

**Testimony of Anthony W. Robinson, President  
Minority Business Enterprise Legal Defense and Educational Fund**

**Before the United States House of Representatives  
Subcommittee on Government Management, Organization, and  
Procurement of the Committee on Oversight and Government Reform**

**Washington, DC  
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Good afternoon Mr. Chairman and members of the subcommittee. My name is Anthony W. Robinson and I'm president of the Minority Business Enterprise Legal Defense And Educational Fund, affectionately referred to as MBELDEF.

MBELDEF was founded and established in 1980 by former Maryland Congressman Parren J. Mitchell to act as a national advocate and legal representative for the minority business community. The organization has monitored barriers to minority business formation and development. We serve as a national advocate and legal representative for minority business enterprises (MBEs) by promoting policies affecting equitable and full participation of minority enterprises in the mainstream marketplace. MBELDEF works with businesses in every sector of the American economy and we work with businesses in every corner of the country. Our organization seeks to advocate on behalf of firm owners from all disadvantaged minority groups. We attempt to provide non-partisan opinions on matters affecting minority firms and small businesses in general.

I appreciate the committee providing this opportunity to come before you to represent the tens of thousands minority and small entrepreneurs who continue to rely on the federal marketplace as their primary source of opportunity.

**GAINS AND SETBACKS**

Since the federal government's first efforts to level the playing field on behalf of the minority business community in the 1970's there has been substantial progress. I should note that assisting minority businesses has always been a bi-partisan effort. In fact in the 1970's President Nixon was instrumental in promoting equal opportunity for minority businesses. Secretary of Labor Arthur Fletcher worked closely with Senator Ed Brookes and Congressman Mitchell to pass the earliest minority business legislation. Today, a variety of public agency and community initiatives are designed to foster fair contracting and build diversity among and between the suppliers of goods and services. It is important to note that Congressional efforts were targeted at addressing not only overt racial and ethnic discrimination, but the longstanding barriers in the marketplace that, when combined resulted in MBEs from losing contracting opportunities, regardless of how many qualified MBEs existed in the marketplace and their ability to perform the work. Congress aimed its sights on addressing the overwhelming evidence of disparity in the percentage of public contracts awarded to MBEs, an inequity which Mitchell felt was inherently a civil rights dilemma.

We now have a system where firms compete as prime or subcontractors as well as an active culture of solicitation for minority firms and obligations by prime contractors and public agencies to report their utilization. Minority firms have grown in numbers and quality. According to a recent study conducted by the Kaufman foundation, the growth among MBEs has been dramatic in actual number of employees and revenues. In fact, in some measure their growth has outpaced the growth among all firms.

However, historically and it remains a fact today, minority firms account for a disproportionately smaller share of overall business opportunities in many industry segments than do non-minority firms. According to the Milkin Institute, minority groups represent 26.1% of the population, but own only 11.6% of the nation's

businesses.<sup>1</sup> Minority businesses receive only 6% of total business gross receipts<sup>2</sup> and employ only 3% of the nation's civilian labor force.<sup>3</sup> Perhaps more startling is the fact that in "19 industries with the largest representation of minority subcontractors, only 3.5% of supply dollars are estimated to have gone to minority businesses."<sup>4</sup>

The Minority Business Development Agency, in its 2006 "State of Minority Business Enterprises" report stated that "MBEs have yet to reach parity in number of firms, gross receipts, and paid employees."<sup>5</sup> In summarizing the U.S. Census Bureau's 1997 Survey of Minority-Owned Business Enterprises (SMOBE) and the 2002 Survey of Business Owners (SBO),<sup>2</sup> MBDA reported that:

- In 2002, minorities represented 29 percent of people age 18 and older in the United States. As previously noted, MBEs represented almost 18 percent of firms that could be classified according to the race, ethnicity, or gender of ownership. They earned 8 percent of gross receipts and employed 9 percent of the people employed by these classifiable firms.
- If parity had been reached, minority firms would have represented 29 percent of classifiable firms and generated comparable percentages in gross receipts and employment.
- Although MBEs have not yet reached parity, the gap in the proportion of firms narrowed between 1997 and 2002. The growth rate in number of MBEs (35 percent), which is larger than the growth of the minority population (25 percent) between 1997 and 2002, has contributed, in part, to closing the parity gap in number of firms.
- MBEs' gap in gross receipts and paid employees remained essentially level over the same period. While MBEs needed \$1.6 trillion more (2.7 times more) gross receipts to reach parity with their population share in 1997, an additional \$1.9 trillion (2.8 times more) was required in 2002.<sup>6</sup>

#### Curtailing Minority Contracting Programs Are Devastating

The plight of the minority entrepreneur is brought into stark relief when he is faced with having to survive in the marketplace without the various minority contracting programs mandated by federal state and local laws in jurisdictions across the nation. An analysis performed by the Urban Institute compared jurisdictions where race-conscious programs were in place with those without such programs. Disparity was markedly greater in jurisdictions where there were no goals program in place. (Do Minority-Owned Businesses Get a Fair Share of Government Contracts, Urban Institute, 1997). Moreover, it is clear that ending or curtailing minority contracting programs causes real and immediate harm. This was confirmed in another study conducted by the former chair of the Dartmouth College Department of Economics, Professor Blanchflower and esteemed economist and disparity study expert, Jon Wainwright.<sup>7</sup>

After the Supreme Court decision in *Croson v. City Of Richmond* (1989) and *Adarand Constructors v. Peña* (1995), many state and local governments eliminated programs designed to provide opportunities to MBEs.

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<sup>1</sup> Michael Harrington and Glenn Yago, "Mainstreaming Minority Business: Financing Domestic Emerging Markets," Milken Institute, p.5. (1999) citing SBA Office of Advocacy, 1992 Economic Census.

<sup>2</sup> Minority Business Development Agency, "The New Realities for Minority Business", p. 3 (1999), quoting data provided at the 1997 NMSDC annual convention .

<sup>3</sup> Ibid. quoting "estimate derived from 1992 and 1997 statistics quoted by Office of Advocacy, U.S. Small Business Administration, from data provided by U.S. Department of Commerce, Bureau of the Census.

<sup>4</sup> Ibid, quoting the Center for Advanced Purchasing Studies (1997).

<sup>5</sup> Minority Business Development Agency, *The State of Minority Business Enterprises*, p. 3 (2006).

<sup>6</sup> Ibid., pp. 3-4.

<sup>7</sup> Blanchflower, D.G., & Wainwright, J., National Bureau of Economic Research (NBER) Working Paper, *An Analysis of the Impact of Affirmative Action Programs on Self-Employment in the Construction Industry*. Cambridge, MA: (2005, November).

Professor Blanchflower and Mr. Waingwright found that "Although Federal highway construction aid dollars increased from \$14.7 billion in 1998 to \$24.3 billion in 2002, and although *overall* disadvantaged business goals remained virtually constant during this time, the proportion of federal aid dollars actually awarded to such businesses declined almost 30% between 1998 and 2002." (Blanchflower and Wainwright, An Analysis of the Impact on Affirmative Action Programs in the Construction Industry, NBER, 2005).

A recent study in the state of California analyzing the impact of proposition 209, which outlawed affirmative action, observed, " during the nine years before passage of proposition 209, the percentage of awards to MBEs was 16.0 percent. However that percentage significantly fell by more than half, to 7.9 percent for the nine years after [it's] passage. Of particular interest was FY 2002. This year had the highest amount of money awarded by CALTRANS, yet it was the year that MBEs received the lowest proportion of awards. (Discrimination Research Center, "Free to Compete? Measuring the Impact of Proposition 209 on Minority Business Enterprises", 2006).

## **REASONS FOR DISPARITIES**

The reasons minority owned firms are not fully participating in the market are many, not least of which is discrimination. The Kaufman study cited several reasons after concluding, "the gap that exists has not in any way been caused by a lack of effort on the part of minority entrepreneurs." The first reason cited by the foundation was that "discriminatory conditions that previously existed were deep and pervasive and have not been fully reversed."

I would like to give you some examples of real business owners who have confronted discrimination. I will submit letters and e-mails providing details of these entrepreneurs' stories for the record, but in the interest of time I will provide only a short synopsis of the difficulties they have experienced. And Mr. Chairman, I would like to ask permission to submit a number of supporting documents to for the record.

- **Earl Peeks** is a young African-American entrepreneur. He is exactly the type of young businessman who should be leading the growth of minority businesses. Instead, Mr. Peeks is embroiled in a race discrimination suit against the Small Business Administration. According to Mr. Peeks, the SBA and the Small Business Investment Company have consistently discriminated against him (and others) on the basis of race. Indeed it has been alleged that 95% of SBIC's investment dollars went to white owned and managed firms between 2000 and 2004 as the result of an old boy network that is tolerated by SBA and SBIC. The SBA Inspector General identified several instances of bias and ill treatment of Mr. Peeks firm Diamond Ventures.
- **John McDonald** is an African-American expert in the world of institutional real estate acquisition. He had a contract with Domino's Pizza to acquire and build several stores. After being the only African-American to attend a Domino's convention where his work was actually featured, he received a call asking him to agree to unreasonable and unheard of amendments to his contract with Domino's. When he refused the Domino's representative told him "I don't like doing business with you people anyway" and threatened to ruin his business. In the end the ensuing litigation bankrupted Mr. McDonald. He took his case all the way to the Supreme Court where the Court ruled against Mr. McDonald saying that only his corporation, not Mr. McDonald personally, had the right to sue for race discrimination in this instance.
- **Maurice E. Coates, Jr.** An African- American mechanical contractor has experienced disparate treatment relative to the cost of materials from suppliers. Mr. Coates solicited a quote for HVAC equipment from his supplier which he submitted with his bid. The supplier, a majority company, mistakenly faxed to Mr. Coates a lower quote supplied to his majority competitor. When Mr. Coates called the supplier asking for the same price quote provided his competitor they replied, "the reserved the right to provide better pricing to their better customers. With all else being equal relative to labor Mr. Coates can never be competitive if materials cost are not the same.
- **John Layman, JRL Enterprises, Inc.** A minority contractor that has experienced a common problem among minority businesses. It relates to corporations falsifying the dollar amounts reported to the federal government and others on the amount of work performed by MBE/DBE

firms. The prime contractor, Mr. Layman's customer, claimed that he had performed \$3.3 million on a project that he had actually performed less than \$900,000. Mr. Layman learned that this occurs often because most transit authorities do not verify figures related to work actually performed by MBE/DBE firms. The customer later retaliated by excluding his firm on a major contract that had initially included his firm on the original proposal.

- **Soo San Choi, Choi Enterprises, Inc.** An Asian-American nuclear chemist and most recently for the past twenty years a general contractor. Mr. Choi intended to use Fay Corp., a majority owned specialty contractor, as a subcontractor on a Army Corp of Engineer's project – Charleroi Locks and Dam in Western Pennsylvania. The majority company desired to use Mr. Choi as a straw man for the SBA 8(a) contract and becoming the de facto prime contractor. The minority firm complained to SBA and the Corp to no avail. Mr. Choi would receive \$125,000 on a contract valued in excess of \$12 million. Through various machinations and smaller majority owned smaller contractors which had worked with Fay in the past, the 5 foot 110 pound 82 year old Choi was coerced and threatened with financial ruin to complete the contract with Fay and his cohorts. Fay became the indemnifier on Choi's surety bond and attempted to include previously purchased materials to manipulate contract costs and assigned Fay employees to Choi's payroll. Mr. Choi has yet to recover financially and his physical health.
- **Charles Baker, President, MCB Lighting & Electrical, Inc. An 8(a)** and Service Disabled Veteran Firm has been acknowledged as a leader by Department of Defense in saving the tax payer money and a Federal Energy & Water Management Award. As the retired Chief of Facilities and ex-electrical Superintendent of Andrews Air Force Base responsible for all maintenance and electrical systems, he waited 2 years after he retired in accordance with rules of ethics. Mr. Baker went through the formal processes including the OSDDBU Offices. He had a local squadron commander take him to the contracting commanders office to vouch for his work using alternate procurement methods because local contracting refused to give him a capability briefing for over 4 years despite multiple request.

### The 8(A) Program

The Small Business Administration is specifically empowered to assist small and developing firms. Some of its guiding principles come directly from the Small Business Act, which Congress has left untouched for decades. These include the notion that business development programs are deemed essential to obtain social and economic equality for all and to improve our national economy. Tied to past discrimination, certain groups according to SBA have been, and continue to be disadvantaged.

SBA's assistance comprises three primary means – training / technical assistance, financial assistance, and contracting assistance. SBA's Small Business Development Centers (SBDCs) offer training and technical assistance to new business owners on establishing a business plan, managing finances, and obtaining funding. SBA's loan program represents the largest financial provider of U.S. businesses in the country. It serves as a guarantor for small businesses seeking loans from financial institutions. Lastly, the SBA's 8(a) program, (referencing that section in the Small Business Act), is the primary entry vehicle to government contracting for small and minority firms. 8(a) firms must have limited gross receipts and/or a finite number of employees for the firm's specific industry, and the owner must be deemed disadvantaged. Once "8(a) certified," a firm can receive sole-source contracts. Federal acquisition policies encourage Federal agencies to award a certain percentage of their contracts to what it terms small disadvantaged businesses, or SDBs. SBA has signed Memorandums of Understanding (MOUs) with 25 Federal agencies and agencies can contract directly with certified 8(a) firms.

In each Federal agency there is a designated "Office of Small Disadvantaged Business Utilization," that assists small firms obtain that agency's contracts. Like, SBA OSDDBU offices also provide technical assistance and actively solicit the participation of small and minority firms.

## **MBELDEF HAS OBSERVED PROBLEMS THAT REMAIN IN PUBLIC CONTRACTING**

1. Historically, minority business enterprises (MBEs) account for a smaller share of overall business opportunities in many industry segments than do non-minority firms. Minority groups represent 26.1% of the population, but own only 11.6% of the nation's businesses. Minority businesses comprise only 6% of total business gross receipts and employ only 3% of the nation's civilian labor force. In 19 industries with the largest representation of minority subcontractors, approximately 3.5 % of supply dollars have gone to minority businesses.<sup>8</sup>

2. In the U.S., MBEs—being for the most part small businesses—find it difficult to obtain working capital, credit, or project financing because of perceived or actual negative views of their creditworthiness or business expertise. Without sufficient funds, their actual capacity for projects is diminished. Many MBE owners turn to debt financing rather than capital financing for their business needs either because of lack of financial know-how of better funding vehicles, or for fear of losing control of their business should they take on partners or shareholders.<sup>9</sup> In addition, because MBEs lack access and reputation in the existing core of businesses, many miss out on key networking connections in the business community which would enable them to enhance their entry and exposure in mainstream markets. They also often lack sufficient staff to make these inroads or assist a business comprehend and comply with regulatory requirements.

3. Although federal government spending has increased (nearly 7 percent from 2001 to 2002), contracts to small businesses decreased by 14 percent.<sup>10</sup> Furthermore, a number of agencies group or “bundle” contracts together, making it difficult for MBEs and other disadvantaged businesses to serve as prime contractors on such large contracts. Bundling has frustrated Congress’ goal of giving the maximum practicable opportunities for small businesses and MBEs.<sup>11</sup>

4. Government and private support structures for MBE development are limited and may not provide precisely what MBEs need. Existing U.S. programs seek to help MBEs build capacity through timely information sharing, technical assistance, education on the procurement process and business techniques, and building relationships within the business community. For example, the Small Business Administration’s (SBA) small business development centers (SBDCs) provide communities with information, guidance, networking and connections with other businesses. SBA's business information centers (BICs) offer on-site counseling, education and training for new entrepreneurs. In some trades, an ombudsman serves as the primary person to provide assistance. He or she provides input on proposals, alert trade associations and business organizations of developments in the field and offering technical assistance grants and grants to community organizations. According to some, these support structures and the capacity building techniques utilized do not effectively enhance MBE development and progress. The very structure of government programs inhibits MBE and small business growth. Many programs set net worth limits on businesses or provide benefits for a set period of time. Once small business becomes successful and their assets increase, or they are in the program for an extended period, they are dropped from the program.

These criteria are not in touch with the real needs of businesses. For instance, some businesses in the industrial sector start out with high assets but have high business costs. Although they face the same burdens as businesses with less assets and are in the same relative stage of development, they may be excluded from capacity building programs.

5. Notwithstanding the tremendous contribution that small businesses add to the U.S. economy, the Federal Government as a buyer of goods and services has implemented policies that have

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<sup>8</sup> Center for Advanced Purchasing Studies

<sup>9</sup> U.S. Department of Commerce, Minority Business Development Agency, *The New Realities for Minority Business*, p.14.

<sup>10</sup> House Small Business Committee Democratic Staff Report, Scorecard IV – Federal Agencies: Closed to Small Businesses, June 25, 2003 p.1.

<sup>11</sup> This goal is enunciated in the Small Business Investment Act of 1958 and subsequent laws and regulations.

not only hindered the growth of the small business sector, it has established barriers to participation in the Federal Procurement Process that has almost destroyed whole sectors of small business participation – especially for minority owned small businesses. Laws such as the Federal Acquisition Streamlining Act and Federal Acquisition Reform Act passed under the previous administration set the stage for the beginning of the end to competition in the Federal Government. Federal Managers have used the philosophy of acquisition reform to consolidate and bundle work that has historically been performed by small businesses into huge multi-level contracts and awarded those contracts to large corporations in many cases using multiple-award contracts that avoid public competition. They then give “lip service” to opportunities for small business as subcontractors knowing that there is little accountability in the present Federal Government subcontracting program thereby giving large prime contractors little incentive for them to provide opportunities for small businesses.

5. The Administration has developed Anti-Contract Bundling initiatives. However, the GAO recently released a report that indicates that the impact of the Administration’s strategy to mitigate the effects of contract bundling is uncertain. In order to clarify the perceptions that there might not be a “good-faith” effort by the Bush Administration to enforce your Executive Order, and in order for the small business community to appreciate and support your commitment to the Executive order that you approved, the small business community needs your personal leadership to correct the major deficiencies that have been caused by the reduction of the SBA Procurement Center Representatives (PCRs) due to cutbacks made in the SBA budget under your Administration. At one time in 1992, there was a peak level of 68 PCRs. At the present time the SBA claims that there are 72 PCRs; however in fact there are 38 full time PCRs and 18 SBA staffers who work part time doing the PCR function.

The PCRs are very important as they are the soldiers who carry out the Bush Administration’s commitment to support the small businesses in the United States doing business with the Federal government because they are the individuals who can, when the rubber hits the road, implement your policy of the Executive Order on Anti-bundling assuring reasonable and fair market share for the small business community and the monitoring of sub-contracting programs that benefit the small business community.

It is also important to note that although SBA, in its June 15, 2004 press release promoted a total of \$65.5 Billion in prime contract awards to small business in the Fiscal Year 2003, members of the small business community doing business with the Federal government find the accuracy of this information doubtful as a result of the May 7, 2003 House Committee on Small Business Hearing, “Reporting of Small Business Contract Awards” does not reflect current business size. In this Republican led congressional hearing it was found that there were many large business Federal contract awards being reported as small business awards. It is necessary, for Congress to inform the small business community what the government has done to correct the wrong reporting of direct contract awards to small businesses. It is important for the small business community to have full confidence that the accomplishments that the SBA is reporting is indeed not seriously suspect because the congressional hearings clearly demonstrate that the reports are not correct.

6. SBA’s practices known as the non-manufacturing rule and class waiver regulations are outdated and being circumvented, thereby allowing large businesses to obtain contracts meant for small business owners. In the waiver system, small firms can apply to bid for contracts over a certain threshold when there are no small firms that can provide the product at the high amount. However, at times, the bids are later withdrawn and large firms obtain the contract. Small businesses must be able to offer the products of a large business regardless of whether there is a contract limit. Limiting small businesses to procurements under \$25,000 prevents them from obtaining meaningful contracts. The SBA ‘non-manufacturing rule,’ in short, is being used to prevent small businesses

Also, large businesses make fraudulent representations to obtain NAICS code designations as well as their size in order to appear to be a small business. The problem lies in the ability of firms to self certify

as small under the CCR directory maintained by SBA. SBA in turn does little to investigate these claims, and when it does, it may be too late for the contract is already awarded.

An organization monitoring these issues and working with MBELDEF – Fairness in Procurement Alliance, has recently reported several instances of these cases to SBA's general counsel's office. The Office of Federal Procurement Policy has issued several memorandums to the procurement community, on such topics as vendor neutral specifications, contracting abuse, and fairness by end-users. This is a step in the right direction.

7. On September 17, 2007, MBELDEF requested an emergency hearing or investigation by Rep. Bennie Thompson, chair of the Committee on Homeland Security, Rep. Nydia Velazquez, chair of the House Committee on Small Business, and ranking members. We objected to the blatant disregard by SBA of the proper implementation of the HUBZone Act for a solicitation #HSHQDC-07-R-0009. SBA chose not to issue this solicitation as a HUBZone small business set-aside even though the contract has been issued as such. In addition, the Department of Homeland Security seeks to ignore the proper legal interpretation and implementation of the HUBZone Act.

Federal agencies have an obligation under the law to increase contracting opportunity for HUBZone companies. Yet, MBELDEF is concerned that the reverse has become true – agencies have violated the legal procedures in solicitations, a situation that jeopardizes the position of the nearly 14,000 HUBZone companies across the country.

Chairman and members of the subcommittee, thank you for allowing me to present MBELDEF's concerns.