

# Inclusive Procurement and Contracting: Building a Field of Policy and Practice



**PolicyLink**

## Executive Summary

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## Executive Summary

If equity is the superior growth model, then the planned and proposed investments for strengthening America's built environment—its transportation, energy, water systems, and building stock—provide a unique opportunity to advance equitable development. Trillions of dollars in public and private investments are planned to fix our aging infrastructure, to strengthen its resilience against extreme weather and climate impacts, and to retrofit and expand our building stock to accommodate population and economic growth. The construction industry (including architecture and engineering), currently accounts for 4 to 6 percent of the American economy,<sup>1</sup> and is poised to see around 3 percent annual growth through 2020.<sup>2</sup> The distributive benefits of these investments, however, are not assured without intentional and effective strategies to connect historically disenfranchised communities to the impending infrastructure boom.

This study, commissioned by the Annie E. Casey Foundation, surveys the current landscape on inclusive procurement and contracting policies and practices in the infrastructure and construction industries. The goal is to specifically determine how to best position minority-owned, women-owned, and disadvantaged businesses (MWDBEs) to effectively compete for large-scale construction projects in these industries. A successful inclusive procurement program of action is key not only to providing jobs, but also to closing the wealth gap needed to secure the well-being and future of children, families, and the regions in which they live.

This report details the rationale for inclusive practices in this industry and includes historical and current equitable

<sup>1</sup> Combining data from Trending Economics, "United States GDP from Construction," accessed August 23, 2017, <https://tradingeconomics.com/united-states/gdp-from-construction/forecast>, and The American Institute of Architects, "Economic Indicators," accessed February 28, 2018, <https://www.aia.org/pages/183976-abi-february-2018-billings-growth-at-firms->.

<sup>2</sup> "Five-Year Outlook for US Construction Industry Looks Brighter," ForConstructionPros.com, August 26, 2015, <http://www.forconstructionpros.com/business/news/12107494/fiveyear-outlook-for-us-construction-industry-looks-brighter> and Tory Newmyer and Damian Paletta, "Trump Backs off Vow that Private Sector Should Help Pay for Infrastructure Package," *The Washington Post*, September 26, 2017, [https://www.washingtonpost.com/powerpost/trump-backs-off-vow-that-private-sector-should-help-pay-for-infrastructure-package/2017/09/26/02dd02f6-a327-11e7-ade1-76d061d56efa\\_story.html?utm\\_term=.0e5bae2b8066](https://www.washingtonpost.com/powerpost/trump-backs-off-vow-that-private-sector-should-help-pay-for-infrastructure-package/2017/09/26/02dd02f6-a327-11e7-ade1-76d061d56efa_story.html?utm_term=.0e5bae2b8066).

development policies and trends. It also identifies challenges and best practices and sets forth recommendations for strengthening the field of practice. The content of this report is based on an extensive review of the literature, over a dozen interviews, as well as a focus group session sponsored by the Casey Foundation and the Richmond Federal Reserve Bank. The interviews and focus group included subject matter experts involved in supplier diversity in the construction/infrastructure sector representing the public sector, private sector, and nonprofit organizations. The report provides insight into inclusive procurement and contracting policies within the energy, water, transportation, health, education, and public housing sectors. It also considers the field of practice in different geographic regions of the United States.

## Key Findings

This report and its key findings are delineated into four sections related to inclusive procurement and contracting: 1) rationale and background of the field, 2) policies, 3) practices, and 4) field building. Highlights from the policies, practices, and field building sections follow.

## Inclusive Procurement and Contracting Policies

- Inclusive procurement and contracting policies, part of a larger MWDBE field of practice, evolved over a 60-year history into today's complex maze of standards and requirements that differ by the procurement agency, the level of government, and the local and state political environment.
- These policies have emerged in bipartisan contexts that are being reclaimed in many cities, and some regions and states.
- The U.S. Department of Transportation is the best performing among federal agencies regarding inclusive procurement and contracting policies and has withstood numerous legal challenges. Other federal agencies have weaker programs or none at all, reflecting the absence of consistent federal standards or guidelines.
- The current federal administration (Trump administration) is moving to weaken or dismantle key pillars of inclusive procurement and contracting provisions, including the Minority Business Development Agency, and federal policies that encourage local hiring and local procurement on federal contracts.

- State and local governments are the most important venues for advancing inclusive procurement and contracting policies in the infrastructure sector. Federal infrastructure investments are blended with local public funds, and a great deal of infrastructure investment is exclusively derived from state and local revenue.
- Political and legal context matters more than geography. Many progressive states and legislatures—such as California and Washington—have race-averse (aka “race-neutral”) procurement policies. While many southern and mid-western cities have effective inclusive procurement policies despite conservative state-level politics; example cities include Atlanta, Dallas-Fort Worth, Memphis, Minneapolis, and New Orleans. The threat of state preemptions by conservative state legislators, however, can undermine the ability of local governments to implement inclusive policies.
- The growth of race-averse policies has clearly benefitted women over racial minorities. The move to race-averse policies, however, does not necessarily mean that MWDBE procurement practices will become ineffective. Many metropolitan areas within states with race-averse policies are developing innovative, flexible ways to implement inclusive procurement standards. The key strategies include, for example, engaging prime contractors at the bidding phase to identify their inclusive procurement plans and then locking them in at the award stage. It is easier to influence MWDBE policies at the local level than at the state level, particularly in urban areas with large ethnically diverse populations; however, scrutiny and advocacy can similarly influence equity inclusion in state infrastructure investments of more racially diverse states.
- There is no “one-size-fits-all” inclusion policy. The policy levers, revenue streams, business motives, historical precedents, and strategies to strengthen inclusive procurement differ for transportation, water, energy, public housing, health, educational institutions, and other sectors.
- Significant new investments in the water and energy sectors lack a commensurate history of equitable inclusion, but a new generation of these primarily ratepayer-funded investments offer important leverage for community advocates to realize goals of equitable inclusion.
- Political will and MWDBE advocacy are key ingredients to creating effective public policies. The advocacy and constituency for MWDBE policies and programs, however, have waned significantly. An increasing number of large private-sector employers are committed to, and demanding that prime contractors increase, contractor diversity and support the inclusion of people-of-color firms and workers in their construction projects.

## Best Practices/Recommendations

- 1. Strengthen the community constituency for and advocacy efforts around MWDBEs**, with a special focus on defending existing federal programs, preventing and fighting state preemption efforts, and strengthening accountability around the use of public funds for proactive economic inclusion.
- 2. Increase the capacity of local elected officials and agency staff to implement legal (race-averse and race-conscious) and effective inclusive procurement policies.** Strengthen the political will at the local level by training and engaging local politicians on the legal and economic issues to support inclusive procurement policies.
- 3. Develop inclusive procurement policy toolkits by sector** (water, energy, public housing, transportation, health, and education) that account for different business cases, regulatory environments, and sources of revenue (federal, local bonds, ratepayer, self-funded, and privately funded). Align cross-sector policy environments as much as possible to reduce duplicative qualifications, diminish systems hurdles, lessen bureaucracy, and achieve and expand goals.
- 4. Proactively engage the private sector**, including project sponsors and developers, financial institutions, and large prime contractors in an initiative to increase and showcase effective inclusive procurement strategies.
- 5. Use triggers in tax credits and Community Reinvestment Act requirements** to build regional capital pools that can provide lines of credit and bonding capacity to help grow participating MWDBEs.
- 6. Strengthen accountability mechanisms to ensure policy goals are met, including assigning 1 percent of project costs to support capacity building of MWDBEs.** This fee would represent a dedicated revenue stream to support data collection and reporting, proactive compliance, contractor training and coaching, etc.

## Inclusive Procurement and Contracting Practices

- Inclusive procurement policies and their realization in practice are disconnected. The adoption of the best policies does not guarantee that the policies will be enforced or effectively implemented. Challenges exist on both the demand side and supply side of the MWDBE industry.
- MWDBE public-sector practitioners operate in silos across different workforces, small businesses, and economic development and sector-specific agencies; this separation creates inefficiencies and suboptimal outcomes.
- A hodgepodge of certification programs, agency disparity studies, procurement goals and standards, and contractor databases result in duplicative, inefficient, and burdensome MWDBE processes and infrastructure.
- The field suffers from underdeveloped tools and processes for proactively monitoring the compliance and enforcement of economic inclusion policies, as well as a scarcity of human and financial resources within procurement offices to apply toward researching and implementing these tools and processes. As a result, data collection has become a low priority.
- Large-scale infrastructure projects are using sophisticated project delivery methods to address risk and capital needs, thereby increasing the size and time horizon of the projects. This complicates the leverage communities and contractors have to influence how projects are designed, bid, and awarded.
- Although inclusive procurement can work under different project delivery methods, each method presents different opportunities and barriers for small contractors. Best-value contracts are more amenable to inclusive requirements in that they are negotiated agreements between project sponsors/owners and contractors in which inclusion, as opposed to 'low cost', is an essential value proposition. It requires, however, strong advocacy for inclusion standards from both public leadership and community demand. Public-private partnerships and job-order contracting are perhaps most difficult for different reasons.
- Access to bonding, insurance, and capital remains a legacy supply-side problem for MWDBEs and requires more hands-on coaching and pooling of capital in innovative ways.
- The size and structure of infrastructure projects exceed most MWDBEs' bid capacity as subcontractors, much less as primes. These are multibillion dollar projects, requiring subcontractors to manage projects in excess of \$10 million.
- Some community development financial institutions have stepped up to provide MWDBE firms with technical assistance in business planning, tax compliance, licensing, and certification, and with lines of credit and capital investment, but they are also undercapitalized for large infrastructure projects.
- Large infrastructure projects tend to favor large prime contractors and unions, which have historically excluded MWDBEs.
- The construction industry is changing. Large-scale public- and private-sector projects increasingly require more sophisticated, automated business systems to handle estimating, project management, and project data for larger projects.
- The construction sector is also going "green" and adopting high-end building standards, materials, and technologies. Large-scale building projects, for example, are trending toward modular construction, which is changing labor demand from on-site construction to manufacturing and factory pre-assembly. There are few MWDBEs in the prefabricated construction supply chain, or that can otherwise acquire the knowledge, technologies, and materials for this changing industry.
- A legacy of discrimination—in lending, contracting, and business ownership—produced the wealth gap that renders minority firms non-competitive with respect to track record, credit scores, business networks, accumulated wealth, and other qualities needed to be competitive.
- There is no "transmission line" connecting first-generation MWDBE contractors and practitioners to the next generation. While first-generation MWDBE contractors and procurement professionals have gained knowledge and expertise and have benefitted substantially from the practices and policies of the 1970s, they are aging out and there is no succession plan or pipeline to continue to build contractor capacity and community wealth. Notwithstanding past and current discrimination, at the end of the day, MWDBEs must pre-qualify for work by demonstrating, among other things, past performance necessary to execute the projects and must aggressively network to stay in the rapidly changing construction industry.

# Best Practices/Recommendations

## Systems Reform

### 1. Establish MWDBE regional ecosystems through networked and/or “multijurisdictional” planning bodies.

- Connect and leverage infrastructure contracting opportunities, knowledge, and assets across public, private, and nonprofit sectors, including small business development, contracting, finance, insurance, workforce, and economic development organizations.
- Coordinate and align disparity studies across agencies and jurisdictions to lower costs and to improve assessment of contractor availability.
- Share contractor databases.
- Identify and mitigate gaps in the local contractor community.
- Align/coordinate certification protocols and processes to reduce burdens on small firms and to streamline costs.
- Streamline contractor access to project opportunities and support services.

### 2. Scale large public infrastructure projects to meet inclusive procurement/contracting goals.

- Provide more granular data on projects with long-term horizons including the timing and range of opportunities over the arc of the development.
- Assess and adopt project delivery methods that provide the best access for small contractors in all phases/stages of project planning, design, and implementation.
- Structure and match right-size projects with right-size contractors so that MWDBEs compete with other contractors with the same level of capacity instead of competing with larger contractors.

### 3. Develop real-time reporting and proactive compliance protocols and systems to improve MWDBE participation rates.

- Adequately fund and staff monitoring and compliance programs.
- Use online data-reporting systems to ensure progress against goals in real time.
- Train contractors on the use of online data-reporting systems.

- Establish enforcement policies with consequences for non-compliance.
- Engage community organizations to align community and business networks and resources to assist contractors in reaching their MWDBE goals.

### 4. Establish a 1 percent project fee to fund local MWDBE support services infrastructure.

- Include contractor support services, monitoring and compliance, workforce support services, and financing pools in the infrastructure created.

## Contractor Capacity Development

### 1. Increase and enhance capital access to undertake large-scale infrastructure projects.

- Pool sources of capital, such as community development financial institution funds, to underwrite larger projects.
- Establish contractor collateral pool(s) to ease access to working capital, bonding, and insurance.

### 2. Expand and strengthen the pipeline of tier 2 contractors to compete.

- Create a succession strategy for first-generation MWDBE contractors and practitioners to provide the following:
  - Mentoring incentives and support between tier 1 and tier 2 contractors.
  - Partnership arrangements between first- and second-generation MWDBEs; for example, target the capacity of tier 1 contractors to bid on large infrastructure projects, while also building in requirements and capacity to operate as feeders for smaller tier 2 and tier 3 contractors
  - Bidding priority (points) given to new generation contractors.
- Facilitate joint venture projects between large and small firms to create a performance record of increasing size and complexity. A third-party facilitator or best-practices guide might assist in ensuring non-exploitative practices.
- Increase the capacity of MWDBEs to build relationships to drive business development.
- Use community economic development financing tools— Low-Income Housing Tax Credit, New Markets Tax Credits, Community Reinvestment Act resources—and projects to build the capacity and track record of MWDBE contractors.

### 3. Foster alternative community wealth-building strategies to increase community benefits and self-reliance.

- Include strategies such as contractor cooperatives, community investment pools, and group purchasing arrangements.

### 4. Increase MWDBEs' access to new construction standards, skills, and materials.

- Provide information and training on green construction policies, practices, technologies, and skills to meet new industry standards.
- Support the use of organizational and project management software.
- Focus on pre-fabrication and other new construction technologies.
- Provide support for bidding and managing projects with different delivery methods, such as indefinite quality contracts, project labor agreements, and public-sector projects.
- Create a group purchasing organization to lower the cost of green construction and high-end equipment and materials.

## Inclusive Procurement and Contracting Field Building

- A large number of actors are involved in helping to increase inclusive procurement, including ethnic chambers of commerce, minority and women business organizations, public agencies, private contractors, large employers, financing organizations, and more.
- These stakeholders participate in a disparate number of trade and peer-exchange organizations.
- Perspectives differ as to whether or not there is a defined field of practice and whether a community of practice is needed.
- There is also no clear perspective of whether this field should be sector specific or foster cross-sector fertilization.
- Messaging and communicating the value of inclusive procurement differs according to the audience, and ranges from making the economic and social case to emphasizing market imperatives.

- Community-based organizations that care about expanding economic opportunity may not understand how to work with large employers or may not know what to ask for.
- A weak advocacy community makes it difficult to keep public officials accountable for use of public funds for private gains.

## Best Practices/Recommendations

- 1. Develop a nationwide capacity-building initiative** to train supply chains of effective economic inclusion leaders and ecosystems, including:
  - mayors and elected officials;
  - economic development and public works leaders;
  - procurement and compliance officers;
  - people-of-color chambers of commerce;
  - community development financial institutions;
  - community-based organizations; and
  - local, regional, and elected state representatives.
- 2. Develop a community of practice** to facilitate cross-sector training and sharing of best practices on a geographic basis. For example, a local transportation agency with strong inclusive procurement policies can help teach local water agencies how to implement such efforts.
- 3. Invest in strengthening MWDBE advocacy**, including a coordinated communications and messaging campaign.

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Please see Appendix A for affiliations.

Read the full report at:

<http://www.policylink.org/find-resources/inclusive-procurement-and-contracting>

<http://emeraldcities.org/media/news/inclusive-procurement-and-contracting>



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