

BEFORE THE COUNCIL OF THE
METROPOLITAN SERVICE DISTRICT

FOR THE PURPOSE OF REVISING THE) ORDINANCE NO. 86-197
DISADVANTAGED BUSINESS PLAN)

THE COUNCIL OF THE METROPOLITAN SERVICE DISTRICT HEREBY ORDAINS:

That the Metropolitan Service District (Metro) Disadvantaged Business Plan, incorporated in Metro Code Sections 2.04.100 through 2.04.270, is amended as follows:

2.04.100 Disadvantaged Business Program, Purpose and Authority:

(a) It is the purpose of this ordinance to establish and implement a program to encourage the utilization by Metro of disadvantaged and women-owned businesses.

(b) This ordinance is adopted pursuant to 49 CFR 23 and is intended to comply with all relevant federal regulations. Federal regulation 49 CFR 23 and its amendments implement section (105)(f) of the Surface Transportation Assistance Act of 1982 relating to the participation by Minority Business Enterprises in Department of Transportation programs.

(c) This ordinance shall be known and may be cited as the "Metro Disadvantaged Business Program," hereinafter referred to as the "Program."

(d) This ordinance supersedes the Metro "Minority Business Enterprise (MBE) Program" dated October 1980 and amended December 1982.

(Ordinance No. 83-165, Sec. 1; amended by Ordinance No. 84-181, Sec. 1)

2.04.120 Policy Statement:

(a) Through this Program, Metro:

- (1) expresses its strong commitment to provide maximum opportunity to disadvantaged and women-owned businesses in contracting;
- (2) informs all employees, governmental agencies and the general public of its intent to implement this policy statement; and
- (3) assures conformity with applicable federal regulations as they exist or may be amended.

(b) It is the policy of Metro to provide equal opportunity to all persons to access and participate in the projects, programs and services of Metro. Metro and Metro contractors will not discriminate against any person or firm on the basis of race, color, national origin, sex, age, religion, physical handicap, political affiliation or marital status.

(c) The policies, practices and procedures established by this ordinance shall apply to all Metro departments and project areas except as expressly provided in this ordinance.

(d) The objectives of the program shall be:

- (1) to assure that provisions of this ordinance are adhered to by all Metro departments, employees, subrecipients and contractors.
- (2) to initiate and maintain efforts to increase program participation by disadvantaged businesses.

(e) Metro accepts and agrees to the statements of 49 CFR §23.43(a)(1) and (2), and said statements shall be included in all agreements with subrecipients and in all DOT assisted contracts between Metro or subrecipients and any contractor. (Ordinance No. 83-165, Sec. 2)

2.04.130 Definitions: For purposes of this Ordinance, the following definitions shall apply:

- (1) APPLICANT -- one who submits an application, request or plan to be approved by a DOT official or by Metro as a condition to eligibility for Department of Transportation (DOT) financial assistance; and "application" means such an application, request or plan.
- (2) CONSTRUCTION CONTRACT -- means a contract for construction of buildings or other facilities, and includes reconstruction, remodeling and all activities which are appropriately associated with a construction project.
- (3) CONTRACT -- means a mutually binding legal relationship or any modification thereof obligating the seller to furnish supplies or services, including construction, and the buyer to pay for them. For purposes of this ordinance a lease or a purchase order of \$500.00 or more is a contract.
- (4) CONTRACTOR -- means the one who participates, through a contract or subcontract, in the Program and includes lessees.
- (5) DEPARTMENT or "DOT" -- means the United States Department of Transportation, including its operating elements.

- (6) DOT ASSISTED CONTRACT -- means any contract or modification of a contract between Metro and a contractor which is paid for in whole or in part with DOT financial assistance or any contract or modification of a contract between Metro and a lessee.
- (7) DOT FINANCIAL ASSISTANCE -- means financial aid provided by DOT or the United States Railroad Association to a recipient, but does not include a direct contract. The financial aid may be provided directly in the form of actual money, or indirectly in the form of guarantees authorized by statute as financial assistance services of Federal personnel, title or other interest in real or personal property transferred for less than fair market value, or any other arrangement through which the recipient benefits financially, including licenses for the construction or operation of a Deep Water Port.
- (8) DISADVANTAGED BUSINESS or DBE -- means a small business concern:
- (a) which is at least 51 percent owned by one or more socially and economically disadvantaged individuals, or, in the case of any publicly-owned business, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals; and
 - (b) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.
- (9) JOINT VENTURE -- is defined as an association of two or more businesses to carry out a single business enterprise for profit for which purpose they combine their property, capital, efforts, skills and knowledge.
- (10) LABOR AND MATERIALS CONTRACT -- is a contract including a combination of personal service and provision of materials other than construction contracts. Examples may include plumbing repair, computer maintenance or electrical repair, etc.
- (11) LESSEE -- means a business or person that leases, or is negotiating to lease, property from a recipient or the Department on the recipient's or Department's facility for the purpose of operating a transportation-related activity or for the provision of goods or services to the facility or to the public on the facility.
- (12) PERSONAL SERVICES CONTRACT -- means a contract for services of a personal or professional nature.
- (13) PROCUREMENT CONTRACT -- means a contract for the purchase or sale of supplies, materials, equipment, furnishings or other goods not associated with a construction or other contract.

- (14) RECIPIENT -- means any entity, public or private, to whom DOT financial assistance is extended, directly or through another recipient for any program.
- (15) SMALL BUSINESS CONCERN -- means a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto.
- (16) SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUALS OR DISADVANTAGED INDIVIDUALS -- means those individuals who are citizens of the United States (or lawfully admitted permanent residents) and who are Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans or Asian-Indian Americans and any other minorities or individuals found to be disadvantaged by the Small Business Administration pursuant to section 8(a) of the Small Business Act. Certifying recipients shall make a rebuttable presumption that individuals in the following groups are socially and economically disadvantaged. Certifying recipients also may determine, on a case-by-case basis, that individuals who are not a member of one of the following groups are socially and economically disadvantaged:
- (a) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;
 - (b) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race;
 - (c) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
 - (d) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific, and the Northern Marianas; and
 - (e) "Asian-Indian Americans," which includes persons whose origins are from India, Pakistan, and Bangladesh.
- (17) WOMEN-OWNED BUSINESS ENTERPRISE or WBE -- means a small business concern, as defined pursuant to section 3 of the Small Business Act and implementing regulations which is owned and controlled by one or more women. "Owned and controlled" means a business which is at least 51 percent owned by one or more women or, in the case of a publicly owned business, at least 51 percent of the stock of which is owned by one or more women, and whose management and

daily business operations are controlled by one or more women.

(Ordinance No. 165, Sec. 3; amended by Ordinance No. 84-181, Sec. 2)

2.04.140 Notice to Contractors, Subcontractors and Subrecipients:

Contractors, subcontractors and subrecipients of Metro accepting contracts or grants under the Program shall be advised that failure to carry out the requirements set forth in 49 CFR 23.43(a) shall constitute a breach of contract and, after notification by Metro, may result in termination of the agreement or contract by Metro or such remedy as Metro deems appropriate. (Ordinance No. 83-165, Sec. 4)

2.04.150 Liaison Officer:

(a) The Executive Officer shall by executive order, designate a Disadvantaged Business Liaison Officer and, if necessary, other staff adequate to administer the Program. The Liaison Officer shall report directly to the Executive Officer on matters pertaining to the Program. (Ordinance No. 83-165, Sec. 5)

(b) The Liaison Officer shall be responsible for developing, managing and implementing the program, and for disseminating information on available business opportunities so that disadvantaged businesses are provided an equitable opportunity to bid on Metro contracts. In addition to the responsibilities of the Liaison Officer, all department heads and program managers shall have responsibility to assure implementation of the Program.

2.04.160 Directory:

A directory of certified disadvantaged businesses and certified women-owned businesses shall be maintained by the Liaison Officer to facilitate identifying disadvantaged and women-owned businesses with capabilities relevant to general contracting requirements and particular solicitations. The directory shall be available to contract bidders and proposers in their efforts to meet Program requirements. (Ordinance No. 83-165, Sec. 6)

2.04.170 Minority-Owned Banks: Metro will seek to identify minority-owned banks within the policies adopted by the Metro Council and make the greatest feasible use of their services. In addition, Metro will encourage prime contractors, subcontractors and consultants to utilize such services by sending them brochures and service information on certified DBE/WBE banks. (Ordinance No. 83-165, Sec. 7; amended by Ordinance No. 84-181, Sec. 3)

2.04.180 Affirmative Action and Equal Opportunity Procedures:

Metro shall use affirmative action techniques to facilitate disadvantaged and women-owned business participation in contracting activities. These techniques include:

(a) Arranging solicitations, time for the presentation of bids, quantities specifications, and delivery schedules so as to facilitate the participation of disadvantaged and women-owned businesses.

(b) The Metropolitan Service District will refer businesses in need of management assistance to established agencies that provide direct management assistance to business.

(c) Carrying out information and communications programs on contracting procedures and specific contracting opportunities in a timely manner, with such programs being bilingual where appropriate.

(d) Distribution of copies of the program to organizations and individuals concerned with DBE/WBE programs.

(e) Periodic reviews with department heads in order to insure that they are aware of the program goals and desired activities on their part to facilitate reaching the goals.

(f) Monitor and insure that Disadvantaged and Women Business Enterprise planning centers and likely DBE/WBE contractors are receiving requests for bids, proposals and quotes. Notify DBE/WBE planning centers of awards to all contractors.

(g) Study the feasibility of certain contracts and procurements being set aside for DBE/WBE participation. (Ordinance No. 83-165, Sec. 8, amended by Ordinance No. 84-181, Sec. 4)

(h) Distribution of lists to potential vendors of the types of goods and services which Metro regularly purchases.

(i) Advising potential vendors that Metro does not certify DBE/WBEs, and directing them to acceptable certifying agencies.

(j) Specifying purchases by generic title rather than specific brand name whenever feasible.

2.04.190 Certification of Disadvantaged Business Eligibility:

(a) To participate in the Program as a disadvantaged or women-owned business, contractors, subcontractors and joint ventures must have been certified pursuant to 49 CFR §23.51 through §23.55.

(b) Metro will not perform certification or recertification of businesses or consider challenges to socially and economically disadvantaged status. Rather, pursuant to 49 CFR §23.45(f) and 49 CFR §23.51(c)(2) and (3), Metro will rely upon the certification and recertification processes of the City of Portland, Oregon, the State of Oregon (ODOT), the metropolitan area transit district (Tri-Met), and the Small Business Administration (SBA) and will utilize the certification lists of said agencies in determining whether a prospective contractor or subcontractor is certified as a disadvantaged business. A prospective contractor or subcontractor must be

certified as a disadvantaged or women-owned business by any one of the above agencies, and appear on the respective certification list of said agency, prior to the award of a contract in order to be considered by Metro to be an eligible disadvantaged or women-owned business and be counted toward meeting goals. Metro will adhere to the Recertification Rulings resulting from 105(f).

(c) Prospective contractors or subcontractors which have been denied certification by one of the above agencies may appeal such denial to the certifying agency pursuant to 49 CFR §23.55 and applicable agency regulations or they may file appeals directly to the U. S. Department of Transportation. However, such appeal shall not cause a delay in any contract award by Metro. Decertification procedures will comply with the requirements of Appendix A "Section by Section Analysis" of the July 21, 1983, Federal Register, Vol. 45, No. 130, p. 45287, and will be administered by the agency which granted certification.

(d) Challenges to certification or to any presumption of social or economic disadvantage, as provided for in 49 CFR 23.69, shall conform to and be processed under the procedures prescribed by each agency indicated in paragraph (b) of this section. That challenge procedure provides that:

"(1) Any third party may challenge the socially and economically disadvantaged status of any individual (except an individual who has a current 8(a) certification from the Small Business Administration) presumed to be socially and economically disadvantaged if that individual is an owner of a firm certified by or seeking certification from the recipient as a disadvantaged business. The challenge shall be made in writing to the recipient.

"(2) With its letter, the challenging party shall include all information available to it relevant to a determination of whether the challenged party is in fact socially and economically disadvantaged.

"(3) The recipient shall determine, on the basis of the information provided by the challenging party, whether there is reason to believe that the challenged party is in fact not socially and economically disadvantaged.

"(i) If the recipient determines that there is not reason to believe that the challenged party is not socially and economically disadvantaged, the recipient shall so inform the challenging party in writing. This terminates the proceeding.

"(ii) If the recipient determines that there is reason to believe that the challenged party is not socially and economically disadvantaged, the recipient shall begin a proceeding as provided in paragraphs [49 CFR 23.69] (b), (4), (5) and (6) of this paragraph.

"(4) The recipient shall notify the challenged party in writing that his or her status as a socially and economically disadvantaged individual has been challenged. The notice shall identify the challenging party and summarize the grounds for the challenge. The notice shall also require the challenged party to provide to the recipient, within a reasonable time, information sufficient to permit the recipient to evaluate his or her status as a socially and economically disadvantaged individual.

"(5) The recipient shall evaluate the information available to it and make a proposed determination of the social and economic disadvantage of the challenged party. The recipient shall notify both parties of this proposed determination in writing, setting forth the reasons for its proposal. The recipient shall provide an opportunity to the parties for an informal hearing, at which they can respond to this proposed determination in writing and in person.

"(6) Following the informal hearing, the recipient shall make a final determination. The recipient shall inform the parties in writing of the final determination, setting forth the reasons for its decision.

"(7) In making the determinations called for in paragraphs [49 CFR 23.69] (b)(3)(5) and (6) of this paragraph, the recipient shall use the standards set forth in Appendix C of this subpart.

"(8) During the pendency of a challenge under this section, the presumption that the challenged party is a socially and economically disadvantaged individual shall remain in effect."
49 CFR 23.69. (Ordinance No. 83-165, Sec. 9; amended by Ordinance No. 84-181, Sec. 5)

2.04.200 Annual Disadvantaged Business Goals:

(a) The Metro Council shall, by resolution each [June] September, establish annual disadvantaged business goals, and separate WBE goals, for the ensuing fiscal year. Such annual goals shall be established separately for construction contracts, labor and materials contracts, personal services contracts, procurement contracts, and DOT assisted contracts regardless of type.

(b) Annual goals will be established taking into consideration the following factors:

- (1) projection of the number and types of contracts to be awarded by Metro;
- (2) projection of the number, expertise and types of disadvantaged businesses likely to be available to compete for the contracts;

(3) past results of Metro's efforts under the Program;
and

(4) existing goals of other local DOT recipients and
their experience in meeting these goals.

(c) Annual goals must be approved by the United States Department of Transportation. 49 CFR §23.45(g)(3).

(d) Metro will publish notice that the overall goals are available for inspection when they are submitted to DOT or other federal agencies. They will be made available for 30 days following publication of notice. Public comment will be accepted for 45 days following publication of the notice. (Ordinance No. 83-165, Sec. 10)

2.04.210 Contract Goals:

(a) The annual goals established for construction contracts shall apply as individual contract goals for construction contracts over \$50,000 and shall be met pursuant to Section 2.04.210(b) of this chapter.

(b) Contract goals for construction contracts over \$50,000 may be complied with by prime contractors only by subcontracting a percentage of the contract work, equal to or exceeding the contract goal, to one or more disadvantaged business subcontractors or by showing of good faith efforts to comply pursuant to Section 2.04.230 of this chapter.

(c) The Liaison Officer may set a contract goal for any contract other than construction contracts over \$50,000. The setting of such contract goal shall be made in writing prior to the solicitation of bids for such contract. Contract goals for contracts other than construction contracts over \$50,000 shall be set at the discretion of the Liaison Officer and shall not be tied to the annual goal for such contract type. Contract goals for such contracts may be complied with pursuant to Section 2.04.260(a)(2) or Section 2.04.230 of this chapter. (Ordinance No. 83-165, Sec. 11)

2.04.220 Contract Award Criteria:

(a) Efforts will be made to assure that prime contracts are awarded to competitors that meet applicable disadvantaged and women-owned business goals. In order to be eligible for award of contracts containing a [disadvantaged business] DBE/WBE goal, prime contractors must either meet or exceed the specific goal for disadvantaged and women-owned businesses, or prove that they have made good faith efforts to meet the goal.

(b) All solicitations on contracts for which goals have been established shall require all bidders/proposers to submit with their bids and proposals a statement indicating that they will comply with the contract goal. To document the intent to meet the goals, all

bidders shall complete and endorse a Disadvantaged Business Utilization form and include said form with bid documents. The form shall be provided by Metro with bid solicitations.

(c) Agreements between a bidder/proposer and a [disadvantaged business] DBE/WBE in which the [disadvantaged business] DBE/WBE promises not to provide subcontracting quotations to other bidders/proposers are prohibited.

(d) Apparent low bidders who indicate compliance with the goal shall, within five (5) working days of bid opening (or bid submission date when no public opening is had), submit to Metro signed Letters of Agreement between the bidder and [disadvantaged business] DBE/WBE subcontractors and suppliers to be utilized in performance of the contract. A Form Letter of Agreement will be provided by Metro.

(e) An apparent low bidder who states in its bid that the goal will be met but who fails to meet the goal or fails to provide Letters of Agreement with [disadvantaged businesses] DBE/WBE firms in a timely manner, may, in lieu thereof, submit evidence of good faith efforts to meet the goal as provided in paragraph (f) of this section.

(f) Apparent low bidders who will not meet the goal but who state in their bid that they have made good faith efforts to meet the goal shall within five (5) working days of bid opening (or bid submission date when no public opening is had) submit to Metro evidence of such good faith efforts. Evidence of good faith efforts, and Metro's determination of the sufficiency of such efforts, shall be in accordance with Section 2.04.230 of this chapter.

(g) In very limited situations the Liaison Officer may in writing, at his/her discretion, extend the five (5) working day deadline noted in paragraphs (d) and (f) above to allow for additional positive efforts to utilize certified disadvantaged or women-owned businesses prior to contract award. Such extensions shall not exceed a total of ten (10) additional working days.

(h) Except as provided in paragraph (i) of this section, apparent low bidders who state in their bids that they will meet the goals or will show good faith efforts to meet the goals, but who fail to comply with paragraph (d) or (f) of this section, shall have their bids rejected and shall forfeit any required bid security or bid bond. In that event, the next lowest bidder shall, within five days of notice of such ineligibility of the low bidder, submit evidence of goal compliance or good faith effort as provided above. This process shall be repeated until a bidder is determined to meet the provisions of this section or until Metro determines that the remaining bids are not acceptable because of amount of bid or otherwise.

(i) The Liaison Officer, at his or her discretion, may waive minor irregularities in a bidder's compliance with the requirements of this section. (Ordinance No. 83-165, Sec. 12)

2.04.230 Determination of Good Faith Efforts:

(a) Pursuant to Section 2.04.220 of this chapter, bidders on contracts to which [disadvantaged business] DBE/WBE goals apply must, to be eligible for contract award, comply with the applicable contract goal or show that good faith efforts have been made to comply with the goal. Good faith efforts should [minimally comply with] include at least the following standards established in the amendment to 49 CFR [23] §23.45(h), Appendix A, [items (i) through (g),] dated Monday, April 27, 1981.

(b) A showing of good faith efforts must include written evidence of at least the following:

- (1) Advertisement in a trade association newsletter or general circulation newspaper and through a minority-owned newspaper or minority-owned trade publication at least 10 days before bids or proposals are due.
- (2) Written notification to no less than three (3) [disadvantaged businesses] DBE/WBE firms that their interest in the contract is solicited. Such efforts should include the segmenting of work to be sub-contracted to the extent consistent with the size and capability of [minority-owned] DBE/WBE firms in order to provide reasonable subcontracting opportunities. Each bidder should send solicitation letters inviting quotes or proposals from [disadvantaged businesses] DBE/WBE firms, segmenting portions of the work and specifically describing, as accurately as possible, the portions of the work for which quotes or proposals are solicited from [minority] DBE/WBE firms and encouraging inquiries for further details. Letters that are general and do not describe specifically the portions of work for which quotes or proposals are desired are discouraged, as such letters generally do not bring responses. It is expected that such letters will be sent in a timely manner so as to allow [disadvantaged firms] DBE/WBE sufficient opportunity to develop quotes or proposals for the work described.
- (3) Evidence of follow-up to initial solicitations of interest, including the following:
 - A. the names, addresses, telephone numbers of all [disadvantaged businesses] DBE/WBE contacted;
 - B. a description of the information provided to [disadvantaged businesses] DBE/WBE firms regarding the plans and specifications for portions of the work to be performed; and

- C. a statement of the reasons for non-utilization of [disadvantaged businesses] DBE/WBE firms, if needed to meet the goal.

(Ordinance No. 83-165, Sec. 13; amended by Ordinance No. 84-181, Sec. 6)

2.04.240 Replacement of Disadvantaged Business Subcontractors:

Prime contractors shall not replace a [disadvantaged business] DBE/WBE subcontractor with another subcontractor, either before contract award or during contract performance, without prior Metro approval. Prime contractors who replace a disadvantaged business subcontractor shall replace such [disadvantaged business] DBE/WBE subcontractor with another certified [disadvantaged business] DBE/WBE subcontractor or make good faith efforts to do so. (Ordinance No. 83-165, Sec. 14)

2.04.250 Records and Reports:

(a) Metro shall develop and maintain a recordkeeping system to identify and assess disadvantaged and women-owned business contract awards, prime contractors' progress in achieving goals and affirmative action efforts. Specifically, the following records will be maintained:

- (1) Awards to disadvantaged or women-owned businesses by number, percentage and dollar amount. Specifically the percentage of dollar value of all contracts awarded to D/WBE and total dollar value of all contracts D/WBE.
- (2) A description of the types of contracts awarded.
- (3) The extent to which goals were exceeded or not met and reasons therefor.

(b) All disadvantaged and women-owned business records will be separately maintained. Required disadvantaged and women-owned business information will be provided to federal agencies and administrators on request.

(c) The Liaison Officer shall prepare semiannual reports on disadvantaged and women-owned business participation to include the following:

- (1) the number of contracts awarded;
- (2) categories of contracts awarded;
- (3) dollar value of contracts awarded;
- (4) percentage of the dollar value of all contracts awarded to [disadvantaged businesses] DBE/WBE firms in the reporting period; and

(5) the extent to which goals have been met or exceeded.

(Ordinance No. 83-165, Sec. 15; amended by Ordinance No. 84-181, Sec. 7)

2.04.260 Counting Disadvantaged and Women-owned Business Participation Toward Meeting Goals:

(a) [Disadvantaged business] DBE/WBE participation shall be counted toward meeting the goals on each contract as follows:

[(1) On construction contracts of \$50,000 or more, the total dollar value of a contract subcontracted to disadvantaged and women-owned businesses is counted toward the applicable contract goal. On such contracts, the dollar amount to be performed by a disadvantaged business or joint venture which is also the prime contractor will not be counted toward the applicable goal for contract award purpose, but will be counted for purposes of Metro compliance with annual goals.]

[(2)] (1) [On contracts other than those indicated in paragraph (1) above, and except as provided below,] Subject to the limitations indicated in paragraphs (2) through (8) below, the total dollar value of a contract to be performed by disadvantaged and women-owned businesses is counted toward the applicable goal for contract award purposes as well as annual goal compliance purposes.

[(3)] (2) The total dollar value of a contract to a disadvantaged business owned and controlled by both disadvantaged males and non-disadvantaged females is counted toward the goals for disadvantaged businesses and women, respectively, in proportion to the percentage of ownership and control of each group in the business.

The total dollar value of a contract with a disadvantaged business owned and controlled by disadvantaged women is counted toward either the disadvantaged business goal or the goal for women, but not to both. Metro shall choose the goal to which the contract value is applied.

[(4)] (3) Metro shall count toward its goals a portion of the total dollar value of a contract with an eligible joint venture equal to the percentage of the ownership and control of the disadvantaged or female business partner in the joint venture.

- [(5)] (4) Metro shall count toward its goals only expenditures to disadvantaged businesses and women-owned that perform a commercially useful function in the work of a contract. A disadvantaged and women-owned business is considered to perform a commercially useful function when it is responsible for execution of a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing and supervising the work involved. To determine whether a disadvantaged and women-owned business is performing a commercially useful function, Metro shall evaluate the amount of work subcontracted, industry practices and other relevant factors.
- [(6)] (5) Consistent with normal industry practices, a disadvantaged and women-owned business may enter into subcontracts. If a disadvantaged business contractor subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices, the disadvantaged business shall be presumed not to be performing a commercially useful function. The disadvantaged and women-owned business may present evidence to Metro to rebut this presumption. Metro's decision on the rebuttal of this presumption is subject to review by DOT for DOT-assisted contracts.
- [(7)] (6) A disadvantaged and women-owned business which provides both labor and materials may count toward its disadvantaged business goals expenditures for materials and supplies obtained from other disadvantaged and women-owned business suppliers and manufacturers, provided that the disadvantaged and women-owned business contractor assumes the actual and contractual responsibility for the provision of the materials and supplies.
- [(8)] (7) Metro shall count its entire expenditure to a disadvantaged and women-owned business manufacturer (i.e., a supplier that produces goods from raw materials or substantially alters them before resale).
- [(9)] (8) Metro shall count against the goals 20 percent of its expenditures to disadvantaged and women-owned business suppliers that are not manufacturers, provided that the disadvantaged

and women-owned business supplier performs a commercially useful function in the supply process.

(9) When funds are passed-through by Metro to other agencies, any contracts made with those funds and any disadvantaged or women-owned business participation in those contracts shall only be counted toward Metro's goals. Likewise, any funds passed-through to Metro from other agencies and then used for contracting shall count only toward that agency's goals. Project managers responsible for administration of pass-through agreements shall include the following language in those agreements:

"(a) Policy. It is the policy of the Department of Transportation that minority business enterprises as defined in 49 CFR Part 23 shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with federal funds under this agreement. Consequently, the MBE requirements of 49 CFR Part 23 apply to this agreement.

"(b) MBE Obligation. The recipient or its contractor agrees to ensure that minority business enterprises as defined in 49 CFR Part 23 have the maximum opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with federal funds provided under this agreement. In this regard, all recipients or contractors shall take all necessary and reasonable steps in accordance with 49 CFR Part 23 to ensure that minority business enterprises have the maximum opportunity to compete for and perform contracts. Recipients and their contractors shall not discriminate on the basis of race, color, national origin or sex in the award and performance of DOT-assisted contracts."

(b) Disadvantaged or women-owned business participation shall be counted toward meeting annual goals as follows:

- (1) Except as otherwise provided below, the total dollar value of any contract which is to be performed by disadvantaged or women-owned businesses is counted toward meeting annual goals.
- (2) The provisions of paragraphs (a)[(3)] (2) through (a)(8) of this section, pertaining to contract goals, shall apply equally to annual goals.

(Ordinance No. 83-165, Sec. 16; amended by Ordinance No. 84-181, Sec. 8)

2.04.270 Compliance and Enforcement:

(a) Metro shall reserve the right, at all times during the period of any contract, to monitor compliance with the terms of this chapter and the contract and with any representation made by a contractor prior to contract award pertaining to disadvantaged business participation in the contract.

(b) The Liaison Officer may require, at any stage of contract completion, documented proof from the contractor of actual disadvantaged business participation. (Ordinance No. 83-165, Sec. 17)

ADOPTED by the Council of the Metropolitan Service District
this 27th day of March, 1986.


Richard Waker, Presiding Officer

ATTEST:


Clerk of the Council

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STAFF REPORT

Agenda Item No. 7.1

Meeting Date March 27, 1986

CONSIDERATION OF ORDINANCE NO. 86-197 FOR THE
PURPOSE OF REVISING THE DISADVANTAGED BUSINESS
PLAN

Date: February 24, 1986

Presented by: Edward K. Stuhr

FACTUAL BACKGROUND AND ANALYSIS

The U.S. Department of Transportation (DOT) requires that recipients of DOT financial assistance create and administer a Disadvantaged Business Plan (DBP) which meets federal requirements. The current Metro DBP is the product of a series of adjustments made over a period of years in response to changes required both by internal contracting needs and by comments from the various federal agencies who have jurisdiction.

The revision proposed by this Ordinance incorporates the most recent changes required by the federal agencies involved. Specific changes include:

- Additional affirmative action procedures (2.04.180 (h-j)).
- Inclusion of certification challenge procedures from federal regulations (2.04.190(d)(1-8)).
- Aligning Metro goal-setting process with federal fiscal year (2.04.200).
- Extension of award criteria to women-owned businesses the same as to DBEs (2.04.220 (a-e)).
- Extension of "good faith effort" requirements to WBE goals (2.04.230).
- When a prime contract is awarded to a DBE/WBE, that award will count as 100 percent to the goal. This has not been the case until now (2.04.260(a)(1)).
- Rules for administration of the program when pass-through funds are involved (2.04.260(a)(9)).

With these changes, the plan has received final approval from DOT. There should be no further substantive changes until the federal law itself changes.

EXECUTIVE OFFICER'S RECOMMENDATION

The Executive Officer recommends adoption of Ordinance No. 86-197.

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Ayes: Councilors Cooper, DeJardin, Frewing, Gardner,
Hansen, Kirkpatrick, Kafoury, Kelley, Oleson,
Van Bergen and Waker

Absent: Councilor Myers

The motion carried and Ordinance No. 86-196 was adopted.

7.2 Consideration of Ordinance No. 86-197, for the Purpose of
Revising the Disadvantaged Business Enterprise Plan (First
Reading and Public Hearing)

The Clerk read the Ordinance a first time by title only.

Ed Stuhr reviewed highlights of the staff report, explaining any agency receiving funds from the U.S. Department of Transportation was required to create and administer a Disadvantaged Business Enterprise Plan. The changes to Metro's DBE Plan as proposed by this ordinance would make the plan consistent with internal contracting procedures and recent federal requirements, he said.

Motion: Councilor Kelley moved the Ordinance be adopted and Councilor Kirkpatrick seconded the motion.

Councilor Frewing asked Mr. Stuhr to review staff's process for involving citizens and the business community in the DBE Plan. Mr. Stuhr explained citizens and the business community were involved in making recommendations when the initial plan was established. At that time, the Executive Officer had appointed a review committee to receive public comment. He said some of the DBE amendments now before the Council were responses to community requests for plan changes. As required by law, proposed changes to the DBE Plan were published 45 days to allow opportunity for public comment, he said. The notification was published in The Oregonian, one minority-owned publication and in a publication of the federal government.

In response to Councilor Hansen's question, Mr. Stuhr said the proposed ordinance would not change the Council's adopted DBE goals. Specific ways of administered those goals, however, would be amended.

Presiding Officer Waker opened the public hearing on Ordinance No. 86-197. There being no public comment, he closed the public hearing and announced the Ordinance would be considered again on March 27, 1986.

4. CITIZEN COMMUNICATIONS TO COUNCIL ON NON-AGENDA ITEMS

None.

6. CONSENT AGENDA

Motion: Councilor Kirkpatrick moved to approve the Consent Agenda and Councilor DeJardin seconded the motion.

Vote: A vote on the motion resulted in:

Ayes: Councilors DeJardin, Frewing, Gardner, Hansen, Kirkpatrick, Kafoury, Kelley, Myers, Oleson, Van Bergen and Waker

Absent: Councilor Cooper

The motion carried and the following items were adopted:

- 6.1 Resolution No. 86-633, Approving the FY 1986 Highway Allocation Plan for the Interstate Transportation Program and Amending the Transportation Improvement Program Accordingly
- 6.2 Minutes of the Meetings of February 27 and March 11, 1986

7. ORDINANCES

- 7.1 Consideration of Ordinance No. 86-197, for the Purpose of Revising the Disadvantaged Plan (Second Reading)

The Clerk read the Ordinance by title only a second time.

Motion: A motion to adopt the Ordinance was made by Councilors Kelley and Kirkpatrick at the Council meeting of March 13, 1986.

Ed Stuhr reviewed staff's report, explaining the proposed revisions to Metro's Disadvantaged Business Plan were made to comply with federal standards. Metro's intent to revise the Plan was published in The Oregonian and The Skanner, he said.

In response to Councilor Kelley's question, Mr. Stuhr said he could provide her with data prepared by the Oregon Department of Transportation used to test whether a business was qualified for the Disadvantaged Business Enterprise program.

Councilor Frewing asked how Metro's Plan would differ from those of other local jurisdictions. Mr. Stuhr explained all plans should not

differ in substance since they were all designed to comply with Department of Transportation regulations.

Vote: A vote on the motion to adopt the Ordinance resulted in:

Ayes: Councilors DeJardin, Frewing, Gardner, Hansen, Kirkpatrick, Kafoury, Kelley, Myers, Oleson, Van Bergen and Waker

Absent: Councilor Cooper

The motion carried and Ordinance No. 86-197 was adopted.

7.2 Consideration of Ordinance No. 86-199, for the Purpose of Adopting the Solid Waste Reduction Program for the Metropolitan Service District (First Reading and Public Hearing)

The Clerk read the Ordinance by title only for the first time.

Dennis Mulvihill discussed the history of Senate Bill 662 which gave the Environmental Quality Commission (EQC) the authority to locate and establish a regional disposal site and Metro the responsibility of preparing a Solid Waste Reduction Program to be submitted by January 1, 1986, for review and approval by the EQC. He explained the EQC did not approved Metro's Program as submitted but gave Metro until May 8, 1986, to modify the Program. The EQC provided Metro a list of 22 recommended modifications. Those modifications and staff's responses were included in the agenda materials.

Mr. Mulvihill said staff were introducing a series of three Ordinances for Council consideration for the purpose of modifying three major aspects of the Solid Waste Reduction Program and formally submitting the Program to the EQC for final approval. The three Program aspects were: 1) waste reduction and promotion; 2) alternative technology; and 3) all other aspects. Ordinance No. 86-197 contained provisions for all Program aspects except alternative technology and waste reduction and promotion, he explained.

Motion: Councilor Kirkpatrick moved to adopt Ordinance No. 86-197 and Councilor Gardner seconded the motion.

In response to the Presiding Officer's questions, Mr. Mulvihill said staff had few problems with DEQ's comments on the draft Program except for those made on the local government certification program. Mr. Mulvihill thought if the Department of Environmental Quality's (DEQ) suggestions were implemented, staff would not have enough time to prepare a well-planned, successful certification program.



METRO

2000 S.W. First Avenue
Portland, OR 97201-5398
503/221-1646

April 1, 1986

Ms. Juanita Orr
County Clerk
Clackamas County Courthouse
8th and Main
Oregon City, Oregon 97045

Dear Ms. Orr:

Enclosed is a true copy of the following ordinance adopted by the Council of the Metropolitan Service District. Please file this ordinance in the Metro ordinance files maintained by your county.

Ordinance No. 86-197, for the Purpose of
Revising the Disadvantaged Business Plan

Sincerely,

A. Marie Nelson
Clerk of the Council

amn

Enclosure

Metro Council

Richard Waker
Presiding Officer
District 2

Jim Gardner
Deputy Presiding
Officer
District 3

Bob Oleson
District 1

Corky Kirkpatrick
District 4

Tom DeJardin
District 5

George Van Bergen
District 6

Sharron Kelley
District 7

(Vacant)
District 8

Hardy Myers
District 9

Larry Cooper
District 10

Marge Kafoury
District 11

Gary Hansen
District 12

Executive Officer
Rick Gustafson



METRO

2000 S.W. First Avenue
Portland, OR 97201-5398
503/221-1646

April 1, 1986

Mr. Don Stilwell
County Administrator
Washington County
150 North First Avenue
Hillsboro, Oregon 97123

Dear Mr. Stilwell:

Enclosed is a true copy of the following ordinance adopted by the Council of the Metropolitan Service District. Please file this ordinance in the Metro ordinance file maintained by your County.

Ordinance No. 86-197, for the Purpose of
Revising the Disadvantaged Business Plan

Sincerely,

A. Marie Nelson
Clerk of the Council

amn

Enclosure

Metro Council

Richard Waker
Presiding Officer
District 2

Jim Gardner
Deputy Presiding
Officer
District 3

Bob Oleson
District 1

Corky Kirkpatrick
District 4

Tom DeJardin
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(Vacant)
District 8

Hardy Myers
District 9

Larry Cooper
District 10

Marge Kafoury
District 11

Gary Hansen
District 12

Executive Officer
Rick Gustafson



METRO

2000 S.W. First Avenue
Portland, OR 97201-5398
503/221-1646

April 1, 1986

Ms. Jane McGarvin
Clerk of the Board
Multnomah County
1021 S.W. Fourth Avenue
Portland, Oregon 97204

Dear Jane:

Enclosed is a true copy of the following ordinance adopted by the Council of the Metropolitan Service District. Please file this ordinance in the Metro ordinance file maintained by your County.

Ordinance No. 86-197, for the Purpose of
Revising the Disadvantaged Business Plan

Sincerely,

A. Marie Nelson
Clerk of the Council

amn

Enclosure

Metro Council

Richard Waker
Presiding Officer
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