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EXECUTIVE MANAGEMENT AND AUDIT COMMITTEE
SEPTEMBER 21, 2006

SUBJECT: DEPARTMENT OF TRANSPORTATION OVERALL GOAL

ACTION: APPROVE DEPARTMENT OF TRANSPORTATION OVERALL GOAL

RECOMMENDATION

Approve 13% as the Federal Transit Administration (FTA) Disadvantaged Business Enterprise (DBE) Overall Goal for Federal Fiscal Year 2007 (FFY07).

ISSUE

In accordance with the U.S. Department of Transportation (DOT) Disadvantaged Business Enterprise (DBE) Program requirements found in 49 Code of Federal Regulations (CFR) Part 26, grant recipients of the Federal Transit Administration (FTA) who reasonably anticipate awarding \$250,000 or more in prime contracts (excluding transit vehicle purchases) for the upcoming fiscal year, are required to develop an overall goal for the participation of DBEs in FTA-assisted contracts.

FTA recipients are required to submit their overall goal to FTA by August 1. Metro requested and was granted an extension from FTA to submit its FFY07 overall goal by October 1, 2006.

Metro's DBE program and overall goal is administered to provide a level playing field on which DBEs can compete fairly for FTA-assisted contracts and to help remove barriers that hinder the participation of DBEs in Metro FTA-assisted contracts.

POLICY IMPLICATIONS

As part of the overall goal development process, recipients are required to review projected federal-aid dollars that are programmed to be expended in the upcoming fiscal year. The Diversity & Economic Opportunity Department (DEOD) conducted a review of Metro's Fiscal Year 2007 (FY07) capital and operating budget to determine the projected number of contracts, type of work, and dollar amounts of contracting opportunities that will be funded, in whole or in part, with FTA-assistance. DEOD reviews all "new" contracts to be awarded in the upcoming fiscal year, which may include carryover contracts that were not awarded in the previous fiscal year. DEOD met with Metro Strategic Business Units (SBUs) as part of the Shared Responsibility Program to obtain information concerning the federal-assisted contracts each SBU anticipates awarding in the upcoming fiscal year.

The FY07 budget comprises a total of \$15.4* million in “new” DOT-assisted contracts. Of this amount, Metro anticipates awarding \$11.5 million with potential DBE opportunities. The projected DOT-assisted contract expenditures are shown below:

DOT Administration	DOT-Assisted Contract Dollars*	New DOT-Assisted Contracts Dollars w/ Potential DBE Opportunities	# of New DOT-Assisted Contracts w/ Potential DBE Opportunities
FTA	\$15,452,330	\$11,553,346	29

*Excludes transit vehicle manufacturer (TVM) purchases, Metro labor/overhead costs and other non- contractible items.

The list of projected FTA-assisted contracts with potential DBE opportunities is shown in Attachment #1.

Overall Goal Methodology

The overall goal is based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on Metro FTA-assisted contracts. Metro followed the two-step goal setting methodology prescribed in 49 CFR 26.45. The first step was to develop a base figure for the relative availability of DBEs. The relative availability of DBEs is the total number of ready, willing and able DBE firms divided by the total number of all firms for the types of contracts Metro anticipates awarding within its geographic procurement market. The second step required an examination of all evidence available in the market area to determine what adjustment, if any, was needed to the base figure to arrive at an overall goal.

Geographic Procurement Market

An analysis of Metro’s geographic procurement market revealed that Metro solicits participation from eight (8) counties, including Los Angeles, Orange, Riverside, San Bernardino, Ventura, Alameda, San Diego, Santa Clara. The geographic procurement market was used for both the numerator (DBEs) and denominator (all businesses) within the area from which Metro draws the substantial majority of its contract competition.

DBE Availability

Metro conducted an analysis to determine the number of certified DBEs that were available to participate as contractors and subcontractors in the projected contracting opportunities. The data source used for establishing availability of ready, willing and able DBE firms was derived from the California Unified Certification Program (CUCP) database of certified firms. The certified firms identified as available to perform work in various North American Industry Classification System (NAICS) work categories were matched with Metro subcontracting opportunities. The total number of certified available DBE firms, supplemented by certified available minority-owned (MBE) and women-owned (WBE) firms totaling 4,378 as shown in Attachment #2 was used in the goal setting formula used to arrive at the base figure.

Total Business Availability

Metro conducted a similar analysis to determine availability of all businesses within the same geographic market area. The U.S. Census Bureau 2003 County Business Pattern (CBP) was used to determine availability of all businesses within the NAICS categories in which Metro contracts. The denominator of 34,578 used to arrive at the base figure, shown in Attachment #2, represents the total number of businesses available in the market area.

Calculation and Adjustment of Base Figure

To calculate the 12% base figure shown in Attachment #2, the number of available DBEs per Work Category was divided by the number of all available businesses in the geographic market and weighted against the percentage of FY07 projected FTA funds. After calculating the base figure, the DBE capacity and historical overall goal attainment was examined to determine what adjustment, if any was needed to the base figure in order to arrive at the overall goal. A careful analysis of past attainment against actual goal for the past two years revealed on average, there was one percent (1%) difference. With this data, the baseline figure was adjusted by 1%, resulting in a proposed overall goal of 13%, compared to an equivalent figure of 8% for FFY06.

OPTIONS

There is no viable option to this recommendation. In accordance with 49 CFR 26.21, FTA grantees receiving planning, capital and/or operating assistance who will award prime contracts (excluding transit vehicle purchases) exceeding \$250,000 in FTA funds in a Federal fiscal year must implement a DBE Program and establish an overall goal for DBE participation.

FINANCIAL IMPACT

Funding to support DBE Program staffing is included in the FY07 budget in cost center #2130 for multiple capital and non-capital projects. For activity that impacts capital projects, funding has been included in the life-of-budget for each project.

DISCUSSION

Breakout of Estimated Race-Neutral and Race-Conscious Participation

In accordance with 49 CFR 26.35(f)(3), Metro is required to breakout the portion of its overall goal that it projects to meet through race-neutral and race-conscious means. Metro is to meet the maximum feasible portion of its overall goal by first using race-neutral means for facilitating DBE participation.

Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE goal, or even if there is a DBE goal, wins a subcontract

from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low bid system to award subcontracts).

Any remaining portion of the overall goal that Metro does not meet with race-neutral means is to be achieved by using race-conscious means which is the use of contract goals on federal-assisted contracts that have subcontracting opportunities. In years past, Metro has strived to achieve its overall DBE goal by using both race-neutral means and contract goals, with contract goals resulting in the highest percentage of DBE participation on Metro contracts.

Ninth Circuit Court Decision

In May 2005, a decision by the United States Court of Appeals for the Ninth Circuit (“Court”) in the *Western States Paving Co. v. State of Washington Department of Transportation* case held that in order to use race-conscious measures (contract goals) to meet overall DBE goals, recipients must establish that there is sufficient evidence of (business) discrimination or its effects in its transportation contracting industry to justify the use of contract goals.

The Court upheld the constitutionality of the DBE Program on its face, by confirming Congress’ compelling interest and support for implementation of narrowly tailored DBE Program regulations used to remedy nationwide discrimination. However, the Court has said that that States and local agencies cannot rely on the national compelling interest to support the use of contract goals without sufficient evidence of discrimination in the local market. As such, the nine states and local agencies, within the court’s jurisdiction, must now establish local compelling interest by documenting sufficient evidence of discrimination or its effects in order to support the continued use of contract goals, of which the use must be limited to groups that have suffered discrimination.

Race-Neutral Overall Goal

The FTA issued guidance to its affected grantees that must now comply with the Court’s *Western States Paving Co.* decision. In compliance with this guidance, Metro examined the evidence of discrimination and its effects from available information on hand and evaluated if such evidence addressed the Court’s decision. Staff has determined that Metro does not have sufficient evidence of discrimination or its effects to meet the new evidentiary standard set by the Court to support the continued use of race-conscious goals as a means to achieve its overall goal. Hence, Metro will only use race-neutral means to achieve the recommended FFY07 overall goal.

NEXT STEPS

Public Participation

In accordance with 49 CFR 26.45(g), Metro must provide for public participation when establishing its overall goal. The overall goal must be made available for public inspection for a period of 30 days and made available for public comment for 45 days. Metro published

a notice announcing the recommended overall goal and methodology on Metro's Doing Business webpage.

The overall goal and methodology was also advertised July 27, 2006 – August 3, 2006 in the following minority and women focused media and general newspapers: LA Times, Daily News, La Opinion, Eastern Group Publications, Rafu Shimpo, Chinese Daily, LA Watts Times, Small Business Exchange, and the APTA Passenger Transport.

Metro has issued a letter to the small business and contracting community and the Transportation Business Advisory Council (TBAC) to advise of Metro's intent to suspend the use of contract goals, effective October 1, 2006, as a means to achieve its overall goal. An explanation of the *Western States Paving Co.* case and the use of race-neutral means is being communicated to the public as it relates to Metro federal-assisted contracts.

Metro conducted a public hearing on Wednesday, August 23, 2006 at Metro Headquarters to receive public comments concerning the use of race-neutral means to achieve the recommended goal and comments and any verbal and/or written statements regarding past or current discrimination. The public comment period began on July 28, 2006 and ended September 15, 2006. DEOD will review comments received through the public participation process and will evaluate if they warrant any adjustments to the overall goal and will provide an information update the Board via Board Box.

Following Board approval, the overall goal will be submitted to FTA by October 1. The recommended FFY07 overall goal will be effective October 1, 2006 – September 30, 2007.

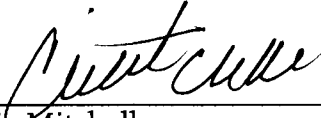
Disparity Study

In compliance with FTA guidance, Metro has begun the planning process to hire a consultant to conduct an independent availability and disparity study of Metro's transportation market industry to determine if remedial measures such as contract goals are necessary to correct any demonstrated existence of discrimination.

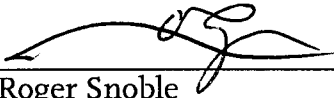
ATTACHMENT(S)

1. FFY07 FTA-Assisted Expenditures Projections by SBU
2. FFY07 Goal Methodology Calculation

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Attachment 1 – FFY07 New FTA-Assisted Expenditures Projections by Strategic Business Unit

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Metro SBU	Project #	Project Name	Projected # of FTA-Assisted Contracts with DBE Opportunities	Projected FTA Contracting \$ with DBE Opportunities
Business Services	100040	Administration - Rail Operations	2	\$3,004,000
Business Services Business Unit Total				
Communications	100040	Administration-Rail Operations	1	\$66,500
	210078	Metro Connections	1	\$930,553
	300011	Bus Operations	1	\$50,000
	300022	Rail Operations - Blue Line	4	\$184,000
	300033	Rail Operations - Green Line	1	\$44,000
	300044	Rail Operations - Red Line	2	\$114,000
	405547	Rideshare Services	1	\$500,000
	420004	MTA Sponsored CFP	1	\$395,000
	800088	Eastside Light Rail Transit	1	\$246,000
Communications Business Unit Total				
Metro Operations	202206	Bus Facility Improvement-Bus Division CCTV	1	\$390,000
	202207	Bus Facility Improvement - Kiosk Orange Line	2	\$500,000
	204004	ROC Reconfiguration	1	\$295,000
	204062	Rail Facility Enhancements - MRL Var Signs	2	\$2,500,000
	204063	Rail Facility Enhancements - Harden the ROC	2	\$694,000
	205004	Rail Security Improvements	1	\$800,000
	205014	Light Rail Train Tracking	1	\$230,000
	300033	Rail Operations - Green Line	2	\$286,267
	300044	Rail Operations - Red Line	1	\$228,878
	300055	Gold Line	1	\$95,148
Metro Operations Business Unit Total				
Construction Business Unit Total			0	\$0
Countywide Planning Business Unit Total			0	\$0
OTHER DEPARTMENTS:				
Board Relation, Policy, Research & Library Service Total			0	\$0
Economic Development Total			0	\$0
Management Audit Services Total			0	\$0
Agency-wide			29	\$11,553,346

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Attachment 2 – FFY2007 Methodology for Calculating FTA Annual DBE Goal

Work Category	Description of Work	NAICS	Projected FTA \$ with contracting opportunities in each category	Weighted % of FTA Funding by Work Category
A	Professional Services	NAICS 23, 33, 54, 56 and 71	\$ 7,908,846	68.46%
B	Equipment	NAICS 23, 33, 51 and 56	\$ 3,448,000	30.19%
C	Materials/Supplies	NAICS 42, 45, 54 and 61	\$ 156,000	1.35%
Total			\$ 11,553,846	100%

Goal Methodology

$$\begin{aligned}
 \text{Base Figure} &= \text{Number of Ready, Willing, and Able DBEs (NAICS)} \\
 &\quad \text{Number of All Ready, Willing, and Able Firms (CBP)} \\
 \text{Base Figure} &= \frac{(68.46\%)\text{ DBEs in A}}{\text{Firms in A}} + \frac{(30.19\%)\text{ DBEs in B}}{\text{Firms in B}} + \frac{(1.35\%)\text{ DBEs in C}}{\text{Firms in C}} \\
 \text{Base Figure} &= \frac{(68.46\%)\ 3,895}{26,832} + \frac{(30.19\%)\ 340}{5,885} + \frac{(1.35\%)\ 143}{1,861} \\
 \text{Base Figure} &= (.6846)(.1452) + (.3019)(.0578) + (.0135)(.0768) \\
 \text{Base Figure} &= .0994 + .0174 + .0010 \\
 \text{Base Figure} &= .1178 \times 100 = 11.78 \\
 \text{Base Figure} &= 12\%^*
 \end{aligned}$$

Annual Goal Components

$$\begin{aligned}
 \text{Annual Goal} &= \text{Base Figure} + \text{Adjusted Figure} \\
 \text{Annual Goal} &= 12\% + 1\% = 13\% \\
 \text{Race Conscious} &= 0\% \text{ DBE participation achieved through contract-specific goals} \\
 \text{Race Neutral} &= 13\% \text{ DBE participation achieved through race-neutral measures}
 \end{aligned}$$



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LEGEND	
CBP	2003 County Business Pattern (Census)
DBE	Disadvantaged Business Enterprise
NAICS	North American Industry Classification System

*Base Figure was rounded to the nearest percent.