



State of Illinois
Pat Quinn, Governor
Illinois Department of Central Management Services

***Sheltered Market Report Related to
Information Technology and Telecommunications
Business Enterprise Program
for Minorities, Females and Persons with Disabilities***



CMS
Illinois Department of
Central Management Services

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Sheltered Market Report Related to Information Technology and Telecommunication Business Enterprise Program

Business Enterprise Council (BEP Council) Resolution and Authority

On July 12, 2013, after reviewing both the anecdotal evidence proffered to the BEP Council and the statistical evidence contained in the IT/Telecom Availability and Disparity Report¹ (IT/Telecom Report), the BEP Council passed the following resolution (Resolution):

Having reviewed anecdotal evidence and the disparity study dated June 13, 2013, the Council finds that there is a strong basis in evidence to determine that discrimination is present in certain sectors of the IT/Telecom industry. The Council does therefore hereby declare that a sheltered market shall exist in those sectors of the IT/Telecom industry where a disparity has been demonstrated.

Under the Business Enterprise for Minorities, Females and Persons with Disabilities Act, 30 ILCS 575/1 et seq. (BEP Act), the BEP Council is charged to receive, review and discuss evidence of “past or present racial, ethnic or gender based discrimination which directly impacts State contracting with businesses owned by minorities, females and persons with disabilities.” 30 ILCS 575/8b. The BEP Council is also empowered to “make such findings, recommendations and proposals to the Governor as are necessary and appropriate to enforce” the Act. 30 ILCS 575/8. If the BEP Council finds that there has been discrimination, it “shall establish sheltered markets or adjust existing sheltered markets tailored to address the Council's specific findings.” 30 ILCS 575/8b. A sheltered market is statutorily defined as a “procurement procedure whereby certain contracts are selected and specifically set aside for businesses owned by minorities, females and persons with disabilities on a competitive bid or negotiated basis.” *Id.*

The State of Illinois enacted the BEP Act in order to increase the participation of businesses owned and controlled by minorities, women and persons with disabilities (also referred to as Minority, Female, and Persons with Disabilities Business Enterprises or M/F/PBEs) in the State’s procurement process. 30 ILCS 575/1. The BEP Act declares that it is the public policy of the State to promote and encourage the continuing economic development of diverse businesses as both prime contractors and subcontractors. *Id.* Moreover, the State has a continuing interest in promoting open access for disadvantaged small businesses “victimized by discriminatory practices.” *Id.* In order to accomplish that objective, the BEP Act establishes an aspirational goal that 20% of the total dollar value of applicable State contracts be spent on M/F/PBEs. 30 ILCS 575/4(a). The imple-

¹ IT/Telecom Report is available on the Illinois Department of Central Management Services website at <http://www2.illinois.gov/cms/About/Reports/Pages/default.aspx>.

mentation of contract participation goals on procurements made by State agencies and State universities, as defined in the BEP Act, was declared to be a narrowly tailored means of achieving the State's continuing interest in promoting open access and furthering the growth and development of M/F/PBEs. 30 ILCS 575/1.

Evidence of Past and Present Discrimination in the IT/Telecom Industry

In March 2012, BEP Council members raised concerns about the lack of minority participation on the State's information technology/telecommunications (IT/Telecom) contracts. At this meeting, BEP Council members alleged that minority vendors receive only 4% of the State's IT/Telecom expenditures. See BEP Council March 23, 2012 Minutes². In order to further investigate the members' concerns, the BEP Council established an IT/Telecom working group. See BEP Council April 23, 2012 Minutes. In September 2012, CMS and the BEP Council held three public hearings across the State, centered on the topic of the State's information technology and telecommunications contracts. The IT/Telecom public hearings provided Illinoisans an opportunity to present evidence of discrimination in the IT/Telecom industry, impairing the State's ability to contract with M/F/PBEs. Business and community participants in attendance included M/F/PBEs in the IT/Telecom industry, business and community organizations, and community leaders.

During the hearings, these representatives offered their insight and perspectives on the State's procurement of IT/Telecom goods and services. For example, Reverend Jesse Jackson from the Rainbow PUSH Coalition testified that minority business owners "need a level playing field" as they are not given the "opportunities and access" they need to "compete in a fair market" and receive their "fair share of contracts." Sept. 11, 2012 Tr. at 9. A representative from the Disability Works Program stated that most of the State's spend related to persons with disabilities goes to non-profits that hire persons with disabilities, rather than businesses owned by persons with disabilities (PBEs). *Id.* at 13. During the public hearing in Collinsville, an owner of an IT support company that is BEP certified testified, "The fact is, the playing field is not level. Until the playing field becomes a little more level, there's just not going to be the capacity to participate and perform" on State contracts. Sept. 12, 2012 Tr. at 50. Finally during the public hearing in Springfield, Larry Ivory, President of the Illinois Black Chamber of Commerce and member of both the BEP Council and Procurement Policy Board, testified that "because of the lack of opportunity, some have just about quit trying to do business with the great State of Illinois." Sept. 13, 2012 Tr. at 23. Other M/F/PBE business representatives testified that they felt that prime contractors, when they even contracted with M/F/PBEs, treated them as inferior and did not give them meaningful work, or as one representative put it, they are given "crumbs." *Id.* at 10, 21, 24, 56-57. The co-president of the

² BEP Council Minutes are available on the Illinois Department of Central Management Services website at http://www2.illinois.gov/cms/business/sell2/bep/Pages/BEP_Council.aspx.

Women's Business Development Center (and a member of the BEP Council) provided examples of vendors shutting out BEP-certified vendors, particularly WBEs. *Id.* at 36-38. Overall, all the representatives who testified felt that M/F/PBEs were being shut out of the procurement process in the State of Illinois and felt that M/F/PBEs should be given the opportunity to be prime contractors.

Additionally, there was correspondence sent to the Governor, the Senate President, and the Director of CMS that questioned the State's procurement process and its commitment to inclusion in State contracting. Senate President John Cullerton and State Senators Kimberly Lightford and Donne Trotter reported receiving complaints about the lack of State contracting opportunities from African-Americans and African-American business owners. The most notable concern expressed by the legislators was the perceived lack of participation by minority-owned businesses (also referred to as minority business enterprises or MBEs) in the IT/Telecom industry, an industry accounting for over half a billion dollars in State spend, annually. Senate President Cullerton wrote to the Director of CMS regarding the State's "very poor track record in doing business with technology companies owned by African-American entrepreneurs" and stated that the State "must do a better job of doing business directly with these companies." State Senators Lightford and Trotter wrote to Governor Quinn asking for his assistance in addressing the allegations of discrimination in the IT/Telecom Industry, including the possibility of implementing a sheltered market.

The anecdotal evidence of discrimination presented to the BEP Council suggested that disparities exist in the awarding of contracts and in the participation of businesses owned by minorities, females and persons with disabilities. In accordance with its statutory responsibility to review evidence of discrimination, the BEP Council commissioned a disparity study to determine whether there was also statistical evidence of past or present discrimination in the State's procurements. Because of the evidence presented to the BEP Council related to the IT/Telecom industry, the first phase of the disparity study was to ascertain if, and to what extent, there were statistical disparities between the availability of minority and women business enterprises (M/FBEs³) compared to the utilization of M/FBEs in the State's purchase of IT/Telecom supplies and services.⁴

The IT/Telecom Report establishes that there are significant disparities in the State's contracting with M/FBEs. The IT/Telecom Report examined the State's spend on IT/Telecom contracts for fiscal years 2010 and 2011, which were the two most recent completed fiscal years with complete data. Also, the procurement process in Illinois underwent a significant change with the passage of Public Acts

³ The terms female and women are used interchangeably; for the purpose of this specific report the acronym M/FBEs has been used rather than M/WBEs.

⁴ As stated below, because classifications based on disability status are subject to rational basis review, which is the least stringent judicial standard of review, the Disparity Study did not include an analysis of PBEs.

96-0795 and 96-0926, which became effective on July 1, 2010, creating independent procurement oversight through four Chief Procurement Officers (CPOs). The utilization of M/FBEs on State contracts and associated subcontracts was calculated, as were calculations of the availability of M/FBEs in the State’s geographic and product markets. The estimated availability of M/FBEs was then compared to the utilization of M/FBEs on State IT/Telecom contracts through the use of the North American Industry Classification System (NAICS) codes, which classify business entities by industry sectors and subsectors. The Dun & Bradstreet/Hoovers database was then used to determine the State’s potential vendor pool. See IT/Telecom Report at 8.

The IT/Telecom Report revealed that M/FBEs suffered significant disparities—notwithstanding the setting of BEP goals—in the IT/Telecom industry. The IT/Telecom Report illustrates that there are several subsectors of the IT/Telecom industry with M/FBE availability, but low, if any, utilization of M/FBEs. Despite availability in all of the subsectors, M/FBEs received no dollars in nine subsectors of the IT/Telecom industry.

Availability and Utilization of M/FBEs in the IT/Telecom Contracts FYs 2010-2011

NAICS	Description	Availability	Utilization
333318	Office Machinery Manufacturing	10.30%	0.0%
334111	Electronic Computer Manufacturing	10.70%	0.0%
443142	Computers and Software Stores	6.80%	0.0%
517110	Wired Telecommunications	10.40%	0.0%
517210	Wireless Telecommunications Carriers (except Satellite Carriers)	3.10%	0.0%
517911	Telecommunications Resellers	5.30%	0.0%
517919	All Other Telecommunications	5.80%	0.0%
518210	Data Processing, Hosting, and Related Services	17.80%	0.0%

There were also four other subsectors in which there were minimal utilization compared to the availability of M/FBE firms:

NAICS	Description	Availability	Utilization
541511	Custom Computer Programming Services	18.60%	13.8%
561499	All other business support services	5.30%	1.70%
541618	Other Management Consulting	13.60%	0.06%
561311	Employment Placement Agencies	19.30%	9.40%

Clearly, the numbers of available M/FBE firms in the above categories and the minimal, if any, utilization of M/FBE firms in these categories reveal considerable disparities in the State's procurement of IT/Telecom services.

Remediation

In order to foster the development of M/F/PBEs, the State employs race- and gender-neutral measures, which include, inter alia, setting aside contracts for small businesses; unbundling large procurements into smaller, more manageable units to increase the number of businesses able to participate; scheduling contract lettings at alternative locations to increase business participation; educating small businesses in proper methods for responding to State solicitations; and establishing mentorship programs.

Also, since race- and gender-neutral measures have been insufficient in eliminating the significant disparities in State contracting, the State of Illinois, pursuant to the BEP Act, applies contract participation goals on State procurements to remediate the effects of discrimination in its contracting and to increase participation of diverse businesses as prime contractors and subcontractors. For most State procurements, the Bureau sets an aspirational goal for the percentage of M/W/PBE participation on a particular contract (BEP goals). BEP goals, while not mandatory, are subject to exemption and waiver requests. 30 ILCS 575/7. Furthermore, an offeror or bidder is not required to meet the BEP goal as long as the offeror or bidder makes a good faith effort to comply. *Id.*

Recommendations

The State continues to have a compelling governmental interest in remedying discrimination in its contracting, as M/F/PBEs are still failing to obtain a fair share of the State's business in the IT/Telecom sector. Unfortunately, race- and gender-neutral measures and BEP goals have not sufficiently remediated the apparent discrimination in the State's procurement of IT/Telecom services. Indeed, the IT/Telecom Report states that “[e]ven with the use of BEP contract goals, M/FBEs as a whole suffer substantively significant disparities in utilization on the State's IT/[T]elecom contracts ...” See IT/Telecom Report at 15. Consequently, based upon its review of the relevant legal standards, the IT/Telecom Report, the testimony and letters of M/F/PBEs and the Council's actions taken pursuant thereto, CMS concurs with the Council's resolution.

The Illinois Procurement Code vests “all procurement authority” in four independent chief procurement officers (CPOs) appointed by the Executive Ethics Commission (EEC).⁵ 30 ILCS 500/1-15.15; 30 ILCS 500/10-20. Neither CMS nor the BEP Council has the statutory authority to implement a sheltered market. Therefore, CMS makes the following recommendations:

⁵ The CPO for transportation construction is appointed by the Secretary of Transportation with the consent of the EEC and then subject to confirmation by the Senate. 30 ILCS 500/1-15.15 (2).

First, race- and gender-neutral measures should continue to be employed in the State’s procurement process. These include, inter alia, using the small business set-aside to provide opportunities for small businesses to obtain State contracts in the IT/Telecom sector; unbundling large contracts into smaller units; pre-bid conferences and the creation of a mentor–protégé program to encourage collaboration among large entities and smaller M/F/PBEs.

Second, BEP goals should continue to be applied on IT/Telecom procurements. While the BEP goals by themselves have not eliminated the significant disparities found by the IT/Telecom Report, they have provided many opportunities for M/F/PBEs to obtain invaluable experience while working on State contracts. Nevertheless, the IT/Telecom Report states that the disparities “suggest the continuing need for intervention in the market through the application of the BEP Program to ensure equal access for all vendors.” IT/Telecom Report at 15. CMS will continue to work with the CPOs to encourage and ensure compliance with BEP goals in an effort to foster developing M/F/PBEs.

Finally, CMS recommends that the BEP Council’s Resolution declaring a sheltered market should be implemented. Despite the State’s use of race- and gender-neutral measures and BEP goals, significant disparities continue to exist in certain subsectors of the IT/Telecom Industry. Furthermore, BEP goals do not promote the use of BEP vendors to act as prime contractors. CMS would like to work with the CPOs, State agencies, and the universities to identify specific procurements in subsectors in which BEP-certified vendors are available, but are not utilized or are underutilized, according to the IT/Telecom Report.

Legal Standards and Analysis

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits states from denying any person equal protection under the law. U.S. Const. Amend. XIV, § 1. Courts apply strict scrutiny to classifications by the government based on race and require a state to show that its actions are narrowly tailored to further a compelling interest. *Adarand Constructors v. Peña*, 515 U.S. 200, 235 (1995). Classifications based on gender are subject to the less stringent “intermediate scrutiny” standard of review, in which the state’s actions must be “substantially related” to “important governmental objectives.” *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982). Classifications based on disability status are subject to rational basis review. *Toeller v. Wisc. Dept. of Corr.*, 461 F.3d 871, 878 (7th Cir. 2006) (citing *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985)). Under rational basis review, a state’s classification will be upheld “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *Heller v. Doe*, 509 U.S. 312, 319 (1993). Because strict scrutiny is the most demanding standard of review, this Report will focus on this standard.

In order to show that it has a compelling interest, a state must “identify that discrimination, public or private, with some specificity,” *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504 (1989), and must have a “strong basis in evidence for its conclusion that remedial action [is] necessary” *Id.* at 500 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion)). A state, however, “can meet its burden without conclusively proving the existence of past or present racial discrimination.” *Concrete Works of Co., Inc. v. City and County of Denver*, 321 F.3d 950, 958 (10th Cir. 2003). A state may demonstrate a compelling interest “by relying on ‘a significant statistical disparity’ between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.” *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 241 (4th Cir. 2010) (quoting *Croson*, 488 U.S. at 509). Anecdotal evidence can help supplement a state’s statistical data in establishing the necessity for remedial actions. *Id.* at 251.

The State of Illinois has shown a “strong basis in evidence” that discrimination in State IT/Telecom contracting exists. It has provided the statistical evidence of significant disparities in the utilization of M/FBEs through the IT/Telecom Report. As noted above, there are multiple subsectors in the IT/Telecom Industry in which there is high availability of M/FBEs, but very little, if any, utilization of these vendors. Courts generally treat disparity ratios⁶ of under 80 as evidence of discrimination. See *H.B. Rowe Co.*, 615 F.3d at 241 (4th Cir. 2010) (citing *Rothe Dev. Corp. v. Dep’t of Def.*, 545 F.3d 1023, 1049 (Fed. Cir. 2008)); *Eng’g Contractors Ass’n of South Fla. v. Metro. Dade County*, 122 F.3d 895, 914 (11th Cir. 1997); see also 29 C.F.R. § 1607.4(D). Here, the IT/Telecom Report shows an adjusted disparity ratio of 49.9 for MBEs and 71.8 for FBEs, resulting in an adjusted disparity ratio of 59.9 for M/FBEs. See IT/Telecom Report at 12, Table 8. For master IT/Telecom contracts, the adjusted disparity ratio for MBEs is 57.4 and for FBEs is 0.1, for a total adjusted disparity ratio of 31.1. See IT/Telecom Report at 13, Table 10. Furthermore, the State has also amassed substantial anecdotal evidence of discrimination in the IT/Telecom Industry against M/F/PBEs. Accordingly, the State has a compelling interest in remedying discrimination in the IT/Telecom Industry.

A state must also demonstrate that its program is narrowly tailored to achieve the state’s compelling interest. In analyzing whether a classification is narrowly tailored, courts examine “the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.” *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion). Also, the United States Supreme Court has emphasized that a state must show that “available, race-neutral alternatives do not suffice.” *Fisher v. Univ. of Tex. at Austin*, 570 U.S. ___, 133 S. Ct. 2411, 2420 (2013). Focusing on the subsectors showing significant disparities in the utilization of M/FBEs where there is availability is a narrowly tailored remedy.

⁶ The calculated utilization of M/WBEs on State contracts and associated subcontracts compared to the estimated availability of M/WBEs in those markets.

The subsectors used in the IT/Telecom Report calculate the total State spend on IT/Telecom by contract type. This breakdown is essential to understanding where disparities currently exist and allows for a more narrowly tailored approach to addressing the disparity. Furthermore, as detailed above, the State has implemented race- and gender-neutral measures, but significant disparities still exist. Indeed, even the State's utilization of BEP Goals has not eliminated the significant disparities discovered in the IT/Telecom Report. Because narrow tailoring largely depends on how a sheltered market is implemented, CMS would like to work with the CPOs to identify specific IT/Telecom procurements for a sheltered market to ensure the sheltered market is narrowly tailored to address those areas showing a significant disparity between BEP-certified vendors and their utilization on State contracts.

Conclusion

The State of Illinois is committed to helping small and diverse businesses grow and prosper. Given the significant disparities found in the IT/Telecom Report, as well as the anecdotal evidence collected by the BEP Council and CMS, the State must take immediate action. CMS looks forward to working with the CPOs, State agencies, State universities, and other stakeholders to address and remedy the discrimination found in the IT/Telecom industry.

