

August 6, 2019

Mayor Martin Walsh  
1 City Hall Square, Suite 500  
Boston, MA 02201-2013

John Barros  
Chief of Economic Development  
1 City Hall Square, Room 717  
Boston, MA 02201

Boston City Council  
1 City Hall Square, Room 550  
Boston, MA 02201

**Re: Eliminating Barriers to M/WBE Participation in City Contracts**

Dear Mayor Walsh, Chief Barros, and Boston City Councilors:

Lawyers for Civil Rights, its undersigned Board Members, the Massachusetts Minority Contractors Association (MMCA), and the Greater Boston Latino Network (GBLN) respectfully write concerning the alarmingly low rate of Minority and Women Business Enterprise (M/WBE) participation in City of Boston contracting. The City expends more than \$600 million of taxpayer dollars annually on contracting, providing an enormous opportunity to economically empower communities of color. We are deeply concerned that this opportunity is being lost – and that the City is losing out on the talents of M/WBE firms in the process.

As the City has recognized, it has engaged in “demonstrated and significant underutilization of M/WBE firms. . .”<sup>1</sup> Indeed, Boston lags far behind other cities in M/WBE inclusion. As explained more fully below, cities such as New York City, Charlotte, Memphis, and Philadelphia have all attained exponentially higher levels of M/WBE participation compared to Boston.

This problem is directly within the City’s power to fix – provided that the political will exists to do so – and would be consistent with the Mayor’s public statements on diversity and equity. To that end, this letter outlines best practices that Boston can adopt to affirmatively ensure that M/WBEs are not frozen out of City contracting opportunities. We understand that the City has been working closely with several stakeholders over the past few months, including the Boston Branch of the NAACP and the Black Economic Council of Massachusetts, Inc. (BECMA), to develop and implement solutions designed to address this critical issue. The policy solutions outlined here are designed to affirm, complement, and expand this important ongoing work. Adoption of these policies will create a healthier, more vibrant economy for communities of color – and for the City of Boston as a whole. It will also lead to greater transparency in

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<sup>1</sup> See *Executive Order of Mayor Martin J. Walsh* (2016), Art. I(D) (retrieved from <http://files.ctctcdn.com/e7a569b1501/462c83b0-224f-4439-98cb-c8bcaecbd54d.pdf>.)

contracting and greater representation and inclusion of minority businesses, including Black, Latinx, and Asian contractors and vendors.

### **I. Minority and Women Business Enterprises Are Dramatically Under-Utilized in City of Boston Contracts**

In May, the *Boston Globe* reported that less than 1% of the \$664 million awarded annually for city contracts goes to M/WBEs.<sup>2</sup> Even accounting for the fact that this figure may not capture every single M/WBE contract with the City, the numbers are extraordinarily low. Other available data makes clear that by any measure, rates of participation by M/WBEs in City of Boston contracting are extremely low – and have been for many years. For example, a statewide “disparity study” conducted in 2017 analyzed three City departments that performed the largest amount of direct construction contracting during 2010-2015 and found that MBEs received only 1.13% and WBEs received only 4.35% of all such contracts.<sup>3</sup>

Notably, the issue is not that M/WBEs are not available to contract with the City. To the contrary, as the City has acknowledged in setting goals of 10%-30% depending on the particular industry, many M/WBEs are ready, willing, and able to do the work required by the City.<sup>4</sup> The City is just not contracting with them.

The impact of the City’s ongoing under-utilization of M/WBEs cannot be overstated. Boston is one of the most economically stratified cities in the nation, with communities of color in particular suffering from this wealth gap. A report by the Federal Reserve Bank of Boston, for example, documented how “the net worth of whites as compared with nonwhites is staggeringly divergent.”<sup>5</sup> Business ownership is one of the primary ways in which families accumulate, and pass along, wealth from generation to generation.<sup>6</sup> By allowing barriers to equal contracting

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<sup>2</sup> *Boston Awarded \$664m in Contracts. Less Than 1% Went to Women- and Minority-Owned Businesses*, BOSTON GLOBE (May 2, 2019) (retrieved from <https://www.bostonglobe.com/metro/2019/05/02/the-city-awarded-million-contracts-last-year-only-percent-went-minority-owned-businesses/K4Tt04GndWBF1MHdvipcNP/story.html>).

<sup>3</sup> See *Business Disparities in the DCAMM Construction and Design Market Area*, NERA ECONOMIC CONSULTING (2017) at 181-182 (retrieved from <https://www.mass.gov/files/documents/2017/12/29/business-disparities-in-the-dcamm-construction-and-design-market-area-study.pdf>). Disparity studies are commissioned by governmental entities to determine whether a disparity exists between their utilization of M/WBEs and the availability of M/WBEs in the market area to do the work needed by the governmental entity. These studies are typically highly sophisticated, analyzing precisely the type of work needed by the governmental entity, the relevant market area, and the corresponding availability of M/WBEs in each relevant industry.

<sup>4</sup> See Walsh Executive Order, *supra* n.1, at Art. I(D).

<sup>5</sup> See *The Color of Wealth in Boston*, FEDERAL RESERVE BANK OF BOSTON (2015) at 1 (retrieved from <https://www.bostonfed.org/publications/one-time-pubs/color-of-wealth.aspx>).

<sup>6</sup> See *Bigger Than You Think: The Economic Impact of Microbusiness in the United States*, ASSOCIATION FOR ENTERPRISE OPPORTUNITY (2013) at 8 (retrieved from

opportunity to persist, the City directly contributes to and perpetuates the enormous wealth gap in Boston. It also deprives the City of the skills and talents of the many M/WBE firms that are ready, willing, and able to contract with the City.

## **II. Disparities Exist Because Boston Is Not Taking Sufficiently Aggressive Steps To Ensure Equal Contracting Opportunity.**

The reasons why M/WBEs are systematically under-utilized in government contracting are well-known, having been studied and analyzed for years. Although observed disparities may vary slightly from jurisdiction to jurisdiction, one theme is consistent: if a city does not take proactive steps to ensure equal contracting opportunity, then M/WBEs will be systematically excluded.<sup>7</sup> For example:

- For prime contracts, particularly those that are discretionary, city officials making contracting decisions often limit M/WBE participation – either through conscious or unconscious bias, or simply because they prefer to contract with firms they have always contracted with in the past. If proactive steps are not taken to disrupt this *status quo*, then the problem builds on itself, as business relationships become more and more entrenched.<sup>8</sup>
- Prime contracts also often contain unnecessary qualifications that preclude newer or smaller firms (which M/WBEs tend to be) from participating. For example, a purchasing contract may require a firm to bid for an entire year’s worth of supplies, rather than breaking down the contract into smaller components. Or an architectural contract may require that a firm have 20+ years of experience in a particular type of design, even though other skills and abilities of a newer firm might be transferable. Without proactive steps to eliminate this type of exclusionary practice, the problem continues to replicate itself over the years.
- Many prime contracts also include subcontracting opportunities. Without affirmative steps to address bias and exclusion in subcontracting, M/WBEs are too often denied equal subcontracting opportunities. Prime contractors tend to simply go back to subcontractors they have used in the past – an “old boys network” that excludes M/WBEs. With

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[http://www.aeworks.org/wp-content/uploads/2019/03/Bigger-than-You-Think-Report\\_FINAL\\_AEO\\_11.10.13.pdf](http://www.aeworks.org/wp-content/uploads/2019/03/Bigger-than-You-Think-Report_FINAL_AEO_11.10.13.pdf)).

<sup>7</sup> See *Contracting for Equity: Best Local Government Practices that Advance Racial Equity in Government Contracting and Procurement*, INSIGHT CENTER FOR COMMUNITY ECONOMIC DEVELOPMENT, GOVERNMENT ALLIANCE ON RACE AND EQUITY (2017) at 6-8 (retrieved from [http://haasinstitute.berkeley.edu/sites/default/files/gare-contract\\_for\\_equity\\_0.pdf](http://haasinstitute.berkeley.edu/sites/default/files/gare-contract_for_equity_0.pdf)).

<sup>8</sup> See *Boston Awarded \$664m in Contracts*, *supra* n. 2 (describing poll of Black Economic Council of Massachusetts members citing concerns that city contracting process is “cumbersome, expensive, and geared toward large companies....”).

taxpayer funds at issue, cities cannot allow this type of subcontractor exclusion to go unchecked.<sup>9</sup>

Cities that take insufficient steps to address the issue of M/WBE exclusion head on become a part of the problem, funneling taxpayer dollars into a system that unfairly excludes M/WBEs from equal opportunity. A *laissez faire* attitude leads directly to M/WBE exclusion.

### **III. Solutions to Increase Diversity and Equity in City Contracting**

Fortunately, proactive solutions are available, and many cities have shown great success in removing unnecessary barriers and actively engaging M/WBE firms. For example:

- **New York City, NY** – achieved 19% M/WBE participation as reported in October 2018.<sup>10</sup>
- **Cook County (Chicago), IL** – achieved 29% M/WBE participation in FY 2017.<sup>11</sup>
- **Philadelphia, PA** – achieved 30.7% M/WBE participation in FY 2016.<sup>12</sup>
- **Memphis, TN** – achieved 18% M/WBE participation in FY 2018.<sup>13</sup>
- **Charlotte, NC** – achieved 18.54% M/WBE participation for direct discretionary spends in FY 2018.<sup>14</sup>

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<sup>9</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1978) (“It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.”).

<sup>10</sup> See *Momentum Builds Behind MWBEs*, CITY & STATE NEW YORK (Oct. 29, 2018) (retrieved from <https://www.cityandstateny.com/articles/policy/diversity/mwbe-momentum-builds.html>).

<sup>11</sup> See *Cook County Government Annual Business Diversity Report*, COOK COUNTY GOVERNMENT (2017) (retrieved from [https://www.cookcountyil.gov/sites/default/files/cook\\_county\\_government\\_annual\\_business\\_diversity\\_report\\_fy\\_2017.pdf](https://www.cookcountyil.gov/sites/default/files/cook_county_government_annual_business_diversity_report_fy_2017.pdf)).

<sup>12</sup> See FY16 Disparity Study (2016), OFFICE OF ECONOMIC OPPORTUNITY, OFFICE OF THE MAYOR (retrieved from <https://www.phila.gov/press-releases/department-of-commerce/office-of-economic-opportunity-releases-fy16-disparity-study/>).

<sup>13</sup> See *Gains in City’s MWBE Spend Based On Incorrect Data*, MEMPHIS BUSINESS JOURNAL (retrieved from <https://www.bizjournals.com/memphis/news/2019/03/14/gains-in-citys-mwbe-spend-based-on-incorrect-data.html>).

<sup>14</sup> See *Annual Report | Minority, Women, Small Business Enterprise*, CITY OF CHARLOTTE (2018) (retrieved from <https://charlottenc.gov/finance/procurement/cbi/CBI%20Document%20Library/FY%202018%20Annual%20Report%20Final.pdf>).

Closer to home, there are excellent examples of public projects in the Boston area where proactive steps have led to significant M/WBE participation, including Massport’s progressive inclusion efforts for the Omni Hotel Project in the Seaport.<sup>15</sup> Since Massport’s innovative model does not depend on a disparity study, it amply demonstrates that meaningful initiatives can be successfully and immediately implemented without legal or bureaucratic red tape.

From these and other examples, best practices are well known. The most successful M/WBE programs are those that directly target the problem of M/WBE under-utilization, through race- and gender-conscious programs. Where a disparity study provides the needed factual predicate, courts have routinely upheld such programs.<sup>16</sup> At the prime contracting level, cities may set goals for M/WBE participation; provide bid preferences or bid discounts for M/WBE firms; or otherwise promote diversity in the selection process.<sup>17</sup> At the subcontracting level, many cities set goals on construction (and other) contracts, requiring that prime contractors either meet those goals or demonstrate that they made good-faith efforts to do so.<sup>18</sup>

There are also a wide variety of race-neutral elements that cities across the country have adopted to bolster M/WBE participation – either alone or in conjunction with race-conscious programs.<sup>19</sup>

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<sup>15</sup> See *Massport Offers Model for Inclusion with Omni Hotel Project in the Seaport*, BOSTON GLOBE (May 22, 2018) (retrieved from <https://www.bostonglobe.com/business/talking-points/2018/05/22/massport-offers-model-for-inclusion-with-omni-hotel-project-seaport/3D2TJqWMTiQUhKGXkHLUgO/story.html>).

<sup>16</sup> See, e.g., *North Shore Concrete and Associates, Inc. v. City of New York*, 1998 U.S. Dist. Lexis 6785 at \*28-29 (E.D.N.Y. 1998) (“There is no indication that the statistical analysis performed by [the consultant] in the present case, which does contain statistics regarding minority contractors in New York City, is not sufficient as a matter of law under *Croson*.”); see also *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 61-62 (2d Cir. 1992); *Concrete Works of Colorado, Inc. v. County of Denver*, 36 F. 3d 1513, 1528 (10th Cir. 1994).

<sup>17</sup> See *Contracting for Equity: Best Local Government Practices*, supra note 7. To encourage inclusion efforts amongst prime contractors, some local governments utilize a grading system, in which prime contractors are given an ‘A’ to ‘F’ grade for their inclusion of M/WBE firms in their sub-contracting. These grades are then published online. See *State Policies and Programs for Minority- and Women-Business Development*, INSIGHT CENTER FOR COMMUNITY ECONOMIC DEVELOPMENT (2007) (Retrieved from <http://ww1.insightccd.org/uploads/publications/assets/50%20state%20inclusive%20business%20policy%20scan.pdf>).

<sup>18</sup> For example, in Seattle, bidders for prime contracts are required to have an inclusion plan. If the prime contractor does not implement its inclusion plan, payment can be withheld and the City could decide not to use them again indefinitely, or could debar them from doing business with the City for ten years. *Contracting for Equity*, supra note 7, at 11.

<sup>19</sup> Race-conscious programs always have race-neutral components as well, since a governmental entity that wishes to adopt a race-conscious program must demonstrate that race-neutral efforts alone are insufficient. See, e.g. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1178-79 (10th Cir. 2000).

Race-neutral efforts include:

1. Breaking down large prime contracts into smaller pieces that smaller companies can successfully compete for. This also has the advantage of increasing competition, thus resulting in better prices for the City.
2. Establishing small or local business programs that provide incentives and/or subcontracting requirements for all small or local businesses. Since M/WBEs are disproportionately small, a small or local business program will often increase M/WBE participation.
3. Requiring each city department to conduct a regular assessment of future needs for goods and services, and proactively communicating these future needs in outreach efforts to small businesses.
4. Enacting prompt payment programs, to ensure that prime contractors pay their subcontractors in a timely fashion.
5. Regular public reporting of M/WBE participation, disaggregated to reflect MBE and WBE participation separately, as a means for city officials, the M/WBE community, and the public to see where progress is being made and where more work needs to be done.
6. Performance measures for Department heads that include success at meeting M/WBE participation goals.
7. Eliminating unnecessary RFP/RFQ and other bid criteria to ensure that overly-stringent requirements do not unnecessarily inhibit competition and limit the ability of M/WBE firms to compete.
8. Providing bonding assistance by playing a brokering role between M/WBEs and financial institutions and bonding companies to help secure a required loan or bond.<sup>20</sup>
9. Creating a publicly accessible dashboard and scorecard for transparency and accountability with respect to progress on M/WBEs.
10. Streamlining certification processes to ensure they are not cumbersome or inaccessible to small businesses.

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<sup>20</sup> A bond essentially constitutes a legal guarantee that a particular project will be completed as expected. In instances where a bonded contractor fails to perform, the bonding company will provide some form of restitution. States such as Rhode Island, South Dakota, Washington, and Wisconsin play a brokering role between M/WBEs and financial institutions and bonding companies to help obtain a loan or bond.

Finally, it is essential that any city regularly conduct – and act upon – disparity studies, since such studies provide the factual predicate needed to institute and refine any strong contracting equity program. New York City, for example, which attained a M/WBE utilization rate of 19% in contracts subject to its M/WBE program, *see supra*, has regularly updated its M/WBE program in response to disparity studies conducted every 7 years beginning in 2005—making adjustments in goals for each race/ethnicity by gender for each type of city spending that reflect the results of each study.<sup>21</sup> In contrast, more than 16 years have passed since Boston’s last disparity study, making it extremely difficult to establish the type of aggressive contracting program that the City clearly needs.

It is our understanding that the City is currently conducting a disparity study, which is a positive step. However, we urge the City not to wait until that study is complete before strengthening its current efforts. Given the data that already exists, it is clear that the disparities between M/WBE utilization and availability are of a magnitude that would easily support much more aggressive measures to ensure M/WBE inclusion.<sup>22</sup> Such measures can then be augmented when the disparity study is complete.

#### **IV. Working in Partnership**

It is alarmingly clear that disparity in City contracting has affected Boston’s diverse business community for far too long, and will continue to persist unless the City takes more proactive steps to eliminate existing barriers. The amount of wealth being lost each year in communities of color as a result is astounding. If Boston were to achieve a similar level of M/WBE participation as Philadelphia, for example, that would mean nearly \$200 million additional dollars flowing to Boston’s M/WBE community each year. Put another way, by allowing the *status quo* to persist, the City is diverting hundreds of millions of dollars away from M/WBEs on an ongoing basis.

We respectfully request a meeting with you, so that we can coordinate efforts and explore these issues in greater detail and come up with a concrete plan to strengthen the City’s contracting equity efforts – starting immediately and continuing until the disparities that currently exist are erased. Please feel free to follow-up directly with the team at Lawyers for Civil Rights, including Iván Espinoza-Madrigal, Priya Lane, and Oren Sellstrom, at (617) 988-0624. We stand ready to assist in this effort in any way that we can.

Sincerely,

Massachusetts Minority Contractors Association (MMCA)

Greater Boston Latino Network (GBLN)

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<sup>21</sup> See *City of New York Disparity Study*, MGT CONSULTING GROUP (2018) at 2-2.

<sup>22</sup> See *Coral Construction Co. v. Kings County*, 941 F.2d 910, 919-20 (9<sup>th</sup> Cir. 1991) (local government must have “some evidence” to support remedial program before enacting it and may rely on post-enactment evidence if challenged).

Inquilinos Boricuas en Acción (IBA)

Sociedad Latina

Collaborative Parent Leadership Action Network (CPLAN)

East Boston Ecumenical Community Council (EBECC)

Higher Education Resource Center

Hyde Square Task Force

La Alianza Hispana

Latinos for Education

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