

Capital Projects Advisory Review Board
Business Equity/Diverse Business Inclusion Committee

REPORT TO LEGISLATURE

In response to section 20 of SB 5032

June 9, 2022



Executive Summary

The Capital Projects Advisory Review Board (CPARB) has compiled recommended practices and guidelines to sustain and increase opportunities in public works contracting for minority-, women-, and veteran-owned businesses and small businesses (small and diverse businesses) by addressing barriers to accessing opportunities, capital, and training. The recommendations identify five groups with the power to make changes: public owners, prime contractors, small and diverse businesses and organizations that exist to support them, and the Legislature.

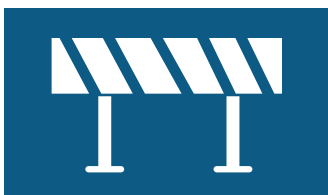


Creating meaningful culture shift requires an expanded view of equity and access in public contracting by changing the hearts and minds of the construction industry.

Accountability needs to be prioritized as an essential measure to success and a way of demonstrating commitment to change. Progress on equity stalled over the past 20 years, and that cannot be repeated. The committee is working with the Office of Equity to embrace policies and actions that are Pro-Equity and Anti-Racism (PEAR) in public contracting. This will ensure firms have what they need to develop and thrive, compete, and become first choice in public works.

Washington is an incredibly diverse state. Therefore, the types of challenges and opportunities, and the various strategies to increase small and diverse business participation may be different across the 39 counties. All Washington project stakeholders need to engage collaboratively to work towards a shared cultural commitment to develop, grow and support business, ensuring equity of opportunities. Owners set the tone and the intentionality for the culture of inclusion for their projects. Every team member has a vital role to ensure small and diverse businesses are welcomed, competitive and successful.

To this end, the board focused on access to opportunities, access to capital, and access to training as fundamental areas to improve in making small and diverse businesses first choice. The report attempts to answer the following questions for each category:



What are the most impactful barriers?



What can each of us do to make the future better?



Are there changes to be considered by the legislature?



How do we hold ourselves accountable?

Within **Access to Opportunities**, many barriers have been identified through previous reports such as the 2019 statewide disparity study. Opportunities include networking/outreach, pipeline, and rosters. Supporting small and diverse businesses in their development will create a healthier, more efficient and more competitive environment for design and construction in public works and the Washington state economy.

Executive Summary

Within **Access to Capital**, opportunities exist to support small and diverse businesses' access to capital through all phases of a business's involvement, before, during and after contract signing. The committee identified areas where each of the five groups can proactively work within current statutes to ensure small and diverse businesses have access to the capital they need to thrive and grow. Further legislative effort around prompt pay, bonding, and defining of small business for the purpose of support programs would provide avenues to further allowable tools in practical ways, supporting small and diverse design and construction businesses in their development and capitalization.

Access to Training Opportunities for small and diverse businesses can be daunting and confusing. Legislative action could create coordination to make opportunities accessible in a central location and identify gaps and overlap between them. Trainings should also be targeted towards businesses' actual needs, including on-the-job components to put learning into practice, and track measurable outcomes. Trainings for public agency and prime contractor staff should focus on inclusion in contracting to ensure all staff on a project understand the importance of inclusion goals and plans and how to implement them.

The purpose behind all these recommended practices is to change the hearts, minds and culture of public agencies, contractors, and the construction industry while at the same time empowering small and diverse businesses to develop, grow and create a Washington State design and construction environment where they are safe to become first choice contractors in public works.



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Small and Diverse Business as First Choice

The 2021 legislature directed the Capital Projects Advisory Review Board (CPARB) to create guidelines for increasing and sustaining access to contracting opportunities in alternative public works for minority-, women-, and veteran-owned businesses, and small businesses.¹ As a result of this charge, the Business Equity/Diverse Business Inclusion committee brought together a cross section of public owners, contractors, architects, engineers, trades organizations, support organizations, diverse business owners, and industry professionals to create a space where opposing opinions and a commitment to active listening opened the door to productive discussion, analysis, and conversation around inclusion in Alternative Public Works.⁴

One of the foundational questions that the committee asked is how to change the hearts and minds of the industry and create an environment where diverse business is first choice. Ensuring equitable contracting opportunities for small and diverse businesses gives Washington state government access to a wider array of business solutions, helps drive innovation, and strengthens economic growth. The success of these businesses makes Washington's economy and families more resilient, strengthens our communities, and improves the quality of life for all Washingtonians. Understanding the value small and diverse businesses bring to public works contracting is critical to embracing meaningful change.



In order to sincerely change hearts and minds, pro-equity, anti-racist and inclusive culture must permeate across the industry.¹⁴

This requires viewing culture as a verb, creating space where small and diverse businesses are understood to be integral to the collective success of the industry. Change should flow from leadership down through every level of an organization, so that each person truly embraces the values of diversity, equity, inclusion, and equal opportunity in public contracting. It is critical that policy and procedural changes are accompanied by shifts in organizational culture. Agencies and businesses can complete all the steps recommended for them and still see no progress on inclusion of small and diverse businesses if the people making decisions every day within the organization don't see the value or understand the need for inclusion.

Small and Diverse Business as First Choice

Change will not come without sincere thoughtful effort, therefore this report is intended to start a dialogue rather than prescribe specific practices that will fit all circumstances. While Public Owners and Prime Contractors/Consultants are often positioned to have greatest impact on practices to increase equity, the involvement of Small and Diverse Business and the support organizations that serve them is needed as well. By examining the barriers to small and diverse business inclusion through open dialog, a full picture of the landscape was born that allowed the committee to determine future legislative topics to support growth and bring back a rich tapestry of these businesses in public works, and specifically alternative public works. There is no substitute for thoughtful planning by each stakeholder in this industry. Each of us needs to use the same critical and innovative thinking processes we utilize daily in our business and nonbusiness lives in looking at our sphere of influence, and make nuanced and targeted changes, whether large or small, that create forward progress.

Proposing change without accountability has not and will not accomplish the goals and objectives of culture shift. Documenting and reporting goals, activities and accomplishments must be requirements for successfully implementing change and building confidence in the commitment to change. Utilization reporting measures the results in money spent. Effort measurements look at the increased actions, programs and tactics to assess performance of a firm working towards inclusion.

The tension between the two methods of measurement arise when either is used without the other. Measuring solely results can excuse poor policy choices or lack of effort when the results are positive for reasons other than intentional effort. Measuring solely effort can excuse a lack of progress and reward policy and practices that are ineffective. A holistic and accurate understanding of progress requires measuring both effort and results and using those metrics to inform future decisions.



Similarly, the 2019 Washington Statewide Disparity Study identified a need for additional performance measures for a complete understanding of progress towards equity in public contracting. Their list of additional benchmarks included increases in bidding by certified firms increased prime contract awards to certified firms increased diversity of the types of industries in which women- and minority-owned businesses receive dollars (a decrease in market segregation), and increased “capacity” of certified firms as measured by factors like bonding limits, size of jobs, and profitability.

Small and Diverse Business as First Choice

A foundation of cultural inclusion, with an overarching emphasis on accountability frames the report that is to follow.

Historically, many programs for contracting equity have focused on outreach and procurement opportunities. While important, these practices alone cannot overcome decades of systemic bias. Barriers to public contracting exist in accessing opportunities and training as well as maintaining the capital needed for businesses to survive and grow. Each of these areas must be addressed to create an environment where small and diverse businesses can succeed. This report builds on existing work by others like the Office of Minority and Women's Business Enterprises (OMWBE), the Washington State Department of Transportation (WSDOT), the Governor's Subcabinet on Business Diversity, the newly formed Office of Equity, and those firms and agencies active in Alternative Public Works. It focuses on areas where the Board sees the greatest opportunities for improvement

based on existing practices and literature.

Each section provides a brief overview of the barriers around access to opportunities, capital and training, followed by practices to consider organized by stakeholder groups, with supporting materials and links to references in the appendices.



Chapter 1: Access to Opportunities

Meaningful and sustainable access to opportunities in alternative public works, traditional public works, and associated design services is impacted by inequity of finding, obtaining and competing for the work. Two distinct factors contribute to this inequity, and the strategies to address these factors can differ. The first is that many existing small and diverse businesses are performing similar work in the federal and private sectors, but the barriers to contracting with state and local public owners deter them or make it impossible to compete. The second is that there is a disparity in the number and capacity of women- and minority-owned businesses available. There is a need to reduce barriers for existing businesses, and a need to support new and upcoming businesses as they grow and develop.

The BE/DBI Committee conducted a survey, the results of which can be found in the appendices.⁵ The survey results demonstrate that perspective plays a large role in access to opportunities. Owners seem to come from a perspective that barriers in opportunity are of a low priority, while diverse businesses tended to rate it as a higher priority. Primes perspective tended to be in the middle. How to navigate the opportunities and choose should be focused on how to help grow small businesses.

Much of the preparation work that takes place to submit bids on public works projects must happen before a solicitation is opened. The period of time when a solicitation is open for bids may not be long enough for businesses to adapt their strategies or seek out training or other support to make themselves more competitive and successful. As a result, businesses need information about public owner processes and approaches as far in advance as possible in order to compete. This is especially true in alternative public works where owner teams are often innovating and reinventing their processes. In addition, businesses need information about **upcoming projects** as far in advance as possible to prepare for bidding or seeking out the solicitations.

Building connections between small and diverse businesses and prime designers and general contractors is critically important, and public owners can play a role in facilitating those connections.

Pursuing relationships with primes often requires such time and effort that it creates a barrier for small and diverse businesses. However, when challenges arise on a project, the power imbalance with Primes and public owners can leave small and diverse businesses at a distinct disadvantage. Support organizations could play a role in facilitating communication, mediating, and advocating for the needs of the small and diverse business within a project. No organization in Washington currently has the formal authority to provide this type of support.

Inconsistencies in how, where, and for how long solicitations are advertised make it difficult for businesses to find the information they need to bid and to be competitive and able to successfully deliver projects. The **method of solicitation** can vary by size or type of project and RCW; for instance, small works roster projects may not be publicly advertised, and formally bid projects must be advertised in newspapers, while alternative public works processes like design-build and job order contracting require that public owners advertise broadly in a variety of publications, specifically including websites. Unlike the low bid environment of traditional public works, Alternative Public Work selection is based upon qualifications.

While Design-Build provides opportunities to directly include the target market of small and diverse

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business via subcontracting methods, those same businesses may need an understanding of how alternative public work differs from low-bid procurements to be successful and competitive. For small and diverse businesses seeking to work as subcontractors, there are also differences in the relationships and networking styles needed to be competitive. Alternative public works often requires a **networking and relationship** approach, which should focus on what the firm can bring to the table and how qualified they are. However, environments where relationships matter allow bias to negatively influence outcomes. In the traditional public works, hard bid, environment the lowest bidder who can confidently minimize administrative and oversight effort and maximize their margins of profits while still being lower than the next bidder will get the job. Both models create an advantage for businesses that have experience with a public owner and are familiar with its decision-makers, processes, and preferences.

When the total contracted amount is below a certain threshold, public owners may have the option of selecting a roster of contractors or a limited number of contractors from a roster, or list, to compete for the work in a low bid scenario instead of offering the project for public bid where entire community of potential bidders have an opportunity to compete. **Small Works Rosters** are currently organized by trade and region, neither of which create an environment with a competitive edge for small and diverse businesses. Additionally, the administrative effort required to join a roster can deter businesses and make rosters an underutilized tool.

Small and diverse businesses are often excluded from consideration to directly contract with the Prime Contractor or Owner due to their size, either in revenue or number of employees, or due to lack of experience with a particular public owner or procurement method. Business owners also report facing **retaliation** for past complaints about the bidding process. It can be difficult to identify who the decision makers are on a project, and to get responses from public owners and primes when a business needs information. Short timelines for responses also create barriers for smaller businesses.



Managers and executive leaders within Owners and Primes may not understand and embrace a culture of inclusiveness, instead viewing project delivery and inclusion as in conflict. Without a foundation where inclusion and equity are core values, there is not a material way that the proactive steps necessary for a successful inclusion project delivery program can be implemented. When 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, these policies do not result in meaningful inclusion.

Requiring **inclusion plans** is a common practice among public owners especially in Alternative Public Works, but the requirements for inclusion plans vary widely across public owners. Inclusion plans are sometimes limited to general outreach approaches and business engagement practices without further thought or effort. This allows owner teams and prime contractors to engage in the minimum effort and fail to create real opportunities. In addition, when they are required, the provisions in inclusion plans are

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The Washington State Attorney General's Office has provided a legal opinion that setting voluntary or aspirational goals for projects to include small and diverse businesses is allowable under state law.

often not monitored or enforced. Businesses need clear expectations and accountability for inclusion plans to have an impact.

The opinion states that while RCW 49.60.400 prohibits discrimination or preferential treatment based on race, gender, and other characteristics in public contracting, aspirational goals are permitted under state law.⁹ The governor's office has published Executive Order 22-02 reinforcing the AG's legal opinion for cabinet agencies and recommending that other state agencies follow suit.¹⁰

Agencies should be informed by the nuances of these

opinions, specific requirements associated with funding sources, and culture within their own organizations.

Setting **voluntary or aspirational goals** for utilizing small and diverse businesses, for a program generally or for a specific project, requires specialized knowledge and understanding. When inclusion goals are generic and do not include consideration of the project scope, size, and characteristics, or business availability and capabilities, the result can be unrealistic processes and unobtainable goals. In addition, goals are often set as a percent of overall contract value, which can be met with one or a few large items without an effort to create real opportunity for a multitude of small and diverse businesses.

Small and diverse business owners report being sought out for help with project proposals and included in responses to obtain the work, only to be replaced or have the prime self-perform once they are selected by the owner. Known as **bait and switch**, this type of misrepresentation on the part of the Prime contractors reinforces inequity and results in the exploitation of small and diverse businesses who have limited remedies for this situation. This has been reported in some cases even with contracts between the prime and small and diverse business in place. In addition, small and diverse businesses continue to face overt discrimination, harassment, bias, and retaliation for making complaints. This is an area where accountability is so important, and safe ways to seek out accountability measures need to be in place.

Increasing the size and scope of projects impacts the ability of firms to work on individual projects due to all the additional requirements involved to participate, even as subcontractors. Fitting work packages to match business capabilities is referred to as **unbundling**. This strategy to increase inclusion is a well-documented method, in fact the disparity study specifically includes the process as does the tool kit published by OWMBE. However, it increases the number of subcontracts that owners and primes must manage, requires the ability to communicate the need to leadership and risk management officers, and adds complexity to subcontract management. Unbundling requires resources and support to effectively create opportunity and mitigate risk.

Certification of small and diverse businesses set forth a unique set of challenges for businesses navigating opportunities within the State of Washington. There are not only varying levels of rigorous to being "certified" dependent upon the type of certification being sought, but there are multiple organizations and agencies providing certifications. The State recognizes OMWBE as the sole agency that certifies minority- and women-owned businesses enterprises for all state and local programs, and the Washington Department of Veterans Affairs as the agency to certify veteran-owned businesses. Small businesses are registered, rather than certified, through DES's WEBS system. This registration is a self-certification style with no verification step. Additionally, some Owners and independent organizations allow for self-certification with very little scrutiny. This confusing landscape of certifications is perceived to provide very little material benefit to small and diverse business. Therefore, not all small and diverse firms are certified, and it leads to a lack of awareness by primes and public owners.

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Section 1: Owners and Prime Contractors/Consultants

Owners and Primes play a leadership role in advancing the good work, success, and sustainability of small and diverse business in the alternative public work arena. As the primary source of opportunities for prime contracts (in the case of Owners) and subcontracts (in the case of Primes), it is critically important that foundationally each of these groups have a culture of inclusion, tolerance, and honest effort with the express goal of increasing inclusion as it relates to opportunities public works. This meaningful approach offsets the check the box mentality and puts Owners and Primes in a position to weighing risks and rewards and mitigate them in a business-like way.

With that in mind Owners and Primes have a collection of things they can do within the current environment and legislation to positively impact access to opportunities for small and diverse businesses. Current practices vary widely across agencies and institutions in Washington. The following practices, in use among some public owners, show promise in reducing barriers for small and diverse businesses to access opportunities.



Forecasting future spending and making this information public ensures businesses can be prepared to respond competitively to procurement opportunities and able successfully deliver. This is particularly important for small and diverse businesses that may have difficulty responding to solicitations without sufficient notice. Regular planning and forecasting help organizations build outreach plans, which can lengthen the amount of time bid opportunities are available. This helps to ensure that every purchase is a planned purchase that can benefit small and diverse businesses.

Owners and Primes should have a more general **socialization and engagement** process to introduce their procurement processes and decision makers, answer questions, and engage with business owners. This first step can be critical in understanding the small and diverse business community in a target area. Don't assume what small and diverse businesses need, your culture of awareness should include the ability to ask and hear the needs and be willing to respond. Many of the recommended practices in this section could impact businesses in a positive way, but there may be more targeted or specific ways to provide opportunities that businesses can provide when asked.



Engagement with small and diverse businesses should occur outside of active solicitations as well. Information on how decisions are made, who makes them, and the processes for solicitation dispute resolution should be provided to the public. Public owners and primes can seek opportunities to coordinate their outreach efforts with others to be more efficient with small and diverse businesses' time. Outreach strategies should be tailored to account for regional differences such as combating lack of local availability versus improving competitive edge in diversified markets. Outreach should also fit the needs and abilities of the targeted businesses.

Owners and primes can look for ways to engage target companies prior to solicitations to understand what work scopes, complexity, requirements and sizes they are capable of and package work accordingly. Strategic **unbundling**, when used appropriately, can provide opportunities for small and diverse businesses to engage in the work at a level they are prepared to handle.^{15.2} It can also benefit public

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owners by increasing competition and distributing risk. When considering this strategy, owners should assess their capabilities, the number of locations involved in the work, the size and complexity of the project, the trades and services involved, and the timing of the work to ensure that unbundling is the right choice.

The General Contractor/Construction Manager (GC/CM) procurement method is the most prescriptive of alternative public works methods in statute. CPARB's GC/CM Committee is currently working to identify ways for unbundling to create more fair and equitable contracting opportunities in this contracting method.

Making Opportunities More Visible

Contracting opportunities should be advertised in a wide range of places to maximize the opportunity for small and diverse businesses to access them. RCW 39.10 requires Owners to explore all potential sources to **advertise** their procurements, not limiting themselves to newspapers, but seeking out other organizations to publish on their websites. This provides those Owners and Primes who reach out, to begin developing relationships with organizations they may not have previously been aware of or engaged with, and naturally provides a networking path for future engagement. Alternate advertising sources may include an easily accessible location on the public owner's own website, OMWBE's website, WEBS, and community organizations such as Tabor 100. In addition, outreach work can involve working with community organizations, holding events, and directly contacting companies. Advertisements should attempt to offer sufficient project or opportunity details to inform bidders of opportunities. Take into account: Delivery method, approximate dollar value or scope size information, even start and finish dates. Solicitation time frames/durations should be sufficient to allow development of bids relative to the amount of work required to submit a responsive bid. Once awards are made, awarded contracts should be published in visible locations so that interested businesses can reach the prime contractors.



To ensure small and diverse businesses used in a prime contractor's **inclusion plan** or proposal are used on the projects where they are listed, public owners and Primes should monitor utilization through all phases of the project. During solicitations, teaming agreements create a contractual relationship between the prime and subcontractor, making it more difficult to exclude a subcontractor after listing them in the inclusion plan. Owners who review teaming agreements of proposing Prime Contractors need to be aware of changes, and should not request Prime Contractors/consultants to invalidate those agreements by asking for changes in proposed subcontractors. Taking measures like these could help reduce the risk of **"bait and switch" practices** and stop public owners from being either an intentional or unintentional party to them.

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Some public owners use supplier diversity management software to monitor progress toward their **utilization goals** using actual payment data, allowing them to identify when a subcontractor is excluded, unpaid or their scope of work is reduced. OMWBE is currently in the process of standing up Access Equity which utilizes B2Gnow software to provide tracking of subcontractor payments. This is a great opportunity for Owners and Primes to achieve data analysis and monitoring capabilities without having to stand up their own programs. Some public owners also conduct reviews to ensure small and diverse subcontractors are performing a “commercially useful function” on the project rather than being used as a pass-through entity to give the appearance of inclusion. Owners may also specify a process for prime contractors to change out any subcontractors that has been named in the contract.

Measuring the performance of inclusion work does not need to be limited to **aspirational goals** for inclusion of small and diverse businesses, public owners and primes can implement/take cues from the structure of the federal approach and research availability by work category, availability and capabilities in lieu of percentage goals. Aspirational goals do not have to be limited to metrics of percentage utilization, but can include effort measurements to seek out and include business, provide services to support small and diverse businesses, or other types of effort intended to create equity.

Owners and Primes should be utilizing race and gender-neutral measures within the parameters of the law to target markets that likely include diverse business. For example, with a concise and consistent **definition of small business** that is inclusive and validated in some way, Owners may stand up programs and criteria that increase opportunities for small businesses. Until the definition of small business is refined, owners and primes need to carefully navigate and consider how they utilize it as a tool in developing their programs.

An appropriate small business definition that is validated and consistent could allow Owners to create Small Works Rosters that target small businesses and provide greater opportunity and incentive for small and diverse businesses to navigate the public work process, increasing both competition and participation, resulting in increased public benefit.

Rosters have the potential to increase opportunities for small and diverse businesses when the application process is simple and accessible, and contracts use plain language. The Municipal Research and Services Center, MRSC, maintains the rosters for 651 public owners in the state, and hundreds more maintain their own rosters with their own processes. CPARB’s Small Work Roster Committee is currently examining options for amending the small works roster process to create a more inclusive and efficient tool for public owners and businesses.

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Section 2: Small and Diverse Businesses/Support Organizations

A number of resources exist to improve access to opportunities for small and diverse businesses. This section provides a summary of some of them, with recommendations for improvements.

The following support organizations can be leveraged by small and diverse business to understand, access, and assist in navigating the **certification** process and opportunities available:

The Washington Procurement Technical Assistance Center (PTAC) provides Washington businesses with no cost, confidential, one-on-one technical assistance in all aspects of selling to federal, state, and local governments.¹⁷ PTAC also helps businesses register with the correct databases to compete for government contracts.

The Minority Business Development Agency (MBDA) within the U.S. Department of Commerce, provides services to minority business enterprises.^{16,5} The Washington MBDA business center offers businesses solicitation analysis, bid preparation, assistance with registration and certification, and assistance with targeted teaming arrangements and joint ventures.

The Office of Minority and Women's Business Enterprises (OMWBE) certifies small businesses owned by women and minorities for contracting with state and local government entities and maintains a database of certified businesses for use by public owners and primes in finding contractors. The Washington Department of Veterans Affairs (DVA) certifies businesses owned by veterans, and the Department of Enterprises Services maintains the database WEBS for state and local bidding opportunities with information on businesses certified by OMWBE, DVA and its own self-identified small businesses.

Additionally there are support organizations like Tabor 100, the National Association of Minority Contractors, Northwest Minority Builders Alliance, The Association of Women and Minority Businesses (AWMB), The Urban League, el Centro de la Raza, and the Black Collective, whose efforts actively cultivate relationship and connections to opportunities for their members.



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Section 3: Potential Legislative Changes

The barriers to access to opportunities often have a foundation in the need to level the playing field, bringing historically socially and economically disadvantaged businesses up to the same starting place as other businesses in the arena and providing them the same opportunities that they have been denied.

Within the limits of state and federal law, public owners could provide targeted relief on some of the above access to opportunities barriers complying with race and gender-neutral measures by targeting small business.



The 2019 statewide disparity study recommended developing a pilot small business enterprise target market, setting aside some smaller or less complex contracts for bidding only by small businesses. This target market program could be paired with other measures such as quick pay, reduced experience requirements and different retainage rules to maximize the benefit to small and diverse businesses participating in the market. Similarly, Rosters classified around a usable definition of small business could provide race and gender-neutral ways to provide opportunities to small and diverse

businesses. Projects let by small works roster could provide a way for public owners to reasonably “unbundle” and appropriately bid projects to a targeted market.

However, any new program to assist small businesses would require a working definition and process for identifying eligible small businesses that is dependable, accurate, and authenticated. Under state and federal law, there are currently several different definitions of small business in use for different purposes and by different agencies. An appropriate small business definition that is validated and consistent would allow Owners to create Small Works Rosters that target small businesses and provide greater opportunity and incentive for small and diverse businesses to navigate the public work process, increasing both competition and participation, resulting in increased public benefit.

Below is an overview of the different ways the state defines “small business”.

For the purpose of **contracting on projects with federal funding** in Washington state, a small business must be independently owned and operated, for-profit, not dominant in its field of operations, under \$28.48 million in annual gross receipts, and meet size standards specific to each industry. For instance, lumber wholesalers are subject to a limit of 150 employees while framing contractors are subject to a limit of \$16.5 million. Business owners must also have a personal net worth under \$1.32 million, excluding their primary residence and the business. Business owners must apply to the Office of Minority and Women’s Business Enterprises and provide financial documents to show eligibility.

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For the purpose of **state agency procurement** of goods and services under the authority of the Department of Enterprise Services (RCW 39.26.010), a small business is one that is independently owned and operated and meets any one of the following criteria:

1. **Has 50 or fewer employees**
2. **Has less than \$7 million in annual gross revenue, or**
3. **Is certified by OMWBE.**
4. **Business owners self-attest to their small business status in the Department of Enterprise Services' electronic bid system called WEBS.**

For the purpose of reducing the **impact to small businesses from state regulations** (RCW 19.85.020), a small business is defined as independently owner and operated with 50 or fewer employees.

For the purpose of providing **small businesses tax relief** on their gross receipts tax obligations (RCW 82.04.4451), qualifying small businesses can have up to \$1,681 in annual B&O tax liability depending on the type of activities that make up most of their liability.

For the purpose of **federal Small Business Administration (SBA) programs**, a small business concern is independently operated and meets size standards specific to each industry. For instance, lumber wholesalers are subject to a limit of 150 employees while framing contractors are subject to a limit of \$ 16.5 million. Business owners can self-attest to the SBA. These industry size standards account for factors that impact new business formation and growth, are updated regularly.

Chapter 2: Access to Capital

Access to capital is a barrier for many small and diverse businesses competing for contracts or working to grow. Businesses often struggle to obtain bonding, insurance and loans, and to maintain the cash flow needed to pay their bills and employees.

For small and diverse businesses working as subcontractors on public contracts, receiving payment quickly is critical to maintain the cash flow needed to pay workers, buy supplies and prepare for new contracts. While there are laws around **prompt payment**, and many public owners have terms in their contract requiring prompt payment to subcontractors, the practical application of the law and adherence to it are challenging. Subcontractors often do not receive payment for 45-120 days after invoicing for completed work. Payment terms are often based upon percentage completion which can differ from hours worked or materials invoiced leading to additional delays in payment of actual money owed the contractor. Additionally change order contract terms and processes can result in performance of work that remains unpaid.

The long delays in payment impact lenders' willingness to provide credit and borrowers, and require either a lot of working capital, or access to construction lines of credit, which firms may not have. Allowing early payment to at-risk subcontractors may ease some of these issues but could create legal risks and impact subcontractors' ability to obtain surety bonds.

Contractors must secure a number of **bonds** to bid for and perform public works.²⁸ The types of required 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. Small and diverse businesses face additional barriers to finding, applying for and receiving bonds. These barriers often relate to lack of credit, experience and information.

The 2019 statewide disparity study identified a gap that the state lacks a bonding and financing assistance program for small businesses.³ Many states offer bonding guarantee programs, guaranteeing a portion of a bond to lower barriers based on capital, financing and experience. Although state funding cannot be used to guarantee the bonds, organizations to support small and diverse businesses could implement a program using private or federal funding. In addition, some states offer bonding assistance programs that include training and a commitment to provide a bond for businesses that complete their training and mentoring program.

Insurance coverage requirements by public owners, intended to minimize risk, can increase costs and create barriers for small and diverse businesses when the insurance requirements exceed the scope of their role in the project or the insurance they can obtain. For instance, in the field of design, insurance coverage typically includes liability related to the business's own negligence.

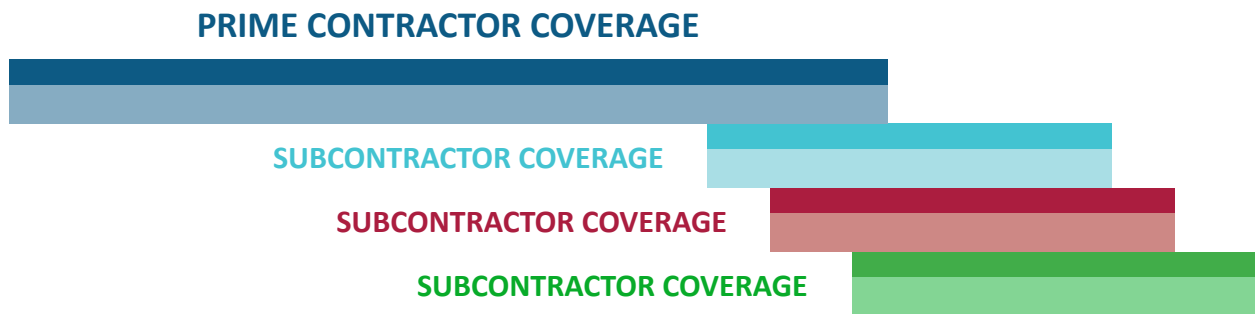
Insurance requirements in public works contracts are not specified to match individual scopes of work and risk of every sub-task or subcontractor, but are typically written to cover the whole project while also requiring coverage as a "flow down" condition; therefore, creating a barrier for subcontractors,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

Chapter 2: Access to Capital

Indemnification clauses can require businesses to take on liability outside what is covered by their insurance, resulting in increased risk to the business. This risk creates a barrier to entry for small and diverse businesses that lack the cash flow to survive under-insured or non-insurable claims. Some indemnification clauses create liability beyond a firm's own negligence. Indemnification provisions in public works contracts can also be complex or ambiguously written.

Agencies and Support Organizations across the State have programs specifically designed to help small and diverse businesses receive access to capital, bonding support and line of credits. Some examples include the Linked Deposit Program, Business Impact NW, and WSDOT Bonding Program. Utilization of these programs is reportedly low. It is unclear if the barrier to businesses accessing these programs has to do with awareness or timing. Accessing these programs at the right time in the business development and growth could be critical for business success.

Traditional insurance products are procured individually for primes, subs, and owners.



Products like owner or prime controlled insurance packages cover the entire project.



Chapter 2: Access to Capital

Section 1: Public Owners and Prime Contractors/Consultants

Barriers to capital have the potential to make or break small and diverse businesses who have decided to pursue public works. Without public owners and primes taking steps to alleviate some of these barriers, winning a public works contract can be the end of a small business.

As the entity most often with a direct relationship with small and diverse subcontractors, prime contractors are in an ideal position to help identify and eliminate barriers and ensure project conditions are tailored to their financial circumstances. Public owners can lay a foundation of policies and practices that encourage direct contractual and financial relationships with small and diverse businesses, as well as build a contractual framework that allows primes to create an environment where small and diverse businesses can be financially successful. The following pages outline promising practices prime contractors and public owners can use to reduce barriers to accessing capital for small and diverse businesses.

Outside of individual projects, public owners and primes should evaluate their **internal processes** and procurement practices to identify areas for improvement. For instance, public owners can seek out ways reduce the number of days between receipt and payment of an invoice by reviewing their processes for unnecessary delays in **prompt payment**, efficiencies or creating special processes that can be made to pay certain invoices in a timelier manner. Each public owner should also evaluate its **bonding requirements** compared to the legal minimums and its own needs, to ensure it is not requiring more bonding than necessary to protect the public investment, and that the impacts of carrying down those requirements are fair and reasonable for all tiers of subcontractor or sub-consultant involved.

Project Contract Components

Public owners legally must include provisions for **prompt payment** in their contracts with primes. However, beyond these minimums required by law, terms to consider may include:

- More frequent pay periods, such as biweekly or twice per month;
- Draft invoice processes to allow development and consensus of the invoice in advance of submission;
- Processes for general contractors to bill for subcontractor materials purchased in advance and stored before using;
- Event-based, interim out of turn invoicing allowing prime contractors to invoice and pays subcontractors as they achieve milestones or complete work.

Whatever payment terms a public owner requires for a contract, monitoring and enforcement are critically important to ensure they are put into practice.

Public owners can also request plans for **prompt payment** from primes as part of their **inclusion plans**. This practice encourages thoughtful discussion early in the project process about tailored solutions that match individual projects and specific subcontractor needs.

During contract negotiations, prime contractors can advocate for payment terms that will allow them to pay subcontractors quickly and frequently. The specific terms that would be most helpful on a project can vary, so primes should work with their subcontractors to find solutions that are acceptable to both parties. One practice that holds potential is submitting invoices for work by small and diverse subcontractors during the month it is expected to be completed based upon **cash flow** analysis, rather



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Section 1: Public Owners and Prime Contractors/Consultants

than waiting until the work is finished to begin the payment process. This would allow the work of the subcontractor to be verified as complete but be paid promptly as owner and prime processes for payment occurred in advance, in lieu of verification of completed work being the start of the payment process.

Other provisions to consider include invoicing based on percentage completion versus invoicing for time and materials, down payments for materials in advance of fabrication and/or delivery, and the timing for payment after delivery of materials to the job-site. Payment related terms should be developed in consultation with surety providers to avoid unintentionally making bonding more difficult.

Joint check agreements give prime contractors the ability to write checks jointly to a subcontractor and their lower tier subcontractors or suppliers. Similarly public owners can utilize joint checks to pay prime contractors and subcontractors as well. As a result, contractors need the signatures of their lower-tier subcontractors to deposit the check, ensuring those subcontractors are paid at the same time. This practice has the potential to ensure lower tier subcontractors and suppliers are paid quickly, and to skip the multiple tiers of processing time required traditionally.

Indemnification clauses that are broader than needed can harm participation by small and diverse businesses. Public owners and primes should carefully review their contract language to ensure indemnification provisions do not exceed the scope of work being performed by subcontractors, or available insurance coverage.

Public owners have a responsibility to make sure **insurance requirements** for project do not exceed what is needed to protect the public investment. Public owners should explicitly note in the contract how insurance requirements may flow down through the tiers of subcontractors, and specify that the insurance requirements for the whole project may be divided among lower tiers based on factors like the scope of work and risk involved.

Alternative insurance products such as Owner Controlled Insurance Programs (OCIP) and Contractor Controlled Insurance Programs (CCIP) allow all the insurance products needed for a public works project to be combined into one package with the public owner, prime contractor and subcontractors all covered for the entire project. These products have the potential to create cost savings and avoid duplication of insurance coverage. This can be more efficient and reduce overlapping insurance coverage. Owners and primes should evaluate whether one of these products meets their needs, and which of them is in the best position to purchase insurance based on credit and ability to obtain policy discounts by insuring multiple projects.

Chapter 2: Access to Capital

Section 2: Small and Diverse Business / Support Organizations

For new businesses, and small and diverse businesses expanding into public contracting from other sectors, there are existing resources available to help overcome the barriers to accessing capital to fund, develop and financially grow. Many of these resources can be most helpful before a business starts its first public works project. Planning and considering business cash flow, overhead, lending needs, and capital portfolio are important measures to engage. Support organization such as the Securities and Exchange Commission (SEC), the Department of Commerce, banks, credit unions, Procurement and Technical Assistance Center (PTAC) and the Minority Business Development Agency (MBDA), Small Business Development Centers (SBDC), the Washington State Micro Business Organization, the Small Business Administration (SBA), and financial advisors can provide the technical assistance needed to understand financial planning to navigate barriers around **prompt pay**, connect businesses with appropriate lenders, and find the right tools to support the business's financial stability.

Additionally, the Office of Minority and Women's Business Enterprises (OMWBE), The Washington Department of Veterans' Affairs (DVA), and the Department of Commerce all have statutory roles in supporting small and diverse businesses. These agencies and organizations are in a unique position to problem solve issues around access to capital as they have relationships with business owners and can identify unmet needs. Most provide one on one support tailored to the business's specific needs.



The **Linked Deposit Program** is jointly administered by OMWBE, the Washington Department of Veterans Affairs, and the Office of the Treasurer.²⁶ These agencies partner to provide certified woman-, minority-, and veteran-owned businesses with reduced interest rates on loans from public depositories like banks and credit unions. The MWBE portion of program currently has unused capacity for loans. These three agencies should partner to increase the visibility of the program,

ensure it is available across the state with a range of lenders, and seek feedback from business owners on ways to make the program more accessible.

The Department of Commerce also offers programs to provide access to capital for small businesses, such as the **Small Business Flex Fund**.^{24,4} Agencies should explore coordinating to maximize the benefits of these programs and ensure they are accessible across geographies and business types.

Chapter 2: Access to Capital

Section 3: Potential Legislative Changes

Access to capital is profoundly important for small and diverse businesses to be successful in public works projects. Navigating bonds, insurance, contracts, payments and cash flow can be daunting.

Even with public owners and primes working within the confines of the law to reduce these barriers, there is still such opportunity to improve equity in a meaningful, tangible way, and prompt payment is an area that needs legislative improvement.



Many of the **prompt payment** barriers can be found in RCW Title 39. Legislative work could be performed around improving the process and allowable methods of payment between public owners and Primes, and between primes and subcontractors. Washington needs to create an auditable and allowable program to make funds available to subcontractors so that their credit is not impacted by the slow payment cycle. Setting up this type of program may require a definition of small business (as recommended for Access to Opportunities) to determine the group of subcontractors who may qualify for this type of program.

Over the past several years, there has also been a legislative effort to create a **state bank** to hold state tax revenues and finance capital projects. In addition to making more capital available for public works projects, this model has the potential to increase access to capital for small and diverse businesses. For instance, the Bank of North Dakota partners with community banks in its state to increase their lending capacity within their communities.⁴³

Chapter 3: Access to Training

When project delivery staff and contracting **staff lack training** on inclusion policies and procedures, the scoring and evaluation processes can introduce bias and result in unfair procurements. Inclusion provisions and policies are hollow and ineffective without training to support their implementation. Project staff for prime contractors also require training on owner adopted best practices. In some cases, estimating and subcontracting staff are unaware of the contents of an inclusion plan and may fail to include people and processes intended by the plan.

Contract language, forms, templates and other tools for equity cannot have an impact without internal policies, procedures and training to put them into practice.

Doing business with the government can **require specialized knowledge** in addition to a business owner's field of expertise. Subjects like bonding, indemnification and insurance are complex and can have major impacts on a business's survival. Understanding of the different delivery methods and funding sources for public works projects and how they impact the way work is done is vital for businesses to succeed. **Training programs** exist to cover all these topics and more. However, training is conducted by a wide variety of organizations and the state lacks a centralized location for business owners to find and evaluate training opportunities.



Training can be categorized into two broad styles: Lecture and Hands On. Much of the current training available to small and diverse businesses is lecture format, which is removed from the every-day working of running a construction or design firm and can be more difficult to put into practice. Hands-on training, like the apprenticeship programs that many business owners used to enter their respective construction fields, are less available.

Mentorship programs are often marketed as a way for small and diverse businesses to build capacity and grow through mentorship with primes. However, when mentorship programs lack structure, they can develop solely focused on networking assistance, which does not meet all the needs of the mentorship businesses to grow and develop. Businesses benefit from comprehensive mentor-protégé programs with active involvement and support throughout the business relationship, rather than solely focusing on networking assistance.

Data on inclusion of small and diverse businesses is not collected or stored in a consistent manner, and at the local level no centralized dataset exists. The information that is collected is often unpublished, requiring public records requests to obtain. In addition, some public owners have their own designations for small and diverse businesses, which may overlap with certification by OMWBE and create confusion in reporting.

Chapter 3: Access to Training

Section 1: Public Owners and Prime Contractors/Consultants

Leadership within public owners and primes should require that all staff are trained on inclusion processes, policies, and goals. **Training** on contractual inclusion should be mandatory for any staff who participate in the solicitation, management, or enforcement of projects. **Cultural training** offered for all positions within an organization helps build a foundational awareness, acceptance and aptitude for all employees so that as they grow, are prompted, and come into positions of power within the organization they carry forward the core values necessary to keep this inclusion work at the forefront. This will ensure that small and diverse business inclusion is considered in decision-making across all levels of an organization.

Project-specific **inclusion plans** and goals should be developed by the staff who will be involved in the project, including staff of the prime contractor. This ensures awareness and understanding of the goals among those charged with implementing them, and that action plans will be developed with concrete actionable steps.

For those public owners and primes who have the ability and capacity to begin offering training and educational opportunities to the industry, careful contemplation, access consideration, and value-added benefits should be fully thought out to avoid duplication of trainings already available. It is important to explore and find the right fit of offered training not only for the small and diverse businesses who take their valuable time to attend the offering, but to be sure that the training aligns with each organization's practices and culture. A feedback loop that allows for anonymous complaints, questions and critiques of the programs offered provides accountability of the trainings offered.

The Minority Business Development Agency (MBDA), in partnership with WSDOT and Sound Transit, administers the Capacity Building Mentorship program that can serve as a model for public owners and primes.

Successful mentorship programs identify the specific needs of mentees before matching them with mentors who can meet those needs. They also support mentees with technical assistance and industry specific knowledge rather than solely networking support. Programs should include specific measurable outcomes, such as increased bonding capacity, increased revenue, increased bidding capacity, continuous objectives improvement, and industry survival rates.

The MBDA Capacity Building Mentorship Program is well developed and has served several cohorts of business owners. The current focus of the program is on contractors who work on WSDOT and Sound Transit in horizontal construction. There are opportunities to grow that program through additional agency involvement, but would require additional funding to provide the additional support staff to accommodate the influx of vertical construction firms. Additionally, firms interested in becoming mentors should understand that mentees are interested in hands-on experience, receiving coaching over the course of an actual project working for a mentor rather than talking through the process in the abstract.

Public owners can require that inclusion plans for each project include provisions for training or mentorship style programs, and can consider training in their scoring criteria. Public owners should be monitoring outcomes based upon the inclusion plan from the contractor.

Chapter 3: Access to Training

Section 2: Small and Diverse Business / Support Organizations

For new businesses, or small and diverse businesses expanding into public contracting from other sectors, there are many resources and training programs available to help overcome the barriers to accessing training to grow and compete. Many of these resources can be most helpful before a business starts its first public works project.



Locating and evaluating training programs can be difficult for owners of small and diverse businesses who must balance the need to develop and grow against the demands of day-to-day operations.

Business owners are best positioned to understand their own strengths and training needs, and the time and money they can afford to invest in development. If unsure of their needs, small and diverse businesses can consult with a support organization like the Department of Commerce, Washington State Small Business Center, or OMWBE's Support Services program, to name a few, to help develop a training plan to support their specific growth needs.

For small and diverse businesses interested in WSDOT and Sound Transit work, the Minority Business Development Agency's (MBDA) Capacity Building Mentorship program provides an opportunity for hands on mentorship type training.¹⁶ The federal **Mentor Protégé Programs** are designed to ensure proper transfer of knowledge between the mentor firm and the protégé firm and an officially legally binding Joint Venture agreement in place for a specified period of time, with the ability to specifically target markets based upon gender, race and class. The Washington State **Capacity Building Program** is flexible and does not require a joint venture agreement. It motivates and encourages mentors to provide developmental assistance to protégés based on a development plan. The program is built to maximize small business access to DOT's procurement programs, foster long-term business relationships, and enhance small businesses' core capabilities.

OMWBE manages an events calendar on its website with information on upcoming workshops, **classes**, and other events by organizations across Washington. The Washington Procurement and Technical Assistance Center (PTAC), SCORE, and Business Impact NW all offer a combination of workshops and one-on-one assistance to businesses across a range of general business and contracting topics.

For alternative public works, the Design Build Institute of America offers training programs in design-build work.³⁵ The AGC Education Foundation offers training on the General Contractor/Construction Manager (GC/CM) contracting method.³⁴ The Washington chapter of the American Public Works Association and the Seattle chapter of the American Institute of Architects also offer training programs in public works contracting.³⁶

Chapter 3: Access to Training

Section 3: Potential Legislative Changes

The multitude of existing support organizations, public agency trainings, and even prime led educational opportunities is an ambiguous and challenging landscape to navigate for small and diverse businesses.

Coordination of existing and available trainings is an area for further exploration. OMWBE currently maintains an event calendar on its website with upcoming workshops and classes, but it is limited to events agency staff can locate or are informed of by partners. No organization has the direction or resources to help coordinate between the entities that offer trainings to identify gaps and duplication in what is offered, provide metrics to identify successful programs, or ensure trainings are accessible in a central location.

The work could begin with an expansion of OMWBE’s calendar but would require resources and coordination between the organizations that offer trainings. One possible path for this work is described below.



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 - 21.5 Capital Trends: Mapping Investment in America: Where are Companies Raising Capital?
Regulation Crowdfunding
<https://www.sec.gov/capitalraising/trends>
22. Innovation Cluster Accelerator
<http://icapwashingtonstate.org/>
23. Washington State Microenterprise Association:
<https://www.wamicrobiz.org/>
 - 23.1 Partner Organizations List
<https://www.wamicrobiz.org/members>
24. Washington State Department of Commerce:
<https://www.commerce.wa.gov/>

Resources and Reference Materials

- 24.1 Culturally relevant assistance for business owners and organizations affected by COVID-19
<https://www.commerce.wa.gov/serving-communities/technical-assistance-from-trusted-community-messengers/>
- 24.2 COVID-19 Emergency Funding for Small Businesses
<https://commercegrants.com/>
- 24.3 Email contract:
bizgrants@commerce.wa.gov
- 24.4 Small Business Flex Fund:
www.SmallBusinessFlexFund.org
- 25. Business Impact NW
<https://businessimpactnw.org/>
- 26. OMWBE Linked Deposit Program:
<https://omwbe.wa.gov/small-business-assistance/linked-deposit-loan-program>
- 27. WDVA Linked Deposit Program:
<https://dva.wa.gov/veterans-their-families/veteran-owned-businesses/linked-deposit>

Additional Studies:

- 28. WSDOT Bonding Study:
<https://wsdot.wa.gov/sites/default/files/2021-11/WSDOT-Surety-Bond-Study.pdf>
- 29. Surety Bonding Accessibility Study: OMWBE and HUB Contractors
<https://wsdot.wa.gov/sites/default/files/2021-11/WSDOT-Surety-Bond-Study.pdf>

Some Training:

- 30. OMWBE Calendar of Events
<https://omwbe.wa.gov/resources/calendar>
- 31. Department of Enterprise Services Training:
<https://des.wa.gov/services/training-and-development>
- 32. American Subcontractors Association: Mastering Payment for Stored Materials
[Mastering-Payment-for-Stored-Materials.pdf \(subcontractorscarolina.com\)](https://www.subcontractorscarolina.com/Mastering-Payment-for-Stored-Materials.pdf)
- 33. AGC Inland Northwest Chapter: Training Calendar
<https://www.nwagc.org/upcoming-classes>

Resources and Reference Materials

34. AGC Education Foundation:
<https://www.constructionfoundation.org/>
35. DBIA Certification Training:
<https://dbia.org/get-certified/>
36. American Public Works Association:
<http://washington.apwa.net/>
37. JLARC Report on Alternative Public Works:
https://leg.wa.gov/jlarc/reports/2020/altpubworks/f_c/default.html
38. Local and Regional Government Alliance on Race & Equity: Contracting for Equity: Best Local Government Practices that Advance Racial Equity in Government Contracting and Procurement
<https://www.racialequityalliance.org/2015/12/01/contracting-for-equity/>

Some Eastern Washington Support Organizations:

39. SCORE Spokane Chapter:
<https://spokane.score.org/>
40. AHANA – geared towards minority business in Eastern Washington
<https://ahana-meba.org/>

Public Banking Resource Material

41. Public Banking Institute
<https://publicbankinginstitute.org/>
42. National Infrastructure Bank Coalition
<https://www.nibcoalition.com/>
43. Bank of North Dakota
<https://bnd.nd.gov/>
44. Public Banking Institute
<https://publicbankinginstitute.org/>
45. Political Economy Research Institute: The Public Banking Movement in the United States: Networks, Agenda, Initiatives, and Challenges
<https://peri.umass.edu/economists/gerald-epstein/item/1413-the-public-banking-movement-in-the-united-states-networks-agenda-initiatives-and-challenges>

Resources and Reference Materials

Some Support Organizations

46. Tabor 100
<https://www.tabor100.org/>
47. National Association of Minority Contractors Washington Chapter
<https://namcwa.com/>
48. Northwest Minority Builders Alliance
<https://nwmba.org/>
49. The Association of Women and Minority Businesses
<https://awmbwa.org/>
50. The Urban League
<https://nul.org/>
51. el Centro de la Raza
<https://elcentrodelaraza.org/>
52. The Black Collective
<https://theblackcollective.org/>

End of Resource and Reference Material