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FORWARD

[BACKGROUND, LEGISLATION]

[ACKNOWLEDGEMENTS]

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PURPOSE AND INTENT OF BARRIER STATEMENTS

[INTENDED AUDIENCE]

[TOOLS FROM MULTIPLE VIEWS WITH MULTIPLE STAKEHOLDERS IN MIND]

[SOME MAY WORK BETTER, SIZE OF WORK, CONTRACT, AGENCY, ETC.]

[SOMETHING TO TRY IF YOU ARE INTERESTED]

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DEFINITIONS

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PART 1: PLANNING

Target: Contents of this section are practices, ideas, and discussion around activities that public owners, prime contractors, service providers, and subcontractors should consider prior to being actively engaged in public procurement or project delivery. The intent is to provide some helpful tips for planning.

Practice Highlights:

- Leadership
- Policy Development
- Training and Education
- Outreach
- Networking
- Project Packaging
- Goal Setting
- Rosters
- Legal Considerations

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Topic: Leadership

Barrier Statement:

Not enough managers and executive leaders understand and embrace the proactive steps necessary for a successful inclusion program. All too often, leaders recite the policy, ordinance, or laws around diverse business inclusion but do not set an active example and push boundaries to ensure inclusion measures are applied sincerely in capital programs.

Suggested Practice or solution:

- Accountability measures for leaders and governance teams, such a performance criteria and expectations.
- Specific training and continuing education around inclusion practices for leaders.
- Ensuring that diverse business inclusion is discussed at leadership meetings.

Exemplars:

- Tacoma Public Schools

Related Barriers:

1. Training and Education
2. Policy Development
3. Legal Interpretations

Topic: Owner/Prime Internal Policies and Standard Operation Procedures for Inclusion

Barrier Statement:

To ensure effective inclusion in public contracting, contract language, forms, templates, and similar tools need to be accompanied by internal polices and/or standard operating procedures. Often many solicitations and contract language are put out without or with limited instructions on how to use, respond, and score.

Inclusion strategies, expectations, plans, language, etc. need to be applied in accordance with the different contracting types and funding sources.

Delivery staff and those managing the contracts at times don't have the training on the process and procedures/needed outcomes of the language, forms, etc.

Expectations are not known/published so the metric is not understood.

Potential Practice/Solution:

- A. Federal guidance/approach to goal setting and DBE programming
 - a. Research by work category
 - b. Availability
 - c. Capabilities

Exemplars

- A. OMWBE
- B. City of Seattle
- C. Sound Transit
- D. Port of Seattle

Related Barrier(s):

- A. Legal Inconsistency
- B. Contract language
- C. Inclusion Plans
- D. Owner training
- E. Community training
- F. Enforcement

Topic: Training and Education

Barrier Statement:

- Project delivery staff and contracting staff often do not have training on inclusion policies and procedures, the result is either a lack of fair scoring, evaluation (enforcement) and/or ineffective inclusion processes. The provisions and policies are hollow and ineffective.
- Prime project staff as well are not fully trained on owner adopted practices, often the estimating and subcontracting staff are not even aware of the contents of an inclusion plan.
- Primes that have “inclusion experts” on staff but don’t utilize those staff until it is too late to be effective or not at all.

Possible practice or solution:

- A. All staff should be trained on inclusion processes, policies, and goals. Owner programs should not allow staff who have not taken inclusion (in contracting) training to solicit, manage, or enforce projects.
- B. Staff proposed for a certain project develop the inclusion plan and goals for the project. Both owner teams and prime teams. An approach to meeting those inclusion goals should be clear and actionable not speculative.

Related:

- A. Contract language
- C. Good Faith Efforts
- D. Enforcement

Topic: Diverse Business Inclusion Goal Setting

Barrier Statement:

- Inclusion goals are generic and not proportional to the project, scope, size, availability, and capabilities. The result is unrealistic inclusion processes and unobtainable goals.
- Many owners and primes do not know how to set justifiable/measurable goals for contracts or programs.
- Many owners are counseled by their legal teams that inclusion goals are not appropriate under I-200.
- Goals are typically based on percentage of the contract value. (limiting)
- Responses to solicitations are often not realistic, simply states “a good faith effort to meet the contract/program goal”
- Goals being met with “big ticket” items and not always looking at all opportunities in the projects

Practice/Solution by Practitioner:

- A. Federal approach to goal setting and DBE programming
 - i. Research by work category
 - ii. Availability
 - iii. Capabilities
- B. City of Seattle Inclusion Tracking
 - a. Past performance of inclusion sets goals for future projects
- C. Sound Transit
 - a. FTA goal setting?
- D. Port of Seattle
 - a. Process and publication

Related:

- A. Legal counsel inconsistent across owners
- B. Contract language
- C. Inclusion Plans
- D. Tracking and reporting
- E. Bait and switch/ghosting
- F. Training

Topic: Rosters

Problem/Issue Statement:

Rosters are often used to increase opportunities for small and diverse businesses with the thought that a simple application process can provide regular and “first” access to opportunities for work both in construction and professional services. The current reality is that rosters can often be difficult to find with application processes that are time consuming to complete. Further, roster opportunities, once you are accepted to the roster, don’t seem to be opportunities you are interested in or there is still too much competition. Roster information can be buried on an owner’s website making it difficult to find an application or opportunities. Some owners use their own roster and some use MRSC making it necessary for contractors to complete multiple applications taking administrative time for very little return on the investment.

Possible practice or solution:

- A. Advertise for rosters in multiple locations – local newspapers, OMWBE website, networking groups
- B. Make roster information and associated opportunities easy to find on websites
- C. Provide clear direction and/or support to complete roster applications. Consider directions in multiple languages.
- D. Consider combining rosters and restrict public owners in their use and application.
- E. Consider a single entry to all open rosters in the state.

Related:

- A. Where to find work
- B. How to find work
- C. Policies
- D. Contracts (how rosters are formed and awarded, etc.)

Known Examples:

- A. MRSC
- B. K12 District
- C. Higher Education District
- D. Department of Enterprise Services

Topic: Rosters and Bid Thresholds

Problem/Issue Statement:

The only available roster for public works is small works. The small works roster is limited in size and owners. These restrictions do not maximize opportunity for small and disadvantaged businesses.

Possible practice or solution:

- Open small works rosters all public owners
- Address thresholds regularly and timely. 5–10-year cycles are not enough to keep up with the cost of construction and goods
- Enable minimum bid thresholds more consistently among all owners

Example: School Districts have a 100K minimum bid threshold for public works. That allows districts to choose a contractor for small projects, under 100k with no solicitation of three bids, which gives the ability to mentor them through the process. This builds experience for bidding larger projects.

Related:

- A. MRSC Bid Thresholds for Public Works Projects (matrix by government type)

Topic: Finding and connecting diverse firms with Designers & GCs (Outreach)

Problem/Issue Statement:

It is of paramount importance to find and connect diverse firms with Designers & GCs for the wide array of design and construction project opportunities.

Reports indicate that most connections are made on a whim or because of the diverse business having to pursue primes and GCs relentlessly. This is a huge barrier for small businesses that don't have extra time and money to be the pursuer.

Possible practice or solution:

- A. Recognize that the State of Washington varies widely from west to east and north to south in terms of available diverse firms and availability of continuous project opportunities; and many ways of communicating, advertising, and ways they connect.
- B. There are many outreach efforts across the State. We should consider a central repository or public information storage that gathers all the information from those outreach efforts, so we are not over-taxing the diverse firms by duplicating requests for information that have already been conducted. Create an information pool.
- C. Look at opportunities to coordinate the outreach efforts of the multiple agencies and primes to be more efficient with their, the diverse firms, designers, and GCs' time.
- D. Conducting outreach sessions virtually targeting firms located in rural areas or firms who have limited staff/no staff to attend those sessions.

Exemplars:

- A. Regional Contracting Forum

Related:

- G. Networking
- H. Rosters
- I. Owner Training
- J. Access

Topic: Networking

Networking is a form of outreach, focused on the process of interaction to exchange information and develop contacts.

Barrier Statement:

It has been touted that you must get out there and meet people, create, and foster relationships, but networking needs to be worth the investment. Some of the problems with networking:

- A. Not enough time to network
- B. Not sure how/what to say
- C. Not confident I will come across as professional
- D. The time investment didn't pay off when I tried it in the past
- E. Good conversations and connections feel like they lead nowhere

Possible Practice or Solution:

Create a statewide networking platform for public works. One place, with clear purpose, create opportunities that are also monitored.

Exemplars:

???

Related:

1. Outreach
2. Access to Leadership
3. Planning
4. Notification, Advertisement, and Solicitations
5. Bait n switch, Ghosting
6. Rosters

Topic: Owner Staff Training

Barrier Statement:

- Project delivery staff and contracting staff do not have training on inclusion policies and procedures, the result is either a lack of fair scoring and evaluation (enforcement) and ineffective inclusion processes. The provisions and policies are hollow and ineffective.
- Prime project staff as well are not fully trained on owner adopted practices, often the estimating and subcontracting staff are not even aware of the contents of an inclusion plan.
- Primes that have “inclusion experts” on staff don’t utilize those staff until it is too late to be effective or not at all.

Possible practice or solution:

- A. All staff should be trained on inclusion processes, policies, and goals. Owner programs should not allow staff who have not taken inclusion (in contracting) training solicit, manage, or enforce projects.
- B. Staff proposed for a certain project develop the inclusion plan and goals for the project. Both owner teams and prime teams. An approach to meeting those inclusion goals should be clear and actionable not speculative.

Related:

1. Contract language
2. Training
3. Business practices v. good faith efforts
4. Enforcement
5. Legal Interpretations

Topic: Legal Interpretations

Barrier Statement:

- Different owners -may have different interpretations/applications on what is advisable, or legal, under I-200 regarding inclusion.
- Some owners are encouraged to be conservative and not score, rank, or judge performance based on inclusion plans leading to too many varied approaches and lack of authentic or value-added inclusion strategies.
- “Inclusion Plans” are often used as outreach approaches with little more than general business engagement practices.
- Allows owner teams to “phone in” the real effort it takes to be effective in this space.
- This lackluster approach trickles into contract language and no progress are truly made.

Possible practice or solution:

- A. The State Attorney General should be involved in setting legal policy and interpretation for all public agencies here in the state, reflective of the intent of several inclusive public business requirements.
- B. I-200 should be modified or reversed to allow true affirmative action.

Related:

1. Outreach and networking
2. Solicitation times
3. Contract language
4. Forecasting
5. Mentor protégé

PART 2: ENGAGEMENT

Target: contents of this section are tasks, activities and practices that owner, primes and diverse businesses should consider when involving the public procurement market.

Practice Highlights:

- Technical Assistance
- Access to contract information
- Certification, registration, self-identification
- Mentor-Protégé
- Advertisement and solicitation

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Topic: Certification

Barrier Statement:

- Certification program in the State of Washington is a focused on a small subset of diverse AND small businesses not the broader community.
- Certification program in the State of Washington is hard and cumbersome, often feeling like we are having to prove we are “human” other businesses don’t have to do that
- Public procurement laws point to state certification, yet because of I-200 there can be no material advantage to winning contracts as a certified firm
- There are other professional organizations/owners that offer certification or registration programs, but perceived as a conflict of interest with OMWBE which leads to multiple certifications and more work for diverse businesses with little return
- Not all diverse firms are registered or certified, and it leads to lack of awareness by primes and owners
- Certified firms have a reputation for being “more professional”. If certification is modified or removed, diverse firms should somehow be trained on proper etiquette or somehow be trained to a higher standard of engagement.
- Other states (e.g. Idaho, Oregon) have a system far less cumbersome more akin to registration, Washington should stream line.
- Perhaps having a regional program certification/registration (e.g. federal region X)

Possible practice or solution:

- State laws should encourage self-identification not unlike employment since there is no material advantage in contracting there is no reason to “game the system.”
- I-200 should be modified or reversed to allow true affirmative action.
- Owners should adopt a broader tracking system and allow for all forms of diverse business identification and inclusion
- Needs to be a crosswalk and alignment with federal requirements

Exemplars:

- A. City of Seattle
- B. UW

Related:

1. Legal interpretations
2. Inclusion Plan/Inclusion requirements
3. Contract language
4. Reporting
5. Coaching and training businesses

Topic: Access to decision makers

Barrier Statement:

Firms that have never won work with an owner team have an unfair disadvantage to incumbents because they don't understand the owner process, who the decision makers are, or the "style" of response or expectations.

Possible practice or solution:

- A. Owners should not just hold pre-bid meetings, but they should have a socialization and engagement process, where their processes and decision makers are introduced, and general questions and engagement take place. This can be outside of active solicitations so that there is no conflict with the public process.
- B. Decision makers should be the contacts for questions on active solicitations or at least part of the dispute process so they are known to the public.
- C. Owners should use "templates" sparingly so as to not allow incumbents to know what "winning" responses/bids look like.

Exemplars:

???

Related:

- 1. Outreach and networking
- 2. Solicitation times
- 3. Contract language
- 4. Forecasting
- 5. Mentor protégé

Topic: Access to Contracting Information

Barrier Statement:

Public owners use various methods to solicit bids for projects often depending on size or type of project. Small Works projects are not always posted and formally bid projects are posted where an owner chooses. This makes it challenging for contractors to know what job opportunities are available or even where to start looking for those opportunities.

Possible practice or solution:

- A. Standardize, across the State, places for owners to post contracting opportunities in addition to their local postings that may be required by law or policy. Possible websites: OMWBE and DES are common.
- B. Owners to post all opportunities on owner website in location easily accessible.
 - 1. Current Projects: Include project requirements and link to project information if using a platform such as Builder's Exchange of Washington ([www.bxwa](http://www.bxwa.com)).
 - 2. Future Projects: Include projected timeline for upcoming projects
 - 3. Past projects: Include all awarded contracts within a certain period (one year?)
- C. Require pre-bid conferences on projects estimated to cost over \$1M.
- D. Leverage local organizations to make them aware of current and upcoming opportunities (e.g. OMWBE, PTAC, etc.)

Exemplars:

[????]

Related:

- 1. Small works rosters
- 2. Outreach
- 3. Data collection
- 4. Contract sizes & scopes

Topic: Technical Assistance

Problem Statement:

Technical assistance can be helpful, if the assistance is tailored to either the public owner or the prime and to specific projects/pursuits. Not all assistance programs are helpful to diverse businesses in preparing for locating, winning, and being successful on public projects.

Possible Practice or Solution:

- Targeted assistance programs (e.g. bidding, bonding, record support, payroll, etc.)

Related:

- A. Contract language
- B. Networking
- C. Training and education

Examples:

1. MBDA
2. WSDOT
3. City of Seattle
4. Tacoma
5. Tabor 100

Topic: Mentor – Protégé Programs

Barrier Statement:

Mentor Protégé programs are often marketed as a way for diverse businesses to build capacity and grow businesses through mentorship with primes. More information is needed to ensure no outreach and networking are included and ensure that real help is provided with measurable outcomes to track.

1. Programs are expensive to run, therefore limited
2. Need to ensure benefits to all parties involved
3. Need to track outcomes and performance and ensure programs are doing what they say they are going to do.

Possible Practice or Solution:

1. Sizeable/Scalable/Proportional versions of WSDOT/Sound Transit

Exemplars:

- A. WSDOT/Sound Transit
- B. US Small Business Administration
- C. MBDA (is administrator for WSDOT/Sound Transit Capacity Building Mentorship Program)

Related:

- A. Training and Education
- B. Networking
- C. Contract Requirements

Topic: Advertisement and Solicitations

Barrier Statement:

There are inconsistent advertising practices among public agencies and primes pursuing work. Inconsistencies, which include, but are not limited to, a lack of key project information, advertising locations, and solicitation timeframes.

Possible practice or solution:

- A. All agencies at a minimum advertise on OMWBE website. This may not be the only location owners/GCs/Subs utilize to advertise work opportunities.
- B. Advertisements should attempt to offer sufficient project or opportunity details to inform bidders about compatibility. Even if information is subject to change as projects evolve. Include estimates of each.
 1. Delivery Method
 2. Approximate Dollar value or size information
 3. Scope
 4. Schedule
 5. Budget
 6. Key requirements
 7. Contact information
- C. Diverse Businesses monitor and sort advertising to locations to help identify the opportunities that fit their business model.
 1. Geographic Filtering
 2. Delivery Method Filtering
 3. Size/Type Filtering
 4. Requirements
- D. Solicitation timeframes/durations should be sufficient to allow development of bids relative to the amount of work required to submit a responsive bid.

Related:

- A. Mentor Protégé
- B. Training/Education
- C. Outreach
- D. Contract Requirements

Topic: Pipeline and Business Development

Barrier Statement:

- By the time solicitations hit the street, the business community is not ready with the necessary labor, training, capabilities, or strategies to effectively compete.
- Particularly in the alternative public workspace, many owner teams are trying to reinvent their processes, try new approaches, or similar. Without socializing requirements, approaches, expectations advertisements just hit the street and give 3-4 weeks to respond. Target businesses are not sure how to react and have not been given enough time to prepare for the response.

Possible practice or solution:

- A. Leverage on-going business support networks such as Minority Business Development Agency. Owners should be spending time helping business understand upcoming work, size, complexity, requirements, etc.
- B. Owners and primes should engage target companies prior to solicitations to understand what work scopes and sizes they are capable of and package accordingly.
- C. *Prior to releasing new contract language, process, or contracting approaches, owners and primes should be required to circulated for feedback to the construction and professional services community and receive feedback.*

Related:

- A. Outreach and networking
- B. Solicitation times
- C. Contract language
- D. Forecasting
- E. Mentor protégé

PART 3: CONTRACT REQUIREMENTS

Target: this section is focused on equitable and inclusive contracting practices. Owners and primes should consider these when developing and administering contracts. Subcontractors/subconsultants should understand contract provisions and their impacts. This section is not intended to provide legal advice.

Practice Highlights:

- Prompt Pay
- Insurance Requirements
- Bonding Requirements
- Indemnification
- Inclusion Plans
- Subcontracting
- Experience Criteria and Qualifications Based Selection
- Bid Shopping/ “bait n switch”/ “ghosting”

Key Tool:

- Proportionality

Topic: Prompt Pay/Quick Pay

Barrier Statement:

The subcontracting community experiences delay in receipt of payment for work performed on public contracts.

A typical duration for a subcontractor to receive funds would be approximately 45-60 days. This can be a significant barrier to entry or problem for small/disadvantaged businesses to manage because cash flow is of critical importance to smaller firms.

Possible practice or solution:

- A. Lump sum packaging, pay 90% of lump sum on a draw-down schedule for consistent payments through the duration of the project, withhold a small amount at the end.
 - B. Pay all undisputed items on a monthly interval regardless of being paid by the Owner.
 - C. Critical to understand, negotiate what timing is needed to support a subcontractor through the execution of work.
 - a. Use mobilization provisions for percentage paid upon NTP
 - b. Use admin cost provisions for materials in advance of fabrication and/or delivery.
 - b. Timing for payment after delivery of materials to the jobsite. Vendor discounts can flow back to project for incentive.
 - c. Labor resourcing over time to develop payroll/labor costs for full onsite duration.
 - d. GC's and subcontractors can/should be transparent about these details and work to incorporate them into the project SOV's so that payments can be made with mutual agreement.
 - B. Use of Joint Checks to subcontractor suppliers can help ensure payment to downstream suppliers or subcontractors in reduce total payment durations.
 - C. Review owner contract for provisions on process to support billing for materials offsite.
 - D. Most public contracts are billed on a monthly interval. Owner support of bi-monthly or even weekly invoicing to better support downstream subcontractors needs?
 - E. Consider retention bonds to eliminate 5% withholding.
- Most contracts are based in "progress" completion at the jobsite. Monthly Interval.
 - Work Completed through end of month is billed. Owner Payment approximately 30 Days later. GC payment to sub up to 7 days later.
 - Example: Completed OMWBE Masonry Wall February 2022. Billed to owner March 1, payment received by sub April 7th.
 - Prompt Pay Concept: GC's, Owners, Arch recognize and allow inclusion of **OMWBE scopes to be billed including the following month of scope which is scheduled.**
 - Completed work as well as scheduled OMWBE work included in progress billing for following month billed.
 - Example: OMWBE Masonry Wall scheduled for completion in February 2022 included in January 2022 Progress billing.
 - Verification at end of February that Masonry wall is satisfactory. Payment received by sub March 7th. (reduction of 30 Days duration)
 - How to:

- Mutual agreement between Owner, GC, Arch that the project does wish to reduce payment durations for OMWBE participants.
 - Main Contract terms which support/allow this. Define “progress” to include OMWBE following month of effort.
 - SOV identification of certified OMWBE scopes/subs.
 - Monthly progress evaluation includes the following month of scheduled OMWBE work.
 - Subsequent monthly evaluations can include confirmation of previously scheduled work progress.
 - Leverage GC receipt of owner funds as separate control check point for OWMBE payment release.

Exemplars:

- City of Seattle (pay every XXX, even if not paid by the owner)

Related:

- A. Contract Language
- B. Enforcement
- C. Owner training
- D. Flow-down contracting provisions
- E. Retainage
- F. Bonding
- G. Insurance

Topic: Insurance (risk)

Barrier Statement:

Insurance requirements in public works contracts are not specified commensurate/proportional with individual scopes of work and risk of every sub-task or subcontractor but are typically written to cover the whole project while also requiring coverage as a “flow down” condition; therefore, creating a barrier for subcontractors, service professionals, and/or smaller firms who cannot obtain the coverage to compete and perform on public contracts.

All type of contracting (DBB, DB, GCCM, JOC, etc.)

Not just amount of coverage but also type of coverage. – example: Owners requiring additional professional liability insurance, which is not a possibility. Understanding how the products work and what they are covering.

Other Insurance vehicles.

Evaluate through an owner procurement process. Example: DB – insurance structure as part of the qualification requirements. Understanding what the insurance plans are by the DB.

Scalable insurance requirements that match the risk of the party you are trying to contract with. The insurability of a firm is going to impact the type of work they can be involved with. Risk – Insurance – Scope of Work.

Techniques for increasing participation impeded by insurance requirements through other methods.

Possible practice or solution:

- A. Contract language discussing flow-down process and giving space for Owners to specify that the insurance requirements for the whole project may be divided among lower tiers commensurate with individual scopes, packages, risk, or similar.
- B. Insurance training for owners and contractors/subcontractors/professional service providers.
- C. Template insurance provisions

Related:

- A. “flow down” provisions
- B. “legal” requirements vs. owner preferred
- C. Insurance limits on projects (general)
- D. Broader training on how to appropriately assign contractor vs. professional service insurance as well as how to specify coverage to subs and lower-tier scopes

Exemplars:

- A. City of Seattle
- B. University of Washington
- C. Department of Enterprise Services

Topic: Bonding

Barrier Statement: Contractors must secure several bonds to bid for and perform public works. Such bonds include: (1) contractor registration bonds under RCW 18.27 in the amount of \$6,000 for specialty contractors and \$12,000 for general contractors with “blocked deposit accounts” as an alternative; (2) bid bonds/guarantees which are typically 5% of the contract amount; (3) payment and performance bonds consistent with RCW 39.08, which are generally the full contract price with exceptions for contracts \$150,000 or below; and (4) retainage bonds, if sought, pursuant to RCW 60.28.011. There may also be additional bonding requirements for licensed trades like electrical and plumbing.

1(a). Do the above-referenced bonds impose unreasonable barriers on the ability of disadvantaged business enterprises and small business entities to bid for and successfully perform public works?

1(b). If yes, how so?

2. While cash can be deposited in lieu of bid bond in some cases, do disadvantaged business enterprises and small business entities face barriers to successfully perform public works if they cannot later obtain a payment and performance bond (*i.e.*, by forfeiting the cash in lieu of bid bond)?

3. Can lack of contracting experience impact bonding capacity and, if so, how so?

4. Are there other contractual, rather than statutorily imposed, bond obligations that act as barriers to bidding for and successfully performing public works that any public owners require?

Possible practice or solution:

- A. More education on back end (not field) of running business.

Related:

- A. Insurance requirements
- B. Contract Language – Flow down provisions
- C. Subcontractor registration
- D. Training and education

Exemplars:

- A. City of Seattle
- B. [Other public owners with right-sized bonding requirements and proportional flow-down provisions]

Topic: Indemnification

Barrier Statement:

Public owners are commonly very risk adverse. There are numerous reasons why this can be true, including: limited budgets, inexperience, requirements from their own insurers, as well as political pressure.

Insurance coverage is frequently dictated by insurance pools whose requirements are dictated by aversion to taking on risk frequently without regard for risks in small or low risk projects.

This risk aversion manifests itself in terms of both pricing risk and liability risk into public works projects. One of the areas of liability risk where the professional design community finds public procurement most problematic is the area of indemnification (and relatedly liability insurance) AND contract requirements for insurance coverage whether for professional or other liability

Indemnification creates a contract law-based liability potential. However, design professionals' insurance only provides coverage for their own negligence which is based in tort law. Their coverage does not extend to claims based in contract law. This is entirely analogous to legal liability for medical professionals.

This being the case, there are significant barriers to entry into the public works marketplace for design firms because of the potential they will not have sufficient or even relevant insurance coverage. This is especially true for small and diverse firms which can be threatened with their very survival should they be subjected to even a single under-insured or non-insurable claim.

The second area surrounding indemnification that arises as a barrier is when public owners use indemnification (contract language) to attempt to make firms liable for more than those firms' own negligence. Indemnification provisions in public works contracts are often complex, ambiguously written, and/or can bring into question whether portions of them are even legal under a statute that limits indemnifications, RCW 4.24.115. While most design professionals understand and agree with the fair-minded standards provided in RCW 4.24.115, they also often see public owners trying to find any manner possible to abrogate those standards using overly complex language or by attempting to make design firms responsible for the costs of defense and claims for which they had no responsibility in causing.

Given these concerns, many firms, especially small and diverse firms decline entering public works projects.

Big issue to the Design Community – revolves around professional liability. Where is the genesis of liability and what are you liable for? Standard of care – very much like a doctor. Based in Tort, based in negligence.

Professional liability insurance is protecting common law liability. If the contract terms that creates a risk or liability that goes above and beyond negligence – the insurance isn't available. Whether or not something is insurable is paramount. Where there is uncertainty risk is mitigated. Tries to create a different standard of care, all claims regardless of if the firm was at fault or not. That is not insurable. Inability to price the risk – mitigate through scoping, defensive design. It ends up costing the owner more money.

If there are questions about tort law – “proximately caused”, versus “all damages”.
Whose negligence are you covering, your own or others? Because flow down can cause a bad relationship between a prime and sub.

From contractor perspective – indemnification horror story – clause that is broader than when your insurance covers. What you agree to indemnify must match what you are insured for.
Business issue across the board – more of barrier for small firms and you are small without access to capital.

Do new firms even understand the risk that they signing onto?
Small firms could be put out of business if they cannot cover their risks in indemnification if it is beyond what their insurance.

Barrier for firms to gain entry and expand.

Should indemnification and insurance be as mixed together as they are when liability is mixed with indemnification?

Whether or not the requirement is statutory and contract?

Whether or not it is appropriate to the risk?

Overkill requirements that lead to several issues that are barriers to diverse businesses and new businesses. RCW 4.20.115

Possible practice or solution:

- A. Standardize indemnification language for public owners in the state both for professional services and for contractors.
- B. Mutual indemnification
- C. Limitation of liability for all parties
- D. More training to understand the process

Related:

- A. Contract language
- B. Risk Management
- C. Legal advice
- D. training and Education

Exemplars:

- A. City of Seattle
- B. University of Washington

Topic: Subcontracting

Barrier Statement:

- Issues around more equitable, fair, and transparent subcontracting opportunities are multiple and nuanced:
- For small diverse firms in consulting or construction, being part of alternative public works projects can frequently make them victims of bait and switch particularly in some sectors.
- Established construction firms have difficulty recruiting diverse firms depending on work and project site location.
- Complexity of public contracting bureaucracy is often a barrier to diverse firms that are developing or small.
- In design fields, difficulty in scoping work for diverse firms (e.g., structural engineering)
- Does not address business model of consulting firms. Break even or profit based on hours billed. Allocating hours outside firm reduces margin without necessarily reducing liability.
- Over reliance on certification for work. Certification is no longer "incubator"
 - Consider: limited term, graduation
 - Consider: use of "emeritus" certified firms

Possible practice or solution:

- "Snowball" sub selection where possible. Owners who request that the team be proposed with just the Designer of Record and the Builder, with the expectation that the team be built after selection.
- Accountability programs. When the Owner determines that the Team should list their subs, requiring accountability to use the firms proposed is paramount.
- Seek out firms, then scope based on capability of those firms
- Accountability includes firms solicited not just firms awarded
- Mentor protégé program as part of contract award
- Seek out firms, then scope based on capability of those firms

Related:

- A. Mentor-Protégé
- B. Contract Language
- C. Certification

Known Examples:

- A. JOC programs

Topic: Inclusion Plans

Barrier Statement:

Generally accepted that inclusion plan development and use are a practice during public procurement to ensure that owner expectations around diverse business inclusion are clear and contractor/consultant approaches are measurable and realistic. However, not all owners are using inclusions plans, expectations are not clear, and inclusion plans are not enforced or enforceable.

Possible Practice of Solution:

1. Sample policies
2. Sample inclusion plans for various contract types (e.g. DBB, DB, GC/CM, JOC, etc.)

Related:

- A. Contract provisions
- B. Enforcement
- C. Legal advice
- D. Flow-down provisions

Exemplars:

1. City of Seattle
2. University of Washington
3. DES
4. Sound Transit

Topic: Experience Requirements/Qualifications Based Selection

Barrier Statement:

In qualifications-based selections, it is often the case that the experience requirements preclude new firms from entering the marketplace, therefore creating a barrier for diverse businesses to advance and expand capabilities. (e.g. in order to propose on a DB team you have to have had prior experience on a DB team and/or 5 years of experience in some sort of alternative delivery model).

Possible Practice of Solution:

- A. Sample RFQ/RFP and scoring recommendations where experience is broken down into more tangible criteria (e.g. preparing estimates, bid packing, risk mitigation practices, etc.)

Related:

1. Contract language
2. Legal advice

Examples:

- A. [Possible to gather and agree on several owners/primes approached here?]

Topic: Bid Shopping/Bait n Switch/Ghosting

Barrier Statement:

It has been reported that diverse businesses are engaged during project pursuits and asked to provide input into proposals and responses for teams to get “diversity points” then after award either never contacted again or told primes are going to pursue other competition to drive down price, or even the prime will self-perform. It is even reported in situations where there was a teaming agreement in place.

Possible Practice of Solution:

1. Owners require inclusion plans at all phases of selection and delivery
2. Inclusion plans include teaming agreements and owner verified diverse business inclusion along with commercially useful function assessment
3. Owners require process to change out any named subs (consultants or contractors)
4. Performance metrics are defined and enforced – owners are going to have to get more involved in prime/sub business terms in extreme non-compliance cases.

Related:

- A. Contract Language
- B. Enforcement
- C. Training and education

Exemplars:

- A. City of Seattle

PART 4: MONITORING, REPORTING, TRACKING

Target: this section provides examples and recommendations around monitoring, reporting, and tracking diverse business inclusion in public procurement. The section attempts to address information and data collection efforts in a consistent and useable manner across the state.

Practice Highlights:

- Technology Applications
- Forms and Templates
- Reporting Processes
- Enforcement
- Project Review Committee

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Topic: Tracking – Reporting

Barrier Statement:

There is inconsistent reporting by owners and construction projects, or lack of reporting all together. Reporting is the best way to understand current state and utilization.

When there is reporting it is often compromised with multiple certifications, registrations, designations and or self-identification. (e.g. OMWBE, MMSDC, WBEC, King County SBC, etc.) There is no consistency on which certification(s)/designations should be recognized and used when reporting diverse business utilization for their Contracts. This inconsistency skews any reporting that is provided.

Possible practice or solution:

- Consistent contract language discussing which certification(s)/designations/registrations are accepted and counted for utilization percentages should be defined by project
- Aligning and/or standardizing a consistent certification process or agency which ALL public work recognizes. (OMWBE? Referenced in RCW now)
- Utilizing B2Gnow for monitoring, tracking, and reporting per State of Washington

Exemplars:

- A. City of Seattle
- B. University of Washington
- C. Sound Transit

Related:

- A. Contract Language
- B. Training
- C. Policies
- D. Legal Interpretations

Topic: Data Collection Systems

Problem/Issue Statement:

- There is not one consistent way to collect utilization and project data and/or a central repository to collect inclusion data, what firms, what percentages, certified, not certified, ethnicity data, etc.
- Any data that may be collected by owners is not readily available to the public, in most cases you must assert a public records request to various public owners and collect for yourself. These processes are most often long and again data is inconsistent.

Possible practice or solution:

- A. All public owners in the state should leverage the OMWBE/Washington State Business Diversity Management System through B2Gnow. <https://omwbe.wa.gov/state-supplier-diversity-reporting/business-diversity-management-system>
- B. Federal reports should be posted on the owner's webpages or some central repository.
- C. Reports should be collected with and PRC application and posted to the PRC website.
- D. Reporting protocols should be minimally required by statute in 39.10 and 39.04 on at least a annual basis.

Exemplars:

- A. OMWBE
- B. City of Seattle
- C. Sound Transit

Related:

- A. Reporting (general)

PART 5: DISCRIMINATION & HARASSMENT

Target: This section focuses on situational cases that have been shared that have led to discrimination and harassment. We are creating this section to bring awareness and create tools to help avoid similar events.

Practice Highlights:

- WMBE firm Inequity
- Retaliation and Retribution
- Site Safety
- DEI training for owners, primes and subs

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Topic: Women-owned firm inequity

Barrier Statement: minority women-owned firms are less likely to receive awards compared to the white women-owned businesses.

Possible Practice: use a women-owned and minority-women-owned category separately with separate, proportional goals...don't lump together

Exemplars:

- A. OMWBE
- B. ???

Related:

1. Inclusion Plans
2. Policy development

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Topic: Construction Workplace Safety

Barrier Statement: Employees of color and women often are victims of violence, harassment, hazing and other forms of inappropriate treatment.

Possible Practice: Labor equity programs, site safety requirements in contracts, training, and education

Exemplars:

1. City of Seattle
2. King County
3. WSDOT

Related:

- C. Contract Language
- D. Training and Education

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Topic: Retaliation and Retribution

Barrier Statement: when/if complaints and inquiries are filed with agencies regarding bidding, award or general contracting practices; the inquiring businesses feel “black-balled” or put on some sort of “list” of “problematic” business.

Possible Practice: owners/primes establish anonymous avenues for complaints questions, etc. These avenues (websites, emails, etc.) are monitored and responded to within 24 hours from knowledgeable staff such as project managers or contracting professionals.

Exemplars:

???

Related:

- A. Policy
- B. Training and Education
- C. Contract Language

APPENDIX

1. Bibliography
 - a. Disparity Studies
 - b. MSRC Report
2. Resources
 - a. OMWBE Tool Kit
 - b. Samples/Examples
 - c. Papers and Reports

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