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February 24, 2025

Hon. Pam Bondi, Attorney General
Christine Stoneman, Section Chief
U.S. Department of Justice, Civil Rights Division
Federal Coordination and Compliance Section
950 Pennsylvania Avenue, NW, 4CON, 7th Floor
Washington, DC 20530
Via email to FCS.CRT@usdoj.gov, christine.stoneman@usdoj.gov

Re: Title VI Complaint, New York Department of Economic Development

Dear Attorney General Bondi:

We represent Contractors for Equal Opportunity, a nationwide association of companies negatively impacted by race discrimination in government contracting programs. Please consider this letter a civil-rights complaint under Title VI of the Civil Rights Act of 1964 against the New York Department of Economic Development (DED) for its discriminatory Minority and Women-Owned Business Enterprise Program (MWBE Program). DED is a recipient of federal funds and therefore subject to the nondiscrimination provisions of Title VI. We are filing this complaint with the U.S. Department of Justice because DED receives federal grants from multiple federal agencies.

President Trump's Executive Orders

Since he took office on January 20, 2025, President Trump has issued multiple executive orders requiring federal agencies to identify, investigate, and ultimately terminate race-based programs. Under *Ending Radical and Wasteful Government DEI Programs and Preferencing*, all agencies must recommend actions to align agency enforcement activities "with the policy of equal dignity and respect."[1] Also, the Executive Order on *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, declares it to be the policy of the United States "to protect the civil rights of all Americans" and orders "all agencies to enforce our

[1] White House, Executive Order on Ending Radical and Wasteful Government DEI Programs and Preferencing (Jan. 20, 2025), available here.

longstanding civil-rights laws."[2] Furthermore, under this Executive Order "every contract or grant award" must ensure that the recipient is in "compliance in all respects with all applicable Federal anti-discrimination laws."

Investigating civil rights violations is one of the most fundamental duties of the Attorney General. In this complaint, we are asking you to open an investigation into a state-based supplier and procurement program that discriminates openly against small businesses based on race. Many states operate similar programs (19 states by our count). These programs are similar to the federal Disadvantaged Business Enterprise Program. As you may know, a federal judge ruled that the DBE program is unconstitutional because it discriminates based on race.[3] If that federal program is unconstitutional, then these state-based counterparts are similarly unconstitutional. We therefore request that you investigate these programs and determine that they are operating in violation of Title VI. Each state agency operating such a program receives federal funds and is therefore bound by Title VI and subject to your jurisdiction.

DEC's MWBE Program

The MWBE Program exists to "increase the participation of minority [ ] owned businesses in State procurement opportunities."[4] Under New York state law, DED administers the program by "encourag[ing] and assist[ing] [ ] agencies in their efforts to increase participation by minority [ ] owned business enterprises on state contracts and subcontracts so as to facilitate the award of a fair share of such contracts to them."[5] DEC's rules administering the program require agencies to: (1) set goals for the use of minority-owned business enterprises, (2) consider a bidder's "diversity practices," including their use of minority-owned contractors, (3) require contractors to "submit utilization plans for achieving contract goals established" for the participation of certified minority-owned businesses; (4) accept contractor utilization plans that meet goals for certified minority-owned businesses; (5) enforce the goals by requiring contractors' best efforts; and (6) disqualify contractors that fail to meet the racial goals of a project.[6]

Additionally, state contractors are subject to intense compliance investigations. One such provision requires an "in-depth compliance review," which compares the ratios of "minority group members in a contractor's work force to the relevant availability and expected levels of participation of minority group members

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[2] White House, Executive Order on Ending Illegal Discrimination and Restoring Merit-Based Opportunity (Jan. 21, 2025), available here.
[3] *See MAMCO v. USDOT*, 2024 WL 4267183, No. 23cv72 (Sept. 23, 2024).
[4] Department of Economic Development, Agency Appropriations, available here.
[5] N.Y. Exec. Law § 311(3)(a).
[6] *See* N.Y. Comp. Codes R. & Regs. tit. 5, § 142.1–14. The complete rules are available here: https://esd.ny.gov/sites/default/files/MWBERegulations-120220.pdf.

[ ] on State contracts."[7] In short, if a contractor does not have the correct racial balance of workers, it is subject to penalties or disqualification.

"Minority" is defined under the regulations as including only the following: "(1) Black persons having origins in any of the African racial groups; (2) Hispanic/Latino persons of Mexican, Puerto Rican, Dominican, Cuban, Central American or South American descent of either Native American or Latin American origin, regardless of race; (3) Native American or Alaskan native persons having origins in any of the original peoples of North America; or (4) Asian and Pacific Islander persons having origins in any of the Far East countries, South East Asia, the Indian Subcontinent or the Pacific Islands."[8]

New York's minority- and women-owned business utilization goal is 30%. On November 12, 2024, Gov. Hochul announced a 2024 utilization rate of 32.21%, representing $3 billion in public contracts awarded in the previous fiscal year.[9]

MWBE Program Violates Title VI

Title VI states that no person shall be subject to discrimination "on the ground of race, color, or national origin" "under any program or activity receiving Federal financial assistance."[10] Under this law, "it is never permissible to say 'yes' to one person but to say 'no' to another person even in part because of the color of his skin."[11] Race-based preferences "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[12] "That principle cannot be overridden except in the most extraordinary case."[13]

DED cannot offer any justification to defend its MWBE Program, which illegally discriminates by enforcing a 30% utilization rate for minority- and women-owned businesses in state procurement and contracting. Under *Students for Fair Admission v. Harvard (*which was a Title VI case*),* a program like this one must pass several independent tests. Here, DED cannot satisfy any of them.

First, DED's program is illegal because it does not remedy "specific, identified instances of past discrimination that violated the Constitution or a statute."[14] DED

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[7] N.Y. Comp. Codes R. & Regs. tit. 5, § 143.4.
[8] N.Y. Comp. Codes R. & Regs. tit. 5, § 140.1.
[9] State of New York, Governor Hochul Announces New York State Exceeds 30% Minority- and Women-Owned Business Utilization (Nov. 12, 2024), available here.
[10] 42 U.S.C. § 2000d.
[11] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 310 (2023) (Gorsuch, J. concurring) (cleaned up).
[12] *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (quotation omitted).
[13] *SFFA*, 600 U.S. at 208. DED, as a subunit of the State of New York, is not immune. Title VI explicitly abrogates state immunity. *See* 42 U.S.C. § 2000d-7.
[14] *SFFA,* 600 U.S. at 207; *see also Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021).

has not identified any past intentional discrimination that it perpetrated, or explained how its race-based target is narrowly designed to remedy that past discrimination.

Second, DED cannot "articulate a meaningful connection between the means they employ and the goals they pursue."[15] For example, DED employs the same type of "overbroad" and "imprecise" racial categories employed by Harvard and North Carolina.[16] DED "group[s] together all Asian" business owners and does not explain why business owners from Jordan, Iraq, Iran, and Egypt are excluded from the program.[17]

Third, DED's program uses race as a "negative."[18] White business owners, because they are white, cannot bid on equal footing with minority-owned firms, which have a clear preference and exclusive access to certain resources based on race. DED contracts are "zero-sum" because there are only a limited number of contracts. Therefore, race is used by DED as a "negative": "A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter."[19]

Fourth, DED's program furthers "stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution."[20] It is simply a pernicious racial stereotype to claim, as DED does here, that all black businesses need help because their owners are black, and that no Arab-owned businesses need help because their owners are Arab.

Fifth, and finally, DED's program has no "logical end point."[21] DED has run this program since 1988, and the agency offers no plan to wrap it up. Apparently, it will continue forever: "In short, there is no reason to believe that respondents will—even acting in good faith—comply with the Equal Protection Clause any time soon."[22]

Under *SFFA*, a race-based government program must meet all five of these requirements to comply with Title VI. DED cannot meet any of these, let alone all five.

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[15] *SFFA,* 600 U.S. at 215.
[16] *See id.* at 216.
[17] *Id.*
[18] *Id.* at 218.
[19] *Id.* at 218–19.
[20] *Id.* at 221.
[21] *Id.*
[22] *Id.* at 225.

DED is subject to Title VI

Title VI applies to a "program or activity" that receives federal funds. This includes "all the operations of… a department…of a state," when "any part of which receives federal financial assistance."[23] As the U.S. Department of Justice explains in its Title VI manual, "[W]hen any part of a state or local government department or agency is extended federal financial assistance, the entire agency or department is covered."[24]

According to USASpending.gov, in the last 36 months, DED received $23 million in federal funds from 64 separate transactions.[25] Several different agencies have issued grants to DOA, including the Department of Commerce, Small Business Administration, and the National Institutes of Standards and Technology.

Therefore, it is beyond question that Title VI applies to DOA, and it is forbidden from discriminating based on race, yet it does, as explained above.[26]

USDOJ Should Investigate These Allegations

Based on this clear evidence of a Title VI violation, we ask that you open a formal investigation based on this complaint and find that DED's MWBE Program violates Title VI. Corrective action should include, at a minimum, a requirement that the program be open to all businesses regardless of race, or that the program should be terminated immediately so that all procurement and contracting decisions at DED are race neutral.

Sincerely,

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.

Daniel P. Lennington
Managing Vice President & Deputy Counsel

[23] *See* USDOJ Title VI Manual, p. 21 (quoting 42 U.S.C. § 2000d-4a(1)).
[24] USDOJ Title VI Manual, p. 24 (quoting S. Rep. No. 100-64, at 16 (1988), reprinted in 1988 U.S.C.C.A.N. 18).
[25] The recipient identifier is M8UJVQN4Q5X5 (UEI), 363661802 (Legacy DUNS).
[26] DOA itself admits that Title VI applies to its actions in its nondiscrimination statement, which is available here.