

Construction Attorney: Compliance ‘Weakest Part’ of Supplier Diversity Efforts

Written by: Joe Bousquin, Senior Reporter, Construction Dive

Diversity and inclusion goals on construction projects have made a lot of news recently.

Not only has the industry spearheaded efforts to bring more diverse workers onto jobs with initiatives like Construction Inclusion Week, contractors are increasingly putting their money on the line, too.

Just look at Gilbane’s \$4 billion commitment over the next five years to up the number of women-, minority-, and veteran-owned businesses in its subcontractor pool.

But meeting workforce participation goals on jobsites comes with its own challenges as well.

There are capacity issues, missed or untracked metrics, and compliance hurdles. In some of the most egregious cases, contractors allegedly use “pass-through” schemes to meet goals on paper, without actually doing so on jobsites.

To gain more insight into the issues around meeting supplier diversity goals on projects, Construction Dive talked with Paula Finch, an attorney at St. Louis-based Greensfelder who specializes in helping construction firms navigate this sometimes confounding area of jobsite management.

Editor’s Note: This interview has been edited for brevity and clarity.

CONSTRUCTION DIVE: How do supplier diversity programs typically work? Are these actual requirements for projects, or are they just goals?

Finch: The most common phrase you hear in this area is “goals.” The city of St. Louis, for example, says you must have X percent



of women, X percent of minorities, and X percent of veterans on your contract.

The interesting thing about supplier diversity is that while the rules are similar, it seems like every jurisdiction has its own little intricacies.

The bottom line is these supplier diversity programs are designed to encourage businesses that have been historically underrepresented. From a big picture standpoint, we don’t have enough women and minority-owned businesses out there.

Because of that, there may not be any businesses that fit into those categories. So it really creates a contracting environment where there can be an inherent conflict.

But these goals are just that. They’re goals. And the contract will say “We want you to make a good faith effort to meet them.”

What's considered a "good-faith" effort?

Well, you can't just say, "We tried." You need to show you did your research, who you contacted, and what the response was.

If there's an area that you're having trouble meeting the goals, then you need to demonstrate that you really don't have a qualified supplier who fills that gap.

Sounds like a lot of work just to get to that point.

It is, for good or bad. The unintended consequences of these goals can sometimes be companies that try and get creative so that their bid looks better than the guy who isn't trying quite so hard. Because everybody wants to have the best bid.

You mentioned different requirements in different jurisdictions. What's an example?

While the concept of supplier diversity is generally understood everywhere, there's all these intricacies out there that result in different aspirational goals. When you see it at the state and local level, they typically have some research behind it that suggests, "Hey, we're going to have a 2.5% goal for women-owned companies in transportation."

And that seems like a small number, but they do that because they know there's just not enough companies out there to fill that goal. They don't want to set up their bidders to fail. They want to set them up to succeed and they want to encourage them.

So the goals are written into the contracts. What types of compliance efforts are there to measure whether they are actually met?

Great question.

At the federal level, and particularly at DOT, there are typically compliance groups within the supplier diversity division. So speaking from firsthand experience, Indiana DOT has a minority supplier division. They have their certification staff, they have their training staff, and they have their compliance staff.

The compliance people go out to the jobsites. They do field checks. They just show up at the jobsite and talk to the minority supplier and find out what's going on. They talk to the prime contractor, and engage with them.

But there are also reporting requirements. In Indiana, for example, both the prime and the sub are required to report the contract amount, the payment amount, and what the balance due is.

So there are two separate reports on the same job, and for that reason, those compliance people can often be a great referral source on the next job. Because they really get a feel for who does what.

We hear a lot about firms missing these goals. So is that type of compliance accountability the norm, or the exception to the rule?

From my experience in the Midwest, it's the norm. That said, compliance has been the weakest part of supplier diversity for ages. The compliance people just can't keep up.

They've had the problem with staffing and funding for years, long before it was a hot topic that folks were talking about.

So what does that mean, as the feds begin to deploy the \$1.2 trillion in funding from the infrastructure act? Should we be on the lookout for more of the creative bids you mentioned before?


Well, that comes down to business ethics. If there's one frustration that I've not been able to overcome in my career, it's the folks that are willing to cross the line from an ethical standpoint, because it better positions them to get the contract.

That's why lawyers have jobs. That's why the compliance people have jobs. When that happens, you can kind of see right through it in the certification process. If that business owner is legit and is out there following both the letter and the spirit of the law, it's obvious.

But if they're out there to find a way to get a free and easy contract, it's obvious, too. And that makes them a very bad supplier. It hurts the project, it hurts the economy, it hurts things all the way around.

What more can be done to have better compliance on these programs?

Well I think anytime you have a government initiative like this, you're always sort of lagging behind to get it properly staffed from the compliance perspective.

We've got the front end dialed in, so to speak. Maybe there will be more money allocated to get the compliance piece covered. But we need some consistency across the board. 



About the Author

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