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**Testimony by the New York Association on Independent Living to the Joint:**

**Senate committees on Labor, Agriculture, and Economic Development  
on**

**The Minority and Women-Owned Business Enterprise (MWBE) Program**

Thank you for the opportunity to provide testimony. My name is Lindsay Miller and I am the Executive Director of the New York Association on Independent Living (NYAIL). NYAIL is a statewide, not-for-profit membership association created by and composed of Independent Living Centers across New York State. Independent Living Centers are unique disability-led, cross-disability, locally administered not-for-profit organizations, providing advocacy and supports to assist people with disabilities of all ages to live independently and fully integrated in their communities. I am testifying today to share the perspective of not-for-profits implementing the Minority and Women Owned Business Enterprise Program through state contract requirements.

Independent Living Centers were established in State statute in 1982 under State Education Law. As such, ILCs' core funding comes from the State Education Department. The State allocation of \$13M funds 41 State Independent Living Centers with grants ranging from \$200,000 to \$500,000. This base funding provides the necessary funding to maintain operations and provide core Independent Living services (transition, peer counseling, information and referral, individual & systems advocacy and independent living skills). However, the total funding of the Independent Living network far exceeds this \$13M allocation at approximately \$160.7M. This is because the ILC network has been successful at diversifying its funding through other State and local grants, foundation funding, Medicaid-funded services, etc. As a statewide organization, NYAIL too administers several state grants with the State Education Department and the Department of Health. As such, through our own experiences and the experiences of our members, NYAIL has firsthand knowledge regarding the on-the-ground impact of the MWBE program and the challenges associated with implementation.

Let me start by saying that the Independent Living network wholeheartedly supports the goals and intent of the MWBE program. The IL network is run by and for people with disabilities, a population that is historically discriminated against and faces significant barriers when it comes to attaining employment. This is reflected by the extreme disparity in the employment rate of people with disabilities compared to their non-disabled peers. In New York, working-age people with disabilities have a 31.6% employment rate, resulting in an employment gap between people with and without disabilities of 41.1% (Disability Status ADA 25, Center for Independence of the Disabled, New York, 2015). The poverty rate for

people with disabilities in New York State is 17% higher than for nondisabled New Yorkers. That is why NYAIL has been advocating for legislation that would add disability-owned business to the MWBE program (A.11184/S.3785 of 2018). The State needs to encourage self-employment business opportunities by including New Yorkers with disabilities in the State procurement program. Peers could have businesses certified in the Minority and Women Business Enterprise process under a “disability” minority classification. This is not intended to increase the current state procurement participation requirements, but would allow disability-owned businesses to participate in the existing program under a new classification. This proposal was included in the Employment First Commission’s report. NYAIL urges the Governor and Legislature to advance this recommendation, as proposed in A.11114 (Santabarbara)/S.3785 (Marcellino) of 2018, as part of the 2019-20 budget negotiations.

While laudable in its mission and intent, there are significant flaws in the implementation of the State’s MWBE program. Most striking is the fact that there is no consistency within and across State agencies regarding the application of the MWBE goals. We understand from Empire State Development (ESD), the State agency tasked with overseeing implementation of the MWBE Executive Law Article 15-A statute, that agencies have a 30% MWBE goal overall, but that this is not intended to translate to a blanket 30% goal on all State contracts. For not-for-profits specifically, it is recommended that any MWBE % goal be applied only to the funds that would potentially go to the open market (i.e. non-personnel services), and that the goal applied must be set based on a feasibility study and assessment of the market regarding what is reasonable and feasible. However, it is unclear what role ESD plays in reviewing and approving these feasibility studies and the participation goal applied to individual grants as a result. From our perspective, the 30% overall goal for State agencies has essentially turned in to a blanket 30% application, regardless of the goals and intent of the contract and with little consideration to the practicality of such a goal.

In addition, it still varies among contracts which costs are excluded from the application of MWBE goals. Some contracts exclude personnel services only, while others go further and exclude the other costs necessary to carrying out a grant with staff time assigned (e.g. rent, utilities, travel, indirect costs, etc.). At least one state agency often applies the MWBE goal on the entire contract regardless of the amount or the contract requirements by using an arbitrarily label of “competitive procurements” (vs. “grant”) to apply this standard. In addition, some agencies exclude contracts funded by federal dollars because these are considered pass through grants, yet other agencies require MWBE goals be met regardless.

Requiring 30% MWBE participation on the discretionary portion of a budget is more doable and reasonable. However, even then identifying appropriate and qualified MWBE providers can be a challenge, and the State agency MWBE coordinators are not prepared to assist you in identifying relevant providers beyond referring you to the MWBE directory (despite being required to complete a feasibility study including an assessment of the market to determine the goal setting).

Another issue is that current MWBE requirements discourage nonprofits from subcontracting with other nonprofits because nonprofits cannot be MWBEs and subcontracts are often

included in all MWBE requirement levels. Not only is the inconsistency confusing and difficult to manage for many not-for-profits, it also directly negatively impacts the work for which the grant was intended.

Despite the myriad of issues, there are M/WBE compliance administrators representing state agencies who do not understand the necessity of exemptions or exclusions for certain items and provide no alternative avenue for appeal, or refuse to accept waiver requests and make unreasonable demands to meet compliance percentages. Waivers are often requested, not because of a lack of M/WBE vendors, but due to large portions of contract budgets being consumed by salaries/fringe, rent, and utilities, existing contractual obligations, necessary expenses not available via local MWBE vendors, or subcontracts to other not-for-profits to enhance the provision of services. A process of appeal could help mediate these misunderstandings.

Executive Law Article 15-A requires that State agencies and authorities ("Agencies") promote opportunities for maximum feasible participation on State grants and contracts ("State Contracts") and eliminate barriers to participation on State Contracts by minority and women-business owned enterprises ("MWBE"). In that vein, the MWBE statute and regulations require that all Agencies assess goals for MWBE participation on State Contracts whenever it is practical, feasible and appropriate. Because Not-For-Profits typically use substantially most of their funds from State Contracts on items for which MWBE utilization is not likely to be realized (e.g. personnel, fringe, travel, rent and utilities), Agencies are permitted to, whenever practical, feasible and appropriate, set MWBE goals on either the whole State Contract or on the portion of the State Contract for which MWBE utilization may be realized.

It would appear that state agencies have the ability to set MWBE goals in the way that is most "practical, feasible, and appropriate." So, while it seems to be well within an agency's rights to apply the MWBE goals to the entire contract, it is not "practical, feasible, (or) appropriate" when only nonprofit agencies are eligible to apply for the grants and procurements and those nonprofits use most of any grant budget to provide the direct services.

In our opinion, it is not practical, feasible, or appropriate:

- to require a nonprofit to rent cars from an MWBE vendor hundreds of miles away from the organization instead of paying mileage to employees.
- to require a nonprofit to break an existing long-term contract with a local non-MWBE vendor in order to establish a new contract with an MWBE vendor.
- to require a nonprofit to increase budgeted expenditures for supplies, or other lines utilizing an MWBE vendor, simply for the sake of meeting the 30% goal, despite not needing that purchase, and thus not allowing the grant funds to cover other necessary expenses that are not available through local MWBE vendors.
- discourage nonprofits from subcontracting service provision to other nonprofit agencies by requiring that the "Subcontract" category be included in MWBE goal calculation.

- to require a nonprofit to provide services to meet grant deliverables without grant funding due to the unreasonable MWBE requirements.
- to require a nonprofit to spend excess funds to obtain goods and services necessary to meet grant deliverables from MWBE vendors when lower costs are available.
- to require a nonprofit to “negotiate” bids/quotes with MWBE vendors when they have not submitted the lowest bids/quotes.
- to disallow a waiver request from a nonprofit with no avenue for appeal.
- to suggest non-profits change their bookkeeping service or auditor for the sake of meeting MWBE requirements, when decisions like these are the responsibility of the board of directors.

However, NYAIL and its members have experienced all of the above.

To provide a specific example, NYAIL has a contract from the State Education Department for Coordination of the Statewide Systems Advocacy Network (SSAN). The SSAN was created to support the Independent Living movement in the development of local partnerships and coalitions to engage in community education about issues impacting people with disabilities. There are 15 SSAN centers, which employ a part time systems advocate to organize and educate in their communities regarding statewide issues impacting people with disabilities. As Coordinator, NYAIL helps to guide these activities, tracking what is happening at the state level and providing technical assistance to the centers in their grassroots activities, as needed. The grant is for \$103,000/year and requires a full-time coordinator be hired to lead the Coordination and ensure the long list of required deliverables are met. The State Education Department included a 30% MWBE goal on the total SSAN Coordination contract, which it considered to be a “competitive procurement”, but only applied the 30% to non-personnel services for the \$30,000/year SSAN center contracts, which SED considered to be a “grant”.

The very basic staff expenses (salary, fringe, rent, electric & phone) needed to meet the grant deliverables for RFP 16-024 SSAN Coordination totaled approximately \$85,002.96/year. This doesn't include other necessary expenses such as staff travel, postage, etc. When required to contract out 30% of the total \$103,000 contract amount to MWBE providers, we were only left with \$72,100 to cover necessary grant expenditures. As a non-profit, this is extremely troublesome. (It should also be noted that these funds are federal Independent Living dollars for which the State Education Department is the Designated State Unit tasked with disbursing the funds as directed in the State Plan for Independent Living (SPIL). Applying an onerous MWBE requirement on these funds diverts these very limited federal funds away from that which they were intended.)

State agencies should not be expecting not-for-profits to give \$30,000+ of free services, when they could easily be accommodated by the proposed grant award. Implementation of the M/WBE participation goals should be coordinated with the expectation of the program being funded. Participation in the M/WBE program should not distract from the goal of the grant. **The purpose of any grant is to achieve the required deliverables.** The primary purpose of state contracts is not to give 30% to M/WBE businesses, and then secondarily try to meet the deliverables with the funds remaining. However, this is the situation with which we are often faced.

As an organization with four state contracts, managing the different requirements can be difficult. Meanwhile, we have members with up to 100 State contracts. Organizations are required to negotiate each contract separately following a different set of exclusions and exemptions for each. Not to mention that a larger organization makes its purchases on a much larger scale than any one contract, so purchase vouchers and invoices have to be dissected and allocated across a number of contracts which makes tracking and reporting more complicated. An inordinate amount of staff time that is not able to be allocated to grant/procurement budgets is required to manage M/WBE compliance.

New York cannot continue to enforce MWBE participation requirements on nonprofits when the MWBE system is fatally flawed (MWBE vendors are not certified in a timely manner; the MWBE directory is not regularly checked or updated as reported in an audit conducted by the Office of the Comptroller; the methods used for goal calculations and participation requirements are not uniform across the agencies and authorities of the state).

As New York considers the future of the MWBE program, NYAIL urges the State to require consistent guidelines for implementation and an avenue for appeal. At a bare minimum, the cost of personnel services should be excluded from MWBE eligible expenses across all State contracts.

Respectfully submitted,

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