



Illinois Department of Transportation

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Supplemental Report to the Illinois General Assembly on Senate Bill 1923, P.A. 097- 0228

On January 31, 2012, the Illinois Department of Transportation (IDOT) herein referred to as the Department, and the Chief Procurement Officer jointly filed the Target Market Annual Report as required by Public Act 097-0228. In the report, the Department and the Chief Procurement Officer further committed to jointly submit a supplemental report of evidence and proposed remedial actions to the Illinois General Assembly within 60 days. The following is the supplemental report on the Target Market Program.

A. The Department with the Aid of its Consultant, Mason Tillman Associates, Ltd., has Analyzed Statistical and Anecdotal Evidence

As noted in the January 31, 2012 report, the Department has been aggressively investigating to determine evidence of discrimination. Several public hearings were held throughout the State and the testimony was compiled into a "Target Market Public Hearings" Report published on December 30, 2011. The *Illinois Department of Transportation Statewide Disparity Study* was published in the Fall of 2011 and attendant material was reviewed, as well as historic material, including the *District 8 Mississippi River Bridge Disparity Study*, District 8 Dual Goal Waiver Request and anecdotal information gathered through the years as to unique local circumstances found to be present in District 8. The Department and the Chief Procurement Officer, after a preliminary review of this information, recognized the historical evidence of discrimination in District 8 and requested that Mason Tillman Associates, Ltd., update statistical information in the Metro-East geographic area (District 8) in order to determine whether the conditions continue to exist.

History of District 8: District 8 and the Metro East area has long had an issue with respect to underutilization and blatant discrimination in road construction. Indeed, in 2005 the US Justice Department Division of Civil Rights Bureau of Community Relations was called upon by the Department and the community alike to review and suggest steps to take to find a solution to the apparent discrepancies in utilization of minority disadvantaged business enterprises working in and around Metro East. As a part of this US Department of Justice Memorandum of Understanding, the Department conducted a separate disparity study to research the activity surrounding construction contracts in Metro East. The findings of that disparity study conducted by Mason Tillman Associates, Ltd., indicated that although the availability of minority owned disadvantaged business enterprise contractors in the regional market was 20.82%, the same minority contractors were only receiving 10.86% of the

construction subcontract dollars from the primes. Additionally, the Mason Tillman Disparity Study of District 8 found: “There was a statistical significant disparity found in construction subcontracts for African Americans, Hispanic Americans and Minority Business Enterprises.”

Beginning in 2011 with the enactment of Public Act 096-0795, the predecessor of the current Target Market Program law, the Department set aside five contracts for minority and women-owned disadvantaged business enterprises (M/W/DBEs) in accordance with the legislation. Those contracts yielded \$733,520.35 of M/W/DBE participation.

B. Mason Tillman Associates, Ltd., Report

Earlier this year, the Department commissioned Mason Tillman Associates, Ltd., to conduct a disparity study which is necessary to document any disparities in the awarding of the construction contracts in District 8. The disparity study was performed in accordance with federal law and confirmed that there remains to be a statistically significant disparity in the award of IDOT construction subcontracts in District 8, which is an eleven county geographic area in southern Illinois. The 11 counties in District 8 include Bond, Calhoun, Clinton, Greene, Jersey, Madison, Marion, Monroe, Randolph, St. Clair, and Washington. Mason Tillman Associates, Ltd., has provided a supplemental report to the Department regarding further and current study of District 8. The Mason Tillman Associates, Ltd., report is attached.

Anecdotal testimony of individual discriminatory acts can, when paired with statistical data, document the routine practices by which minority and woman-owned business enterprises (M/WBEs) are excluded from business opportunities within the Illinois Department of Transportation’s relevant market area. The United States Supreme Court in its 1989 decision, *City of Richmond v. J.A. Croson Co.*, specified the use of anecdotal testimony as a means to determine whether remedial race-conscious relief may be justified in a particular market area. Mason Tillman Associates, Ltd., utilized anecdotal testimony from five sources—(1) 2011-IDOT Target Market Program Public Hearing; (2) 2009-IDOT Dual Goal Waiver Public Hearings; (3) 2009-IDOT District 8 Disparity Study Anecdotal Analysis Focus Groups; (4) 2009- IDOT/Illinois State Toll Highway Authority Disparity Study Anecdotal Analysis; and (5) 2005-IDOT Disadvantaged Business Enterprise Public Hearing. The five anecdotal sources yielded substantial testimony evincing patterns and practices of discrimination against M/WBE in construction by prime contractors. The anecdotal testimony chronicles anecdotes from M/WBE construction contractors from 2005 to 2012.

The Department finds that there is sufficient evidence to warrant a finding of egregious discrimination. This finding permits IDOT to implement a Target Market Program that is designed to address, to the fullest extent practicable and permitted by law, the disparity in the utilization of available minority and female-owned businesses on IDOT construction contracts. Provisions in the existing state and federal codes support methods to award IDOT construction contracts in an orderly and efficient manner to qualified M/WBEs. IDOT’s Target Market Program will be designed to both improve opportunities and build capacity of M/WBEs in

District 8 and to allow them to compete in the open market at a prime contracting level.

Based upon the analysis of statistical evidence, anecdotal evidence and the Mason Tillman Supplemental Report, the Department has made the following findings:

- 1) the finding of egregious discrimination supports a compelling interest in remedying the identified race or gender discrimination;
- 2) insufficient race or gender-neutral means available to remedy the egregious discrimination;
- 3) insufficient existing goal-oriented remedial programs available to remedy the egregious discrimination; and
- 4) that the only remedy for the race or gender discrimination is a narrowly tailored target market remedial action.

Based upon these findings, the Department finds that there continues to be a strong basis in the evidence that there is a compelling interest present to remedy the egregious discrimination identified in the findings of the original District 8 study and the current study. The remedy for the flagrant discrimination is a narrowly tailored target market remedial action. The findings have been provided to the Chief Procurement Officer pursuant to Section 6.820 of the Target Market rules, 44 Ill. Admin. Code Section 6, Subpart K. The Chief Procurement Officer concurs with the findings.

C. Proposed Remedial Actions: 44 Ill. Admin. Code 6.820(c) Now Calls for an Additional Public Hearing to Provide Input into the Below Mentioned Remedial Measures.

Because the CPO has concurred in the findings of the department, the Department must now conduct a public hearing. 44 Ill. Admin. Code 6.820(c). The Department will set a time and place for the hearing. Minority, female and general contractors, contracting organizations, community organizations and other interested parties shall have the opportunity to provide comments before, during and for a period of time determined by the Department, after the hearing. After concurrence by the CPO, the hearing will take place within 30 days. A written record of the public hearing will be made and kept by the CPO. (See Section 2705-600(0.5) of the Law.)

Section 6.830 of the Code, 44 Ill. Admin. Code sets forth a number of remedial measures that may be included in the Target Market Program. The remedial action must be supported by the factual findings and be specific and definite in duration.

1. Contract Formation

Designate contract work reserved for performance by M/WBEs, depending on the funding sources for the contract, could be considered as a remedial action. Relevant contract and

procurement documents would require that contractors make a good faith effort to have the reserved work performed by eligible M/WBEs.

Additionally, to encourage and facilitate bidding and offers by M/WBEs, the Department, in consultation with the Chief Procurement Officer, may:

- Divide procurements into smaller projects;
- Schedule contract lettings at alternative locations conducive to eligible business participation;
- Provide for bidding documentation and submission procedures conducive to eligible business participation; and
- Remove bid bond requirements

2. Contract Goals

Separate minority-owned and female-owned business participation goals could be set as a remedial action on a particular contract or contracts.

3. Contract Incentive

Bid incentives for achievement of M/WBE goals advertised in contracts could be established as a remedial action.

4. Contract Set-Aside

The Department, in consultation with the Chief Procurement Officer, may advertise contracts for award or selection set-aside M/WBEs. This action would establish a sheltered procurement process open only to eligible businesses.

D. Next Steps

After the public hearing, the Chief Procurement Officer and the Department will determine and implement the remedial measures appropriate to address the findings. The Department continues to study other geographical areas for evidence of discrimination which may require target market remedies.