



TACIR

The Tennessee Advisory Commission
on Intergovernmental Relations



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MEMORANDUM

TO: Commission Members

FROM: Cliff Lippard
Executive Director

DATE: 2 December 2021

SUBJECT: House Bill 1593/Senate Bill 1235 (State Contracting and African-American Owned Businesses)—Draft Report for Review and Comment

The attached Commission report is submitted for your review and comment. It was prepared in response to House Bill 1593 by Representative Miller (Senate Bill 1235 by Senator Gilmore), which directs the Commission to study whether disparities exist in the issuance of state contracts to businesses owned and operated by African Americans; provide information on the effect of any such disparities on the African American business community, as well as the manner in which other states have addressed disparities; and report its findings no later than January 31, 2022, including any recommendations for reducing disparities if they are found. Additionally, in committee discussions of House Bill 1593, House Minority Leader Camper asked whether any of the recommendations included in the state's 2009 study of disparities in state contracting for minority-owned and woman-owned businesses had been implemented.

Most of the 23 recommendations included in the 2009 disparity study have been implemented. The study found that Tennessee had "a strong basis in evidence to take proactive measures to prevent discrimination based on race, ethnicity, or gender against women and minority prime contractors and subcontractors." The state has not updated the disparity analysis from the 2009 study in the decade since its publication.

TACIR staff could not update the analysis from the 2009 disparity study for this project. Data on state contracts are collected and maintained by the state's Central Procurement Office (CPO) with the state's overall procurement needs in mind and are not tailored to serve as a foundation for disparity studies. However, the Governor's Office of Diversity Business Enterprise (Go-DBE) within the CPO provided TACIR staff with procurement

data that, along with other data included in Go-DBE's annual reports, allows for some analysis and comparisons with the 2009 study.

The data provided show that state procurement spending with African American-owned businesses has increased both in total amount and as a percentage of overall state procurement spending. From fiscal year 2015-16 through 2019-20, the state spent \$657 million with businesses that it certified as African American-owned, up from the \$28 million spent with African American-owned businesses—both certified and non-certified—from fiscal year 2002-03 through 2006-07 that was reported in the 2009 study. The percentage of state procurement spending with African American-owned businesses also increased to 3.3% from 0.4%. These increases are likely greater than the data suggest because anecdotally there are some African American-owned businesses that have not sought certification that have been awarded state contracts.

Despite this overall increase, agency-level spending goals for minority-owned businesses are not often being met. Go-DBE coordinates with each of 30 agencies to establish minority-owned business procurement goals annually, set as a percentage of each agency's total spending on procurement—the state does not set goals specifically for African American-owned businesses or other racial minority groups. Only five of these 30 state agencies met their goals for procurement spending with minority-owned businesses in at least three of the five fiscal years from 2015-16 through 2019-20. Only two of those five met their goals every year, and half of the 30 agencies did not meet their goal in any of the five years. Most of the state's procurement spending with minority-owned businesses comes from two agencies, the Department of Finance and Administration and TennCare.

Although many barriers to winning state contracts apply generally across different types of businesses, some are more likely to affect African American-owned businesses. Nationally, past research has shown that, compared to white-owned businesses, African American-owned businesses tend to start out with less wealth and are less likely to be approved for loans, and the loans they do receive are smaller on average. This lack of access to capital can impede their ability to grow, meet certain bonding or insurance requirements, or make successful and competitive bids on larger projects. Moreover, African American business owners are often less likely to have family members who have owned and operated their own businesses, are less likely to have direct personal experience with operating a business, and may have fewer personal connections with existing businesses and supporting institutions—all of which may further hinder their ability to make successful bids for state contracts.

Acknowledging that some business owners have been “impeded from normal entry into the economic mainstream,” the state of Tennessee has at various times in the last

five decades adopted policies intended to “aid, counsel, and assist in every practical manner disadvantaged businesses in order to preserve free competition on equal terms with those businesses constituting the major part of the businesses community.” Tennessee’s procurement policies at the time of the 2009 disparity study were race-neutral and remain so today. They operate under the adage that a rising tide raises all ships, so what is good for small businesses generally will also be good for businesses owned by African Americans. However, some stakeholders argue that existing barriers affecting African American-owned businesses cannot be fully overcome using a race neutral approach.

Some local governments and the state of Illinois have adopted limited race-conscious procurement policies to help African American-owned and other minority-owned businesses obtain government contracts, but federal courts have placed limits on the adoption of these policies. Policies that take race into account when awarding contracts are permissible only if narrow conditions are met. Importantly, the US Supreme Court has rejected the “claim that past societal discrimination alone can serve as the basis for rigid racial preferences.”

Government officials have used disparity studies to document racial disparities in contracting to demonstrate both the need for remedial action and that other non-discriminatory remedies would be insufficient. These studies have effectively become a necessary first step before implementing any race-conscious procurement policies. It is important to note that even with a comprehensive disparity study in place, the use of racial quotas—which establish a minimum amount or percentage of contracts set aside for businesses based on race—is not allowed under state or federal law.

The draft report finds that race-conscious procurement policies are not feasible at this time given that the data collected by the CPO cannot on their own support the type of analysis needed to demonstrate whether racial disparities exist in state contracting. And even if a new disparity study found such racial disparities, stakeholders may well disagree whether to address them through race-conscious means. For example, none of the six race- and gender-conscious policy recommendations included in the 2009 disparity study were adopted despite the study’s results likely providing the legal basis to enact them. However, data provided by the CPO suggest it is worth looking at whether the state’s race-neutral approach can be improved. Most state departments are not consistently meeting their aspirational goals for contracting with minority-owned businesses, and Go-DBE hasn’t published these data since its 2013-14 annual report. Annually publishing data on whether agencies are meeting their annual aspirational procurement goals for minority-owned businesses could help keep interested parties

informed of agency progress at meeting goals, encourage efforts to identify areas where improvements are warranted, and potentially refine the goal setting process.

Based on these findings, the draft report includes two recommendations to improve data collection and reporting of disparity efforts across state agencies:

- **Should the state decide it wants to update the 2009 disparity study, it would benefit from exploring cost-effective ways to enhance procurement data collection to better compare state procurement spending with the availability of different categories of businesses—including but not limited to African American-owned businesses—and calculate disparity ratios.**
- **Go-DBE should publish in its annual report each state department’s aspirational goals and achievements for businesses owned by minorities, women, persons with disabilities, and service-disabled veterans, as well as other small businesses. This information could also be published on the Go-DBE website; Go-DBE could discuss sharing this information with the staff of Transparent Tennessee, which serves as the executive branch’s clearinghouse for making data more accessible.**