

Before the
**NATIONAL TELECOMMUNICATIONS AND INFORMATION
ADMINISTRATION AND THE RURAL UTILITIES SERVICE OF
THE U.S. DEPARTMENT OF AGRICULTURE**

In the Matter of)
)
Joint National Telecommunications and) Docket No. 090309298-9299-01
Information Administration-Rural Utilities)
Service Request for Information)

BEST PRACTICES FOR ENGAGING MINORITY BUSINESS ENTITIES

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Executive Summary

In its comments in response to the NTIA/RUS NPRM regarding the Broadband Stimulus buildout, MMTC, along with 34 other civil rights organizations, recommended that NTIA and RUS collaborate to ensure substantial Small Disadvantaged Business (“SDB”) and Minority Business Enterprise (“MBE”) participation in broadband contracting opportunities. It would not be necessary for NTIA and RUS to “reinvent the wheel,” as several state and local jurisdictions have already implemented programs that will enhance minority participation in state and local procurement initiatives. Here, we outline a suggested framework for engaging MBEs and SDBs as fully as possible. Our recommendations are primarily based upon the approaches taken by the Public Service Commission of Maryland and the California Public Utilities Commission with the cooperation of participating prime contractors.

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I. Memorandum of Understanding (MOU) Framework

MMTC recommends that NTIA and RUS enter into Memoranda of Understanding (“MOUs”) with prime contractors. MOUs, while flexible and negotiable, would lend an additional air of authority and structure between prime contractors and the federal agencies that are charged by Congress to ensure that disadvantaged businesses are given a fair opportunity to participate under the broadband stimulus program. MMTC expresses deep gratitude to the Public Service Commission of Maryland, their participating contractors,¹ and the California

¹ See Public Service Commission of Maryland, “Signed Memoranda of Understanding” available at http://webapp.psc.state.md.us/Intranet/utility/sdiversity_new.cfm (last visited June 25, 2009) (several signed memoranda of understanding between the Public Service Commission of Maryland and contractors including Qwest Communications, Verizon Maryland, Washington Gas Light Company, and XO Communications).

Public Utilities Commission,² for their groundbreaking work in this area and for informing our proposal.

II. Proposed Components of a Standard Form MOU between NTIA/RUS and Prime Contractors

1. Set Goals not Quotas and Do Not Penalize for Failure to Meet Goals

While Adarand v. Peña established the strict scrutiny standard for reviewing government regulations that include racial classifications,³ meaningful participation by MBEs and SDBs in government procurement opportunities may be accomplished while still surviving strict scrutiny. By not setting quotas and not penalizing prime contractors for failing to meet goals, government agencies and prime contractors avoid constitutional challenges.

2. Require Prime Contractors to Develop Internal Procedures and Policies to Ensure Maximum Participation by SDBs and MBEs

Best practices would include reliable internal monitoring procedures to ensure that each contractor has made and continues to make bona fide progress in engaging SDBs and MBEs. This approach is reasonable for companies because it reduces the likelihood of excessive government review and scrutiny. Internal procedures also avoid the necessity of committing government resources to ongoing monitoring by government employees. By holding companies

² See California Public Utilities Commission, “Utility Supplier Diversity Program” available at <http://www.cpuc.ca.gov/PUC/SupplierDiversity/> (last visited June 25, 2009); see also California Public Utilities Commission, General Order 156, Decision 88-04-057 in R.87-02-026 (2009).

³ See Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (2009).

accountable by allowing them to set their own, custom-tailored monitoring procedures, unnecessarily burdensome government oversight is avoided.

3. Require Annual Review/Report from Prime Contractors on SDB and MBE Utilization and Procurement Practices

Annual review and reports from prime contractors on SDB and MBE utilization and procurement practices ensures regular monitoring without excessive government interference. Setting reasonable benchmarks and holding prime contractors accountable for meeting those benchmarks are fair and efficient means of maintaining an ongoing and current dialogue about each prime contractor's efforts to fully utilize SDBs and MBEs.

4. Reporting Requirements for Any Modifications to SDB and MBE Program

While companies should be trusted to develop their own effective SDB and MBE program, granting agencies should require prime contractors to report any modifications to these programs. This additional mechanism would work to hold contractors accountable while reducing the extent of day-to-day oversight by regulating authorities.

5. Establish Certification Requirements for Participating SDBs and MBEs

Confusion is likely to develop due to the differing standards and definitions currently used by a variety of organizations as to what constitutes an MBE. A certification requirement is critical for establishing uniform MBE requirements and procedures.

a. Independent Committee to Certify SDBs and MBEs

Creating a diverse and independent committee to avoid a dominating influence by any particular special interest is recommended for establishing the certification process for MBEs.

b. SDBs and MBEs may Self-Certify, but must Re-Certify Every Three Years

In a fast-moving program such as BTOP or BIP, self-certifications with full transparency, random audits and reporting would provide the most efficient and least costly means for SDBs and MBEs to prove their eligibility and use their SDB or MBE status as an inducement to investors and lenders. To validate self-certifications and keep pace with changing market conditions, SDBs and MBEs should be required to re-certify every three years.

6. Include SDBs and MBEs in a Centralized Database/Clearinghouse

The first step in meeting goals to engage more SDBs and MBEs is to find qualified SDBs and MBEs. This process can be simplified by developing a centralized database of certified SDBs and MBEs.

a. Database not an Endorsement

To preserve the role of the government as a facilitator rather than an overseer, public utility authorities should make it clear that merely including a certified SDBs and MBEs in a database does not constitute an endorsement of the business.

b. Database Subject to Public Inspection

The database should be subject to public inspection so that the process of certifying SDBs and MBEs remains transparent.

7. Delineate Specific Implementation Tactics

Although not permitted to authorize or require set-asides, preferences, or quotas, the programs should be organized to encourage the outreach and participation of diverse suppliers. While programs dedicated to outreach will necessarily be unique to each prime contractor's business, certain requirements should always be incorporated into these programs. These

minimum requirements will provide guidance to prime contractors in implementing the outreach program.

a. Hire Staff to Provide Overall Diversity Program Direction

Each participating prime contractor should create a staff function dedicated at driving diverse supplier programs and goals. To achieve success with diverse supplier programs, programs must have the appropriate resources, including a trained staff that understands the goals and requirements of the MOU and seeks to implement and improve programs in an effective manner.

b. Requirement for Prime Contractors to Engage in External Outreach

Each prime contractor should be required to develop an outreach program designed to recruit and educate diverse suppliers about opportunities to participate and provide services within the scope of the MOU. Each prime contractor should actively identify and expand its diverse supplier resource pool to generate greater SDB and MBE participation.

c. Actively Engage with Minority Organizations

Prime contractors should encourage and engage on issues of mutual importance with organizations that represent diverse supplier interests. Collaborating with these organizations is beneficial to prime contractors because it provides an opportunity to network and develop a solid resource pool of eligible SDBs and MBEs and encourages constant education on new issues regarding diverse supplier participation.

d. Require Prime Contractors to Provide Information to Unsuccessful Bidders on Why Such Bidders Were Rejected

Prime contractors should constantly strive to increase SDB and MBE participation in a variety of ways. Implementing simple measures, such as explaining procedures and

requirements relating to qualifications, bid, contracting, materials, invoicing, payment and any other process issues would clear the path for substantial SDB and MBE participation.

Provided that more than two bidders participated in the bidding process and that information can be disclosed without revealing any confidential or proprietary information, the prime contractor should also provide, upon request, information to any unsuccessful SDB or MBE bidder explaining why the SDB or MBE lost the bid. This information should generally include a general comparison of the winning bid and the unsuccessful one, including the difference in warranties, maintenance, delivery and other associated costs. Requiring prime contractors to present this information to unsuccessful bidders would facilitate increased SDB and MBE participation by generally demonstrating market factors and instructing the unsuccessful bidder how to become a competitive bidder. Including a provision protecting confidential and proprietary information balances the interests of the prime contractor and winning bidder, thus encouraging participation in the MOU program.

e. Require Prime Contractors to Provide SDBs and MBEs With Lists of the Most Viable Purchase/Procurement Categories

Another method of encouraging SDB and MBE participation and conserving SDB and MBE resources is to direct SDBs and MBEs toward tailored opportunities. Prime contractors should be required to provide an individualized list matching SDBs and MBEs with the most practicable opportunities for each business to obtain contracts. This list will increase minority participation by allowing SDBs and MBEs to focus efforts on securing the most attainable contracts and/or contracts providing the best fit.

f. Unbundling of Contracts Wherever Possible, and Elimination of Other Market Entry Barriers

Prime contractors should required to direct employees in their procurement department to

unbundle contracts and purchasing requirements whenever practicable. The unbundling of contracts encourages broader participation from SDBs and MBEs, especially participation by smaller SDBs and MBEs who may not have the resources to compete for the larger contracts. Prime contractors should also avoid other entry barriers that discourage small business participation while having no significant business justification, e.g., requirements for large project experience, years-in-business requirements, or excessive bonding requirements.

g. Summarize the Diverse Supplier Program in Marketing Outreach Literature

Company literature distributed to suppliers should include a summary of the prime contractor's diverse supplier program. The literature should encourage SDB and MBE participation and inform diverse suppliers of their right to request a full copy of the MOU. Using company outreach and marketing literature will foster minority participation by educating SDBs and MBEs about potential opportunities pursuant to programs created under the MOU.

h. Encourage Development of Diverse Contractors Relationships

As a basic principle of good business and program success, prime contractors should work to continue developing and preserving diverse contractor relationships as well as ensuring cooperation between non-diverse suppliers and diverse suppliers. The retention of diverse contractors will allow a particular SDB or MBE to continue its own development and therefore provide greater opportunities for the SDB and MBE communities because the number of employees will necessarily increase in correlation with the growing businesses.

i. Require Prime Contractors to Work to Retain Diverse Contractors

Prime contractors should strive to ensure that diverse contractors are retained. This requirement is beneficial because it allows the prime contractor to ensure consistent and

sustainable service from the diverse contractor throughout the term of the contract. Retaining diverse contractors also ensures SDB and MBE development through the term of the contract by encouraging participation through additional contracting experience.

j. Include Clear and Conspicuous Language in Purchase Orders and Other Materials Stating Utilization of SDBs and MBEs

To promote SDB and MBE participation across all levels of contracting and subcontracting as well as alert potential suppliers about the terms of the MOU, prime contractors should include language in all procurement related documents, including purchase orders and requests for bid-proposals, setting forth the prime contractor's policy of encouraging SDB and MBE participation. Prime contractors should note that, while the goal is to increase diverse suppliers, and that a business' SDB or MBE status may be a factor in deciding bids, the MOU does not operate to exclude other qualified non-diverse suppliers from participating. The prime contractor should also require subcontractors to comply with this policy whenever possible.

k. Establishment of a Formal SDB and MBE Supplier Complaint Process that Minimizes the Role of Government Agencies in Handling Complaints

To ensure a fair process and selection of diverse suppliers, the prime contractor should be required to establish a procedure for reviewing and responding to complaints related to diverse supplier engagement. In accordance with section 15(k) of the SBA Act, NTIA and RUS are each expected to maintain an Office of Small and Disadvantaged Business Utilization (OSDBU),⁴ for the purpose of monitoring compliance with the SBA Act. This would include managing a

⁴ See 15 U.S.C. §644(k) (2009).

complaint process. However, reviewing these complaints may, at times, be an inefficient use of NTIA's and RUS' resources. Therefore, we propose that each prime contractor maintain effective internal procedures for handling SDB and MBE complaints.

I. Establishment of Substantial and Verifiable Short-Term, Mid-Term and Long-Term Goals for the Utilization of Diverse Suppliers

Each year, all prime contractors should be required to specify verifiable goals for programs and diverse supplier participation. Goals provide the framework to turn the vague and abstract into a more concrete roadmap from which the prime contractor can visualize the effects that day-to-day decisions have on SDB and MBE participation. Goals should be classified as short-term goals, mid-term goals, and long-term goals. NTIA and RUS should set minimum apportionments of a prime contractor's initial long-term goals toward increasing participation among SDB and MBE subgroups. For example a certain percentage of its goals should be focused on increasing participation of Women Business Enterprises, Minority Women-Owned Business Enterprises, and Service Disabled Veteran Business Enterprises. Setting quantitative goals in terms of years and percentage apportionments for subsets of minority businesses provide the prime contractor and NTIA or RUS with valuable tools to measure progress and determine the best methods of achieving policy goals.

i. Prime Contractors' Total Contracting Projections

When creating goals, the prime contractors should look to their total projections to ensure that goals are practical and attainable. Prime contractors should use these totals to pinpoint opportunities for SDB and MBE participation.

ii. Availability of Diverse Suppliers and their Competitiveness

After the prime contractor pinpoints opportunities to include SDBs and MBEs, the next step in setting pragmatic goals is to identify diverse suppliers on local and national levels. Not only will this help to determine the attainability of the goals, but conducting this type of inquiry on both levels also allows the prime contractor flexibility in choosing methods of ensuring substantial SDB and MBE participation. If the prime contractor is able to use local SDBs and MBEs, and therefore aid the local community, the prime contractor has the added benefit of using this to generate publicity and consumer goodwill.

iii. Market Dynamics

An important factor in creating achievable goals for SDB and MBE participation is to study the market. A prime contractor should identify market information and trends to determine feasibility and estimate time frames for each short-term, mid-term, and long-term goal.

iv. Provisions for Preventing Inconsistencies Between Prime Contractors and Commission Objectives

To ensure that goals are consistent with NTIA's and RUS' objective of substantial SDB and MBE participation, each prime contractor should perform a detailed analysis of each goal, projecting the practical effect that implementation would have on NTIA's and RUS' objectives. If implementation would contravene substantial SDB and MBE participation, the prime contractor should reevaluate the goal or identify additional measures to achieve the goal in a way that is consistent with NTIA's and RUS' objectives.

v. Categories in Which Minority Businesses Have Traditionally Been Underrepresented (e.g. legal and technical services)

To ensure meaningful participation, prime contractors should consider ways to

incorporate SDB and MBE participation where minority businesses have traditionally been underrepresented. Prime contractors should actively identify opportunities to incorporate SDBs and MBEs in legal, financial, and technical services rather than janitorial or other services with limited functions.

vi. Other Appropriate Factors

Given the distinct nature of each prime contractor's business, the prime contractor should account for any additional information that is relevant to the ultimate goal of substantial SDB and MBE participation. The prime contractor should design its specific goals around reaching this target.

8. Requirement for Annual Report

To develop effective programs and policies, it is essential that the NTIA and RUS measure each participant's progress in effectuating MOU goals. Annual reporting provides an appropriate tool for measuring the previous year's accomplishments and determine areas in which improvement must be made in either performance or policy. For these purposes, each participant should file an annual report with NTIA or RUS.

a. Description of Efforts to Engage SDBs and MBEs During the Previous Years

The annual report should include a detailed description of the programs and activities the prime contractor implemented the previous year encourage SDB and MBE participation, both internally and externally. This description is an essential element of the annual report because it demonstrates the prime contractor's methods of carrying out the goals of the MOU. The description would also allow NTIA or RUS to track the success rate of each program and use the resulting data to determine the most effective means of achieving policy objectives.

b. A Summary of Dollars Spent on SDB and MBE Contracting, Compared to Total Dollars Spent

The annual report should include a summary of SDB and MBE expenditures. To accurately determine the increase in participation within each SDB and MBE subgroup, the summary should also include a report on expenditures for each category of socially disadvantaged business compared to the total amount spent on contracting the previous year. These numbers should be compared to the prime contractor's goals for each subgroup from the previous year. This comparison provides an opportunity for the prime contractor and NTIA or RUS to analyze progress and evaluate program goals as necessary to ensure increased participation within each subgroup.

c. Sound Accounting Practices to Ensure that Each Dollar Spent is Only Spent Once

NTIA and RUS should work with prime contractors to establish detailed accounting practices within the MOU to ensure that every dollar amount is only counted once toward achieving goals. These procedures explaining how calculations are made are necessary to dispel confusion and identify misleading or inaccurate data. Without them, a situation may arise where a prime contractor calculates a dollar spent for women-owned businesses toward its goals of both MBE and women-owned businesses instead of calculating it once under just one of those goals. Permitting this type of double counting would lead to inaccurate and inflated data on the progress of agency objectives.

d. Itemization of Diverse Supplier Expenses Including Salaries and Outreach

For the purpose of creating practical policy goals and programs through agency insight and expense comparison, NTIA and RUS should require each prime contractor to submit a detailed summary of expenses for its diverse supplier programs, including salaries and outreach,

as compared to total general contracting expenses. To encourage participation with the MOU program, NTIA and RUS should also develop a mechanism for prime contractors to elect to keep all information relating to salaries confidential.

e. Progress Report on Meeting or Exceeding Diversity Goals

Each prime contractor should discuss the success rates of each goal from the previous year. The discussion should center on how participants met or exceeded goals and any setbacks encountered along the way, such as lack of diverse supplier availability; or for those who failed to meet goals, explanations as to why goals were not met and reevaluate programs in light of performance. The prime contractor should discuss efforts made during the previous year to include SDBs and MBEs in legal, financial, technical, and other services where diverse suppliers have historically had low participation rates. The prime contractor may also discuss other information relevant to program success rates and detail areas in which the prime contractor used diverse supplier subcontractors. This detailed discussion and analysis will provide NTIA and RUS with better insight into program adoption and follow-through, ultimately leading to increased efficiency and effectiveness of programs and policies.

f. A List of SDB and MBE Complaints

The annual report should also include a brief description and status of all complaints regarding diverse supplier procurement to alert NTIA and RUS to the issues being raised in conjunction with the MOU. Requiring a prime contractor to include the status of the complaint would also ensure that complaints are being dealt with in a timely manner.

g. A Discussion of How Prime Contractors Have Addressed SDB and MBE Complaints

Prime contractors should include a section addressing how they have dealt with complaints. Including this section in the annual report is beneficial because it NTIA and RUS an opportunity to ensure that not only are SDB and MBE complaints being handled fairly and efficiently, but the underlying issues regarding diverse supplier procurement are also being resolved in an appropriate manner.

h. Accounting of Diverse Suppliers

To ensure meaningful SDB and MBE participation among multiple companies, NTIA and RUS should require each prime contractor to report the names, amount paid, and services provided for each diverse supplier. The prime contractor should also specify the names, amount paid, services provided, and efforts to recruit diverse suppliers who provided services in areas traditionally underrepresented by minorities including, but not limited to, legal, finance, technology and many other services that require extensive training and skill. Due to the sensitive nature of this list, prime contractors should have the opportunity to file this portion of the annual report confidentially.

i. Agreement to Retain Data for a Period of Time (e.g. three years) and to Provide it to the Governing Agency Upon Request

NTIA and RUS should require prime contractors to retain sources and data used to formulate the annual report for a set period of time and retain the authority to require production of this information upon request. This provision gives NTIA and RUS the authority to review documents to resolve questions and verify data. Determining the accuracy of data and the ability to resolve data disputes are essential to continuously improving programs and policy decisions.

j. Interim Report Requirement

After establishing the initial MOU, the prime contractor should be required to file an interim report detailing progress and problems encountered during the first six months of implementing the MOU. The report should summarize the prime contractor's expenditures for diverse supplier services in each category of socially disadvantaged businesses as compared to the prime contractor's total expenditures of services and products within the scope of the MOU and address its progress tracking diverse supplier expenditures. A discussion should also be included on the prime contractor's progress in preparing the annual report and plan, and any problems in preparing these reports should be noted in the interim report. Requiring an interim report ultimately encourages prime contractors to develop procedures to effectuate the agreement shortly after signing the MOU. The interim report would also provide prime contractors with the opportunity to reevaluate these procedures and develop an efficient system for filing the annual report and plan based on the success as documented in the interim report.

9. Requirement for Annual Plan

Prime contractors should file an annual plan with NTIA or RUS on a specific date each year. Filing the annual plan allows NTIA and RUS, as well as prime contractors, to set benchmarks and compare programs among various participants. In turn, these benchmarks and comparisons provide better agency insight into the industry, which can then be incorporated in policy decisions.

a. Short, Mid, and Long-Term Goals for the Upcoming Year

For NTIA and RUS to evaluate these goals for attainability and to ensure that participants are promoting SDB and MBE participation pursuant to the agreement, the completed analysis of

each goal should also be provided in the annual plan.

b. Description of Plans for Diverse Supplier Recruitment Activities

A description of both internal and external plans and activities for diverse supplier recruitment should be included in the annual plan to demonstrate how the prime contractor's goals are being implemented.

c. Plans for Recruiting Diverse Suppliers for Areas Where Diverse Supplier Utilization has Been Low

To ensure meaningful SDB and MBE participation, the prime contractor should be required to include plans for recruiting diverse suppliers to perform services in areas where SDB and MBE participation has historically been minimal. These areas include, but are not limited to, legal, financial, and technical services.

d. Plans for Seeking Diverse Suppliers From Business Incubators

For the purpose of stimulating small business diverse supplier success and participation, Plans to encourage and recruit these business and other minority small business incubators should be included in the annual plan. Plans should detail how the prime contractor will encourage meaningful participation by utilizing SDB and MBE services that generally have not been performed by these companies.

e. Plans for Seeking Diverse Suppliers Where Diverse Suppliers are Unavailable

To promote substantial, nation-wide SDB and MBE participation, the prime contractor should identify, in the annual plan, geographic areas where diverse supplier services are not available as well as each prime contractor's plans to develop and encourage meaningful participation in these areas.

f. Plans for Compliance with the Diverse Supplier Guidelines Established by the Regulating Agencies

The annual plan should include the prime contractor's methods of compliance with agency guidelines. Including these plans will aid NTIA and RUS in formulating improvements to create the most practical and achievable guidelines possible while ensuring the success of NTIA's and RUS' overarching goals.

10. Opportunity to Review and Report; Public Hearings

NTIA and RUS should retain authority to make inquiries and review all data used in preparation of contractors' annual reports and annual plans. This is important because it gives the agency the opportunity to clarify results and verify information to ensure substantial SDB and MBE participation.

In conjunction with the review, NTIA and RUS should create a report of their findings with regard to MOU compliance and diverse supplier status as well as set forth goals for the prime contractor for the next term. Once this final report is filed, a public hearing should be convened to discuss the annual report and annual plan. This would enable the agency to hear feedback from various perspectives, which the agency can then use to generate ideas to more efficiently and effectively attain SDB and MBE policy goals. The report would be presented to Congress and would include a policy analysis of all current programs.

11. Prime Contractors Voluntarily Enter Into MOU

The voluntary nature of the agreement allows prime contractors to tailor the MOU to fit their distinct business while still working to achieve the ultimate goal of substantial SDB and MBE participation. Since February 2009, the Maryland Public Service Commission has experienced success with ten utility companies signing a voluntary MOU and others still in

negotiation.⁵ At the signing ceremony, members of the Commission, State Delegates, and Senators recognized the companies.⁶

12. MOU not a Waiver of a Right to Sue

To protect the program participants, the MOU should not operate as a waiver of the prime contractor's right to seek legal recourse should NTIA or RUS exceed the scope of its authority as granted by applicable law.

13. Termination: Either Party May Terminate Upon Filing of Written Notice

Due to the voluntary nature of the MOU, either party should be able to terminate the MOU by notifying the other in writing.

Respectfully submitted,

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⁵ See Maryland PSC Reaches Agreement with Regulated Utilities Establishing New Minority Contracting Goals, Maryland PSC, Press Release (Feb. 12, 2009).

⁶ Id.