

Equitable Development Toolkit

Local Hiring

Updated August 2002

What Is It?

Healthy local businesses are a basic component of strong, sustainable communities. They generate job opportunities for residents, and that keeps money circulating within the neighborhood rather than draining outward. In urban communities of color, businesses owned by people of color (known to most government programs as "minority-owned" businesses) are particularly important. Research shows that minority businesses hire much greater percentages of minority employees than majority-owned firms do.

Small businesses and minority-owned businesses face many challenges, however. Compared to their numbers, they receive a proportionately small percentage of public contracts. In Virginia, approximately 15 percent of businesses are minority-owned, but in 2001 only 1.4 percent of state contracts were awarded to them. Legal actions and voter initiatives to dismantle or weaken affirmative action programs are exacerbating such trends. Seattle, Washington, eliminated any race-targeted programs in 1998; by 2001, the number of black-owned construction firms with city contracts had declined from 25 to four.

To support the economic health of urban neighborhoods and level the business playing field, many governments and community organizations have created policies and programs to increase opportunities for minority-owned and other emerging small businesses. Most of these programs focus on the construction industry, because it receives a large amount of public money and offers well-paying jobs for people without advanced education. Connections and prior experience are also very important in the construction world, which makes disparities more stubborn. This tool will focus on minority-owned contracting firms, but many of the lessons could be applied to other areas of small business support as well.

There are three major approaches to achieving parity for minority-owned businesses:

- Legislation that creates institutional mechanisms to ensure ample and consistent opportunities for minority contractors;
- Community-benefits agreements that require publicly-subsidized developments to take up demonstrated community needs, like hiring local firms and residents; and
- Efforts by government and community-based organizations to both build the capacity of, and enhance access for, targeted firms.

These measures can have a demonstrable effect. Since 1990, Chicago has consistently met or exceeded its goal of awarding 25 percent of contract dollars (on contracts over \$10,000) to minority-owned businesses. The city also directs 5 percent to women-owned businesses. The Port Authority of New York and New Jersey, which operates aggressive outreach efforts in Queens, Washington Heights, and Newark, increased contracts to small minority- and women-owned firms by 113 percent between 1998 and 1999. This translated to \$189 million in construction, architectural and engineering, and goods and services contracts, which supported 2,770 jobs and \$108 million in wages.

With targeted efforts to break through the isolation of minority-owned firms and build capacity and connections, development projects can begin to return more of a benefit to urban neighborhoods.

Why Use It?

Address Disproportionate Representation

Minorities make up more than 20 percent of the U.S. population but own only 9 percent of all construction firms and receive only 5 percent of all construction contracts. The impact of such a divide is particularly devastating because construction is affected by a capacity catch-22: firms with little capacity are unable to bid on big projects, but without working on bigger projects, companies will never sufficiently expand their capacity to bid on big projects in the future.

This cycle of lack of opportunity and low capacity is too pervasive to be solved by promises of equal opportunity and too deep to be solved by market forces. But even moderate intervention can make a dramatic difference. Assistance on even one contract can dramatically increase a disadvantaged firm's capacity - helping it to break out of the low capacity/lack of opportunity cycle.

Create Community Wealth

Healthy, successful businesses are a basic component of strong, sustainable communities. But many of the businesses within urban communities of color have been devastated by redlining, job flight, and disinvestment.

Job engine

Most minority owned firms employ over 75% minority workers.

Increasing the capacity of these local businesses creates wealth in the community by generating job opportunities for residents. Research shows that minority businesses hire greater percentages of minority employees than majority-owned firms do. A report prepared by the Regional Alliance and New York Building Congress in the mid-1990s found that 90 percent of minority-owned firms rely on a labor force that is at least 50 percent minority, and most had a labor force of at least 75 percent minority workers. As businesses of color are given greater opportunity to grow, they will train and employ more minority residents, who can then reinvest in their communities.

Link Development with Community Benefits

Leverage Public Money

Much neighborhood revitalization investment comes in the form of construction projects. Assuring that local, disadvantaged businesses and workers work on those projects strongly increasing their impact.

Strategies that increase minority contractors' access to and capacity for contracts are

one way of building additional community benefit into any community development or revitalization project. Minority contracting programs are part of a larger community benefits movement, where communities are organizing around publicly subsidized development projects to leverage community benefits like agreements to pay workers a living wage, hire local residents, provide sufficient affordable housing, or provide for displaced homes and businesses. The construction activity generated by new housing, new transportation infrastructure, or any physical community improvem

ents can pump economic benefit into depressed areas with little additional spending.

Target an Industry that Has Both Opportunity and Need

Strategies to support minority-owned businesses focus on construction for several reasons:

1. Construction is an industry that relies heavily on public money. Federal, state, and local governments are responsible for building roads, schools, transportation systems, etc. Anywhere public money is being used, there is a leverage point for community benefits agreements.
2. Construction is a profitable industry that can support workers with good wages even at basic levels of education. Once the skills are mastered, they can become keys to life-long employment opportunities.
3. Even more than other industries, construction has historically been dominated by white men, due to restrictive union memberships, discriminatory hiring practices, and heavy reliance on exclusive networks. Achieving equity within this industry requires outside intervention.

How To Use It

Encouraging greater economic participation by minority firms has two key components: increasing opportunity and increasing capacity. The best programs combine at least one approach from each category. But for any strategy, the first step is to determine who is being targeted, and what the goals are.

Identify Constituents and Goals

Alphabet Soup

SDB

Small Disadvantaged Business (a Small Business Administration term)

MBE

Minority-owned Business Enterprise

WBE

Woman-owned Business Enterprise

DBE

Disadvantaged Business Enterprise (a Department of Transportation term)

To craft a truly successful local minority contracting policy, the participation of the businesses that would benefit from it is essential. So first, the main targets need to be identified. Will the program focus on certain types of businesses within the construction industry, certain types of contracts, very small businesses, etc.? Or will it be focused on all aspects of a particular large construction project? How will eligibility be determined?

Many programs choose to borrow eligibility definitions from federal programs. They usually have a size/income limit, and some definition of the owners' membership in a disadvantaged group.

"Disadvantaged" usually casts a wider net than just racial minorities; it could include, for example, someone with a physical disability.

The Small Business Administration considers general building and heavy construction contractors "small" if they have less than \$28.5 million in average annual receipts. For special trade construction contractors the number is \$12 million. To qualify for SBA's ["Small Disadvantaged Business"](#) certification or its [8\(a\) technical assistance program](#), a small business must be "unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of the United States," and have a personal net worth of under \$750,000.

Once advocates have identified who the targets are, they should bring together an organized group of representatives from among those targeted minority businesses. These business owners are the best suited to identify what barriers they are facing and what sorts of solutions they would like to see. The needs and experiences they identify should be the foundation for any policy plan.

Prove the Need

Once a coalition is organized, research should be done on local agencies and their history of contracting with minority firms. What percent of contracts go to minority firms, compared to the existing number of those firms? Are there particular areas in which they are particularly under-represented? Being able to identify a pattern of neglect will be valuable for two reasons: convincing officials of the need for such a program, and defending its constitutionality once instituted.

In the process, identify any large public subsidies to construction projects. These are potential opportunities for developing agreements to increase participation by local and minority contractors.

Programs to Increase Opportunity

Small disadvantaged businesses are often caught in a catch-22 in trying to achieve parity with more established or non-minority firms. It is easier to get large contracts when you have already gotten large contracts. And the personal connections and networks that have been established are hard to break into, carrying past discrimination into the present. Programs to increase opportunity attempt to break through these patterns by changing the way those selecting contractors do business.

Set Aside or Affirmative Action Programs. The most common approach to increasing opportunity for minority contracting is affirmative action or set-aside programs. An affirmative action minority contracting program needs to include a clear definition of eligibility and a mechanism for checking on the progress toward that goal. There are two major ways that these programs go about encouraging participation: setting target goals for the percentages of contracts going to minority firms, or applying a discount to minority firms' bids so they have a leg up in competing for contracts.

Affirmative action contracting programs take many forms:

- *City ordinance.* An ordinance makes goals for minority participation a matter of citywide policy and generally applies to all or most city contracts. The city of Durham, North Carolina, passed a W/MBE ordinance in 1994 that directs the Equal Opportunity/Equity Assurance director to establish MBE and WBE goals for each contract to be awarded by the City. The goals are stated as a percentage of the total value of work for each contract. The goals take into account the availability of MBEs and WBEs to provide the goods and services to be furnished.
- *Agency policy.* Sometimes a particular agency will commit itself to minority firm participation, and include DBE goals in its Requests for Proposals (RFPs). Most local transportation agencies have some sort of program, because by doing so they can receive partial federal reimbursement of project costs when they hire DBEs.
- *Large development projects.* Any large development, public or private, but especially those receiving some significant amount of public subsidy, is a good target for a specific DBE outreach plan and goals. When Dallas proposed raising rental car and hotel taxes to support construction of the American Airlines Center, a 26 percent "fair-share" minority contracting goal for the project was included-and it proved key to gaining community support for the measure.

The 1998 plan to expand Lambert Airport in St. Louis, Missouri, includes a goal that "disadvantaged business enterprises" account for 30 percent of contractors for design, environmental consulting, and construction. (They achieved 37 percent.) The Market Creek Plaza commercial development in San Diego, which has had a large amount of resident planning input, met its goal that 65 percent of construction be done by community-based contractors.

- *Community benefits agreements* . Sometimes community groups will take the lead on negotiating agreements that include items like local hiring and minority contracting with developers entering their neighborhoods. For more on CBAs, see PolicyLink's [Local Hiring Tool](#).

Affirmative action-type policies must be carefully worded to attend to local needs and meet constitutional requirements. The Supreme Court requires that affirmative action programs be "narrowly tailored." This means:

Narrowly Tailored

Strict race-based preferences and quotas are considered unconstitutional. Programs must be designed to support those businesses that are proven to need assistance in as race-neutral a way as possible.

- Goals must be set relative to availability of qualified firms in the relevant industries;
- Programs must include the option of race-neutral alternatives (like general outreach and technical assistance) in addition to race-conscious goals;
- Quotas are prohibited;
- Waiver mechanisms must be available;
- Factors other than race must be included in determining eligibility (e.g. net assets);
- Duration of the program must be clearly defined and the program must go through periodic review; and
- Program must analyze the degree of burden it places on non-DBEs (e.g., evaluating concentration of DBEs in any one industry);

The best way to ensure that a policy designed to encourage minority contracting withstands challenge is to tie it carefully to a disparity study that shows the policy is needed.

The most well-crafted, progressive policies will make no impact without firm and effective monitoring tools. All set-aside programs should include some way to ensure compliance. A basic approach is to require contractors to document good faith efforts and explain why hiring did not occur in cases where a minority contractor did not win the bid.

Other Options

Measures that encourage small businesses by making smaller contracts, paying up front, and rotating opportunities can all help minority businesses break into public contracting.

Break up large contracts. Cities can also increase smaller firms' access to public contracts without new set-aside programs. Breaking up what would usually be large public contracts into multiple, smaller opportunities, allows firms with lower capacity to bid on city contracts. In the face of Initiative 200, which outlawed race-targeted programs, Seattle, Washington, has begun breaking up its contracts into smaller projects as one way to continue to increase opportunity for disadvantaged businesses.

Offer Advance Payments .Lack of capital up front prohibits many minority firms from being able to bid on public contracts. One way to increase access to public contracts is to offer advance payments to competent businesses that are unable to work on a contract without a little initial assistance. In 2000, Chicago strengthened its original M/WBE ordinance by allowing the city to make advance payments of 10 percent of

the total contract value, up to a maximum of \$200,000. This changed existing law, which had set the limit for advance payments at \$50,000.

Connect DBEs with prime contractors. An important way to increase opportunity for minority firms is just making connections between them and general contractors or owners. An intermediary group can identify DBEs that are serious about bidding for larger projects and connect them with those who are collecting bids. San Diego's Multicultural Contractors Group has secured more than \$25 million in contracts for over 200 membership contractors. Big successes include 80 percent minority participation on a naval housing project and increasing minority participation from 3 to 35 percent on the Otay Mesa pipeline project.

Programs to Increase Capacity

A wide range of training and technical assistance programs have been created to help small and minority businesses increase their capacity and gain parity with other firms. Any comprehensive minority contracting program should include some of these approaches along with those to increase opportunity. Some examples of these programs follow.

Help with Bonding. One focus of technical assistance for minority firms should be help with the bonding process. Most public contracts require a contractor to be bonded, and yet smaller firms often have trouble getting bonded without the experience of larger contracts.

Getting Bonded

Most large construction contracts required that contractors be "bonded." This means that a surety company has analyzed a company's "capital, character, and capacity" and determined that it is able to carry out the work in question. The company will then issue "bonds," which are promises to the owner/developer that the contractor will complete its end of the contract. If the contractor doesn't, the surety company will. Bonds can be made for performance (getting the work done), payment (making sure suppliers, subcontractors, and workers are paid), and bids (assuring a company will take the bid if offered it). Not being bonded is often a major obstacle to the growth of minority-owned businesses.

Knowledgeable guidance through the process can help small and minority firms achieve bond-readiness. The Lambert Airport Expansion in St. Louis, which has met and surpassed its high goals for minority contractor participation, operates one of the more comprehensive efforts to bond minority firms. The Contractor Assistance Program (CAP) initially assesses bonding readiness by evaluating the contractor's bond history, gross receipts in recent years, financial strength, ownership, banking relationship, and performance on past jobs. Based on this assessment, CAP's bonding specialist determines how close the contractor is to being able to obtain bonding, and resources are offered accordingly. Help is targeted to strengthen the company's weaknesses and develop the firm's financial control and reporting tools. Help is also provided on the bonding applications themselves.

The Value of Cooperation

Emerging businesses that co-locate in a larger space can share business expenses such as conference rooms, receptionists, insurance, and copy machines.

Create Business Incubators . Incubator-style programs build firms' capacity by providing a supportive environment and lowering overhead through shared space and other capital costs. The North Amityville Community Economic Council has pioneered an "incubator" project wherein a 15,000 sq. ft. office and

warehouse space is shared by up to seven small disadvantaged businesses who pay market rate rent for the space but save money by sharing costs such as insurance, support staff, and conference rooms.

The Tennessee Valley Authority has implemented this strategy on a policy level. It operates a Business Incubation Program with more than twenty incubator facilities throughout the valley, where tenants share services, equipment, and building space, while the TVA provides technical and financial assistance.

Cooperative solutions like business-incubators can go a long way toward increasing the capacity of small firms. Local governments or CBOs can found and fund incubators and recruit businesses to participate. But this type of strategy can also be adopted on a long-term basis by firms who choose to come together and share costs.

The [National Business Incubation Association](#) reports that the small firms' average stay in an "incubator" is 2.3 years, and they enjoy an 87 percent success rate.

Mentorship Programs. Create mentoring opportunities for large, established businesses to mentor small, aspiring minority firms. A mentor-protégé relationship helps disadvantaged businesses by providing basic support and technical assistance as well as developing a relationship that can be the source of future contracts. It also brings in large business firms as partners and allies in a movement to increase and support minority business enterprises; these mentor-protégé relationships may also grow into future alliances.

Benefits of a Mentor-Protege Program

For Mentors

1. Increased business opportunities resulting from new strategic business relationships.
2. Strengthened long-term relationships with the small business community.
3. Enhanced competitive edge resulting from a broadened, more diverse group of business partners.
4. Introduction to new markets and marketing opportunities
5. Demonstrated commitment to corporate citizenship and community reinvestment initiatives

For Emerging Firms

1. Guidance from recognized business leaders in areas such as strategic planning, budgeting, marketing, personnel, and financial management
2. Increased business opportunities for future growth
3. Heightened credibility as a secure business enterprise
4. Enhanced professional development.
5. Long-term business partnerships

Georgia Small Business Center Mentor Protege Program

Minority Business Loans. Increasing access to capital funds is an essential component of increasing the capacity of minority firms. The following programs work to make capital more accessible for disadvantaged firms.

- The **Tennessee Valley Authority** operates a Minority Business Development Loan Fund (MBDLF), a \$9 million revolving fund that supports minority businesses either in their start-up or expansion with loans ranging from \$50,000 to \$500,000. In the 2001 fiscal year, the fund lent \$1.5 million to 10 companies.
- **Wisconsin's Bureau of Minority Business Development** operates a similar program, the Minority Business Development Loan Program, designed to provide financial assistance for minority business start-up or expansion. This program offers loans for fixed-asset financing and working capital at fixed-rate below-market interest (usually 4 percent).
- **Virginia Department of Minority Business Enterprise** administers a \$1 million Capital Access Fund for Disadvantaged Businesses, through two loan programs within the Providing Access to Capital for Entrepreneurs (PACE) program. This loan fund, unlike those in Wisconsin or Tennessee, provides loan guarantees to banks that fund disadvantaged firms, rather than to the businesses themselves. The guarantee program provides a bank with up to a 90 percent, or \$50,000 guarantee on a loan offered to a disadvantaged firm.
- The [Minority Enterprise Development Corporation](#) is a for-profit community development financial institution in Providence, Rhode Island. Its mission is to increase access to capital for minority and disadvantaged entrepreneurs statewide, and for entrepreneurs in low/moderate income communities. It does this through a range of flexible and targeted lending options.

Structured Help

The Black Contractors Association in San Diego runs a comprehensive Apprenticeship Training Center, an inner city Community Labor Pool, and a Labor Boot Camp, which have produced over 1500 construction jobs.

Comprehensive Programs. Many capacity-building programs incorporate a number of the above elements. For example, Winning Opportunities for Responsible Contractors (WORC) targets companies who do less than \$10 million in business annually. WORC offers classes on the business of contracting - software, bonding requirements, certified payroll, etc., and pairs contractors with First International Bank and Willis Corroon Surety Co. who coach contractors individually. In addition, Willis Corroon has secured a \$1 million line of surety credit for participating contractors who go through the program and necessary steps for obtaining bonding.

Key Players

- *Eligible Business Owners.* Minority-owned and other disadvantaged contracting businesses are themselves clearly the starting point for any minority-owned contracting programs. Their needs and experiences should shape the program.
- *Local Government Agencies.* Minority contracting programs are often focused on public contracts. Government agencies that hire contractors, from public works departments to transportation agencies to boards of education, need to buy into [or, be brought into] the idea of increasing minority contractor participation to make it successful.
- *Prime contractors.* Much of the hiring in a large construction project is not actually done by the owner, but by the "prime contractor" who hires subcontractors for specialized tasks. These prime contractors should be both committed to the concept of increasing minority contractor participation and should be given help and incentives to look outside their usual set of contacts.
- *Community Based Organizations .* Many aspects of minority contracting programs, especially those to increase capacity, are carried out by community groups. Community development financial institutions may offer business loans, while a network of small business owners may set up mentoring or bonding assistance. Community organizations concerned with neighborhood economic development will also often be advocates for creating set aside programs or other approaches to increasing opportunity.
- *Private Owners.* Sometimes increased opportunities for minority contractors will be negotiated between community advocates and private owners on a development-by-development basis.
- *Local Government Leadership.* To have a citywide minority contracting program passed as an ordinance and then enforced, the support and initiative of local government leaders is essential. It is, however, possible for minority contracting programs to be carried out within a single agency or for a single project entirely at the initiative of that agency.
- *Federal Government.* The federal government maintains definitions of small businesses and disadvantaged businesses and other incentive programs that can support or affect local programs.

Challenges

Conflicts with Organized Labor

Project Labor Agreements

For more information on pro-community PLAs, see the National Economic Development and Law Center's "[Getting to the Table: A Project Labor Agreement Primer](#)," which provides case studies and practical advice to community and labor groups.

In Hartford, Connecticut, city ordinances give preference to local hiring and minority contracting. Project labor agreements (PLAs) between the city and unions, however, require the use of union firms, and 90 percent of minority contractors run non-union businesses. The PLAs have taken priority, resulting in widespread, sanctioned non-compliance with the local hiring and minority contracting goals. The \$107 million Hartford Trinity Learning Corridor is an example: only three of Hartford's 68 registered minority contractors worked on the job and half of the contractors were hired from out of state.

There are, however, promising advances being made in writing pro-community project labor agreements, which include requirements about percentages of minority and/or local laborers and subcontractors. In Seattle, a number of PLA agreements have maintained 25 percent minority and women participation rates. In Buffalo, intense monitoring of participation on a PLA agreement governing the Roswell Park Cancer Institute Project achieved 28 percent participation rates for minorities and women. And New York City's Tappan Zee Bridge project designed a PLA that stipulated 60 percent of apprenticeship positions would be filled by minorities and/or women.

False Certification

Ideally, affirmative action programs enhance the competitiveness of women or minority owned firms by increasing their access to projects. Unfortunately, these programs can suffer significant abuses, which undermine their effectiveness. There are a number of techniques that white- and male-owned businesses have used to manipulate the incentives intended for disadvantaged business enterprises (DBEs).

The Washington State administrative code has defined the following schemes as business shams that majority firms have used to manufacture the appearance of a DBE:

- *Conduit*: a DBE agrees to be named as a subcontractor when the work is actually performed by some other contractor.
- *Front*: a majority business that creates the appearance of being owned by a woman or a member of a protected class.
- *Switch Business*: a business that was previously white- or male-owned and controlled that made technical changes to its business structure so it now is reported as woman- or minority-owned and controlled, though the true power structure remains unchanged.

In 2001, a number of prime contractors in New York City were found to have performed over \$40 million worth of fraudulent MBE contracts in the last decade. These prime contractors created the appearance that MBEs were performing the subcontracting positions that they were in fact performing themselves. Lack of

enforcement of New York City's MBE program (see item below), before it disappeared altogether, made it vulnerable to such abuses.

DBE certification must be a dependable, monitored process to ensure that the program is assisting those it was designed to help. The city must also have viable, enforceable punishments to render when firms are found to have operated sham businesses. In Chicago, for example, contractors who fraudulently misrepresent minority participation are banned from doing business with the city for up to three years.

Reluctant City Leadership

Generally, the successful implementation and accountability of ordinances lies in the hands of the mayor and city council. Unfortunately, this means that unwilling city leadership can stymie local efforts.

Unmet Goals

The County of Hamilton, Ohio, which includes Cincinnati, has an official goal to give 15 percent of its contracts to "minority or women-owned business enterprises," but it has rarely gotten above 1998's level of 7 percent.

In 1992, New York City passed a charter that set a 15 percent goal for minority- and women-owned construction business participation, and an 8 percent goal for goods and services contracts. But in 1994, the new administration of Rudolph Giuliani took office, and began supporting actions that led to the program being declared unconstitutional by the New York Supreme Court later that year. In order to revive the program, a disparity study was required. The Giuliani administration, however, never authorized funding for this study and the charter was allowed to sunset. This has resulted in no legislation requiring the city to monitor how much business is done with MBEs or requiring that MBEs receive an equitable percentage of contracts. It is estimated that between 1994 and 2000, New York minority- and women-owned businesses have lost \$2 billion worth of contracts due to the absence of such a provision.

Programs that habitually fail to meet prescribed goals must be held accountable. If city leadership lacks the political will to do so, community groups, residents, and business associations must organize to put pressure on their political representatives to monitor and enforce the program.

Constitutionality of Ordinances

Over the past fifteen years, the U.S. Courts have significantly shaped local, state, and federal racial preference policies. Three particular cases have had a significant impact:

City of Richmond v. J.A. Croson Co.

In 1989, the Supreme Court found Richmond's minority set-aside program to be in violation of the Equal Protection Clause of the Constitution. This was the first time the court had agreed that a standard of "strict scrutiny" was appropriate for race-conscious programs.

In Richmond, prior to the adoption of an affirmative action program, minority business enterprises (MBEs) executed less than one percent of the city's construction work, even though minorities made up more than 50 percent of Richmond's population. After the adoption of the set-aside program, MBE participation increased to approximately 40 percent. After the court case and subsequent dismantling of the program, minority construction business participation fell to 10 percent. The restructured program, which passed the strict scrutiny test, set levels at 16 percent.

The Effects of *Richmond v. Croson*

The fallout after the *Croson* decision resulted in a serious restructuring of affirmative action programs through the United States:

- In 1990, 15 programs were voluntarily dismantled, 35 were re-evaluated and 27 faced legal challenges.
- In 1991, 60 state and local governments spent over \$13 million on disparity studies to show evidence of discrimination.
- In 1993, 30 programs were voluntarily suspended, 90 were being re-evaluated, and 55 were challenged (less than 15 of which were successfully defended).

Metro Broadcasting v. FCC

In 1990, the Supreme Court upheld a federal program that gave preference to minority and female applicants for broadcast station licenses. The court found in a 5-4 decision that the goal of fostering broadcast diversity was a sufficiently important goal to warrant the program, and that a less rigorous standard of "intermediate scrutiny" was satisfactory review for affirmative action programs.

Adarand Construction, Inc v. Peña

The Supreme Court decision in *Adarand* is considered a critical turning point in the federal government's position on affirmative action programs. In 1995, the Court reversed its previous opinion in *Metro*, finding that "all racial classifications, imposed by whatever federal, state, or local government act, must be analyzed by a reviewing court under strict scrutiny." Strict scrutiny, the court argued, was necessary to differentiate benign and malign racial classifications and to ensure that there is sufficient demonstrated need to warrant use of this "highly suspect tool." The strict scrutiny test must ascertain whether the program supports a compelling government interest, and is narrowly tailored to meet demonstrated need.

Background: In 1989, the United States Department of Transportation awarded the prime contract for a highway construction project in Colorado to Mountain Gravel and Construction Co. Mountain Gravel awarded Gonzales Construction (a certified DBE) the bid for a subcontracting job, even though another firm (*Adarand Construction*) offered the lowest bid. Under DOT's "Subcontracting Compensation Clause," Mountain Gravel was eligible for an incentive of 10 percent of the subcontractor contract if they hired a certified DBE - an incentive which more than made up the difference between the two bids. *Adarand Construction, Inc.* brought a case against federal officials after losing this bid, claiming that the race-based presumptions of minority subcontractor programs violated the equal protection clause of the Fifth Amendment.

After many appeals and reversals, the program has been restructured and passed the constitutionality test in 2000. (For detailed on the new DOT program, see their [website](#).)

Success Factors

Ingredients for Success

Hire Construction Professionals. The world of construction is highly specialized, and programs aimed at increasing opportunities for minority firms will have the best success if their staff and leaders include people who are intimately familiar with the terms and practices of the industry. This will help their outreach to minority firms and also their interactions with prime contractors and owners.

Knowledge is Power

Don't just do disparity studies to defend your program. Studies can provide valuable information about how well a program is working and ways they should improve new areas to focus on.

Perform Frequent Disparity Studies. Simply adopting a progressive ordinance or program in your community is not enough; it remains essential to track the program's impact. Annual studies of minority firms' contracting achievements are necessary to justify the policy against legal challenges, as well as important for ensuring that the ordinance continues to have the impact it was designed to.

A thorough disparity study will document the discrepancy between minority and white firms in local industry participation and in awards from city contracts. [The Delaware Disparity Study](#), completed by the Metropolitan Wilmington Urban League in November of 2001, is a useful template for how to go about conducting a disparity study. It includes discussion on the methodology of how to conduct the study, as well as illustrates how to translate disparity findings into policy recommendations.

Build on Federal Resources. The federal government has a number of different programs designed to support small and minority businesses. (See [policy](#) section.) Local efforts should make themselves aware of these programs and capitalize on them. For example, local efforts to help minority firms become bonded can make use of the Small Business Administration's [Office of Surety Guarantees](#). For qualified contractors, this program will guarantee a certain percentage of the bonding company's surety, making them more comfortable in offering bonds to smaller or newer contractors. Federal incentives and federal databases of "disadvantaged businesses" can also be resources for local programs.

Look Beyond Construction. Although construction is a natural first step for many programs, it is also important to examine minority participation in professional services such as engineering or accounting. Where disparity studies find under-representation in professional services, "minority business utilization plans" should establish goals for minority participation. This has been successfully done on the Alameda Corridor project in Southern California. The Alameda Corridor Transportation Authority created a 22 percent minority participation goal for professional services as well as construction and surpassed that goal by hiring firms of color on 29 percent of their professional service contracts (see [Case Studies](#) section).

Financing

Creating target participation goals requires little direct funding. Programs that actively build capacity and create networking opportunities, however, generally require staffing and funding. This often is part of a municipal budget, but there are different ways to approach it.

Federal Funding

DOT. Local transit agencies receive 10 percent back on the cost of a contract every time a Disadvantaged Business is hired. This incentive alone makes it financially worthwhile to develop a minority contracting program, and is one reason why they are most common in transportation-related projects.

CDBG. Community Development Block Grants have been used for some capacity building projects. The Black Contractors Association in San Diego received \$1,500,000 through CDBG funds and used it to build a comprehensive Apprenticeship Training Center. Winning Opportunities for Responsible Contractors (WORC) targets companies who do less than \$10 million in business annually and offers classes on the business of contracting - software, bonding requirements, certified payroll, etc., and pairs contractors with First International Bank and Willis Corroon Surety Co. who coach contractors individually. WORC was partially funded by CDBG money.

State Funding

State economic development agencies may be inclined to support programs to develop local businesses. For example, WORC was partially funded by an award from the California Technology, Trade, and Commerce Agency.

States may also have their own offices of Minority and Women Business Enterprises, like [Washington State's](#) (currently threatened by budget cuts).

Local Options

Non-compliance fines. Any program that has strong enforcement can direct fines for non-compliance back into the program itself.

RFP standards. While active capacity-building and certification programs generally require some funding, building a commitment to increasing minority business participation into agency RFPs and community benefits agreements should be a fairly low-cost measure. San Francisco's Women/Minority/Local Business Use Ordinance, for example, required contract awarding departments to discount bids by up to 10 percent to firms that are at least 51 percent women- or minority-owned. Local business enterprises received 5 percent discounts. When this ordinance came up for renewal in 1998, it was considered to be a potentially no-cost measure - no specific funding was sought for it.

Policy

Feds Can Help

Additional federal resources can be found at [Multicultural Advantage](#), a web portal that provides resources, tools, and information designed to help minority professionals and business-owners succeed.

The federal government has enacted numerous programs to advance the opportunities of small and disadvantaged businesses. These policies are not necessarily the most progressive or the most well-enforced, but they are responsible for many advances, and minority-owned businesses should be aware of all the programs they are eligible for. Better utilization of existing policies will expand the opportunities of minority firms and allow businesses and communities to evaluate and learn from them so as to generate more successful local programs.

Minority Business Enterprise Development

Created in 1983 by Executive Order 12432, the minority business enterprise development program requires each department with substantial procurement or grantmaking authority to develop a Minority Business Enterprise (MBE) development plan. These plans are intended to encourage minority businesses to compete for federal contracts. To carry out these plans, departments from the Environmental Protection Agency to the Department of the Interior each operate their own Office of Small Disadvantaged Business Utilization (OSDBU). While some of these offices are essentially inactive, it is useful for advocates to investigate the OSDBU programs offered by agencies with major work contracts in their communities.

In addition, the Small Business Reauthorization Act of 1997 increased the goals for all government procurement from 20 percent from small businesses to 23 percent.

Small and Disadvantaged Business Certification

The Small Business Administration (SBA) operates programs to assist small disadvantaged businesses (SDB). To qualify as an SDB, a business must:

1. Be at least 51 percent owned and controlled by one or more socially and economically disadvantaged individuals (African Americans, Hispanic Americans, Asian Pacific Americans, Subcontinent Asian Americans, Native Americans, or other individuals who can show a "preponderance of evidence" that they are disadvantaged);
2. Be owned by an individual with a net worth less than \$750,000; and
3. Meet industry-specific size standards.

Certified businesses are added to an on-line database - [Pro-Net](#) - where contracting officers can search for potential suppliers or subcontractors.

SBA offers SDBs price evaluation adjustments of up to 10 percent when bidding on federal contracts in industries where the U.S. Department of Commerce has determined that SDBs are underrepresented because of the effects of ongoing discrimination (including agriculture, fishing, construction, mining, transportation, manufacturing, retail trade, finance, insurance, and real estate service among others). SBA also provides incentives for prime contractors who achieve SDB subcontracting targets.

8(a) Business Development Program

The SBA's 8(a) program offers more intensive support to disadvantaged firms, helping them access management expertise, technical assistance, and capital. The 8(a) program is more competitive than general SDB certification: in addition to meeting the SDB requirements, eligible businesses must have been in operation for at least two years and business owners' net worth cannot exceed \$250,000.

The program's goal is to teach small companies "how to compete in the federal contracting arena and how to take advantage of greater subcontracting opportunities available from large firms as the result of public-private partnerships."

Small businesses in 8(a) can participate in the Mentor-Protégé program where they form a relationship with a successful business, which provides technical and managerial assistance. The relationship may result in joint-venture opportunities to raise capital. In addition, 8(a) firms can receive sole-source contracts, up to a ceiling of \$3 million for goods and services and \$5 million for manufacturing.

HUB Zones

Is Your Small Business in a HUBZone?

To find out if your business is located in a HUBZone, go to <https://eweb1.sba.gov/hubzone/internet/general/findout.cfm>

The "Historically Under-Utilized Business Zones" empowerment contracting program was enacted as part of the 1997 Small Business Reauthorization Act and is run through the Small Business Administration. It encourages economic development in areas defined as "historically under-utilized business zones" and ensures federal contracting opportunities for qualified small businesses located in those areas. To qualify, a small business must meet the same requirements as SDBs, be located in a HUBZone, and employ at least 35 percent HUBZone residents.

In 1997, the government set a goal that HUBZone contracts would account for 2 percent of all government procurement in 2001; 2.5 percent in 2002; and 3 percent in 2003 and beyond.

Department of Transportation's Disadvantaged Business Enterprise (DOT DBE)

The Department of Transportation, which oversees a great deal of federal construction, has a significant impact on minority contractors. Its DBE plan was revised in 1999 to "scrupulously adhere" to the *Adarand v. Peña* decision. It still includes percentage goals-14.6 percent for disadvantaged small businesses in FY 2002, for example-but the guidelines have been very carefully tailored:

- Quotas are prohibited;
- Recipients must set goals based on local evidence of the actual availability of qualified DBEs;
- Recipients must use race-neutral methods (like outreach and technical assistance) as much as possible to meet overall goals;
- Business owners with a personal net worth of more than \$750,000 (excluding the value of the primary residence and the ownership interest in the business) may not participate in the program;
- Firms owned by socially and economically disadvantaged white males must be allowed to participate as DBEs;

- In order to minimize burden on non-DBEs, recipients must address "over-concentration" of DBEs in certain fields and ensure that bidders who make good faith efforts to obtain DBE participation will not lose contracts;
- Recipients have substantial flexibility to adapt the program to local conditions, including a program waiver provision that allows recipients to seek Department of Transportation approval for alternative ways of running the program;
- Contract goals can be waived if bidder demonstrates good faith efforts to meet the goal;
- Individual firms must graduate from the program if they exceed the small business size caps or if the firm's owner exceeds the personal net worth cap; and
- To ensure that the program stays consistent with demonstrated need, the entire DBE program will expire in 2004, unless it is reauthorized by Congress.

The Department of Transportation (DOT) has consistently met or surpassed its goals for minority participation. The following table demonstrates DOT's achievements in FY 2002.

Department of Transportation*
Major Procurement Preference Goals & Achievements FY 2002

Contract Distribution	Goal (percent)	Achievement (percent)	Achievement (\$)
Contracts to Small Businesses	32.0	53.36	\$1,282,908
Contracts to Small Disadvantaged Businesses	14.5	16.46	\$395,872
Contracts To Small Disadvantaged Business Non-8(a)	3.0	5.38	\$129,398
Contracts To Small Disadvantaged Business 8(a)	11.5	11.08	\$266,474
Contracts to Women's Business Enterprise	5.0	3.83	\$92,068
Contracts To Service-Disabled Veteran-Owned Small Businesses	3.0	0.16	\$3,762
Contracts To Certified HUBZone Small Businesses	2.0	3.05	\$73,243

*Preliminary Data. Dollars in thousands.
(Chart taken from <http://osdbuweb.dot.gov/about/dotcont.html>)

The Department of Transportation also runs a Bonding Assistance Program. The program helps disadvantaged business enterprises obtain bid, payment, and performance bonds for transportation-related projects by guaranteeing 80 percent of losses on contracts up to \$1,000,000. The actual bond approval and

issuance are performed by approved local surety companies that accept the guarantee from the Department of Transportation.

Case Studies

Alameda Corridor Business Outreach Program Los Angeles, California

The Alameda Corridor Project, a 20-mile railroad express line that links downtown Los Angeles to the port of Long Beach, was the largest public works project in the U.S. when it was begun. The project cost \$2.4 billion.

"The Governing Board was quite clear in its desire that the Alameda Corridor leave a legacy beyond actual construction of the project."

ACTA

James C. Hankla, CEO

The Alameda Corridor Transportation Authority (ACTA) implemented a stringent and effective Disadvantaged Business Enterprise Program for the construction of the Alameda Corridor. It required that at least 22 percent of professional services work and construction work be subcontracted to DBEs. In addition to establishing these goals, ACTA, the U.S. Economic Development Administration, and the Los Angeles Mayor's Office of Economic Development formed the Alameda Corridor Business Outreach Program (ACBOP), designed to improve the ability of disadvantaged businesses to compete for these contracts.

Through the outreach efforts of ACBOP, the project, completed in April 2002, surpassed its DBE participation goals. Of the total ACTA contract awards, 22.3 percent went to DBEs. Twenty-nine percent of professional services contracts were awarded to DBEs, 36 percent of construction management contracts, and 20 percent of construction services contracts. This translated into \$289 million dollars worth of contracts for 155 DBE companies.

ACBOP provided the following services:

- Notified DBEs of all contracting and procurement opportunities;
- Established ten plan-viewing rooms throughout the Los Angeles region;
- Provided DBEs with access to bonding and capital services through the U.S. Department of Transportation's Bonding Program;
- Assisted with certification;
- Referred DBEs to technical assistance services;
- Assisted prime contractors with DBE outreach; and
- Gave workshops on DBE outreach for small prime contractors.

Minority Contractor firms who approached ACBOP for assistance or who were identified through outreach workshops were referred to ACTA's partner in the Department of Transportation Bonding Program, J.R. Olsen Bonds and Insurance Brokers. Olsen counseled individual contractors through bonding certification. Newly bonded firms were notified when new job announcements and bid specifications were made available and were given access to ten plan-viewing rooms throughout Los Angeles.

"Los Angeles has the richest pool of women and minority owned businesses in the country. Thanks to the dedication of ACTA and the Alameda Corridor Business Outreach Program we have far exceeded even our

own city's expectations for contracting qualified businesses. These companies are providing the talent and drive that will ensure Los Angeles' place as the capital city of the 21st century."

Richard Riordan
Former Los Angeles Mayor

ACBOP surveyed DBEs who are serious about bidding and provided the prime contractors with lists of potential DBEs. This somewhat simple step was incredibly effective in holding prime contractors accountable to making a good faith effort. Once the prime contractors knew that ACTA was aware of which DBEs were serious, the prime contractors had to be even more vigilant at contacting those DBEs. They had no defense for failing to connect with these firms. To ensure maximum accountability, ACBOP also provided the serious DBEs with bi-weekly reminders about the potential bid, including the prime contractors' contact information. These extra steps enhanced communication and produced excellent results.

Because of ACTA's success in meeting its progressive goals for local and minority involvement and completing the Alameda Corridor on time, it has earned a positive reputation and entered into a contract with CalTrans to build a portion of the Pacific Coast Highway. This \$50-60 million construction project went to bid in July 2001 and will be governed by similar outreach programs.

Interstate Avenue Light Rail Portland, Oregon

When TriMet, Portland, Oregon's regional transit agency, embarked on the \$350 million Interstate Avenue light rail project, General Manager Fred Hanson knew that it ought to have a minority contracting component. Hanson had been working at the federal Department of Transportation and he had both experience with minority contracting programs and a deep commitment to community involvement.

Newly Tailored

One of the most important qualities of TriMet's program, says Program Director Bruce Watts, was the commitment from the agency to the goals." The commitment has to start at the top - without that level of commitment, many things will divert the energy into other places," he says.

Hanson enlisted TriMet's director of capital projects, and they recruited Bruce Watts, a longtime community activist with experience in the construction industry, to head the effort. Watts began his approach with community involvement and a lot of patience. There had been not-so-successful programs of this sort promised to the ethnically-diverse neighborhood before, and the first stage of community input was largely venting. But it then moved on to suggestions and recommendations, which TriMet took seriously.

One of the major concerns was that previous DBE programs hadn't factored in any geographical percentages, so while they had technically met their goals for minority-owned contractor participation, most of the contracts still went out of state, which brought little benefit to the neighborhood. In response, TriMet included a "bull's eye" targeting approach. Although they didn't set percentage goals for local firms, they did establish an order of preference, with neighborhood firms coming first, then city, county, tri-county, and state. TriMet also included local hiring provisions in the criteria for selecting subcontractors. The agency directed companies to local workforce programs in its RFP, and expected them to participate in a city apprenticeship program.

Watts kept the community in the loop after receiving their input. He came back and honestly presented to the group the suggestions that could be taken, ones that couldn't, and why. "At all points it was dialogue, not monologue," he says. He then invited them to stay involved and meet candidates for prime contractor.

The program's goal was to direct 16 percent of capital spending to DBEs. TriMet selected prime contractors using a request-for-proposal process, which allowed it to consider things other than cost, such as approach and plans for securing DBE participation.

"The process sent a heck of a message to the contractors - it's not business as usual. We want control. And our contractors got it.

Bruce Watts

TriMet's commitment was made clear to the prime contractor candidates early on. They responded to a detailed RFP, and the four top candidates came to a community meeting to present their plans for achieving the DBE participation goals. "We made it very clear to them that the community was a partner, and they had to be prepared to present to our partner," explains Watts. "There was excitement, also some nervousness. But the contractors were very willing to go through this step."

With that tone of agency-contractor-community cooperation set from the beginning, the program had little trouble meeting, and usually exceeding, its goals. The prime contractors used many different ways to increase DBE opportunity including: selecting a local firm as a DBE/workforce coordinator responsible for notifying DBE firms of opportunities, creating smaller bid packages for subcontractors, and rotating extended subcontracting work among different firms to give experience to more DBE firms.

TriMet also sponsored several get-acquainted networking sessions and compiled a directory of certified DBE contractors that included the information prime contractors said would be useful to them. Technical assistance from the agency included workshops on a range of topics, a daylong session on certification, and networking assistance.

Creative efforts were included as well, such as the NE Urban Trucking Consortium, a collaboration of small trucking firms that had had less than \$50,000 in gross receipts for the past two years. Working together, they got trucking contracts of \$2.5 million over the course of the project. TriMet did run into trouble from the Teamsters Union, which was unhappy about this use of small non-union trucking firms, but the Teamsters stopped short of going to the courts.

The success of the Interstate Avenue program comes down to a four-letter word, says Watts: will. "Will, and a viable plan. That's what doesn't exist in so many situations." Hopefully the success of programs like his will make political will for similar approaches easier to come by in other jurisdictions.

For more information:

Federal Transit Administration, [Lessons Learned #45](#).

Bruce Watts, TriMet Director of Diversity and Transit Equity, wattsb@trimet.org

Resources

Organizations

[Multicultural Advantage](#). A set of links to federal government pages on minority business enterprises.

[Regional Alliance for Small Contractors](#). A New York, New Jersey, Connecticut "industry partnership led by major corporations in construction, public agencies and small businesses to help small, minority, women-owned, and disadvantaged business enterprises compete openly and perform effectively on public and private sector contracts."

[Minority Business Enterprise Legal Defense and Education Fund](#). A nonprofit law firm focusing on defense of minority contracting programs and preparation of adequate disparity studies.

Multi-Cultural Contracting Group. An independent organization that provides a mentoring program and other technical assistance to minority and women contractors in the San Diego area.

Department of Transportation's [Office of Small Disadvantaged Business Utilization](#)

Small Business Administration's [Small Disadvantaged Business Page](#)

Readings

[The Delaware Disparity Study](#), completed by the Metropolitan Wilmington Urban League in November of 2001, is a useful template for how to go about conducting a disparity study. It includes discussion on the methodology of how to conduct the study and illustrates how to translate disparity findings into policy recommendations.

"Networking Across Boundaries. New Directions in Community-Based Job Training and Economic Development. Volume 2: Peer-to-Peer Workforce Development Networks". Ed. Bennett Harrison and Marcus Weiss. Economic Development Consortium, 1998.

"Networking Across Boundaries. New Directions in Community-Based Job Training and Economic Development. Volume 3: Regional Intermediaries Bridging Job Training with Business and Community Development". Ed. Bennett Harrison and Marcus Weiss.