

HB21-1168

Title: Historically Underutilized Businesses Local Government Procurement

Sponsors: Reps. Bacon & Ricks; Sen. Kolker

Purpose:

This bill seeks to advance the State of Colorado's goal to level the playing field for Historically Underutilized Businesses (HUBs) to compete for contracts and act on the following recommendations of the State Disparity Study: (1c) implement systems to track and report progress in reaching annual aspirational goals for eligible contracts, and (5b) require local governments in Colorado should to review equity in their contracts.

Background:

The problem of historically underutilized businesses being substantially underrepresented in contract procurement is not unique to State contracts, it exists at all levels of contracting with public institutions. Based on a disparity study conducted by [Keen Independent Research](#) as a result of [SB19-135](#): only 8% of available State contract dollars were awarded to Minority and/or Women owned Business Enterprises (MWBE), which is substantially less than 28% expected based on availability analysis.

In order for public institutions to set formal benchmarks for HUB/MWBE procurement they must first provide a body of evidence to demonstrate that a disparity exists between available HUBs and contracted HUBs. This body of evidence requirement is not from statute, but from a series of constitutional case law. Although the state study illuminated disparities between HUBs represented in procurement and HUBs available in the market, the disparity study only satisfies case law 'body of evidence' requirements for state contracts. Therefore it is necessary for local public institutions to develop their own body of evidence and/or best practices to achieve parity between HUB availability and procurement.

Bill Action:

This legislation will convene a pilot program with the Department of Local Affairs and public institutions of varying sizes, constituencies and geographies. This pilot program would task public institutions with identifying the perceptual and substantial barriers to entry for Historically Underutilized Businesses (HUBs) in the procurement process. At the end of the pilot program, public institutions will present a report of promising practices to inform future legislation.

Stakeholder Engagement:

- Hispanic Chamber of Commerce
- Black Chamber of Commerce
- Rocky Mountain Indian Chamber of Commerce
- Asian Chamber of Commerce
- Women Chamber of Commerce
- Colorado Municipal League
- Colorado Counties Inc.



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100 Fillmore Street, 5th Floor
Denver CO 80206

www.keenindependent.com

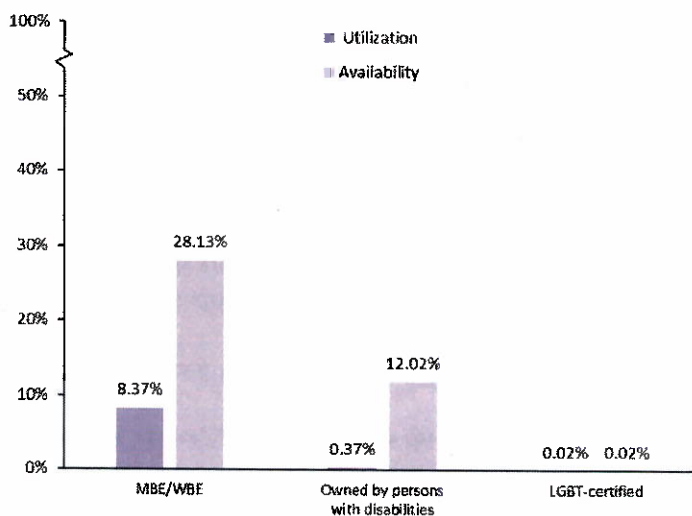
2020 State of Colorado Disparity Study

The State of Colorado seeks to level the playing field for historically underutilized businesses to compete for State contracts. In January 2020, the State engaged Keen Independent Research (Keen Independent) to analyze whether there were disparities in the State’s utilization of diverse firms.

Keen Independent’s 700+ page report can be found at www.keenindependent.com/coloradodisparitystudy2020.

Disparity analysis for State contracts. Keen Independent determined that 8 percent of State contract dollars went to minority- and women-owned businesses (MBE/WBEs), which was below the 28 percent expected from the availability analysis. Firms owned by persons with disabilities were also underutilized in State contracts. There was no overall disparity for businesses that were LGBT-certified.

Utilization and availability of diverse businesses in State contracts, July 2014–June 2018 (% of contract dollars)



Source: Keen Independent Research utilization and availability analyses for State contracts.

Study components

Senate Bill 19-135 directed study of businesses owned by people of color, women, persons with physical or mental disabilities, and members of the LGBT community.

SB-135 required analysis of State contracts between July 1, 2014 and June 30, 2018 for each executive agency except institutions of higher education that have opted out of the State Procurement Code.

Study methodology followed legal decisions and SB-135.

- 22,000 State contracts and subcontracts
- Availability surveys reaching 17,000 businesses
- Disparity analysis for firms owned by people of color (MBEs), white women (WBEs), persons with disabilities, LGBT-certified firms
- Data for Colorado marketplace
- Qualitative information from 700+ businesses, trade associations, State staff and others
- Internal and external stakeholder groups
- Website, email and telephone hotline collecting comments from the public

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Keen Independent identified a pattern of disparities in State contracts in every industry for businesses owned by African Americans, Hispanic Americans, Native Americans, white women, and persons with physical or mental disabilities. There were also disparities for Asian American-owned professional services firms. There was evidence of discrimination in the broader Colorado marketplace affecting each group in the study, including members of the LGBT community.

Conclusions. Keen Independent concluded the following based on the combined study information:

- The State is already helping diverse businesses and other small businesses, but with limited tools and resources.
- There is not a level playing field in Colorado for certain groups of businesses.
- Disparities in participation of diverse businesses will likely persist without action.
- With legislation and resources, disparities can be narrowed or eliminated.
- Addressing disparities needs to be a multi-year, phased effort.

Recommendations. The State Legislature should authorize and fund a comprehensive effort to address disadvantages for diverse firms identified in this study.

1. Establish policy and overall annual aspirational goals for eligible contracts;
2. Remove barriers to small business participation;
3. Work with partners to increase the readiness of diverse businesses for State contracts;
4. Authorize and implement new equity tools in State procurement; and
5. State agencies that did not participate in the disparity study should conduct their own studies or other comprehensive review of equity in procurement.

Legislation authorizing a contract equity program should specify the types of additional equity tools that can be used in the procurement process, provide sufficient funding for a successful program and indicate a date that the program will expire unless it is reauthorized. The figure on the following page summarizes initiatives the State might pursue. The full report discusses recommendations in detail.

Eligibility for new equity programs. Keen Independent recommended three new equity programs that have been successfully used in other states:

- Contract goals program;
- Sheltered market program; and
- Price and evaluation preference program.

The State will need to decide eligibility for participation in such programs based on the evidence in the study and other information. One option is for the State to certify firms that are both socially and economically disadvantaged, as explained in the full report.

Certain groups might be presumed to be socially disadvantaged based on disparity results for State contracts, while other businesses could be certified on a case-by-case basis if they show evidence that they are socially disadvantaged. Economic disadvantage might be based on small business status, using industry-specific revenue size standards set by the U.S. Small Business Administration.

Recommended contract equity program for the State of Colorado

Recommendations
1. Establish policy and overall annual aspirational goals for eligible contracts
a. Set separate annual statewide goals for the utilization of the following four groups: MBEs, WBEs, businesses owned by persons with disabilities and firms owned by members of the LGBT community
b. Set department-specific goals for all diverse businesses combined
c. Implement systems to track and report progress in reaching these goals
d. Develop new certification system
2. Remove barriers to small business participation
a. Increase the threshold when it requires bid, payment and performance bonds for its contracts
b. Address any overly restrictive insurance requirements
c. Ensure that evaluation criteria used in qualifications-based awards do not have unintended negative effects on smaller or newer businesses
d. Consolidate and simplify the process to register as a potential bidder
e. Reach out to expand the number of diverse businesses registered with the State
f. Consistently require prime contractors to identify the subcontractors they use on State contracts
g. Expand CDOT's subcontractor payment notifications system to other departments
3. Work with partners to increase the readiness of diverse businesses for State contracts
a. Continue to partner with others to provide business assistance
b. Provide real-time training on how to win and perform State contracts and subcontracts
c. Partner with others to provide training and resources for business insurance
d. Create bonding assistance program
e. Create working capital program for diverse businesses winning State contracts
f. Expand CDOT's mentor-protégé program statewide
4. Authorize and implement new equity tools in State procurement
a. Implement a contract goals program
b. Implement a sheltered market program
c. Implement a price and evaluation preference program
d. Regularly evaluate which groups of diverse businesses are eligible for each program and provide for program review or sunset
5. State agencies that did not participate in the disparity study should conduct their own studies or other comprehensive review of equity in procurement
a. The legislative and judicial branches of the State and institutions of higher education that have not reviewed equity in their contracts should do so
b. Local governments in Colorado should also review equity in their contracts