

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2561 Rayburn House Office Building
Washington, DC 20515-6515

MEMORANDUM

TO: Members, Subcommittee on Contracting and Infrastructure
FROM: Kweisi Mfume, Chairman
DATE: June 10, 2021
RE: Subcommittee Remote Hearing: “Utilization of Small Contractors in the Infrastructure Plan”

The Committee on Small Business Subcommittee on Contracting and Infrastructure will meet for a remote hearing entitled: “Utilization of Small Contractors in the Infrastructure Plan.” **This hearing is scheduled to begin at 1:00 P.M. on Thursday, June 10, 2021, via the Zoom platform.** The hearing will focus on the importance of infrastructure investment and how it will promote contracting opportunities for small businesses, who will play a central role in upgrading our nation’s infrastructure. The hearing will provide Committee Members the opportunity to learn more about where contractual opportunities lie as well as the resources small businesses will need to undertake infrastructure projects.

Panel

- Ms. Sheila Ohrenberg, National President of Women Construction Owners and Executives (WCOE) and President of Sorella Group, Kansas City, KS
- Mr. Ralph Thomas III, Executive Director Emeritus of the National Association of Minority Contractors (NAMC) and Attorney, Law Offices of Ralph C. Thomas III PLLC, Washington, DC
- Mr. Josh Bone, Executive Director of ELECTRI International, Washington, DC
- Ms. Annie Mecias-Murphy, Treasurer and Board Member of the Associated Builders and Contractors (ABC) Florida First Coast Chapter and Co-Owner & President of JA&M Developing Corp., Pembroke Pines, FL

Background

The current infrastructure is deteriorating, with bridges, highways, and roads sorely in need of repairs. Despite being one of the wealthiest countries in the world, the U.S. ranks 13th in the overall quality of its infrastructure.¹ The American Society of Civil Engineers recently gave America a C-grade in its infrastructure report card and has been consistently giving it low scores for years.² Moreover, our antiquated infrastructure system is inadequate to deal with today’s realities, which

¹ Klaus Schwab, World Economic Forum, *The Global Competitiveness Report* (2019).

² Am. Soc’y Of Civil Engineers, *A Comprehensive Assessment of America’s Infrastructure* (2021).

include the effects of climate change and the need for broadband connectivity.³

The country needs robust infrastructure to facilitate commerce and economic growth. Many small firms rely on infrastructure systems daily to conduct their businesses and reach clients, both domestically and internationally. An investment in infrastructure would directly impact these small firms because they would be able to take advantage of the increased capacity and the efficiencies in these systems and, in turn, become more productive and competitive.

Equally important, such investment supports the millions of small businesses and employees that directly and indirectly support the development, modernization, and maintenance of the many facets of infrastructure, which include surface transportation, water, the national electric grid, and broadband. In the construction industry alone, it is estimated that there are 3 million small businesses, employing over 82% of all the U.S. employees in this sector.⁴ An investment in infrastructure has the potential to put these companies to work for years to come, promote the creation of new businesses, and create millions of jobs.

American Jobs Plan

On March 31, President Biden unveiled the “American Jobs Plan,” the Administration’s proposal for infrastructure investment. The plan would address an array of infrastructure needs, including:

- modernizing 20,000 miles of highways and roads, repairing 10,000 bridges, replacing buses and rail cars, improving airports and ports, and expanding transit and rail into new communities;
- eliminating all lead water pipes, modernizing wastewater and stormwater systems, renewing the electric grid and providing high-speed broadband to all Americans;
- retrofitting two million homes and commercial spaces, upgrading schools and child-care facilities and improving VA hospitals and federal buildings; and
- revitalizing manufacturing to protect the national supply chain and investing in R&D and critical technologies that will further our national defense and allow the U.S. to remain competitive.

In addition, the American Jobs Plan calls for \$100 billion for workforce development programs, which would complement and support the millions of jobs created as a result on an investment in the nation’s infrastructure. In general, the proposal focuses on a new Dislocated Workers Program and sector-based training programs which would prioritize underserved communities and communities hit hard by the changing economy. It also focuses on apprenticeships and pre-apprenticeships to ensure that women and people of color are better positioned to access infrastructure-related jobs.

Federal Procurement and SBA’s Contracting Programs

Congress has established a series of policies to ensure small businesses are able to participate in the federal procurement process (i.e. the process by which agencies acquire good and services)

³ See: Adie Tomer et. al, Brookings Metropolitan Policy Program, *Rebuild with Purpose: An affirmative Vision for 21st Century American Infrastructure* (Apr. 2021).

⁴ U.S. SMALL BUS. ADMIN, *2020 Small Business Profile* (2020).

and receive their fair share of contracting dollars.⁵ These policies include, among others, the following:

- the establishment of government-wide goals requiring that 23% of all eligible prime contracting dollars be spent with small businesses and requiring SBA to ensure that this goal is met or surpassed;⁶
- the establishment of government-wide goals for certain subsets of small businesses at the prime and subcontracting level (5% for small and disadvantaged businesses, 5% for women-owned small businesses, 3% for HUBZones and 3% for service-disabled veteran-owned small businesses) and requiring SBA to ensure that these goals are met or surpassed;⁷
- requiring that contracting opportunities between the micro-purchase threshold (currently at \$10,000) and the simplified acquisition threshold (\$250,000) be generally reserved for small businesses;⁸
- requiring that contracting opportunities above the simplified acquisition threshold (\$250,000) be reserved for small businesses under certain circumstances;⁹ and
- requiring subcontracting plans when a contractor, who is not a small business, receives a contract that is expected to exceed \$750,000 or \$1.5 million in the case of construction.¹⁰

These policies also include the creation of contracting programs administered by the SBA that reserve contracts for certain types of small businesses through set aside and sole-source opportunities. In particular, the four contracting programs are: the 8(a) program (which is for socially and economically disadvantaged individuals or groups), the HUBZone program, the Women-Owned Small Business (WOSB) program and the Service-Disabled Veteran-Owned Small Business (SDVOSB) program. Currently, the 8(a), HubZone and WOSB programs require formal certification to participate in them. Formal certification is, for the most part, provided by the SBA.¹¹

To the extent that federal agencies are the ones procuring goods and services to implement federal initiatives, these policies would be of general application, thereby potentially representing contracting opportunities for small businesses at the prime and subcontracting level.

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

In addition to conducting its own procurements, each year DOT distributes substantial funds to state and local governments, public transit, and airport agencies to finance transportation projects.¹² It is precisely for these instances that the DBE Program was created. The purpose of the DBE program is to remedy discrimination and ensure a level playing field for minority and

⁵ Robert Dilger, Cong. Rsch. Serv., R45576, *An Overview of Small Business Contracting* (Feb. 2021).

⁶ 15 U.S.C. §644(g)

⁷ *Id.*

⁸ FAR §19.502-2(a)

⁹ FAR §19.502-2(b)

¹⁰ FAR §19.702(a)

¹¹ Except in the case of the WOSB program where, in addition to the SBA, there are 4 third-party certifiers that issue formal certification.

¹² DOT's Office of Civil Rights, Disadvantaged Business Enterprise website, available at: [Disadvantaged Business Enterprise \(DBE\) Program | US Department of Transportation](#)

women-owned small businesses competing for transportation contracts assisted by certain DOT funds.¹³ The majority of transportation and infrastructure initiatives related to roads, bridges, airports, ports, and rail will presumably be implemented through DOT financial assistance, hence the importance of the DBE program.

Congress first statutorily authorized the program in 1983 and has reauthorized it on multiple occasions, most recently in P.L. 114-94, the Fixing America's Surface Transportation Act (FAST-Act). The FAST Act requires that, unless the Secretary of Transportation determines otherwise, no less than 10% of funds made available for any program under Titles I, II, III and VI of the Act and 23 U.S. Code 403, shall be expended with DBEs.¹⁴ The FAA also manages a separate DBE program for airport concessions.¹⁵

Under the DBE program, a DBE is defined as a small business that is: 1) at least 51% owned by socially and economically disadvantaged individuals and 2) controlled, in terms of its management and daily operations, by the same individuals.¹⁶ In order to participate in the program small businesses certify eligibility through a Unified Certification Program (UCP) which is established by recipients of DOT financial assistance (such as state departments of transportation, transit agencies and port authorities). The UCP serves as a "one stop shop" for businesses interested in DBE certifications and issues certification determinations on behalf of all recipients in that state.¹⁷

While Congress has set a national 10% participation goal for DBEs, the program requires recipients to set their own goals.¹⁸ DOT regulations require recipients of DOT financial assistance who receive the funds from the Federal Aviation Administration (FAA) and the Federal Transit Administration (FTA) and anticipate awarding contracts exceeding \$250,000, to establish a DBE program and set an overall DBE participation goal. Recipients of DOT financial assistance through the Federal Highway Administration (FHWA) must always have a DBE program and set a participation goal.¹⁹ This participation goal must reflect what DBE participation would look like in the absence of discrimination regardless of the 10% national goal and must be based on demonstrable evidence of the availability of DBEs who are ready, willing and able to participate in the DOT-assisted contract. This demonstrable evidence can be obtained through multiple methods, including DBE directories, DBE bidders lists and data from disparity studies.²⁰

In general, recipients of DOT financial assistance cannot use set asides to meet their DBE goal.²¹ In fact, recipients are required to use "race neutral" means (which includes gender neutral means) to achieve as much of their overall goal as possible. These neutral means include aiding small businesses in overcoming challenges such as the inability to obtain bonding or financing and unbundling large contracts so that DBEs can access them at the prime level. If the recipient cannot meet its goal through race neutral means, then it must establish contracting goals (which are

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 49 CFR §26.5

¹⁷ 49 CFR §26.81

¹⁸ See: 49 CFR §26.41

¹⁹ 49 CFR §26.21 & 49 CFR §26.45

²⁰ 49 CFR §26.45

²¹ 49 CFR §26.43

deemed race-conscious). These contracting goals can only be set in DOT assisted contracts with subcontracting opportunities.²² There are no penalties for recipients not achieving their set DBE goal as long as they administer their DBE program in good faith.²³

The DBE Program and SBA Contracting Programs: Similarities and Differences

The DBE program shares with SBA Contracting Programs the overall purpose of leveling the playing field for underserved or disadvantaged small businesses. However, there are multiple differences between the programs and how they work, even with the 8(a) program, which is the one the DBE program most closely resembles. For example, with respect to eligibility requirements, while both programs are for socially and economically disadvantaged individuals, women are presumed socially and economically disadvantaged in the DBE program.²⁴ Also, net worth requirements for individuals to be deemed economically disadvantaged in the DBE program are different to those in the 8(a) program, standing at \$1.32 million.²⁵ In this respect, it is also different from the WOSB program, in which there are no net worth requirements for the owner unless the company is an Economically Disadvantaged Women-Owned Small Business (EDWOSB).²⁶ Also, while DBEs must meet SBA size standards to be deemed small, they must comply with a \$26.29 million annual gross receipts cap, calculated over the preceding 3 years, for FHWA and FTA assisted work.²⁷ Finally, in contrast with SBA contracting programs, there are generally no set asides in the DBE program.²⁸

Conclusion

Infrastructure investment represents an investment in all those small businesses that one way or another support the U.S. infrastructure. The Administration's current proposal for infrastructure investment has the potential of encouraging small business contracting at the federal, state, and local level. In this respect, it is important to understand the scope of the different contracting programs and how they work to maximize small business participation. The hearing will provide stakeholders an avenue to share their perspectives on infrastructure investment, the importance of these programs, as well as the challenges and opportunities in them, to ensure they adequately serve those small businesses for which they were intended.

²² 49 CFR §26.51

²³ 49 CFR §26.47

²⁴ See Dilger, *supra* note 5; 49 CFR §26.67.

²⁵ See Dilger, *supra* note 5; 49 CFR §26.67.

²⁶ 13 CFR 127.200

²⁷ See Dilger, *supra* note 5, 49 CFR §26.65.

²⁸ 49 CFR §26.43