

**M**INORITY AND  
**WOMEN'S BUSINESS**  
**ENTERPRISE PROGRAMS**  
**IN ALASKA**

**A**LASKA ADVISORY

COMMITTEE TO  
THE U.S. COMMISSION  
ON CIVIL RIGHTS

*These edited proceedings of a community forum conducted by the Alaska Advisory Committee to the United States Commission on Civil Rights were prepared for the information and consideration of the Commission. Statements and viewpoints in the proceedings should not be attributed to the Commission or the Advisory Committee, but only to individual participants in the forum.*

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UNITED STATES COMMISSION ON CIVIL RIGHTS

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Washington, D. C. 20425

LETTER OF TRANSMITTAL

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We are pleased to submit for the Commissioners' information the attached edited transcript of a community forum held by the Alaska Advisory Committee in Anchorage on November 6, 1987. The purpose of the forum was to obtain information on the operation of State and municipal programs designed to promote participation of minorities and women in government contracts. By a vote of 10 to 0, the Committee approved transmittal of this document to the Commissioners.

During this forum, the Advisory Committee heard from State and local government officials, as well as representatives of business and community groups. The presentations reflected diverse views and experiences with these programs. The forum generated considerable interest within the State. The question of the constitutionality of the Anchorage program, which may be affected by the recent decision of the Supreme Court (City of Richmond v. J.A. Croson Co., 57 U.S.L.W. 4132 Jan. 23, 1989) was not an issue discussed at the forum.

The Committee intends to follow up on the issues examined at this forum. The transcript will be shared with the Governor and other appropriate State and local officials. Efforts will be made to document actions taken by the State to address concerns raised during the course of the project.

We hope this transcript, while not reflecting an exhaustive or extensive analysis, provides a useful overview of one State's experiences with minority and women's business enterprise programs. The Committee believes various concerns were presented which should be of interest to the United States Commission on Civil Rights.

Respectfully,

DANIEL ALEX, CHAIRPERSON  
Alaska Advisory Committee

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Acknowledgments

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## SUMMARY

On January 6, 1983, President Reagan signed into law the Surface Transportation Assistance Act (STAA), which established a national goal of committing at least 10 percent of Federal highway and transit funds to disadvantaged small businesses. When Congress passed the legislation, it directed that "except to the extent that the Secretary [of the U.S. Department of Transportation] determines otherwise, not less than ten percent of the amounts authorized under the Act shall be expended by socially and economically disadvantaged individuals."<sup>1</sup>

The program is administered by the U.S. Department of Transportation (DOT), which issued regulations in 1983 for recipients of Federal transportation funds.<sup>2</sup> These regulations expanded upon the existing Minority Business Enterprise (MBE) program requirements in effect since 1972. The Department of Transportation included, in the new regulations, a requirement that each State agency receiving Federal transportation funds set annual goals for participation of disadvantaged business enterprises prior to

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<sup>1</sup>49 C.F.R. 23.61(a) (1986)

<sup>2</sup>ibid.



the start of the fiscal year. These goals are subject to Federal approval (Alaska set a goal of 10 percent for fiscal year 1986. This goal was exceeded by 1.7 percent, and a total of \$8,413,000 was awarded in that year to disadvantaged business enterprises).

In 1987, amendments to the Surface Transportation and Uniform Relocation Assistance Act maintained the 10 percent set-aside for disadvantaged small businesses; however, the definition was changed to include women as socially and economically disadvantaged persons.<sup>3</sup>

The Alaska Advisory Committee to the United States Commission on Civil Rights convened a public forum in Anchorage on November 6, 1987, to obtain information on the status of State and municipal programs to promote participation of minorities and women in government contracts. The primary focus was on the Alaska Department of Transportation and Public Facilities, which administers federally assisted transportation funds at the State level and is therefore responsible for ensuring compliance with Federal set-aside requirements. In addition, the Municipality of Anchorage has a Women's and Minority Business Enterprise

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<sup>3</sup>For the purpose of this report, the terms MBE (Minority Business Enterprise); WMBE (Women's and Minority Business Enterprise) and DBE (Disadvantaged Business Enterprise) are used interchangeably. They all refer to business enterprises eligible for program benefits established by the STAA.

Program (WMBE) which is governed by city ordinance,<sup>4</sup> as well as by Federal regulations, and representatives of the municipality were also invited to participate in the forum.

A special assistant to Governor Cowper addressed the Advisory Committee and discussed new executive policy decisions affecting the Minority Business Enterprise (MBE) program in Alaska. Others invited to share information and exchange views on the subject included representatives of the Associated General Contractors,<sup>5</sup> Alaska Subcontractors Association, women's, civil rights, and business organizations, the Alaska State Human Rights Commission, and the Alaska Minority Business Development Center.

Participants were asked to share their knowledge and expertise on each of the following:

- a) laws, regulations, and policies governing participation of minorities and women in State and municipal contracts;
- b) programs and initiatives designed to promote enhanced participation of minority and women's business enterprises;

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<sup>4</sup>Anchorage (AK) Ordinance A079-161 (1984).

<sup>5</sup>Declined to participate in the forum.

- c) affirmative action and equal opportunity policies and goals to promote employment of minorities and women in contracts awarded by State and municipal governments;
- d) recommendations and suggestions for policies, programs, and administrative initiatives to increase the role of minorities and women in governmental contracting.

What follows is a brief summary of the major issues and recommendations made by the forum participants and an overview of related correspondence. This is followed by an edited and condensed version of the transcript of the Alaska Advisory Committee's forum on minority and women's business enterprise programs held at the Federal Building in Anchorage on November 6, 1987.

The Alaska Advisory Committee received many informative comments from the participants at the November 1987 forum. The need for closer monitoring of the WMBE program was emphasized by many presenters. Several observers suggested that the program was not being effectively administered by the State Department of Transportation and Public Facilities, and recommendations were received that an independent contract

compliance function should be established outside of the contracting agency. Most presenters agreed there is confusion and uncertainty concerning WMBE regulations and that a need exists for increased outreach, publicity, and community education concerning the program. Presenters also called for greater technical assistance and support services for existing and potential WMBE firms.

The Advisory Committee was also made aware of existing conflicts between the Federal Highway Administration and the Alaska Department of Transportation. State officials told the Committee that Federal regulations are overly restrictive, inconsistently interpreted, and unevenly enforced. Federal officials responded that Alaska has not developed its own priorities, initiatives, and policies to address State interests. This concern expressed by Federal representatives was shared by private individuals at the forum.

Several private sector participants also maintained that Federal guidelines may be stifling some WMBEs, preventing them from expanding and diversifying. They recommended that State and Federal officials work more closely together to discuss problems, offer recommendations, and work toward solutions.

Minimizing conflicts and misunderstandings was seen as essential to promoting effective implementation of the program. Finally, it was suggested by several participants that the Governor place a higher priority on the State's WMBE program and that the Federal Government monitor compliance in a more vigilant manner.

Following the Alaska Advisory Committee's forum, Barry F. Morehead, Division Administrator of the U.S. Department of Transportation, Federal Highway Administration (FHWA), requested a copy of the transcript. In a letter to Commission staff dated April 13, 1988, Mr. Morehead responded to allegations by State officials that there is a lack of Federal guidance for administration of the MBE program.<sup>6</sup> He explained that the Federal assistance program is a partnership between State departments of transportation and the FHWA. The Federal Government develops general guidelines to reflect the intent of Congress. According to Mr. Morehead, "the individual States then develop detailed procedures which are appropriate for their State and conform to the general Federal guidelines."<sup>7</sup> However, he continued, "the Alaska Department of Transportation and Public

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<sup>6</sup>This letter and all other correspondence cited are contained in Appendix I of this document.

<sup>7</sup>Barry F. Morehead, Division Administrator, Federal Highway Administration, letter to John F. Dulles II, staff, U.S. Commission on Civil Rights, Apr. 13, 1988.

Facilities has not developed implementing procedures which address State concerns."<sup>8</sup> Although the FHWA has attempted to fill this void by meeting with affected persons and sometimes developing specific criteria, Mr. Morehead concluded that "as can be seen from the testimony at the hearing, the lack of State procedures has caused considerable frustration and confusion in the contracting community."<sup>9</sup>

The correspondence also reveals that although the Federal Government has provided nearly \$635,000 to Alaska in the last 5 years to provide technical and managerial assistance to minority individuals, only \$213,000 of this has been expended. Mr. Morehead agreed that the program is restrictive, noting that it is "designed to help a select group which has not had the opportunity to participate as fully as possible in the Federal-Aid Highway program."<sup>10</sup> He asserted that these criteria have been consistently applied and did not anticipate liberalization, noting that "the purpose of the criteria is to minimize the opportunity for nonminority firms to hire a minority to 'run' the company."<sup>11</sup>

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<sup>8</sup>bid.

<sup>9</sup>bid.

<sup>10</sup>bid.

<sup>11</sup>bid.

The Alaska forum also generated correspondence to Governor Steve Cowper from the Alaska Human Rights Commission. A December 11, 1987, letter to the Governor signed by all seven Commissioners refers to "severe criticisms" voiced about the State's WMBE program at the Advisory Committee proceedings.<sup>12</sup> The State Commission discussed the issue during a subsequent meeting and concluded that the State's WMBE program "is not a priority for the Department of Transportation and Public Facilities."<sup>13</sup> This position was based on information provided by participants at the November 6, 1987 forum, according to the letter.

The Commissioners also referred to a June 1987 meeting with Special Assistant Ray Price wherein they were advised of the development in the Governor's office of a comprehensive office of equal opportunity, with a WMBE component. The Commissioners asserted that the plan was "aborted."<sup>14</sup> The letter concludes: "we once again feel compelled to state our position in favor of an independent, oversight function located within the office of the Governor to ensure the fair participation of WMBE's in State contracting."<sup>15</sup> The Commissioners urged immediate action by Governor Cowper.

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<sup>12</sup>Alaska Human Rights Commission letter to Governor Steve Cowper, Dec. 11, 1987.

<sup>13</sup>ibid.

<sup>14</sup>ibid.

<sup>15</sup>ibid.

Governor Cowper responded to the Human Rights Commission on February 11, 1988. His letter noted that Mr. Price "has worked vigorously for the past year researching and developing an Equal Opportunity Program (EEO) that will strengthen EEO requirements for our state transportation agency."<sup>16</sup> The Governor stated that internal EEO programs would be consolidated within his office. However, he continued, contract compliance responsibilities (including WMBE) would be retained within the Department of Transportation and Public Facilities. Governor Cowper also promised additional WMBE staff and stated that "a more vigorous contract compliance program will soon be implemented."<sup>17</sup>

Additional correspondence staff from the Alaska Human Rights Commission provided background information concerning the agency's efforts with the State Department of Transportation and the Alaska Power Authority on behalf of minority and women's business enterprises. The letter included a chronology of events over a 9-year period which reflected a lack of success in resolving WMBE problems within the Department of Transportation.

Finally, Commission staff received a letter from the

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<sup>16</sup>Steve Cowper, Governor, letter to Morgan P. Solomon, Chair, Human Rights Commission, Feb. 11, 1988

<sup>17</sup>ibid.



Alaska Black Caucus reinforcing the forum presentation of Everett Louis Overstreet, a Caucus board member, and calling for removal of WMBE functions from the Department of Transportation. The correspondence concluded that "the plan for promoting minority, female, and disadvantaged utilization as outlined by...the Cowper Administration, is not acceptable."<sup>18</sup>

The Alaska Advisory Committee believes that this edited transcript deserves the close attention and scrutiny of public officials, especially the Governor of Alaska, the State legislature, the Commissioner of the Department of Transportation and Public Facilities, and policymakers at the U.S. Department of Transportation. The Alaska Advisory Committee is committed to monitoring developments in the State of Alaska's WMBE program, and hopes that it can contribute to achievement of the program's objectives.

#### PROCEEDINGS

CHAIRMAN DANIEL ALEX: This meeting of the Alaska Advisory Committee to the United States Commission on Civil Rights will now come to order.

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<sup>18</sup>Bettye Davis, Alaska Black Caucus, letter to John F. Dulles II, staff, U.S. Commission on Civil Rights, Nov. 9, 1987.

We are convened here today to gather information on the status of State and municipal programs for increasing the participation of minorities and women in the governmental contracting process.

Ray Price, Special Assistant to the Governor

Mr. Chair and members of the Committee, since December of last year I have been engaged in a number of programs relating to minority and women's business. I have coauthored a reorganization plan for all equal opportunity programs statewide which includes minority and women's business enterprise, specifically, as it relates to the Department of Transportation and the Department of Administration. I'll address the Department of Administration first.

As you know, the [Alaska] Department of Administration has what we consider to be a very cumbersome process for letting contracts, be they for procurement or personal services. In addition to that, these procedures do not include aggressive programs to enhance the participation of minorities and women. To help combat that situation the

Cowper administration followed up on an action that started in the previous administration which was to seek and obtain a Federal grant for minority business development.

We received that grant in January of this year. It is housed and administered in the Department of Administration. The purpose of that grant is to [promote minority business participation] in the area of [State] procurement and personal service contracting.

The program [funded by the grant] today has submitted two quarterly reports to the Federal Government. They have indicated that they're extremely pleased with the progress to date. We're currently working on a policy statement and a program for the department heads, not only in the Department of Administration, but in 16 departments to assist them in their contracting activities in terms of making the atmosphere more conducive to participation of minorities and women. We expect that in this session, or the following legislative session, we will be presenting some legislation addressing procurement and personal service contracting.

The reorganization proposal originally addressed the issue of minority business enterprise by recommending the

transfer of that program from the Department of Transportation to the Governor's office in addition to other equal opportunity programs in the State.

We have finally come to a conclusion as to what scope the reorganization will take. We will be transferring from the Department of Transportation into the Governor's office [the agency's] internal equal employment opportunity (EEO) office and we will leave in the Department of Transportation, for an unspecified length of time, the certification process and the contract compliance process.

In addition to that, the proposal outlined a number of proactive activities and programs and services that could be provided to women's and minority business enterprises (WMBE). The Department of Transportation has agreed to take a look at those suggestions that were made in the proposal. I've agreed to work with them on these proposals -- and we expect to have a fairly aggressive program in the Department of Transportation as it relates to minority and women's business enterprise programs.

COMMITTEE MEMBER--SENATOR ARLISS STURGULEWSKI: I would like to point out to you that I've had some calls from the

business community which includes the minority firms. I think you should take a look at how long names are retained. For instance, there were a lot of firms from outside the State of Alaska, and I think that minority firms within the State should be of a major concern.

MR. PRICE: We have looked at that and it is a concern as it is in other areas regarding contracting. One of the problems we have in dealing with Federal dollars is that we cannot restrict the participation of outside minority firms when it comes to Federal contracting.

SENATOR STURGULEWESKI: I totally agree with that and that's as it should be, but we do not have to advertise for the total United States of America either.

STAFF MEMBER: Does the MBE program apply to all State agencies, or is it restricted to contracts that are funded or channeled through the Department of Transportation? Do you have a statewide program that would affect all contracts regardless of funding source? One that would be applicable to every State agency? Are we talking about a comprehensive program or are we talking strictly about a program that is generated as a result of the Federal requirements under the Department of Transportation?

MR. PRICE: Currently the State has no program statewide to address women's and minority business enterprise development. The Federal programs that are administered by the Department of Transportation are operated by DOT and have goals and so forth. The program that I mentioned previously, the minority business development agency grant that we receive from the Federal Government, is designed to facilitate that statewide through all departments, but when it comes to the State -- pure State dollars -- the State has no program.

Robert Poe, Deputy Commissioner, Department of Transportation  
and Public Facilities

I understand that we have the opportunity to talk to you about our program and also to talk to you about some of the concerns we have in dealing with the program, implementing it, dealing with Federal agencies. I've prepared a few remarks, and I might go into those and then I'd be happy to answer any questions you would have.

Under my part of the organization, we deal with the

minority business or MBE program today under the new Surface Transportation Act. One thing that we find is that the program is not standardized. That is, the requirements are not standardized across all Federal agencies, and I could offer some examples. Right now under [DOT-Federal Highway Administration] we have one program under the Surface Transportation Act that has combined the WBE and the MBE goals together. They are probably the most rigorous in terms of defining requirements for the program, making sure that they're enforced and so forth. The Federal Aviation Administration (FAA) is a lot more lax on that.

We also run into a situation where the Bureau of Indian Affairs (BIA) comes into play. We'll have potential candidates for an MBE situation. They want to be certified as a minority business enterprise and they'll say, "I have BIA certification already, so shouldn't I just be able to walk in and get certification under the FHWA program?" I'd love to tell that person, yes, but the answer is often no, because the requirements that are set out by FHWA are quite a bit more rigorous than those of the BIA.

Another thing that we run into is how FHWA, or DOT and

FHWA, interpret their requirements across their entire department. We have a situation right now where we have a letter from the General Counsel of the Federal Highway Administration (FHWA) which has determined that no wholly owned subsidiary of a Native corporation can be an MBE. This was a startling revelation to me.

By the same token, I have a memo from Mr. Ray Barnhart [former Federal Highway Administrator] which says that they certainly are. I find a little conflict there and certainly that conflict is a difficult thing to enforce in an effective manner with the contractors and the minority and women's business enterprises that want to work with us.

Another problem we have is in terms of the requirements across all 50 States. I just appeared before the Associated General Contractors (AGC) convention yesterday and received about a half hour of extreme verbal abuse on the program. I don't mean to make light of it, but it can be a pretty brutal situation.

One of the things that they'll talk to us about is how the requirements are applied across the 50 States. In Alaska



we're trying to certify firms in the areas for which they are qualified. Several States don't enforce this work category area. If you're qualified to perform concrete work this doesn't mean you're qualified for construction surveying, as an example. We enforce that pretty strictly. That is, you've got to come in and demonstrate the ability to do the job; demonstrate that the individual, or individuals who own the company and are qualifying under the requirements of the certification can perform a commercial, useful function in that specific area. Well, that's not across all States, so the AGC which is across all States certainly makes us well aware that that is not applied equally. Yet FHWA is very certain that we should enforce that certification and we do our best. But it would help if they were consistent across the country especially -- with groups like the Associated General Contractors.

About 4 or 5 months ago, the regional director of FHWA came to Alaska to talk about our program. I noted that just at this one regional visit they had as many people as we had working on the program watching us work on the program.

One of the things that we are really focusing on is not just being a bureaucratic organization that just says you are qualified, or no, you're not and out the door and we're not going to use our brains in this process. We are trying to educate the public on what it takes to be qualified; what the rules are; what the logic is; offering assistance to contractors in better understanding what it takes to be qualified, so that the marriage can work much better. That outreach program takes people and money. Of course, the more people we get interested in this [process] and the more people we make qualified, buries us with more applications. We do not have enough people to do the work of encouraging minority and women's business enterprises to succeed and become viable enterprises in the future. If we could see more funding in the supportive services area, it would be a big help to us.

Simplifying the paperwork would be a big help. One of the problems that comes up is recertification. Those involved say, "Hey, I went through all this stuff before, why do I have to file all this additional paperwork just to have you reiterate the fact that my firm is qualified?"

One problem we have is that DOT has not always done the same quality job over the years. So some of the firms that were certified in the past may have been inappropriately certified and we have to look at them. We try very carefully to make sure that if we've got some bad ones out there that we take care of that.

If a contractor calls us and says there is a sham over here, this is just a front operation and this big construction company is financing that company and is doing everything to make that work for them, we want to know about it and we try to look into that. But, for those legitimate companies that should be certified and recertified on a regular basis a simplification of that process would help quite a bit.

Personally, one of the problems that I have with the Federal programs is that they often never have to face the impact of their programs. As an example, yesterday at the AGC I did not see any FHWA people. They did not have the budget to come. We had the budget to send a representative. I think that might have been a convenient choice on their part. They can be real hardnosed about what it takes, but they are not out there trying to explain it to the people that are affected by it.

We have this big budget and they're watching over us diligently, but I think that they would bring a lot more realism to their programs if they were out there [explaining the WMBE requirements].

There is no outreach program from the Federal program that advises you on how to enforce this program.

What they do say is this or that State has a good program, call them and find out about that. What is this, a random process? It would help if there were real guidelines as to how to get this done, where your interpretation is allowed and where it is not.

What they do tell you is after you make a choice they'll be happy to second guess you after the fact. After you have certified a firm and the contractor has taken on the contract and he has engaged several subcontractors to do the job, they'll be happy to tell you that firm didn't qualify, but nothing up front to prevent all of that heartache in the beginning. [We need] something that really lays out what those requirements are.

I have to personally object to some of these guidelines and I'll explain why. WBE interpretations are extremely

discriminatory, in my opinion. If I look at a women's business enterprise application, and the husband has anything to do with that business, if he has any skills related to that business at all, then it's a front. I have to be completely chauvinistic about that. But you bend over 18 ways to find where the woman does exert operational control [so that her application may qualify].

The logic is, "she's just a wife. She couldn't possibly run that company". It happens all the time. We may get a case and the wife has 2 years in the business and the husband has 8; however, she might be the brains behind the organization, she might make all the financing deals, all the bids, organize the company, keep it running. Those of you who have companies know that business knowledge is as critical to long term success as is knowing how to pour concrete. We cannot certify her [based on Federal guidelines]. That's a family-owned business. There's no way around it.

If a Native corporation owns a firm, even if it has a Native shareholder, or a Native running that company, that's not certifiable under [the Federal Government's] current interpretation. But we have not acted on this. We've got an

attorney general's opinion that says that's highly questionable and I have a letter which says they are. So, we've got some problems there.

There is also a wide variance of opinions on the right way to go. Take this Native interpretation again. I don't think the local FHWA supports that opinion. The regional folks do. Washington, D.C. does, but I don't know how many of those folks have ever been to Alaska. So, that's kind of difficult to deal with.

We have to conduct compliance reviews on firms. We've had a very hard time meeting our goals this year. Two things entered into it. One is that we were supposed to look at 10 companies and we have only a limited staff to do that.

The second is that we have a 4-month construction season and the idea is that you're going to try to look at them somewhere in the peak of their operation so that you can really see who they've hired and who they haven't hired. And if you don't get that compliance review out by 30 days after it was done they won't accept it.

So now, we've got to review 10 companies, with a limited staff, over 4 months and do a good job at it. [The Federal

officials] will second guess whether it met the qualifications or not. There are no standards describing what a good compliance review is. It's just that they'll know it when they see it. And none of that is acceptable.

We may not comply because of our construction season and so forth. That's a problem for us and it's a unique problem to Alaska because the ground is going to be frozen in 2 more weeks and construction will stop.

I believe that the program was intended to give minorities and women the opportunity to break into businesses that they did not have before, especially in the construction industry where it was a very white, male-oriented kind of a thing.

Now, you get a chicken and egg issue here. If you have not done all the work before, you're not qualified for certification.

For example, if you have only done a year of striping and you worked for other people and you've never run a company like that before, they might question whether you really know how to do the work you're trying to be certified for.

Now an intelligent business person would hire other

people that have that knowledge and they would use them to get that job done. Now, that's a front, you cannot do that.

Making a minority business and women's enterprise work requires good business knowledge. We can't count that. If you're going to run a trucking company, but what you primarily do is work out the bids, the scheduling, the leases for the trucks, all of the business things that make or break a business, that doesn't count. You've got to go out and drive a truck. This causes problems because I do not think that really results in a minority or women's business enterprise really becoming successful.

You stop a lot of people before they ever get that extra competitive edge because the rules are that you've got to really know how to do [the actual work].

Ed Ramirez, MBE Coordinator, Department of Transportation and  
Public Facilities

I feel that educating the public is very important in the program. I believe that in the past there has been a public relations effort, an opportunity for the director or his staff to go out into the community and have a workshop or



seminar, send newsletters out, do something to educate the public about the program.

Many times we have people who call, sending in applications who know nothing about the program. This creates an abundance of paperwork because people from bush areas, or even Anchorage and Fairbanks, come in thinking that they (owning 51 percent of a company) will be certified. That is not the case, and the reason is that they don't know what the program is all about. This is my number one focus, going out into the community throughout the State, throughout the bush areas and holding seminars, workshops, sending out newsletters and educating prime contractors and subcontractors on what the program is all about. And that hasn't been done in the past.

MR. POE: Let me propose some solutions. I think for one -- I think the Federal program ought to do exactly what Ed's doing. We're going to try to lay out to folks who don't understand the program why the program exists, what it's there for, what it takes to qualify, what services exist to help you qualify. We're trying to make the process of certification involve more due process.

Secondly, I think that FHWA, FAA, BIA, and the

other Federal organizations should get together as we're trying to do. We're not there yet, but there's been talk of a consortium effort where we're trying to coordinate DOT and the municipality of Anchorage and city and borough of Juneau, and we will be working on that next year to see if we can do something along those lines. It might make sense if BIA and FAA and FHWA sat down and said, "let's make this program consistent across all agencies".

COMMITTEE MEMBER--GILBERT GUTIERREZ: How are goals set up now?

MR. RAMIREZ: Goals are set by funding source. It is based on the availability of the minority contractors. Usually the goals are set a little higher in the urban areas than in the bush areas because of the availability of [WMBE'S]. Most of the time the jobs in the bush areas are not as large as the urban areas, so you can't set goals as high in the bush areas as you do in the urban areas. But we always get complaints, especially from the AGC, telling us our goals are too high. And then we get it from the other side, the subcontractors are telling us the goals are too low.

CHAIRMAN ALEX: Do prime contractors practice bid

shopping, and what, if anything, do you know about it and how can that be solved?<sup>19</sup>

MR. POE: Every contractor does. They're going to see who will give them the best price.

The one thing that can be done about this is that you don't allow bid shopping after the award is made. In other words, if you shopped up in making your bid then that's what you're tied to.

Vince Casey, Manager, Office of Equal Opportunity,  
Municipality of Anchorage

I would just like to briefly point out what I think are the important points of the municipality of Anchorage's minority and women's business enterprise program. We have an ordinance and regulation that indicate how the program will be set up, who is responsible for it, and who will set the goals.

The most important component of the program is certification. We adhere to the Federal regulations as strictly as we can. When the program was started some years ago, anyone applying was granted certification recognition as a minority or women-owned business.

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<sup>19</sup>"bid shopping" is a term which refers to the informal process used by contractors to secure the most favorable offers for subcontracted work.

When I came aboard in 1985 the Mayor called me one day and said, "I have not seen minority subcontractors on that particular project across the street."

I said, "Well, it is interesting you should call Mr. Mayor, because the business that you are looking at is supposed to be black-owned, but you and I know that the person with the white hair is the owner. But they are certified in our directory and so I cannot criticize the prime contractor for not hiring minority contractors."

At that point we went about auditing our directory of certified businesses and we have just about completed that. It has taken quite some time because also each year our staff has also been reduced. When we certify businesses we list them in a directory, and we make this directory available to the prime contractors and whomever wishes to have it.

The Federal Government requires us to submit a plan with our overall goal each year. Once you submit a plan, you must update the goals annually. Our goals at this time are 10 percent minority and 3 percent women. Our ordinance gives the minority business enterprise officer the responsibility to

establish overall goals for the year, as well as goals for individual projects.

In establishing goals we have engineers to identify the scope of work and the components of the project, be it a construction, or an RFP, and list the possible subcontracting opportunities and the dollar amount of that particular component. Then they submit that to our office. It is treated as confidential information, and we compare those components to the minority and women subcontractors that we have certified to see if we have any that can provide those services or products listed by the applicant as possible for subcontracting.

Then we determine whether we are going to have 10 percent minority and 3 percent female goals. Sometimes I have set goals as 15 percent minority and 5 percent female. Sometimes I have higher female goals than I do minority goals and that is the reason we have higher than 10/3 when the opportunity is available to try to reach our overall goal. Once we establish the goals, we mail out a weekly newsletter to each business in the directory listing the contracting opportunities with or without goals that are

coming out of purchasing.

Once the bids are submitted, the low bidder contractor has three municipal work days to submit the MBE-5 [a municipal form], which requires they name the subcontractor; the total dollar amount that they are going to pay them for that work; whether or not they are a local contractor; the work that they're supposed to perform, and to indicate their goals.

Once we receive that, we used to pretty much contact all of those listed subcontractors to confirm that commitment and the dollar figure. In the beginning we found out that a lot of them had not even been contacted, and so that caused prime contractors to start cleaning up their acts. At that time we also decided (because minorities and women said that prime contractors were bid shopping) to require that they submit this as part of the bid, and we did that for a year and a half. Our staff has continuously been cut, and we started having a lot of litigation so we were not able to keep up, and we did acquiesce and go back to the 3 days.

To be frank with you, that has not worked out too well. There are other components of the government that are

supposed to help us enforce that, and that 3 day requirement has not necessarily been enforced the way it should. When prime contractors do not meet the goal established, or set on the project, then they are required to show us in writing how they went about seeking minority and women subcontractors. If they demonstrate what we call good faith effort, then we can go ahead and approve that bid, even though they did not meet the goals. We have on several occasions found that they did not demonstrate a good faith effort. We have gone to court four times, won the first three cases, and lost the fourth one. We had prime contractors who reported to us that minorities and women businesses had misrepresented themselves as being certified. I felt that I was being very fair by allowing contractors to replace them with certified businesses, but the judge ruled that I was not being consistent and was arbitrary and capricious and so we lost that case.

I have told you how we contact the subcontractors to verify their dollar amount and participation. At the end of the year or when the project is through, we contact them to determine if they did get the dollar amount and get to perform. Sometimes we have found that they did not even get

to perform. [The job] was given to someone else and that is a violation of our ordinance.

What we are trying to implement at this time is a requirement that the project manager be the monitoring force; that the prime contractors be required to submit their utilization reports of minority and women to the project manager who will then forward it to our office. At present, the municipal departments have to sign off on a form to release progress and final payments. We are attempting to get our office as part of the sign off process. If they have not met our requirements, then we would not sign off. We think this could be effective, and because we have been reduced in staff, it also would be efficient.

I think that there ought to be some kind of government program to assist minorities and women with bonding and insurance problems.

The municipality of Anchorage says that it will break down projects which will enhance opportunities for minorities and women to bid, because we do not require a performance and payment bond if the project is estimated at \$100,000 or less. The fact is the municipality is not doing that.



The government should also monitor and pass on positive remarks to us (when earned) about the performance of minority and women contractors.

I also think that there should be some monitoring because I am sure that there are prime contractors who harass minority and women's businesses and make them redo their work, which is quite expensive, and they do not make any money from the bid.

I have seen prime contractors get a bid and give it to a nonminority contractor who couldn't get bonding and insurance, and I have told them they can do the same thing for minorities, and that is what the program is about.

My final remark is that minority and women businesses should band together and hire a business agent to be their advocate, because many of them know of violations but do not report them because they are fearful that they will be drummed out of business.

Don Barlow, President, National Association for the

Advancement of Colored People, Anchorage Branch

I see a correlation between the Federal monies which are being directed and made available for use and the need to

ensure that there are minorities involved in those processes.

I think it's important to note that there are significant numbers of qualified people who are being denied an opportunity to participate with MBE and WBE. I am not so sure that it's a result of a complex structure of regulations or a lack of ability to understand those regulations, as much as it is a less than honest attempt to involve those individuals.

The terms good intention and good faith effort have been used earlier this afternoon. That is highly suggestive of a number of things and it comes down to your personal interpretation. Yet I find the suggestion of that offensive. I am not convinced that honest effort and good intentions are enough, especially if Federal monies are made available for specific usages. Compliance should not be waived in the name of good intent.

I am aware of one project worth millions of dollars where the statement that minority contractors tend to shy away from projects of this magnitude in terms of the size of the project is misleading. I believe that the reason there were no contractors involved in that particular project

was not because of them wanting in ability, but being denied the opportunity.

Certainly as the local president of the NAACP, it would be [my] desire and intent to begin monitoring more closely many of the various processes. The State of Alaska has suggested that they are suffering from a reduction in staff. If the lack of staff presents a problem in terms of their effectively monitoring compliance with those monies then perhaps there should be a moratorium on the monies until there is corresponding staff support in place. I only suggest that because I realize how important Federal monies are to the State as well as local economies at this point. Yet beyond the general contractors and those select few who may actually land the contracts are those who ultimately work on those job sites.

It's my hope and desire that from the testimony you've received here today that you will be able to see through the rhetoric and actually see the actual need. Enforcement has been less than aggressive. Compliance has been without a doubt less than acceptable. The monitoring at times comes after the fact, after the jobs are already [completed],

everyone's packed up, headed back home, there's no additional money to be attained. To simply find out afterwards that they were in violation but there's nothing we can do now does not suggest aggressive monitoring.

There are 10 major projects under the State programs which are monitored. I believe there is enough advance notification of projects that the bid process can be monitored, so that compliance can be measured as opposed to wondering after the fact.

Climactic considerations was another point alluded to and again, I found it rather difficult to actually sit through this. I wonder about the real intent and purpose behind some of the testimony being offered.

The percentage of prospective contractors who lack program familiarity is very low. I do not think it is [right] to suggest that is why there is a low amount of participation.

Additionally, I believe there are significant percentages of certified contractors who are not being extended equal access or opportunity.

In closing, I would hope that from this open meeting you will be able to apply measures within the State, and on a

regional basis, develop some type of continuity and functional model.

I can assure you that the NAACP will take a more aggressive approach to monitoring. We may establish more effective communication and contact with the various organizations which are tasked with approving and setting percentage compliance factors. We may be involved with them as much as the system will allow our participation in setting those goals. And I hope that some good can come from what you are doing here today.

Earlene Caress, Associated Subcontractors of Alaska

I am Earlene Caress from the Associated Subcontractors of Alaska (ASA). ASA was formed about a year ago for the promotion, education, and understanding of contractual procedures on the subcontractor level.

Now a subcontractor is the second tier from a principal owner and we decided that there were some concerns that we as a group needed to address.

General contractors had their organization which could directly address the owners. Suppliers had their own

organization. We decided that perhaps being in the middle of all of this we would get together and find out what we need to do.

Basically, it is a group of people from every type of subcontracting you can come into contact with. It is mechanical, electrical, fabrication. You have people who have one truck, self-employed, all the way up to an employer that has 35 employees. It is a large range and group of individuals. Within this group there are women-owned firms and also Native contractors.

The association feels very strongly that whatever program is put into play, if it is handled correctly in a clear, concise manner it helps everybody. What we do feel very strongly about is not what program you have but that it is handled correctly and enforced.

I would like to explain what a subcontractor is and what he does. Five years ago when you talked about a general contractor you were talking about a gentleman who you would think would be a very large affluent employer. He was the one that had some money backing him.

Over the last 5 years it has gotten to the point

where a general contractor may be one individual. He basically has become a project manager because 98 percent of all his work now is subcontracted to subcontractors. So you can see that a great deal of work is spread out among what we refer to as subcontractors.

A subcontractor is sitting at what the industry calls a second-tiered level from a general contractor. In other words, sometimes a general contractor can meet his goals or a portion of his goals by the use of subcontractors. If he is not employing anybody he's going to have to use the subcontract.

Subcontractors only obtain jobs from general contractors, period. They are our bread and butter. However, we are their bank. In other words, we front all of their projects. You pay the owner, and we still wait to get payment.

But on this level, a lot of subcontractors no longer can afford the privilege of subcontracting with some of the general [contractors] who get the jobs.

In other words, if a contractor is not going to pay subs in a prompt manner, you cannot afford to do the job. It is very difficult to explain this to your banker when you are

telling him that you need a working capital loan and he says, well, if you'd only sit on your accounts you'd probably be better off. But that is not the way real life is.

A general [contractor] always says, we will pay you when we get paid. I am a steel fabricator and that means I buy my materials, pay my men up to a certain period of time. I bill the contractors and wait until their next billing cycle. They bill whoever they do and then they retain the money. The funny part about that is, they tell us, "I will pay you when I get paid." How do we know when they get paid? If you do not know, or if they have a reputation as not being prompt, you may not bid with them. And I think that I have found more people this year on the sublevel that have finally said, even though you are my bread and butter I cannot afford it. You can only do so much for cost and then after a while you have to do something else.

So basically on these programs, does anybody ever come back when a goal is not reached? Does anybody go back and do a survey of the subs to find out why they do not bid with certain contractors?

Or when you let a bid for \$100,000 does anybody find out



that by the time you get paid it may be only \$70,000. Why? Well, we have change orders and we have deletions to contracts. We have all sorts of things that are a very normal course of business, but sometimes it is not quite normal.

You can get bid and end up going all the way through until all of a sudden you find out, no, we're sorry, we're not going to use you on this portion.

Another problem is, I cannot handle a project worth \$750,000 because I cannot front it. So when they get it out and they say, gee, nobody came forward to bid on this project, this is one of the reasons.

Subcontractors, even though [we represent] the largest employment base in the construction industry with the most economic benefit back to a community, cannot do anything as far as loans and banking because we sit in the second position.

A contractor can sell a project to a bank because they are dealing directly with an owner. You step off that ownership level and a bank says no. So you have got the problem that subs can't front a job. You cannot grow or do anything at that point. It's a very slow process to move

ahead on a subcontracting level.

After you've established goals, come back and find out why the people that you supposedly have ready to bid on these projects do not actually submit any bids. I think that the lack of funding would answer a lot of your questions regarding why the program is not working. That is a problem.

You are not hearing why we aren't bidding on these jobs. There are some of us who have managed to get through all of the qualifications and whatever else that we need to do, but we are still caught due to funding.

Janet Bradley, Executive Director, Alaska State Human Rights  
Commission

I would like to state so that all of us understand that the State Human Rights Commission has no responsibility in the area of contract compliance. Sometimes many people who are involved even on the civil rights commissions do not understand the delineation of responsibility within State government.

However, the concern for MBE, WBE, and affirmative action

among State contractors and subcontractors has been very much at the Commission's core of concern since 1978. We entered into litigation in 1982 as a result of the failure of compliance with a predetermination settlement which was concluded between the State Human Rights Commission and the State Department of Transportation and Public Facilities. That litigation was settled out of court. And that settlement agreement is no longer in effect. That is to say the course of compliance with the settlement has now expired.

Nevertheless, the State Human Rights Commission remains concerned about the problems that you've heard here today because we also hear them. We hear them through complaints filed in our office under a section of our statute which prohibits unlawful practices of discrimination by the State or its political subdivisions.

Bonding is one of the issues we've heard mentioned today. It would be a jurisdictional cause of action for a minority or a female or a member of a protected class to allege that they were denied bonding by financial institutions [on the basis of their protected status]. To the best of my knowledge we do not see those types of complaints; therefore,

I would conclude that the bonding problems are less associated with discrimination and more associated with the kinds of problems that the previous speaker just identified.

With respect to where the Commission is at this point in its concern I would like to quote from our annual report which explains well what the commissioners feel about this problem in State government. And we're going to limit our concerns to what happens in State government because that is where the focus of our action has to be. Commissioner, then Chairperson Virgie King wrote in our annual report, "The Commission believes that minority/female business enterprise and affirmative requirements for state contractors are major items of unfinished business in our state. While we are mindful of the budget deficit and the need for cost containment in state government these matters demand attention to resolve the Commission's lingering concerns for equal opportunity in affirmative action in state government. The Commission has proposed the formation of a task force to study those concerns and the assignment of civil rights responsibility within state government."

Now, this report was submitted to the legislature in

early 1987. Subsequently, Ray Price, special assistant to the Governor, has solicited comments and has put together a plan. Mr. Price, in June, met with our commissioners in Fairbanks and described that plan, and we have been continuing to work with him on the implementation.

If I can summarize the Commission's concerns, we believe that a State office of contract compliance is required and that it should be an oversight office. That is, separate and apart from the contracting agency. That is the substance of the Commission's position. And we are still eager to see that happen.

We are very concerned because we hear the same problems that you've heard here today. And I know this is a difficult time in State government. I know everyone is strapped, but we feel that there still can be some progress. Therefore, I would urge you to the extent that it is possible to focus attention on the State level. I don't know how successful you might be at the Federal level because of the many opportunities for the bureaucracy to intervene, but certainly at the State level you have the capability of using your authority and using your status as the Advisory Commission to get behind efforts to

effect the creation of that office here in Alaska.

The Human Rights Commission would be very interested in working with you and working with the community to see that happen.

Katie Hurley, Commissioner, Alaska State Human Rights  
Commission

Four years ago, when I was with the Women's Commission, we met with contractors and with the unions regarding women obtaining contracts. What we need to do is put the pressure on the administration to make this a priority. We do not necessarily need more funding, but the funds need to be channeled so that this is a priority. With the numbers of staff that you have at DOT it certainly seems to me that that small amount of money could be found. It's just a matter of somebody saying this is important and this is where we ought to spend the dollars. I certainly hope that even though you are an Advisory Committee you will use your good influence to help the people here.

Everett Louis Overstreet, Alaska Black Caucus

It was our organization in 1978 that brought this problem to the attention of the human rights commission. It was based on the fact that the Public Works Act of 1977 (and I know people don't like to use this word) had a quota set-aside of 10 percent. That was not a goal or a timetable, it was required that minority/female businesses receive 10 percent of all those public works monies. That fear was based on the fact that Alaska had not had a significant MBE program in place or any capability for monitoring how those monies were utilized.

As it turned out, our fear was realized. It didn't happen. Subsequently, some of the issues that Ms. Bradley talked about were addressed. But, also for the record, it should be indicated that the goals and timetables that were contained in that settlement agreement were never realized. They didn't even come close.

I want to point out a couple of things in terms of how our organization approached the problem. We were never suggesting that unqualified persons or businesses receive

anything. Our concern was that we create a climate where opportunity would exist.

Frances Gallela, Executive Director, Alaska Minority Business  
Development Center

The Alaska Minority Business Development Center is operated by the Community Enterprise Development Corporation. We are funded by the Department of Commerce, Minority Business Development Agency. We've been in existence for approximately 5 years. And if there is a problem or type of problem that minority firms have in the State of Alaska we usually hear about it. It usually comes across my desk, and usually dozens of examples come across my desk. And I could talk to you about many different problems that minority business persons have, but because we're limited in time, I'm just going to mention a few of them.

First of all, let me address the certification problem. The problem is not exaggerated, and the people who have testified have not blown it out of proportion. Certification as practiced by State DOT is an extreme problem because there's structural bias in the way the regulations are written.



The regulations are biased against women, against Native Alaskans, blacks, and Hispanics who are innovative entrepreneurs. I say it's structurally biased because I can't believe that everybody in DOT is intuitively biased against these minority business persons.

Ideally, if you were to take the regulations and the interpretation of regulations apart and look at what is the ideal example of a business that DOT wants to certify, you would come up with a small owner-operated construction or janitorial [firm].

The regulations are not written to take into account the full spectrum of entrepreneurial activities and innovativeness that blacks, Hispanics, Natives, and women are currently engaged in. It's a question of bureaucrats being handed a set of regulations which simply cannot do the job, which hamstring them.

Now, is DOT aware of this? Absolutely, yes. They are aware of the fact that by regulation they cannot recognize what are de facto bona-fide minority firms. And this was brought home to me during a session that I had with Federal

Department of Highway representatives stationed in Juneau.

It was a frustrating confrontation because we would cite case after case of bona-fide minority individuals and minority businesses wanting to expand. They wanted to expand into areas that they themselves did not have personal expertise in, but like any other good businessperson in this country they could go out and hire someone with the expertise in order to get into this new kind of enterprise.

By regulation the DOT cannot recognize that new capability as being a part of the minority firm, and therefore, that minority firm cannot use that new capability to bid on DOT contracts. This is ludicrous, and we said this. And DOT said, yes, we know, but that is the regulation.

Where's the problem? Is the problem in the legislation? No. the problem is in the writing of the regulations which rest with DOT. And this where you can have an effect.

The State DOT gives me the impression that they feel they must religiously accept what the Federal DOT says. I can't buy that. I cannot accept that Senator Stevens would allow the Department of Transportation to take every highway

dollar out of the State of Alaska if the State of Alaska were to more liberally and more accurately interpret the regulations.

Additionally, the State of Alaska has its own money that it dispenses on all kinds of construction funds and dispenses through DOT. There is no reason why we have to adhere to any kind of DOT Federal regulations in dispensing that money to minority firms or qualifying different types of firms as minority firms to receive State monies.

Now, let me get down to the case in point that's particularly bothersome to me. I fought this battle with DOT for all kinds of firms: female, Hispanic, black, Native, et cetera. [What] particularly bothers me is that it seems that the Federal DOT is wholesale writing off all of the Native firms in the State of Alaska.

I'm going to read a quick letter to you and then I will give this portion to the Committee so you can peruse it at your leisure. This letter is from the Alaska Division of the Federal Highway Administration, dated September 16, 1987, signed by Robert Ruby who's in Juneau, Alaska, with the Federal Highway Department. It is addressed to Pat Borden,

Civil Rights Coordinator, Alaska DOT/PF Juneau. "Dear Miss Borden: Your July 8 letter requested a determination if businesses owned by Native corporations are eligible for the DBE program under the 1987 Surface Transportation Act. Enclosed is a response from our headquarters and regional office stating firms which are wholly owned subsidiaries of Native corporations are not eligible."<sup>20</sup>

That, to me, flies in the face of common logic. If Natives are, in fact, minorities then by definition, by legislation they are minorities according to Federal legislation. A business owned by them is a minority-owned business. But the rationale that they've come up with is a convoluted piece of logic utilizing Small Business Administration legislation and selectively using the Surface Transportation legislation to come up with an opinion that, I think, has been done with mirrors because they wanted the end result. And I will give this to you so you can research the three letters and the copy of the regulations attached to see that the findings that they have are really on thin ice. I think you can do something about it, at least by way of recommendations because they're clearly writing off our large

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<sup>20</sup>Robert E. Ruby, Assistant Division Administrator, for Barry F. Morehead, Division Administrator, Federal Highway Administration, to Pat Borden, Civil Rights Coordinator, Alaska DOT/PF, Sept. 16, 1987.

minority in Alaska and writing off a lot of businesses and causing a lot of my clients a lot of trouble.

I'm going to conclude by saying that I feel really strongly about economic rights as a part of civil rights because denial of economic rights means a denial of economic power. That helps ensure de facto denial of all other civil rights.

Winston Henderson, Small Business Owner

I'm speaking today as a small business owner and concerned citizen. There are a couple of observations that I'd like to share with you.

One is a comment on the perception in the MBE community, in general, regarding DOT. And that is that there's no State initiative in writing to do anything beyond what is minimally required of them in terms of meeting any MBE requirements. And that the State DOT in particular--is being forced kicking and screaming to meet the very minimal requirements, and that they, in fact, bend over backwards to complicate the entire picture and make it as difficult as possible. And I would

also hope to see stronger leadership from the Governor's office and the legislature, and hopefully, creation of a better climate and passing that climate down to DOT to improve their performance.

I'm somewhat disappointed today that DOT was not required to produce more hard statistics and evidence and testimony regarding their past performance over the last 2 or 3 years and to talk in more detail on how they intended to correct that dismal record.

There were concerns expressed regarding certification problems. And we know those exist, but I think that is getting a disproportionate amount of attention today. [We believe] that if you focus on making work available to MBE's, the certification problems tend to solve themselves. If, in fact, you're able to get 10 percent of the Federal dollars into MBE hands, then suddenly you're expanding the whole realm of opportunity that's available and more and more people are able to become certified.

There are already a large number of minority and women-owned businesses that are clearly certifiable, clearly capable of owning, operating, and managing businesses. So,

aside from those about which you have questions regarding certification, it is a much more important issue to get work to those who are able to function now and to keep those businesses viable and alive. If, in fact, the State wanted to be more helpful in those areas we would want to see more programs that would assist new business owners with estimating, bidding procedures, bonding, and financial assistance.

Clearly, it's been demonstrated that there are any number of minority individuals who are capable of performing the work on these contracts. Certainly, there have been many instances where minority business who have been unable to obtain jobs as prime contractors have ended up doing those very jobs as subcontractors and making nothing on the project. And, certainly, that's something that needs to be addressed. [There are many] problems that minority businesses face once they get a contract. They may not receive the dollar amount of a contract that was initially reported, or payment is often several weeks, if not months behind. Also, there's a problem with being able to get on a job and perform efficiently.

If, as a painting contractor, you get a project and you

need to paint 10,000 square feet a day to be profitable, and yet the prime contractor is piecemealing this out to you at 1,000 square feet a day so that you're setting up for half days and mobilizing and demobilizing, and your project ends up getting stretched out two or three times your [normal length of time], of course, you're not going to succeed. Of course, you can't make any money. And these are problems that are not being addressed.

Finally, we would want to see much more involvement from FHA on overseeing how their funds are spent here in the State. It would be our preference to see the legislature and the Governor's office take a very strong and clear position and not force the Federal Government to have to look over their shoulders. We're not at all optimistic that that will happen given the recent track record, but that would certainly be the ideal.



APPENDIX I

CORRESPONDENCE



US Department  
of Transportation

Federal Highway  
Administration

April 13, 1988

Alaska Division

P.O. Box 21648  
Juneau, Alaska 99802-1648

HCR-AK  
951.1

Mr. John F. Dulles, II  
Western Regional Division  
U.S. Commission on Civil Rights  
3660 Wilshire Blvd. #810  
Los Angeles, California 90010

Dear Mr. Dulles:

We appreciate receiving the transcript of the Public Forum held by the Alaska Advisory Committee in Anchorage last November. Reading through the testimony, we noted a few items which require some clarification.

At several points, the Alaska Department of Transportation and Public Facilities (DOT&PF) representative noted a lack of Federal guidance for administration of the DBE program. The Federal-Aid Highway Program is a partnership between the State DOT's and the FHWA. The program is structured for the FHWA to develop general guidelines to reflect the intent of Congress for each of the various program activities. The individual States then develop detailed procedures which are appropriate for their State and conform to the general Federal guidelines. Administration of the DBE program is based on this concept. However, the Alaska DOT&PF has not developed implementing procedures which address State concerns and are relying on general FHWA/USDOT criteria. These criteria are not specific enough to efficiently address daily issues. The Division office has attempted to fill this void by meeting directly with affected persons throughout the State and, in some instances, developing specific criteria for the Alaska DOT&PF to include in their manuals and contracts. As can be seen from the testimony at the hearing, the lack of State procedures has caused considerable frustration and confusion in the contracting community.

Another issue raised by the Alaska DOT&PF was the lack of assistance to the contracting community by this program. The purpose of the DBE program is to assure existing minority owned firms receive a larger share of the Federal-Aid Highway funds. It is not designed to help minority owners develop their business expertise. To fill this need, supportive service funds are made available each year for the Department to provide minority individuals both technical and managerial assistance in developing a viable business. In the last five years, nearly \$635,000 in supportive service funds have been made available to Alaska DOT&PF. Of that amount only \$213,000 has been expended.

April 13, 1988

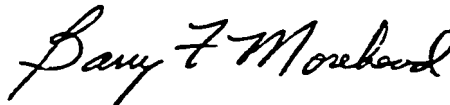
There were also several complaints that the criteria being used in this program is too restrictive. This program is designed to help a select group which has not had the opportunity to participate as fully as possible in the Federal-Aid Highway program. The criteria is restrictive, as a minority or female owner operating in accordance with normal business practices cannot always qualify for this special program. The primary restriction is that the owner must have sufficient technical expertise to control the daily operations of the firm. The normal business practice of hiring an individual with the field experience is not allowed as a substitute for the owners lack of knowledge. This criteria has been consistently applied by both the U.S. DOT and FHWA and has caused considerable problems in the field. The purpose of the criteria is to minimize the opportunity for non-minority firms to hire a minority to "run" the company. Liberalization of this criteria is not expected.

Two other items need mentioning. On page 85, Ms. Caress indicates that 98% of the work is subcontracted out. She was probably referring to buildings as the State limits subcontracting on highway projects to 50%.

The remaining item we think has been beneficial to highway subcontractors is a mutually developed contract provision that requires the subcontractor to be paid for completed work within 7 days of the prime contractor receiving payment.

If our comments generate any additional questions, please do not hesitate to contact us.

Sincerely yours,



Barry F. Morehead  
Division Administrator

# STATE OF ALASKA

## HUMAN RIGHTS COMMISSION

STEVE COWPER, GOVERNOR

HEADQUARTERS  
800 A STREET, SUITE 202  
ANCHORAGE, ALASKA 99501-3628  
PHONE: (907) 278-7474

December 11, 1987

The Honorable Steve Cowper  
Governor  
State of Alaska  
P.O. Box A  
Juneau, AK 99811

Dear Governor Cowper:

On November 6, 1987, Human Rights Commission member Katie Hurley attended a fact finding meeting held in Anchorage by the Alaska Advisory Committee to the U.S. Commission on Civil Rights during which severe criticisms were voiced about the state's minority/female business enterprise program (MBE/FBE) in the Alaska Department of Transportation and Public Facilities (DOTPF). This matter was subsequently discussed by all seven Human Rights Commissioners at their November 30, 1987 teleconference meeting. Based on these public criticisms and the lackluster performance of DOTPF in this area, the commission is forced to conclude that the state's MBE/FBE program is not a priority for the Department of Transportation and Public Facilities.

Specifically, at the November 6, 1987 public hearing, testimony was offered by Alaskan minority and female sub-contractors objecting to DOTPF's strict interpretation of the certification procedures, the lack of certification reciprocity between the Municipality of Anchorage and DOTPF, DOTPF's failure to enforce contractor commitments to minority/female business enterprises and the general lack of state initiative and state leadership in the MBE/FBE arena.

The commission has a long history of efforts to prod DOTPF into the creation of an effective MBE/FBE program. These efforts began in 1978 with a director's charge and include litigation in Superior Court against DOTPF for non-compliance with the terms of the agreement concluded as a result of that investigation. In its 1986 Annual Report, the commission reaffirmed its belief that minority/female business enterprise and affirmative action requirements for state contractors are major items of unfinished business in our state. Most recently, on June 4, 1987, Special Assistant Ray Price reported to us at our Fairbanks meeting that a comprehensive Office of Equal Opportunity with an MBE/FBE component was under development in the Office of the Governor.

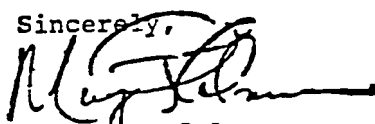
TOLL-FREE COMPLAINT HOT LINE (800) 478-4692  
TTY/TDD HOTLINE (800) 478-3177

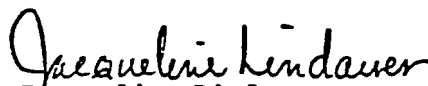
Governor Cowper  
Page 2  
December 11, 1987

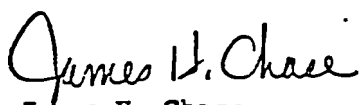
We now understand that, contrary to our hopes, this plan has been aborted. Furthermore, the commission for the past three years has submitted to the Governor as proposed legislation the creation of an Office of State Contract Compliance in the Office of the Governor. In light of these recent events, we once again feel compelled to state our position in favor of an independent, over-sight function located within the Office of the Governor to ensure the fair participation of MBE/FBE's in state contracting.

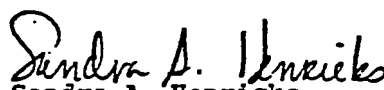
We urge you, Governor Cowper, to take immediate action to resolve this lingering problem and to demonstrate the commitment of the Cowper administration by establishing a vital, effective state office of contract compliance.


Sincerely,

  
Morgan P. Solomon  
Chairperson


  
Jacqueline Lindauer  
Vice-Chairperson

  
James H. Chase  
Commissioner

  
Sandra A. Henricks  
Commissioner

  
Katie Hurley  
Commissioner

  
Virgie M. King  
Commissioner

  
Doris M. Volzke  
Commissioner

MPS:JLB/b 230/1987b

February 11, 1988

Mr. Morgan P. Solomon  
Chairperson  
Human Rights Commission  
800 A Street, Suite 202  
Anchorage, AK 99501-3628

Dear Mr. Solomon:

Thank you for your concerns regarding the Department of Transportation and Public Facilities' (DOTPF) Minority Business Enterprise/Disability Business Enterprise (MBE/DBE) program.

Mr. Price, my Special Staff Assistant, has worked vigorously for the past year researching and developing an Equal Employment Opportunity (EEO) program that will strengthen EEO requirements for our state transportation agency. Presently, plans are underway to transfer the department's internal EEO office to the Office of the Governor. This move will consolidate DOTPF's internal EEO program and the state's EEO program. This will raise our overall level of expertise, and the added staff resources should be better able to deal with discrimination complaints and practices.

DOTPF's MBE office in Anchorage will assume full responsibility for external EEO, which includes contract compliance. The responsibility for the MBE/DBE program must remain with the state highway agency as has been mandated by the U.S. Department of Transportation. The addition of added staff to the MBE office in Anchorage is forthcoming and a more vigorous contract compliance program will soon be implemented.

Robert Poe, Deputy Commissioner, and Ed Ramirez, MBE Coordinator, have taken great strides to ensure that minorities are receiving and will continue to receive equitable opportunities in our state's DBE/MBE program. They have met with numerous minority organizations, prime contractors, and DOTPF administrators to discuss issues of concern regarding the department's DBE/MBE program. Because of their efforts, positive reports have been received by my office. Perhaps in the very near future, the opportunity would be there for

Mr. Solomon

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February 11, 1988

the Commission to meet with Mr. Poe and Mr. Ramirez for a discussion relevant to the state's DBE/MBE program.

Mark Hickey, Commissioner of Transportation and Public Facilities, is very much aware of your concerns and is committed to do everything in his power to see that the utilization of minorities in Federal Highway Administration and state-funded projects is equitable and consistent with federal and state law.

Again, thank you for your concern.

Sincerely,

Steve Cowper  
Governor

cc: John F. Dulles, II  
Western Regional Division

Bettye Davis  
Alaska Black Caucus

Commissioner Mark Hickey  
DOTPF

Deputy Commissioner Robert G. Poe, Jr.  
DOTPF

Ed Ramirez  
MBE Coordinator, DOTPF

Ray Price  
Office of the Governor

Human Rights Advisory Committee Members

SC/RP/es/ab/pd  
RAY2/solomon

2528

# STATE OF ALASKA

## HUMAN RIGHTS COMMISSION

STEVE COWPER, GOVERNOR

HEADQUARTERS  
800 A STREET, SUITE 202  
ANCHORAGE, ALASKA 99501-3628  
PHONE (907) 276-7474

December 16, 1987

John F. Dulles, II  
Western Regional Division  
U.S. Commission on Civil Rights  
3660 Wilshire Blvd., Suite 810  
Los Angeles, CA 90010


Dear Mr. Dulles:

As a result of the public testimony to the Alaska Advisory Committee to the U.S. Commission on Civil Rights on November 6, the Alaska Human Rights Commissioners have written Governor Cowper, expressing their concerns about the State of Alaska's minority and female business enterprise program. I trust you will share this letter with the members of your commission to inform them of our action.

I am enclosing Administrative Order No. 86 promulgated by former Governor Bill Sheffield on March 4, 1986 concerning construction projects of the Alaska Power Authority. Also enclosed is a brief chronology of the commission's efforts with the Alaska Department of Public Administration on behalf of minority/female business enterprise, listing nearly ten years of unsuccessful efforts to resolve this problem.

Although I understand that your resources are quite limited, I hope that individually and collectively the Alaska Advisory Committee members will join the chorus of voices crying out to right the lingering problems which you heard so eloquently described in the testimony at your November 6 meeting.

Sincerely yours,

  
Janet L. Bradley  
Executive Director

JLB/b 244/1987b

TOLL-FREE COMPLAINT HOT LINE (800) 478-4692  
TTY/TDD HOTLINE (800) 478-3177



DOTPF CHRONOLOGY

- 12/12/78 - ASCHR files charge against DOT.
- 02/22/80 - ASCHR and DOT sign the initial Settlement Agreement.
- 11/24/80 - Executive Director of ASCHR files a Determination of Noncompliance.
- 04/22/82 - Acting Executive Director of ASCHR files a Determination of Noncompliance.
- 10/15/82 - ASCHR retains private counsel and files suit against DOT.
- 04/30/83 - Addendum to Settlement Agreement signed; suit dismissed.
- 08/10/83 - DOT Commissioner Casey formally submits MBE plan.
- 02/15/84 - Executive Director of ASCHR files a Determination of Noncompliance.
- 04/16/84 - DOT Commissioner Knapp proposes new MBE plan.
- 06/16/84 - DOT Commissioner Knapp agrees to continue Commission monitoring.
- 07/24/84 - ASCHR decides that the most recent Determination of Noncompliance has been resolved.
- 01/30/86 - ASCHR Commissioner King writes to the Governor expressing continued concern about the MBE program.
- 01/02/87 - ASCHR Chairperson King in transmitting the 1986 Annual Report to the Legislature and the Governor addresses MBE/FBE and affirmative action requirements for state contractors as "unfinished business in our state".
- 12/11/87 - ASCHR Commissioners write Governor Cowper calling for action by this administration on MBE/FBE by creating a state office of contract compliance.

JLB/b 245/1987b



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

ADMINISTRATIVE ORDER NO. 86

In furtherance of the State of Alaska's commitment to human rights as expressed in art. I of the Alaska Constitution and Alaska Statute 18.80.200, in particular in connection with construction projects of the Alaska Power Authority, I, Bill Sheffield, Governor of the State of Alaska, under the authority granted by art. III, sec. 1, of the Alaska Constitution, order the following:

1. Purpose. The purpose of this order is (1) to assure that there is no unconstitutional or otherwise unlawful discrimination in the award of contracts and subcontracts for public works projects undertaken by the Alaska Power Authority; (2) to overcome the effects of past discrimination against minorities, women, and other classes of persons protected by AS 18.80.200; and (3) to promote the economic health and well-being of the state through taking positive measures to ensure equal business opportunities for minorities, women, and other classes of persons protected by AS 18.80.200.

2. Minorities and Women in Business Enterprises; Affirmative Action; Supplement to Earlier Orders. This order supplements Administrative Order No. 59, dated June 20, 1980, by Governor Jay Hammond; Administrative Order No. 75, dated April 7, 1983, by me; and Administrative Order No. 76, dated May 23, 1983, by me; by adding provisions for affirmative action in state contracting.

3. Findings. (a) The historical and continuing high rate of unemployment among Alaska residents poses serious social and economic consequences that are chronic in nature. These consequences include, but are certainly not limited to, high rates of alcoholism, poverty, broken families, violent crimes, and personal and commercial insolvencies and bankruptcies.

(b) A significant and contributing factor to this high rate of unemployment, particularly in certain industries such as construction, is the disproportionate award of construction contracts and construction procurement contracts to male non-minorities, even though minority and female contractors are available and qualified to perform the work.

(c) The Alaska legislature is presently considering a model procurement code that would ensure the fair and equitable treatment of all persons who deal with the procurement system of the

state and eliminate and prevent discrimination in state contracting because of race, religion, color, national origin, sex, age, marital status, pregnancy, or parenthood. This measure might not be enacted and take effect until January 1, 1987. The bill in its present form, however, provides that parties to a contract may agree to the application of the procurement code for contracts solicited or entered into before that date.

(d) A number of state-funded and energy-related public works projects will be put out to bid by the Alaska Power Authority and might be awarded before the effective date of any new legislation that might be adopted to ensure fair and equitable treatment of the targeted groups.

(e) In order to maximize the coverage and benefits of any new affirmative action legislation that might be included in the model procurement code at the time of its adoption, it is in the public interest to ensure that all state-funded and energy-related public works construction projects awarded by the Alaska Power Authority after the date of this administrative order and before the effective date of any procurement legislation that might be enacted incorporate a provision securing the contractors' agreement and commitment to comply with any applicable affirmative action legislation that might subsequently take effect during the term of the contract.

4. Alaska Power Authority Public Works Bid Documents and Contracts. In light of the findings set out in sec. 3 above, I direct that language substantially as follows be included in any public works bid document issued or public works contract awarded by the Alaska Power Authority after the date of this order and before the effective date of any applicable procurement legislation that might be enacted:

Contractor shall comply with all applicable laws and regulations regarding the fair and equitable treatment of minority and female contractors and subcontractors now in effect or that might subsequently take effect during the term of this contract. In order to ensure that contractor's subcontractors will comply with all applicable laws and regulations regarding the fair and equitable treatment of minority and female contractors and subcontractors now in effect or that might subsequently take effect, contractor shall include in its contracts with subcontractors under this contract language that is substantially the same as the first sentence of this paragraph.

5. Public Funds; Alaska Power Authority Construction. (a) An overwhelming share of public funds spent for energy-related public construction projects is spent by the Alaska Power Authority on contracts awarded to competitive bidders. In addition, a majority of the construction contracts awarded by the Alaska Power Authority is carried out with significant use of subcontractors. Consequently, a preponderant share of state funds spent on energy-related public construction carried out by the Alaska Power Authority goes to contractors and subcontractors under contracts with the Alaska Power Authority.

(b) In light of (a) of this section, the Alaska Power Authority shall take positive, aggressive measures to help assure that business enterprises owned or controlled by minorities, women, or other classes of persons protected by AS 18.80.200 are not discriminated against in the award of contracts and subcontracts. The Alaska Power Authority shall take all possible affirmative action that will help (1) to overcome effects of past discrimination in the contracting business against minorities, women, and other classes of persons protected by AS 18.80.200; and (2) to promote full and equal opportunity for business enterprises owned or controlled by minorities, women, or other classes of persons protected by AS 18.80.200, to receive public construction funds.

6. Definition of "Minority"; Administrative Order No. 18 Definition Superseded. The definition of "minority" in Administrative Order No. 18 dated November 22, 1972, by Governor Egan is superseded. For purposes of this order and Administrative Order No. 18, "minority" includes a person from the following groups: Black American, Hispanic American, Asian American, Pacific Islander, American Indian, or Alaska Native.

This order takes effect immediately

DATED at Juneau, Alaska, this 4<sup>th</sup> day of March, 1986.

  
Bill Sheffield  
Governor

3/4/86  
Date



November 9, 1987

Mr. John F. Dulles, II  
Western Regional Division  
U. S. Commission on Civil Rights  
3660 Wilshire Blvd. #810  
Los Angeles, California 90010

Dear Mr. Dulles:

Please consider this letter as a reiteration of the testimony provided by Louis Overstreet, a member of our Board of Directors.

The plan for promoting minority, female, and disadvantaged utilization, as outlined by Mr. Price and Mr. Poe of the Cowper Administration, is not acceptable.

A necessary first step would be for the Cowper Administration to lead by example. It is grossly inconsistent for the Administration to mandate to the private sector, in difficult economic times, when the Governor has not promoted in an equitable manner, opportunity for minorities, particularly blacks, in his Administration.

Historically, the problem existing in DOT/PF clearly suggests that oversight of any program relating to promoting increased utilization of minority and female businesses be removed from its control.

I trust you will provide advisory committee members with a copy of this letter.

Sincerely,

Bettye Davis

cc: Advisory Committee Members  
Governor Steve Cowper  
Mr. Price  
Mr. Poe



U.S. Department  
of Transportation  
Federal Highway  
Administration

Alaska Division

P.O. Box 21648  
Juneau, Alaska 99802-1648

September 16, 1987

HCR-AK  
951.1

Pat Borden, Civil Rights  
Coordinator  
Alaska DOT&PF  
Juneau, Alaska

SEP 22 1987

Dear Ms. Borden:

Your July 8 letter requested a determination if businesses owned by Native Corporations are eligible for the DBE program under the 1987 STURAA.

Enclosed is a response from our Headquarters and Region offices stating firms which are wholly owned subsidiaries of Native Corporations are not eligible.

Sincerely yours,

Barry F. Morehead  
Division Administrator

  
By: Robert E. Ruby  
Assistant Division Administrator

Enclosure





U.S. Department  
of Transportation  
Federal Highway  
Administration

# Memorandum

Subject Native Corporations DBE Status

Date SEP 4 1987

From Deputy Director, Office of Civil Rights  
Washington, D.C. 20590

Reply to  
Attn of HCR-30.2

To Mr. M. Eldon Green  
Regional Administrator (HRA-010)  
Portland, Oregon  
THRU: Mr. Robert B. Rutledge  
Regional Counsel (HRC-010)

This replies to your June 26 memorandum requesting clarification of the status of Alaska Native Corporations under section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act (STURAA) of 1987. We delayed responding to your request while the matter of authority to issue implementing regulations was still uncertain. As it has now been determined that the Department will issue the regulations, and they will contain only those amendments that are believed essential to implement the changes in the disadvantaged business enterprise (DBE) program contained in the STURAA of 1987, the response to your question is based on the existing regulations. That question is:

Will firms created as subsidiaries of Alaska Native Corporations be ineligible for certification as DBEs by virtue of Sec. 106(c)(2)(A) of the STURAA which excludes "any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals which has average annual gross receipts over the preceding 3 fiscal years in excess of \$14,000,000, as adjusted by the Secretary for inflation" from the definition of "small business concern?"

In response to a similar question in 1984, you were advised that if the company seeking certification as a DBE were wholly owned by a corporation, it would not meet the definition in 49 CFR Part 23. A 1986 amendment to section 8(a) of the Small Business Act (SBA) changed the definition of "socially and economically disadvantaged small business concern" to include one owned by "an economically disadvantaged Indian tribe." The amendment went on further to extend the term "Indian tribe" to include "any Alaska Native regional or village corporation." This does not mean that every such corporation is "an economically disadvantaged Indian tribe." The amendment provides: "In determining the economic disadvantage of an Indian tribe, the Administration shall consider,



where available, information such as the following: the per capita income of members of the tribe excluding judgment awards, the percentage of the local Indian population below the poverty level, and the tribe's access to capital markets." (See 15 U.S.C. 637 (a)(6)).

Such determinations would be made by the SBA in its certification procedures and would apply to its section 8(a) program. Section 106(c) retains the reference in section 105(f) of the Surface Transportation Assistance Act of 1982 to the definition of "socially and economically disadvantaged individuals" under section 8(d) of the SBA (15 U.S.C. 637(d)) "and relevant subcontracting regulations promulgated pursuant thereto." The relevant subcontracting regulations in 13 CFR § 125.9 contain no elaboration of the section 8(d) definition. Section 8(d) provides language to be inserted in all contracts let by Federal agencies committing contractors to adopt the Federal policy of affording maximum practicable subcontracting opportunities to "small business concerns" and "small business concerns owned and controlled by socially and economically disadvantaged individuals." For the definition of "small business concern" the inserted language refers to "section 3 of the Small Business Act and the relevant regulations promulgated pursuant thereto." With respect to "small business concern owned and controlled by socially and economically disadvantaged individuals," however, the inserted language includes a separate definition of its own. That definition refers only to ownership and control by individuals, and does not incorporate (and therefore rejects) the expanded definition in section 8(a) which includes Indian tribes (or Alaska Native corporations).

In view of the above, we would have to conclude that if the firms seeking DBE certification are wholly owned subsidiaries of Alaska Native corporations, they do not come within the definition of DBE under section 106(c) of the STURAA or 49 CFR Part 23. If, however, the firms are owned and controlled by individual members of the corporations, who are native Americans, and are merely financed through arrangements with the regional or village corporations, they would apparently meet that part of the definition. Whether they are "small business concerns" is determined by the level of average annual gross receipts (up to \$14,000,000) of the firm, and not its corporate financier.

  
Edward W. Morris, Jr.