



New York **Makes Work Pay**

Developing a path to employment for New Yorkers with disabilities

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Medicaid Infrastructure Grant (MIG) Report

State Contracting Procurement Preferences for Disability-owned Small Businesses in New York

*Report to the New York State Medicaid
Infrastructure Grant*

November 2010

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Cornell University
ILR School
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I. INTRODUCTION

Government at all levels exercises great influence over the nature and scope of economic activity. It has many levers for doing this, ranging from tax policy to banking regulation, but one of the chief tools at government's disposal is the contracting process through which goods and services are procured. According to some reports, nearly one in four American workers (approximately 22 million employees) is employed by a Federal contractor.¹ That is close to 200,000 businesses with contracts amounting to over \$700 billion.² In New York there are 2,500 centralized state government contracts, amounting to over \$5 billion dollars, in addition to individual agency contracts.³

Given the scope of government contracting and the range of goods and services that governments need and buy, it comes as no surprise that the selection of vendors and service-providers has emerged as a source of legal and political conflict. An entire body of

¹ "Plan to Seek Use of U.S. Contracts as a Wage Lever," New York Times, February 26, 2010.

² R. Bjorklund, FedSources Market Intelligence Services, "Federal Budget Analysis: 2011" (2010).

³ "Doing Business with New York State: A Guide to Understanding the State's Procurement Process," available at www.empire.state.ny.us/.

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law, known as public contracts law, has grown up around the regulation of how governments make purchases, and issues of equity in procurement have emerged as a flashpoint for many debates over fairness and equal opportunity in our time.

In the 1960s the Federal government began to use its contracting and purchasing power as an instrument for contributing to the economic advancement of disadvantaged minority groups.⁴ Although the goal of job-creation predominated at the outset, the objective of enhancing minority-owned small business development emerged distinctively in the early 1970s, and shortly thereafter was joined by similar aspirations for women-owned small firms.⁵

New York State enacted its program of contract preferences for minority and women-owned small businesses enterprises (MWBE) in 1988,⁶ adopting a program with a 30-year lifespan scheduled to sunset in 2018.⁷

New York, as discussed in more detail below, continues to work at improving its program. In 2008, a Task Force to Increase Participation of MWBE Firms in Debt Issuances was established. The Task Force reviewed the debt-issuing practices of the five authorities which issue State-supported debt, and, in April 2010, wrote recommendations designed to improve their performance in retaining MWBE underwriting firms.⁸ In July 2010, Governor Paterson signed the New York State Diversity Act, consisting of several bills designed to improve MWBE contracting in New York.⁹ In September 2010, the Division of

⁴ See Minority Contracting and Affirmative Action for Disadvantaged Small Businesses: Legal Issues, by Charles V. Dale (Congressional Res. Service, (CRS) RL 33284 (Feb. 24, 2006) (available at <http://www.policyarchive.org/handle/10207/bitstreams/2753.pdf>).

⁵ Id.

⁶ N.Y. Exec. L. Art. 15-A (L. 1988, C. 261).

⁷ Presumably, the Legislature believed that 30 years, approximately a generation, would be sufficient to achieve equality. In any event, twice in the past four years, under governors of both parties, the December 31, 2018, sunset has been reaffirmed in law. See, L. 209, 2009, c. 361, Sec. 7; L. 2006, c. 59, Sec. 7

⁸ http://www.state.ny.us/governor/press/press_0428092.html. The Task Force's preliminary report indicated that MWBE participation in underwriting was improved by adoption by the five agencies of a common Request for Proposals procedure, a goal of 20% MWBE participation, and common performance measures.

⁹ <http://www.state.ny.us/governor/press/071510MWBE.html>. Governor's Program Bill No. 297 (S.8312/A.11525) raised the cap on discretionary purchases that a State agency can award to MWBEs or small businesses from \$100,000 to \$200,000, subject to the agency's internal controls, but not based on full-blown competitive procurement procedures. Governor's Program Bill No. 298 (S.8313/A.11526) expanded contracting practices of public authorities granting increased opportunities for MWBE participation and required that the procurement guidelines for each public authority include the designation of senior staff to oversee the authority's MWBE program and requires that procurements be conducted to achieve the authority's MWBE goals to the maximum feasible extent. Governor's Program Bill No. 299 (S.8314/A.11527) expanded and strengthened the State's program for MWBE contracting, and authorized a thorough disparity study before the MWBE program expires, including in-depth review of contractors' hiring and promotional practices. This legislation also created the position of Chief Diversity Officer to oversee the MWBE program

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Minority and Women Business Development proposed new regulations intended to improve the MWBE program.¹⁰

Absent from the discussion of preferences and from the rhetoric of New York State political leaders surrounding the topic is the question of whether and how comparable preferences should be extended to small disability-owned business enterprises (DBEs). Many people believe that such a broadening of state efforts is feasible, desirable and likely to be effective in helping to bring entrepreneurs with disabilities into the economic mainstream. There appears to be no overt opposition to this view, but inertia and lack of awareness of the issue continue to be barriers.

The purpose of this paper is, therefore, to briefly summarize the key arguments for extending New York State small business contracting priorities to include DBEs; to describe the state's current system of preferences with a view to identifying the extent to which it would be a viable precedent or model for such an extension; to examine the ways that other jurisdictions, state and federal, have attempted to bring DBEs into their purchasing communities; and to make recommendations for reforms here in New York.

II. THE CASE FOR INCLUSION

Americans with disabilities are disproportionately unemployed, underemployed, and living in poverty. No other disadvantaged group has a higher rate of unemployment. In 2006, the overall percentage of working-age people with disabilities ages 21-64 in New York State was 11.5%, representing a total of 1,295,000 people.¹¹ The same survey reported that the employment rate of working age people with disabilities was only 33.5%, compared to the employment rate of working-age people without disabilities, reported at 77.9%.

Although people with disabilities may be served by programs for women- and minority-owned businesses, to the extent they are women or minorities, disability should be recognized as an additional disadvantage and entrepreneurship should be recognized and encouraged as an option that particularly responds to the needs of people with disabilities. A program designed to support small business ownership by people with disabilities would recognize that the disabilities of white males, who are not otherwise covered by New York's MWBE program, disadvantage them in the business world in much the same way that minority background or gender disadvantages women and minorities. It would also recognize that business owners with disabilities can benefit from many of supports available to women and minority business owners, but also that they need different

and diversity issues in the workforce from within the Executive Chamber. Emerging Investment Managers Bill (S.6888/ A.9976) addressed entities that are not executive agencies, and that control large pools of money for investment: the Comptroller, the State Insurance Fund and the Deferred Compensation Board, providing emerging investment managers the ability to invest with MWBE financial institutions and to adopt a strategy that motivates investments in underserved regions of the State.

¹⁰ <http://www.empire.state.ny.us/MWBE.html>.

¹¹ Rehabilitation Research and Training Center on Disability Demographics and Statistics (2007). Disability Status Report. Ithaca, NY; Cornell University

supports. Providing disability-responsive support programs would benefit women and minorities with disabilities who are otherwise not able to effectively benefit from the MWBE program. It would also recognize the unique societal benefits made possible by helping people with disabilities transition to gainful employment and away from reliance on public benefits and services.

As with other disadvantaged populations, many individuals with disabilities turn to business ownership as a means to economic independence. Small business development is a growing, substantial form of employment and according to recent statistics self-employment rates were highest among individuals with disabilities.¹² As the introduction to the December 2009 Entrepreneurship Partners Dialog¹³ states: "In the past decade, entrepreneurship has emerged as a vital alternative to wage employment in meeting the employment and career needs of people with disabilities. Historically, people with disabilities have tended to turn to self-employment in greater numbers than those without disabilities. According to the U.S. Census (1996), 12.8% of people with disabilities choose self-employment compared to 7.8% of the general labor force. Entrepreneurship has been shown to be a particularly good fit for many with disabilities, including veterans with disabilities. In the current economic climate, with a scarcity of jobs, corporate downsizing, and diminishing job attachment, entrepreneurship has become an increasingly attractive option for many."

Entrepreneurship is an important option for people with disabilities for a variety of reasons. It can operate as a stepping stone to traditional employment. It can offer flexibility in hours, location, and equipment to suit a variety of accessibility and accommodation needs of people with disabilities. Self-employment offers consistently higher wages than other forms of employment achieved by people with disabilities through Vocational Rehabilitation (VR) services.¹⁴

A 2001 national study indicated limitations in quantifying the number of self-employed people with disabilities.¹⁵ Self-employment is established in the Rehabilitation Act as a valid employment outcome for people with disabilities, but is underutilized by VR agencies. For the 2007 reporting year, self-employment closures represented 1.7% of VR

¹² U.S. Small Business Administration, Office of Advocacy, The Small Business Economy For Data Year 2006, A Report to the President, December 2007, p. 12

¹³ See Meeting Brief: Entrepreneurship Partners Dialog, sponsored by New York Makes Work Pay (December 14, 1999) on file at BBI.

¹⁴ Revel, Smith & Inge, "An Analysis of Self-Employment Outcomes within the Federal/State Vocational Rehabilitation System," Journal of Vocational Rehabilitation 31 (2009) 11-18, Table 4.

¹⁵ First National Study of People with Disabilities who are Self-Employed; Progress Report #8 (February 2001). Rural Disability and Rehabilitation Research

employment closures nationwide.¹⁶ In New York, however, self-employment closures represented only .69% of all vocational closures reported by NYS VESID.¹⁷

However, support for new business creation by people with disabilities is growing. Onondaga County and the Burton Blatt Institute at Syracuse University operates one of three national projects on self-employment for people with disabilities funded through the US Department of Labor/Office of Disability Employment Policy. During the three-year project, over 200 individuals received business planning training through the program, 65 registered businesses and 48 generated income from their businesses.¹⁸

Entrepreneurship thus addresses the preferences and interests of individuals with disabilities, and yields unique potential benefits to them.¹⁹ However, facilitating entrepreneurship by individuals with disabilities also serves the societal interest. America invests billions of dollars each year in the vocational rehabilitation of individuals with disabilities. It expends these resources because it understands that people with disabilities are no less able than anyone else to contribute to the growth and dynamism of the economy, if given a chance, and it invests these resources because of a recognition that the persistently high rates of unemployment among Americans with disabilities do major harm, not only to them and their families, but to our society as a whole.

At the same time, the funds expended on dependency and subsistence through transfer payment programs such as Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI) continue to grow. With the rise of concern over the size of the federal deficit, and with the growth of awareness of the role of social spending as a component of public expenditure, it has become increasingly obvious that no long-term solution to the deficit problem is possible without greatly enhanced efforts to facilitate the economic self-sufficiency of a variety of marginalized and disadvantaged groups, including persons with disabilities. Because of the rules of SSI/SSDI, self-employment actually offers the best option for people with disabilities to transition smoothly from public benefits to economic self-sufficiency.²⁰

When people with disabilities earn income as business owners, they also buy equipment and supplies, pay taxes and rent and contribute to their local economies. Small disabled-owned businesses, strengthened through supportive state programs, could also create jobs for people with or without disabilities in those companies. Currently, most small

¹⁶ Revel, Smith & Inge, "An Analysis of Self-Employment Outcomes within the Federal/State Vocational Rehabilitation System," *Journal of Vocational Rehabilitation* 31 (2009) 11-18.

¹⁷ Source: 2007 Rehabilitation Services Administration 911 Data

¹⁸ Start Up NY: Inclusive Entrepreneurship Final Report, November 17, 2010.

¹⁹ See On Innovation and Expectation: Microenterprise and Disability in 2010, by Patti Lind in *Equity* (March 2010) available at www.wid.org.

²⁰ Griffin, C., Hammis, D. *Making Self-Employment Work for People with Disabilities*, Pgs. 13-15. Paul H. Brookes Publishing Co. 2003.

businesses developed and operated by people with disabilities are 'lifestyle businesses.' They are businesses of modest size and scope that return income to the owner to maintain a present or improved lifestyle over and above what they may earn from SSI/SSDI. State incentives would encourage business owners with disabilities to grow their businesses and thrive in the marketplace beyond the more limited objectives they may have at present, providing the state with a social and economic return on investment for decades to come.

To the degree that entrepreneurship and small business represent an attractive and viable approach to greater economic self-sufficiency for many people, and to the degree that public contracting is an important source of revenue and opportunity for a variety of small enterprises, the logic, if not the indispensability, of extending existing procurement preference programs to DBEs becomes all the more clear.

Entrepreneurs with disabilities across the state could expand their markets through the state's MWBE and preferred source programs, if those options were available to them. Many of the same programs currently offered or proposed to be offered to women- and minority-owned businesses and sheltered workshops could easily be extended to, and would significantly benefit, disability-owned businesses. Data is now available to set contracting goals for disability-owned businesses and systems have been developed to certify disability-owned businesses.

III. NEW YORK STATE'S PROCUREMENT PREFERENCES

A. Minority and Women-Owned Business Enterprise Program

New York's program of preferences for MWBEs is established by statute.²¹ From time to time, particularly in recent years under the administration of Governor Paterson, it has been the subject of executive and legislative efforts designed to strengthen and modernize the program.²² The New York program, unlike some other models, does not cover DBEs or provide for an "other" category that DBEs might use.

a. Current Program

Article 15-A covers "state contracts" for labor, services, supplies, equipment and materials in excess of \$25,000, and acquisition, demolition, reconstruction, etc. of real property and improvements in excess of \$100,000.²³ Key definitions related to MWBEs include:

7. "Minority-owned business enterprise" shall mean a business enterprise, including a sole proprietorship, partnership or corporation that is: (a) at least fifty-one percent owned by one or more minority group members; (b) an enterprise in which such minority ownership is real, substantial and

²¹ N.Y. Exec. L. Art. 15-A, including §§ 310-318; N.Y. Finance Law Sec. 163 subd. 6; see also 5 NYCRR Part 140 et seq.

²² See n. 7 & 8, supra.

²³ N.Y. Exec. L. Art. 15-A §310(13).

continuing; (c) an enterprise in which such minority ownership has and exercises the authority to control independently the day-to-day business decisions of the enterprise; and (d) an enterprise authorized to do business in this state and independently owned and operated.

8. "Minority group member" shall mean a United States citizen or permanent resident alien who is and can demonstrate membership in one of the following groups: (a) Black persons having origins in any of the Black African racial groups; (b) Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American of either Indian or Hispanic origin, regardless of race; (c) Native American or Alaskan native persons having origins in any of the original peoples of North America; (d) Asian and Pacific Islander persons having origins in any of the Far East countries, South East Asia, the Indian subcontinent or the Pacific Islands.

15. "Women-owned business enterprise" shall mean a business enterprise, including a sole proprietorship, partnership or corporation that is: (a) at least fifty-one percent owned by one or more United States citizens or permanent resident aliens who are women; (b) an enterprise in which the ownership interest of such women is real, substantial and continuing; (c) an enterprise in which such women ownership has and exercises the authority to control independently the day-to-day business decisions of the enterprise; and (d) an enterprise authorized to do business in this state and independently owned and operated.²⁴

The law created a Division of Minority and Women's Business Development (DMWBD), which is now located within the Empire State Development agency,²⁵ to "assist the governor in the formulation and implementation of laws and policies relating to minority and women-owned business enterprises."²⁶ The Division has the authority to maintain a directory of certified MWBEs, to adjudicate claims, and to manage the certification process.²⁷

Division programs include: the Pilot Bonding Program for certified MWBEs to facilitate their participation in the SBA Bond Guarantee program, including special technical assistance; the Capital Access Pilot Program, in collaboration with the New York Business Development Corporation, to provide capital in connection with a specific contract; the Transportation Capital Assistance Program for M/WBEs and small firms that have prime contracts or subcontracts with New York DOT; the Resource Referral Network of Technical

²⁴ N.Y. Exec. L. Art. 15-A §310.

²⁵ <http://www.empire.state.ny.us/index.html>.

²⁶ N.Y. Exec. L. Art. 15-A §311(1).

²⁷ *Id.* §311(3).

Assistance Providers; and financial, technical and “green” industries initiatives.²⁸

The statute addresses non-discrimination in hiring and employment,²⁹ as well as more affirmative measures intended to “facilitate the award of a fair share of state contracts to” MWBEs.³⁰

The law is as much concerned with subcontracts as it is with prime contracts, requiring agencies to require prime contractors to “make good faith efforts to solicit” certified MWBEs in their selection of subcontractors,³¹ requiring prime contractors to provide “utilization plans” indicating the measures to be used to include MWBEs as subcontractors and allowing disqualification for failure to implement an adequate utilization plan,³² and providing for waivers of MWBE obligations when “there is not reasonable availability” of MWBEs for the project.³³ For each requirement, significant due process and administrative hearing protections are identified for prime contractors. Contracting agencies are required to monitor their contracts to ensure compliance, to provide bidders with the list of certified MWBEs and regulations, and to report activities to the Division.³⁴

The Division may also assist MWBEs by providing technical assistance, information on resources available, and facilitating access to federal resources.³⁵ In 2006, Article 15-A was amended to create a MWBE Statewide Advocate act as a liaison for MWBEs to assist them in obtaining technical, managerial, financial and other business assistance and to assist certified businesses and applicants in the certification process. The Advocate also investigates complaints by MWBEs concerning certification delays and violations by state agencies.³⁶

Unlike other states discussed later, New York does not currently use set-asides or goals. That is, it does not predetermine any particular number of contracts, proportion of total state contracting dollars, or types of contracts that should go to certified MWBEs. The only specification of how much money or how many contracts are to go to such firms is found in the instruction that MWBEs receive a “fair share” of state contracts.³⁷ As a result, it appears

²⁸ The State of Minority and Women-Owned Business Enterprise: Evidence from New York, Prepared for the New York State Department of Economic Development at 390 (NERA Economic Consulting, April 2010), available at http://www.empire.state.ny.us/MWBE/Data/NERA_NYS_Disparity_Study_Final_NEW.pdf.

²⁹ Id. §312.

³⁰ Id. §313(1).

³¹ Id. §313(2).

³² Id. §313(4).

³³ Id. §313(5).

³⁴ Id. §315.

³⁵ Id. §311(4).

³⁶ N.Y. Exec. L. Art. 15-A §311-a as amended by L. 2006, c. 59, at Sec. 4, subd. 2.

³⁷ N.Y. Exec. L. Art. 15-A § 311(3), and 313(1); see also the homepage of the Division of Minority and Women's

difficult to identify what constitutes full compliance with the law. In default of rigid numerical guidelines or benchmarks, procedural compliance appears to have taken on an especially important role.³⁸ However, recent proposed regulations, discussed below, would add numerical goals for MWBE contracting.

Program Administration. The MWBE program has several gaps, even for covered businesses. Until recently, MWBE participation in small contracts was not even subject to reporting.³⁹ In addition, the DMWBD permits agencies to develop an "Exclusion List" of classes of goods or services for which the agency concludes there are no procurement opportunities for MWBEs.⁴⁰ Goods and services on the exclusion list may be excluded from the agency's annual MWBE Goal Plan. The statutory basis for this list, if any, is unclear. But its implications are considerable. Because individual line agencies are responsible, subject to DMWBD approval, for creating and updating the list(s), the potential exists for the exclusion lists used by different agencies to vary, based on their differing levels of industry knowledge, even with respect to the same goods or services. Finally, providing for such a list undermines the underlying premise of the MWBE program, namely that MWBEs are capable of participating in all contracting areas and should be represented in all areas. Creating an Exclusion List institutionalizes a point-in-time circumstance in which no MWBE exists for a category of goods or services, excusing contractors from seeking out MWBEs, and thus making it more difficult for an MWBE to enter the arena.

Technical Assistance. The DMWBD provides a wide array of forms and instructions. Resources available online through the Division's <http://www.empire.state.ny.us/MWBE.html> website include: the statewide directory of certified MWBE businesses, a certification Q and A, the certification application form, the NYS contracts reporter and newsletter (containing listings of bid opportunities) and

Business Development, <http://www.nylovesmwbe.ny.gov/>. Some agencies set their own overall goals The State of Minority and Women-Owned Business Enterprise, supra n. 25, at 390-91 ("For example, the State University Construction Fund has adopted goals of 8% for MBEs and 4% for WBEs or 10% for MBEs and 4% for WBEs for projects located in the New York City and Long Island regions. The Dormitory Authority of the State of New York's (DASNY) statewide construction-related goals are 13% for MBEs and 7% for WBEs.")

³⁸ A recent agency audit by the State Comptroller illustrates this.

<http://osc.state.ny.us/audits/allaudits/093008/07f23.pdf>. In a review of the Battery Park City Authority (BPCA) the deficiencies cited by the audit, and thereafter remedied by the line agency related, not principally to the authority's utilization of certified firm, nor to the number of MWBE contractors involved in various projects, but to the agency's monitoring of prime contractors' compliance with their own utilization plans, with the agency's monitoring of contractor reports and of its own documentation of waivers, and with concerns over whether the contracting agency was reporting dollars obligated or dollars actually spent. Interestingly, among the 11 contracts randomly selected for audit in this instance, waivers of compliance with some or all of the MWBE requirements were found to have been granted in 4 cases.

³⁹ See Guidelines For Completing Agency Utilization Reporting Forms set forth on the DMWBD website, <http://www.nylovesmwbe.ny.gov/State%20Agency%20Guidelines/auguidelines.htm>.

⁴⁰ Id.

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others.⁴¹

The directory of certified MWBEs, updated weekly and available in a searchable database, is the major link in bringing state agencies and prime contractors together with MWBE firms. By virtue of the directory, agencies can be confident that entities representing themselves as MWBEs are in fact such, and agencies are freed from the necessity of conducting any independent inquiries into eligibility and certification.

New York State Empire State Development, the parent of DMWBD, also operates the Entrepreneurial Assistance Program (EAP).⁴² Through centers around the state that, as described, sound very much like business incubators, and many of which work in partnership with microenterprise programs, the EAPs are designed to provide a variety of services, expertise and resources to startup businesses. It is not clear what, if any, relationship or overlap exists between the EAP centers and the Small Business Development Centers (SBDCs). Uncertainty on this point and on the overall level of coordination within the state's efforts is heightened by the fact that Empire State Development also refers interested parties to "other" sources of certification and technical assistance.⁴³

Another effort to provide broad-ranging assistance to MWBEs in the certification and procurement process was made by the state in 2006 with the creation of the Office of Statewide Advocate for Minority and Women-Owned Business.⁴⁴ The Advocate was given significant authority to assist MWBEs. However, no further references to its work, reports or impact have yet been found in the statements of the governors or the websites and press releases of the relevant state agencies. It is thus unclear how this office has functioned as a source of technical assistance for MWBEs.

A partnership initiative launched in 2008 seeks to address one fundamental problem facing small MWBEs. Many such businesses are unable to meet the bonding requirements associated with providing indemnification to qualify for state contracts. A program that began as a small-scale experiment involving the Jamaica Business Resource Center (JBRC) and the Surety and Fidelity Association of America (SFAA) grew into a statewide effort involving JBRC, SFAA, ESAID, the New York State Department of Insurance and the SUNY-administered statewide network of 23 small business development centers (SBDC's).⁴⁵ A continuum of services and opportunities are involved in this initiative, including education

⁴¹ See generally <http://www.empire.state.ny.us/SmallBusiness/BusinessAssistance.html>; see also, N.Y. Exec. L. Art. 15-A § 311(4).

⁴² <http://esd.ny.gov/businessprograms/eap.html> and <http://esd.ny.gov/businessprograms/Data/EAP/EAPCenters.pdf>.

⁴³ <http://www.empire.state.ny.us/MWBE/OtherCertificationOpportunities.html>.

⁴⁴ N.Y. Exec. L. Art. 15-A § 310 (16), and 311-a, as added by L. 2006, c. 59, §§ 3-4 (Part BB).

⁴⁵ See Unique Partnership Fosters New York Bonding and Financial Assistance Program, by Sam Carradine, in DWMD News 2008. <http://www.nylovesmwbe.ny.gov/MWBE%20News/bondassist.htm>.

and training on bonding-related issues; assistance in rectifying company financial deficiencies that would make firms ineligible for surety coverage; networking and key introductions; and other services. Recognizing that insufficient capital is a barrier to obtaining surety coverage, the initiative also involves partnerships designed to provide capital for small MWBE firms. An additional resource is Empire State Development's Capital Access Program, designed to increase access to capital to those contractors participating in the bonding initiative who need additional capital in their business to qualify for surety bonds. As a founding partner in the initiative, SFAA was replicating a model that it has used in other states. Of the four states listed where this Model Contractor Program has been implemented, only one, Illinois, is known to have a DBE procurement program, but it is unknown whether entrepreneurs with disabilities were identified as a target population for the program.

Effects. As of December 2007, there were 6,899 certified MWBEs, including 2,578 MBEs, 3,627 WBEs, and 694 businesses that have dual certification.⁴⁶ According to a 2010 report on *The State of Minority and Women-Owned Business Enterprise: Evidence from New York*,⁴⁷ minority and women-owned businesses continue to face disparities in government contracting. MWBEs represent between 23% and 37% of available contractors in the studied industries, but only .75% to 19% of state government contractors.⁴⁸ MWBEs represent, on average across all sectors, 29% of New York state businesses, but only 5% of state agency contractors.⁴⁹ Data on the amount of money being contracted to MWBEs appears to be unavailable, although the Division has made some recent attempts to collect it.⁵⁰ The statement accompanying Governor Paterson's issuance of Executive Order 10 in 2008,⁵¹ notes that of the \$22 billion in state debt issued since April 2004, MWBE firms participated as senior managers or co-managers in only 4% of these financings.⁵²

The current New York MWBE program clearly has significant shortcomings for the populations it purports to serve. Because of the continued underrepresentation of MWBEs in New York State contracting, a 2010 report recommended numerous improvements to

⁴⁶ <http://www.nylovesmwbe.ny.gov/index.htm>.

⁴⁷ *The State of Minority and Women-Owned Business Enterprise: Evidence from New York*, supra n. 25.

⁴⁸ *Id.* at Table C (Construction – Availability 23%, Utilization 12%; Construction-Related Professional Services – Availability 25%, Utilization 19%; Services – Availability 37%, Utilization 3%; Commodities – Availability 27%, Utilization .75%; All Procurement – Availability 29%, Utilization 5%).

⁴⁹ *Id.*

⁵⁰ Bulletin A-301-R1, Voucher Preparation Changes for MWBE Reporting (updated 12/07/09 <http://www.osc.state.ny.us/agencies/abulls/a301r1.htm>) compare, Guidelines For Completing Agency Utilization Reporting Forms set forth on the DMWBD website, <http://www.nylovesmwbe.ny.gov/State%20Agency%20Guidelines/auguidelines.htm>.

⁵¹ Executive Order No. 10 (June 22, 2008), Establishing a Task Force to Increase the Utilization of Minority and Women-Owned Business Enterprise Underwriters for State Debt Offerings, available at http://www.state.ny.us/governor/executive_orders/xeorders/eo_10.html.

⁵² See N.Y. Finance L. Sec. 136-b.

the MWBE program, including setting agency-wide and contract-specific goals, increased monitoring of contractors' compliance with their utilization plans and results, and strengthened enforcement and remedies.⁵³

The deficiencies in the current program need to be addressed in order for the program to be successful for additional populations, such as people with disabilities or veterans. Some of the deficiencies are beginning to be addressed through legislation in July 2010 to increase the size of discretionary purchase contracts that can be awarded to MWBEs, improving required agency MWBE procurement practices, assigning executive level oversight, and expanding MWBE procurement practices to non-executive agencies.⁵⁴ Proposed regulations in September 2010, if adopted, will also improve effectiveness of the MWBE program. In the area of debt issuance, recent improvements have already demonstrated positive impact.⁵⁵

b. Proposed Changes

New regulations implementing Article 15-A were proposed on September 15, 2010.⁵⁶ These new regulations streamline and strengthen goal-setting, performance reporting, monitoring and compliance in a number of key ways, most notably by establishing numerical criteria for procurement from minority-owned and women-owned firms ("Section 313 goals").⁵⁷ Agencies would be required to submit annual goals based on the Section 313 goal of 28.92% MWBE (16.53% minority-owned businesses; 12.39% women-owned businesses) based on the state's disparity study or on alternative agency-specific goals. Contractors would be required to include MWBE contracting goals in utilization plans submitted to their contracting agencies.⁵⁸ Contracting agencies would be called upon to conduct Diversity practice assessments of their contractors.⁵⁹ The proposal would create a state Chief Diversity Officer, sets goals for MWBE subcontracts based on labor force availability data, provides for partnerships between MWBEs and non-MWBEs, as well as Mentor-Protégé Agreements. Contracting agencies are authorized to include contract provisions for damages for contractors' failure to comply with their utilization plans.⁶⁰

⁵³ The State of Minority and Women-Owned Business Enterprise: Evidence from New York – Program Recommendations, Prepared for the New York State Department of Economic Development, (NERA Economic Consulting, April 2010), available at http://www.empire.state.ny.us/MWBE/Data/NERA_NYS_Disparity_Study_Recommendations.pdf.

⁵⁴ See n. 8, supra.

⁵⁵ See n. 7, supra.

⁵⁶ http://www.empire.state.ny.us/MWBE/Data/091410_MWBE_15a_regulations.pdf. Prop. 5 NYCRR § 140.1.

⁵⁷ Prop. 5 NYCRR §141.2

⁵⁸ Id. §142.2.

⁵⁹ Id. §142.3.

⁶⁰ Id. §142.13.

B. Preferred Purchasing Program

New York has a “preferred purchasing” preference system that is intended to “promote the self sufficiency and self determination of preferred source clients and their families.”⁶¹ However, as currently implemented, the program relies on a model that does not effectively serve the goals of supporting competitive integrated employment, including self-employment, of people with disabilities. In addition, New York further supports these sheltered work centers by allowing them to pay workers with disabilities below the minimum wage.⁶²

The preferred source program gives noncompetitive preferences to certain nonprofit organizations, including those that operate sheltered workshops, for the provision of certain goods and services to the state. As currently structured, this program supports segregated employment of people with disabilities and may support employment below minimum wage, as permitted by other state and federal laws. Segregated employment programs are intended to prepare people with significant disabilities for integrated employment. However, few sheltered workers leave segregated employment to enter the competitive workforce.⁶³ For these and other reasons, the Rehabilitation Services Administration no longer considers placement in sheltered work to be a successful employment closure for people with disabilities.⁶⁴

The BUY OMH program is one of the mechanisms through which nonprofit organizations serving people with mental health conditions can participate at preferred sources. It should be noted that the NYS Office of Mental Health made attempts in the late 1980s-1990s to transform these sheltered work programs into more community-based, mainstream enterprises using a ‘social enterprise’ model⁶⁵ that generally paid at or above federal minimum wage. The BUY OMH initiative provided employment in such enterprises as community based retail art framing shops, general contracting construction companies, restaurants and other enterprises. Although BUY OMH succeeded in creating improved employment options in more mainstream business settings for people not otherwise

⁶¹ NYS PROCUREMENT BULLETIN PREFERRED SOURCE GUIDELINES, <http://www.ogs.state.ny.us/procurecounc/pdfdoc/psguide.pdf> (March, 2010).

⁶² N.Y. Labor L. §651(5).

⁶³ See General Accounting Office, *Special Minimum Wage Program: Centers Offer Employment and Support Services to Workers with Disabilities 1* (2001); Peter Blanck, Helen Schartz & Kevin Schartz, *Labor Force Participation and Income of Individuals with Disabilities in Sheltered and Competitive Employment: Cross-Sectional and Logitudinal Analyses from Seven States during the 1980s and 1990s*, U.S.D.O.L. 47 (2001).

⁶⁴ See TECHNICAL ASSISTANCE CIRCULAR RSA-TAC-02-01 (February 11, 2002).

⁶⁵ Social enterprises have a social objective. The **primary** objective of a social enterprise is to maintain and improve social conditions in a way that goes beyond financial benefits created for the organization’s funders, employees, or customers. Social enterprises blend social and commercial methods. In addition to using their ability to tap into the goodwill of some of their stakeholders, they look for creative ways to generate revenue, like businesses. Where businesses are completely commercial, social enterprises are a hybrid of commercial and philanthropic methods (Dees, Emerson and Economy 2001)

successful in using VR-sponsored services to obtain jobs and received significant governor and legislative support and recognition, they were not able to fully achieve their workplace integration goals of hiring proportionally similar numbers of employees without disabilities into these businesses.

The Preferred Source regulations could be modified, however, to serve as the basis for a DBE procurement program in the competitive sector that better meets the interests of people with disabilities and the State of New York.

As set forth in Section 162 of the New York Finance Law for “Preferred Sources,” the key provisions of the preferred purchasing program are as follows:

1. Purpose. To advance special social and economic goals, selected providers shall have preferred source status for the purposes of procurement in accordance with the provisions of this section. Procurement from these providers shall be exempted from the competitive procurement provisions of section one hundred sixty-three of this article and other competitive procurement statutes. Such exemption shall apply to commodities produced, manufactured or assembled, including those repackaged to meet the form, function and utility required by state agencies, in New York state and, where so designated, services provided by those sources in accordance with this section.

2. Preferred status. Preferred status as prescribed in this section shall be accorded to:

a. Commodities produced by the department of correctional services' correctional industries program

b. Commodities and services produced by any qualified charitable non-profit-making agency for the blind approved for such purposes by the commissioner of the office of children and family services;

c. Commodities and services produced by any special employment program serving mentally ill persons, which shall not be required to be incorporated and which is operated by facilities within the office of mental health and is approved for such purposes by the commissioner of mental health;

d. Commodities and services produced by any qualified charitable non-profit-making agency for other severely disabled persons approved for such purposes by the commissioner of education, or incorporated under the laws of this state and approved for such purposes by the commissioner of education;

e. Commodities and services produced by a qualified veterans' workshop providing job and employment-skills training to veterans where such a

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workshop is operated by the United States department of veterans affairs and is manufacturing products or performing services within this state and where such workshop is approved for such purposes by the commissioner of education;

f. Commodities and services produced by any qualified charitable non-profit-making workshop for veterans approved for such purposes by the commissioner of education, or incorporated under the laws of this state and approved for such purposes by the commissioner of education.⁶⁶

A list of all commodities and services being provided to state agencies by preferred sources was developed as of December 31, 1995 and the list is maintained by the Office of General Services and available online.⁶⁷ After 1995, new goods or services are only required to be purchased from preferred sources if they are added to the list.⁶⁸ Agency commissioners may apply for additions or deletions of goods or services on the list and appeal procedures are provided.⁶⁹ The commissioner sets prices for the goods and services on the preferred source list, which are based on the reasonable costs of the preferred sources and “as close to prevailing market price as practicable, but in no event greater than 15 percent above the prevailing market prices among responsive offerors for the same or equivalent commodities or services.”⁷⁰

Preferred sources are ranked in order of priority. For goods, correctional industries programs have first priority, followed by blind agencies, followed by agencies for severely disabled persons, mentally ill persons, and veterans.⁷¹ For services, agencies for blind persons, severely disabled persons, mentally ill persons, and veterans have equal priority.⁷²

Nonprofit “facilitating entities” (Industries for the Blind of the State of New York, New York State Industries for the Disabled, and the New York State Office of Mental Health “Buy OMH” program) serve as the agents for the preferred source businesses in all dealings with state agencies. The facilitating agencies offer online catalogs of their affiliated businesses’ goods and services. While this role for the facilitating agencies indicates limitations on the programmatic options available to each individual facility, it also gives rise to the possibility of centralized action to bring about major transformation of these programs.

⁶⁶ N.Y. Fin. L. §162.

⁶⁷ Id.; <http://www.ogs.state.ny.us/procurecounc/pdfdoc/pslist.pdf>.

⁶⁸ Id. §162(3).

⁶⁹ Id. §162(3).

⁷⁰ Id. §162(6).

⁷¹ Id. §162(4).

⁷² Id.

State agencies must “make reasonable efforts” to publicize their goods and services requirements to preferred sources. If a preferred source submits a notice of intent to provide the service within 10 days, the agency must purchase the service from the preferred source. If more than one preferred source submits a notice of intent, the agency must choose the provider based on cost.⁷³

The statute also requires the relevant agencies to conduct pilot studies to explore partnerships between preferred sources and private vendors, through which private vendors can be awarded preferred source status if a preferred source provides most of the work, the partnership provides long term employment opportunities for the targeted groups, and the proposal offers the needed goods or services at a lower price than a preferred source would otherwise offer.⁷⁴ However, this program appears to be defunct.

The instructions on the use and operation of the preferred source program were updated in March of 2010.⁷⁵ The new bulletin notes an improvement in the goal of the program: "Purchases of this nature promote the self sufficiency and self determination of preferred source clients and their families." However, the bulletin makes no specific reference to the importance of people with disabilities receiving at least minimum wages in order to support self-determination. Nor does it emphasize the importance of integrated employment, where employees with and without disabilities work together. Nor, regrettably, does it refer to the one provision of the underlying statute (subd. 7), dealing with partnership pilot projects, that might hold out some hope of helping "preferred source clients" to transition to competitive employment.

IV. OTHER MODELS

A number of models exist for extending contracting preferences to disability-owned enterprises (DBEs). Distinguishing issues in the models include (1) the definition of disability and ownership, (2) how set-asides are calculated and implemented, (3) how preferences are implemented, and (4) what supports are provided.

1. Definition of Disability and Other Eligibility Criteria.

Basic to any program is the definition of disability. This definition matters from the standpoint of how inclusive the program will be and from the standpoint of the kinds and costs of documentation requirements, as well as the risk of abuse.

The Americans with Disabilities Act (ADA), as amended, which prohibits discrimination on the basis of disability, defines disability broadly, as a mental or physical impairment that substantially limits a major life activity, or a record of such an impairment or being regarded as having such an impairment. Presumably because procurement preference

⁷³ *Id.*

⁷⁴ *Id.* §162(7).

⁷⁵ New York State Procurement Bulletin, Preferred Purchasing Guidelines., <http://www.ogs.state.ny.us/procurecounc/pdfdoc/psguide.pdf> (March 2010).

programs are intended to grant benefits greater than just nondiscrimination, the states with DBE procurement programs tend to use a definition of disability that is narrower than the ADA definition, by requiring a higher level of severity, providing specific causes, or requiring a level of impact on employment or rehabilitation.

Thus, Illinois's disability-owned business program provides:

"Disabled" means a severe physical or mental disability that: (a) results from: amputation, arthritis, autism, blindness, burn injury, cancer, cerebral palsy, Crohn's disease, cystic fibrosis, deafness, head injury, heart disease, hemiplegia, hemophilia, respiratory or pulmonary dysfunction, mental retardation, mental illness, multiple sclerosis, muscular dystrophy, musculoskeletal disorders, neurological disorders, including stroke and epilepsy, paraplegia, quadriplegia and other spinal cord conditions, sickle cell anemia, ulcerative colitis, specific learning disabilities, or end stage renal failure disease; and (b) substantially limits one or more of the person's major life activities. Another disability or combination of disabilities may also be considered as a severe disability for the purposes of item (a) of this subdivision (2.1) if it is determined by an evaluation of rehabilitation potential to cause a comparable degree of substantial functional limitation similar to the specific list of disabilities listed in item (a) of this subdivision (2.1).⁷⁶

Alaska's definition is similar:

"In this section, "person with a disability" means an individual (1) who has a severe physical or mental disability that seriously limits one or more functional capacities in terms of employability; in this paragraph, "functional capacities" means mobility, communication, self-care, self-direction, interpersonal skills, work tolerance, or work skills; (2) whose physical or mental disability (A) results from [same list of conditions as Illinois] or (B) is a disability or combination of disabilities that are not identified in (A) of this paragraph and that are determined on the basis of an evaluation of rehabilitation potential to cause substantial functional limitation comparable to a disability identified in (A) of this paragraph; and (3) whose vocational rehabilitation can be expected to require multiple vocational rehabilitation services over an extended period of time."⁷⁷

In Rhode Island's program, "disability" is defined as a "physical or mental impairment which constitutes a substantial barrier to employment as certified by the department of human services or the department of mental health, retardation, and hospitals."⁷⁸

⁷⁶ 30 Illinois Compiled Stat. § 575/2.05

⁷⁷ Alaska Stat. § 36.30.170 (k).

⁷⁸ Rhode Island General Laws § 37.2.2-2.

States generally do not include people who are only “regarded as” having a disability.⁷⁹ In Michigan's procurement system, however, “Disability” means a determinable physical or mental impairment of an individual or the history of an impairment that may result from disease, injury, congenital condition of birth, or functional disorder.”⁸⁰ Iowa uses the full ADA definition (physical or mental impairment that substantially limits a major life activity), including the “record of” disability and “regarded as” disabled prongs.⁸¹

Minnesota limits DBE participation in the procurement program to people with physical, as opposed to mental, disabilities.⁸² This limitation has been challenged as discriminating against individuals with mental disabilities, but has withstood such challenges to date.⁸³ However, there does not appear to be any policy basis for excluding people with mental disabilities from procurement programs.

Minnesota also allows individual businesses to be designated as targeted small businesses if their owners have suffered discrimination in public contracting on the basis of race, gender or disability.⁸⁴

All states include additional requirements pertaining to such matters as business size (revenue or number of employees), residency within the state, length of time in business, possession of a proper business license, up-to-date tax returns, or other general considerations which apply to women and minority-owned firms as well.

One issue likely to attend any definition of disability is that of what documentation will be required to substantiate its existence. States must ensure the integrity and effective administration of the program. States deal with these issues in several ways. Most require documentation in the form of an affidavit from the business owner, a medical certification from a physician,⁸⁵ a certification by the state VR agency or some combination of the above.

Generally, the same agencies that review and approve minority or women-owned business applications and eligibility also review the documentation from disability-owned firms. However, some jurisdictions involve their VR agencies and Rhode Island's Governor's Commission on Disabilities and Chicago's Mayor's Office on Persons with Disabilities play

⁷⁹ But see Chicago Code 2-92-586 (a) (including the other two prongs of the ADA definition, namely, having a record of being or being regarded as a person with a disability).

⁸⁰ Mich. Comp. Laws Ann. § 450.791 (2)(d).

⁸¹ <http://www.state.ia.us/government/dia/Verification%20of%20Disability.pdf>.

⁸² Minn. Stat. § 16C.16 Subd. 5(a).

⁸³ In the Matter of ULTRAFLEX ENTERPRISES' APPEAL FROM DECERTIFICATION IN the MINNESOTA SMALL BUSINESS PROCUREMENT PROGRAM, 497 N.W.2d 641 (Minn. App. 1993).

⁸⁴ Id. at subd. 5 b.

⁸⁵ <http://www.state.ia.us/government/dia/Verification%20of%20Disability.pdf> (Iowa - doctor's certification).

major roles in their jurisdictions' programs.⁸⁶

All states that extend procurement priorities to DBEs retain the ownership and control requirements that routinely apply to minority and women-owned firms. These require at least 51% ownership by a group member or members, and actual management and day-to-day control.⁸⁷ As discussed later, this latter requirement could present a problem people with intellectual, traumatic brain, or psychiatric disabilities who may need the assistance of others in the day to day management of their affairs.

2. Nature of Preferences, Set-Asides, and Other Assistance

States vary enormously in how they define the amount of money, volume or types of contracts subject to their preferences. Some states set aside a certain dollar value or percentage of contracts for the priority groups, which may be done on a yearly basis through administrative action either centrally or on an agency by agency basis, or may be specified by statute. For example, Illinois specifies that 20% of the total dollar amount of state contracts will go to minority-owned (11%), women-owned (7%) and disability-owned (2%) firms.⁸⁸ Michigan sets a goal 3% of contracts to go to disability-owned businesses.⁸⁹ Other states allow preferred enterprises to bid on any procurements, and build in a price premium, e.g., 6%, as the amount by which the preferred bidder's tender may exceed other bids or fair market value and still be accepted. Thus, Minnesota provides for 25% of the value of state contracts to go to small businesses and permits targeted groups, including disability-owned businesses, to bid up to 6% higher.⁹⁰ Alaska allows DBEs to bid up to 10% higher than the lowest bid.⁹¹ Minnesota may also designate some contracts as only eligible for bids from targeted groups and may require prime contractors to subcontract a percentage of the work to targeted groups.⁹²

Generally, DBEs can benefit from whatever preference or set-aside program is in place for minority- and women-owned businesses. People's disabilities and long-term reliance on public benefits may also affect their credit, including the lack of credit history or poor credit due to an unexpected health emergency, work experience, as well as their ability to provide collateral. And exclusion from traditional social networks may limit their ability to find mentors and models.

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<http://www.cityofchicago.org/city/en/depts/mopd/supp.info/business.enterprisesownedbypeoplewithdisabilities.bepdinitiative.html>.

⁸⁷ 30 Illinois Compiled Stat. § 575/4.1.

⁸⁸ 30 Illinois Compiled Stat. §575/4.

⁸⁹ Mich. Comp. Laws Ann. § 450.793.

⁹⁰ Minn. Stat. § 16C.16 subd. 1, subd. 5, subd. 6.

⁹¹ Alaska Stat. § 36.30.170 (e).

⁹² Id. subd. 5.

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Thus, best practices include reductions in the qualifications required (experience, inventory), business development assistance (e.g., planning, marketing, finance), financial assistance programs (e.g., low interest loans), project-related technical assistance programs (e.g., estimating, bidding, negotiations, technical tasks, reading specifications and plans, production scheduling, procuring materials and supplies, reporting and documentation, subcontracting, and project management), legal assistance, targeted vendor outreach programs, and programs supporting partnerships between large and targeted businesses (e.g., “match-making,” mentoring).⁹³ Currently, even when jurisdictions offer these programs, many seem to lack easily available information on how to access them.

However, disability-owned businesses may have additional needs, such as assistive technology, accessible transportation, environmental modifications or personal assistance services. These disability-related needs may increase the costs of contract performance and may require some modifications in the way work is done. Just as the costs of reasonable accommodations are recognized as necessary to nondiscriminatory employment, such costs should be recognized in public sector contracting as well.⁹⁴ It should be noted that entrepreneurs with disabilities requiring assistive technology, extra support and counseling for operating a business or assistance in managing the effects of disability on business ownership have a number of options to obtain such services. The NYS TRAIID program offers assistive technology resources, state VR can pay for such supports as well and for education that individuals may need to obtain to improve their skills and qualifications. The NYS SBDC recently publish a manual for its counselors providing guidance on ways to better serve entrepreneurs with disabilities⁹⁵ and One Stop Career Centers can provide training on computer skills and other types of training that could support entrepreneurs with disabilities. However, because self-employment is an underutilized option for people with disabilities, their connections with SBDCs and One Stop Career Centers is fragmented at best and often unknown by both consumers and providers. Therefore, it is important for disability-supportive agencies assisting entrepreneurs utilizing state procurement preference programs to help business owners to access the array of services that facilitate their ability to compete effectively using the preferences. In addition, state agencies’ processes, program and services structures supporting entrepreneurship and marketing materials may need to be changed in order to accommodate participation by business owners with disabilities. The ADA already requires agency websites, forms, procedures, and meetings/trainings to be accessible,

⁹³ See State Policies and Programs for Minority- and Women- Business Development, Insight Center for Community Economic Development, <http://www.insightcced.org/uploads/publications/assets/50%20state%20inclusive%20business%20policy%20scan.pdf>.

⁹⁴ cf. <https://dia.iowa.gov/tsb/index.php/home>. (low-cost loans and other forms of assistance to targeted small businesses including disability-owned).

⁹⁵ Simply Speaking Inclusive Entrepreneurship Guidelines for SBDC Advisors, at <http://www.ilr.cornell.edu/edi/nymakesworkpay/m-resources.cfm>.

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however they often are not. In addition, the online processes for meeting prerequisites, such as DUNS numbers, are often inaccessible to people with vision impairments.

3. Veterans Preferences

Most states accord some kind of public sector hiring or contract procurement preference to veterans who have served in conflict zones or who have served during periods of hostilities, and veterans with disabilities who meet these criteria would of course be eligible for these preferences. In addition, a growing number of states are incorporating preferences specifically for small businesses owned by veterans with service-connected disabilities.⁹⁶

State statutes vary widely in their approach to allocation and administration of preferences. Some specify the amount of the set-aside (like California which specifies 3% of the dollar value of contracts be set aside for service-disabled veteran-owned businesses (SVDOB's)),⁹⁷ while others either say nothing or speak in terms of an appropriate or fair share.

On the question of identifying eligible individuals, states either expressly or impliedly leave the determination of who is a service-connected veteran with a disability to the Department of Veterans Affairs (VA). Applicants are required to produce the documentation of their VA-certified status.

4. Federal Programs

a. Section 8(a)

The Small Business Act requires federal contracting goals for small, disadvantaged, and women-owned businesses. Currently the goal for disadvantaged businesses is 5% and small disadvantaged businesses received 7.6% of federal contract dollars in 2009.⁹⁸ The Small Business Administration's (SBA) Section 8(a) program for small disadvantaged businesses offers preferential procurement opportunities to socially and economically disadvantaged persons.⁹⁹ In addition to procurement preferences, Section 8(a) businesses can receive substantial business development supports, including business development training and technical assistance, loan programs, and bond guarantees. Recent changes provide the ability to use joint ventures and offer a mentoring program.¹⁰⁰

⁹⁶ CA: Cal. Pub. Contracts Code Sec. 10115; IL: 30 ILCS Art. 500, Sec. 500/45-57; MN: Minn. Stat. Chap. 16C, Sec. 16C.16 subd. 6a.

⁹⁷ CA Military & Veterans Code §999.7.

⁹⁸ Small Business Administration 2009 Small Business Procurement Scorecard, <http://www.sba.gov/aboutsba/sbaprograms/goals/SCORECARD2009.html>.

⁹⁹ 15 USC §§ 637.

¹⁰⁰ <http://www.sba.gov/aboutsba/sbaprograms/8abd/mentorprogram/index.html>.

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In defining disadvantage the program creates an irrebuttable presumption that African-Americans and members of other ethnic groups, defined in terms of geographic origins, meet the test for such disadvantage, while requiring all others to prove disadvantage, on an individualized basis, by a "preponderance of evidence."¹⁰¹

In order to establish disadvantage, a business must identify

At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged:

- Personal experiences of social disadvantage stemming from the objective distinguishing feature or features set forth in the preceding paragraph. The experiences must have been in American society, not in other countries, and must have been substantial and chronic.
- Negative impact on entry into or advancement in the business world because of the disadvantage. SBA considers any relevant evidence in assessing this element. In every case, however, SBA considers education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering or advancing in the business world.¹⁰²

Evidence of disadvantage may include:

Court or administrative findings of discrimination. Statements made under oath to an investigator or in a court or administrative proceeding. Affidavits or statements sworn under oath by an individual owner which have specific recurrent incidents of discrimination or a pattern of discrimination over a significant period of time. Applicant statements alone, without supporting or corroborating evidence will be given less weight than if corroborated. Sworn affidavits or statements from independent third parties, who do not have an interest in or close relationship to the owner, corroborating or supporting assertions made by the owner. Statements by relatives or friends of the owner will have less weight than statements by independent third parties. Documentary evidence which corroborates or supports assertions made by an owner regarding specific incidents or a pattern of discrimination. Such documentation includes these items:

- Personnel records

¹⁰¹ See <http://www.sba.gov/aboutsba/sbaprograms/8abd/faqs/index.html>.

¹⁰² Id.

- Payroll records
- Rejection letters on job applications
- Denials of credit application
- Documents relating to rejected contract offers, i.e., bid abstracts, solicitations, etc.
- Contemporaneous records memorializing meetings, conversations, negotiations, telephone calls, etc.
- Documents setting forth company policy(ies) which are alleged to be discriminatory.
- Evidence which tends to show generalized patterns of discrimination against a non-designated group or statistical data showing that businesses owned by a specific non-designated group are disproportionately underrepresented in a particular industry may be used to augment an individual's case. Statistics and generalized patterns are not sufficient by themselves to establish a case of individual social disadvantage. However, an individual's statement of personal experiences in combination with the generalized evidence may be sufficient to demonstrate social disadvantage.¹⁰³

Although this other avenue for demonstrating disadvantage is technically available to disability-owned businesses, there is no evidence that it has been used effectively to support disability-owned businesses and contracts awarded to disability-owned businesses are not tracked by SBA.

b. Service-Disabled Veterans

One area where the SBA has been active in connection with disability-owned businesses is in the area of federal contracting preferences for veterans with service-connected disabilities. The Service-Disabled Veteran-Owned Small Business Concerns program (SDVO SBC) was established by statute¹⁰⁴ to provide enhanced access to federal contracts for these veterans. To be eligible for the program, the small business must be 51% owned and operated by persons certified by the Department of Veterans Affairs (VA) as service-disabled veterans.¹⁰⁵

One factor complicating the efforts to assist returning veterans to gain or regain an economic foothold is the prevalence of cognitive and emotional injury, often manifesting itself long after cessation of combat and often after separation from service. It is believed by many that veterans suffering from posttraumatic stress disorder and other delayed-onset disabilities are not adequately served by the VA's current disability determination system. In addition, concerns about fraudulent claims of veteran status led to recent

¹⁰³ Id.

¹⁰⁴ 15 U.S.C. § 657f.

¹⁰⁵ 15 U.S.C. § 632q.

amendments permitting the SBA to require VA verification of veteran status of applicants.¹⁰⁶

In developing and deploying the SDVO program, the SBA has had to address a number of technical issues that may also be encountered in programs with other disability groups. One such issue involves the definition given to business operation and control. As noted earlier, all procurement preference and set-aside programs, in order to avoid the award of contracts to firms with figurehead executives, require that the targeted entrepreneur(s) not only have nominal ownership but also exercise management authority and day to day control over decisionmaking. Some people with intellectual and psychiatric disabilities may have difficulty demonstrating such day to day control. The SBA regulation deals with this problem by stating: "(t)he management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a service-disabled veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran."¹⁰⁷ To be eligible, the spouse or caregiver must be "legally designated, in writing, to undertake responsibility for managing the well-being of the service-disabled veteran with a permanent and severe disability, to include housing, health and safety.... In the case of a service-disabled veteran with a permanent and severe disability lacking legal capacity, the permanent caregiver shall be a parent, guardian, or person having legal custody."¹⁰⁸ This approach demonstrates that the necessary flexibility is possible without creating unacceptable loopholes or opportunities for fraud. This approach thus involves a degree of formality that relieves SBA of the necessity for making the determination of the representative's authority. SBA does require evidence that the veteran or the spouse or caregiver has the requisite experience or training for the type of business they manage.¹⁰⁹

5. Private Sector Models

Important work is being done by the US Business Leadership Network (USBLN) in connection with bringing disability-owned businesses into the supply chains and supplier networks of major American firms. The commitment of major sectors of American business to inclusiveness and diversity is an in-depth and growing one. Major sectors of business have recognized that people with disabilities make good employees, and that they represent a significant segment of the consumer market. Businesses are now recognizing the importance of people with disabilities as suppliers and providers of products and services that larger companies need.

Several features of the USBLN's Disability Supplier Diversity Program (DSDP) particularly commend themselves as models for, or potentially useful strategies in, public sector efforts in New York State and elsewhere to bring DBEs into procurement preference programs.¹¹⁰

¹⁰⁶ Veterans Benefits Act of 2010, Pub. L. 111-275 (Oct. 13, 2010).

¹⁰⁷ 13 CFR § 125.8 (g)(2); see also, 13 CFR § 125.10.

¹⁰⁸ 13 CFR § 125.8 (c).

¹⁰⁹ Id. at Sec. 125.10 (a).

¹¹⁰ <http://www.usbln.org/programs.html>.

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The USBLN uses the ADA definition of disability.

The USBLN has developed and is testing a system for validation, verification, and certification of disability-owned businesses. The USBLN's approach includes an application, affidavit, supporting documentation, and a site visit, to verify that the business meets the criteria for inclusion in the program. Supporting documentation includes records from a vocational rehabilitation specialist, a Federal or state agency that issues disability benefits, or a licensed medical professional.¹¹¹ Alternatively, an applicant may provide media reports, advertising, awards, or membership certificates that specifically indicate that the owner has a disability.¹¹² The USBLN's interview process and other features of its vetting procedure thus offer the security that the certification system needs. It might even prove cost effective to subcontract the verification, certification and recertification processes to firms involved in and familiar with the USBLN's methods.

New York's existing minority and women-owned enterprises database could be expanded to include disability-owned businesses, and the USBLN's innovative Certified Supplier Database might provide a model for organizing the information. The Certified Supplier Database provides a level of confidentiality to business owners with disabilities, in that the database indicates that the owner has a disability, but does not provide details about the nature of the disability. Disability-specific information and documentation is kept confidential.¹¹³

V. CONCLUSION AND RECOMMENDATIONS

A growing body of data support the role of self-employment as a viable strategy for the economic advancement of many people with disabilities. Access to public sector procurement is one element in the success of many small businesses. Entrepreneurs with disabilities face barriers to entry and competition that make them an appropriate target population for the types of procurement preferences that have been developed over the years on behalf of other groups previously recognized to be comparably disadvantaged and to face historical and ongoing barriers.

Supporting disability-owned businesses serves the same public interests as support for minority- and women-owned businesses; namely, overcoming longstanding unfair discrimination and underrepresentation. In addition, supporting individuals with disabilities to start and grow small businesses would reduce reliance on public benefits, reduce stigma, and to contribute to the New York economy by creating jobs and purchasing goods and services. By increasing opportunities for people with disabilities beyond traditional employment, which may not meet their needs (for flexible scheduling, accessible office space, and technology), support for entrepreneurs with disabilities would

¹¹¹ http://www.usbln.org/pdf-docs/DSDP_Certification_Status_Qualifiers.pdf.

¹¹² *Id.*

¹¹³ http://www.usbln.org/pdf-docs/DSDP_FAQs.pdf.

also increase the ability of state agencies, such as Vocational Rehabilitation, to meet their goals of increasing employment of people with disabilities.

New York State stands at a crossroads in its own economic development. Massive revitalization and innovation are universally recognized to be necessary if New York is to retain its preeminence and grow its population. People with disabilities cannot be left out of the planning for the economy of the 21st century. While public sector procurement, and the technical assistance necessary to make it truly meaningful, is only a small part of the answer, it is a significant and achievable piece of the puzzle, and an appropriate and feasible place from which to begin.

RECOMMENDATIONS

1. Include Disability-Owned Businesses in the Preferred Source Program

New York's current Preferred Source program provides significant procurement preferences, including special opportunities to bid on state goods and services contracts and the ability to charge up to 15% more than the prevailing rate. As it is currently set up, the program supports segregated employment of people with disabilities, often below the minimum wage. As such, it is not the most effective mechanism for meeting the program's stated goal to "promote the self sufficiency and self determination of preferred source clients and their families." Extending the preferred source program to cover businesses owned by the groups intended to benefit from the program would better serve self-sufficiency and self-determination. It would also facilitate transition from sheltered work programs for many individuals as workshops proceed to transform themselves into entrepreneurial options like social enterprises or like individual business incubators as currently envisioned. The preferences could be reserved for the disability groups currently covered by the preferred source program, namely, people who are blind or visually impaired, people with mental illness, people with severe disabilities, and veterans. Current sheltered work providers should be encouraged to transition toward disability-ownership models by providing counseling and support to their employees who are interested in business ownership, and by converting to employee ownership and management through worker equity and other programs.

2. Expand the current MWBE program to include disability-owned businesses, including veterans with disabilities

Bills have been previously introduced in the New York legislature to add to Article 15-A procurement preferences for businesses owned by service-disabled veterans.¹¹⁴ Such bills

¹¹⁴ S3249 would simply add service-related disabled veterans to the existing MWBE program. It would not change the requirement that the veteran exercise day to day management and control of the business. Rather than creating a state certification process, it would rely on Veterans Administration certification of 40% disability. S3285/A8555A (2009), which was vetoed by Governor Paterson, would have given service-disabled veteran-owned businesses the ability to receive state contracts if their bids were up to 6% higher than the lowest bid, as long as no lower bid from a minority- or woman-owned business was received. The bill would also have established a certification process and addressed the management-and-control issue by allowing management and control "by

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would only address a small portion of business owners and potential business owners with disabilities. The same barriers, accommodation needs, and discriminatory attitudes face all people with significant disabilities. Procurement supports are a means to overcome those unfair barriers and level the playing field, and not a charitable benefit given in response to desperate need or extraordinary service. As such, they should be extended to all business owners with disabilities, regardless of the cause of their disabilities.

Simply including disability-owned business in the existing MWBE program, along with pending and future improvements to the effectiveness of the existing program, would do much to accomplish the goal of leveling the playing field for business owners with disabilities. This would require a legislative change. Of course, the Division and contracting agencies must ensure that their processes, facilities, forms, websites, training, and other mechanisms for interacting with and serving covered businesses are accessible and usable by people with a variety of disabilities.

Even without legislative change, the Division could begin developing services that respond to the needs of women and minorities with disabilities. Thus, the Division and partner agencies could collect data on how many currently certified minority- and women-owned businesses have disabilities and what different or additional barriers they face. Those with disabilities could receive an additional designation in the certified business database if they choose. The Division should connect those businesses with resources that can address their disability-related needs, as well as their gender- and ethnicity-related needs, including programs already helping people with disabilities to start and run businesses, such as Start-Up NY and the Entrepreneurship Bootcamp for Veterans with Disabilities. The Division should also connect them with Vocational Rehabilitation agencies, who can assist with a variety of disability-related needs.

a. *Setting Goals*

If the new MWBE regulations are adopted, including the proposed procurement goals, inclusion of disability-owned businesses in the program would require development of goals for disability-owned businesses. Such goals could be determined by including disability-owned businesses in the state's disparity studies. However, in order for such a study to be effective, the Division must begin collecting information about disability-owned businesses. Disability-owned businesses have little reason to provide such information if they are not eligible to receive Division services. Moreover, until supports exist for disability-owned businesses, prospective business owners with disabilities will continue to be underrepresented in any study. Studies of women- and minority-owned businesses were not conducted until years after supportive services began, thus allowing disparities to be both studied and remedied at the same time. Therefore, disability-owned businesses

one or more service-disabled veterans or, for a service-disabled veteran with a permanent and total disability, by the spouse or permanent caregiver of the veteran." The bill would also have allowed ownership and management to be allocated among more than one service-disabled veteran. Another bill (S3285) would have established a state contracting goal of awarding 3% of contracts to businesses owned by service-disabled veterans.

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should be made eligible to receive some supportive services from the Division before study and final goal setting is completed. According to the 2009 American Community Survey, approximately 12% of the US civilian noninstitutionalized population are people with disabilities. Including disability-owned businesses within the MWBE program and setting a modest 2% goal (which is in line with other states, who provide 2%-3% goals) would enable the work of supporting disability-owned businesses to begin and would provide data to support future goal setting and program improvement.

b. Defining and Certifying Disability

Several definitions of disability are available. If procurement preferences are intended simply to respond to the long history of discrimination against people with disabilities, the definition of disability for this purpose should be the same as the definition for purposes of anti-discrimination laws such as the ADA (a physical or mental impairment that substantially limits a major life activity). Nor should procurement programs be limited to people whose disabilities are work-related. Entrepreneurship is an option for a variety of people and the purpose of procurement programs is to ensure that that option is equally available to everyone, regardless of disability. The purpose of procurement programs should not be to make entrepreneurship a safety net only for people who cannot access traditional employment. Therefore, neither the Social Security nor the Vocational Rehabilitation definitions of disability should be adopted for this purpose.

The Census and American Community Survey have recently expanded their data-collection on people with disabilities and their definitions could provide a model for procurement. The Census Bureau defines disability as a long-lasting (6 months or more) physical, mental, or emotional condition. This condition can make it difficult for a person to do activities such as walking, climbing stairs, dressing, bathing, learning, or remembering. This condition can also impede a person from being able to go outside the home alone or to work at a job or business. Therefore, the American Community Survey considers a person to have a disability if they have

- long-lasting "blindness, deafness, severe vision, or hearing impairment,"
- a long-lasting "condition that substantially limits physical activities such as walking, climbing stairs, reaching, lifting, or carrying,"
- a long-lasting condition that makes it difficult to "learn, remember, or concentrate,"
- a long-lasting self-care limitation that makes it difficult to "dress, bathe, or get around inside the home,"
- a long-lasting condition that makes it difficult to "go outside the home alone to shop or visit a doctor's office," or
- a long-lasting condition that makes it difficult to "work at a job or a business."¹¹⁵

Because of the difficulty of ensuring the completeness of any list, there should be an "other

¹¹⁵ http://www.census.gov/hhes/www/disability/disab_defn.html.

disability” category that permits applicants to demonstrate that another type of disability has resulted in discrimination and similar limitations on their ability to compete as a small business.

The risk of fraud in certification of disability-owned businesses does not appear to be greater than the risk for minority and women-owned businesses. Therefore, certification of disability should not be significantly more difficult than certification of gender or race/ethnicity. The business owner applicant should be required to attest that he/she meets the applicable definition and to provide some proof of disability, such as certification from a medical professional, Vocational Rehabilitation agency, Veterans Administration, Social Security Administration, or school. Verification should be performed in the same way it occurs under the current program. The US Business Leadership Network’s Disability Supplier Diversity program provides a model and could be used to provide third-party certification and verification.

Once a business is certified as a disability-owned business, it can be included in the NYMWBE Directory of Certified Businesses and noted as a disability-owned business. It is important that the nature of the disability not be disclosed.

c. Management and Control

As noted above, for some veterans and others with intellectual or psychiatric disabilities, day-to-day management and control of a business may be difficult. Following the model of the federal Service-Disabled-Owned Business program, a disability-owned business procurement program should permit management and control to be exercised by the parent, spouse, or guardian or the business owner.

3. Provide Programs to Serve the Unique Needs of Disability-Owned Businesses

Any disability-owned business procurement program should include a mechanism to evaluate its effectiveness and identify potential improvements. New York should commit to gather information about businesses applying for certification as disability-owned businesses, including receipt of government benefits, discrimination and other disadvantages encountered, income and assets, hours worked, home ownership, type of business, size of business, work history/experience, education, expenses for disability-related technology and accommodations, and whether their employees have disabilities. The state should then track these factors over time to evaluate the effect of business ownership on quality of life, reliance on public benefits, and contribution to the local economy, as well as to identify and address the barriers these businesses face.

Because disability-owned businesses have not received any type of procurement support in the past, the procurement program should include a robust outreach program targeting individuals with disabilities who own businesses or who want to start businesses. The program should reach out to independent living centers, community-based disability organizations, agencies serving individuals with developmental and psychiatric disabilities, organizations and associations of disabled merchants, disability program navigators, one-stop centers, and community service providers and SBDCs for business planning assistance. In addition to training and technical assistance on certification, business planning and

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financing, partnerships, taxes and credit, the program should provide training and technical assistance to prospective business owners with disabilities on issues such as public benefits, asset accumulation, assistive technology, and health insurance.

In addition, the program should partner with, and expand, programs already helping people with disabilities to start and run businesses, such as Start-Up NY and the Entrepreneurship Bootcamp for Veterans with Disabilities. Start-Up NY, a partnership between Onondaga County, the Syracuse University Burton Blatt Institute and Whitman School of Management, and local organizations, which was originally funded by the U.S. Department of Labor, has demonstrated success in helping individuals with disabilities start and succeed in business in Onondaga County and is now expanding to New York City using a blended public-private partnership model termed “Inclusive Entrepreneurship.”¹¹⁶ The Entrepreneurship Bootcamp for Veterans with Disabilities programs is a nationwide project led by the Syracuse University Whitman School of Management and the Burton Blatt Institute, which offers a week-long training program and year-round support through business schools.¹¹⁷

The program should also work closely with state vocational rehabilitation agencies, who can support entrepreneurs with disabilities through assessment, business planning, and a variety of funding and services supports.

¹¹⁶ http://bbi.syr.edu/projects/startup_ny/.

¹¹⁷ <http://bbi.syr.edu/projects/ebv/>.

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Partnering Organizations

New York State Office of Mental Health
Employment and Disability Institute (Cornell University)