Participation of Minority and Women Contractors in the Northeast Corridor Improvement Project (NECIP)

—A Report of the Inter-Regional Advisory Subcommittee on NECIP to the U.S. Commission on Civil Rights

September 1986

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LETTER OF TRANSMITTAL

Inter-Regional Advisory Subcommittee
on NECIP to the U.S.
Commission on Civil Rights
May 1985

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Dear Commissioners:

The members of the Inter-Regional Advisory Subcomittee are pleased to transmit for your approval and adoption *Participation of Minority and Women Contractors in the Northeast Corridor Improvement Project* (NECIP). This report is an evaluation of the minority and female contracting program operated by the Federal Railroad Administration (FRA) during the $2.19 billion project to upgrade Amtrak's northeast rail corridor. It focuses in particular on the implementation of the nondiscrimination clause of the Railroad Revitalization and Regulatory Reform Act, and of P.L. 95-507, which requires Federal contractors to conduct a subcontracting program for small and disadvantaged businesses.

The information presented in this report is derived in part from three Factfinding Meetings held in New York, Philadelphia, and Washington, D.C., in 1982. Representatives of the Federal Railroad Administration, Amtrak, minority contractor associations, and NECIP outreach agencies all participated in the Factfinding Meetings. In addition, interviews were held with these and other knowledgeable persons and extensive research of the various pertinent laws and regulations was conducted.

The need for special efforts to encourage the development of minority and women enterprises has long been recognized by Congress and the courts. In 1975, Secretary of Transportation William T. Coleman set a goal for minority and women participation in the Northeast Corridor Improvement Project (NECIP) of 15 percent—the highest goal ever set for such a large Federal Project. The efforts undertaken in the project, now nearing completion, have resulted in minority- and female-owned businesses garnering more than 17 percent of the available contracting dollars. The Department of Transportation, the Federal Railroad Administration, and Amtrak are to be commended for this achievement.

This report discusses the background of NECIP, examines NECIP's structure and governing laws and regulations, and appraises NECIP's accomplishment in relation to its 15 percent goal. The report also reviews both NECIP's outreach efforts and the problems confronting minority and female contractors.

Based on the results of such review, analysis and examination, this report finds, among other things, that the 15 percent goal—a genuine goal, not a set-aside or quota—for minority- and women-owned enterprise participation in NECIP has been exceeded. It concludes that this success was feasible largely because there was a shared commitment to the goal within FRA/NECIP management. Our study of NECIP underscores the important role that high-level Federal administrators play in any successful effort toward enhancing the participation of minorities and women in mainstream economic activities. In addition, this report identifies various administrative tools that were at FRA's and Amtrak's disposal to be used for achieving NECIP's goal; it also describes the problems and barriers confronting minority and women contractors in participating in Federal railroad and construction projects.

The Inter-Regional Advisory Subcommittee believes that its study of NECIP constitutes an instructive case study and the study's findings and conclusions should be of interest to other Federal agencies undertaking similar programs.

Respectfully,

WALTER E. WASHINGTON, *CHAIRPERSON*
Inter-Regional Advisory Subcommittee

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The project director for this report was Tino Calabia, civil rights analyst, who conducted background research, designed and held factfinding meetings in 1982, and wrote the first draft. Suzanne Crowell, civil rights analyst, Mid-Atlantic Regional Office, revised the draft with assistance from Robert Owens, regional attorney, who provided legal research and legal guidance/review throughout the project. The final revision, including the incorporation of FY 84 data, was carried out by Ki-Taek Chun, Deputy Regional Director of the Mid-Atlantic Regional Office. Yvonne E. Schumacher, civil rights analyst of the Mid-Atlantic Regional Office, and Donald A. Deppe of the Office of Regional Programs provided helpful comments.

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The project was carried out under the overall direction of Edward Rutledge, Regional Office Director of the Mid-Atlantic Regional Office.

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Chapter 1

The Northeast Corridor Improvement Project (NECIP): An Introduction

The Northeast Corridor Improvement Project (NECIP) is a landmark public works project, sometimes described as the "Nation's most ambitious revitalization and rehabilitation effort ever."[1] Along with the $4 billion Local Public Works (LPW)–Round II program of 1977 (officially called the Public Works Employment Act of 1977)[2] and the $70 billion Surface Transportation Assistance Act program initiated in 1983, the $2.19 billion NECIP is one of the three largest public works programs launched in modern times. In addition to its fiscal magnitude, NECIP is noteworthy for having set a 15 percent goal for minority- and female-owned business participation. This goal established by NECIP is precedent-setting since it was neither required by enabling legislation, nor mandated by court orders. It was a goal set by the administration voluntarily in the absence of any threat of lawsuits or court injunction. It deserves a special recognition that this voluntary goal has been met and exceeded; NECIP thereby provided experience to minority- and female-owned business enterprises (M/WBE), the experience needed for their future survival and competition in a free market place, and also demonstrated what committed leadership can accomplish for the growth and increased participation of M/WBE.

This introductory chapter provides a brief account of how NECIP came into being, how and with what funding it has operated, and how the Inter-Regional Advisory Subcommittee came to be interested in NECIP.

The Northeast Corridor is "an almost continuous stretch of urban and suburban areas from southern New Hampshire to northern Virginia and from the Atlantic shore to the Appalachian foothills."[3] The 456-mile line from Washington to Boston encompasses about 20 percent of the Nation's population on 2 percent of its land area, serves a major share of the Nation's industry, and attracts a great deal of business and tourist travel. Although for decades railroads played a critical role in contributing to the wealth of this region, the railroads receded in importance, resulting in a state of disrepair in proportion to the increase in air travel and the construction of the interstate highway system. Not unexpectedly, complaints about declining passenger service reached the region's elected officials, and in the early 1960s, Rhode Island Senator Claiborne Pell and others in Congress attempted to convince President John F. Kennedy and later President Lyndon B. Johnson to refurbish the Northeast Corridor railway system.[4]

Begining in the middle sixties, this transportation corridor received increasing academic and public attention. Numerous studies of this corridor focused on the fact that both highway and airport capacity were becoming increasingly congested, and it was highly expensive to create more highway or air capacity. The noise pollution, air pollution, and

[1] Diane Elliott, "On the Right Track," *Express* (August 1982), p. 11.

[2] Public Works Employment Act of 1977, P.L. 95–28, 91 Stat. 116–120 (codified as amended at 42 U.S.C. sections 6701–6736 (1982)). The earlier LPW–Round I Program was funded at $2 billion.

[3] Jean Gottman, *Megalopolis: The Urbanized Northeastern Seaboard of the United States* (Cambridge: M.I.T. Press, 1964), p. 3.

[4] U.S., Library of Congress, Congressional Research Service, *The Northeast Corridor Improvement Project: An Overview*, by John W. Fischer and Teresa Ellis Brown, Report No. 79–183E (Washington, D.C.: Government Printing Office, 1979), p. 4.

energy consumption impacts of these modes compelled thorough examination of available alternatives. The most desirable alternative was, and is, an upgrading of the railroad line. Transportation studies in the United States and abroad have consistently shown that where adequate population density exists and where adequate service is provided, railroads can compete very effectively with air and highway travel. By the early 1970s, all of the studies supported the conclusion that, at least in the northeastern United States, upgraded rail passenger, rail commuter, and rail freight deserved serious attention for Federal assistance. It was from these studies that the concept of a Northeast Corridor Improvement Project emerged.[5]

By 1965, the High-Speed Ground Transportation Act[6] authorized demonstration projects, the first two of which involved the Washington-New York segment and the New York-Boston segment. In 1973, the Regional Rail Reorganization Act,[7] known as the 3-R Act, directed the U.S. Department of Transportation (DOT) to begin engineering studies on the Northeast Corridor. Two years later, DOT issued a report recommending development of a Northeast Corridor Improvement Project, often referred to as "NECIP." The report was finally followed in 1976 by passage of the Railroad Revitalization and Regulatory Reform Act,[8] known as the 4-R Act, which directed the Secretary of Transportation to implement NECIP. The 4-R Act called for NECIP to be completed in 1981.[9] The Passenger Railroad Rebuilding Act of 1980,[10] however, extended the completion date to September 1985.[11]

Upon signing a $2.5 billion budget for NECIP in 1980, President Jimmy Carter called it "the largest public investment ever made in the Northeast."[12] NECIP was also described as "the most comprehensive railroad program ever attempted in the United States,"[13] "the most important railroad legislation of this century,"[14] and "the largest single project the Department of Transportation has ever undertaken [directly]."[15] For this project, Congress initially authorized a $1.75 billion total budget, which was increased to $2.5 billion at the time of the Passenger Railroad Rebuilding Act of 1980. In 1981, however, the working budget for NECIP was reduced to $2.19 billion to conform with President Reagan's Economic Recovery Program.[16]

Even before taking office in 1975 as Secretary of Transportation, William T. Coleman believed that "it is entirely proper to use Federal funds to remove economic barriers to minority participation in our economic systems."[17] Once in office, he discovered that the DOT was spending $18 billion a year, most of it in contracts with private contractors to build railroads, highways, and airports, but "less than one percent of that money was going to the black community."[18] He stated, "I really felt that as a Secretary one ought to do something about that. The opportunity came in connection with the Northeast Corridor where the Federal government was going to put up $2.2 billion to reconstruct the Corridor."[19] He was afforded "the opportunity to put into actual practice these words which [he] used to talk about many times before [he] took public office."[20] With the support of Congressional back-

[5] Louis S. Thompson, "The Northeast Corridor Improvement Project: Building a High Speed Railroad Between Washington and Boston" (a paper presented at the Center for Transportation Studies, Massachusetts Institute of Technology, Cambridge, MA., January 1985), pp. 4-5.

[6] High Speed Rail Transportation Act, P.L. 89-220, 79 Stat. 893 (codified as amended at 49 U.S.C. section 1643 (1982)).

[7] Regional Rail Reorganization Act of 1973, P.L. 93-236, 87 Stat. 985 (codified as amended at 45 U.S.C. sections 701-797m (1982)).

[8] Railroad Revitalization and Regulatory Reform Act of 1976, P.L. 94-210, 90 Stat. 31 (codified as amended at 45 U.S.C. sections 801-855 (1982)).

[9] U.S., Department of Transportation, Office of Public Affairs, "Modernizing the Northeast Corridor," by Beverly Rabner Silverberg, *Transportation USA*, Vol. 3, No. 2 (Winter 1977), p. 21.

[10] Passenger Railroad Rebuilding Act of 1980, P.L. 996-254, 94 Stat. 410 section 204 (codified as amended at 45 U.S.C. section 854 (1982)).

[11] *Id.* at section 853(1).

[12] President Jimmy Carter, "Remarks on Signing S.2253 Into Law—May 30, 1980," *Weekly Compilation of Presidential Documents*, Vol. 16, p. 1009.

[13] James A. Caywood, "A Candid View of the Northeast Corridor Improvement Project," *Traffic Quarterly*, Vol. 34, No. 1 (January 1980), p. 45.

[14] Tom Shedd, "The State of the Industry: What Does the 4R Act Mean to You?" *Modern Railroads*, Vol. 31, No. 12 (December 1976), p. 54.

[15] Louis S. Thompson, Associate Administrator for Passenger and Freight Services, Federal Railroad Administration, U.S. Department of Transportation, testimony before the U.S. Commission on Civil Rights, Inter-Regional Advisory Subcommittee on NECIP, "Transcript of Factfinding Meeting on NECIP Minority and Female Contracting, Sept. 15, 1982," Vol. II, p. 46 (hereafter cited as *September 1982 Factfinding Transcript*).

[16] Ibid., p. 33.

[17] William T. Coleman, *September 1982 Factfinding Transcript*, Vol. 1, p. 7.

[18] Ibid., p.8.

[19] Ibid.

[20] Ibid., p. 7.

ers, he promulgated the objective that "at least 15 percent of the money spent will be directed into the minority community."[21]

It is important to note that the 15 percent goal announced in the spring of 1976 was not a set-aside, but a genuine goal that DOT officials believed could be and should be reached. Succeeding Secretaries of Transportation all supported this goal,[22] and it has remained unchanged through the Reagan administration. According to the Federal Railroad Adminstration (FRA) Associate Administrator responsible for NECIP, the first instruction from Reagan-appointed Secretary of Transportation Andrew L. Lewis, Jr., was "that goal will not be relaxed, it will not be compromised; it will be met."[23] Indeed, Secretary Elizabeth Hansford Dole has reiterated the Department's commitment to meeting the minority business enterprise goals of her predecessors.[24]

The U.S. Commission on Civil Rights has long had an interest in the role of the Federal Government in ending discrimination against what are commonly known as the disadvantaged businesses, i.e. the small businesses owned by minorities or women. In 1975, the Commission published a report *Minorities and Women as Government Contractors* that found that less than 1 percent of government contracts went to firms owned by minorities or women in fiscal 1972. In its 1983 report, *Greater Baltimore Commitment: A Study of Urban Minority Economic Development*, the Commission recommended significant upgrading of Federal efforts to assist minority business enterprise.

The initial interest in NECIP was sparked in 1979 by the Delaware State Advisory Committee (SAC) to the Commission. The Delaware SAC was concerned that 2 years after the NECIP implementation, no minority- or female-owned Delaware firm was participating in NECIP. The Committee also felt that the then-existing DOT approach contained more assurances for the involvement of minority- and female-owned firms than the regulations then being proposed by DOT, and thus decided to comment on proposed DOT regulations.[25]

Over the following year, members of several State Advisory Committees in the Mid-Atlantic Region and elsewhere expressed interest in monitoring NECIP as it affected their States, and an Inter-Regional Advisory Subcommittee was formed of representatives from Advisory Committees of the States containing NECIP trackage, 18 representatives from 8 SACs.

The project came to encompass three public Factfinding Meetings; they were held in New York City on March 12, 1982, in Philadelphia, Pa., on May 13, 1982, and in Washington, D.C., on September 15, 1982, respectively. Government and Amtrak officials, NECIP outreach groups, and minority contractors and M/WBE associations all presented their views on both the accomplishments and problems of NECIP. In addition, Commission staff reviewed Congressional and General Accounting Office (GAO) publications, DOT and Amtrak reports, newspapers and specialized periodicals, and materials from the files of minority and female contractors. FRA, Amtrak, and DeLeuw, Cather/Parsons, the prime architect/engineer contractor for NECIP, also supplied answers to specific follow-up questions posed by the Inter-Regional Advisory Subcommittee.

The issue of minority/women contracting goals continues to receive national attention. In 1984 President Ronald Reagan signed an amendment to defense procurement law that would permit, for the first time, restricting competition for appropriate Federal contracts to small and disadvantaged businesses only.[26] On October 1, 1984, the Supreme Court refused to review a decision upholding the legality of a set-aside program for black contractors in Dade County, Florida.[27] To further delineate the parameters and opposing arguments on this ongoing national debate, the U.S. Commission on Civil Rights has recently held a "Consultation on Selected Affirmative Action Topics in Employment and Business Set-asides" on March 6 and 7, 1985.

The Inter-Regional Advisory Subcommittee hopes the lessons learned from NECIP will illumi-

[21] Ibid., p. 9.

[22] Memorandum to Administrator, Federal Railroad Administration, from Brock Adams, Secretary of Transportation, re: Affirmative Action Program—4-R Act, Sept. 16, 1977.

[23] Thompson, *September 1982 Factfinding Transcript*, Vol. II, p. 49.

[24] Louis S. Thompson, interview in Washington, D.C., Mar. 29, 1985 (hereafter cited as Thompson Interview). Also see Michael Isikoff, "DOT's Dole Threatens to Cut Off Aid to State Not Meeting Minority Quota," *Washington Post*, Apr. 19, 1982, p. A-19.

[25] Beatrice Coker, chairperson, Delaware State Advisory Committee to the U.S. Commission on Civil Rights, letter to Robert L. Fairman, Deputy Assistant Secretary for Administration, U.S. Department of Transportation, July 6, 1979.

[26] Deficit Reduction Act of 1984, P.L. 98-369, July 18, 1984.

[27] Associated General Contractors v. Dade County, 723 F.2d 846, 52 LW 2451; *cert. denied*, Oct. 1, 1984.

nate the ongoing debate surrounding minority contracting programs, and that such lessons can be used to strengthen the Nation's commitment to eliminating discrimination in the free enterprise system. The Inter-Regional Subcommittee is reminded of former Secretary Coleman's admonition:

> You ought to make it an affirmative recommendation to say that that's one of the responsibilities of any cabinet officer when he or she takes that oath—that he has a duty to make sure that the Federal money is spent in ways which would give minorities the maximum opportunity to participate.[28]

[28] *September 1982 Factfinding Transcript,* Vol. I, p. 16.

Chapter 2

NECIP'S Structure and Governing Laws and Regulations

Understanding both the laws and regulations governing the Northeast Corridor Improvement Project (NECIP) and the working structure of NECIP is a necessary step in appraising NECIP's efforts to ensure the particiation of minority- and female-owned business enterprises (M/WBE) in NECIP. Accordingly, this chapter provides a discussion of those laws and regulations that govern the administration of NECIP as related to M/WBE and a description of how NECIP is organized and administered.

Governing Laws and Regulations

The Railroad Revitalization and Regulatory Reform Act of 1976 (commonly called the 4–R Act), which occasioned the Department of Transportation (DOT) to adopt the 15 percent minority/women participation goal,[1] contained a nondiscrimination provision. Section 905(a) provided that:

> No person in the United States shall on the ground of race, color, national origin, or sex be excluded from participation in, or denied the benefits of, or be subjected to discrimination under, any project, program, or activity funded in whole or in part through financial assistance under this act.[2]

Section 905 applies only to those programs funded through the 4–R Act. In addition to the prohibition against discrimination, section 905 provided for fund cut-offs and civil action against any person who persisted in failure to comply with the statute. On January 12, 1983, this section of the act was repealed[3] and recodified[4] but these provisions have been retained in the recodification.[5] Thus, Section 905 prohibited discrimination, but never required affirmative action per se.

Public Law 95–507,[6] effective October 24, 1978, requires that affirmative steps be taken by large contractors to involve small businesses as well as small businesses owned by disadvantaged individuals[7] (i.e., minority- and women-owned businesses) in

[1] Railroad Revitalization and Regulatory Reform Act of 1976, P.L. 94–210, 90 Stat. 31 (codified as amended at 45 U.S.C. sections 801–855 (1982)).

[2] P.L. 94–210 section 905 (a) (current version at 49 U.S.C.A. section 306 (Supp. 1984)).

[3] P.L. 94–210 section 905(a) (repealed by P.L. 97–449 section 7(b), Jan. 12, 1983, 96 Stat. 2445).

[4] 49 U.S.C.A. section 306 (Supp. 1984).

[5] *Id.* at section 306(d).

[6] P.L. 95–507, Oct. 24, 1978, 92 Stat. 1757 (codified at 15 U.S.C. section 637 (1982)).

[7] Reference is to the term "small business concern owned and controlled by socially and economically disadvantaged individuals," as used in P.L. 95–507. The term means any small business concern:

> which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and whose management and daily business operations are controlled by one or more of such individuals. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities. Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete

performing contracts let by any Federal agency, and therefore it is the most important governing statute for NECIP's M/WBE procurement. P.L. 95-507 provides that all such contracts[8] must contain the following clause:

(A) It is the policy of the United States that small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency.

(B) The contractor hereby agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with the efficient performance of this contract. . . .[9]

Public Law 95-507 contains other provisions that seek to ensure participation by small business and small disadvantaged business firms. For any contract that may exceed $1 million in the case of a contract for construction of a public facility, or $500,000 for all other contracts, and offer subcontracting possibilities, the contractor is required to submit a subcontracting plan to the procurement authority.[10] (Small businesses are exempt from this requirement.[11]) The subcontracting plan must include:

A) percentage goals for the utilization as subcontractors of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals;

B) the name of an individual within the employ of the bidder who will administer the subcontracting plan and a description of the duties of such individual; and,

C) a description of the efforts the bidder will take to assure that small business concerns and small businesses owned and controlled by the socially and economically disadvantaged individuals will have an equitable opportunity to compete for subcontracts. . . .[12]

The subcontracting plan, according to the law, "shall be included in and made a material part of the contract,"[13] the failure of any contractor to comply in good faith with any plan required of such contractor "shall be a material breach of such contract. . . ."[14] The statute also requires the apparent successful bidder to make assurances concerning the maintenance and submission of periodic reports to the Federal agency.[15]

Federal agencies, in general, obtain products or services by either formal advertising,[16] negotiation,[17] or by special methods.[18] When dealing with small businesses and small disadvantaged businesses, the regulations make special provisions to enhance their participation. One such special provision, pursuant to the Small Business Act of 1958,[19] allows the Small Business Administration (SBA) to enter into contracts with Federal agencies and thereafter to subcontract the work to disadvantaged business firms.[20] The objectives of this SBA contracting program, commonly known as the 8(a) program, are fully consistent with section 905 of the 4-R Act and with various provisions of P.L. 95-507. Another special provision, applicable to Amtrak, is the competitive set-aside program called "focused solicitation."

In the 8(a) program, a single minority business is selected and a contract is negotiated on a sole-source basis. Both agencies and M/WBEs have objected to the way the 8(a) program is implemented, complaining that the process is too lengthy and involves too much red tape.[21] The negotiations involved between SBA, Federal Railroad Administration (FRA), and the M/WBE can take from 3 or 4 months to as long as 1 year to complete.[22] The agency's project is often delayed while costs rise and deadlines are missed. M/WBEs are often unable to sustain themselves until they finally sign a contract, or lose out in the end because they were forced to take other work.[23]

in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. 15 U.S.C. section 637(d)(4)-(6) (1982).

[8] Permissible exceptions are those contracts which do not exceed $10,000, are to be performed outside the United States or its territories, or are for services of a personal nature. 15 U.S.C. section 637(d)(2)(1982).

[9] *Id.* at section 637(d)(3).

[10] *Id.* at section 637(d)(4)(B).

[11] *Id.* at section 637(d)(7).

[12] *Id.* at section 637(d)(6).

[13] *Id.* at section 637(d)(4)(B).

[14] *Id.* at section 637(d)(8).

[15] *Id.* at section 637(d)(6).

[16] 41 C.F.R. section 12-2.102—2.503-50 (1984).

[17] *Id.* at section 12-3.200—12-3.5011.

[18] *Id.* at section 12-4.1002—12-4.1052.

[19] Small Business Act of 1958, P.L. 85-536, 72 Stat. 384 (codified as amended at 15 U.S.C. section 631-651 (1982)).

[20] 15 U.S.C. section 637(a)(1)(1982).

[21] Thompson Interview, Apr. 16, 1984.

[22] Mark Lindsey, assistant chief counsel, FRA, U.S. Department of Transportation, interview in Washington, D.C., Apr. 19, 1984.

[23] Marvin Williams, former NECIP minority business project manager, DeLeuw, Cather/Parsons, telephone interview, Apr. 25, 1984 (hereafter cited as Williams Interview).

Since neither Amtrak nor the firm of DeLeuw, Cather/Parsons (DCP) (see the next section, *NECIP Structure,* for details on Amtrak and DCP) are government agencies, some affirmative action tools are available to them that are not available to FRA.[24] DCP recommended that FRA use a competitive minority set-aside program whereby, under certain conditions, bidding for a contract would be restricted to minority firms.[25] Such set-asides were used by FRA early in NECIP construction,[26] but were abandoned when FRA officials concluded they lacked the statutory authority to implement such programs on a general basis.[27] The 8(a) program became the only M/WBE set-aside used by FRA.

In addition to 8(a), FRA used one other set-aside program designed for small businesses in general. Pursuant to the Small Business Act,[28] Federal procurement regulations and Department of Transportation regulations provide that contract awards may be set aside for competition restricted to small businesses (not sole-source negotiation as in 8(a)) upon the determination by a DOT contracting officer that such a set-aside is warranted. This provision is designed:

> to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government are placed with small business concerns.[29]

Since minority businesses usually fall into the category of small business, this small business set-aside program may assist M/WBEs to some extent.[30]

Thus, NECIP's minority/women business enterprise program is undergirded by the FRA's administrative goal of 15 percent for M/WBE participation, section 905 of the 4–R Act, P.L. 95–507, and the SBA 8(a) and small business set-aside programs. NECIP's M/WBE program has been brought to fruition because implementing affirmative stategies were adopted and pursued by FRA's two primary contractors, Amtrak and DCP, a topic discussed in the following sections.

NECIP Structure

The overall responsibility of the Secretary of Transportation for NECIP has been delegated to the Federal Railroad Administration (FRA) within the Department. FRA manages the overall project direction of NECIP, and has retained two primary contractors, Amtrak and the private sector firm of DeLeuw, Cather/Parsons (DCP).

Set up under Federal law in 1971, Amtrak is operated and managed as a "for-profit corporation," explicitly "not. . .an agency or establishment of the United States Government."[31] Amtrak owns most of the Northeast Corridor and operates its intercity passenger service, placing itself in the unique position of receiving a government contract to improve its own property. Generally, construction work with direct impact on Amtrak operations was subcontracted by Amtrak, making Amtrak the largest single contractor for FRA. Other work, mainly stations, was let by FRA itself. The arrangement is significant because Amtrak is not governed by the same procurement regulations regarding minority contracting that govern FRA.

DCP is under contract with FRA, on the other hand, for design, construction management, and procurement packaging of all NECIP work. DCP is "a joint venture comprised of DeLeuw, Cather, and Co., and the Ralph M. Parsons Company, along with 12 associate [firms]."[32] Both are part of the Parsons Corp., a California firm employing over 8,600 staff with multibillion dollar projects stretching from San Francisco to Saudi Arabia.[33]

The applicability of various legal authorities to each of these entities is somewhat different. The major distinction is between FRA as a Federal agency on the one hand and Amtrak and DCP as private contractors on the other.

[24] Ibid.
[25] Competitive set-asides were to be used where there is an adequate number of qualified M/WBEs in the relevant geographical area available to submit bids or proposals for the contracts. (U.S., Department of Transportation, DOT Order 4000.7A, Subject: Minority Business Enterprise Program, Mar. 6, 1978, section 7.a(4)). If no minority firms could be identified within the time provided, the contract was to be let in accordance with the routine procurement methods. (U.S., Department of Transportation, Memorandum to Administrator, Federal Railroad Administration, from Brock Adams, Secretary of Transportation, re: Affirmative Action Program—4-R Act, Sept. 16, 1977).
[26] Boone, Young and Associates, *Minority Business Office Operations Manual* (June 1981), p. 24 (hereafter cited as *Operations Manual).*
[27] Louis S. Thompson, letter to Edward Rutledge, Regional Office Director, Mid-Atlantic Regional Office, U.S. Commission on Civil Rights, Aug. 10, 1984.
[28] 15 U.S.C. section 644(e)(1982).
[29] *Id.*
[30] Thompson Interview, Apr. 16, 1984.
[31] 45 U.S.C. section 541 (1982).
[32] Robert H. Curtin, general manager, DeLeuw, Cather/Parsons, letter to Edward Rutledge, Sept. 21, 1983.
[33] Kathleen K. Wiegner, "That Overused Word, Infrastructure," *Forbes,* Vol. 131, No. 2 (Jan. 17, 1983), p. 62.

DCP subcontracted development and implementation of its minority and small business assistance plans to its member firm of Boone, Young and Associates. Under this subcontract, Boone, Young had several responsibilities, including identification of capable minority/women business enterprises, outreach to minorities and women, technical assistance to M/WBEs, and promotion of joint ventures. In addition, Boone, Young was to assist DCP "in identifying work packages for set-asides and in sizing packages for minority business participation,"[34] as well as to fulfill various liaison and monitoring functions.[35]

Design Phase

NECIP's work proceeded in two phases, design phase and construction phase. In the design phase, as the sole contractor for FRA in charge of design, construction management and procurement packaging, DCP's responsibility was to evaluate engineering and design firms for NECIP. In carrying out this responsibility, DCP followed DOT procurement regulations for the selection of architectural and engineering (A and E) contractors, pursuant to P.L. 92-582.[36] First, designs for construction projects are publicized, to which interested firms respond by describing their organizational capabilities and qualifications. The firm of Boone, Young and Associates, as the minority business office (MBO) of DCP, plays a role at this point in the process by "encouraging the formation of minority prime and/or joint venture assignments among the interested firms."[37] Specific proposals, received from the A and E firms, are evaluated by a contractor evaluation board that must include a representative of the minority business office.

The regulations require the preselection of at least three firms to be placed on a list of best qualified firms.[38] Each of the best qualified firms is then ranked based upon several factors, including the percentage and number of minority and women employees in all job classifications and pay scales[39] and the "participation of minority and small business concerns as principals, joint venture partners, associates, and lower-tier subcontractors."[40]

In order to ensure that the promised participation materializes and proceeds without difficulty, the MBO keeps:

> in contact with the minority A&Es during the life of the project for the purposes of monitoring the compliance of a majority prime contractor or joint venture partner with respect to the MBE agreement.[41]

Thus, every step of the way, M/WBE participation is promoted, scrutinized, and monitored.

In addition to promoting and monitoring M/WBE participation, the firm of Boone, Young and Associates was to assist DCP in packaging NECIP work to facilitate M/WBE participation in NECIP. This assistance was rendered in the following manner. First, Amtrak identified (1) prime contracts "particularly appropriate for direct Amtrak contracting with small businesses and minority business enterprises,"[42] and (2) "those aspects within large general contractor packages which are appropriate for small businesses and minority business participation."[43] When a successful A/E firm completes 60 percent of the design, MBO technical staff analyzes it to determine the work areas "where minority and small business subcontracting would be most successful."[44] The MBO outreach staff then begins a search for qualified and available M/WBE contractors and, based on the results of this search, preliminary subcontracting goals are established.

At the 90 percent completion stage, another review takes place. Any necessary modifications are made, and the final procurement plan is prepared. The procurement plan contains subcontracting goals for M/WBEs and for small businesses and related items such as:

> 1). . .the maximum and minimum M/WBE and small business participation which can be expected on this contract,
>
> 2). . .all of the work elements thought to be prime candidates for such subcontracting, and

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[34] *Operations Manual*, pp. 2-3.

[35] Ibid.

[36] Act of Oct. 27, 1972, P.L. 92-582, 86 Stat. 1278 (codified at 40 U.S.C. section 541-544 (1982)). This law is sometimes referred to as the Brooks Act.

[37] *Operations Manual*, p. 19.

[38] 41 C.F.R. section 12-4.1004-2(b)(4) (1984).

[39] *Id.* at section 12-4.1004-3(h).

[40] *Operations Manual*, p. 21.

[41] Ibid.

[42] "Subcontracting Plan for Small Businesses, Small Disadvantaged Businesses, and Minority Business Enterprises," prepared by the National Passenger Railroad Corporation (Nov. 26, 1980), p. 5 (hereafter cited as "Subcontracting Plan").

[43] Ibid.

[44] *Operations Manual*, p. 24.

3). . .an approximate number of small disadvantaged businesses in the area of the construction project who appear both qualified and available to undertake the proposed subcontracting tasks.[45]

Construction Phase

Amtrak's efforts for M/WBE participation during the construction phase of NECIP were embodied in its subcontracting plan which required FRA approval prior to implementation. Several features of the Amtrak subcontracting program are noteworthy. First of all, Amtrak adopted a lower threshold for subcontracting plans than that required by P.L. 95-507:

Amtrak may require any contractor who receives a contract in excess of $50,000 to adopt a subcontracting plan.[46]

Amtrak also did not exempt small businesses from subcontracting plans, as did P.L. 95-507. The need for such a plan was determined by the size of the job rather than by the size of the contract.[47] Further, Amtrak required the bidder to include a subcontracting plan with the bid.

Second, Amtrak's M/WBE program incorporated a financial incentive of up to 4 percent of the dollar amount of a contract for superior M/WBE participation:

If one or more competitors for a contract offers a price within 4 percent of the low, responsive, and responsible bidder, and meets the goals suggested in the solicitation, then Amtrak may presume that all other competitors for the contract that failed to meet the goals have failed to exert reasonable efforts and are ineligible to be awarded this contract. If no competitor meeting the goals has proposed a price within 4 percent of the low, responsive, and responsible bid price, then Amtrak may award the contract to the competitor, among those offering prices with 4 percent of the low responsive and responsible bid price, that has come closest to meeting the goals suggested in the solicitation.[48]

For example, if the low bid on a job were $10 million, and the contractor offered only 10 percent minority/women participation when 15 percent was suggested, Amtrak could award the contract to the second or third lowest bidder if such bidder promised higher minority participation and the contract price did not exceed $10.4 million.

With regard to materials acquisition contracts, Amtrak may split the award if a large majority firm is the low bidder and if an M/WBE has submitted a competitive bid regarding a portion of the contract. In such an instance, the splitting of the award may not increase the total cost to Amtrak more than 2 percent.[49] Where Amtrak plans to use a sole source majority vendor, it may require the vendor to submit a bid using its standard subcontractors and another one using M/WBE subcontractors. If the latter is within 4 percent of the former, Amtrak may award the contract based on the second bid.[50]

Amtrak also developed an M/WBE set-aside program similar to the one first used and then abandoned by FRA. Called the "focused solicitation program," it provided for restricting bids on a particular job to M/WBEs, providing that at least three bids were received.[51]

In addition, Amtrak's M/WBE utilization plan includes financial and technical assistance programs such as waiver of normal bonding requirements and accelerated payment for equipment required to be purchased by the contractor. The plan also provides an "entry and small buy program" that allowed Amtrak to award contracts of up to $3,000 to qualified or qualifiable M/WBEs, provided that no such firm receives awards worth more than $7,000 in one calendar year and that such awards do not total more than $100,000 overall in any calendar year.

Each construction project to be let through competitive bidding is first advertised in *The Commerce Business Daily*,[52] followed by a pre-bid conference open to prospective contractors.[53] For Amtrak projects, bidders are encouraged to visit the site of the project and:

take such other steps as may be reasonably necessary to ascertain the nature and location of the work, and the general and local conditions which can affect the work or the cost thereof.[54]

Several equal opportunity provisions are incorporated in the construction contract included in Amt-

[45] Ibid., p. 25.
[46] "Subcontracting Plan," p. 2.
[47] Ibid.
[48] "Subcontracting Plan," p. 7.
[49] Ibid.
[50] Ibid.
[51] Ibid., p. 5.
[52] Title 48—Federal Acquisition Regulation System, Chapter 1-5.101(a)(1).
[53] Roland Jones, minority business program manager, Amtrak, interview in Philadelphia, May 15, 1984 (hereafter cited as Jones Interview).
[54] "Amtrak Instructions to Bidders (Contruction Contract)," p. 1 (included in Invitation for Bids Number Am-82-DHACD2X).

rak's and FRA's invitation for bids. Bidders are to identify themselves as small or minority business enterprises, if appropriate;[55] to certify generally that no employee facilities are segregated;[56] to state that no formal written notice of noncompliance with Executive Orders 11246 and 11375 (regarding equal employment opportunity) has been received;[57] and to indicate that all necessary equal opportunity compliance reports have been filed.[58] Schedule "C" of the Invitation for Bids contains Amtrak's NECIP goals for small and minority/women business enterprises on the project in question, and bidders must include percentage goals of their own in a subcontracting plan.[59]

The subcontracting plan must be quite detailed. In addition to the percentage goals, bidders must specify the total dollar amount to be subcontracted, as well as the dollar amount to be subcontracted to small businesses and to M/WBEs. Bidders must also describe the "principal product and service areas to be subcontracted" and must identify those areas where small businesses and MBEs will each be utilized.[60]

Of particular importance is a requirement that bidders specify the types of records they will keep regarding their outreach efforts. These records are to include source lists and guides for small and minority subcontractors; organizations consulted for names of small and minority businesses; contacts with trade associations, trade fairs, and the like; descriptions of internal activities such as workshops and seminars; and award date on a-contract-by-contract basis.[61] Finally, bidders must agree to maintain records regarding all subcontract solicitations over $100,000, indicating:

(i) whether small business was solicited, and if not, why not;

(ii) whether minority business was solicited, and if not, why not;

(iii) reasons for the failure of solicited small business or minority business enterprise to receive the subcontract award;. . .[62]

FRA requirements and procedures are essentially the same as Amtrak's with two exceptions. The first of these exceptions is the 4 percent cost variation permitted by Amtrak, and the second is that Amtrak requires subcontracting plans for any contract in excess of $50,000, compared to $1 million required by FRA under P.L. 95-507.[63] Otherwise the bidding process, equal opportunity assurances, and outreach components are similar.[64]

55 "Amtrak Representations, Certifications, and Acknowledgements (Construction Contract)," p. 1 (included in Amtrak Invitation for Bids Number AM-82-DHACD2X) (hereafter cited as "Amtrak Representations").
56 Ibid., p. 3.
57 Ibid., p. 4.
58 Ibid., p. 5.
59 "Schedule 'C': Amtrak's NECIP Goal for Small Business and Minority Business Enterprise" (contained In Invitation for Bids Number AM-82-DHACD2X).
60 "Amtrak Representations," p. 7.
61 Ibid.
62 Ibid.
63 15 U.S.C. section 637(d)(4)(B) (1982).
64 Alexander Chavrid, M/WBE Officer for NECIP, Federal Railroad Administration, U.S. Department of Transportation, telephone interview, Aug. 17, 1984.

Chapter 3

NECIP Exceeds Its Goal

This chapter presents an analysis of the available data[1] to determine to what extent the NECIP's goal for minority- and women-owned business enterprise (M/WBE) participation has been fulfilled. Participation data will be examined first in terms of overall contract awards. This overall analysis will be followed by an examination of participation rate by contract program categories and by year-to-year trend. Our analysis will then focus on prime contracts and subcontracts, separately. This chapter will conclude with a brief discussion of the type of work M/WBE performed in NECIP.

NECIP Contracts and M/WBE Participation

According to the Federal Railroad Administration (FRA), approximately $802 million of the $2.19 billion NECIP budget, or 37 percent, is not available for contracting.[2] The budget figure pertinent to our discussion is $1.39 billion, 15 percent of which is $208 million. As of September 30, 1984 (the end of FY 1984), the latest date for which data are available, the total amount of NECIP contracts awarded (both prime contracts and subcontracts) was $1.11 billion. (See table 1). Thus, 80 percent of the funds available for contracts has already been committed. Our analysis presented in this chapter is limited to the use of this 80 percent of the NECIP contract fund. With 80 percent of the fund expended, 95 percent of the M/WBE goal (i.e., $197 out of $208 million) has already been achieved, indicating a much higher rate of M/WBE achievement than the rate of overall NECIP fund disbursement. Indeed, $197 million out of $1.107 billion represents 17.8 percent. As of the end of FY '84, then, M/WBE awards represented 17.8 percent of the dollars spent on contracting, exceeding the original 15 percent goal.

Since the M/WBE participation rate is an aggregate percentage comprised of diverse program categories and all the subsequent years after FY '76, it could have been boosted up by any one of the constituent figures and made artificially inflated to be unrepresentative of the true situation. Therefore, this commendable level of achievement would become more meaningful when it is examined in terms of program categories and yearly trends.

M/WBE Participation by Program Categories

As shown in table 1, the percentage of M/WBE awards ranges from the low of 12.7 percent for "materials, supplies, and long-lead materials" to the high of 30.5 percent for "architectural and engineering (A/E) contractors." The firm of DeLeuw, Cather/Parsons (DCP), through its subcontractor, Boone, Young and Associates, was directly responsible as the prime contractor in the design phase for

[1] This chapter relies exclusively on the data made available by FRA officials. Appreciation is due to them for generating and/or providing unpublished data for the Commission staff. However, an independent assessment of the validity and accuracy of the data provided has not been conducted by the Commission staff.

[2] Louis S. Thompson, *September 1982 Factfinding Transcript*, Vol. II, p. 50.

the involvement of minority/women architectural and engineering (A/E) firms. Minority/women firms received 30.5 percent of the total dollars spent on contracts through September 30, 1984, totaling $26.9 million. The A/E support services category, while not as successful as the design category, is nevertheless considerable. At the end of FY '84, M/WBEs accounted for $20.9 million or 20 percent of the total contracts awarded in that category. As described in chapter 2, contracts in the design phase were negotiated by DCP using minority/women participation as one of the selection criteria. It seems reasonable to conclude that many procedural assurances, including such selection criteria, paid off, enabling the M/WBE participation level to reach as high as twice the original goal.

The third contract category of "materials, supplies, and long-lead materials" has yielded the lowest percentage. Of the $513 million let in this category, $65 million or 12.7 percent went to M/WBEs. Although the M/WBE participation rate is the lowest of the four contract categories and lower than its 15 percent goal, FRA considers this category the most difficult and thereby views its accomplishment in a positive way:

> We are especially proud of the M/WBE participation in the materials, supplies, and long-lead (e.g. wired signal houses) category in which 12 percent of the contracts and subcontracts were awarded to M/WBEs. The 12 percent figure is exceptional because few minority suppliers are available to supply steel rail, signals, interlockings, electrification, communications, and computer control systems.[3]

The fourth contract category, "construction," shows the second highest M/WBE percentage of 21.1, $84.6 million out of $400.4 million. With the exception of "materials, supplies, and long-lead materials," then, the NECIP goal for M/WBE participation has been exceeded in all program categories. Even in the category in which the M/WBE participation rate fell short of the goal, 85 percent of the goal was accomplished (i.e., 12.7 percent out of 15 percent). Thus, NECIP's 15 percent goal has been achieved more or less in all program categories; the overall achievement of 17.8 percent is not due to an abnormally high award rate to M/WBEs in one or another program category, but is a result of the efforts exerted across all program areas.

Yearly Trends

As shown in table 2, it was not from the beginning that the M/WBE goal was achieved. In the first year of NECIP contract awarding, the M/WBE share was a mere 9 percent, falling significantly short of the 15 percent goal. By the second year of contract awards, however, M/WBE participation reached its goal and in the third year stayed close to it (14.1 percent). From the fourth year (FY '80), M/WBE share has consistently exceeded the original goal, reaching an all time high of 26.8 percent in FY '83. Except in the first start-up year, then, the M/WBE participation has always been near the goal or far exceeded it, indicating that the commendable level of minority and women business participation in NECIP contracts is not a statistical anomaly produced by one or two exceptional years.

The cumulative M/WBE percent column also reveals a steadily increasing level of M/WBE participation. The last column of table 2 provides a year-by-year percentage of M/WBE participation for all preceeding years. The M/WBE participation started from a lowly 9 percent in FY '77, but continued to increase to 13.4 and 13.7 percent in the two succeeding years, reaching its goal of 15 percent by FY 1980. Thereafter, the cumulative percentage kept increasing, reaching a plateau at 17.8 percent in the final years. An obvious conclusion from these statistics is that M/WBE participation had started below its goal, but continued to increase throughout the life of NECIP until it met and then exceeded its goal.

Prime Contracts

An examination of prime contracts data by business sizes (i.e., M/WBE, small business, and large contractors) and the method of bidding reveals an interesting facet of NECIP contracting. In addition to business size and method of bidding, table 3 shows a breakdown of these NECIP contracts by whether contracts were let by FRA or Amtrak.

There were a total of 76 prime contracts let for NECIP, 15 of which were awarded by FRA and 61 by Amtrak. Of these 76 prime contracts, minority/women firms garnered 16; small businesses won 34; and large contractors won 26. The minority/women contracts were worth approximately $15 million, for an average of $0.94 million. The small business contracts were worth approximately $83

[3] Louis Thompson, letter to Walter Washington, Apr. 18, 1983. This letter referred to fiscal 1982 results, but the percentages were virtually identical for FYs '83–'84.

TABLE 1
NECIP Awards by Major Program Category
(As of September 30, 1984)
(In millions)

	Total awards	M/WBE awards	Percent
Architectural & engineering (A/E) contractors	$ 88.3	$26.9	30.5
A/E support services and consultants	104.8	20.9	19.9
Materials, supplies, and long-lead materials	513.0	65.0	12.7
Construction	400.4	84.6	21.1
Total	$1,106.5	$197.4	17.8

Source: Louis S. Thompson, Associate Administrator for Passenger and Freight Services, Federal Railroad Administration, U.S. Department of Transportation, letter to Edward Rutledge, Regional Office Director, Mid-Atlantic Regional Office, U.S. Commission on Civil Rights, August 10, 1984. FY '84 data were supplemented by Alexander V. Chavrid, M/WBE Officer for NECIP, FRA, DOT, March 29, 1985.

TABLE 2
NECIP Obligations by Fiscal Year and M/WBE Awards
(As of September 30, 1984)
(In millions)

Fiscal year	Obligations[1]	Contract awards	M/WBE awards	M/WBE percent[2]	Cumulative M/WBE percent[3]
1976	$ 20.9				
1977	203.1	$ 63.4	$ 5.7	9.0	9.0
1978	320.5	172.9	25.9	15.0	13.4
1979	440.3	188.3	26.5	14.1	13.7
1980	336.5	175.1	32.0	18.3	15.0
1981	277.6	115.0	19.1	16.6	15.3
1982	307.8	117.3	23.9	20.4	16.0
1983	160.3	163.6	43.9	26.8	17.8
1984	70.9	110.9	20.4	18.4	17.8
1985	52.1[4]				
Total	$2,190.0	$1,106.5	$197.4	17.8	17.8

[1]Contracts awarded or services received requiring Federal payment.
[2]M/WBE percent of total contract awards.
[3]M/WBE percent of total contract awards for all preceeding years.
[4]Planned FY 85 obligation.
Source: Louis Thompson, Associate Administrator for Passenger and Freight Services, Federal Railroad Administration, U.S. Department of Transportation, letter to Edward Rutledge, Regional Office Director, Mid-Atlantic Regional Office, U.S. Commission on Civil Rights, August 10, 1984. FY '84 data were supplemented by Alexander Chavrid, M/WBE Officer for NECIP, FRA, DOT, March 29, 1985.

TABLE 3
Prime Construction Contracts
(In millions)

Awarded by	Minority/women-owned firms					Small business			Large contractors		Total
	8(a)	Focused solicitation	Small business set-aside	Open bidding	Total	Small business set-aside	Open bidding	Total	Open bidding	Total	
FRA	6	(N/A)	2	0	8	0	4	4	3	3	15
Amtrak	(N/A)	2	2	4	8	7	23	30	23	23	61
Total					16			34		26	76
Average contract size					$ 0.9			$ 2.4		$ 6.3	
Total contract					$14.9			$83.2		$165.0	$263.1

Source: Louis B. Thompson, Associate Administrator for Passenger and Freight Services, Federal Railroad Administration, U.S. Department of Transportation, letter to Edward Rutledge, Regional Office Director, Mid-Atlantic Regional Office, U.S. Commission on Civil Rights, August 10, 1984. FY '84 data were supplemented by Alexander Chavrid, M/WBE officer for NECIP, FRA, DOT, telephone interview, April 8, 1985.

million, for an average of $2.4 million. The large contractors won awards worth approximately $165 million, for an average of $6.3 million.

Of the 15 contracts awarded by FRA, 8 were awarded to M/WBEs; 4 were awarded to small businesses; and 3 to large contractors. Of the eight contracts awarded to M/WBEs by FRA, six were let under the 8(a) process and two were awarded through a small business set-aside. Of the four awarded to small businesses by FRA, all were won in open competition. The remaining three contracts were won in open bidding by large contractors.

Of the 61 contracts awarded by Amtrak, 8 were won by M/WBEs, two of which were won through small business set-asides and another two contracts through focused solicitations. The remaining four contracts were won in open bidding. Small businesses won 30 contracts from Amtrak, of which 7 came from small business set-asides and 23 from open bidding. Large contractors won 23 Amtrak contracts, all in open bidding.

When FRA and Amtrak contract awards are combined, we find that half of the M/WBE contracts (8 out of 16) were won through programs restricted to minority/women businesses, i.e., the 8(a) or Amtrak's "focused solicitation" program. Thus, such minority/women set-aside programs adopted by NECIP helped minority/women firms to gain experience as prime contractors. It is also clear that one quarter of M/WBEs contracts were won through small business set-asides.

Small businesses overall did extremely well in winning NECIP contracts. Of the 34 contracts won by small businesses, only 7 were won through small business set-asides. Thus about one-fifth (20.6 percent) of small businesses were aided by a restrictive program designed to aid small businesses. In contrast, one-half (50 percent) of the M/WBEs won contracts because of the restrictive program designed to benefit M/WBEs. It may be that small nonminority businesses are not as disadvantaged in competing for government contracts as has been thought to be, compared to small minority/women businesses.

The size of contracts won by M/WBEs and small businesses lends credence to this view. Of the 34 contracts won by small businesses, about half were over $2 million. Of the 16 M/WBE contracts, less than one-fifth were over $2 million. These figures provide a rough gauge of the relative capabilities of the two types of contractors, minority/women small businesses in comparison with nonminority small businesses.

Another possible indicator of their relative capabilities is the average size of their contracts: the average amount of the M/WBE contract is $0.94 million whereas the corresponding figure for small nonminority businesses is $2.4 million, more than twice the average of M/WBE contracts. In this connection it should be noted that although 16 out of 76 prime contracts went to M/WBEs, constituting a hefty 21 percent of contracts, the total dollar amount of these 16 M/WBE contracts comprised a mere 5.7 percent. Therefore, it is misleading to discuss the M/WBE share in NECIP contracting in terms of the number of contracts, unless accompanied by total dollar amount. In terms of the total NECIP contracts, then, the share given to M/WBE prime contractors is only 5.7 percent, $14.9 million out of $263 million.

If large conractors and nonminority small businesses were to meet their 15 percent goal in subcontracting, the M/WBE subcontracting share in dollar amount would be $39.5 million, approximately two-and-a-half times the dollar amount awarded in prime contracts to M/WBEs. This underscores the significance of subcontracting in increasing M/WBE participation in NECIP.

Subcontracting

Under its own regulations, Amtrak could require contractors to submit M/WBE subcontracting goals for all projects of $50,000 or more, and it did so.[4] Thus of its 61 contracts, all nonminority contractors (30 small contractors and 23 large contractors) were required to submit subcontracting plans. Of these 53 nonminority prime contractors subject to M/WBE subcontract goal-setting requirements, several were reduced in scope eliminating the portion to be done by an M/WBE and a few others had not progressed far enough as of the completion of this report to warrant analysis. Eliminating these contracts reduces the number of prime contractors for the present analysis to 45.

Table 4 lists these 45 nonminority Amtrak prime contractors by contract size and the status of their M/WBE goal achievement. As shown in table 4, slightly less than one-half (49 percent) of the 45

[4] Chavrid Interview, Aug. 9, 1984.

TABLE 4
Amtrak Subcontracting by Contract Size and Status of M/WBE Goal Achievement

Goal achievement status	$1.0m* or less	Over $1.0m less than $2.0m	Over $2.0m less than $3.0m	$3.0m or more	Total
15% or more	5	5	5	7	22
14% or less	6	4	7	6	23
Total	11	9	12	13	45

*In millions.
Source: Louis S. Thompson, Associate Administrator for Passenger and Freight Services, Federal Railroad Administration, U.S. Department of Transportation, letter to Edward Rutledge, Regional Office Director, Mid-Atlantic Regional Office, U.S. Commission on Civil Rights, August 10, 1984. FY 1984 data were supplemented by Alexander Chavrid, M/WBE officer for NECIP, FRA, DOT, March 29, 1985.

nonminority prime contractors met or exceeded the 15 percent M/WBE subcontracting goal. This trend appears to hold up regardless of the prime contract size, i.e., whether the contract is over $3.0 million, or less than $1.0 million, or in between.

Since $84.6 million construction contract money went to M/WBEs and the M/WBE share in prime construction contract is a mere $14.9 million (see table 1), $69.7 million of the M/WBE share must have been generated from subcontracting and the M/WBE share in subcontracting must have been in excess of 22 percent. All this demonstrates the significant role the Amtrak subcontracting program played in ensuring that NECIP met its M/WBE contracting goal. Since slightly more than half of the prime contractors (23 out of 45) failed to meet the 15 percent M/WBE subcontracting goal, the remaining half of the prime contractors meeting their goal must have far exceeded the 15 percent goal to have compensated for the failure of the other half of the prime contractors. It is clear then that the M/WBE share (22 percent) of the total NECIP construction money, which exceeded the original 15 percent goal, was accomplished not because M/WBEs participated in NECIP as prime contractors in any significant manner, but because about half of the Amtrak prime contractors subcontracted to M/WBEs a large portion of their work, in excess of the 15 percent goal.

Little information is available regarding either the reasons for this or the consequences of this uneven subcontracting performance by prime contractors.

At this point, it is useful to recall that affirmative action supporters originally objected to P.L. 95–507 because it relied almost exclusively on "good-faith efforts" to obtain compliance and because its goals were not binding.[5] Their fear was that the requirement for good-faith efforts would not be taken seriously. FRA and Amtrak, however, devised ways to measure good faith efforts that were not foolproof, but that did demonstrate to the company involved that the goals were to be taken seriously. By requiring extensive reporting and conducting close monitoring of the contractor, they were able to learn a great deal about the contractor's behavior. For example, a contractor might report having contacted various minority/women firms without finding one interested in doing the work available. Amtrak might then offer to contact the named firms to determine what the difficulty might be. Such an offer usually revealed quickly whether the M/WBE contacts were genuine or had even been attempted.[6] In addition, Amtrak, DCP and FRA personnel conducted onsite inspections to determine whether minority/women firms were in fact at work as reported.[7]

As to whether or not the goals were binding, FRA believed that as a government agency, it could

[5] "Following the Rules on Minority Contracts but Taking a Shortcut," *Washington Post*, Mar. 23, 1981, p. A-3.

[6] Jones Interview, May 15, 1984.
[7] Williams Interview, Apr. 25, 1984.

not enforce goals it proposed prior to contract awards,[8] but its belief had little practical impact since only two FRA contracts required subcontracting goals. On the other hand, Amtrak contended that while it could not impose goals, any goals included by a contractor as part of a bid became enforceable as a material part of the contract. Thus, payments might be held up and various other remedies pursued in the event that goals were not fulfilled.[9] A DCP official noted that, as a private corporation, "DCP assumed the goals could be enforced; we never had a real fight on the issue. Once word got out that DCP was serious, we never had anyone oppose us."[10]

Early in the course of NECIP, Amtrak did reject bids with inadequate goals. Roland Jones, Amtrak's minority business program manager, observed that "after a couple of contractors were kicked out, the bids were 15 percent minimum."[11]

At the same time, Amtrak allowed some leeway for what it considered to be reasonable lapses based on changes in the work required or genuine unavailabilty of minority firms. Contractors were permitted to "make up" deficiencies at a later time or even on another project.[12] To some extent, the success of the minority subcontracting program may have been compromised to the goal of building a railroad. Given the pressure of finite budgets appropriated by Congress, Amtrak did not cancel ongoing contracts for failure to meet the M/WBE goal, nor did they refuse payment or engage in lengthy litigation for that reason.[13] Nevertheless, the goal was in fact met, so credence must be given to the insistence by FRA, Amtrak, and DCP that the most important factor in reaching the goal was a serious commitment on the part of all NECIP personnel that was clearly communicated to bidders. Officials at FRA, Amtrak, and DCP, thus, are saying that administrators' commitment to M/WBE participation and persistence in conveying such commitment to contractors play a crucial role in enhancing the opportunities for successful M/WBE participation.

Type of Work Performed by M/WBEs

A question is often raised as to the type of work minority/women contractors were able to perform, and whether they were able to go beyond the more traditional tasks of demolition and hauling trash. Amtrak foresaw that M/WBEs might share in such work as section improvement, maintenance of way, station construction/renovation, or bridge rehabilitation.[14] The M/WBE prime contract awards were for a variety of projects. Of the 16 M/WBE prime contracts (see table 3) four involved roof work, five involved new station construction or renovation, and two involved construction of service facilitites for Amtrak. The remainder involved bridge rehabilitation, section improvement, street realignment, and fencing.

While all accounting of actual subcontracting work done is not available, FRA officials believe that many M/WBEs performed work other than demolition and site preparation. Their assumption is based on the fact that these activities alone could simply not account for the $84.6 million in M/WBE construction work.[15] In evaluating the actual work performed by Amtrak subcontractors, an Amtrak official estimated that "the preponderance of work done [by M/WBEs] is in the area of site preparation and demolition," but he added "there has also been movement in other areas."[16] It is probable that aggressive commitment of Federal agencies regarding the type of work M/WBEs can perform would assist M/WBEs in expanding the range of their contractual capabilities beyond demolition, site preparation, and trash hauling.

[8] Thompson Interview, Apr. 15, 1984.
[9] Jones Interview, May 15, 1984; also R.D. Johnson, Regional Engineer/East, Project Manager NECIP, letter to Walter Washington, Chairperson, District of Columbia Advisory Committee to the U.S. Commission on Civil Rights, Feb. 23, 1983.
[10] Williams Interview, Apr. 25, 1984.
[11] Jones Interview, May 15, 1984.
[12] Ibid.
[13] Ibid.
[14] "Subcontracting Plan," p. 3.
[15] Alexander Chavrid, interview in Philadelphia, May 15, 1984.
[16] Jones Interview, May 15, 1984.

Chapter 4

NECIP Outreach

The quality of outreach and the technical assistance provided to minority- and women-owned firms heavily affects the outcome of NECIP's equal opportunity contracting. A variety of outreach programs played a role in NECIP's success in meeting its goal for the participation of minority- and women-owned businesses in NECIP. This chapter presents a description of these outreach programs and discusses their effectiveness as well as criticism of these outreach efforts.

Outreach Mechanisms

The Federal Railroad Administration (FRA) first set up an outreach program in 1976:

> to help link established firms with minority enterprises. . . .and direct minority firms to sources of technical, financial, and bonding assistance prior to bidding and after the award of a contract.[1]

This outreach program, carried out under contract by DeLeuw, Cather/Parsons (DCP) in five offices located along the northeast corridor,[2] registered 500 such firms in a "Contractor Information File."[3]

In 1978, then, FRA established a Minority Business Resource Center (MBRC) to ensure that:

> minority-owned businesses (including women) would have the maximum opportunity to participate in railroad projects funded in whole or in part by the Federal government.[4]

The MBRC contracted with 22 local outreach centers (LOCs) stretching from Boston to Los Angeles. Their outreach was not confined to NECIP, but involved federally-funded railroad projects throughout the country.[5]

On September 29, 1980, the MBRC was moved from FRA into the Office of the Secretary of the Department of Transportation (DOT), a move which was effected by a DOT order signed by Secretary Brock Adams.[6] From that fresh vantage point, the MBRC was now meant to expose disadvantaged contractors to "an increase in potential business opportunities from $2 billion to over $20 billion annually."[7] Not just rails, but highways, airports, and other transportation facilities became targets of opportunity to be tapped for minority and

[1] U.S., Department of Transportation, Federal Railroad Administration, *Minority Business Program: U.S. Department of Transportation Northeast Corridor Improvement Project* (probably published May 1978), p. 15.
[2] Ibid., pp. 15 and 20.
[3] Ibid., p. 8.
[4] U.S., Department of Transportation, Federal Railroad Administration, *Minority Business Resource Center*, September 1978, p. 3.
[5] The LOC program was actually begun by the Office of Minority Business Enterprise in the U.S. Department of Commerce. Through interagency agreements with the Department of Transportation, the LOCs expanded their outreach to include the railroad industry and utilized assistance contractors of the Small Business Administration. Kenneth E. Bolton, Director, Minority Business Resource Center, Statement Before the Task Force on Minority Enterprise of the Subcomm. on General Oversight and Minority Enterprise, Comm. on Small Business, U.S. House of Representatives, June 14, 1979, p. 3 (hereafter cited as "House Task Force Testimony").
[6] U.S., Department of Transportation, Office of Small and Disadvantaged Business Utilization, *Minority Business Resource Center: FY 1980 Annual Report*, December 1980, p. 1.
[7] Bolton, "House Task Force Testimony," p. 4.

female-owned firms. Eight LOCs were located on the corridor.[8]

MBRC's January 1981 document, "Vendor Information File: Minority Construction Firms in NEC Geographical Area," listed 491 minority firms "potentially capable of providing goods and services in rail-related areas."[9] These firms were located in the eight States along the corridor and the District of Columbia as well as in New Hampshire and Virginia.[10]

In early 1981, however, all of the LOCs were terminated, and for approximately 1 year thereafter, the MBRC had no outreach program. In March 1982, Secretary Drew Lewis announced that the LOCs had been replaced with a network of 13 units now called Program Management Centers (PMCs).[11] Although the PMCs assumed the LOC outreach and other functions, one key difference was that the LOCs covered only cities, while the new PMCs cover regions or a number of States.[12]

Malcolm Johnson, acting chief of the MBRC, asserted that the regional coverage provided by the PMC network is more in conformance with the law.[13] However, Juan Scott, an official of the New York City PMC, noted that "We have a smaller staff and more territory to cover."[14] For example, the New York city-based PMC is responsible for Connecticut, New Jersey, and New York—three Northeast Corridor States covered by a total of four LOCs under the previous arrangement. In addition to reduced staff and expanded territory, the PMCs did very little work in relation to NECIP. DCP's Marvin Williams remarked that the PMCs came too late for NECIP construction and that "they were not chosen for their technical expertise in construction, but for other procurement."[15]

Throughout this period, NECIP maintained its own outreach program using the services of DCP. In the view of FRA, their efforts, along with those of Amtrak and the prime contractors, made a significant contribution to the success of NECIP's minority and women contracting program.

DCP's Outreach

DCP conducted both contracting and outreach in the A/E phase of NECIP. Its outreach program had two goals: 1) informing M/WBEs about NECIP and notifying them of potential opportunities, and 2) identifying minority/women firms, particularly construction contractors.[16] The A/E files maintained by DCP on minority firms were very detailed and, according to Williams, are "still unique," although their construction files were less sophisticated. Even though DCP shared information with the LOCs, DCP's efforts remained independent of the latter.[17]

DCP developed educational and informational materials which it distributed to minority/women business groups, business development organizations, and individuals. The materials included general informational handouts and press releases, a technical manual for minority/women architects and engineers and one for minority/women construction contractors, and presentation materials and kits for conferences and seminars.[18]

According to DCP, the A/E manual was distributed to hundreds of firms, detailing projected opportunities by State and projected dollar amount. Interested A/E firms would register with DCP's Contractor Information File, which was designed to provide advance information on work projects to registered firms. The construction manual contained the types, locations, and dollar ranges of anticipated construction projects, contracting procedures and M/WBE provisions, and technical assistance.[19]

The minority business office (MBO) of DCP met with various affected government agencies and participated in a variety of conferences and seminars.[20] The MBO maintained "a standard policy of

[8] Ibid., pp. 19–20.

[9] Earl D. Proctor, [former] executive director, MBRC, "Minority Business Resource Center Vendor Information File: Minority Construction Service Firms in NEC Geographical Area," Jan. 14, 1981, p. 1.

[10] Ibid.

[11] U.S., Department of Transportation, "Lewis Says New DOT Centers Will Expand Minority Business Effort," (press release), Mar. 8, 1982.

[12] Malcolm Johnson, acting chief, DOT Minority Business Resource Center, *September 1982 Factfinding Transcript*, Vol. II, pp. 7–8.

[13] Ibid.

[14] Juan Scott, Arawak Consulting Corporation (the Program Management Center based in New York City), testimony before the U.S. Commission on Civil Rights, Inter-Regional Advisory Subcommittee on NECIP, "Transcript of Factfinding Meeting on NECIP Minority and Female Contracting, Mar. 12, 1982," p. 58 (hereafter cited as *March 1982 Factfinding Transcript).*

[15] Williams Interview, Apr. 25, 1984.

[16] *Minority Business Office Operations Manual*, prepared by Boone, Young and Associates (June 1981), p. 11.

[17] Williams Interview, Apr. 25, 1984.

[18] Boone, Young, "Operations Manual," pp. 12–13.

[19] Ibid., p. 13.

[20] Ibid., pp. 13–14.

meeting with any minority or nonminority business person interested in the project. . . .through formal appointments or on a walk-in basis."[21]

DCP's Contractor Information File was augmented by contact with various Federal agencies, including MBRC, and by contractor seminars in the major Northeast Corridor cities. DCP ascertained from each contractor its bonding capacity, number of employees, union status and 8(a) status, largest contracts in the last 2 years, and skills by Standard Industrial Code.[22]

Amtrak's Outreach

Amtrak too maintained an M/WBE directory with the assistance of MBRC, SBA, the National Minority Purchasing Council Vendor Information Service, the Department of Commerce, DCP's Contractor Information File, and local small and minority business associations.[23] In addition to outreach efforts to minority/women contractor organizations similar to those described for DCP, Amtrak also promised to send to the MBRC copies of pre-invitation [for bids] notices and to both MBRC and the LOCs copies of all of its procurement requisitions. Copies of all plans and solicitations were to be made available for inspection at each of four regional construction management offices and to be furnished to MBRC.[24] Finally, Amtrak promised to assist, upon request, majority contractors in locating potential M/WBE subcontractors.[25]

Amtrak's recordkeeping was to include maintenance of records documenting its outreach efforts, the number of contract solicitations to minority/women business relative to all solicitations, and its internal activities to guide and encourage buyers such as workshops, seminars, and training programs.[26] In addition, for each subcontract solicitation over $100,000, Amtrak was to maintain records indicating:

(a) whether small and minority business enterprises were solicited, and if not, why not, and

(b) reasons for the failure of such solicited businesses to receive the subcontract award.[27]

[21] Ibid., p. 13.
[22] Ibid., p. 16.
[23] "Subcontracting Plan," p. 5.
[24] Ibid., p. 4.
[25] Ibid., p. 6.
[26] Ibid., pp. 8–9.
[27] Ibid., p. 9.
[28] Kenneth Bolton, "House Task Force Testimony," p. 1.

Effectiveness of MBRC Networks

Presumably the payoff from MBRC's resources devoted to identifying and engaging minority- and female-owned firms in NECIP would ultimately be reflected in the number and size of the NECIP contracts won by those firms. In June 1979, the first MBRC director, Kenneth Bolton, testified before the House of Representatives Task Force on Minority Enterprise that the MBRC measured progress in terms of:

(1) contracts awarded to minorities by the railroads and their suppliers, and

(2) implementation of the center's legislatively mandated assistance programs.[28]

Bolton stated that from virtually no minority contracting by the railroads when the MBRC opened in mid-1976, NECIP awards alone were $13.3 million in [calendar year] 1977, and $39.6 million in 1978.[29]

At the September 1982 Factfinding Meeting, Malcolm Johnson, then MBRC acting chief, and Melvin Humphrey, director of the DOT Office of Small and Disadvantaged Business Utilization (OSDBU), were asked what the MBRC statistics show regarding NECIP. Johnson deferred the question to FRA inasmuch as the MBRC was no longer as close to the day-to-day monitoring of NECIP as it was before being moved from FRA to the Office of the Secretary (of Transportation).[30] As discussed in chapter 3 (see table 2), M/WBE share of NECIP contracts has shown a general tendency to increase over the years, staying above the 15 percent goal. However, no information is available regarding the extent to which the increased M/WBE participation was a result of MBRC.

Asked how to gauge the net effect of all the identification tasks and technical assistance rendered by the MBRC, or how to measure "the results of having given the assistance," rather than just measuring the assistance delivered,[31] Humphrey acknowleged that there is no direct measure of the effectiveness of assistance rendered. He noted,

[29] Ibid., p. 2.
[30] Malcolm Johnson, *September 1982 Factfinding Transcript*, Vol. II, p. 8.
[31] Bradford E. Brown, chairperson, Massachusetts State Advisory Committee to the U.S. Commission on Civil Rights, Ibid., p. 26.

though, "Someday we are going to have to do that. . . ."[32] With regards to the level of such assistance, Humphrey believed that what was accomplished in the previous "4 or 5 months" (the period in which the PMC began functioning) exceeded what had been done in FY 1980 or FY 1981.[33]

Some Outreach Difficulties

Not all outreach efforts were successful, and as a result many minority- and women-owned businesses were critical of NECIP and its outreach efforts. The opening panel during the first Factfinding Meeting (March 1982) included Dudley Christie, a former LOC director. Christie's agency continues economic development work in New Jersey, a State with one of the longest spans of corridor trackage. A veteran of the LOC "firing line," he characterized NECIP "as a lot of delays, of unfulfilled promises, of raising a lot of hopes and then shattering them."[34] He went on to add:

> One of the big drawbacks we had was promise of construction in the Northeast Corridor. We were to get all the construction contractors geared up for construction work, primarily in fencing—a lot of talk about how much fencing jobs would be available. We put together all of these contractors and were not able to get any of these jobs. A lot of delays upon the improvement of the corridor. . .that's where we were. . . .It is about 3 years behind schedule.[35]

Michael Sharp, president of the Connecticut Association of Minority Contractors, met with his members to discuss NECIP prior to his scheduled appearance at the March 1982 Factfinding Meeting. From the 55 firms represented at his own meeting, he learned that although one firm had been awarded a NECIP contract, only one other firm was familiar with NECIP or its opportunities for minority and female contractors.[36] On the other hand, of the three Connecticut-based minority firms represented at the March Factfinding Meeting, two clearly had knowledge of NECIP developments, and the third was the one that had reported to the association that it won a NECIP award.

Some contractors, although aware of NECIP in general, encountered difficulties in learning specific NECIP opportunities. For example, Sergio Diaz, president of a New Jersey firm specializing in railroad work, indicated that after placing his firm's name on NECIP lists he received calls from Amtrak, but they were accompanied by considerable confusion. "Most of the time, in spite of all the paperwork and computers they have set up to organize this operation, I am always listed in the wrong trade,"[37] he said.

Beverly Harper, president both of a 12-year-old management consultant firm specializing in public information in transportation projects and of The Brain Trust: A Minority Business Action Group based in Philadelphia, was active in the successful effort to get Philadelphia to commit 15 percent of its municipal contracts to minority firms plus 10 percent to female-owned firms.[38] Her own firm was encouraged to participate in NECIP meetings in Washington and later was repeatedly sent applications and forms for NECIP's files. Yet the firm "never received one phone call, one letter, or one request for proposals that identified a potential project" on which it could bid.[39]

Nona Cunane, whose firms won three NECIP awards, complained that as a target of NECIP's outreach she received repeated requests for basic information for NECIP files. On occasion, she responded by resorting to simply forwarding fresh copies of forms filled out just days before.[40]

Marilyn Andrulis, president of the National Association of Women Federal Contractors (NAWFC), was fully conversant with NECIP, particularly with the provisions in the 4–R Act stipulating that women are to be included among the beneficiaries of the FRA equal opportunity measures. She observed that:

[32] Melvin Humphrey, Ibid.
[33] Ibid., p. 24.
[34] Dudley Christie, director, Interracial Council for Business Opportunity (Newark), *March 1982 Factfinding Transcript,* p. 11.
[35] Ibid., p. 13. The fencing component, however, was largely eliminated due to budget cuts, Louis S. Thompson, *September 1982 Factfinding Transcript,* Vol. II, p. 57.
[36] Michael Sharp, president, Legal Technical Development Corporation, telephone interviews (two), Mar. 5, 1982 (Sharp was unable to attend the March meeting); letters to Sharp from Tino Calabia, project director, Mid-Atlantic Regional Office, U.S. Commission on Civil Rights, March 6 and March 9, 1982.
[37] Sergio O. Diaz, president, Diaz Contracting, Inc., *March 1982 Factfinding Transcript,* p. 55.
[38] Beverly A. Harper, president, Portfolio Associates, testimony before the U.S. Commission on Civil Rights, Inter-Regional Advisory Subcommittee on NECIP, "Summary of Factfinding Meeting on NECIP Minority and Women Contracting, May 13, 1982," p. 4 (hereafter cited as *May 1982 Factfinding Summary).*
[39] Ibid.
[40] Nona Cunane, president, Guardian Construction Co., Ibid., p. 15.

NAWFC members have experienced an inordinate difficulty in simply being registered in computerized minority business source lists. And, if they are successful in becoming part of a source list, their experience has been that they are not provided any opportunities for consideration of NECIP prime or subcontracts.[41]

Andrulis noted that six member-firms involved in the construction industry went out of business in the past year, while one informed NAWFC "that in order to simply stay in business it has temporarily agreed to place its employees with a DOT-recognized minority business enterprise." That firm also told NAWFC that "at no time has any potential NECIP buyer contacted [the member firm] to pursue affirmative action procurement goals."[42]

An Asian American contractor based in Washington said he learned of NECIP about 4 years ago and registered at DOT as a regular contractor. Upon being told his firm could be qualified as minority-owned, he also registered as a minority contractor. Afterward, he initiated other communications and even revisited DOT to assure himself of the inclusion of his firm in the computerized list. Nonetheless, when he appeared before the Factfinding Meeting, he had not received any invitation to bid.[43]

These criticisms and expressions of frustration do not seem restricted to the railroad construction industry; rather, the same kind of problems has apparently affected Federal procurement efforts in general. Writing generally of the task of matching firms to procurement opportunities, one observer noted in 1980 that if there are very many minority firms capable of meeting the government's needs:

the government has not yet developed very efficient methods for locating them and matching their capabilities with the government's requirements.[44]

Bidding Problems

The comments of some panelists focused on problems encountered in the bidding process. Hanford Jones, executive director of a Statewide trade association of 200 minority firms in Maryland, outlined his attempts to facilitate NECIP awards for his member-firms. He reported that in June 1978 his association sponsored a seminar on NECIP for 25 contractors with the assistance of DCP. Most of the comments from the contractors at that time reflected their belief that Amtrak and FRA operated in confusing ways that only frustrated contractors. According to Jones, "projects are advertised and then suddenly just taken off the street prior to bid opening or cancelled the day of a pre-bid meeting."[45]

Contractor Nona Cunane concurred with Jones. Cunane said she arrived at some NECIP pre-bid briefings only to discover that they had been cancelled, and went to other meetings where Amtrak failed to appear. She also said that she had been given wrong meeting dates or places on more than one occasion.[46]

In January 1983, 8 months after the May 1982 Factfinding Meeting, Hanford Jones complained that such confusion still persisted. As examples, he cited the handling of two NECIP section improvement components on Maryland trackage. A pre-bid meeting was announced by Amtrak for a date in January 1983. Without sufficient notice to potential minority contractors, the meeting was switched to about a week later, when reportedly it was suddenly postponed again. As of the time Jones complained, the design drawings were still not available to his association or to his member-firms, and he was of the opinion that even the LOC may not have been kept abreast of the changes.[47]

Traveling to a pre-bid meeting that has already been canceled is particularly costly for minority businesses, Jones said. Many disadvantaged firms are small and the loss of a firm's officer for a day can have heavier consequences for a small firm than it would for a large firm. His association attempts to keep member-firms abreast of contracting developments but he complained of insufficient support from NECIP personnel to do the kind of job required.

[41] Marilyn W. Andrulis, president, National Association of Women Federal Contractors, *September 1982 Factfinding Transcript*, Vol. I, p. 40, as corrected by Dr. Andrulis and submitted with other materials attached to her letter to Tino Calabia, Oct. 18, 1982.
[42] Ibid.
[43] Stanley S. Lee, president, Meridian Roofing and Construction Co., Inc., *September 1982 Factfinding Transcript*, Vol. I, pp. 65 and 68.
[44] Singer, "Minority Share of Government Work Increasing Under Carter's Prodding," *National Journal* (August 1980), p. 1,270.

[45] Hanford Jones, executive director, Maryland Minority Contractors Association, Inc., *May 1982 Factfinding Summary*, p. 10. Also, Jones, "MMCA, Inc., Testimony for Submission to the U.S. Commission on Civil Rights Hearings Concerning the Northeast Corridor Improvement Project," May 13, 1982, p. 1 (hereafter cited as "MMCA Testimony").
[46] Nona Cunane, *May 1982 Factfinding Summary*, p. 15.
[47] Hanford Jones, telephone interview, Jan. 14, 1983; "MMCA Testimony," p. 1.

Jones had also sought NECIP materials from DOT, DCP, and Amtrak which he had hoped to put at the disposal of local member-firms visiting the association's office, but he was unsuccessful in obtaining them.[48]

NECIP officials admitted early delays and confusion about contract opportunities. "The contracts we discussed [at seminars] in 1977–78 are only now being done," said Roland Jones in 1984. He added, "the minority community was disillusioned," although he also stated that minority contracting associations did get pre-bid announcements of NECIP contracts but often did not respond.[49]

Overall Results

MBRC had had contractual relationships with its old network of LOCs for 2 years by the time the LOCs closed their doors in the first half of 1981. For an outside assessment of the MBRC, a Washington-based consulting firm was commissioned by FRA to review the first several years of the MBRC's operations. Its report[50] nowhere seems to narrow its focus on the LOCs, which once constituted the MBRC's essential "frontline" mechanism. The omission may have been due to the fact that the LOCs had operated for less than a year when the report was issued. The report, however, did cover the range of relationships and responsibilities that the MBRC held vis-a-vis minority and female contractors.

Noting that the MBRC was "operating at less than 5 percent of the required resources necessary to initiate their programs effectively,"[51] the report summarized its analysis as follows:

> Although the MBRC officially opened in mid-1976, it operated with a skeletal staff, consisting of an executive director and a secretary, until the following year. This and other organizational problems created a credibility gap between the Center and potential participants in the Minority Business Enterprise (MBE) program. Delivery services seemed marginal compared to heightened expectations. This resulted in an atmosphere of apprehension about DOT's promises, in general, and the Center's efforts in particular.[52]

While this assessment—2½ years after the MBRC became operational—did not dwell on the LOCs as such, it gave an overview echoed by some of the former MBRC and LOC participants whose frustrations have already been described in this chapter.

On the positive side, however, LOC director Joseph Montserrat saw the MBRC and LOCs as instruments of the only Federal program featuring strong provisions for the inclusion of disadvantaged contractors—provisions then actually based in the law undergirding that program.[53] Montserrat also observed:

> One of the big results of this, which is very difficult to measure, is the amount of education received by people who never dealt with minorities before. I think it is intangible, but intangible worthy of note.
>
> This is the first time in law that women were recognized as minorities. This created all kinds of problems in the beginning, but again we had to do some learning. We were able to differentiate between the fronts. . .and those women who were legitimately in business as minorities with problems. But this is another aspect of the program which I think has great value.
>
> From another point of view—I must add for my own self-consciousness—we, Hispanics, unfortunately. . .in this program like so many others—we not only had to fight the railroads but we had to fight our own way into the program. That was a necessary part of education to even us minority-oriented folk, because we had to learn about each other, too.
>
> So all in all, I would say that the law is still on the books, the requirement is still there. . . .It is, it has been, despite all of its failures, a very successful program.[54]

In summing up his views on NECIP, outreach official Dudley Christie observed:

> I think one of our problems in these programs was that we looked for quick fixes. We looked to get quick results when that doesn't happen in the business world. You're dealing with people who need to develop certain. . .relationships, especially in purchasing. The railroads purchase a lot by purchase orders, a lot of it is by telephone requests. You don't do this with new people coming in.
>
> I found that dealing with the minority firms, we had to try to get them to meet with the purchaser—whether Amtrak or Conrail—and develop these relationships, personal

[48] Ibid. See also "MMCA Testimony," Exhibits 1 and 2.

[49] Jones Interview May 15, 1984.

[50] International Business Services, Inc., "Assessment of the Effectiveness of MBRC Program Design/Structure," Jan. 5, 1979 (hereafter cited as "Effectiveness of MBRC").

[51] Robin L. Anderson, executive vice president, International Business Services, Inc., transmittal letter to John M. Sullivan, Administrator, Federal Railroad Administration, Jan. 12, 1979.

[52] "Effectiveness of MBRC," Appendix II, p. 1.

[53] Joseph Montserrat, *March 1982 Factfinding Transcript*, p. 14.

[54] Ibid., p. 17.

relationships, with the hope of getting some kinds of contracts.[55]

As a practical matter, the efforts of majority contractors to fulfill their goals were also an important part of the outreach program, albeit a difficult one to measure.[56] As these contractors sought out minority subcontractors, the potential for expanding existing business networks on a permanent basis increased.

In the end, any assessment of NECIP outreach efforts must balance the program's success in surpassing the 15 percent goal with the frustrations of those who may feel they missed opportunities for lack of knowledge about them.

[55] Ibid., p. 12.
[56] Efforts to interview majority contractors, assisted by FRA and Amtrak, were unsuccessful.

Chapter 5

Barriers Facing Minority and Women Contractors

Among the general barriers confronting minority/women contractors are difficulties in acquiring bonding and insurance, undercapitalization, opposition from majority prime contractors to goals and set-asides, and competition from "fronts." This chapter discusses how such problems as bonding, undercapitalization, insurance, "fronting," and opposition from white male contractors may have affected M/WBE participation in NECIP. It also touches on how some of these problems may be alleviated in the future.

Bonding

Access to bonding and insurance is a problem that seriously impairs the ability of disadvantaged firms to win contracts. A survey conducted by the Associated Minority Contractors of America revealed that:

> 24 minority contractors. . .lost between $64 million and $99 million in total contracts because they could not get bonded by the Federal government or from private surety companies. The average amount lost was between $262,705 and $409,549 per contractor.[1]

Virtually every representative of a construction firm or trade association identified bonding as a serious problem, or agreed with others that it is so. Hector Vasquez, a former member of the Minority Business Resource Center (MBRC) Advisory Council, reported that at one point $4 million was expected by the MBRC for a program to combat bonding problems. After a year and a half of delay and difficulties, the MBRC was able to distribute only $400,000 to several Minority Enterprise Small Business Investment Companies (MESBICs), some of which made fast use of the resources to help local contractors.[2]

At the September 1982 Factfinding Meeting, Sherman L. Brown, chief executive officer of the Minority Contractors Assistance Project (MCAP), spoke at great length on the severity of bonding problems.[3] In 1977, MCAP was approached by the Surety Association of America on how better to facilitate bonding for minority contractors; from the discussions emerged the MCAP Bonding and Insurance Agency, Inc., which has since bonded minority firms for contracts ranging from $50,000 to $5 and $7 million. In addition, MCAP itself was directly involved in NECIP from 1979 to 1981.[4]

Out of that experience, Brown summarized his views on bonding. He stated that on the day that minority contractors reach economic parity, they will be able to "walk in and build a $100 million project and shake hands on it, and get. . .bond also on the same day," implying that bonding would then no longer remain a problem. However, he pointed out that "it's going to be years before, in the

[1] Roy Betts, "Construction in the 1980's," *Hispanic Business*, September 1980, p. 8.

[2] Hector Vasquez, *March 1982 Factfinding Transcript*, p. 7.

[3] Sherman L. Brown, *September 1982 Factfinding Transcript*, Vol. I, pp. 80–92. MCAP was created in 1970 due to interest expressed by the Ford Foundation, five major insurance companies, and the National Urban Coalition. Headquartered in Washington, D.C., MCAP has offices in Georgia, Illinois, and California.

[4] Ibid., p. 80.

construction industry, you are going to find minority contractors reach economic parity."[5] Although a few of MCAP's clients obtain bonds for up to $7 million, "the overwhelming majority have a poor bonding experience record. . . ."[6]

According to MCAP officials, one major effect of this predicament is a catch-22 situation:

> [M]inority firms usually find themselves in a Catch-22 situation: Without a work track record, it's difficult for them to get the bonding and capital. Without the bonding and capital, it's hard for them to win contracts to build that track record.[7]

The same predicament affects women-owned enterprises as well. Asked whether bonding problems affected female contractors because they are women, Marilyn Andrulis, president of the National Association of Women Federal contractors (NAWFC) replied:

> Yes, our members have had difficulty. . .on account of the fact that they are women and they don't have the track record. It's very circular. If you have never had the opportunity to demonstrate, how can you demonstrate you are credible enough to be bonded?[8]

Ivo Amaral, chairperson of the Hispanic American Construction Association (HACA) (who also served as president of the National Association of Minority Contractors (NAMC) for 6 years and helped negotiate the creation of MCAP[9]), noted the same bonding issue. He observed that:

> We minorities weren't allowed to own property. We, therefore, have no collateral and that is the problem with the bonding. . . .It would take another 20 years before we can own property enough to have the bond.[10]

Amaral is also president of a construction firm and mentioned that by 1968 his firm enjoyed "a half-million dollars worth" of bonding and a revolving line of bank credit.[11] Despite having been selected to carry out Federal and other construction work on the mainland, in Puerto Rico, and even in Poland, his firm has lost its bond and credit line, and is now in the same situation as many other minority firms—without a bonding capacity.[12] He alleges that "there is a red lining on minority contracting and the bonding company should not be let off easy."[13]

Although the bonding problem is widespread, obviously not all minority- and women-owned contractors are without bonding capability. Among the heads of construction firms appearing at the Inter-Regional Advisory Subcommittee's Factfinding Meetings were at least four who reported they either had not, or do not now, suffer from bonding problems. Anita Sterrette, a black woman who is president of a firm founded in 1969 but still among the smallest of the 20 construction firms represented, stated that most of her painting jobs were under $10,000. This meant that she needed no bonding, or only "a very small performance bond," which the general contractor for the job would often put up.[14]

Guardian Construction Company, controlled by Nona Cunane, began operations in 1977. Guardian suffered bonding problems initially, but, after establishing a record of performance over several years, the firm is now able to get some bonding without apparent difficulty and has already won three NECIP contracts.[15] Nevertheless, firms started by males at the same time Guardian began are now doing multimillion dollar jobs, while Guardian is still unable to obtain a bond for $1 million.[16]

A third firm in business for 30 years and relatively free of bonding problems does general contracting. Firm owner Carlson Harvey was congratulated by the Connecticut Transportation Commissioner on the State's "award of the first contract to a black minority business enterprise as a prime contractor."[17] The work involved almost $50,000 for bridge repairs over railway tracks. Harvey told the Inter-Regional Advisory Subcommittee that he "can bond up the size of the job I want to get involved in."[18]

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5 Ibid., p. 84.
6 Ibid., p. 54.
7 James P. Fremgen, "Cashing In on a Boom: Minority Firms Look to Share in Construction," *Washington Post*, Mar. 20, 1982, p. F-20.
8 Marilyn W. Andrulis, president, National Association of Women Federal Contractors, *September 1982 Factfinding Transcript*, Vol. I, p. 52.
9 Ivo Amaral, president, Hispanic American Construction Association, ibid., p. 101.
10 Ibid., p. 36.
11 Ibid., p. 51.
12 Ibid., pp. 100–101.
13 Ibid., p. 101.
14 Anita Sterrette, president, Anita Painting, *September 1982 Factfinding Transcript*, Vol. I, p. 75.
15 Nona Cunane, president, Guardian Construction Company, *May 1982 Factfinding Summary*, p. 15.
16 Ibid., p. 16.
17 "Powers Awards Contract to Minority Firms," *Connecticut Construction*, June-July 1980, p. 104. Also, Morgan McGinley, "Black Businessman Finds Uphill Battle Pays Off," *New London Day*, July 19, 1980, p. 2.
18 Carlson Harvey, president, Carlson Industries, *March 1982 Factfinding Transcript*, p. 86. But he also complained that, despite persistent efforts, he was unable to engage in any NECIP work, including the much publicized Connecticut River Bridge repairs. Ibid., pp. 80–82 and 86.

The fourth firm no longer with bonding problems, Roubin and Janeiro, Inc., of the Washington area, was one of the largest of all firms which were represented at Factfinding Meetings or interviewed for the present study. It had completed multimillion dollar stone work on the highly acclaimed East Building of the National Gallery of Art and the Frances Perkins Department of Labor Building.[19] When Roubin and Janeiro started, it was hard-pressed to make ends meet. Attempting to meet one payroll, the firm's president, Angel S. Roubin, unsuccessfully sought loans at four banks and had to put up his own house in order to borrow $1,500 from a loan company. As a Hispanic, he felt that institutions controlling the construction industry were saying "this spic hasn't gotten a chance to go anywhere, why should we take a chance with him? The same problem. . .happens with a black or with a woman."[20] But the firm persisted, said the president, and:

I can go to a bank today and borrow a million dollars on my own signature without even putting up my house or my company or anything. . .My gross bond capacity is about $25 million.[21]

Recalling his early difficulties, he reiterated the need to help minority subcontractors along "so that one day [a minority] contractor can be on his own, get his own. . .bond, and bid on his own job as a general contractor."[22] Roubin's approach was commended as an effective means of establishing performance track records for minority/women subcontractors, leading to overcoming the bonding problem:

When I started, I didn't have any kind of bond. . .[Since] they had confidence in my abilities as a person, they took a chance on me with a small job. . .they wouldn't take a chance on me with a million dollar job, [but] they took a chance on me with a 50 thousand dollar job.[23]

Prime contractors could waive bonding requirement for subcontractors if the risk of waiving is small and affordable, since they have already put up bond for the whole project.[24] MCAP president Brown observed that:

If we essentially do what Mr. Roubin has suggested, the way he works with minority subcontractors, he seeks them out, he tells them this is the price I get, if you can do it for this you've got it. If the majority contractors do that, you will get $300 million or more on the Northeast Corridor Improvement Project.[25]

Joint Ventures as a Remedy

In addition to what some minority contractors might do for other minority/women subcontractors, as described above, the Inter-Regional Advisory Subcommittee heard additional recommendations on how bonding barriers might be surmounted. Ernest Edwards, the black president of a Philadelphia general contracting firm, observed that becoming a joint venture partner is one way of overcoming some bonding problems. Joint ventures allow one partner to share in available bonding, thus, allowing a disadvantaged firm to share in the "bondability" of the majority partner.[26] Moreover, the concept of joint venturing becomes an economic development strategy which can easily lead to the development of minority general contractors. Many observers attest to the viability of the joint venture strategy for disadvantaged firms.[27]

During the March 1982 Factfinding Meeting in New York City, the former director of a Local Outreach Center (LOC) (once funded by FRA) reported that a joint venture approach was attempted during the earliest NECIP construction efforts. At that time, LOCs encouraged joint ventures among minority subcontractors, in part to reduce bonding problems and also to permit them to take on large NECIP fencing jobs,[28] although such jobs ultimately failed to materialize.

[19] Angel S. Roubin, president, Roubin and Janeiro, Inc., *September 1982 Factfinding Transcript,* Vol. 1, p. 58.
[20] Ibid.
[21] Ibid.
[22] Ibid., p. 29.
[23] Ibid., p. 94.
[24] Ibid., p. 95.
[25] Sherman L. Brown, Ibid., p. 80.
[26] Ernest Edwards, Jr., president, UNILAND Corporation, *May 1982 Factfinding Summary,* p. 17.
[27] As examples, note such pronounced statements as "By themselves, most minority subcontractors could not qualify from the experience, bonding, or operating capital point of view to take on [large projects]. . .But by joining with another subcontractor, the minority firm gets the opportunity to do the work and participate in the experience and the profits," and "joint venturing can help the minority firm to overcome financing and bonding barriers [in the construction and development area]." The sources of these quotes are, respectively, Fremgen, "Cashing in on a Boom," p. F-2 and Jesse Hill, Jr., "A Bicentennial Look at Black Americans in Business From an Economic Detour to the Economic Mainstream," *Vital Speeches of the Day,* Vol. 42 (Sept. 1, 1976), p. 696.
[28] Dudley Christie, director, Interracial Council for Business, Newark, *March 1982 Factfinding Transcript,* p. 40.

Ernest Edwards advocated and carried the concept of joint venture a step farther. He suggested that when a general contractor complains that sufficient minority subcontractors cannot be found for a project, "the general contractor should be forced into joint ventures. . . .A minority subcontractor, like a majority general contractor, only needs to employ a project manager to function as a general contractor."[29] Such strategy of forcing joint ventureship would help minority subcontractors to become general contractors by sharing in partner's bondability.

Nona Cunane, president of a female-owned firm that has held three Federal construction contracts, suggested that NECIP components be broken down to below $25,000 wherever possible. Knowing that bonds may be waived for Army, Navy, and Air Force contracts below $25,000, she believed that this would facilitate increased opportunities for disadvantaged contractors in NECIP.[30]

Finally, in his address opening the September 1982 Factfinding Meeting, former DOT Secretary Coleman recommended "that a surety bonding program become a major thrust of Department of Transportation policy in the future" and expressed hope that the MBRC's current efforts to establish such a program would eventually lead to increased participation of minority- and female-owned firms and even larger contracts involving them.[31] On December 7, 1982, at the first departmentwide civil rights conference since Coleman's tenure, DOT Secretary Drew Lewis announced that DOT, "under agreement with a private surety company, [is] making a $20 million bonding pool available to [M/WBEs] participating in railroad contracts."[32] Without doubt this announcement is a step in the right direction, and one hopes that such a step would ease the problem of bonding barrier confronting M/WBEs.

[29] Edwards, *May 1982 Factfinding Summary*, p. 17.

[30] Ibid., p. 13.

[31] William T. Coleman, *September 1982 Factfinding Transcript*, Vol. I, p. 11.

[32] Drew Lewis, (then) Secretary of Transportation, "Talking Points for Secretary Drew Lewis, Civil Rights Conference, Washington, D.C., Dec. 7, 1982," p. 6.

[33] Jones Interview, May 1, 1984.

[34] Melvin Humphrey, Director, Office of Small and Disadvantaged Business Utilization, Department of Transportation, *September 1982 Factfinding Transcript*, Vol. II, p. 3.

Undercapitalization

Apart from bonding, many involved in NECIP agree that undercapitalization is a major barrier for minority/women construction contractors. Roland Jones of Amtrak identified lack of capital and bonding as the chief obstacles to minority/women contractors, observing that "you have to be capitalized to work construction." He added that a 60-day lead time is required for payment by Amtrak.[33] DOT official Melvin Humphrey also noted that:

> One of the problems businessmen have faced (where I say businessmen, I mean females also) is the inability to have working capital adequately to finance operations, finance inventories, and so forth. . .and in many cases a lack of sufficient capital to take long-term investments.[34]

Humphrey went on to outline how the Department of Transportation funded seven MESBICs with $9.6 million. Despite less funding than had been hoped for (the expected participation of SBA did not materialize), Humphrey reported that MESBICs "were instrumental in providing long term equity and debt capital to minority business enterprises that were seeking rail-related contracts. . . ."[35] According to Humphrey, MBRC was:

> in the midst of working with business entities, both minority firms and nonminority firms, to provide mechanisms that will enable us to have available, for businessmen who are actually seeking contracts up and down the Corridor, short-term, capital and bonding assistance. It is our plan to have this apparatus operational before the end of the year.[36]

The progress made by MBRC in implementing this program since the time of the Factfinding Meeting could not be ascertained.[37] However, FRA noted that a short-term financial assistance program had been negotiated with the Atlantic National Bank of Norfolk, Va.[38]

Amtrak took steps occasionally to relieve cash flow difficulties experienced by subcontractors. In one instance, for example, a subcontractor lacked the funds to meet his payroll, thus slowing down

[35] Ibid.

[36] Ibid., p. 4.

[37] Inquiries on this subject to MBRC staff from the U.S. Commission on Civil Rights, Mid-Atlantic Regional Office, were never answered. See Suzanne Crowell, civil rights analyst, U.S. Commission on Civil Rights, Mid-Atlantic Regional Office, letter to Wendell Harbour, Assistant Chief, Minority Business Resource Center, Apr. 19, 1984.

[38] Louis S. Thompson, letter to Walter Washington, Apr. 18, 1983, p. 25.

completion of the job. Amtrak worked with the prime contractor:

> to reschedule the work performed by the subcontractor into smaller segments which allowed faster invoicing by the subcontractor, and subsequent faster payments alleviating the cash flow problem.[39]

In spite of these efforts, or perhaps because these efforts are too sporadic and meager to confront the challenge, the problem of undercapitalization remains, binding M/WBEs to disadvantage.

Insurance

While not as prevalent as problems stemming from lack of bonding or capital, obtaining insurance represents another obstacle for some minority- and women-owned firms. In connection with NECIP opportunities for part of what was once publicized as a $22 million fencing component, James R. Carter, president of a New Jersey firm, noted that for $1 million of insurance, a contractor needs to pay as much as $25,000 and the smallest NECIP fencing job was over $900 thousand. Since the bids generally ranged from $1 million to $3 million, the insurance rate on such large contracts worked serious hardships on minority firms like his own.[40]

Even the female contractor who overcame bonding problems and who won three NECIP contracts stated that her insurance difficulties were only solved by resorting to a costly policy with Lloyd's of London. Nona Cunane believed insurance was extremely difficult or expensive to obtain for railroad work because of the special protective policy needed for personnel working on or along high-speed tracks. This might only increase the level of hardship encountered by small disadvantaged businesses like minority- and female-owned construction firms interested in NECIP.[41]

Although the participants in the three Factfinding Meetings believed insurance was a problem, they offered no solutions.

Problems of Fronts

Although designed to benefit disadvantaged contractors, a few governmental affirmative action programs have been exploited by unscrupulous contractors. Minorities or females have posed as heads of firms actually controlled by white males, and have thus won awards intended for bona fide disadvantaged contractors.

"Fronts" and sham joint ventures between white contractors and minority/female subcontractors have been uncovered in various governmentally sponsored programs.[42] For example, they were found in the 1977 Local Public Works–Round II (LPW–II) program of the U.S. Department of Commerce's Economic Development Administration (EDA). EDA's final report on LPW–II stated that:

> The most difficult monitoring responsibility involved the determination on a case by case basis of whether, and to what extent, each proposed MBE expenditure should be counted toward fulfillment of the 10 percent MBE participation requirement.[43]

To help handle the monitoring responsibility, EDA mobilized close to 100 staff, including attorneys in its regional office network and others in Washington, D.C., according to Darryl Johnson, former attorney and expert advisor to LPW at EDA.[44]

When the Inter-Regional Advisory Subcommittee met in March 1981 with Miles Washington, director of FRA's Minority Business Program Office, he cited examples of fronts uncovered by his staff and documented in the FRA files.[45] Although front-page scandals involving such firms still occur,[46] some believe the problem can be checked. For example, Darryl Johnson viewed the commitment of more than 100 staff to eligibility monitoring, out of a total of approximately 1,000 fulltime LPW staff, as a clear measure of EDA's seriousness about its affirmative action program.[47] Contractor Nona Cunane suggested that a scrupulous certification process like

[39] E.C. Rudolph (for R.D. Johnson, Project Manager, NECIP), letter to Walter E. Washington, Feb. 23, 1983, p. 3.
[40] James R. Carter, president, Garden State Fence Company, *May 1982 Factfinding Summary*, p. 22.
[41] Nona Cunane, Ibid., p. 15.
[42] Robert W. Glover, *Minority Enterprise in Construction*, (New York: Praeger, 1977), pp. 97–98.
[43] U.S., Department of Commerce, *Local Public Works Program: Final Report: Creating Jobs Through Public Works Projects in Areas of High Unemployment*, December 1980, p. 62.
[44] Darryl C. Johnson, former expert advisor to the EDA Local Public Works Program, interview in Washington, D.C., May 2, 1983 (hereafter cited as Johnson Interview).
[45] Miles S. Washington, Jr., director, FRA Minority Business Program Office, summary record of Inter-Regional Advisory Subcommittee meeting, Baltimore, Mar. 26, 1981, pp. 1–2 (U.S. Commission on Civil Rights, Mid-Atlantic Regional Office files). Washington later became director of Civil Rights for FRA.
[46] Selwyn Raab, "Abuses Are Found in Minority Hiring in New York State," *New York Times*, June 13, 1983, p. A-1.
[47] Johnson Interview, May 2, 1983.

the one adopted by Maryland's Department of Transportation could weed out fronts.[48] Marilyn Andrulis of the National Association of Women Federal Contractors conveyed the belief that "fronting is a false issue" which is readily exposable if the reviewing agency is truly interested in detecting and exposing fronting firms.[49]

Opposition from White Prime Contractors

Disadvantaged firms involved in construction are relatively small and depend on the good will of majority contractors for subcontracts.[50] The Associated General Contractors of America (AGC) is the national organization of general contractors, and describes itself as "not an all-white association: we have black, Spanish, Indian, and Asian members, though not as many as we would like to have."[51] AGC is nevertheless viewed by some disadvantaged contractors and their proponents as reflecting the attitudes of unsympathetic white contractors. For example, it has been observed that "AGC and organizations like it had done more to undercut competitive bidding than anyone else operating. . .so as to exclude minority contractors."[52]

AGC's own monthly trade journal and the public record provide examples of AGC opposition to provisions calling for minority goals in Federal or other governmental programs.[53] In some cases, the AGC claimed success in having Federally proposed provisions modified. For example, the June 1979 issue of AGC's trade journal, *Constructor*, reported that:

> When [the Office of Federal Procurement Policy] published its final version [of the subcontracting regulations implementing the Small Business and Minority Business Enterprise Subcontracting section of P.L. 95-507], many changes had been made in accordance with AGC's February 13, 1979, comments.
>
> OFPP eliminated the section that gave contract officers the authority to ask a contractor to resubmit plans for employing minority and small businessmen.
>
> OFPP's final subcontracting regulations state that when the contracting officer sends "the offeror" a letter advising of the goals the Government contemplates for subcontracting to small and small disadvantaged concerns, that letter *shall* (not should, as in the proposed regulations) state that the goals are informational only and not legally binding.[54]

In other instances, AGC was less successful. AGC brought suit against the U.S. Department of Commerce in *Fullilove* v. *Klutznick*,[55] challenging the constitutionality of the set-aside provisions in the Local Public Works (LPW)–Round II program. A month after losing the case,[56] the incumbent AGC president characterized the decision to mean that "it is legal to discriminate in favor of some citizens solely on the basis of race," adding that the construction industry was being advised to "accept so-called benign racism as a fact of life with which we must live."[57] The AGC "vowed to continue actions to correct improper MBE policy through Congress and the courts" and subsequently launched a legal challenge to DOT's regulations which, like those of the Commerce Department, similarly prescribed a level of involvement of disadvantaged firms in certain DOT programs.[58]

After losing in both of those challenges, the AGC leadership in 1981 still favored dismantling Federal mechanisms designed to increase the involvement of minority- and female-owned firms in programs like NECIP. According to a March 1981 *Washington Post* report, the AGC was among several groups that "have been up in arms" about a DOT measure which would allow a contract to be awarded to a bidder who meets subcontracting goals, even if the bidder is not the lowest bidder.[59]

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48 Cunane, *May 1982 Factfinding Summary*, p. 16.
49 Andrulis, *September 1982 Factfinding Transcript*, Vol. I, p. 55.
50 Williams Interview, Apr. 25, 1984.
51 James M. Sprouse, executive vice-president, Associated General Contractors of America, "Minority Business Enterprises in Construction," *Constructor*, Vol. LX, No. 4 (April 1978), p. 61.
52 Brenda Wilson, "Set-Asides: New Laws Aid Minority Firms," *Civil Rights Digest*, Summer 1978, p. 5.
53 See especially "MBE/WBE Regulations: The History of AGC's Involvement," *Constructor*, Vol. LXII, No. 10 (October 1980), pp. 29-36.
54 "OFPP Announces Subcontracting Regulations," *Constructor*, Vol. LXI, No. 6 (June 1979), p. 1. Emphasis in the original.
55 *Fullilove* v. *Klutznick*, 100 S.Ct. 2758 (1980).
56 In 1980, by a 6 to 3 decision the Supreme Court ruled that Congress may impose quotas in awarding Federal contracts in order to remedy past discrimination. *Fullilove* v. *Klutznick*, 100 S. Ct. 2758, 2775-2776 (1980).
57 Ival R. Cianchette, "Supreme Court Makes Congressional Return to Reason Imperative," *Constructor*, Vol. 62, No. 8 (August 1980), p. 4.
58 "MBE/WBE Regulations: The History of AGC's Involvement," *Constructor*, Vol. 62, No. 1 (October 1980), p. 35. Also, James W. Singer, "Minority Share of Government Work Increasing under Carter's Prodding," *National Journal*, Vol. 12, No. 31 (Aug. 2, 1980), p. 1269.
59 "Following the Rules on Minority Contracts by Taking a Shortcut," *Washington Post*, Mar. 23, 1981, p. A-3.

In March 1982, the newly elected president of AGC was interviewed by the *Engineering News-Record,* which published brief quotes from him on six "controversial issues." The trade journal's verbatim report on two such issues ran as follows:

On minority participation: "Minority business enterprise requirements should be shelved in their entirety. There is no way that contractors in many areas can conform to them."

On the 8(a) program: "The AGC is against set-asides [for small and disadvantaged businesses] in their entirety. Personally, I think that a $5 million limit [on the size of firms that qualify for coverage] would be adequate."[60]

Later the same month, another AGC spokesman observed that "his group's members 'were not too happy about the [minority participation] laws.'" This spokesperson also said, "general contractors believed the requirements sometimes are unfair and toughen the competitive bidding nature of the construction industry."[61] Several months later, the *National Journal* reported that general contractors were also complaining that the requirements "impose too great a burden on contractors and are causing further delays in what is already a slow process."[62]

A similar AGC position may be inferred from its official response to the DOT's proposed regulations for implementing the 10 percent minority goal contained in the Surface Transportation Assistance Act of 1982. The proposed regulations would cut off Federal highway and mass transit aid to States that do not take immediate steps to award 10 percent of their contract funds to minority-owned businesses. To this proposal an AGC official (director of the AGC's highway division) is quoted as responding, "To say they've gone way beyond what is required is the understatement of the year."[63] At the same time, a DOT attorney was reported as "dismissing most of the criticism as coming from groups that have been strongly opposed to minority set-asides in any form."[64]

Such an unsympathetic stance, which is readily discernible from public documents, could have created an atmosphere of hostile resistance to FRA efforts toward increasing M/WBE participation. However, in spite of the barriers of bonding, undercapitalization, etc., and the underlying inhospitality, the NECIP goal has been exceeded. This plain fact raises the question of how it was possible for NECIP to overcome obstacles and exceed its goal. According to FRA officials,[65] there was no specific resistance which they could not overcome through either persuasion or conveyance of their firm commitment to the goal. Neither do they recall any counter-pressure from the Congressional representatives of general contractors against NECIP pursuing its commitment to the M/WBE goal. In retrospect, they feel that NECIP succeeded in reaching and surpassing its numerical goal largely because there was a shared commitment to the goal within FRA/NECIP management. And because leadership pursued this commitment in an unswerving manner throughout the administration of succeeding Secretaries of Transportation and to the present.[66] FRA officials take special note that they were able to achieve their goal through "exploiting" available administrative resources or leverage without having to file one single lawsuit against any general contractor. Their account underscores the important role that high-level Federal administrators play in any successful effort toward enhancing the participation of minorities and women in mainstream economic activities. It emphasizes that the manner in which commitment is conveyed and the degree to which commitment is pursued may ultimately be a deciding factor.

[60] "AGC Backs Reaganomics, But. . .," *Engineering News-Record,* Vol. 208, No. 12 (Mar. 25, 1982), p. 11. Brackets in original.
[61] Fremgen, "Cashing In on a Boom," p. F–20.
[62] James W. Singer, "Minority Share," p. 1272. (The April 1980 *Constructor* reported that an AGC survey returned by 1,079 respondents ranked minority subcontracting regulations in fourth place as among the most costly with which to comply.)

[63] Isikoff, "DOT's Dole Threatens to Cut Off Aid to States Not Meeting Minority Quota," p. A–19.
[64] Ibid.
[65] Louis S. Thompson and Alexander Chavrid, interview in Washington, D.C., Mar. 29, 1985.
[66] Ibid.

Chapter 6

Summary and Conclusions

The Northeast Corridor Improvement Project (NECIP) started in 1976 under the Secretary of Transportation William T. Coleman. In launching this project, one of the three largest public works programs of modern times, he felt NECIP should serve as a centerpiece and an example of what could be accomplished for disadvantaged businesses. As a result of his determination, NECIP adopted a goal of awarding 15 percent of its contracts or subcontracts to minority- or women-owned business enterprises (M/WBE). This is the highest percentage goal and NECIP is the largest of any Federal project employing such a goal.[1] The goal has been exceeded to date: approximately 17 percent of NECIP contracts or subcontracts has been awarded to M/WBEs.

This report has examined several aspects of NECIP that are of critical concern in achieving the goal of increased M/WBE participation in the Nation's mainstream economic activities: laws and regulations governing NECIP (Ch. 2), NECIP's performance record on M/WBE participation (Ch. 3), NECIP's outreach efforts (Ch. 4), and barriers facing minority and women contractors (Ch. 5). This concluding chapter provides highlights of each chapter, drawing conclusions where appropriate.

Chap. 2: Laws and Regulations Governing NECIP

NECIP has had several tools at its disposal and has effectively used them in achieving its M/WBE goal. Included among the tools available to NECIP were procedural requirements for subcontracting to M/WBEs, financial incentives for M/WBE subcontracting plans, and extensive reporting requirements for M/WBE subcontracting.

P.L. 95-507 requires Federal contractors to establish goals for small and disadvantaged business subcontracting when a construction contract may exceed $1 million, or when any other contract with subcontracting possibilities that is awarded through negotiated procurement may exceed $500,000 (and meets certain other qualifications). Failure to exert a good faith effort to meet the goals pledged is a material breach of any such contract, although litigation regarding such breach is unlikely as a practical matter. Federal agencies are permitted to provide appropriate incentives for contracts let through negotiation.

Not only may Amtrak (as the largest contractor for the NECIP) require each bidder to offer a subcontracting plan when the contract exceeds $50,000, but it also permits selection of a contractor that is not the lowest bidder when such contract represents a superior subcontracting plan and the bid is within 4 percent of the lowest bidder. By rewarding contractors with superior M/WBE plans as long as costs stay within a predetermined limit, Amtrak encourages all bidders to make a serious attempt to utilize minority- and women-owned firms.

[1] Thompson, "Northeast Corridor Improvement Project," p. 27.

The 8(a) set-aside program of the Small Business Administration (SBA), available for use by the Federal Railroad Administration, enabled the awarding of six contracts to M/WBE. But its implementation is said to be time consuming, encumbered with red-tape, and not cost-effective. To increase the utility of 8(a) to Federal agencies and thereby increase the frequency with which Federal agencies are willing to use it, SBA should endeavor to remove administrative encumbrances and increase cost-effectiveness.

Amtrak utilized a focused solicitation program whereby competition for appropriate contracts was reserved to minority/women business enterprises. Two of the seven contracts let by Amtrak to M/WBEs were awarded by this program. The continued use of similar programs and the wider use of competitive minority set-asides by Federal agencies would serve as useful tools to increase Federal minority/women contracting.

Both Amtrak and FRA required extensive reporting of minority subcontracting efforts, including outreach efforts and actual performance of work. Additional on-site monitoring of the periodic reports required of contractors to ensure that good faith efforts by majority contractors are in fact underway has been a necessary ingredient for NECIP success.

Although it is not possible to delineate in any quantitative fashion the relative contribution each of these tools has made toward the NECIP success, it is nevertheless clear that a significant contribution has been made by each tool including 8(a), focused solicitation, reporting requirements, and on-site monitoring programs. Therefore, any effort geared to increase M/WBE participation in Federal contracting should consider these tools viable and significant contributors.

Chap. 3: NECIP Exceeds Its Goal

NECIP exceeded its 15 percent goal in M/WBE contracting. Considering charges that the railroad and construction industries tend to be inhospitable to M/WBE, most Federal agencies should be able to equal the minority/women participation rate achieved in NECIP. Federal agencies should take NECIP's accomplishments into account when setting their own small disadvantaged business subcontracting goals under P.L. 95-507. Viewed in this light, the 10 percent goal required by the Surface Transportation Assistance Act of 1983 does seem quite attainable, for example.

DeLeuw, Cather/Parsons (DCP), as FRA's primary contractor for design, construction management, and procurement packaging for NECIP, adopted Federal procedures that enabled it to use a negotiated method of procurement, in which proposed use of minority architects and engineers by design firms was a criterion used in the selection of such firms. The ability to use such criteria in the selection process was extremely helpful to increasing minority/women participation. In this category of architectural and engineering contractors, NECIP achieved 30.5 percent minority/women participation. Consequently, when selecting a bid for construction in Federal programs, it is desirable to evaluate the quality of a subcontracting plan vis-a-vis minority and women participation.

Nonminority small businesses were more successful in gaining work as prime contractors than were minority small businesses in open competition. It is essential for Congress and Federal agencies to recognize that the problems of minority and nonminority small businesses are not the same, and that measures tailored to assist small businesses in general would not automatically benefit minority- or women-owned business. By the same token, special provisions geared to assist disadvantaged businesses are critical to the success of minority/women firms in gaining work as prime contractors.

The subcontracting programs of FRA and Amtrak were crucial to reaching NECIP's 15 percent goal, since the size of many contracts prohibits the involvement of M/WBE contractors as primes. Along with set-aside programs, subcontracting programs are necessary as part of a two-pronged approach to increase minority and women Federal contracting.

FRA's implementation of Federal procurement law regarding minority/women subcontracting faltered at the beginning, but improved over time. Early excitement and expectations about the size of the NECIP appropriation turned out to be overly optimistic and, when coupled with FRA's early failures, gave rise to frustration and a sense of betrayal among many minority/women contractors. Opportune and targeted dissemination of information has helped over time to ameliorate such problems and should eliminate them in the future.

Prime contractors sometimes failed to meet their pledged goals. In order to encourage meeting pledged subcontracting goals, serious consideration should be given to revising procurement regulations so that Federal agencies may, where appropriate, reduce final payment on a contract in direct proportion to the degree of failure to achieve subcontracting goals or impose other forms of financial disincentive.

Minority/women contractors performed a variety of work beyond site preparation and demolition, which predominated. The most problematic area of procurement for minority/women participation was the category of materials, supplies, and long-lead materials. These problems underscore the need that policy attention should be directed to the means of expanding the range of contracting capabilities for minority/women firms and assisting the development of M/WBE manufacturing firms.

Chap. 4: NECIP Outreach

Over the course of NECIP, outreach efforts were carried out by DCP, Amtrak, and the Minority Business Resource Center's Local Outreach Centers and Program Management Centers. Dissemination of premature and incorrect information regarding potential NECIP contracting opportunities caused confusion and some disillusionment among minority/women firms. In addition, overlapping responsibilities may have caused duplication in the compilation of information about individual minority contractors. Needless to say, such confusion, frustration and disillusionment are avoidable, and it would be essential in the future to ensure that information to be publicized is timely and accurate.

The effectiveness of MBRC efforts in assisting minority/women firms to gain NECIP work is difficult to assess, if not impossible, because MBRC does not appear to compile data that would show which assisted contractors, if any, won NECIP contracts or subcontracts. Further, for at least 1 year, MBRC had no outreach program at all. In addition to ensuring continuity of outreach efforts in the future, it is necessary for DOT to require all outreach programs to keep contract award records that will enable an assessment of outreach effectiveness.

Despite the difficulties inherent in launching the first outreach efforts for a project of this type, and despite the problems inherent in dealing with an industry whose established methods of doing business are of extremely long standing, NECIP outreach efforts were able to assist some contractors and make some inroads into Amtrak procurement that may affect the future contracting operations of the railroad industry.

When NECIP is completed, DOT may wish to undertake a comprehensive review and evaluation of NECIP's minority business utilization, including but not limited to the efforts of various DOT elements such as Amtrak and DCP.

Such a review may be able to identify precisely the ingredients contributing to NECIP's success and also elucidate how various factors interacted to bring about success in NECIP's effort for M/WBE participation. It may also be able to gauge the relative contribution that each ingredient or tool has made to the overall NECIP success. Such a review, if designed and structured in the spirit of causal inquiry, would be of considerable value to other Federal agencies undertaking large Federal projects and having interest in increasing M/WBE participation.

Chap. 5: Barriers Facing Minority and Women Contractors

Department of Transportation (DOT) efforts regarding access to bonding and insurance were of no visible assistance to minority/women contractors doing or attempting to do business with NECIP. Lack of access to bonding and insurance continues to be a major problem for minority/women contractors who would otherwise avail themselves of Federal construction contracting opportunities. DOT mechanisms to invest in or loan funds to undercapitalized minority/women businesses similarly had little or no effect on the ability of minority/women contractors to gain NECIP work. Efforts by Amtrak to assist firms with cash flow problems were helpful, but necessarily limited. It appears, therefore, that bonding and insurance programs, as well as investment mechanisms and loan funds, should be put in place in a timely fashion and, at a minimum, should be ready to function when a major project such as NECIP is launched.

Minority- and women-owned businesses are usually small. Organized opposition from majority contractors to minority set-aside programs continues, adversely affecting the use of minority subcontractors or the willingness of minority or women entrepreneurs to risk entry into the construction field.

Given their expertise and experience, majority contractors have much to contribute toward efforts to combat discrimination against minority- and women-owned firms. Such efforts, if successful, would simultaneously benefit society at large and reduce tensions between the minority/women and majority contractor communities. When minority- and women-owned firms gain self-sufficiency and competitive edge overcoming discriminatory barriers, set-aside and other programs designed to assist M/WBE would become unnecessary. Majority contractors thus can contribute significantly toward building an industry where "color-blind" competition would prevail.

List of Acronyms and Abbreviations

A/E—Architectural and Engineering
AGC—Associated General Contractors of America
DCP—DeLeuw, Cather/Parsons
DOT—U.S. Department of Transportation
EDA—Economic Development Administration (U.S. Dept. of Commerce)
FRA—Federal Railroad Administration (DOT)
GAO—General Accounting Office
HACA—Hispanic American Construction Association
LOC—Local Outreach Center
LPW-II—Local Public Works-Round II
MBE—Minority Business Enterprise
MBO—Minority Business Office (of DCP)
MBRC—Minority Business Resource Center (of DOT)
MCAP—Minority Contractors Assistance Project
MESBICs—Minority Enterprise Small Business Investment Companies
MMCA—Maryland Minority Contractors Association, Inc.
M/WBE—Minority- and Women-owned Business Enterprise
NAMC—National Association of Minority Contractors
NAWFC—National Association of Women Federal Contractors
NEC—Northeast (Rail) Corridor
NECIP—Northeast Corridor Improvement Project
OSDBU—Office of Small and Disadvantaged Business Utilization (of DOT)
PMC—Program Management Center
SBA—Small Business Administration

The 3-R Act: The Regional Rail Reorganization Act of 1973
The 4-R Act: The Railroad Revitalization and Regulatory Reform Act of 1976