

MINUTES OF THE COUNCIL GOVERNMENTAL AFFAIRS COMMITTEE
OF THE METROPOLITAN SERVICE DISTRICT

April 16, 1992

Council Chamber

Committee Members Present: Chair Tanya Collier, Larry Bauer,
Richard Devlin and Ed Gronke

Committee Members Absent: Judy Wyers

Chair Collier called the regular meeting to order at 4:04 p.m.

1. Minutes of January 16 and February 20, 1992

Motion: Councilor Bauer moved for approval of the minutes

Vote: Councilors Bauer, Gronke and Collier voted aye.
Councilors Devlin and Wyers were absent. The vote
was unanimous and the minutes were approved.

2. Work Session to Consider Draft Ordinance Establishing a
Metro Program for Minority/Women/Disadvantaged Businesses
and Emerging Small Businesses

Casey Short, Council Analyst, gave staff's report on the draft ordinance. Mr. Short explained the current task force, as well as its predecessor convened the previous year, considered an ordinance to amend Metro's existing Metro Code language on Minority/Women/Disadvantage Businesses and Emerging Small Businesses (DBE). He said during the last year Regional Facilities Department staff had worked with community representatives to reach consensus on a satisfactory program. He said no consensus was reached after the meetings were held. He said the Governmental Affairs Committee had been briefed on committee activities at its March 5 meeting and Chair Collier directed Council staff and community representatives to draft an ordinance to establish a new DBE program. Mr. Short said Bruce Broussard, The American Contractor; Clifford Freeman, Governor's Advocate in the Office of Minority, Emerging and Small Businesses; Shirley Minor, Minor Steele & Associates; and Henry Pelfrey, Dirt & Aggregate Interchange; met three times assisted by General Counsel Dan Cooper and himself and discussed at length constitutional interpretations handed down by the U.S. Supreme Court. He said the task force discussed recent decisions such as Crosen v. the City of Richmond and from the 9th Circuit Court, Coral Construction Co. & Associated General Contractors v. King County.

Mr. Short said the task force discussed what obstacles the cases cited above presented to Metro's ability to develop a viable DBE program. He said the task force determined that any program a local government might implement that included preference of any

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sort in public contracting procedures based on race or gender would be deemed unconstitutional. He said there were provisions state and local governments could use to encourage emerging small businesses (ESB) based on the size of firm(s) and could be limited to specific geographical areas as determined by the local government itself. Mr. Short noted at the first two meetings Mr. Pelfrey, with assistance from Impact Business Consultants, assembled a summary of the Metro Code and the King County MBE/WBE program for legal review. He said after the first two meetings, Legal Counsel drafted a set of ordinances for Committee review. He told Legal Counsel, per Governmental Affairs Committee instructions, to draft the most liberal program based on what they interpreted current court cases to be that would withstand legal challenge. He said Legal Counsel returned with Ordinance No. 92-466. He said there were four separate Code sections to establish four different programs the first of which were the Minority Business Enterprise Program and a Women-Owned Business Enterprise Program.

Mr. Short said the task force wanted to separate minority and women-owned business programs because with separate programs, better tracking of goals could be achieved. He said one section defined what a minority-owned business was and the other defined what a women-owned business was. He said listed on page 3 of staff's report were different programs from different jurisdictions Legal Counsel used to develop the ordinance. He said Neil Saling, Director of Regional Facilities, was asked if Regional Facilities Department staff had the opportunity to review the draft ordinance. Mr. Saling said staff had and believed it would require additional 1.5 FTE to track, monitor and enforce all the different provisions.

Mr. Short discussed the DBE program which applied to federally funded programs only. He said Metro had to have a DBE program in the Code to meet federal law requirements. He said he received a call the date of this meeting from Bea Brooks, Oregon Department of Transportation (ODOT), who noted page 12 contained language that required apparent low bidders to submit their list of proposed DBE/WBE participants by the close of the next working day. Mr. Short said Ms. Brooks advised him it was ODOT's position, and soon would be state policy, that the list of M/WBE participants be forthcoming as soon as bids were opened.

Mr. Short reviewed the Emerging Small Business Program (ESB). He said there was little or no support among the members of the task force for including an ESB program in the Code. He said a local government could include preference provisions or mandatory goals for an ESB program, but said those programs had to be race and gender neutral.

Mr. Short summarized the task force's recommendations. He said the task force had consensus that the language was the best that could be developed based on federal law and existing programs. He said the language had little enforcement capabilities, other than requiring good faith efforts in directing that there be outreach and other similar efforts. He said the overriding conclusion was that if the Council wanted a viable MBE/WBE program that provided stricter standards, stronger compliance and efforts on the part of prime contractors and provided for mandatory goals, that it could be done only after a study was performed of past discriminatory practices that Metro had engaged in, either implicitly or explicitly. He said federal law required such a study be performed to establish that past discrimination has occurred and that a remedy could be narrowly tailored to guarantee greater minority/women business participation. Mr. Short said the DBE program should be included in the Code to meet federal requirements. He said some task force members were present and available to testify if so desired.

Mr. Cooper said Senior Assistant Mark Williams drafted the actual document and that it was not ready for formal Council consideration at this time.

Mr. Short stated for the record the process used to convene the task force. He said he did not do a broad distribution of the document before the Committee meeting to members of the minority contracting community or the representatives of prime contractors because he wanted to hear Committee direction on how to proceed next.

Chair Collier thanked Mr. Short and said the Committee should discuss language at this meeting and then hold a public hearing two to four weeks from this meeting.

Chair Collier said work on a new DBE program had been underway for approximately a year. She said Metro's old program had worked, but that Legal Counsel had advised the Council it would not be considered federally constitutional. She said that led to staff's efforts to replace the old program with the most feasible program possible.

Chair Collier opened a public hearing.

Henry Pelfrey, Dirt and Aggregate Interchange, said the task force obtained various DBE program language from other states and compared it with current State of Washington programs. He discussed the King County program which he said was based on goals and not on statistical quotas. He said he and other

parties affected had challenged that program. Mr. Pelfrey said a study should be conducted as the draft ordinance language was extremely liberal in its current state.

Mr. Cooper said Metro had gone as far as it could go without making findings of past discrimination. He said the plan contained mandatory activities for both the administration to follow with regard to outreach programs as well as for prime contractors bidding on Metro contracts to make outreach efforts and to provide opportunities for minority and women subcontractors, in their separate categories, to submit bids.

Chair Collier asked if draft language should be coupled with a study. Mr. Pelfrey said the draft language had no enforcement power and represented a good faith effort only. Mr. Pelfrey said Metro would have to conduct a study eventually and said the City of Portland and Multnomah County were planning to conduct such a study.

Chair Collier agreed with Mr. Pelfrey and said she would recommend Metro undertake that study. She asked Mr. Pelfrey his opinion of the draft ordinance. Mr. Pelfrey said the language should target goals to be assessed on a quarterly basis.

Chair Collier asked Mr. Cooper if Metro could do targeted goals. Mr. Cooper said staff did add an agency goal-setting process, not for specific contracts, but for agency overall goals so that Metro could adopt a target to reassess on a yearly basis. Mr. Cooper said Metro could legally argue it was entitled to do so. He expressed concern about contract by contract good faith efforts.

Councilor Devlin said Metro could develop agency goals and evaluate program effectiveness on an overall basis and seek adjustments to the program in an overall capacity. Mr. Cooper said that would be a valid Metro activity.

Mr. Pelfrey said he would like target goals added to the draft language.

Mr. Short said before and after Crosen statistical data was referred to in staff's report and distributed them to those present.

Councilor Gronke asked how staff would develop target goals and asked what they would be based on. Mr. Cooper said Metro would have to look at the business sector for which the goals were being created and ascertain the percentage of MBE/WBE businesses and what percentage of those businesses were participating. He

said in the past, Metro had used 10 percent as an approximate goal for minority participation. He said staff would have to ascertain some actual data to establish what goals should be. He said such a goal could be used to the extent that circumstances were not set up to create a preference for MBE/WBE enterprises. He said beyond that, Metro would need findings of past discrimination and a narrowly-tailored program designed to overcome the effects of that past discrimination.

The Committee and staff briefly discussed the issues further. Chair Collier noted Mr. Pelfrey's request for targeted goals and instructed Mr. Short to draft language to that effect. She asked Mr. Short to investigate how Metro could participate in a study in order to make a recommendation to the Committee as a whole. Chair Collier thanked Mr. Pelfrey for his efforts on Metro's behalf.

Bruce Broussard, American Contractor, said he appreciated Metro staff's efforts with regard to new language and said good faith efforts had been strengthened. He said Metro needed to conduct a stronger outreach effort on the in-house level rather than rely on the contractor only to do so. He said a good example was the Sears Building construction project which he said would exceed 10 percent in MBE/WBE participation. He noted ODOT has mandatory goals and objectives and held pre-bid conferences to brief proposers. He said pre-bid conferences gave contractors the opportunity to network among themselves also. He said Metro could mandate mandatory pre-bid efforts.

Chair Collier asked Mr. Short to incorporate Mr. Broussard's recommendations in staff's report also and asked Mr. Pelfrey and Mr. Broussard to continue to work with Mr. Short to produce the next version of the draft document for public comment. She said she wanted any one who would be interested in the document to testify when the Committee considered the issues again.

Councilor Devlin said the Committee should draft a request to the Budget Committee requesting an approximate amount be placed in the Contingency and Support Services Funds in case a MBE/WBE program was created. Chair Collier noted funds should also be budgeted to pay for Mr. Broussard's recommended action on pre-bid conferences.

Mr. Cooper asked Chair Collier if her preference was that he and Mr. Short continue drafting proposed Code sections, or if she wanted them to draft an ordinance for first reading and committee consideration. Chair Collier said with the agreement of the Committee, her preference was to finish working on the document in Committee and then start the formal process.

3. Consideration of the Executive Officer's Request for the Council to Clarify Its Intent Regarding an RFP for Financial Impact Study: Tri-Met/Metro Merger

Betsy Bergstein, Senior Management Analyst, gave staff's report. She said the RFP to proceed with the Tri-Met/Metro study was filed in the Council Department on March 11 and reviewed by the Governmental Affairs Committee on March 19. She said Executive Officer Cusma requested the Council at the April 9 Council meeting to clarify its intent with regard to the RFP. Ms. Bergstein referred to Resolution No. 90-1361 adopted December 13, 1990, which specified that any RFP "for performing any or all parts of the study shall occur upon resolution of the UMTA full funding issue." Ms. Bergstein said she made the request for clarification per a letter from Tom Walsh, Tri-Met General Manager, which stated his request to wait until full-funding was achieved for the Westside light rail project. She said Mr. Walsh's letter also raised two issues: 1) Tri-Met's status in the bond market and 2) Tri-Met's current labor dispute.

Ms. Bergstein said Mr. Cooper discussed bonding issues with Metro's and Tri-Met's bond counsel. She said she had discussions on the time frame and process for Tri-Met's labor issues.

Ms. Bergstein said per her discussion with Mr. Cooper, there were two items related to bonding issues. She said one issue had to do with general obligation bonds for Westside light rail which would be sold in July. She said Tri-Met had to get a bond rating by July and said the bonds would be secured by property taxes, similar to Metro's Oregon Convention Center bonds.

Chair Collier asked what Metro's bond rating was. Ms. Bergstein said Metro had a "AA" rating on the Oregon Convention Center and an "A" rating on solid waste bonds. She noted Metro had a very high bond rating compared to other local governments.

Ms. Bergstein discussed "Bus Bonds" which were refinanced in 1985 and backed by payroll tax revenues and issued by the Urban Mass Transit Authority. She said language on those bonds were specific to what would happen if a merger were to occur. She said those bonds were due to be refunded in 1992. She said the 1985 refunding was backed by a letter from the Bank of Tokyo. She said Tri-Met planned to refinance those bonds this year backed by payroll taxes and not by a letter of credit.

Councilor Devlin said the RFP's scope of work could be narrowed.

Chris Scherer, Financial Planning Manager, discussed organizational alternatives and noted the Scope of Work was

tailored to allow the proposer to deal with organizational alternatives.

Councilor Gronke asked if solid waste bonds were general obligation (GO) or revenue bonds. Mr. Cooper said they were revenue bonds. The Committee and staff briefly discussed bonding issues.

Chair Collier opened a public hearing.

David Knowles, former Metro Councilor, said the Council adopted a resolution to suspend negotiations to take over Tri-Met. He said UMTA funding was not yet stabilized and noted Tri-Met was currently spending \$2.5 million per month on the project. He said beyond the promise the Council made in 1990 via Resolution No. 90-1361, For the Purpose of Establishing a Work Plan for the Analysis of Issues Related to the Transfer of Mass Transit Services from Tri-Met to the Metropolitan Service District, adopted on December 13, 1990, he said the current RFP was the third time Metro had pursued the issues and said each time had not been the right time. He suggested the Council open up a dialogue with the Charter Committee to build into the charter a date certain on when merger could take place.

Chair Collier asked if performing a study only meant Metro was actively pursuing a merger with Tri-Met. Mr. Knowles said it did. Chair Collier said she wanted to complete the study to see what the data said because she had not yet made up her mind. She said no one would ever consider it the "right time" for consideration of these issues and that on each occasion interested parties had stated Metro should wait for the right time. She asked when that would be. She told Mr. Knowles to read Charter language as it was currently written. Mr. Knowles said if the merger went on a general ballot and the voters did not approve the merger, then it should definitely not be pursued. Chair Collier said the RFP would clarify the issues and provide more information.

Councilor Bauer asked Mr. Knowles what capacity he was testifying in. Mr. Knowles said he was testifying as a citizen, a former Councilor, and as a former member of the Joint Policy Advisory Committee on Transportation. Councilor Bauer said it would not be harmful to know financial data and facts. Mr. Knowles said the process as listed in Resolution No. 90-1361 was complete and listed subjects that could be studied in advance. The Committee and Mr. Knowles discussed resolution language further.

Mr. Knowles said he contacted Senator Hatfield's staff who expressed opposition to issuance of the RFP at this time. Chair

Collier noted calls in opposition had been received from Tri-Met General Manager Tom Walsh, the Portland Chamber of Commerce and from Clackamas County. Councilor Gronke said interested parties were concerned because they viewed the RFP as the first step toward merger of the two agencies. He said concerns could be alleviated by rewording some RFP language. Councilor Devlin said the Committee was supposed to make a recommendation to the full Council on the issues. Chair Collier said Councilor Gronke's suggestion to rephrase the RFP was a good one.

Motion to Table: Councilor Devlin moved to table consideration of the RFP until the next Committee meeting.

Vote on Motion to Table: Councilors Bauer and Devlin voted aye. Councilors Gronke and Collier voted nay. Councilor Wyers was absent. The vote was 2 to 2 and the motion failed.

Motion: Councilor Bauer moved to send the RFP to the full Council for consideration with no recommendation by the Committee.

Vote: Councilors Bauer, Gronke and Collier voted aye. Councilor Devlin voted nay. Councilor Wyers was absent. The vote was 3 to 1 in favor and the motion passed.

4. Update on Discussions with Multnomah County Regarding Regionalization of Certain County Services

Deferred.

5. Update on Metro Charter Activity

Deferred.

All business having been attended to, Chair Collier adjourned the meeting at 5:34 p.m.

Respectfully submitted,


Paulette Allen
Clerk of the Council