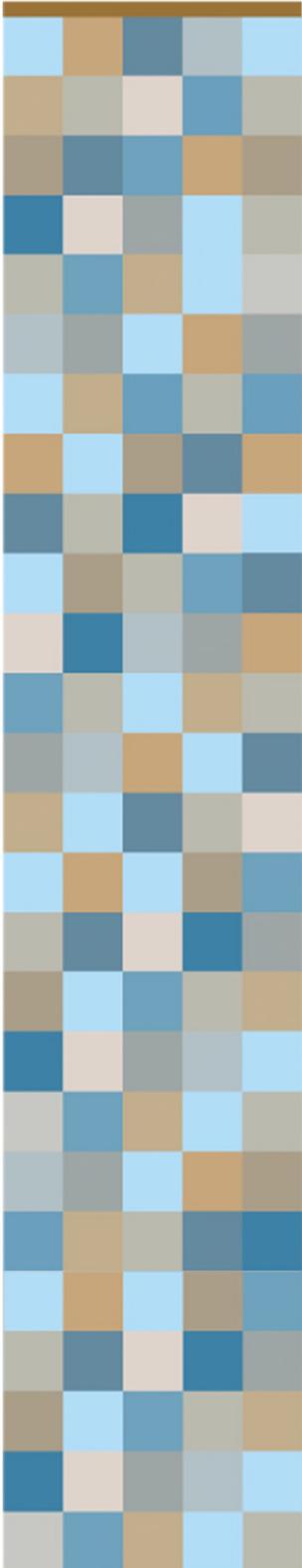


**CONSTRUCTION LAW
ALERT**



November 2017

**M/WBE Regulatory Compliance-
Don't Get "Pushed Around"**
by: Henry L. Goldberg

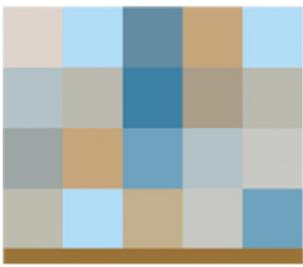
For many reasons, not the least political, NYS contracting agency personnel are under increasing pressure to strictly enforce M/WBE regulations. This ever-growing demand on contractors is on a collision course with the reality of a dearth of qualified, certified M/WBEs. Governor Cuomo's over-the-top goal of 30% for M/WBE participation, which is supported neither by New York laws, nor regulations, nor disparity studies, is a prime example. When the governor made this announcement, conspicuously absent was any magical increase in certified, or, more importantly, qualified, M/WBEs that would justify such quantum leap in goal setting. This 30% goal greatly exceeds the required disparity studies' factual predicate which is required by law.

At the present time, few can argue that there is an insurmountable gulf between state utilization goals and qualified M/WBE availability. As construction activity continues to pick up, given, among other things, the recent efforts to prioritize infrastructure modernization, there clearly will be high-level political pressure on all agencies to assure achievement of utilization goals. Prime contractors are desperately seeking qualified, certified M/WBEs, but their availability numbers, as indicated, have not appreciably increased. The number of qualified M/WBEs is nowhere near what is needed to meet the current aggressive enforcement of the goals.

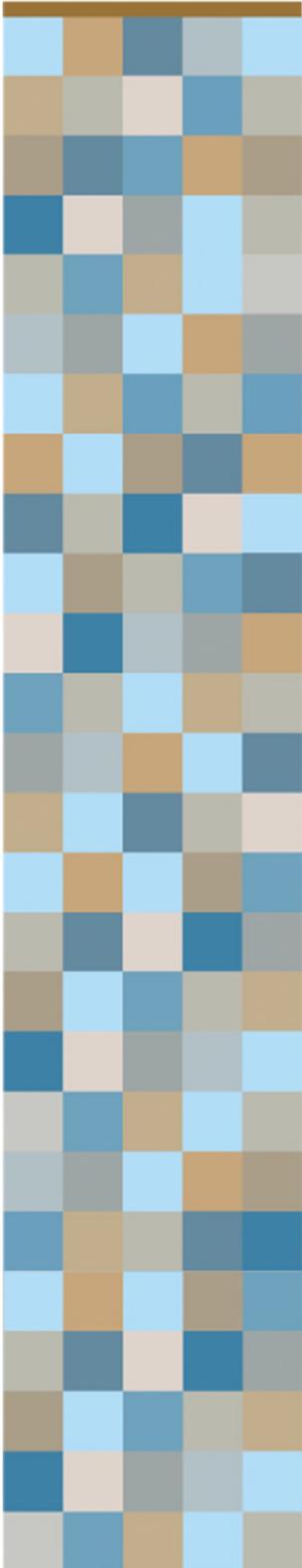
The lack of certified M/WBE availability, capacity, and demonstrated skills has hit a critical level. Unjustifiably aggressive enforcement of the goal percentages (and they are only aspirational "goals") creates a tremendous risk for contractors, as well as a waste of resources for both agency employees and the contracting community as they currently attempt to achieve "mission impossible."

Bidders are often inappropriately pressed to "just meet the goals," as if they were a quota or mandate. They are not. Bidders are often not afforded the required review of their good faith efforts (GFE). The commercially useful value of an M/WBE is often not considered or appreciated in the context of the scope, skill requirements, and location of a project. This is all required under applicable State law and regulation.

Despite claims by agency personnel, a contractor need not give up its own work. Goals must be established "project by project" based on a realistic assessment of the project size, complexity, and subcontracting opportunities. In addition, the number, and type of



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certified and qualified firms available geographically must also be considered. Agency personnel often do not give proper legal significance to GFE and, instead of required waivers, resort to threats of liquidated damages, adverse performance evaluations, and findings of non-responsiveness.

In fact, it appears these well-intended programs have lost their focus in the current political frenzy. Let's take a breather and reassess! The United States Supreme Court has long held that race-based preferences in public contracting are inherently suspect (see *City of Richmond v. Croson*).

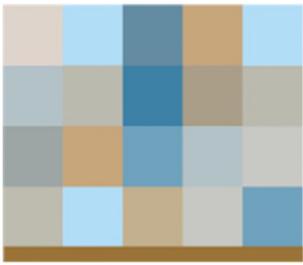
To satisfy the required "strict scrutiny" standard applicable to all race-based preference programs, a government entity must present a strong evidentiary basis that the preference program is "narrowly tailored" and serves a compelling state interest. The Supreme Court requires a "searching judicial inquiry" into legislative and regulatory justification of race-preference programs. Otherwise, there is no fair way of discerning which programs are truly "benign" and "remedial." Illegitimate notions of racial inferiority or simple "race-politics" are not acceptable.

The following considerations must guide the courts in evaluating whether a race-based program is "narrowly tailored" to accomplish its goals without unconstitutionally hurting innocent third parties:

- (1) The efficacy of alternative, race-neutral remedies (this is sorely missing in New York programs);
- (2) The flexibility and duration of the race-conscious remedy, including whether waiver provisions are readily available;
- (3) The relationship between the remedy's numerical goals and the relevant labor market;
- (4) The effect of the race-conscious remedy on the rights of innocent third parties.

Interestingly, in its *Croson* decision, the Supreme Court rejected as insufficient evidence that minority businesses in Richmond received less than 1% of that city's prime contracts, while they constituted 50% of the population. Nonetheless, the Supreme Court held that the comparison of the general population is of little probative value when special qualifications are required to fill particular jobs, such as on public construction contracts. To show discriminatory exclusion in a field requiring special skills, the relevant group for comparison is the number of qualified minorities. This is particularly important to keep in mind given the extreme shortage of qualified MBEs in this state at this time.

Know your rights. Don't get pushed around. A waiver is not a privilege. It is your right to have your GFEs carefully reviewed. While you are responsible to do just that, exercise



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good faith, the contracting agency must do the same, and fairly consider your waiver submittal.

A separate Alert will soon discuss best practices for establishing defensible, rock-solid, GFE.

Any issues raised in this Alert may be addressed to Mr. Goldberg who can be reached at: (516) 873-2000 or by email at hgoldberg@moritthock.com



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