

Thelton E. Henderson
Center for Social Justice

Testimony of
Michael Sumner, PhD
Research Manager, Thelton E. Henderson Center for Social Justice,
Berkeley Law

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Subcommittee on Government Management, Organization and
Procurement

“Minority Contracting: Opportunities and Challenges for Current and
Future Minority-Owned Businesses”

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Michael Sumner, PhD
Research Manager
Thelton E. Henderson Center for Social Justice, UC Berkeley School of Law

Chairwoman Watson, Ranking Member Bilbray, and members of the Subcommittee, thank you for the opportunity to speak with you today regarding the challenges and opportunities for minority-owned businesses in contracting.

My name is Michael Sumner, and I hold a PhD in Social Psychology from New York University. Currently, I am the Research Manager at the Thelton E. Henderson Center for Social Justice at the University of California, Berkeley School of Law.

The Thelton E. Henderson Center for Social Justice (Henderson Center) at UC Berkeley School of Law is a training and research center that prepares the next generation of lawyers to represent underserved communities and produces innovative and accessible scholarship on issues of race, sex, and poverty. Established in 1999, the Henderson Center draws together law students, law faculty, and members of the bench and bar to transfer knowledge, exchange ideas, and meld the theory and practice of law.

My colleagues and I have researched the effects of equal opportunity programs on small businesses owned and operated by people of color and by women of all racial and ethnic groups. As a result of this research, we have published several reports and I have given presentations at conferences for equal opportunity professionals, to contractors, and at government hearings.

Regarding equal opportunity programs, our research found evidence that:

- Discrimination and disparity are still prevalent for minority- and women-owned businesses.
- Equal opportunity programs can aid in leveling the playing field.
- Removing or weakening equal opportunity programs can lead to dramatic reductions in the opportunity for minority- and women-owned businesses to succeed.
- The removal of equal opportunity programs can create a climate in which discrimination and disparity become more widespread.

In summary, our research supports the idea that equal opportunity programs enable small businesses owned and operated by people of color and women of all races and ethnicities to more freely compete, and that ending these programs hinders the success of minority- and women-owned businesses. Equal opportunity programs should utilize best and emerging practices when being designed and implemented.

The Henderson Center conducted research in California, where in the mid-1990s equal opportunity programs were scaled back or eliminated completely. California's experience is important, in part because its economy is responsible for 13 percent of the gross domestic product of the United States. Furthermore, the lessons learned in California can also serve as an example for the rest of the nation as we consider whether and how to implement equal opportunity programs currently and in the future.

The California Department of Transportation, or Caltrans, operates a Disadvantaged Business Enterprise (DBE) program. DBEs are small businesses that are majority-owned and operated by people of color or women of any race or ethnicity. Prior to the mid-1990s, the DBE program was used for all transportation construction awards. In the mid-1990s, there was a successful effort to curtail equal opportunity programs in California, beginning with an Executive Order in 1995 and culminating in the passage of Proposition 209 in 1996. For contracts awarded by Caltrans, the equal opportunity program was dismantled entirely for projects with state funding. However, the program still operated for contracts on projects with federal funding, as required by federal law.

We examined over 20 years of federal awards distributed by Caltrans to DBEs and to non-DBEs, and found that awards to DBEs doubled between the mid-1980s and the mid-1990s, providing evidence for the success of the equal opportunity program. However, as equal opportunity programs were removed and scaled back, federal awards to DBEs plunged. In 1996, the percentage of awards to DBEs dropped by nearly 50 percent and has continued to fall since then. In fact, rates have fallen from a high of 28 percent of awards going to DBEs in 1994 to only two percent of awards going to DBEs in 2008. As a point of reference, California's population is over 50 percent people of color and nearly 25 percent white women.

It is important to stress that this reduction in awards occurred for projects with federal funding, in which an equal opportunity program was still in place. Unfortunately, we were unable to analyze trends for state awards, where equal opportunity programs were completely eliminated, as Caltrans ceased collecting data for state awards. Without the rigorous collection and analysis of data each year, it is impossible to ascertain if significant disparity is still present or whether there are changes in the level of disparity.

In an Availability and Disparity study commissioned by Caltrans, BBC Research and Consulting collected data on both federal and state awards. The report included the level of disparity faced by minority- and women-owned businesses. The report found that for federal awards in California between 2002 and 2006, in which there was a federally required DBE program, the level of disparity faced by minority- and women-owned businesses was between 13 and 17 percent. For state awards, in which there was no DBE program, the level of disparity was 41 percent, which was two to three times higher. Therefore, the

federally required DBE program might have been instrumental in reducing the level of disparity by at least half.

Research from other states that have passed affirmative action bans shows similar trends to California. For example, a 2007 Insight Center for Community and Economic Development study “State Policies and Programs for Minority- and Women-Business Development” documented similar trends in Washington state, with increased awards to DBEs when equal opportunity programs were utilized and decreased awards after the anti-affirmative action Initiative 200 was passed in 1998.

We also collected anecdotal evidence via focus groups and interviews with DBE owners and operators who were certified in 1996 and stayed in business for at least 10 years. DBE contractors mentioned a number of barriers to their success that were eased by the DBE program. They mentioned an industry culture in which they perceived the operation of a “good old boy” network, one which systematically excluded people of color and women by keeping DBEs from gaining access to information about requests for bids and proposals and by ignoring quality bids from DBEs. DBE owners said the race- and gender-conscious DBE program opened doors for subcontracting opportunities by helping DBEs build relationships with prime contractors. In their words, it encouraged prime contractors to “pick up the phone.” However, after the end to traditional affirmative action programs, DBE owners reported that the “phone stopped ringing.”

When the anti-affirmative action Proposition 209 passed, it was perceived by DBE contractors as reinforcing a system of exclusion. Although billed as a way to create equal opportunity, they felt it never addressed the root causes of the discrimination and disparity they faced. Instead, it appeared to have had to a “chilling effect” on the climate of diversity in the state. For example, one female contractor that participated in our study reported that:

“When Proposition 209 passed, I was working on \$200,000 worth of projects. The day after Proposition 209 passed, the senior project manager walked up to me and said, ‘Hey, Prop 209 passed, and we don’t have to use you anymore.’ I didn’t say anything to him at first, but the next day, I told him that I wanted to talk to him about what he had said to me. I said, ‘Did it occur to you that I’ve been working here for a number of years and that I have always finished on time or early...and how many letters do you have from clients praising my cleanliness and professionalism?’ Well, he didn’t care. He just looked at me and said, ‘Well, it’s true. Prop 209 passed, and we don’t have to use you anymore.’ The next year, my projects plummeted to \$30,000. To this day, I have to call and remind clients that I’m still in business”

Our research indicates that the discrimination faced by this woman was not uncommon. Many women in the male-dominated field of transportation construction confront a hostile working environment,

facing both physical and emotional intimidation on the job, such as being randomly quizzed to prove their knowledge of the industry. Women also reported receiving the “run around” when trying to file a grievance or discrimination complaint.

The contractors also had suggestions for how DBE programs could be improved. They stressed the importance that the components put into place are effective and utilize best practices. As one example, they observed that the DBE program only encouraged their participation at a subcontracting level, offering little help for reaching the prime contracting level, which is typically more lucrative and stable.

Additionally, contractors discussed the need for assistance in securing loans, bonding, and insurance. These elements are key for capacity building in the transportation construction industry, and are areas in which racial and gender discrimination are still present. As a result of both present day discrimination and the vestiges of historical discrimination, people of color and women who own businesses tend to be undercapitalized. For instance, one contractor shared a story of being asked to provide collateral for a \$200,000 loan he was attempting to secure. His attorney said that similarly situated White male clients were able to secure loans of that size without being asked for collateral.

In summary, our research points to the need for robust equal opportunity programs which utilize best practices. It is important that federal programs maintain and appropriately strengthen equal opportunity programs when warranted so that minority- and women-owned businesses have a chance to demonstrate their abilities.

In order to promote equal opportunity in contracting for all small business owners, we recommend the following:

- The programs should be championed by leaders in key positions and should work in partnership with ethnic Chambers of Commerce, professional networks, and advocacy organizations to counter discriminatory and isolated social networks, including “good old boy” networks. The programs should include elements that help minority and women contractors gain access to key information, expand their networks, and identify mentors.
- The programs should include help with securing bonding, financing, and insurance, access to which minority and female business owners are more likely to be denied because of historic and present day discrimination.
- The programs should minimize the burdens on entrepreneurs applying for certification while being stringent enough to weed out “false fronts.” By minimizing paperwork and creating

reciprocal certifications with other contracting agencies, certification does not need to be unduly burdensome.

- The programs should promote prompt payment, unbundled contracts, and increased lead time, elements that are race- and gender-neutral.
- The programs should include a data collection and analysis mandate. Trends should be studied over time rather than focusing on year-to-year trends to ensure the utilization of best practices.

The research I have mentioned today is available in more detail in our reports, “Free to Compete? Measuring the Impact of Proposition 209 on Minority Business Enterprises” and “A Vision Fulfilled? The Impact of Proposition 209 on Equal Opportunity for Women,” which are freely available on our website, www.law.berkeley.edu/HendersonCenter.htm. I am also submitting copies of the reports with my testimony today and ask that they be made a part of the record.

Thank you very much for the opportunity to be here today. I am happy to answer any questions you may have.