



Metro

Los Angeles County
Metropolitan Transportation Authority

One Gateway Plaza
Los Angeles, CA 90012-2952

213.922.2000
metro.net

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**EXECUTIVE MANAGEMENT COMMITTEE
OCTOBER 17, 2013**

**SUBJECT: DISADVANTAGED BUSINESS ENTERPRISE AND
SMALL BUSINESS ENTERPRISE PROGRAM UPDATE**

ACTION: RECEIVE AND FILE

RECOMMENDATION

Receive and file status report on Disadvantaged Business Enterprise (DBE) and Small Business Enterprise (SBE) programs update as requested at the September 19, 2013, Executive Management Committee meeting.

ISSUE

Metro's DBE and SBE programs have undergone considerable changes since Fiscal Year 2009. Program improvements include adoption of mandatory DBE contract goals and SBE preference program, extensive outreach and updates to the SBE certification guidelines.

DISCUSSION

DBE Program

The Department of Transportation (DOT) Disadvantaged Business Enterprise Program regulation, 49 Code of Federal Regulations (CFR) Part 26.21, requires recipients of Federal Transit Administration (FTA), and the American Recovery and Reinvestment Act of 2009 (ARRA) funding assistance, who reasonably anticipate awarding \$250,000 or more in prime contracts annually, to implement a DBE Program and submit to FTA every three years, an overall goal for the participation of DBE firms.

The DBE program's primary objectives are to (1) provide a level playing field so DBEs can fairly compete for DOT-assisted projects, (2) ensure that only eligible firms become certified as DBEs, and (3) assist in the development of DBE firms so that they can compete. To meet these objectives, Metro evaluates its FTA-assisted contracts throughout the year and establishes contract specific DBE goals when subcontracting opportunities are available. The level of DBE subcontracting goals

vary based on the contract size, scope and availability of certified in the subcontracting industries identified for the project.

A DBE is a for-profit small business concern that is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged. In the case of a corporation, 51 percent of the stock is owned by one or more such individuals; and, whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

Prior to 2006, Metro used race-conscious (mandatory) DBE contract goals as the primary means to meet its overall goal for DBE participation. A mandatory goal requires bidders and proposers to meet the DBE contract goal for the contract to be responsive and considered for contract award. Should a bidder or proposer not meet the DBE goal, review of good faith efforts undertaken during the preparation of their bid or proposal to meaningfully solicit and team with DBE firms is evaluated based on good faith effort evaluation criteria to determine sufficient efforts were met to meet the goal, although the goal was not met.

In 2006, Metro discontinued the use of mandatory goals and good faith efforts from its DBE program as a result of the Ninth Circuit Court of Appeals ruling, May 2005, in the Western States Paving Co. vs. Washington State Department of Transportation (Western Sates) case which established new evidentiary standards necessary to constitutionally support the use of mandatory DBE goals on Federal contracts. The court held that a recipient's DBE program must have sufficient evidence of discrimination or its effects in its transportation contracting industry to justify the use of race-conscious mandatory goals. The ruling also required the narrowly tailoring of mandatory goals to provide remedial relief to only those DBE groups that have actually suffered discrimination in the recipient's transportation market.

In accordance with the ruling and FTA guidance, Metro transitioned from a DBE program using mandatory goals to a race-neutral DBE program. Under its race-neutral DBE program, Metro could no longer require bidders or proposers to meet the contract goal or use good faith efforts to obtain DBE participation. Rather, bidders and proposers could only be encouraged to meet the goal eliminating imposed sanctions if DBE commitments were not met.

The DBE program operated under a race-neutral program from 2006 through mid-2013. Below is a 5-year history of DBE participation during this period:

FFY09		FFY10		FFY11		FFY12		FFY13*	
Goal	Attainment	Goal	Attainment	Goal	Attainment	Goal	Attainment	Goal	Attainment
7%	2.46%	8%	4.37%	8%	11.23%	8%	13.87%	27%	8.74%

*Transitioned to mandatory goals

Change to Mandatory Program

In March 2013, the Metro Board approved the transition to a mandatory race-conscious DBE program with the adoption of a 27% DBE overall goal, of which 6.11% will be attained through race neutral means and 20.89% through race conscious means. The overall goal is for a triennial period for Federal Fiscal Years (FFY) 2013 through 2015 and applies to Federal Transportation Administration (FTA) funded contracts. This change resulted from statistical evidence obtained from the 2012 Metro Disparity Study.

Metro's Disparity Study update was conducted by Mason Tillman Associates, LTD. The Study began in December 2011; the final report was released in March 2013. The Study was conducted in response to the aforementioned Western States case to determine whether or not statistical evidence of discrimination exists with Metro transportation market area requiring the need for race conscious remedial action.

Study findings showed evidence of statistically-significant disparity in Metro contracting for the following DBE groups: African Americans, Asian Pacific Americans, Hispanic Americans, Subcontinent Asian Americans and Native Americans. As a result, race-conscious DBE contract goals have limited application to the above groups. Caucasian females were found to be over-utilized and are counted towards race-neutral DBE participation. In early April, Metro notified FTA of the Study results and limited application for review and approval. Metro received notification from FTA in May 2013 to move forward with the 27% overall goal, pending the Department of Transportation's review of the limited race-conscious application.

To date, Metro has established race-conscious goals on 27 contracts, including the Regional Connector and Westside Subway Extension design/build contracts. Of the 27 contracts, two (2) contracts have been awarded to date. Metro anticipates a steady increase of DBE participation as we progress through the three-year goal period. Metro staff continues to educate the contracting community on the new mandatory race-conscious contract provisions and other changes to the DBE program requirements. Should prime contractors fail to meet DBE contract goals, contract provisions allow for administrative sanctions for non-compliance.

Small Business Program

Metro's SBE Program was originally adopted by the Board in 1997 in response to the passage of Proposition 209 prohibiting preferential treatment in public contracting on the basis of race, sex, ethnicity, or national origin. The SBE program was in alternative to the minority and women business program based on race, primarily used in public contracting to ensure participation of minority and women-owned firms in public contracting. The SBE program allowed for contract goals to be set for small businesses, as opposed to

minority and women-owned businesses based on race or sex, now prohibited by state law. The SBE program is race and gender neutral.

Upon implementation, the SBE program allowed the use of mandatory SBE goals on negotiated procurements only, while voluntary goals continued to be applied to competitively bid contracts. Over several years, SBE program revisions were made to model the DBE program certification guidelines, prompt payment requirements and other provisions. In April 2011, the Metro Board adopted the SBE preference program authorized by state law, through Metro sponsored legislation, on competitively bid contracts with mandatory subcontracting goals. The Metro Board also approved a 30% SBE overall goal.

The SBE program's 5-year history from FY09 through FY13 is provided below:

FY09		FY10		FY11		FY12		FY13*	
Goal	Attainment	Goal	Attainment	Goal	Attainment	Goal	Attainment	Goal	Attainment
15%	23.41%	15%	4.86%	30%	9.01%	30%	22.51%	30%	11.71%

* Change from mandatory goals

In late 2012, Metro discontinued SBE mandatory goals for the preference program under counsel's advisement. Counsel advised that the state statute, as written, will require additional changes to carry out mandatory SBE goals on non-federal competitively bid contracts. Metro continues to implement the SBE preference program, but, meeting the SBE goal is not a condition of award. Metro recommends sponsorship of new legislation to make the required statute amendments.

DBE/SBE Certification

The Certification Unit fosters and facilitates increased participation by small businesses in Metro's contracting activities as well as preserves the integrity of each Metro small business program. Small businesses seek to be certified because certification provides opportunities for firms to more effectively compete in Metro procurements and achieve greater levels of participation in a wide range of Metro contracting opportunities.

Metro accepts applications from business owners seeking certification of their firms in both the DBE and SBE programs. It is important to note that Metro has its own SBE Program. The requirements for SBE certification are the same as for DBE certification – except that for Metro's SBE certification a firm need not be owned or controlled by a particular ethnic or gender group as the SBE program is race, ethnic and gender neutral.

Metro is one of three certifying agencies in Southern California under the California Unified Certification Program (CUCP), in accordance with 49 Code of Federal Regulations (CFR) Part 26, Department of Transportation's DBE Program. Metro's Certification Unit processes applications and makes recommendations to the CUCP to assess whether a small business' application for DBE certification should be approved, based on federal procedures and standards described in the regulations at 49 CFR Part 26. Certification staff members represent Metro at monthly CUCP meetings and quarterly CUCP Executive Committee meetings.

When a firm seeks certification it must define/categorize the nature of its business utilizing the North American Industrial Classification System (NAICS) codes which define each industry in which the firm's DBE/SBE participation will be recognized. A DBE/SBE certified firm is not DBE/SBE certified for all industries – only for those industries/NAICS codes in which certification are granted. These codes also allow Metro to target specific small businesses in their respective areas of expertise or service when procurements are in process. Lastly, in order to assist in the timely processing of applications, in October 2012, the MTA Board approved a six year not-to-exceed cumulative contract totaling \$2.6 million for DBE and SBE Certification Services.

In January, 2013 consultants were selected to assist with processing certifications. The utilization of the consultants will support the Certification Unit in processing applications. Since Metro is one of three certifying agencies, it not only certifies businesses seeking opportunities with Metro, but for other agencies as well. For instance, applications for DBE and SBE certification are received from businesses seeking opportunities with Expo and Foothill Construction Authorities, High Speed Rail, etc. The utilization of the consultants will help reduce cycle time and increase our pool of certified DBE/SBE firms.

NEXT STEPS

Metro has made significant strides to re-engage the small business community and other stakeholders in Metro's contracting process. Metro will undertake the following in FY14 to forge increased DBE and SBE participation:

- Recommend for Board adoption of a small business set-aside program on FTA funded contracts
- Partner with Department of Transportation to host a "Bonding Workshop and Small Business Development Day" on October 29, 2013 at Metro Headquarters. The workshop will provide training in bond readiness and access to capital
- System improvements for electronic reporting and validation of prime contractor payments to DBE and SBE subcontractors by

contract and on an aggregate basis using the Contract Information Management System (currently being designed)

- Continue to make appropriate small business and procurement process improvements through continued dialogue with the Transportation Business Advisory Council

Additional activities completed and planned in support of the DBE and SBE programs are further described in Attachment A.

Staff will monitor progress of DBE and SBE program changes and resulting impact to DBE and SBE participation and take necessary steps to enforce mandatory contract goals.

ATTACHMENT

A. Small Business Programs Activity Report

Prepared by: Tashai R. Smith, Director, Small Business Programs
(213) 922-2128

Michelle Lopes Caldwell

Michelle Lopes Caldwell
Chief Administrative Services Officer

Arthur T. Leahy

for Arthur T. Leahy
Chief Executive Officer

ATTACHMENT A

Current Small Business Program Activities

1	Conduct Monthly Transportation Business Advisory Council (TBAC) Meeting	Small business owners are encouraged to attend the monthly Transportation Business Advisory Council (TBAC) meeting held on the first Thursday of the month. TBAC advocates for small business owners to have increased access to Metro's procurement process and advises METRO on matters regarding Metro's DBE and SBE Programs.	Meeting minutes as well as all meeting materials are posted to Metro's TBAC website to ensure wide dissemination of relevant information to the small business community.
2	How to Do Business With Metro Workshops	The Business Outreach Unit develops, plans and facilitates the Monthly Workshop to present updated information on Metro's procurement process and to facilitate communication between Metro Executives, Procurement Staff and the Business Community. Approximately 150 individuals attend the monthly workshop.	Automated the event registration process to an on-line system designed to facilitate attendee registration and capture demographic and business data of participants. This allows for tailored workshops and targeted marketing.
3	Increased Overall DBE goal from 14.2% to 27% for FFY13 – FFY15	MTA Board approved staff recommendation	Filed FTA Limited Application and receive approval to implement DBE Race Conscious goal, effective April 2013.
4	Small Business Preference Program	Implemented the Small Business Preference Program in response to California Senate Bill 1341, shall take necessary steps to develop policies that encourages and promotes small business contracting opportunities on state/locally funded projects.	Bids are evaluated by subtracting a maximum 10% from each bid submitted from bidders that subcontract with SBE and meet all other solicitation requirements. A&E projects are exempt from preference.

ATTACHMENT A

No.	Objective	Description	Performance Results
5	Goals and Unbundled Opportunities on Large Contracts to facilitate the participation of DBE, SBE and other small business programs administered by Caltrans and Federal Railroad Administration (FRA)	In addition to major design build projects administered by Metro, Small Business Programs facilitated and worked collaboratively with Caltrans (FHWA) and FRA to implement and incorporate components of their Disadvantaged, Small, Disabled Veteran Business, and Micro Business into projects administered by MTA.	<p>Metro projects:</p> <ul style="list-style-type: none"> • Crenshaw/LAX • Regional Connector • Westside Subway Extension • Metro Express Lanes <p>FHWA and FRA funded projects include:</p> <ul style="list-style-type: none"> • Southern California Regional Interconnector (SCRIP) • Accelerated Regional Transportation Improvement Program (ARTI)
6	Shared Responsibility Program	Metro established a 25% small business target for each strategic business unit. Shared responsibility requires department executives to identify contracting opportunities for small business participation, inclusive of DBE, SBE and M/WBE firms. Departmental year-end performance is tracked and reported to the CEO.	From FY11 to FY13 the total small business participation has increased over 10%, as referenced in the attached spreadsheet.
7	DBE goal requirements for three major Measure R projects	Established DBE contracts goals for both Design and Construction phases for maximum opportunities. Metro projects: <ul style="list-style-type: none"> • Crenshaw/LAX • Regional Connector • Westside Subway Extension 	As a result of DBE program changes, established race-conscious DBE mandatory goals for Regional Connector and Westside Subway

ATTACHMENT A

8	Contract Look Aheads	In an effort to give the small business community the earliest possible notification about potential contract opportunities, DEOD prepares and distributes a monthly contract "look-ahead" report, forecasting upcoming opportunities. The report highlights specific areas of potential subcontracting opportunity, and established DBE/SBE contract goals.	The report is provided in hard copy to TBAC, and sent electronically to designated organizational representatives along with the most recent list of current Metro bid and request for proposal solicitations for distribution to their constituents.
In The Works			
9	Contract Information Management System (CIMS)	DEOD is currently undergoing CIMS Phase 11 which is solely focused on DEOD functions.	Ultimately, CIMS will increase efficiency, facilitate contract compliance, certification, PLA/CCP, labor compliance reporting, and enable better communication with other user departments.
10	Small Business Enterprise (SBE) Set Aside Program	Implementation of the SBE set aside is an element of the requirements of 49 CFR Part 26.39. Race-neutral measures will be utilized to assist in achieving DBE participation to the maximum feasible extent.	DEOD is working to formulate a policy to reserve certain types of federally-funded contracts exclusively for competition among SBEs.
11	Disabled Veterans Business Enterprise (DVBE) Program	The program will focus its efforts on developing and implementing a Disabled Veteran Business Enterprise (DVBE) program.	Veterans, some whom are business owners, and others who plan to start a business, will benefit from this program by obtaining certification and potentially increasing their business opportunities.

ATTACHMENT A

12	Small Business Academy	The Metro Small Business Academy will include various curriculums from putting together a proposal, training on Metro Procurement and DEOD processes as well as relevant topic-specific training useful in small business development.	The goal of the Academy is to increase small business participation in all aspects of Metro contracting.
13	Acknowledging Successes	Implement SBE Champion Initiative	By the end of this fiscal year, DEOD will host a reception for small businesses who have been awarded a contract or subcontract on a Metro project. It is our hope to establish this congratulatory reception as an annual event.

