



NATIONAL ASSOCIATION OF MINORITY CONTRACTORS

2018-2019 LEGISLATIVE INITIATIVES

FOR THE 115TH CONGRESS

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NAMC LEGISLATIVE INITIATIVES

The NAMC Mission

The National Association of Minority Contractors (NAMC) is a nearly 50-year old trade association that assists members with building capacity by providing access to opportunity, advocacy, and contractor development in collaboration with strategic alliances. Our mission is to serve and develop the economic base of diverse communities by ensuring equal access to public and private construction contract opportunities. At present, the association is represented by nearly 20 chapters across the country with over 1000 constituent members and more than 30 major corporate partners and owners, strategic alliances, and Legacy Builders with over a billion dollars of project capacity.

A Prominent Voice in the Construction Industry

NAMC is a leading voice for minority contractors in the construction industry to the Congressional Black Caucus on the issues of job creation and Department of Transportation (DOT) projects which support minority contractor participation. To that end, the association proposes the following initiatives.

Our Initiatives

NAMC Calls for Zero Tolerance of Workforce Discrimination & Intimidation on Construction Jobsites

In enforcing Title VII's prohibition of race and color discrimination, the U.S. Equal Employment Opportunity Commission (EEOC) has filed, resolved, and adjudicated a number of cases since 1964. Under the E-RACE Initiative, the Commission continues to be focused on the eradication of race and color discrimination from the 21st century workplace and is seeking to retool its enforcement efforts to address contemporary forms of overt, subtle and implicit bias. NAMC has developed a list of significant EEOC private or federal sector cases from 2003 to the present. These cases illustrate some of the common, novel, systemic, and emerging racism issues in the realm of race and color discrimination.

NAMC Calls for a Long Term Infrastructure Bill

Congressional Update on the Infrastructure Bill. President Donald Trump admitted while previewing his infrastructure bill (which was more a run-through of pet projects), that the administration's proposal could be passed in a series of measures like immigration, health care, trade, etc. – noting that a big, beautiful bill is not in the cards this year. "I don't think you're going to get Democrat support very much," Trump said. The administration's proposal could "be passed in one bill or in a series of measures," A senior administration official told reporters, "It makes much more sense, as Congress is passing legislation, for us to tuck on things that the president cares about as part of those pieces of legislation." Small business has a hard time receiving funding if working on short term bill contracts and an unfunded bill will make that nearly impossible.

SBA Contracting Guidelines

NAMC calls for the SBA to require that recipients track and regularly report utilization data to the Operating Administrations, including each DBE's number of years in the program and the number of DBE subcontracts or prime contracts received since first becoming certified, including but not limited to, companies like Raytheon which has been counted as small business participation. Private sector has counted companies like Magic Johnson Enterprises as a minority small business contractor. **Size standards limit DBE construction contractors to 23 million versus a 33 million dollar limit for airport vendors.** NAMC believes to be this not in the spirit of the SBA programs.

NAMC Calls for Small Business Banking Reform

Federal Banking Regulators Should Not Disallow Construction A/R (Accounts Receivable/Progress Billing or Government Contracts) for DBEs

Generally, banks only loan against work in progress for self-performed work by the largest, most well-capitalized subcontractors and general contractors. Many banks will not loan to contractors at all, specifically due to progress billing. Banks also typically avoid loaning against bonded receivables where the bonding company has a priority lien and almost always exclude unbilled retainage. Banks typically advance more against accounts receivables (up to 80% under 90 days) than inventory (50%) because the work of selling has already occurred. In the case of work-in-progress, the work of converting the "inventory" (i.e., construction) is only partially complete causing banks to shy away.

Additional NAMC Recommendations

Banking Business Loans. The underwriting criteria of banks tends to be unfavorable to small businesses because they do not have adequate collateral, meet credit score requirements, or acceptable levels of liquidity. Authoritative studies have documented that African Americans and Hispanics are less likely to receive a bank loan and more likely to pay a higher interest rate than do similarly situated non-minorities. NAMC makes the following recommendations:

- **Microloan Programs**
Expanding the threshold of microloan programs up to a \$250,000 maximum should be considered for construction firms. Awareness of these programs should also be improved through greater marketing and promotional efforts in minority communities.
- **Community Reinvestment Act (CRA)**
This act establishes a regulatory regime for monitoring the level of lending, investments, and services in low- and moderate-income neighborhoods traditionally underserved by lending institutions. While there has been a great deal of community redevelopment, minority contractors have not been included in redevelopment partnerships. This is an opportunity to expand minority contracting.
- **NAMC Recommendation**
Alternative fiduciary instruments should be considered, where loans are based on merit versus credit.

Workforce Development in the Transportation Industry

- **Minority Job Participation is Dependent on Minority Contractor Participation**
NAMC Board of Directors believe that engaging constituency organizations such as NAMC, whose members are directly affected by the USDOT's policies, is the best approach to identifying best practices and solutions that create a more effective program for inclusion, capacity building, and job creation of the 4.6 million workers needed.
- **NAMC stands committed to job readiness programs** through its Construction Training Center Program to engage our local communities to be a major part of the 4 million skilled workers needed to rebuild the infrastructure of America. We are working with K-12 Science, Technology, Engineering and Math Program (STEM) schools and the NAMC Student Chapter to provide hands-on projects for STEM program students. The **NAMC Construction Training Center Program** provides pre-apprenticeship trade-specific training designed to prepare individuals to enter and succeed in a registered apprenticeship program. NAMC instructors use curriculum offered and certified by NCCER. The program is offered to high school youth, adults, veterans, and underemployed/unemployed individuals.
- **NAMC Supports Disadvantaged Workers**
In addition, we support and are hiring disadvantaged workers reentering the workplace from welfare and incarceration. NAMC provided OSHA 10 training at its annual national conference and encourages local disadvantaged workers to look to the construction industry as a viable career path.

A joint report released by the U.S. Departments of Education, Transportation, and Labor entitled "Strengthening Skills Training and Career Pathways across the Transportation Industry"¹ states "The U.S. Department of Transportation provides over \$51 billion in surface transportation construction funding each year to build, repair, and operate our Nation's highways, bridges, and public transportation systems. **For every \$1 billion in transportation infrastructure investments, 13,000 jobs are projected to be created over the next 10 years.** In addition to these hundreds of

¹ Dated August 2015

thousands of jobs that will be created, transportation employers across the main subsectors of trucking, transit, air, highway, rail, and maritime will need to hire up to **4.6 million workers**—1.2 times the current transportation workforce—in the next decade, due to the industry’s employment needs that will result from growth, retirements, and turnover. Many of these individuals will require training to meet the skill requirements of transportation employers.”

They identify well-paying, high-demand transportation jobs and analyze patterns in education and work experience required for entry, including **on-the-job training requirements** for new entrants to gain full competency. **These jobs can help move minorities out of poverty. Investments in job readiness programs, apprenticeships, and other work-based training programs are helping millions of Americans punch their ticket to the middle class.** Communities in poverty and minorities must be included. Skilled minority workers today are the NAMC contractors of tomorrow.

NAMC Supports No State DBE Waivers that Reduce DBE Business Participation

The purpose of the request for waiver is to implement a race-conscious or non-race conscious goal pursuant to Code of Federal Regulations, Title 49, Section 26.15 so that states may utilize the maximum level of participation and achieve stronger parity and expanded opportunities for minority-owned and disadvantaged business enterprises within the heavy highway construction and engineering industries. In some states, the DBE program is dominated by non-minority Women Business Enterprises (WBEs).

NAMC Supports Federal Procurement Reform

Prohibit Federal Agencies from Procuring Construction Services through Reverse Auctions. Procuring design and construction services are different than procuring off-the-shelf, manufactured commodities. In 2004, the U.S. Army Corps of Engineers (USACE) determined that procuring design and construction services through reverse auctions “should be the very rare exception and not the rule—if used at all.”

Make the Design-Build Construction Process More Competitive by Limiting One-Step Design-Build Procurements. Many qualified design/construction teams—especially small DBE businesses—cannot risk the high cost of producing complete design and engineering technical proposals and, consequently, do not compete in design-build contract competitions where the number of competing teams is unknown. When designers choose not to compete, it limits the prime contractor pool selection on design-build projects. Reasonably limiting one-step, design-build competitions will help spur more design-build competition within the construction industry, leading to more innovative and better value proposals.

S.1526 - Construction Consensus Procurement Improvement Act of 2015

Sponsor: Sen. Portman, Rob [R-OH] (Introduced 06/08/2015)

Committees: Senate - Homeland Security and Governmental Affairs

Latest Action: 10/27/2016 - Placed on Senate Legislative Calendar under General Orders. Calendar No. 656.

10/27/2016 - Reported by Senator Johnson under authority of the order of the Senate of 09/29/2016 with an amendment in the nature of a substitute. With written report No. 114-366. Action By: Committee on Homeland Security and Governmental Affairs

Introduced in Senate (06/08/2015)

(Sec. 3) This bill modifies the design-build selection procedures used by federal agencies soliciting offers to enter into civilian contracts for the design and construction of a public building, facility, or work. Two-phase selection procedures (i.e., submission of qualifications and then the submission of price and technical proposals in response to a request for proposal) must be used when a contracting officer determines that a project has a value of \$750,000 or greater. But for contracts valued at less than \$750,000, the contracting officer makes the same determination under current law as to whether the use of two-phase selection procedures is appropriate when the officer anticipates at least three offers for the contract.

Federal agencies must report, each year through FY2021, on each instance where the agency awarded a design-build contract in which: (1) more than five finalists were selected for phase-two requests for proposals, or (2) the contract or order was awarded without using two-phase selection procedures. The Government Accountability Office must report on agency compliance with design-build contract procedures.

(Sec. 4) The Federal Acquisition Regulatory Council must amend the Federal Acquisition Regulation to prohibit the use of reverse auctions as part of the two-phase selection procedure for awarding contracts for construction and design services. A "reverse auction," with respect to procurement by an agency, is: (1) a real-time auction conducted through an electronic medium among at least two offerors who compete by submitting bids for a supply or service contract with the ability to submit revised lower bids before the closing of the auction; and (2) the award of the contract, delivery order, task order, or purchase order to the offeror based on the price obtained through the auction process.

Government-Mandated Project Labor Agreement (PLA) Contracting Acts

The government requires contractors to negotiate a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project. PLAs typically restrict the majority of employment to those workers whom unions are willing to refer to the project. This leads to a negative impact on non-union companies, small companies, and other disadvantaged businesses as they are frequently excluded from contracting opportunities by such agreements.

Government-mandated PLAs can limit the number of competitors and DBEs on a project. Government mandates for PLAs typically require contractors to use the union hiring hall to obtain workers, under the course of collective bargaining, and pay into union benefit and pension plans that non-union employees will never be able to access. Such changes are impracticable for many contractors and subcontractors, particularly those not historically signatory to collective bargaining agreements.

Government Neutrality in Contracting Act (H.R. 1671). This bill would preserve open competition and federal government neutrality towards the labor relations of federal government contractors on federal and federally-funded construction projects for DBEs at a minimum on projects under one million dollars.

Enforcement and Compliance of the U.S. Department of Transportation's Disadvantaged Business Program

NAMC stands in full agreement with the issues outlined in a letter dated May 15, 2013 from members of the Congressional Black Caucus (CBC) with regard to the U.S. Department of Transportation's Office of Inspector General Audit Report titled "Weaknesses in the Department's Disadvantaged Business Enterprise Program Limit Achievement of its Objectives"² and the CBC's call for immediate corrective action. Areas of deficiency in the program, as documented in the IG's report, which directly affect the ability of disadvantaged businesses to succeed in the marketplace, include:

1. Ineffective program management for the multibillion-dollar DBE program. The IG report documented that DOT had not established a single line of accountability for the program.
2. Operating Administrations and recipients do not adequately oversee or implement the DBE program, partly due to the Department's lack of integrated program management and standardized guidance on DBE practices.
3. The Department does not use program assessment methods, such as performance measures, to manage and improve the DBE program and determine whether the overall program is meeting its stated objectives.
4. The Department does not regularly assess the effectiveness of the Operating Administrations' oversight practices. Operating Administration oversight responsibilities are carried out inconsistently, and most divisions and regions do not perform reviews of DBE certification practices and project sites.
5. **The Department does not effectively monitor or document DBE contractual performance at project sites to prevent the use of "front companies" created to simply win bids.**
6. The Department does not adequately track and, therefore, cannot fully account for its billions of dollars in annual DBE awards and payments. Past collected data has not been validated nor was of "sound quality." Without accurate data on its DBE outlays, the Department cannot determine whether it achieves its DBE goals.

² Issued April 23, 2013

7. Recipients do not adequately develop DBE Firms to succeed in the marketplace. The responsibility to develop DBE firms lies with the recipients who implement the DBE programs in each State. However, recipients focus most of their efforts on helping firms complete the lengthy DBE certification process, leaving few resources in place to help certified firms obtain DBE work on federally funded projects. As a result, State DBE officials stated that certified DBE firms are not sure how to market themselves or identify work opportunities. Without contract work, DBEs cannot grow and develop their businesses to be able to compete outside the program. For example, Maryland has a large database of almost 5,000 eligible DBE firms, but only 560 firms (12 percent) have ever received work as a subcontractor or prime contractor of a federally funded project.

In light of these deficiencies, the IG's report offered the following recommendations to US DOT:

1. The Office of the Secretary should
 - a. Develop comprehensive guidance and best practices for DBE program implementation by involving DBE stakeholders from all levels. The guidance should provide direction for conducting certification processes, certification reviews, and on-site project reviews.
 - b. Formally assign one Department office the responsibility and accountability for integrating and managing the DBE program.
2. The accountable DBE lead program office or the Office of the Secretary should:
 - a. Develop program performance measures to regularly assess the DBE program and evaluate whether it is achieving its objectives;
 - b. Establish a centralized Departmental data system for collecting and tracking DBE commitment and award information and require that the Operating Administrations implement procedures to ensure that recipients are accurately reporting DBE award and other financial information.
 - c. Maintain the Department's DBE website to ensure it contains current information and includes accurate DBE program contact information;
 - d. Develop an oversight and compliance plan with the Operating Administrations to identify specific, required oversight processes and reviews and ensure that a sufficient number of reviews are performed based on assessed risk; and,
 - e. Require that the Operating Administrations work with recipients to develop ways to improve utilization rates and require the establishment of Business Development Programs for firms that have not received DBE work for several years.

Additional Recommendations

NAMC is a contributor to the U.S. Department of Transportation Congressional Black Caucus Roundtable on behalf of diversity and inclusion. This collaboration with NAMC and other minority organizations is a forum to engage meaningful dialogue and accountability, particularly with regard to Minority Business Enterprises (MBEs) where issues are most acute. We also make the following recommendations for compliance and enforcement of the DBE program are:

1. Title VI as a viable approach to enforce the anti-discrimination provision of the 1964 Civil Rights Act aligned with placing a recipient's federal funds in jeopardy;
2. a more robust investigative initiative from the Office of Federal Contract Compliance (OFCCP); and
3. allocation of financial resources to hire professional expertise for assignment to projects who are responsible for monitoring compliance of DBE programs.

With its comprehensive knowledge of the industry and cumulative expertise, NAMC also suggests that construction organizations such as itself can serve as substantive partner in executing initiative of monitoring and compliance. **One percent of Federal DOT non-compliance costs DBE firms 1 billion dollars in contract participation annually.** Deficiencies in the oversight and management of the Federal DBE program include DBE and other core civil rights programmatic responsibilities as part of staff performance expectations upon which they will be evaluated.

As an example, in 2015, as documented in a report issued by the Minnesota Department of Transportation's Office of Inspector General, MnDOT overused its "good faith effort" to meet the project goals for Disadvantaged Business Enterprises. NAMC sent a letter to MnDOT staff and Governor Mark Dayton in support of the advocacy initiatives of the NAMC Upper Midwest Chapter.

NAMC Continues to Call for the Justice Department to Take Action Against Fraudulent DBEs

The faces of DBE businesses should reflect the diversity of local communities. Cities and states owe it to their residents to support minority firms, beginning with tighter DBE program oversight. If a state has lax compliance standards, then, of course, there will be firms who are willing and able to defraud the system.

One construction company paid \$5.4 million to the United States to resolve allegations that it fraudulently billed the government for work on multiple projects on Camp Pendleton and other military bases, the U.S. Attorney's Office in San Diego has reported. It was alleged that Harper Construction, Inc., a privately-held general contractor headquartered in San Diego which earns a substantial portion of its revenue through government contracting on construction projects across the country, **knowingly used fraudulent small disadvantaged businesses, then falsely certified to the government that it used legitimate small disadvantaged businesses.**

The settlement involved four government contracts for facilities at Camp Pendleton and Camp Lejeune. As part of the contracts, **Harper was required to subcontract a certain percentage of work to small disadvantaged businesses — a stipulation meant to ensure that small subcontracting businesses also benefit from federal dollars.** Federal prosecutors said that Harper claimed that it met this requirement when, in fact, it subcontracted with fraudulent small disadvantaged businesses. According to court documents, Harper also allegedly required these small businesses to pass through all of their work to an affiliated large business, Frazier Masonry Corporation.

“This type of fraud siphons taxpayer dollars and takes away opportunities from legitimate small businesses for which this money was set aside,” said Southern California District U.S. Attorney Laura Duffy. MWBEs should continue to bring light to these compliance issues. NAMC commends U.S. Attorney General efforts to root out fraudulent DBE companies.

Conclusion

NAMC desires to offer effective solutions for meeting DBE goals across the country. We will continue to collaborate strategically with our respective alliances, elected officials, and transportation leaders to shape meaningful and effective solutions that align with our mutual objectives.

Respectfully,



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“Adversity can engulf the individual but not the group. If you are part of the group, it weakens the adversity.”

— *Raymon Perkins Dones, NAMC Founder*