeguards to ensure that in the future, documents are not misplaced or lost. The city should make a public announcement explaining its inability to locate the report; and if the report is found, the city should make it available to the public.

Barriers to M/WBE Participation and Development

Barriers impede many M/WBEs from successfully participating in public and private business opportunities. Many of the barriers identified at the Committee's forum occur simultaneously. Some, particularly union interference and late payment by prime contractors, may so significantly impede M/WBEs that they are forced out of business. While some barriers such as negative stereotypes of M/WBEs may take longer to overcome, immediate steps can be taken to lessen the burden these businesses face. Throughout the forum, the Advisory Committee inquired as to what these steps might entail and what action could be taken to alleviate barriers. These ideas, some of which are derived from suggestions offered by panelists and components of successful initiatives described in chapter 4, correspond to specific barriers identified at the forum and are presented below.

Negative Views

Conclusion 5

M/WBE owners claimed that majority contractors and vendors hold prejudicial views that M/WBEs in general are not fully capable of completing a project. Not only are these views demeaning, but M/WBE owners are also faced with the additional hurdle of having to prove their capability to handle a particular job.

Recommendation 5.1

State contracting agencies should undertake a systematic survey of M/WBEs to ascertain the nature of prejudice and then hold trainings/workshops to reduce and eventually prevent its occurrence. They should inquire as to the number of successful contracting experiences

by M/WBEs, barriers they may have encountered, and the reasons for any failure to win contracts. In addition to quantitative data analysis and expert opinion, this survey should include anecdotal information from M/WBE owners through in-person interviews, questionnaires, and public hearings.¹²

Recommendation 5.2

Public officials as well as civil rights and business leaders must join forces to take a strong position that M/WBEs be included early in all phases of project development and educate prime contractors that M/WBEs are willing and, more importantly, capable of performing contracts. This commitment must come from municipal leaders, who should actively promote M/WBEs' consideration and inclusion in all contract opportunities.¹³ Municipal leaders should encourage labor unions and large contractors to recruit M/WBEs.

Recommendation 5.3

Prime contractors should hold training sessions with M/WBE owners to educate them on how to bid for contracts effectively.

¹² The state of Colorado and the Colorado Department of Transportation conducted a disparity study using these techniques. See MGT of America Inc., *State of Colorado and the Colorado Department of Transportation Disparity Study Final Report*, April 1998, accessed at <http://www.state.co.us/gov_dir/gss/edo/purchasing/contents.html>.

¹³ It should be noted that at the March 1999 hearings before the U.S. House of Representatives, Subcommittee on Empowerment of the Committee on Small Business, witnesses offered suggestions on how to enhance business opportunities for M/WBE owners and future entrepreneurs. Panelists urged public and corporate leaders to commit their resources to ensure that M/WBEs remain included in contracting opportunities and that assistance to these firms continues. Once this commitment is made, agents for these businesses will become aware that including M/WBEs is a priority and thus make sure they find minority contractors for their projects. U.S. House of Representatives, Subcommittee on Empowerment of the Committee on Small Business, Mar. 23, 1999. See also Yvonne Simpson, vice president, Small Business Services, Greenville South Carolina Chamber of Commerce, testimony, Subcommittee on Empowerment hearing, Mar. 23, 1999, transcript, p. 19.

Limited Access to Critical Information and Business Networks

Conclusion 6

M/WBEs do not always have the established business contacts or relationships with key persons or organizations necessary to promote their business. Furthermore, they claim that prime contractors frequently do not provide them with timely information about contracting opportunities. They are left out of the information flow whether inadvertently or by design. When they do get information, it is sometimes so late that they are unable to prepare an adequate proposal.

Recommendation 6.1

A centralized resource center should be formed to provide bid information and monitor whether prime contractors are informing M/WBEs of contracting opportunities.¹⁴ The center should also grant mobilization and training funds, and offer workshops with contractors and subcontractors.¹⁵

Recommendation 6.2

Municipal agencies can help M/WBEs build stronger relationships with prime contractors and assist in disseminating information on bid and contracting opportunities. State and local government agencies, such as the various governor's advisory commissions and small-business coalitions, should sponsor more business roundtable events inviting M/WBE owners, prime contractors, and financial services and chamber of commerce representatives. BCABD, in coordination with the women and minority business advocates, should host more regional/state conferences or awards banquets with M/WBEs to highlight businesses that have demonstrated growth and innovation. An example of this activity is the Minority Business Plan Competition funded

¹⁴ This recommendation was made by Nancy Myers, president, Qualified Women and Minorities in Construction. See Nancy Myers, testimony before the Pennsylvania Advisory Committee to the U.S. Commission on Civil Rights, forum, Philadelphia, PA, Jan. 14, 1999, transcript, p. 264.

¹⁵ Some examples include publicizing information about a particular firm, submitting bids to contractors, and sending/receiving needed information during the contracting process. Commercially available systems can accomplish these functions, and the state and municipalities should explore whether their current systems could be improved.

by the Pennsylvania Department of Community and Economic Development.¹⁶ Similar events should be held throughout the state so that future M/WBE owners can network with other business owners and entrepreneurs.

Recommendation 6.3

Unions should expand programs such as the Stempel program sponsored by the Associated General Contractors of America to other cities. This program in Philadelphia, termed the Mentor-Protégé Program, is designed to build relationships between established firms and newer, smaller businesses and increase the number of minority firms and skilled laborers in the construction industry. Established firms offer advice and assistance during the contracting process to smaller companies. The goal is to help minority firms gain a foothold in selected markets and ultimately help M/WBEs win contracts. Similar efforts could take the form of joint ventures wherein large firms are allied with M/WBEs on a specific project.

Limited Access to Capital and Bonding

Conclusion 7

M/WBEs claim that limited access to capital and bonding sources is a significant barrier to their development, often citing instances of risking their own credit or personal savings. WBEs claim they are more disadvantaged than their male counterparts when trying to secure adequate funding. All businesses need funding so they can offer a competitive bid for certain jobs, obtain new equipment, and pay their employees. With limited operating funds and small staff, some M/WBEs cannot adequately prepare bids, carry payroll, or purchase equipment as work progresses. Limited access to financing thus creates an overall operating difficulty that can

¹⁶ The event is implemented by various federal and local agencies and educational institutions. Winners receive grants of \$20,000 and are selected among five categories. Because of the success, the Department of Community and Economic Development expanded this competition to include five southeastern Pennsylvania counties. This should be replicated in other parts of the state. See Ben Franklin Technology Partners of Southeastern Pennsylvania, "Ben Franklin Technology Partners Kicks-Off Round Two of Minority Business Plan Competition," news release, Mar. 13, 2001, accessed at <<http://www.sep.benfranklin.org/news/010313a.html>>.

threaten a firm's survival. Prime contractors may consider this a weakness and avoid choosing that firm as a subcontractor. In addition, to be successful, firms must have sufficient bonding to bid for a contract. Particularly for newly established firms, it is hard to get funding from financial institutions for start-up capital or money to meet bonding requirements.

Recommendation 7.1

Municipal leaders and financial services industry representatives should expand their efforts to extend sufficient capital and bonding to M/WBEs on a timely basis. Municipal leaders should explore how existing programs in Pennsylvania such as the PennCap Access Program, the Small Business First Fund, and the Pennsylvania Minority Business Development Authority, which offer low-cost loans to M/WBEs and small businesses within distressed communities, can be enhanced. Small-business-friendly banking institutions should publicize their special services and lending record to small businesses and M/WBEs.¹⁷

Recommendation 7.2

The existing small-business-friendly programs noted above (and private initiatives by financial institutions) have eligibility requirements depending on the type and/or location of the business, number of employees, and business purpose. The various state agencies charged with assisting M/WBEs should provide assistance to M/WBE owners so that they may qualify for special loans from these programs. Agencies should reinforce the need for M/WBEs to maintain records adequately, or in many cases, improve their record keeping. Agencies should offer additional training and informational resources to help M/WBE owners accomplish this.

¹⁷ M/WBE owners should note that a list of small-business-friendly banks in Pennsylvania can be obtained from the U.S. Small Business Administration. See U.S. Small Business Administration, "Small Business Lending in the United States," June 1999, accessed at <<http://www.sba.gov/stats/lending>>.

Unclear Contract Terms

Conclusion 8

M/WBE owners encounter problems after they have entered into a contract due to unclear or confusing contract provisions. Most small businesses lack sufficient staff or expertise to analyze contract terms before signing the contract. As a result, it is only after they sign the contract that owners find contract terms unclear or contract provisions detrimental to their business.

Recommendation 8.1

Prime contractors should clearly explain in plain English key provisions of a contract (preferably in person) to their subcontractors regarding payment provisions, delivery of goods and services, and labor issues.

Recommendation 8.2

State and municipal agencies should provide technical training and increased business counseling to prepare M/WBEs for future business dealings with these entities. In addition, agencies should publish and distribute materials that cover commonly used contract provisions and fair business practices to help owners understand the contracting process. These materials should be annotated to highlight significant parts of the contract such as deadlines and conditions. Special services should be offered to language minority M/WBEs to help owners understand contracts, tax forms, and other business documents required by municipal and private entities.

Difficulty Entering the Skilled Trades

Conclusion 9

Traditionally, trade unions have been a primary source for learning skilled trades. Minorities historically have found great difficulty joining trade unions—depriving them the opportunity to develop needed skills and contributing to the underrepresentation of minorities in trade unions.

Recommendation 9.1

Because trade unions are the primary sources for entering the skilled trades, trade schools must try to recruit minority students and provide minority and female applicants greater opportunity to participate in pre-apprenticeship training programs. To enhance their recruitability, trade schools should provide online access for minority and female students.

Recommendation 9.2

Since union membership is also crucial, unions must continue their outreach efforts, including participation in local job fairs, school career days, and related community activities. They should disseminate information on job openings and career positions, encouraging young persons as well as M/WBE owners to visit work sites and speak with workers and owners.

Prevailing Wage Laws

Conclusion 10

Opinions vary as to whether selected industries should be exempt from prevailing wage laws. For some, such laws are necessary to preserve a fair wage level for working-class individuals and to guarantee a skilled work force trained in specific trades and industries. Yet, some M/WBE owners claim that paying prevailing wages for public construction and repair projects is expensive and not cost effective. Therefore, those M/WBEs that cannot pay prevailing wages are effectively prevented from bidding on contracts in which prevailing wages are specified. In some industries, only unionized firms can compete, which means small or non-union M/WBEs are shut out from business opportunities. Because some trades rely on a specialized work force, M/WBEs are at times unable to find non-unionized workers with needed skills, further preventing them from pursuing contracts.

Recommendation 10

To the extent M/WBE owners claim that prevailing wages are a barrier, a more systematic, in-depth study should be conducted by state or federal agencies, such as the Pennsylvania Department of Labor and Industry and U.S. Department of Labor, to better understand the percentage of M/WBE firms participating in prevailing wage projects and, in particular, how some M/WBEs participate while others cannot. Espe-

cially useful information would include the reasons some firms claim they experienced hardship.

Irregularities in Payment for Work Performed

Conclusion 11

Payments to M/WBEs by the prime contractor and other subcontractors for completed work are sometimes delayed for extended periods of time beyond what is specified in the contract. Delayed payments place M/WBEs in cash flow jeopardy and prevent them from paying their workers. As a consequence, firms must extend their resources or shift capital away from other projects.

Recommendation 11

State and municipal agencies, such as MBEC, BCABD, and the Allegheny County Minority, Women and Disadvantaged Business Enterprise Department, should (1) monitor payments to M/WBEs as specified in subcontracts to ensure that firms are paid on a timely basis, (2) create a mediation process to help solve payment disputes between prime contractors and M/WBEs,¹⁸ and (3) recommend an alternative payment schedule so that M/WBEs and small firms are paid incrementally throughout the course of a project.

Claims of Interference from Labor Unions and Trade Organizations

Conclusion 12

At the forum, complaints surfaced that union and trade organizations use various tactics to interfere with valid contracts between prime contractors and M/WBEs. It was alleged that the prime contractor and/or the M/WBE may be subjected to threats of work shutdown, trespassing on the job site, picketing, or vandalism. Shutdowns invariably result in work delay and ensuing disruptions on cash flow, which in turn, affect M/WBE capability on other jobs.

Recommendation 12.1

State and municipal agencies, such as MBEC, BCABD, and the Allegheny County Mi-

¹⁸ It should be mentioned that MBEC does serve as an intermediary in disputes between the prime contractor and M/WBEs.

nority, Women and Disadvantaged Business Enterprise Department, should undertake a comprehensive study on whether these alleged practices are employed by labor unions and trade organizations and what effects these alleged practices have on M/WBEs. When appropriate, protective measures should be devised to mitigate any adverse impact on M/WBEs.

Recommendation 12.2

Representatives of labor unions, contractors, and M/WBEs should reach agreement so that M/WBEs and smaller businesses are permitted to work on projects even though they are non-unionized. One compromise is to allow non-union M/WBEs to work as long as they recruit from the labor union work force.

Contracting Fraud and Mismanagement of Municipal Projects

Conclusion 13

M/WBE participation is adversely affected by mismanagement or failure to manage. In Pittsburgh, various forms of contracting fraud were alleged involving large-scale municipal projects. In Philadelphia, concerns surfaced early on that M/WBEs were not getting a fair share of the business opportunities in the Kvaerner shipyard project and others. Although these projects have undoubtedly generated high revenues for areas businesses, M/WBEs may not have received fair consideration during these contracting stages.

For example, in the Pittsburgh stadium projects, some M/WBEs alleged they were asked to serve as front companies by agreeing to take pass-through payments for being named on projects. In Philadelphia, some M/WBEs claimed that although prime contractors listed them in their bid proposals, these M/WBEs were not used in the project once the contract was awarded. They alleged that contractors did not report their non-use of M/WBEs to city officials nor did city officials monitor whether contractors were in fact employing M/WBEs.¹⁹

Recommendation 13

Although public officials are aware of the issue and have vowed increased diligence and monitoring, state and city agencies such as BCABD and MBEC should renew their efforts to monitor and verify whether M/WBEs listed in original contract proposals continue to work on the project and receive prompt and adequate payment. As part of their monitoring, agencies should require contractors to regularly demonstrate M/WBE utilization on each project. Agencies should conduct periodic on-site reviews and/or investigations if it is suspected that M/WBEs are not utilized as specified in the contract, they are serving as front companies, or they are not in fact minority- or women-owned. Where federal or state laws are violated, appropriate investigative and enforcement agencies should prosecute violators and pursue remedial solutions.

¹⁹ In the affected agency review of the Advisory Committee's report, Michelle Flamer, senior attorney, City of Philadelphia Law Department, provided two clarifications: First, the awarding agency identified in this paragraph is not revealed, but the contract is identified as a housing contract. Contracts for housing rehabilitation are not within MBEC's purview as they are awarded by Commonwealth agencies such as the Redevelopment Authority or independent quasi-public agencies such as the Philadelphia Housing Development Corporation. Second, MBEC conducts two contract monitoring phases—when bids are opened (MBEC verifies the scope and dollar amount of participation of M/WBEs named on the "Solicitation for Participation and Commitment Form")—and after award of the contract (MBEC requires submission of invoices and other documents showing achievement of participation). MBEC also serves as an advocate to the M/WBE community and functions as an intermediary in payment disputes between the prime contractor and M/WBEs. Michelle D. Flamer, senior attorney, letter to Marc Pentino, Eastern Regional Office, USCCR, Oct. 9, 2001. Note, the response does not address MBEC monitoring of reimbursements or timely payment.

APPENDIX 1

List of Presenters at the January 1999 Forum

Minority- and Women-Owned Business Enterprise (M/WBE) Owners

Floyd Alston, president, Beech Interplex Inc.
Cornelius O. Baker, president, Progressive Plastics Products Co. Inc.
Marcellus Blair, president, MBA Enterprises Inc.
Ambrose O. Chukwunenyne, P.E., president, Conquest Construction Services
Earl F. Callaway, owner, C.E. Franklin Inc.
Anthony Fullard, project manager, KKAJ Inc.
Grace Gibson, president, Quality Heating & Sheet Metal Co. Inc.
Darcel McGee, president, Quality Mobile Hearing
Derrick Townes, president, Townes Mechanical Contractors Inc.

State and City of Philadelphia Officials

Michael E. Bell, director of minority and women business development, Redevelopment Authority
Andrew J. Carn, representative, Pennsylvania House of Representatives
Charles Gillean, disadvantaged business enterprise specialist, SEPTA
Paula J. McKinney, minority business coordinator, Governor's Action Team
Hanford Jones, economic and opportunity coordinator, Office of Housing and Community Development
Edward G. Rendell, mayor of Philadelphia
Jim Roundtree, director, Philadelphia Minority Business Enterprise Council
Mary Jo Shawb, women's business advocate, Department of Community and Economic Development

Community Advocates

Jihad Ali, representative, United Minority Enterprise Association Inc.
Clinton Connor, chairman, NAACP (Economic Development Committee)
Jasper Jones, representative, Crop Action Team and Center for Economic and Social Justice
Charles Soloman, director of economic development, Greater Philadelphia Urban Affairs Coalition
Horace Trent III, representative, Crop Action Team and Center for Economic and Social Justice
Jesse W. Woods III, vice president, Center for Economic and Social Justice

Industry Analysts

Lynn L. Claytor, president, Contract Compliance Inc.
Nancy Myers, president, Qualified Women/Minorities in Construction

Large Prime Contractor Representatives

Ben Kaplan, purchasing manager, Turner Construction
Jack Shannon, director of economic development, University of Pennsylvania
Herb Young, director of community affairs, Turner Construction

Public

Leon Alexander, student
Theodore Brimat, P.E., laboratory director, Ava Shypula Consulting Inc.
Percival T. Fields, PTA /Crop Economic Development Co.
David Leary, student
Roxane Mandel, president, ADR Services
Carole E. Robinson, president, Robins Industrial & Building Supplies Inc.
John Thomas, MeaJencoe Construction & Services Inc.

APPENDIX 2

Pennsylvania State Agency Contracts and Payments to MBEs and WBEs, 1995–97

Agency	Number of contracts to MBEs			Total amount paid to MBEs			Number of contracts to WBEs			Total amount paid to WBEs		
	1995	1996	1997	1995	1996	1997	1995	1996	1997	1995	1996	1997
Agriculture	NA	4	3	\$12,189.37	\$5,191.14	\$336,666.18	NA	1	3	\$18,482.30	\$637.77	\$61,693.71
Banking	NA	0	1	0.00	0.00	109.00	NA	4	5	5,193.00	398.90	7,211.15
Conservation & Natural Resour.	NA	2	5	--	1,189,020.00	140,509.25	NA	15	9	--	242,867.58	45,397.99
Corrections	NA	--	0	--	--	0.00	NA	--	8	--	--	106,158.42
Education	NA	5	7	10,472.19	1,926.12	2,411.20	NA	45	18	44,322.21	15,734.17	16,822.50
Emergency Man. Agency	NA	2	0	656.75	399.00	0.00	NA	33	30	149,380.20	7,891.33	7,733.55
Environmental Protection	NA	0	0	219,142.73	0.00	0.00	NA	6	7	--	67,861.83	87,248.67
Game Commission	NA	0	0	--	--	--	NA	0	0	--	--	--
General Services	NA	--	--	3,509,716.60	4,633,629.62	12,177,535.45	NA	--	--	3,328,123.84	5,930,249.01	10,549,903.47
Health	NA	3	28	313.50	3,651.13	64,324.85	NA	23	41	3,142,735.31	468,206.18	26,367.30
Insurance	NA	5	2	4,426.34	1,702.85	486.77	NA	0	1	0.00	0.00	36.18
Labor and Industry	NA	14	--	144,525.41	138,573.07	--	NA	35	--	404,299.21	4,061,868.34	--
Liquor Control Board	NA	5	2	6,566.02	42,322.00	5,391.40	NA	60	19	92,185.87	33,519.54	5,446.04
Military and Veterans Affairs	NA	0	18	4,289.00	0.00	16,875.47	NA	25	47	43,216.59	37,279.77	64,935.87
Milk Marketing Board	NA	--	0	--	--	0.00	NA	--	9	--	--	11,274.15
Probation and Parole	NA	0	0	0.00	0.00	0.00	NA	10	12	3,206.72	3,465.49	13,081.69
Public School Employees Ret. Sys.	NA	--	0	--	--	0.00	NA		2	--	--	1,547.33
Public Welfare	NA	32	4	44,011.35	2,097,008.00	64,061.00	NA	47	5	385,229.32	563,024.00	27,050.00
Revenue	NA	15	14	15,837.58	27,812.40	34,451.09	NA	47	31	637,233.98	3,048,478.47	35,913.22
State Police	NA	--	1	--	--	700.00	NA	--	--	4,716.00	--	--
Transportation	NA	--	211	7,657,896.38	4,394,298.98	25,963,874.43	NA	--	--	4,516,384.44	--	27,770,210.03
TOTAL		87	296	11,630,043.22	12,535,534.31	38,807,396.09		351	680	12,775,308.99	18,457,020.31	38,838,031.27

NA = Not provided

Table constructed using BCABD contract activity reports.

APPENDIX 3

Timeline and Citations Relating to Chapter 17-500 of the Philadelphia Code, Mayoral Executive Orders 6-90 and 1-93, and *Contractors Association of Eastern Pennsylvania v. Philadelphia* Litigation¹

April 5, 1990. Judge Louis T. Bechtle rules in favor of the Contractors Association and permanently enjoins the City from implementing Chapter 17-500. City appeals this decision along with defendant intervenor, “United Minority Enterprise Associates (UMEA).” *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 735 F. Supp. 1274 (E.D. Pa. 1990).

June 1990. Mayor W. Wilson Goode issues Executive Order 6-90, relating to the nondiscriminatory solicitation and use of businesses owned by minorities, women, and disabled persons on City contracts.

September 30, 1991. Court of Appeals vacates Judge Bechtle’s 4/5/90 Order and allows City and UMEA a period of time to discover information relating to instances or a pattern of discrimination in the Philadelphia construction industry prior to the passage of Chapter 17-500, *Contractors Association of Eastern Pennsylvania, Inc. v. Philadelphia*, 945 F.2d 1260 (3d Cir. 1991) (“Contractors I”).

September 22, 1992. Judge Bechtle is unpersuaded by the City and UMEA’s submission of additional evidence and rules, for the second time, that Chapter 17-500 is unconstitutional, *Contractors Association of Eastern Pennsylvania, Inc. v. Philadelphia*, 1992 U.S. Dist. LEXIS 14416 (E.D. Pa. Sept. 22, 1992).

January 1993. Mayor Edward G. Rendell issues Executive Order 1-93, relating to the nondiscriminatory solicitation and use of businesses owned by minorities, women, and disabled persons on City contracts.

October 7, 1993. Court of Appeals partially vacates Judge Bechtle’s ruling by limiting the Contractors’ standing to challenge only those sections of Chapter 17-500 pertaining to construction contracts (standing limited since this was the only area in which Contractors had a personal stake) and orders a trial on the issue of whether there was evidence of discrimination sufficient to support the City’s use of goals for the participation of businesses owned by blacks in City construction contracts (the Court of Appeals concluded that the City had not presented, at the summary judgment level, adequate evidence of discrimination against businesses owned by Hispanic, Native, Asian American, and female persons in the Philadelphia construction industry, so the City remained enjoined from applying the goals program for these businesses on City construction contracts). *Contractors Association of Eastern Pennsylvania, Inc. v. Philadelphia*, 6 F.3d.990 (3d Cir. 1993) (“Contractors III”).

January 11, 1995. Following a nine-day non-jury trial held in the summer of 1994, Judge Bechtle rules that the City failed to identify racial discrimination in the Philadelphia construction industry sufficient to warrant the use of a race-based remedy for black construction firms, the City takes another appeal. *Contractors Association of Eastern Pennsylvania, Inc. v. Philadelphia*, 893 F. Supp. 419 (E.D. Pa. 1995).

September 29, 1995. Philadelphia Recycling Company, a disappointed bidder to a City service/supply/equipment contract, challenges Chapter 17-500. After a two-day hearing, Judge Harvey Bartle, United States District Court for the Eastern District of Pennsylvania, issues a preliminary injunction, enjoining the City from applying Chapter 17-500 to service/supply/equipment contracts. (Case not reported.)

July 31, 1996. The Court of Appeals affirms Judge Bechtle’s January 1995 judgment. The Court of Appeals ruled that although it is a “close call” whether the City had presented evidence of discrimination in the prime contracting market sufficient to support a race-based remedy, since Chapter 17-500 focused

¹ Timeline provided by Michelle D. Flamer, senior attorney, City of Philadelphia Law Department, Aug. 17, 2000.

primarily on subcontracting and the City had been unable to produce adequate evidence of discrimination in construction industry subcontracting, Chapter 17-500 failed. *Contractors Association of Eastern Pennsylvania, Inc. v. Philadelphia*, No. 95-1095 (3d Cir. July 31, 1996) (“Contractors III”).

December 4, 1996. City files petition with the United States Supreme Court for a *writ of certiorari* to review the judgment of the Court of Appeals.

February 18, 1997. U.S. Supreme Court denies City’s petition for *certiorari*.

January 1, 1998. Chapter 17-500 of the Philadelphia Code expired pursuant to Section 17-502(2) of that Chapter.

APPENDIX 4

Executive Order 5-95 (Public Works Project Labor Agreements)

WHEREAS, the City of Philadelphia has a compelling interest in awarding public works contracts so as to yield the lowest reasonable costs and the highest standard of quality and efficiency; and

WHEREAS, Project Labor Agreements, when appropriate and feasible, can ensure that a public works project is completed at the lowest reasonable cost; by the highest quality and most professional work force; and in a timely manner without labor disruptions such as strikes, lockouts or slowdowns; and

WHEREAS, The benefits of any proposed Project Labor Agreement must be carefully weighed with the effect the Project Labor Agreement would have on competitive bidding, project costs and the City's policy to advance women- and minority-owned businesses; and

WHEREAS, a Project Labor Agreement may be used on a particular project if such Agreement clearly benefits the interests of the City on the basis of cost, efficiency, quality, safety and/or timeliness;

NOW, THEREFORE, by the powers vested in me by the Philadelphia Home Rule Charter, it is hereby ORDERED:

1. Definitions.

(a) Appropriate Labor Organization. An organization representing, for purposes of collective bargaining, journeymen in one or more crafts or trades with a Federal or state certified approved apprenticeship training program and which:

- (i) has entered into a labor agreement with an employer in the building and construction industry;
- (ii) has represented journeymen, mechanics and apprentices employed on projects similar to the project for which a Project Labor Agreement is being considered; and
- (iii) possesses the present ability to refer, provide or represent qualified journeymen in the crafts or trades required by the project, in sufficient numbers to perform the contracted work involved in the project.

(b) City Agency. A City office, department, board, commission or other entity which procures goods and services through the City Procurement Department.

(c) Project Labor Agreement. A collective bargaining agreement between an employer and an Appropriate Labor Organization relating to work performed at the site of a particular construction project. Such an agreement

sets forth the terms and conditions of employment for workers hired by the employer and sets forth certain work rules, no-strike clauses, jurisdictional determinations and other provisions that the employer deems important for the completion of the project. For purposes of this Executive Order, the form and manner of the Project Labor Agreement shall be substantially in the form attached hereto as the "Uniform City of Philadelphia Public Projects Labor Agreement," subject to the review and approval of the City Solicitor.

2. Project Labor Agreement Pilot Program.

There is hereby created a pilot program to test the appropriateness and feasibility of the use of Project Labor Agreements in major City public works projects. Such Project Labor Agreements may be used only in accordance with the terms of this Executive Order. Every Project Labor Agreement entered into pursuant to this Executive Order will be monitored and evaluated by the Advisory Committee established pursuant to paragraph 3 hereof. The duration of this pilot program will depend upon the findings and recommendations of the Advisory Committee as it monitors and evaluates each Project Labor Agreement.

3. Project Labor Agreement Advisory Committee.

(a) Composition. There is hereby created a Project Labor Agreement Advisory Committee consisting of the following persons:

- (i) Procurement Commissioner or his/her designee;
- (ii) Commissioner of Public Property or his/her designee;
- (iii) Director, Minority Business Enterprise Council;
- (iv) Director of Aviation or his/her designee;
- (v) Deputy Mayor for Labor;
- (vi) Chair, Law Department's Corporate Group;
- (vii) Managing Director or his/her designee; and
- (viii) such other person or persons designated from time to time by the Mayor.

(b) Duties. The Advisory Committee shall:

- (i) Make recommendations to the Mayor as to whether a City agency's request to use a Project Labor Agreement on a particular public works project should be approved as part of the Project Labor Agreement Pilot Program;

- (ii) Monitor and evaluate every Project Labor Agreement entered into pursuant to this Executive Order;
- (iii) Make periodic reports to the Mayor as to the status of the Project Labor Agreement Pilot Program;
- (iv) Ensure compliance with the terms of this Executive Order;
- (v) Make recommendations to the Mayor as to the continued feasibility of Project Labor Agreements in City public works contracts, including recommendations as to whether the Project Labor Agreement Pilot Program established under this Executive Order should be modified, ended, continued or made permanent; and
- (vi) Perform such other duties as the Mayor may from time to time assign.

4. Scope.

This Executive Order shall apply to major public works projects governed by Section 17-107 of the Philadelphia Code (relating to prevailing wages) and which are for an amount in excess of \$250,000 or such greater or lesser amount as may from time to time be recommended by the Advisory Committee and approved by the Mayor.

5. When City Agencies May Use Project Labor Agreements.

(a) A City agency may use a Project Labor Agreement in a particular public works project if and only if the City agency makes a prior written determination that such an Agreement is appropriate and feasible with respect to the particular project, under the standards set forth in paragraph 5(b) hereof. The written determination must be sent to the Advisory Committee which shall review it and make a recommendation to the Mayor as to whether a Project Labor Agreement should be used for the specified public works project.

(b) A City agency's determination of the appropriateness and feasibility of using a Project Labor Agreement for a particular project shall set forth in detail the investigation, analysis and justification supporting the determination that the agreement will benefit and enhance the interests of the City on the basis of cost, efficiency, quality, safety and/or timeliness, and shall specifically address the following factors:

- (i) The need for safe, timely and efficient completion of the project;
- (ii) The need for predictable costs and enforcement of prevailing wage requirements;
- (iii) The need for effective mechanisms for resolution of disputes;

(iv) The need for a ready and adequate supply of highly skilled and highly trained craft workers and the need to guarantee performance of the project in a workmanlike and professional manner; and

(v) The opportunity to provide significant employment opportunities for qualified City residents and for small, women and minority-owned businesses, taking into consideration the market or pool of available women- and minority-owned businesses, and the effect a Project Labor Agreement would have on the City's policy to advance moment and minority-owned businesses.

(c) The written determination shall also make a finding as to the Appropriate Labor Organization, and shall specifically address whether there are labor organizations other than the Philadelphia, Pennsylvania Building and Trades Council that have the capacity to enter into a Project Labor Agreement within the project area.

(d) This Executive Order does not require the use of a Project Labor Agreement with respect to any particular project, nor does this Executive Order require the selection of any particular union, trade council or labor organization.

6. Required Provisions In Project Labor Agreements.

Any Project Labor Agreement entered into pursuant to this Executive Order shall:

- (a) Contain guarantees against strikes, lockouts, slowdowns and similar actions; and
- (b) Set forth effective, immediate and mutually binding procedures for resolving jurisdictional disputes arising before the completion of the work.

7. Bid Specifications and Procedures When Project Labor Agreements Are Used.

If a Project Labor Agreement is used pursuant to this Executive Order in any public works contracts, the following procedures shall be followed:

(a) The form and manner of the Project Labor Agreement shall be substantially in the form attached hereto as the "Uniform City of Philadelphia Public Projects Labor Agreement," subject to the review and approval of the City Solicitor. Such form and manner of Uniform City of Philadelphia Public Projects Labor Agreement shall be subject to modification or revision from time to time on the recommendation of the City Solicitor or the Advisory Committee.

(b) The Project Labor Agreement shall be negotiated and executed by the general contractor or project manager, subject to the review and approval of the City;

(c) The Instructions to Bidders shall provide that the City, the project manager and any contractor shall have the

absolute right to select any qualified bidder for the award of project contracts without reference to whether the bidder was unionized, provided, however, that only a bidder willing to execute and comply win the Project Labor Agreement would be designated the successful bidder;

(d) The Instructions to Bidders shall provide that the Project labor Agreement shall be made binding on all contractors and subcontractors on the project through inclusion of appropriate bid specifications in all relevant bid documents; and

(e) The public works project shall comply with all other provisions of law, including, but not limited to, the provisions of Executive Order 1-93 (“Antidiscrimination Policy”).

8. Effective Date.

This Executive Order shall take effect immediately and shall apply only to public works project contracts executed after that date.

APPENDIX 5

Marc Pentino, Eastern Regional Office, USCCR, Letters to Gary N. Lee, Director, BCABD,
June 27, 2000, and Sept. 21, 2001



UNITED STATES
COMMISSION ON
CIVIL RIGHTS

624 Ninth Street, N.W.
Washington, D.C. 20425

June 27, 2000

Mr. Gary N. Lee
Director
Bureau of Contract Administration and Business Development
502 North Office Building
Harrisburg, PA 17125

Dear Mr. Lee:

The Pennsylvania Advisory Committee to the U.S. Commission on Civil Rights is preparing a report entitled *Barriers to Minority and Women Owned Businesses in Pennsylvania* based on its January 1999 community forum which we hope to release early next year. Enclosed are portions of the draft report pertaining to the Bureau of Contract Administration and Business Development (BCABD) which were based on available literature and BCABD staff interviews. I have sent copies of this material to BCABD staff referenced in the report.

We invite you and BCABD staff to assist us to strengthen the section by reviewing and commenting upon the draft passages for accuracy and supplementing the description of BCABD. You may elaborate on the draft by simply writing in changes or comments directly on the attached portion or attaching a separate sheet. If there is additional information which has appeared in other publications or other kind of internal documentation which we may review for possible citation, please share it with us as well. As a suggestion, items you may wish to contribute include:

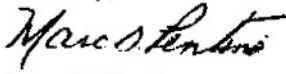
- Improvements or changes you have seen both in public contracting since the implementation of the State's new contract and procurement procedures.
- Number of certified M/WBEs as of July 1, 2000.
- Number of M/WBE certifications or request for certification which have been rescinded or denied during the last 5 years.
- Number of investigations performed by BCABD for alleged fraud in programs involving M/WBEs.
- Commitments and payments to MBE, WBE, Enterprise Zone, and African American firms in 1999 and first half of 2000.
- BCABD reports submitted to the Department of General Services, if publicly available.

Since State contracting is a significant source of business opportunity for M/WBEs, I have also included a copy of chapter 2, *Barriers to Minority and Women-Owned Businesses* which describe the difficulties reported to the Committee at its January 1999 forum. We invite you to comment on your perceptions of the challenges M/WBEs face and solutions which could be implemented by State agencies, prime contractors, and others.

Please be mindful that the draft is confidential and as such should not be released to the public or quoted. As we are trying to complete our report quickly, we would appreciate your response by **July 14, 2000**. We would appreciate your coordination of the response by BCABD staff which will be incorporated as appropriate. If we do not hear from you on or before that date, we shall assume that you have no corrections to this draft. For your convenience, I am enclosing a

postage-paid return envelop to return your comments, or if you wish, you may fax your changes to 202-376-7548. If I can be of any assistance, please feel free to contact me at 202-376-7533.

Sincerely,



Marc D. Pentino
Civil Rights Analyst
Eastern Regional Office

cc: Ki-Taek Chun, Director, Eastern Regional Office
Pennsylvania Advisory Committee
Bureau of Contract Administration and Business Development
Betty Miller
Zara Waters
Usha Hannigan
Mary Grace Majors

Suite 500
624 Ninth Street NW
Washington, D.C. 20425

**UNITED STATES COMMISSION ON CIVIL RIGHTS
Eastern Regional Office**

To: Mr. Gary N. Lee
Director
Bureau of Contract Admin. and Bus. Develop. 717-783-3119 (phone)
717-787-7052 (fax)

From: Marc Pentino, Civil Rights Analyst
marc.pentino@usccr.sprint.com 202 376-7533 (phone)
202 376-7548 (fax)

Date: September 21, 2001

Re: Pennsylvania Advisory Committee Report

The Pennsylvania Advisory Committee to the U.S. Commission on Civil Rights has completed its report entitled *Barriers to Minority and Women Owned Businesses in Pennsylvania*. In accordance with Commission policy, we are sending for your review portions of the report. Your organization is mentioned in the enclosed portion of the report or referenced as a footnote. Please review it for accuracy. You may write in changes or comments directly in the margin or on a separate sheet.

As we are trying to complete this process quickly, we would appreciate your response by October 5, 2001. Should you need an extension or have any questions, please contact me before October 5th. I can be reached at 202-376-7533.

Please Note: The enclosed portions are for editing purposes only and are not to be released to the public

APPENDIX 6

Gary N. Lee, Director, BCABD, Letter to Marc Pentino, Eastern Regional Office, USCCR, Oct. 11, 2001*



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF GENERAL SERVICES
HARRISBURG

October 11, 2001

Mr. Marc Pentino, Civil Rights Analyst
United States Commission on Civil Rights
Eastern Regional Office
Suite 500
624 Ninth Street NW
Washington, D.C. 20425

Dear Mr. Pentino:

This letter is the Bureau of Contract Administration and Business Development (BCABD) official response to your September 21, 2001 correspondence regarding "Barriers to Minority and Women Owned Businesses in Pennsylvania."

The following is the bureau's response to the "Barriers to Minority and Women Owned Businesses in Pennsylvania: "

i) Chapter I, Page 9, Section 1 - Sentence 2

Some agencies that are not under the Governor's jurisdiction may prepare their own contracting report. These agencies are not required to submit the report to BCABD.

*Section has
been
revised as
suggested.*

ii) Chapter 1, Section 3, Pages 9-12

This information is presented in a misleading and unclear manner. BCABD believes that your interpretation is extremely confusing.

From the inception of the program in 1988 to the present, the bureau receives monthly reports from agencies under the Governor's jurisdiction, specifying commitments to MBEs/WBEs in their contracts. These reports continue to be prepared manually. These reports are not an ideal way to monitor and measure program success but they are the only tools available.

*See
Appendix 7
for
response to
this section*

502 North Office Building
Harrisburg, PA 17125
(717) 783-3119

* Broken vertical lines indicate sections incorporated into the report. Unbroken vertical lines represent sections not incorporated. For the Advisory Committee's response to sections not incorporated, see appendix 7.

The Commonwealth has embarked on the implementation of Enterprise Resource Planning (ERP) to replace the aging Integrated Central System and put in place a fully integrated administrative system supporting procurement, personnel, payroll, accounting and budgeting. When ERP is implemented, the desired statistical reports will be available and this decades-old deficiency will be corrected.

Section has been revised as suggested

Attached is a copy of the bureau's annual report for years of 1998 through 2000. (See Attachment #1). This report tracks the annual dollars awarded to MBEs and WBEs.

See Appendix 7 for response to this section

III) **Chapter 2, Page 17, Paragraph 2 – Sentence 6**

This sentence is unclear. Therefore, the section should read as follows:

The purpose of the SERB program is to promote the use of small and emerging businesses by giving them opportunities to participate in state contracting.

Section has been revised as suggested

Many of the companies that qualify for SERB are too small to bid as prime contractors on most state contracts; however, these contracts may provide subcontracting and joint venture opportunities that would be within the capacity of a small business. The SERB Program encourages prime contractors to consider SERB businesses when seeking supplies and services that their own companies cannot provide.

In the RFP process, contracts are awarded according to a point system. Each proposal is evaluated, and points are assigned for the technical aspect of the proposal, cost, SERB participation, and other possible factors. The total of these points determines which firm will be awarded the contract.

Additional information may be taken from attachment #2.

Chapter 2, Page 18

Description of the bureau's four Units. I would encourage you to use information in attachment #3. This handout explains the bureau's units in a clear and concise manner.

See Appendix 7 for response to this section

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(717) 783-3119

Chapter 2, Page 19 - Investigation Unit

This statement is incorrect. The Investigation Unit does not have the power to rescind or deny certification files. Only the certification board has the power to deny a file.

Section has
been
revised as
suggested

IV) Chapter 6, Page 56

Understaffing of State Agencies Assisting MWBEs and Efficiency of State Programs - Conclusion 2

This statement is incorrect.

The Investigation Unit is staffed with a supervisor and not a director. In addition, the supervisor has full access to the bureau's support staff.

Revised in
part. See
Appendix 7

The Investigation Unit is staffed to meet the current needs of our customers. Any increase in staff would only be justified by an increase in the unit's workload.

The bureau conducts an on-site visit if there are concerns regarding the ownership and control of an MBE or WBE firm. Therefore, a firm will not be certified prior to a comprehensive review being performed.

Section has
been
revised as
suggested

Footnote 35. This statement is incorrect.

The Supervisor of the Training and Development Unit did not make this statement. The Training and Development Unit is properly staffed. The unit is doing an outstanding job in providing quality services to the bureau's customers. The unit's activity level is exceptional. (See Attachment #4).

V) Final Comments

In conclusion, the bureau strongly suggests that the footnotes regarding telephone interviews with staff be omitted. The staff was attempting to provide you with basic information on the bureau. They were not informed up front that you were conducting an interview. Therefore, by using the staff names, you may be unintentionally misrepresenting their statements.

The information submitted provides a true and accurate description of the bureau's functions.

See
Appendix 7

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Mr. Marc Pentino
October 11, 2001
Page 4

The employees of the bureau work aggressively to represent and accommodate the interests of minority- and women-owned businesses and provide them with the opportunity to compete for state contracts.

If you have any questions, please contact me at (717) 783-3119.

Sincerely,



Gary N. Lee, Director
Bureau of Contract Administration and
Business Development

GNU/z

cc: Gregory C. Santoro, Chief Counsel for the Department of General Services
Les Jin, Staff Director of United States Commission on Civil Rights
Ki-Taek Chun, Director of Eastern Regional Office, United States
Commission on Civil Rights

502 North Office Building
Harrisburg, PA 17125
(717) 783-3119

Annual Contract Dollars Awarded to Minority Business Enterprises (MBEs) and Women Business Enterprises (WBEs)

The Bureau of Contract Administration and Business Development (BCABD) prepares an annual report to monitor minority business enterprises (MBEs) and women business enterprises (WBEs) participation in state contracts. The report includes Construction Contracts, Invitation for Bid (IFB) and Sole Source Contracts, and Request for Proposals (RFPs).

The Construction Contracts Report tracks the total dollar amount of BCABD bid evaluations on construction contracts over \$50,000.00 for the Department of General Services. In addition, PennDOT prepares a report of the total dollars awarded on construction contracts by their department.

The Invitation for Bid and Sole Source Contracts Report tracks the total dollar amount of BCABD bid evaluations for Invitation for Bid and Sole Source Contracts for all agencies under the Governor's jurisdiction.

The Request for Proposals Report tracks the total dollar amount of commitments made on contracts involving socially economically restricted businesses (SERBs).

The attached report is for the calendar years of 1998 through 2000.

Annual Dollars Awarded to MBEs and WBEs

Year of 2000		Year of 1999		Year of 1998	
Construction Contracts		Construction Contracts		Construction Contracts	
	Contract Amount	MBE Amount	MBE %	WBE Amount	WBE %
DGS	\$188,347,133.00	\$30,101,882.00	15.18	\$23,510,543.00	11.85
PennDOT	\$237,617,820.00	\$9,603,259.00	4.04	\$8,181,860.00	3.44
TOTAL	\$435,964,953.00	\$39,704,941.00	9.11	\$31,692,203.00	7.27
Invitation for Bids (IFBs)	\$179,353,162.00	\$1,590,080.00	0.88	\$1,147,870.00	0.64
Request for Proposals (RFPs)	\$239,089,658.00	\$8,353,679.00	3.49	\$19,867,125.00	8.31
Grand Total of All Contracts	\$464,407,773.00	\$49,648,700.00	5.51	\$52,707,198.00	6.17
Year of 1999					
Construction Contracts					
DGS	\$219,367,503.00	\$7,028,703.00	3.20	\$6,430,724.00	2.93
PennDOT	\$184,968,942.00	\$7,914,657.00	4.28	\$6,429,791.00	3.48
TOTAL	\$404,336,445.00	\$14,943,360.00	3.70	\$12,863,515.00	3.18
Invitation for Bids (IFBs)	\$130,153,683.00	\$1,753,727.00	1.35	\$846,785.00	0.65
Request for Proposals (RFPs)	\$2,517,210,215.00	\$3,428,640.00	0.14	\$3,657,635.00	0.15
Grand Total of All Contracts	\$3,061,700,363.00	\$20,126,727.00	0.66	\$17,667,936.00	0.58
Year of 1998					
Construction Contracts					
DGS	\$349,000,681.00	\$11,757,680.00	3.37	\$13,538,897.00	3.88
PennDOT	\$456,374,383.00	\$19,488,651.00	4.27	\$19,750,558.00	4.33
TOTAL	\$805,375,064.00	\$31,246,331.00	3.88	\$33,289,455.00	4.13
Invitation for Bids (IFBs)	\$145,911,021.00	\$525,686.00	0.36	\$494,529.00	0.33
Request for Proposals (RFPs)	\$768,838,321.00	\$19,137,524.00	2.49	\$28,309,151.00	3.42
Grand Total of All Contracts	\$1,720,122,406.00	\$50,909,541.00	2.96	\$60,093,136.00	3.49

Socially and Economically Restricted Business Program (SERB)

The purpose of the SERB Program is to promote the use of small and emerging businesses by giving them opportunities to participate in state contracting.

Many of the companies that qualify for SERB are too small to bid as prime contractors on most state contracts, however even those contracts may provide subcontracting and joint venture opportunities that would be within the capacity of a small business. The SERB Program encourages prime contractors to consider SERB businesses when seeking supplies and services their own companies cannot provide.

In the RFP process, contracts are awarded according to a point system. Each proposal is evaluated, and points are assigned for the technical aspect of the proposal, cost, SERB participation, and other possible factors. The total of these points determines which bidder will win the contract.

How does a business qualify as a SERB?

A business can qualify as a SERB in one of three ways:

First, by being certified by the PA Department of General Services as a Minority Business Enterprise (MBE) or Women Business Enterprise (WBE) or

Second, by being located in a Pennsylvania Designated Enterprise Zone or

Third, by being certified by the U.S. Small Business Administration as a Small Disadvantaged Business (SDB) and/or in the 8(a) Business Development Program.

IN ADDITION: to qualify as a SERB, a company must gross less than \$8 million per year (\$18 million for Information Technology (IT) companies) and have 50 or fewer employees.

Never assume a business qualifies as SERB because it is certified or is located in an Enterprise Zone; you must also verify its gross annual revenues. Proof of gross revenues can include a recent tax or audited financial statement. If the company has subsidiaries or is the subsidiary of another company, the total revenue of the company and its subsidiaries must be under \$8 million (\$18 million for IT companies).

Priority Rankings for SERB points

Of the maximum number of points available for SERB, a prime bidder can earn:

Up to 100% if the prime bidder qualifies as a SERB.

Up to 90% if the prime bidder enters into a joint venture agreement with a SERB.

Up to 50% if the prime bidder is subcontracting to a SERB (includes purchase agreements.)

The prime contractor is responsible for verifying SERB status with each contract

1. If a business claims SERB status because it is DGS-certified, provide a copy of the certificate and proof that the company does less than \$8 million in gross annual revenues (\$18 million for Information Technology companies).

2. If a business claims SERB status because its headquarters is located in a Pennsylvania Designated Enterprise Zone, provide proof of the headquarters address (such as a lease or deed), a statement from the local Enterprise Zone office confirming that the address is in a zone, and proof that the company does less than \$8 million in gross annual revenues (\$18 million for Information Technology companies).
3. If a business claims SERB status because it is a SDB-certified and/or 8(a) business, provide a copy of their registration in PRO-Net (pro-net.sba.gov) and proof that the company does less than \$8 million in gross annual revenues (\$18 million for Information Technology companies).

Include the appropriate verifications in the SERB portion of the proposal.

Read the RFP and follow it carefully! Important information to note:

1. You must name the specific SERB business(es) to which you are making commitments. Include the company name, address, and telephone number for each specific SERB business included in the proposal. You will not receive credit by stating that you will find a SERB after the contract is awarded or by listing several companies and stating you will select one later.
2. Specify the type of goods or services the SERB business(es) will provide. Specify the timeframe for the SERB(s) to provide the goods or services and the location where the SERB(s) will perform these services.
3. Specify the estimated dollar value of the contract to each SERB. If subcontracting, a signed subcontract or letter of intent must be included in the SERB portion of the proposal. Also estimate what percent of the total value of services or products purchased under the proposal will be provided by SERBs.

Bind the SERB portion separately from the rest of the proposal. (Most RFPs ask that the SERB section be sealed in an envelope). Only one copy of the SERB section is needed. Be sure to identify your company on the outside of the envelope.

How do I find qualified SERB businesses?

The Bureau of Contract Administration and Business Development (BCABD) maintains a database of all Minority Business Enterprises (MBEs) and Women Business Enterprises (WBEs) certified by the PA Department of General Services. Information on these firms is available on BCABD's website at www.dgs.state.pa.us/cabd.htm.

If you have difficulty using the website to search for MBEs and WBEs, contact BCABD for assistance. Please note that the businesses in BCABD's database are coded according to the goods or services they are certified to provide. If you have problems finding the correct codes for the supplies or services you are seeking, you can request a codebook from BCABD. Contact BCABD by e-mail at gs-cabdinternet@state.pa.us. If you do not have e-mail, call 717-787-8708.

For more information on Designated Enterprise Zones, contact the PA Department of Community and Economic Development at 717-720-7342 (phone), 717-787-4088 (fax), or dcad@state.pa.us (e-mail). Request a list of Enterprise Zone offices.

For more information on Federal certification (SDB and/or the 8(a) program), contact the U.S. Small Business Administration at 1-800-U-ASK-SBA (phone), 202-205-7064 (fax), or visit their website at www.sba.gov/gcmed.

SERB Commitments are Binding

Commitments to SERBs made at the time of proposal submittal or contract negotiation become part of the resulting contract and must be maintained throughout the term of the contract. Any proposed change must be submitted to and approved by BCABD.

Joint Ventures

A Joint Venture is an association of two or more companies to carry out a project for profit. A Joint Venture generally requires a shared interest in the performance of a common purpose. After the project is completed, the Joint Venture terminates.

The Joint Venture relationship is created by a contract between two or more companies. Each invests its money, labor or skills in the venture. The profits are divided between them.

The terms of the contract must be agreed on by all parties before a Joint Venture relationship exists.

Co-ownership of the project is one indication of a true Joint Venture, which occurs when two or more companies pool their resources in a common enterprise comprised of equal obligations and benefits. If the contract indicates that one company is merely employed to provide certain goods or perform certain services and has no financial interest in the enterprise other than compensation, there is no Joint Venture. When a company has invested nothing in or contributed nothing to the project, there is no Joint Venture.

Generally, shared interest in the profits and losses resulting from a project is indicative of a Joint Venture. The participation in profits is an indispensable requisite of a Joint Venture relationship. The absence of participation in profits is conclusive that it is not a Joint Venture.

The burden of proving a Joint Venture is on the party who asserts it.

Examples of evidence indicating a Joint Venture relationship include: 1) showing a checking account with the Joint Venture name, 2) providing a copy of the contract establishing the Joint Venture, 3) providing an individual income tax return showing Joint Venture income, 4) documenting a pooling of assets into a common enterprise with a division of profits, 5) providing evidence of a parity in direction and management, and 6) showing proof of the securing of insurance in the name of the Joint Venture.

If asserting a joint venture with a SERB, the Joint Venture Agreement must be included in the SERB portion of the proposal.

For more information on Joint Ventures, contact BCABD's Evaluations Unit at 717-787-7629.

For more information on the SERB Program contact
PA Bureau of Contract Administration and Business Development
613 North Office Building, Harrisburg, PA 17125
E-mail: gs-cabdinternet@state.pa.us
717-787-6706 or FAX: 717-772-0021

To reach our Western Regional Office, e-mail cjumba@state.pa.us or call 412-442-5872.

8/01

Bureau of Contract Administration and Business Development

Our mission is to provide the necessary resources and inspiration for our customers, minority and women business owners, to compete for and participate in the state contracting process; to teach these business owners how to pursue the opportunities available through state contracting; and to insure Commonwealth contracts are executed without discrimination.

The Bureau of Contract Administration and Business Development (BCABD) fulfills its mission through four organizational units:

Certification Unit

Certification of minority- and woman-owned business enterprises (MBEs and WBEs) is at the heart of BCABD's mission. By becoming certified, MBEs and WBEs can more readily identify and use the opportunities available to small businesses through state contracting.

The certification application is a comprehensive process, which assures only qualified companies are approved. In addition to owning at least 51% of their companies, MBE and WBE owners must be U.S. citizens, must have training or experience in their business fields, and must have management and operational control of their companies.

Training & Development Unit

BCABD's Training and Development Unit promotes successful involvement of MBEs and WBEs in state contracting through education and information. Free training programs, consulting, and resource materials are made available to certified companies, the business community, and organizations assisting small businesses.

The staff provides technical assistance and consulting to all small business owners, especially minority and women-owned businesses, to increase their opportunities to compete successfully in the state procurement system.

Evaluations Unit

The Evaluations Unit monitors the participation of MBEs and WBEs in state contracting, to measure adherence to programs designed to promote opportunities for certified companies and other small businesses. The majority of state contracts over designated cost levels come under the review of BCABD.

Investigations Unit

The Investigations Unit performs on-site reviews of firms that apply for certification, responds to complaints, and investigates alleged fraud in state programs designed to promote opportunities for MBEs and WBEs.

To apply for certification or learn more about BCABD services contact:
PA Bureau of Contract Administration & Business Development
613 North Office Building, Harrisburg, PA 17125
E-mail: gs-cabdinternet@state.pa.us
717-787-6708 or FAX: 717-772-0021
Website: www.dgs.state.pa.us/cabd.htm

To reach our Western Regional Office, e-mail cjumba@state.pa.us or call 412-442-5872.

09/01

ANNUAL ACTIVITIES STATISTICS FOR 2000
BCABD Training and Development Unit

EVENT SUMMARY (see full report for locations, host organizations, and dates):

Type of event	# of events	Total participation	Participation by MBEs & WBEs	Attendance at exhibits
Full Workshop on State Contracting and Certification (2-3 hrs.)	36	708	469	
Presentation/Workshop on Certification	17	573	331	
Presentation/Workshop on State Contracting	2	45	23	
SERB Presentations	53	*	*	
Exhibits	12			2,117
Special Event for State Purchasing Agents and MBEs/WBEs (see report on Special Projects)	1	76	30	
Totals	121	1,402	853	2,117

OTHER SERVICES

Referral Reports	947
Bidding notices sent to MBEs/WBEs	4,050
State contracting help/materials provided	745
Website information/help provided	266
Certification information/help provided	614
Other assistance provided	504
Total services provided, excluding events	7,126**

GROUPS RECEIVING SERVICES (excluding events)

MBEs and WBEs	4,770
Other small businesses	67
Business startups	40
Prime contractors and bidders	1,079
State departments and agencies	385
Others	369
Unknown	33
Total individuals/organizations served	6,743**

* Participation statistics are not collected for SERB presentations. Participants are companies bidding on state contracts.

** Totals are not the same because some entities contacted us for more than one service.

APPENDIX 7

Marc Pentino, Eastern Regional Office, USCCR, Response to Oct. 11, 2001, Letter from Gary N. Lee, Director, BCABD, Oct. 30, 2001



UNITED STATES
COMMISSION ON
CIVIL RIGHTS

624 Ninth Street, N.W.
Washington, D.C. 20425

October 30, 2001

Mr. Gary N. Lee
Director
Bureau of Contract Administration and Business Development
502 North Office Building
Harrisburg PA 17125

Dear Mr. Lee:

Thank you for reviewing portions of the Pennsylvania Advisory Committee's September 2001 draft report, *Barriers to Minority and Women Owned Businesses in Pennsylvania*. Your comments regarding the Commonwealth's Enterprise Resource Plan system and correction to the report's description of the SERB program will be useful as we revise the report based on agency responses.

I wish to take this opportunity, however, to address other points of your October 11th response.

1. We value your observations that pages 9-12 of the draft report are presented in a misleading and unclear manner. Indeed, the purpose of affected agency review is for agencies to make needed revisions and suggestions to the draft. Your corrective effort in this regard is much appreciated.

Taking this opportunity, however, I wish to point out the Committee's past difficulty with obtaining information from BCABD regarding M/WBE programs, BCABD development and operations, and progress/difficulties in assisting M/WBEs. You may recall that the Committee invited you or a BCABD representative to attend the Committee's January 1999 forum to speak on these and other issues. On the day of the event, you informed us that you could not attend due to bad weather. At the time, the Committee was surprised as staff from other agencies in Harrisburg did attend. The Committee decided to seek information from written sources and telephone interviews and we contacted BCABD staff at various times between February 1999 and August 2001.

We also sent a written request to you in June 2000 (see attached) asking that you review the Committee's draft report. We wish you had responded to our request then, providing needed information to clarify and strengthen the sections on BCABD. In our request, we suggested that you include items relating to a) improvements in public contracting since the implementation of the State's new contract and procurement procedures, b) updated data on the number of certified M/WBEs and requests for certification which have been approved/denied c) number of investigations for alleged fraud, d) updated information on payments and commitments to certified M/WBEs and Enterprise Zone firms, and e) BCABD reports submitted to the Department of General Services. We also asked for your perceptions of the challenges M/WBEs face and possible solutions that could be implemented. A copy of our request was also sent to members of your staff in key units within BCABD. Regrettably, there was no response to the June 2000 draft from any person at BCABD.

2. You recommend in §III of your October 11th response that the Committee use attachments 2 and 3. Please be advised that much of this information had already been incorporated in the Committee's draft report. Your attachment 1 "Annual Contract Dollars Awarded to MBEs and WBEs" is in a different format from data previously supplied by BCABD staff, which was relied in drafting the report. For instance, your attachment 1 provides data on contract dollar amounts awarded under IFBs and RFPs, whereas past data supplied cited commitments and payments to M/WBEs. If one looks at the

totals for 1998, for example, the figures between these two data sets do not match and it is unclear how these amounts were generated. Attachment 4 is very useful and will be duly incorporated.

3. Your October 11th response makes two claims: a) some comments by BCABD staff were inaccurate or not made by the persons cited, and b) we failed to inform BCABD staff that we were conducting interviews (see §§ IV and V of your response). As for your first claim, BCABD staff were informed that they would be given the opportunity to review appropriate sections of the report for accuracy and clarification. In June 2000 and in September 2001, we sent letters with appropriate sections to all persons mentioned in the report for them to review for accuracy. However, no one at BCABD responded, which we interpret to mean there are no errors in either substance or attribution. Regarding your second claim, I disagree with your belief that BCABD staff was not informed up front that we were conducting interviews. It is our practice to inform all persons that we are drafting a report referencing their agency/department and that their comments may be mentioned in the text or footnotes. Again, both in June 2000 and in September 2001, no staff person from BCABD responded to us objecting to being referenced, nor asked that their names be omitted.

4. Your October 11th response provides little background to the actual operation of BCABD and the important topic of contracting to M/WBEs. For instance, there is little or no information on page 3 of your response, referencing the number of certification files denied by the certification board, whether BCABD conducts on-site visits in response to complaints of discrimination or fraud, and the investigation unit's current workload. This information is critical to an understanding of BCABD's operations and staffing adequacy.

It is most unfortunate that our report cannot benefit from detailed information from your office. The Committee is most disappointed that in the past BCABD has neither furnished requested information on a timely basis, nor fully explained BCABD operations in a way the public can easily understand. Sometime early next year, the Committee will hold a press conference to release its report. At that time, we hope a representative from BCABD and the Department of General Services can participate to share the bureau's efforts to assist M/WBEs.

Sincerely,



Marc D. Pentino
Civil Rights Analyst
Eastern Regional Office
202-376-7533

cc: Pennsylvania Advisory Committee members
Ki-Taek Chun, director, Eastern Regional Office, U.S. Commission on Civil Rights
Les Jin, staff director, U.S. Commission on Civil Rights
Gregory C. Santoro, chief counsel, Pennsylvania Department of General Services

Attachment

APPENDIX 8

Marc Pentino, Eastern Regional Office, USCCR, Letter to Gary N. Lee, Director, BCABD,
Mar. 22, 2002



UNITED STATES
COMMISSION ON
CIVIL RIGHTS

624 Ninth Street, N.W.
Washington, D.C. 20425

March 22, 2002

Mr. Gary N. Lee
Director
Bureau of Contract Administration and Business Development
502 North Office Building
Harrisburg PA 17125

Dear Mr. Lee:

We recently received your December 17, 2001 letter to me, copy to Ki-Taek Chun, director, Eastern Regional Office in response to our October 30, 2001 correspondence to you. Mail reaching Washington has been significantly delayed since September 11, 2001. I am still receiving mail from last Fall and Winter and it was only last week that Ki-Taek Chun received the copy of your December 17th letter. In fact, your letter addressed to me has still not arrived.

The information you provided regarding the number of certification files denied by the board and the Bureau's investigation unit will be incorporated into the Pennsylvania State Advisory Committee report, *Barriers to Minority and Women-Owned Businesses in Pennsylvania*. As you requested, I am enclosing a list of members to the Pennsylvania State Advisory Committee. I am somewhat puzzled by the mention that you did respond to our request regarding the Committee's June 2000 draft report as we have no record of that correspondence. At any rate, we will keep you informed of the upcoming press conference to release the report. If I can be of further assistance, please contact me at 202-376-7533.

Sincerely,

A handwritten signature in cursive script, appearing to read "Marc D. Pentino".

Marc D. Pentino
Civil Rights Analyst
Eastern Regional Office

cc: Les Jin, staff director, U.S. Commission on Civil Rights
Ki-Taek Chun, director, Eastern Regional Office, U.S. Commission on Civil Rights
Gregory C. Santoro, chief counsel, Pennsylvania Department of General Services

Attachment