



**LAWYERS FOR
CIVIL RIGHTS
BOSTON**

September 18, 2023

DELIVERED VIA MAIL AND EMAIL

Governor Daniel McKee
Office of the Governor
82 Smith Street
Providence, RI 02903

Jonathan Womer, Director
Department of Administration
One Capitol Hill
Providence, RI 02908

Tomas Avila, Associate Director
Office of Diversity, Equity and Opportunity
One Capitol Hill Road
Providence, RI 02908

RE: Remediating unequal opportunity for Minority and Women Business Enterprises in state contract awards

Dear Governor McKee, Director Womer and Assistant Director Avila:

Lawyers for Civil Rights writes on behalf of the Rhode Island Black Business Association (RIBBA) regarding the distressing under-utilization of Minority and Women Business Enterprises (MBE/WBE) in state contracting for construction, goods and services. As the State's recent disparity study demonstrates, Minority and Women Business Enterprises are consistently under-utilized in state contracting, despite their availability to perform the work that the State requires. Without a proactive stance, the disparities will continue to increase.

Lawyers for Civil Rights works with communities of color and immigrants to fight discrimination and foster equity through legal advocacy, education, and economic empowerment. Our ongoing work for minority-owned businesses includes filing a [Title VI complaint against the City of Boston](#) for its discriminatory contracting practices and fighting against a [reverse discrimination claim](#) brought to upend a grant opportunity for minority-owned businesses. We also operate [BizGrow](#), a program that focuses on closing the economic wealth gap for communities of color by providing free legal support to entrepreneurs. BizGrow's recent work includes supporting food businesses in Rhode Island.

We write to highlight the benefits of increasing opportunities for M/WBEs in Rhode Island, and to underscore the State's legal exposure. The practices and policies of Rhode Island's state contracting system disproportionately and unjustifiably harm MBEs in a manner inconsistent with federal law, notably Title VI of the Civil Rights Act of 1964.

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To avoid legal liability, the State must correct these longstanding inequities immediately. The 2021 disparity study conducted by Mason Tillman^[1] provides guidance and affirmative steps that would lead to a more equitable contracting system. RIBBA has made many similar recommendations over the years. Greater transparency, increased opportunities, and additional support for M/WBEs in Rhode Island will bolster equity and address longstanding barriers in state contracting while reducing the risk of legal liability for violating antidiscrimination laws.

I. Federal law bars contracting practices that have an unjustified disparate impact on MBEs.

Under Title VI of the Civil Rights Act of 1964, recipients of federal funding are prohibited from discrimination based on race, color or national origin. While Title VI itself prohibits only intentional discrimination, federal agencies such as the U.S. Department of Justice (DOJ) have promulgated regulations that also prohibit practices that have a discriminatory *impact* on communities of color.^[2] Title VI's regulations do not depend on proof that a recipient of federal funds intended to discriminate; it is sufficient to show that the recipient's policies and practices disproportionately harm communities of color.

As a recipient of grant funding from the DOJ, along with several other federal agencies,^[3] Rhode Island is subject to its Title VI regulations.^[4] Under Title VI's regulations, liability occurs when (1) a practice disproportionately affects members of a group protected by Title VI; (2) the practice has no substantial legitimate justification; (3) or there is an alternative that would achieve the same objective but with less of a discriminatory effect.^[5] As outlined below, all of these prongs are met in the case of Rhode Island's contracting practices.

II. Rhode Island's public contracting practices violate Title VI and its implementing regulations.

By denying readily available minority-owned businesses state contracting opportunities, Rhode Island is engaged in a discriminatory, exclusionary system based on race, exposing the State to liability under federal law.

As the 2021 disparity study demonstrates in meticulous detail, the facially neutral practices of Rhode Island have a significant discriminatory effect on minority-owned businesses. The study analyzed the State's process for awarding contracts, comparing the proportion of available M/WBEs to perform work under State contracts to the amount of public contracts being awarded to M/WBEs. Notably, the study analyzed MBE availability in a highly sophisticated manner, based on the State's actual contracting records and other sources.

The study found that disparities between MBE utilization and availability exist across all sectors of Rhode Island's state contracting categories,^[6] showing a widespread practice of under-utilizing readily available minority-owned businesses. At the prime contracting level, disparities were identified for construction, professional services and supplies.^[7] Disparities at the subcontracting level are even more staggering. For example, the study documented how only 4.36% of subcontracts were awarded to Black-owned businesses during the study period and an

abysmal .90% to Latinx-owned businesses. In short, the study leaves no question that Rhode Island's contracting practices disproportionately harm MBEs.

Under Title VI, contracting practices that result in disparities of this nature are only permitted if the federal funding recipient can show a legitimate justification for them. Here, the disparity study makes clear that Rhode Island can show no such justification. As outlined below, numerous steps – both race-neutral and race-conscious – are available to the State that would break down exclusionary barriers and reduce these disparities. The State has simply chosen not to take them. For the same reason, it is plain that less discriminatory alternatives to the State's current contracting system exist.

III. Action steps to bolster minority- and women-owned businesses and increase transparency for Rhode Island residents.

The disparity study sets forth numerous steps that Rhode Island can and should take to ensure more equitable contracting. Many of these recommendations echo those that RIBBA and others have long made. A number of the recommended reforms are race-neutral, meaning that they could be undertaken even in the absence of a disparity study. And because the State now has firm evidence of disparities, it can and should also undertake race-conscious remedies that are specifically targeted towards remedying the impact of its exclusionary contracting system.

Race-neutral Efforts

- Expand solicitation notification criteria to reach a broader audience;
- Break down, or “unbundle,” large contracts into smaller contracts that are accessible to more businesses;
- Examine bid specifications to ensure that overly-restrictive criteria are not used that have the effect of excluding M/WBEs and/or limiting competition to only large firms;
- Create policies and procedures for the collection of comprehensive data to be followed by state agencies during the procurement process, including subcontracting data, and share disaggregated data to reflect MBE and WBE participation separately;
- Implement a mechanism for complaints of noncompliance with an investigation procedure and corrective actions to be taken when the findings support noncompliance;
- Implement an enhanced data collection and management system;
- Implement a publicly-accessible dashboard and scorecard for increased transparency and accountability; and

- Institute an independent reporting system for subcontractors to input payments from prime contractors for the state to review.

Race-conscious Efforts

- Mandate the MBE-Utilization-Plan and documentation of good faith efforts be submitted with the bid proposal by prime contractors to utilize M/WBEs as subcontractors, marking bids without such documentation as non-responsive. The good faith documentation must meet the criteria set forth in the MBECO's guidance document. [\[8\]](#)
- Monitor compliance with statutory and regulatory procurement provisions pertaining to M/WBEs. Reporting by the firm should be quarterly with findings of noncompliance being addressed by the Attorney General of Rhode Island within a specified timeframe.
- Provide bid discounts and incentive credits for MBE prime contractors and those that select MBEs.
- Mandate MBE goals for subcontracts, with compliance verified at bid opening.
- Implement MBE/WBE tracking and monitoring standards with a quarterly utilization review.
- Impose penalties on prime and subcontractors for non-compliance with M/WBE policies and laws.
- Utilize the state agency webpages to provide resources, information, updates and reports to increase transparency in government and assist M/WBEs with the procurement process and available opportunities.
- Provide statewide workshops and training to assist M/WBEs with the bidding process, other available funding opportunities, and how to increase stability for their businesses in general.
- Increase outreach efforts and improve outreach strategies to improve participation in the M/WBE state Program.
- Actively identify and utilize community organizations to assist with supporting minority- and women-owned businesses. Engage Black, Latino and women community members to assist with decision-making on program development and how to increase participation from M/WBEs.
- Increase funding opportunities to historically marginalized business owners through loan, grant and bond programs.

Finally, it should be underscored that data collection and transparency are key components in strengthening support for the MBE program in Rhode Island. Throughout the disparity study, Mason Tillman highlighted significant problems with how Rhode Island tracks data on its own contracting. Mason Tillman had to perform extensive research just to reconstruct the subcontracts for construction and professional services, as the information was not readily available from various state agencies. Subcontractor information was requested from 26 departments that spanned four different state agencies. Even after working to reconstruct the data on subcontractors, there were still seven departments that did not provide any information at all. This level of noncompliance is egregious and unacceptable.

This failure to adequately collect and monitor M/WBE participation significantly undermines compliance and transparency. Remedying the gaps in the State's data collection systems is one of the key action steps that should be taken immediately.

IV. Remedying MBE exclusion will benefit Rhode Island as a whole.

Remedying the disparities identified by the disparity study is not only legally required, it will also inure to the benefit of the State as a whole. There is a direct connection between the racial wealth gap and minority-owned businesses. Reports show that Black and Latino families live in poverty at twice and almost three times the rate, respectively, of white families in Rhode Island.^[9] This disparity is a depiction of the racial wealth gap and evidence that inequalities based on race persist. Issues that have plagued minority-owned businesses including limited access to capital and discriminatory banking practices^[10] are reflected in Rhode Island's poverty rate for communities of color. Studies have found a correlation between business ownership and the wealth gap that is persistently increasing.

Rhode Island can address the disparities in contracting opportunities for M/WBEs, by increasing assistance to M/WBEs and also by developing initiatives to increase economic development in poverty-stricken neighborhoods. Utilizing M/WBEs to assist with projects in economically disadvantaged neighborhoods creates benefits that are twofold: addressing poverty for historically marginalized families and addressing barriers to entry that plague minority-owned businesses. It is possible for the state to open up opportunities for greater M/WBE participation and to serve underserved communities simultaneously. In January 2022, for example, bond money was allocated to underserved districts for school improvements with a focus on including MBEs.^[11] Expanding investment into the MBE program would translate to a functioning program that affords more opportunities like the ones created by the school district improvement project.

V. Conclusion

For all of the foregoing reasons, we urge the State to take immediate steps to remedy the longstanding disparities identified in the disparity study.

We respectfully request a meeting to discuss the legal and policy solutions outlined above in greater detail to help move Rhode Island's existing equity efforts forward. Please contact Attorney Tasheena Davis of Lawyers for Civil Rights at tdavis@lawyersforcivilrights.org to

schedule this meeting with LCR and RIBBA. We look forward to finding an amicable and expeditious path forward.

Sincerely,

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^[1] MASON TILLMAN ASSOCIATES, LTD., *Disparity Study Executive Summary-State of Rhode Island* (July 2021), <https://dedi.ri.gov/sites/g/files/xkgbur811/files/documents/State-of-Rhode-Island-Disparity-Study-Executive-Summary---July-2021.pdf> [hereinafter “RI DISPARITY STUDY”].

^[2] 28 C.F.R. § 42.104(b)(2).

^[3] Amy Russo, *McKee announces \$81M in federal fund for new learning centers around state. What we know.*, THE PROVIDENCE JOURNAL (July 18, 2023), <https://www.providencejournal.com/story/news/local/2023/07/18/ri-is-getting-81-million-in-federal-funds-to-build-education-centers-learn-365/70424120007/>; U.S. DEPARTMENT OF COMMERCE, *Biden-Harris Administration Awards 5.5 Million to Rhode Island in ‘Internet for All’ Planning Grants* (November 22, 2022), <https://www.commerce.gov/news/press-releases/2022/11/biden-harris-administration-awards-55-million-rhode-island-internet-all>.

^[4] U.S. ATTORNEY’S OFFICE-DISTRICT OF RHODE ISLAND, *Rhode Island Law Enforcement Nets More Than \$1.2 Million in Justice Department Grants* (October 17, 2022), <https://www.justice.gov/usao-ri/pr/rhode-island-law-enforcement-nets-more-12-million-justice-department-grants>.

^[5] CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE, TITLE VI LEGAL MANUAL, Sec. VII (C), <https://www.justice.gov/media/1121301/dl?inline> (last visited September 13, 2023).

^[6] RI DISPARITY STUDY, *supra* note 1, pp. 8-14 (finding statistical disparity for Black Americans and M/WBEs in prime construction contracts, construction subcontracts, construction-related services, and goods, commodities and supplies contracts).

^[7] RI DISPARITY STUDY, *supra* note 1, pp. 7-10.

^[8] RHODE ISLAND DIVISION OF DIVERSITY, EQUITY AND OPPORTUNITY, *Good Faith Efforts to achieve MBE participation*, <https://dedi.ri.gov/sites/g/files/xkgbur811/files/documents/good-faith-efforts.pdf> (last visited August 10, 2023).

^[9] Aditya Aladangady and Akila Forde, *The Wealth Inequality and the Racial Wealth Gap*, U.S. FEDERAL RESERVE (October 22, 2021), <https://www.federalreserve.gov/econres/notes/feds-notes/wealth-inequality-and-the-racial-wealth-gap-20211022.html>.

^[10] BOSTON INDICATORS, *The Color of the Capital Gap: Increasing Capital Access for Entrepreneurs of Color in Massachusetts* (May 2021), <https://www.bostonindicators.org/-/media/indicators/boston-indicators-reports/report-files/capitalgap052020211458.pdf>.

^[11] OFFICE OF THE GOVERNOR OF RHODE ISLAND-Press Release, *Governor McKee, Rhode Island Department of Education Announce \$20 Million in Funding for Facilities Equity* (January 12, 2022), <https://governor.ri.gov/press-releases/governor-mckee-rhode-island-department-education-announce-20-million-funding?msclkid=56d7e60ec1ad11ecbbd97cfb55b00548>.