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Minority Business Enterprise Legal Defense and Education Fund

Before the United States House of Representatives
Subcommittee on Management, Organization, and Procurement
Committee on Oversight and Government Reform

Washington, DC
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Good morning Madam Chairwoman and members of this subcommittee. My name is Anthony W. Robinson, and I am President of the Minority Business Enterprise Legal Defense and Education Fund (MBELDEF). Our organization was founded by the late Congressman Parren J. Mitchell, to act as a national advocate and legal representative of the minority enterprise community. We promote policies affecting the equitable and full participation of minority businesses in the national and international marketplace. We attempt to provide non-partisan opinions on matters affecting these enterprises.

We appreciate the subcommittee providing us this opportunity to represent the class interest of minority entrepreneurs who continue to rely on the federal marketplace as a primary source of opportunity.

BACKGROUND

According to the most recent data published by the U.S. Census Bureau, minority-owned businesses now comprise approximately 21% of the 27 million U.S. businesses and they are growing very rapidly. Between 2002 and 2007, the percentage increase in the number of firms owned by Hispanic Americans was over three times that of whites; the percentage increase in firms owned by Black Americans was over four times that of whites; and the percentage increase among Asians owned firms was just under three times that of whites.¹

As we project forward, this represents a rapidly changing business demographic profile. The advent of public policies encouraging minority participation and population changes are producing a growing parity in the number of businesses that are owned by minority and other historically underrepresented groups. However, because of pervasive discrimination there remains a tremendous disparity in the relative capacity and scale of minority-owned businesses in comparison to businesses owned by whites.

The global nature of the economy is forcing upon small and minority-owned businesses the need to increase scale and capacity to compete successfully or

¹ www.census.gov/econ/sbo.

merely survive. Globalization has moved major corporations to reduce the number of firms they use in their supply chain. In addition, there continues to be growing phenomena of government organizations bundling contracts.

Minority contractors who manage to overcome these obstacles are frequently confronted with racial discrimination in attempting to bid for, obtain, and perform construction contracts. In a recent survey by the economic research firm Euquant, they surveyed 350 of the fastest growing minority-owned firms relative to the significance of discrimination in their industry. The survey results found eighty percent (80%) of the firms in communication and utilities, forty-six percent (46%) in transportation; fifty-seven percent (57%) in heavy construction; and fifty-three percent (53%) among general and specialty contractors considered discrimination a very significant factor within their industry.²

The evidence of discrimination against minority contractors is stark and affects all aspects of market access, utilization and performance. Quantitative studies, as well as anecdotal reports, detail the considerable discrimination based on race and national origin that confronts minority contractors in all parts of the country and in virtually every industry. These discriminatory practices have been documented extensively in case law, regional disparity studies, and congressional hearings.

The discrimination is not limited to one particular minority group; instead disparity studies show conclusively that businesses owned by African-Americans, Hispanics/Latinos, Asians, Pacific Islanders, and Native Americans all confront discrimination in their efforts to form, grow and maintain businesses.

SUMMARY OF FINDINGS

In a collaborative effort between the Minority Business Enterprise Legal Defense and Education Fund (MBELDEF), the National Black Chamber of Commerce (NBCC) and the Philadelphia Chapter of the National Association of Minority Contractors (NAMC), we conducted field hearings in eight U.S. cities. The cities included Philadelphia, Chicago, St. Louis, New Orleans, Houston, Washington, DC, Portland and Richmond. Testimony provided by nearly sixty witnesses, including construction contractors and others directly involved in the implementation of minority inclusion programs, provides us with a clear and unimpeachable perspective on the nature of the discrimination they face. What the testimonies document are the operation of discriminatory systems that, independently are troubling enough, but in combination yield devastating outcomes

² T. Boston and Linje Boston (October 2007) "Increasing the Capacity of the Nation's Small Disadvantaged Businesses" Research Report prepared for the Congressional Black Caucus Foundation and entered into the Congressional Record as part of testimony before U.S. Senate Committee on Small Business and Entrepreneurship, September 11, 2008, 63 pp.

for the survivability of minority construction contractors and the creation of job opportunities for minorities in the construction industry.

Finance

Minority-owned construction firms face significant discrimination in the financial arena. They are less likely to receive loans than non-minority firms. Banks apply tighter lending standards for minority-owned construction firms than to their non-minority competitors. Creditworthy minority-owned construction firms are denied loans because they are minority-owned and, in some cases, have been forced to accept non-minority equity partners in order to qualify for loans. SBA and DOT loan programs and Federal Reserve Community Reinvestment Act are ineffective in increasing lending to minority-owned construction firms, fundamentally because they do not have a significant effect on bank lending procedures.

The testimonies of our witnesses have been buttressed by numerous studies that continue to document the racially discriminatory barriers minority firms encounter when pursuing debt and equity funding. A study by Ken Cavalluzzo analyzed credit applications, loan denials and interest rates paid across gender, race and ethnic characteristics of the small business owners. He gathered data on businesses that applied for credit and those that did not apply because they felt their application would have been turned down. He found large unexplained differences in denial rates between African American and white male owned companies that could only be attributed to discrimination.³

In a 2004 study conducted by Susan Coleman examined access to the capital for women and minority owned small firms and found that after controlling for differences in human capital characteristics of owners, minorities were significantly less likely to be approved for loan requests and they were also significantly less likely to apply for loans because they assumed they would be denied.⁴ Karlyn Mitchell and Douglas Pearce (2004) found that African American and Hispanic firms are significantly less likely to receive bank loans than are white business owners. (cite?)

The inability of minority-owned construction firms to meet bonding requirements seriously constrains their participation. Approaches to risk management that have proven to be effective in dealing with this problem are not fully utilized. Insurance brokers lack incentives to serve the minority-owned construction firms, whose contracting opportunities are generally smaller in size.

³ Ken Cavalluzzo & Linda Cavalluzzo & John Wolken, 1999. "Competition, small business financing, and discrimination: evidence from a new survey," Proceedings, Federal Reserve Bank of Chicago, issue Mar, pages 180-266.

⁴ Availability of Financing to Small Firms Using the Survey of Small Business Finances, by Karlyn Mitchell and Douglas K. Pearce SBA Office of Advocacy, May 2005, Under contract number SBAHQ-03-Q-0016.

Enforcement of MBE Regulations

The certification of minority contractors is fraught with problems. Minority certification places minority-owned construction firms at a competitive disadvantage when competing for work as prime contractors, relegating them to subcontracting. Lack of enforcement discourages minority participation. Prime contractors use a variety of tactics to discourage minority participation, such as slow payment, unjust termination, forced reduction in bid price, forcing subcontractors to pay liquidated damages, requesting bids without intending to use the contractor, and refusing to assist minority-owned construction firms to obtain equipment, supplies and financing. When project owners fail to challenge these tactics and regulators fail to enforce the law, minority contractor discouragement is exacerbated.

Private Sector Participation

One of the reasons that government minority business programs are important is that the discrimination and disparities in the private sector are so pervasive. There has been an enormous amount of research documenting the fact that private sector discrimination, where minority business programs are not in place, is far greater than in the public sector where such programs do exist. I would direct the committee's attention to many of the disparity studies that my colleague, Mr. O'Bannon is putting in the record today for ample evidence of private sector discrimination. Another problem is that, unfortunately, existing public sector minority business programs are insufficiently effective in preparing minority construction firms to compete for work in the private sector. We must improve and strengthen these programs so that they do more to allow minority businesses to transfer their skills and experience from the public sector to the private sector. We may also need to consider new legislation to more effectively prohibit discrimination in the private sector. Without these improvements, minority-owned construction firms will continue to work almost exclusively in the public sector. .

Impact of Unions, PLAs and Exclusionary Agreements

It is clear that the construction trade labor unions have been, and remain, a serious obstacle to the participation of minority contractors and workers in the construction industry. They intimidate minority-owned construction firms to discourage utilization of minority construction workers, discourage workforce development in higher-paying skilled trades, send less qualified workers to minority-owned construction firms, and discriminate against minority-group workers in apprenticeship programs. The execution of project labor agreement was also cited as disadvantageous to minority owned construction companies and their desire to employ minority workers.

I would like to give you some specific examples of real business owners who have confronted discrimination. This represents a sampling of the testimonies we have collected. With the Chair's permission, we may supplement our testimony with additional examples at a later date. It is critical that the Committee understand how very difficult it is for these businesspersons to come forward and share their experiences. By coming forward, they are putting their businesses in jeopardy of being blackballed and frozen out of future business opportunities with larger companies that dominate their market or industry. I hope that you will all carefully consider the sort of courage and commitment to justice required to those kinds of risks. I will submit letters and emails providing details of these entrepreneurs' stories for the record. However in the interest of time, I will provide only a short synopsis anonymously of the difficulties they have experienced

INDIVIDUAL TESTIMONIES

- A Louisiana concrete contractor was rejected by six banks despite the fact that he worked for some of the largest real estate development companies in the country, and had been an officer of the city government with responsibility for putting finance deals together. He therefore knew what the banks were looking for and knew the bankers personally. He had contract commitments from customers who were willing to go with him to the bank to verify their commitments. Nevertheless, he was forced to diversify his ownership to include a white minority partner before any of the banks would approve a loan. The only difference in his presentation to the banks before and after loan approval was the presence of a white equity partner. The critical variable was not the financial strength of his presentation because he had a wealthy black football player that was willing to act as credit backer, but the banks still rejected the loan application. Only when the white credit backer was presented did the banks approve, so the issue had to be the credit backer's race.

His is an 8-year-old business with 45 employees. He has generated 25% annual growth even during the recession with \$10-15 million annual sales and \$800,000 to \$1 million in annual profits, which he used to retire his debt by 50% in the last two years. He has three times the cash flow needed to cover debt service on three new plants, but still can not get a loan for a single new plant unless he has a backer. In spite of his obvious creditworthiness, he is facing the same discrimination today that he faced as a start-up business. No matter how strong his business is, he must have a "secondary source" of repayment before the banks will lend to him, and he has documentation from the banks to prove it.

- An African-American contractor in Richmond, Virginia faced disparate treatment in his competition for construction, demolition, and disposal contracts. After his bid for a city demolition contract was determined to be the lowest, the contract was split in half – resulting in a majority contractor receiving a portion of the contract as well. In other cases where he was the lowest bidder and the contract award was split, majority contractors would receive larger shares of the work despite their higher bids. In another case where he had the lowest of four bids and another African-American contractor submitted the second lowest bid, the contract was subsequently awarded in part to all four.
- An African-American electrical contractor in Philadelphia, Pennsylvania was forced to join the International Brotherhood of Electrical Workers in order to continue to provide services to the Philadelphia School District under the terms of a union-only project labor agreement (PLA). The PLA provided that minority contractors who joined the union because of the PLA but were never unionized prior to the PLA, would be permitted to utilize their own work force of skilled and semi-skilled workers rather than workers provided by the union hiring hall. Six of the contractor's nine employees were signed as apprentices. The apprentices were told that apprenticeship classes would begin three or four months later. When the classes began, they learned that all the other participants in the apprenticeship program had been given the benefit of up to ten weeks pre-apprenticeship training, including mathematics courses. The minority apprentices had difficulty with the geometry, trigonometry and other subjects, having been out of school six to seven years. The union terminated all six apprentices, banning them from continuing to perform work that they had been successfully performing for years and denying the minority contractor the benefit of utilizing the workforce he had personally trained and should have been allowed to employ under the terms of the PLA. The contractor is now litigating this and other related issues with the IBEW in federal court.
- A leading second-generation New Orleans African-American general contractor has been in business for eighteen years, and has done business throughout the Gulf region and in more than a dozen countries. He is an 8A and HUB Zone program participant. Recently he paid cash for a 50,000 square foot strip mall and a 26-unit condominium complex worth \$8 million. He has perfect credit and substantial deposits on account with Omni Bank, Chase and Capital One. He has done business with Chase and Capital One for years and they know him well. Yet even though he has perfect credit and has \$8 million in real estate as collateral, when he sought a loan of \$1.5 to \$2 million and was not able to get a response for three months from these banks to complete the project renovations. He has over \$20 million in bonding capacity and an 18-year track record, but still cannot

get a modest working capital loan, even from banks that have known him, and profited from his business, for years.

- Another African-American contractor encountered difficulties while working on a bridge project in Maryland. The Ironworkers Local said that they were informed by the business manager of the ironworkers in another jurisdiction that the contractor only hired minorities and told him that was not going to happen in Baltimore. The contractor explained that, while he planned to hire minorities on the project, he did not have a problem hiring non-minorities, some of whom he had already identified. He agreed to release the non-union minorities he had hired and hire his workers through the union hall. The union initially sent him a crew of four, two of which were minorities that were so obviously unqualified that they themselves wondered why the union had sent them. They were on probation (complete with ankle bracelets) and had to receive visits from their probation officer twice a day. Though they both carried union cards identifying them as journeymen, they did not know how to read blueprints and did not know how to tie steel. When the contractor complained to the union for sending unqualified workers he was told, “you asked for blacks and we sent you blacks.” The contractor explained his dilemma to one of his non-minority workers, who told him that he knew of many minority ironworkers who could tie steel. When he contacted them he was asked why he had not contacted the black ironworkers, and was told that there are hundreds of black ironworkers were “sitting on the bench” waiting for a call to work. When they learned that an African-American had been awarded the contract, they felt that they would get an equitable opportunity to work but had never been called. The union refused to call minority ironworkers who were qualified.
- An African-American general contractor in Richmond, Virginia formed a joint venture with other African Americans in an effort to pool their resources, knowledge and experience. The group faced disparate treatment in the bidding process for the construction of 106 manufactured homes through HUD. They were selected as finalists and invited to compete in a defined, multi-step process. However, the local agency failed to follow its own steps in the process that had been outlined before awarding the contract to a majority firm with less experience. Through its bid protest, the group discovered that they had been assigned a “zero” on the financial component of their evaluation by the white committee members even though they “had four banks backing them” and “more money than everyone else [bidding] combined.”

In another example of disparate treatment, the group bid on, and won, a contract in Petersburg, Virginia for mixed use and income apartments. Subsequently, certain issues regarding parking and historical preservation were identified. Although the group identified efficient solutions, the city manager said he doubted their figures and that the contract would be

resubmitted for bidding. A majority contractor with strong political ties was ultimately awarded the project.

- Another African-American contractor in Richmond, Virginia successfully bid on the first large contract awarded to a minority firm by a local university. The university had a “dog and pony show” congratulating him. Once the project commenced, it became clear that drawings were incomplete. The contractor proposed the necessary solutions and price, but did not receive approval. An African-American from the university working supportively with the contractor was terminated. Ultimately the in-house renovations department took over the project. The contractor was advised by the campus diversity purchasing director to “just let it go.” The contractor was not compensated for a large amount of the work performed before his removal.

Clearly racial discrimination remains a very serious problem in government contracting. We strongly urge this subcommittee to continue to investigate and document this discrimination so that we can ensure that the government is adequately addressing this very serious problem. Thank you for your attention.