

Not Adopted

BEFORE THE COUNCIL OF THE  
METROPOLITAN SERVICE DISTRICT

FOR THE PURPOSE OF AMENDING	)	ORDINANCE NO. 91-391
METRO CODE CHAPTER 2.04,	)	
MODIFYING THE PROVISIONS	)	Introduced by
RELATING TO PROCUREMENTS	)	Executive Officer
INVOLVING MINORITIES,	)	Rena Cusma
WOMEN AND EMERGING SMALL	)	
BUSINESSES	)	

WHEREAS, the Metropolitan Service District Code Chapter 2.04 provides guidance on Metro contracting procedures; and

WHEREAS, Section 2.04.030 (e) and Sections 2.04.100 through 2.04.180 constitute the Metro Disadvantaged Business Enterprise Program; and

WHEREAS, Modification of the program to incorporate the concept of Emerging small businesses is required to be consistent with Chapter 1043, Oregon Laws 1989 and to minimize the potential for legal challenge to the Metro procurement procedures based upon discrimination; now therefore,

THE COUNCIL OF THE METROPOLITAN SERVICE DISTRICT HEREBY ORDAINS:

Section 1. Metro code Section 2.04.030 (e) is amended to read:

" (e) [Disadvantaged-Business-Program]

Special Contracts Program: All contracting and purchasing is subject to the Metro [Disadvantaged-Business-Program] Special Contracts Program.

Metro will take affirmative action to do business with

Disadvantaged Business Enterprises and Emerging Small Businesses. The

Director of [Finance-and-Administration] Regional Facilities will

maintain a directory of disadvantaged businesses and Emerging Small

Businesses which shall be consulted and used in all contracting and purchasing of goods and services. If a disadvantaged business or Emerging Small Businesses is included in the directory capable of providing needed goods and services, that businesses should be contacted and given an opportunity to compete for Metro business. Contracts awarded subject to the Program may be exempted from the competitive bidding process by resolution of the Contracting Review Board."

Section 2. Metro Code Section 2.04.100 through 2.04.180 are amended as shown in Exhibit A:

ADOPTED by the Council of the Metropolitan Service District  
this \_\_\_\_\_ day of \_\_\_\_\_, 1991.

\_\_\_\_\_  
Tanya Collier, Presiding Officer

ATTEST:

\_\_\_\_\_  
Clerk of the Council

EXHIBIT A

2.04.100 Special Contracting Programs, Purpose and Authority

(a) It is the purpose of this portion of the Metro Code (Sections 2.04.100 through 2.04.180) to establish and implement programs to encourage the utilization by Metro of emerging small businesses, minority/women-owned businesses and businesses owned by disadvantaged individuals by creating for such businesses the maximum possible opportunity to compete for and participate in Metro contracting activities.

(b) Metro Code Sections 2.04.100 to 2.04.180 shall be known and may be cited as the "Metro Special Contracting Program, 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 by creating for such businesses the maximum possible opportunity to compete for and participate in Metro contracting activities.~~

~~(b) The portions of this ordinance which relate to federally funded contracts are adopted pursuant to 49 CFR 23 and are 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.~~

2.04.105 Policy Statement:

(a) Through this Program, Metro:

(1) expresses its strong commitment to provide maximum contracting opportunity to emerging small businesses, minority/women owned businesses and businesses owned by disadvantaged individuals;

(2) informs all employees, ~~(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) Through this program, Metro provides equal access and opportunity to all persons to participate in the projects, (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, sexual orientation, age, religion, physical handicap, political affiliation or marital status.~~

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

~~(d) Metro accepts and agrees to the statements of 49 CFR 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, contractors, employees and USDOT subrecipients and contractors.~~  
~~(2) to initiate and maintain efforts to increase program participation by disadvantaged and women 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 USDOT agreements with USDOT subrecipients and in all USDOT assisted contracts between Metro or USDOT subrecipients and any contractor.~~

**2.04.110 Definitions:** ~~For purposes of this Program, For purposes of this Ordinance, the following definitions shall apply:~~

(a) APPLICANT -- one who submits an application, request or plan to be approved by a USDOT official or by Metro as a condition to eligibility for Department of Transportation (USDOT) financial assistance; and "application" means such an application, request or plan.



(b) 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.

(c) 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 Program a lease or a purchase order of \$500 or more is a contract. ~~For purposes of this ordinance a lease or a purchase order of \$500.00 or more is a contract.~~

(d) CONTRACTOR -- means the one who participates, through a contract or subcontract, in the Program and includes lessees.

(e) DISADVANTAGED BUSINESS ENTERPRISE or DBE -- means a small business concern which is at least 51 percent owned by one or more socially and economically disadvantaged individuals. ~~(e) DEPARTMENT or "USDOT" -- means the United States Department of Transportation, including its operating elements.~~

~~(f) DISADVANTAGED BUSINESS ENTERPRISE or DBE -- means a small business concern which is certified by an authorized agency and:~~  
~~(1) 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 whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it. Women and minorities are rebuttably presumed to be disadvantaged.~~

(f) EMERGING SMALL BUSINESS or ESB means

(1) A business with its principal place of business located in the State of Oregon;

(2) A business with average annual gross receipts over the last three years not exceeding \$2 million for construction or \$700,000 for nonconstruction;

(3) A business which has fewer than 20 employees;

(4) An independent business; and

(5) A business properly licensed and legally registered in the State of Oregon.

(g) EXECUTIVE DEPARTMENT -- means the State of Oregon's Executive Department.

~~(h) 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, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals; and~~

~~(2) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.~~

~~For purposes of USDOT assisted contracts, the term Disadvantaged Business Enterprise shall be deemed to include Women-Owned Business Enterprises.~~

~~(g) EXECUTIVE DEPARTMENT -- means the State of Oregon's Executive Department.~~

~~(h) 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. In a joint venture between an ESB, DBE, or MBE/WBE and non-ESB, non-DBE or non-MBE/WBE, the ESB, DBE or MBE/WBE must be responsible for a clearly defined portion of the work to be performed and must share in the ownership. In a joint venture between a DBE/WBE and non-DBE/WBE, the DBE/WBE must be responsible for a clearly defined portion of the work to be performed and must share in the ownership, control, management responsibilities, risks and profits of the joint venture. A joint venture must receive Metro approval prior to contract award. A joint venture of a DBE/WBE and a non-DBE/WBE must receive Metro approval prior to contract award to be counted toward any DBE/WBE contract goals.~~

~~(i) LABOR AND MATERIALS CONTRACT -- is a contract including a combination of service and provision of materials other than construction contracts. Examples may include plumbing repair, computer maintenance or electrical repair, etc.~~

~~(j) MINORITY OWNED BUSINESS or MBE - means a small business concern which is at least 51 percent owned by one or more minorities or, in the case of any publicly-owned business, at least 51 percent of the stock of which is owned by one or more minorities or women, and whose management and daily business operations are controlled by one or more such individuals.~~

~~(k) PERSONAL SERVICES CONTRACT -- means a contract for services of a personal or professional nature.~~

(l) ~~PROCUREMENT CONTRACT -- means a contract for the purchase or sale of supplies, (j) 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.~~

(k) ~~OREGON DEPARTMENT OF TRANSPORTATION OR "ODOT" -- means the State of Oregon's Department of Transportation.~~

(l) ~~PERSONAL SERVICES CONTRACT -- means a contract for services of a personal or professional nature.~~

(m) ~~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.~~

(m) ~~RECIPIENT -- means any entity, (n) RECIPIENT -- means any entity, public or private, to whom USDOT financial assistance is extended, directly or through another recipient for any program.~~

(n) ~~SMALL BUSINESS CONCERN -- means a small business as defined pursuant to Section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto.~~

(o) ~~USDOT 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 USDOT financial assistance.~~

(p) ~~USDOT FINANCIAL ASSISTANCE -- means financial aid provided by USDOT or the United States Railroad Association to a recipient, (o) SMALL BUSINESS CONCERN -- means a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto.~~

(p) ~~SOCIALY 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.~~

~~(1) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;~~

~~(2) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Portuguese-American, Spanish culture or origin, regardless of race;~~

~~(3) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;~~

~~(4) "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~~

~~(5) "Asian Indian Americans," which includes persons whose origins are from India, Pakistan, and Bangladesh.~~

~~(q) USDOT 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 USDOT financial assistance.~~

~~(r) USDOT FINANCIAL ASSISTANCE means financial aid provided by USDOT 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.~~

~~(q) WOMEN OWNED BUSINESS or WBE - means a small business concern which is at least 51 percent owned by one or more women or, in the case of any publicly-owned business, (s) 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 and which is certified by an authorized agency. "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 such individuals and whose management and daily business operations are controlled by one or more women.~~

~~For purposes of USDOT assisted contracts, the term Disadvantaged Business Enterprise shall be deemed to include Women-Owned Business Enterprises.~~

~~2.04.115 Notice to Contractors, Subcontractors and Subrecipients. Contractors, subcontractors and subrecipients of Metro accepting contracts or grants under the Program which are USDOT assisted 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. Likewise, contractors of Metro accepting locally funded contracts under the Program shall be advised that failure to carry out the applicable provisions of the Program shall constitute a breach of contract and, after notification by Metro, may result in termination or such other remedy as Metro deems appropriate.~~

2.04.120 Liaison Officer:

(a) ~~The Executive Officer shall by executive order, designate a Special Contracting Liaison Officer and, 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.~~

(b) ~~The Liaison Officer shall be responsible for developing, managing and implementing the Program, and for disseminating information on available business opportunities so that ESBs, DBEs and MBE/WBEs are provided an equitable opportunity to bid on Metro contracts. In addition to the specific responsibilities of the Liaison Officer, managing and implementing the program, and for disseminating information on available business opportunities so that DBEs and WBEs 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.~~

(c) ~~The liaison officer may waive certain provisions in implementing the Program in so far as they do not materially deviate from the intent of the Program and are beneficial to the District.~~

**2.04.125 Directory:** A directory of ESBs, DBEs and MBE/WBEs certified by the Executive Department, shall be maintained by the Liaison Officer to facilitate identifying such businesses with capabilities relevant to general contracting requirements and particular solicitations. ~~A directory of DBEs and WBEs certified by ODOT or the Executive Department, as applicable shall be maintained by the Liaison Officer to facilitate identifying such 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.

**2.04.130 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/MBE banks. ~~subcontractors and consultants to utilize such services by sending them brochures and service information on certified DBE/WBE banks.~~

**2.04.135 Affirmative Action and Equal Opportunity Procedures:** Metro shall use affirmative action techniques to facilitate ESB, DBE and MBE/WBE participation in contracting activities. ~~Metro shall use affirmative action techniques to facilitate DBE and WBE participation in contracting activities.~~ These techniques include:

(a) ~~Arrange solicitations,~~ (a) ~~Arranging solicitations,~~ time for the presentation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation of ESBs, DBEs and MBE/WBEs.

(b) ~~Refer ESBs, DBEs and MBE/WBEs in need of management assistance to established agencies that provide direct management assistance to such businesses.~~

(c) ~~Carry out information and communications programs on contracting procedures and specific contracting opportunities in a timely manner, quantities specifications, and delivery schedules so as to facilitate the participation of DBEs and WBEs.~~

~~(b) Referring DBEs and WBEs in need of management assistance to established agencies that provide direct management assistance to such businesses.~~

~~(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) Distribute copies of the Program to organizations and individuals concerned with ESB, DBE and MBE/WBE programs.

(e) Review the Program periodically with department heads to insure that they are aware of the Program goals and desired activities on their parts to facilitate reaching the goals. ~~(d) Distribution of copies of the program to organizations and individuals concerned with DBE/WBE programs.~~

~~(e) Periodic reviews with department heads to insure that they are aware of the program goals and desired activities on their parts to facilitate reaching the goals.~~ Additionally, departmental efforts toward and success in meeting ESB, DBE and MBE/WBE goals for department contracts shall be factors considered during annual performance evaluations of the department heads.

(f) Monitor and assure that Disadvantaged and Women Business Enterprise planning centers and likely ESB, DBE and MBE/WBE contractors are receiving requests for bids, ~~departmental efforts toward and success in meeting DBE/WBE goals for department contracts shall be factors considered during annual performance evaluations of the department heads.~~

~~(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.~~

(g) Study the feasibility of certain USDOT-assisted contracts and procurement being set aside for DBE participation.

(h) Distribute to potential ESB, DBE and MBE/WBE contractors lists of the types of goods and services which Metro regularly purchases.

(i) Establish an Interdepartmental Contract Management Committee which will meet regularly to monitor and discuss, ~~(g) Study the feasibility of certain USDOT-assisted contracts and procurements being set aside for DBE/WBE participation.~~

~~(h) Distribution of lists to potential DBE/WBE contractors of the types of goods and services which Metro regularly purchases.~~

~~(i) Advising potential DBE/WBE vendors that Metro does not certify DBE/WBEs, and directing them to ODOT until December 31, 1987, and, thereafter, to the Executive Department.~~

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

~~(k) Establishing an interdepartmental contract management committee which will meet regularly to monitor and discuss, among other issues, potential ESB, DBE and MBE/WBE participation in contracts. In an effort to become more knowledgeable regarding ESB, DBE and MBE/WBE resources, the committee shall also invite potential ESB, DBE and MBE/WBE contractors to attend selected meetings.~~

~~(j) Require that at least one DBE or MBE/WBE vendor or contractor be contacted for all contract awards which are not exempt from Metro's contract selection procedures and which are 1) for more than \$500 but not more than \$25,000 in the case of non-personal services contracts; potential DBE and WBE participation in contracts. In an effort to become more knowledgeable regarding DBE and WBE resources, the committee shall also invite potential DBE and WBE contractors to attend selected meetings.~~

~~(i) Requiring that at least one DBE or WBE vendor or contractor be contacted for all contract awards which are not exempt from Metro's contract selection procedures and which are 1) for more than \$500 but not more than \$15,001 in the case of non-personal services contracts; and 2) for more than \$2,500 but not more than \$25,000 for personal services contracts. The Liaison Officer may waive this requirement if he/she determines that there are no DBEs or MBE/WBEs on the certification list capable of providing the service or item. 500 but not more than \$10,001 for personal services contracts. The Liaison Officer may waive this requirement if he/she determines that there are no DBEs or WBEs on the certification list capable of providing the service or item. For contracts over the dollar amounts indicated in this section, all known DBEs and WBEs in the business of providing the service or item(s) required shall be mailed bid or proposal information.~~

~~(k) The Executive Officer or his/her designee, may establish and implement additional affirmative action techniques which are designed to facilitate participation of ESBS, DBEs and MBE/WBEs in Metro contracting activities.~~

#### 2.04.140 Certification:

~~(a) To participate in the Program as ESB, DBE or MBE/WBE, contractors and subcontractors must have been certified by the State of Oregon Executive Department as being qualified and meeting the criteria to be designated as either ESB, DBE, MBE, WBE or any combination thereof.~~



~~(b) Prospective contractors or subcontractors which have been denied certification by the Executive Department may appeal such denial pursuant to applicable law. (m) The Executive Officer or his/her designee, may establish and implement additional affirmative action techniques which are designed to facilitate participation of DBEs and WBEs in Metro contracting activities.~~

#### ~~2.04.140 Certification of Disadvantaged Business Eligibility.~~

~~(a) To participate in the Program as a DBE or WBE, contractors, subcontractors and joint ventures must have been certified by an authorized certifying agency as described in subsection (b) of this section.~~

~~(b) Metro will not perform certification or recertification of businesses or consider challenges to socially and economically disadvantaged status. Rather Metro will rely upon the certification and recertification processes of ODOT and will utilize ODOT's certification list until December 31, 1987, and, thereafter, the Executive Department's list in determining whether a prospective contractor or subcontractor is certified as a DBE or WBE. A prospective contractor or subcontractor must be certified as a DBE or WBE by one of the above agencies, as applicable, and appear on the respective certification list of said agency, prior to the pertinent bid opening or proposal submission date to be considered by Metro to be an eligible DBE or WBE and be counted toward meeting goals. Metro will adhere to the Recertification Rulings resulting from 105(f) or state law, as applicable.~~

~~(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 applicable law. However, such appeal shall not cause a delay in any contract award by Metro. Decertification procedures for USDOT-assisted contractor, or potential contractors will comply with the requirements of Appendix A "Section by Section Analysis" of the July 21, Decertification procedures for USDOT-assisted contractor or potential contractors 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 Executive Department.~~

~~(c) Challenges to certification or to any presumption of social or economic disadvantage shall be made directly to the Executive Department in conformance to applicable law and regulations.~~

~~2.04.145 Annual Participation Goals; and will be administered by the agency which granted certification.~~

~~(d) Challenges to certification or to any presumption of social or economic disadvantage with regard to the USDOT assisted portion of this Program, 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 certifying agency 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 (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 (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.~~

#### ~~2.04.145 Annual Disadvantaged Business Goals.~~

~~(a) The Metro Council shall, by resolution each June, establish annual ESB, DBE and MBE/WBE goals. establish annual DBE goals and for locally funded contracts, 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 USDOT 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 ESBs, DBEs and MBE/WBEs likely to be available to compete for the contracts; ~~expertise and types of DBEs and WBEs likely to be available to compete for the contracts;~~

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

(4) for USDOT-assisted contract goals, existing goals of other local USDOT recipients and their experience in meeting these goals; and

(5) for locally-funded contract goals, ~~existing goals of other Portland metropolitan area contracting agencies, existing goals of other Portland metropolitan area contracting agencies,~~ and their experience in meeting these goals.

(c) Annual goals for USDOT-assisted contracts must be approved by the United States Department of Transportation. 49 CFR §23.45(g)(3). Metro will publish notice that the USDOT-assisted contract goals are available for inspection when they are submitted to USDOT or other federal agencies.

~~(d) Metro will publish notice that the USDOT-assisted contract goals are available for inspection when they are submitted to USDOT 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.~~

~~(d) Metro will publish notice regarding proposed locally-funded contract goals not later than ten (10) days prior to adoption of the goals.~~

~~(e) Metro will publish notice regarding proposed locally-funded contract goals not later than ten (10) days prior to adoption of the goals.~~

#### 2.04.150 Contract Goals:

Specific contract goals will be set on a contract by contract basis by the Liaison Officer taking into consideration the established annual goals, the potential subcontracting areas and the availability of ESB, DBE and MBE/WBE firms.

#### 2.04.155 Contract Award Criteria:

(a) To be eligible for award of contracts containing ESB/ DBE goals, prime contractors must either meet or exceed the specific goal for ESB/DBE participation, or prove that they have made good faith efforts to meet the goal prior to the time bids are opened or proposals are due. Bidders/Proposers are required to utilize the most current list of ESBs/DBEs certified by the Executive Department in existence at the time of bid opening in all of the bidders'/proposers' good faith efforts solicitations. ~~(a) The annual goals established for construction contracts shall apply as individual contract goals for construction contracts over \$50,000.~~

~~(b) The Liaison Officer may set a contract goal for any contract other than construction contracts over \$25,000. 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, necessarily, to the annual goal for such contract type.~~

~~(c) Even though no DBE/WBE goals are established at the time that bid/proposal documents are drafted, the Liaison Officer may direct the inclusion of a clause in any RFP or bid documents for any contract described in this section which requires that the prime contractor, prior to entering into any subcontracts, make good faith efforts, as that term is defined in Section 2.04.160, to achieve DBE/WBE participation in the same goal amount as the current annual goal for that contract type.~~

~~(d) Contract goals may be complied with pursuant to Section 2.04.160 and/or 2.04.175. The extent to which DBE/WBE participation will be counted toward contract goals is governed by the latter section.~~

#### 2.04.155 Contract Award Criteria:

~~(a) To be eligible for award of contracts containing a DBE/WBE goal, prime contractors must either meet or exceed the specific goal for DBE and WBE participation, or prove that they have made good faith efforts to meet the goal prior to the time bids are opened or proposal are due. Bidders/Proposers are required to utilize the most current list of DBEs and WBEs certified by ODOT until December 31, 1987, and, thereafter, by the Executive Department, in all of the bidders'/proposers' good faith efforts solicitations. The address where certified lists may be obtained shall be included in all applicable bid/proposal documents.~~

(b) All invitations to bid or requests for proposals 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 or that they have made good faith efforts as defined in Sections 2.04.166 or 2.04.170 to do so. ~~(b) All invitations to bid or request for proposals 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 or that they have made good faith efforts as defined in Section 2.04.160 to do so.~~ To document the intent to meet the goals, all bidders and proposers shall complete and endorse a Special Contracts Compliance form and include said form with bid or proposal documents. ~~all bidders and proposers shall complete and endorse a Disadvantaged Business Program Compliance form and include said form with bid or proposal documents.~~ The form shall be provided by Metro with bid/proposal solicitations.

(c) Agreements between a bidder/proposer and an ESB/DBE in which the ESB/DBE promises not to provide subcontracting quotations to other bidders/proposers are prohibited. ~~(c) Agreements between a bidder/proposer and a DBE/WBE in which the DBE/WBE promises not to provide subcontracting quotations to other bidders/proposers are prohibited.~~

(d) Apparent low bidders/proposers shall, by the close of the next working day following bid opening (or proposal submission date when no public opening is conducted), submit to Metro detailed ESB/DBE Utilization Forms listing names of ESB/DBEs who will be utilized and the nature and dollar amount of their participation. ~~by the close of the next working day following bid opening (or proposal submission date when no public opening is had), submit to Metro detailed DBE and WBE Utilization Forms listing names of DBEs and WBEs who will be utilized and the nature and dollar amount of their participation.~~ This form will be binding upon the bidder/proposer. Within five working days of bid opening or proposal submission date, such bidders/proposers shall submit to Metro signed Letters of Agreement between the bidder/proposer and ESB/DBE subcontractors and suppliers to be utilized in performance of the contract. ~~such bidders/proposers shall submit to Metro signed Letters of Agreement between the bidder/proposer and DBE/WBE subcontractors and suppliers to be utilized in performance of the contract.~~ A sample Letter of Agreement will be provided by Metro. The ESB/DBE Utilization Forms shall be provided by Metro with bid/proposal documents.

(e) An apparent low bidder/proposer who states in its bid/proposal that the ESB/DBE goals were not met but that good faith efforts were performed shall submit written evidence of such good faith efforts within two working days of bid opening or proposal submission in accordance with Sections 2.04.166 or 2.04.170. Metro reserves the right to determine the sufficiency of such efforts. ~~The DBE and WBE Utilization Forms shall be provided by Metro with bid/proposal documents.~~

~~(e) An apparent low bidder/proposer who states in its bid/proposal that the DBE/WBE goals were not met but that good faith efforts were performed shall submit written evidence of such good faith efforts within two working days of bid opening or proposal submission in accordance with Section 2.04.160. Metro reserves the right determine the sufficiency of such efforts.~~

(f) Except as provided in paragraph (g) of this section, apparent low bidders or apparent successful proposers who state in their bids/proposals 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 (e) of this section, ~~shall have their bids or proposals rejected. shall have their bids or proposals rejected and shall forfeit any required bid security or bid bond.~~ In that event the next lowest bidder or, for personal services contracts, the firm which scores second highest shall, ~~within two days of notice of such ineligibility of the low bidder/proposer, within two 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 or proposer 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.

(g) The Liaison Officer, at his or her discretion, may waive minor irregularities in a bidder's or proposer's compliance with the requirements of this section provided, however, that the bid or proposal substantially complies with public bidding requirements as required by applicable law.

#### 2.04.166 Federally Assisted Contracts:

(a) Determination of good faith efforts - The DBE program applies to federally funded contracts only. Bidders or Proposers on USDOT-assisted contracts to which DBE goals apply must, ~~2.04.160 Determination of Good Faith Efforts.~~



~~(a) Bidders or Proposers on USDOT-assisted contracts to which DBE 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 include at least the following standards established in the amendment to 49 CFR §23.45(h), Appendix A, dated Monday, April 27, 1981. A showing of good faith efforts must include written evidence of at least the following:

~~(1) Attendance at any presolicitation or prebid meetings that were scheduled by Metro to inform disadvantaged business enterprises of contracting and subcontracting or material supply opportunities available on the project; (1) Attendance at any presolicitation or prebid meetings that were scheduled by Metro to inform disadvantaged and women business enterprises of contracting and subcontracting or material supply opportunities available on the project;~~

(2) Advertisement in trade association, general circulation, minority and trade-oriented, ~~women-focused publications, women-focus publications,~~ if any and through a minority-owned newspaper or minority-owned trade publication concerning the sub-contracting or material supply opportunities at least 10 days before bids or proposals are due.

(3) Written notification to a reasonable number but no less than five (5) DBE firms that their interest in the contract is solicited. Such efforts should include the segmenting of work to be subcontracted to the extent consistent with the size and capability of DBE firms in order to provide reasonable subcontracting opportunities. ~~Each bidder should send solicitation letters inviting quotes or proposals from DBE firms on the segmented portions of the work and specifically describing, Each bidder should send solicitation letters inviting quotes or proposals from DBE 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 DBE 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 DBE sufficient opportunity to develop quotes or proposals for the work described.

(4) Evidence of follow-up to initial solicitations of interest, including the following:



(i) the names, addresses and telephone numbers of all DBE contacted;

(ii) a description of the information provided to DBE firms regarding the plans and specifications for portions of the work to be performed; and

(iii) a statement of the reasons for non-utilization of DBE firms, ~~(A) the names, addresses, telephone numbers of all DBE contacted;~~

~~(B) a description of the information provided to DBE 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 DBE firms, if needed to meet the goal.~~

(5) Negotiation in good faith with DBE firms. The bidder shall not, without justifiable reason, reject as unsatisfactory bids prepared by any DBE firms;

(6) Where applicable, the bidder must provide advice and assistance to interested DBE firms in obtaining bonding, lines of credit or insurance required by Metro or the bidder;

(7) Overall, the bidder's efforts to obtain DBE participation must be reasonably expected to produce a level of participation sufficient to meet Metro's goals; and

(8) The bidder must use the services of minority community organizations, minority contractor groups, local, state and federal minority business assistance offices and other organizations identified by the Executive Department's Advocate for Minority, Women and Emerging Small Business that provide assistance in the recruitment and placement of DBEs and WBEs.

(b) Replacement of DBE Subcontractors: Prime contractors shall not replace a DBE subcontractor with another subcontractor, either before contract award or during contract performance, without prior Metro approval. Prime contractors who replace a DBE subcontractor shall replace such DBE subcontractor with another certified DBE subcontractor or make good faith efforts as described in the preceding section to do so.

#### 2.04.167 Counting DBE Participation Toward Meeting Goals:

DBE participation shall be counted toward meeting the goals on each federally assisted contract as follows:

(1) The total dollar value of a prime contract or subcontract to be performed by DBE is counted toward the applicable goal for contract award purposes as well as annual goal compliance purposes.

(2) Metro shall count toward its contract 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 DBE business partner in the joint venture.

(3) Metro shall count toward its contract goals only expenditures by DBEs that perform a commercially useful function in the work of a contract. A DBE 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 DBE is performing a commercially useful function, Metro shall evaluate the amount of work subcontracted, industry practices and other relevant factors.

(4) Consistent with normal industry practices, a DBE may enter into subcontracts. If a DBE contractor subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices, the DBE shall be presumed not to be performing a commercially useful function. The DBE may present evidence to Metro to rebut this presumption. ~~state and federal minority business assistance offices and other organizations identified by the Executive Department's Advocate for Minority and Women Business that provide assistance in the recruitment and placement of DBEs and WBEs.~~

~~(b) Bidders or proposers on locally funded contracts to which DBE/WBE goals apply shall achieve the applicable contract goal or demonstrate that they have made good faith efforts to achieve the goals.~~

~~THE FOLLOWING TEXT WAS MOVED:~~

Metro's decision on the rebuttal of this presumption is subject to review by USDOT for USDOT-assisted contracts.

(5) A DBE which provides both labor and materials may count toward its disadvantaged business goals expenditures for materials and supplies obtained from other than DBE suppliers and manufacturers, provided that the DBE contractor assumes the actual and contractual responsibility for the provision of the materials and supplies.

(6) Metro shall count its entire expenditure to an DBE manufacturer (i.e., a supplier that produces goods from raw materials or substantially alters them before resale).

(7) Metro shall count toward the contract goals 60 percent of its expenditures to DBE suppliers that are not manufacturers, provided that the DBE supplier performs a commercially useful function in the supply process.

(8) When USDOT funds are passed-through by Metro to other agencies, ~~(6) A DBE or WBE which provides both labor and materials may count toward its disadvantaged business goals expenditures for materials and supplies obtained from other than DBE or WBE suppliers and manufacturers, provided that the DBE or WBE contractor assumes the actual and contractual responsibility for the provision of the materials and supplies.~~

~~(7) Metro shall count its entire expenditure to a DBE or WBE manufacturer (i.e., a supplier that produces goods from raw materials or substantially alters them before resale).~~

~~(8) Metro shall count against the goals 60 percent of its expenditures to DBE or WBE suppliers that are not manufacturers, provided that the DBE or WBE supplier performs a commercially useful function in the supply process.~~

~~(9) When USDOT funds are passed-through by Metro to other agencies, any contracts made with those funds and any DBE participation in those contracts shall only be counted toward Metro's goals. Likewise, any USDOT 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. ~~(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 DBE 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. ~~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 USDOT-assisted contracts."~~

#### 2.04.170 Locally Funded Contracts

(a) Good Faith Efforts determination - The ESB program applies to locally funded contracts. Bidders or proposers on locally-funded contracts to which ESB goals apply shall achieve the applicable contract goal or demonstrate that they have made good faith efforts to achieve the goal. ~~(b) DBE or WBE 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 a DBE or WBE is counted toward meeting annual goals.~~

~~(2) The provisions of paragraphs (a)(2) through (a)(8) of this section, pertaining to contract goals, shall apply equally to annual goals.~~

THE PRECEDING TEXT WAS MOVED:

Good faith efforts shall include written documentation of at least the following actions by bidders:

(1) Attendance at any presolicitation or prebid meetings that were scheduled by Metro to inform ESBs of contracting and subcontracting or material supply opportunities available on the project; ~~(1) Attendance at any presolicitation or prebid meetings that were scheduled by Metro to inform DBEs and WBEs of contracting and subcontracting or material supply opportunities available on the project;~~

Documentation required: Signature of representative of bidder or proposer on prebid meeting attendance sheet.

(2) Identifying and selecting specific economically feasible units of the project to be performed by ESBs to increase the likelihood of participation by such enterprises; ~~(2) Identifying and selecting specific economically feasible units of the project to be performed by DBEs or WBEs to increase the likelihood of participation by such enterprises;~~

Minimum documentation required: At least the documentation required under subsection (4) below.

(3) Advertising in, at a minimum, a newspaper of general circulation, a trade oriented publication and minority oriented or women-focused publication concerning the subcontracting or material supply opportunities on the project at least ten (10) days before bids or proposals are due; ~~and trade association, minority and trade oriented, women-focused publications, if any, concerning the subcontracting or material supply opportunities on the project at least ten (10) days before bids or proposals are due;~~

Documentation required: copies of ads published.

(4) Providing written notice soliciting sub-bids/proposals to not less than five (5) ESBs for each subcontracting or material supply work item selected pursuant to (2) above not less than ten (10) days before bids/proposals are due.

If there are less than five certified ESBs listed for that work or supply specialty then the solicitation must be mailed to at least the number of ESBs listed for that specialty. ~~(4) Providing written notice soliciting sub-bids/proposals to not less than five (5) DBEs or WBEs for each subcontracting or material supply work item selected pursuant to (2) above not less than ten (10) days before bids/proposals are due.~~

~~If there are less than five certified DBEs/WBEs listed for that work or supply specialty then the solicitation must be mailed to at least the number of DBEs/WBEs listed for that specialty.~~ The solicitation shall include a description of the work for which subcontract bids/proposals are requested and complete information on bid/proposal deadlines along with details regarding where project specifications may be reviewed.

Documentation required: Copies of all solicitation letters sent to ESB along with a written statement from the bidder/proposer that all the letters were sent by regular or certified mail not less than 10 days before bids/proposals were due. ~~Copies of all solicitation letters sent to DBE/WBE along with a written statement from the bidder/proposer that all the letters were sent by regular or certified mail not less than 10 days before bids/proposals were due.~~

(5) Making, not later than five days before bids/proposals are due, follow-up phone calls to all ESBs who have not responded to the solicitation letters to determine if they would be submitting bids and/or to encourage them to do so. ~~follow-up phone calls to all DBEs/WBEs who have not responded to the solicitation letters to determine if they would be submitting bids and/or to encourage them to do so.~~

Minimum documentation required: Log showing a) dates and times of follow-up calls along with names of individuals contacted and individuals placing the calls; and b) results attained from each ESB to whom a solicitation letter was sent (e. and b) results attained from each DBE/WBE to whom a solicitation letter was sent (e.g., bid submitted, declined, no response). In instances where ESB bids were rejected, the dollar amount of the bid rejected from the ESB must be indicated along with the reason for rejection and the dollar amount of the bid which was accepted for that subcontract or material supply item.



(6) Contacting and requesting assistance of community organizations, minority contractor groups, local, state and federal business assistance offices and other organizations identified by the Executive Department's Advocate for Minority, Women and Emerging Small Business that provide assistance in the recruitment and placement of ESBs; ~~In instances where DBE/WBE bids were rejected, the dollar amount of the bid rejected from the DBE/WBE must be indicated along with the reason for rejection and the dollar amount of the bid which was accepted for that subcontract or material supply item.~~

~~(6) Using the services of minority community organizations, minority contractor groups, local, state and federal minority business assistance offices and other organizations identified by the Executive Department's Advocate for Minority and Women Business that provide assistance in the recruitment and placement of DBEs and WBEs; where applicable, advising and assisting ESBs in obtaining lines of credit or insurance required by Metro or the bidder/proposer; advising and assisting DBEs and WBEs in obtaining lines of credit or insurance required by Metro or the bidder/proposer; and, otherwise, making efforts to encourage participation by ESBs which could reasonably be expected to produce a level of participation sufficient to meet the goals.~~

~~making efforts to encourage participation by DBEs and WBEs which could reasonably be expected to produce a level of participation sufficient to meet the goals.~~

Minimum documentation required: Letter from bidder/proposer indicating all special efforts made to facilitate attainment of contract goals, the dates such actions were taken and results realized.

(7) Notwithstanding any other provision of this section, bidders and proposers on locally-funded contracts to which ESB goals apply need not accept the bid of an ESB on any particular subcontract or material supply item if the bidder/ proposer demonstrates that none of the ESBs submitting bids were the lowest responsible, bidders and proposers on locally-funded contracts to which DBE/WBE goals apply need not accept the bid of a DBE or WBE on any particular subcontract or material supply item if the bidder/ proposer demonstrates that none of the DBEs or WBEs submitting bids were the lowest responsible, responsive and qualified bidders/proposers on that particular subcontract item and that the subcontract item was awarded to the lowest responsible, responsive bidder/proposer.

Metro reserves the right to require additional written documentation of good faith efforts and bidders and proposers shall comply with all such requirements by Metro. It shall be a rebuttable presumption that a bidder or proposer has made a good faith effort to comply with the contract goals if the bidder has performed and submits written documentation of all of the above actions. It shall be a rebuttable presumption that the bidder has not made a good faith effort if the bidder has not performed or has not submitted documentation of all of the above actions.

(b) Replacement of ESB Subcontractors: Prime contractors shall not replace an ESB subcontractor with another subcontractor, either before contract award or during contract performance, without prior Metro approval. Prime contractors who replace an ESB subcontractor shall replace such ESB subcontractor with another certified ESB subcontractor or make good faith efforts as described in the preceding section to do so.

#### 2.04.175 Counting ESB Participation Toward Meeting Goals:

ESB participation shall be counted toward meeting the goals on each locally funded contract as follows:

(1) The total dollar value of a prime contract or subcontract to be performed by ESB is counted toward the applicable goal for contract award purposes as well as annual goal compliance purposes.

(2) Metro shall count toward its contract 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 ESB business partner in the joint venture.

(3) Metro shall count toward its contract goals only expenditures by ESBs that perform a commercially useful function in the work of a contract. An ESB 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 an ESB is performing a commercially useful function, Metro shall evaluate the amount of work subcontracted, industry practices and other relevant factors.



(4) Consistent with normal industry practices, an ESB may enter into subcontracts. If an ESB contractor subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices, the ESB shall be presumed not to be performing a commercially useful function. The ESB may present evidence to Metro to rebut this presumption. Metro's decision on the rebuttal of this presumption is subject to review by the State Executive Department.

(5) An ESB which provides both labor and materials may count toward its emerging small business or ESB goals expenditures for materials and supplies obtained from other than ESB suppliers and manufacturers, provided that the ESB contractor assumes the actual and contractual responsibility for the provision of the materials and supplies.

(6) Metro shall count its entire expenditure to an ESB manufacturer (i.e., a supplier that produces goods from raw materials or substantially alters them before resale).

(7) Metro shall count toward the contract goals 60 percent of its expenditures to ESB suppliers that are not manufacturers, provided that the ESB supplier performs a commercially useful function in the supply process.

2.04.177 Counting MBE/WBE Participation Toward Meeting Annual Goals:

MBE/WBE participation shall be counted toward meeting the annual goals as follows:

(1) Subject to the limitations indicated in paragraphs

(2) through (8) below, the total dollar value of a prime contract or subcontract to be performed by MBEs or WBEs is counted toward the applicable annual goal or contract goal if specified.

(2) The total dollar value of a contract with a business owned and controlled by minority women is counted toward either the minority business goal or the goal for women. ~~2.04.165 Replacement of DBE or WBE Subcontractors: Prime contractors shall not replace a DBE/WBE subcontractor with another subcontractor, either before contract award or during contract performance, without prior Metro approval. Prime contractors who replace a DBE or WBE subcontractor shall replace such DBE/WBE subcontractor with another certified DBE/WBE subcontractor or make good faith efforts as described in the preceding section to do so.~~

~~2.04.170 Records and Reports:~~

~~(a) Metro shall develop and maintain a recordkeeping system to identify and assess DBE and WBE contract awards,~~

~~THE FOLLOWING TEXT WAS MOVED:~~

but not to both. Metro shall choose the goal to which the contract value is applied.

(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 minority or woman business partner in the joint venture.

(4) Metro shall count toward its goals only expenditures to MBEs and WBEs that perform a commercially useful function in the work of a contract. An MBE or WBE 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 an MBE or WBE is performing a commercially useful function, (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.

~~(4) Metro shall count toward its goals only expenditures to DBEs and WBEs that perform a commercially useful function in the work of a contract. A DBE or WBE 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 DBE or WBE is performing a commercially useful function, Metro shall evaluate the amount of work subcontracted, industry practices and other relevant factors.~~

(5) Consistent with normal industry practices, an MBE or WBE may enter into subcontracts. If an MBE or WBE contractor subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices, the MBE or WBE shall be presumed not to be performing a commercially useful function. The MBE or WBE may present evidence to Metro to rebut this presumption.

(6) An MBE or WBE which provides both labor and materials may count toward its goals expenditures for materials and supplies obtained from other than MBE or WBE suppliers and manufacturers, provided that the MBE or WBE contractor assumes the actual and contractual responsibility for the provision of the materials and supplies.

(7) Metro shall count its entire expenditure to an MBE or WBE manufacturer (i.e., a supplier that produces goods from raw materials or substantially alters them before resale).

(8) Metro shall count toward the contract goals 60 percent of its expenditures to MBE or WBE suppliers that are not manufacturers, provided that the MBE or WBE supplier performs a commercially useful function in the supply process.

#### 2.04.178 Records and Reports:

(a) Metro shall develop and maintain a recordkeeping system to identify and assess ESB, DBE, MBE and WBE participation in contract awards. ~~a DBE or WBE may enter into subcontracts. If a DBE or WBE contractor subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices, the DBE or WBE shall be presumed not to be performing a commercially useful function. The DBE or WBE may present evidence to Metro to rebut this presumption.~~

~~THE PRECEDING TEXT WAS MOVED.~~

~~THE FOLLOWING TEXT WAS MOVED.~~

prime contractors' progress in achieving goals and affirmative action efforts. Specifically, the following records will be maintained:

~~(1) Awards to ESBs, DBEs, MBEs and WBEs by number, (1) Awards to DBEs and WBEs by number, percentage and dollar amount.~~

(2) A description of the types of contracts awarded.

~~(3) The extent to which specified goals were exceeded or not met and reasons therefor.~~

~~(b) All ESB, DBE MBE and WBE records will be separately maintained. Required ESB, DBE, MBE and WBE information will be provided to federal agencies and administrators on request. (3) The extent to which goals were exceeded or not met and reasons therefor.~~

~~(b) All DBE and WBE records will be separately maintained. Required DBE and WBE information will be provided to federal agencies and administrators on request.~~

(c) The Liaison Officer shall prepare reports, at least semiannually, on DBE, ESB and MBE/WBE participation to include the following: ~~on DBE and WBE 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 ESB, DBE, MBE/WBE firms in the reporting period; and~~

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

~~(4) percentage of the dollar value of all contracts awarded to DBE/WBE firms in the reporting period; and~~

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

2.04.175 Counting Disadvantaged Business Participation Toward Meeting Goals:

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

(1) Subject to the limitations indicated in paragraphs (2) through (8) below, the total dollar value of a prime contract or subcontract to be performed by DBEs or WBEs is counted toward the applicable goal for contract award purposes as well as annual goal compliance purposes.

(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.

THE PRECEDING TEXT WAS MOVED:

2.04.180 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 DBE and WBE participation in the contract.

(b) The Liaison Officer may require, at any stage of contract completion, documented proof from the contractor of actual ESB/DBE participation. ~~documented proof from the contractor of actual DBE and WBE participation.~~

~~(Ordinance No. 83-165, Sec. 17; all previous Ordinances repealed by Ordinance No. 87-216, Sec. 1; amended by Ordinance No. 87-231, Sec. 1)~~

## STAFF REPORT

### ORDINANCE NO. 91-391 AMENDING THE METRO CODE RELATING TO SPECIAL CONTRACTING PROVISIONS RELATED TO PROCUREMENTS INVOLVING MINORITIES, WOMEN AND EMERGING SMALL BUSINESSES.

Date: May 6, 1991

Presented by: Neil E. Saling

#### Factual Background and Analysis

Metro Code Section 2.04.030 (e) and Sections 2.04.100 through 2.04.180 contain provisions which presently constitute Metro's Disadvantaged Business Program. This program is the Metro outreach effort to encourage utilization of minority and women owned enterprises in its contracting activities. The program includes guidelines for both locally funded as well as federally funded or assisted contracts.

In its 1988 Croson v. City of Richmond decision, the Supreme Court found a special minority contracting program to be invalid based upon the lack of a demonstrated record of past discrimination. Closer to home, the Federal District Court for Oregon sustained a challenge by the Associated General Contractors (AGC) against Multnomah County on similar grounds.

The State of Oregon responded in October 1989 by passing HB-3001 which had as its intent a program of contracting opportunities aimed at "emerging small businesses" thus creating a race and gender neutral program. A copy of General Counsel's opinion on this Act is included as Attachment A.

The existing Metro program includes no set-asides and has provisions which have allowed it to continue without legal challenge to date. Most notably, minority and women contractors must also be the low bidder to successfully contract with Metro or be a subcontractor to a Metro prime contractor. This provision, which was not contained in State or Multnomah County programs, puts all contractors on an even footing while emphasizing the importance of the outreach effort to the minority and women contractors.

Metro, at present, is the only agency in the State of Oregon with a DBE/WBE program for locally funded projects. Notwithstanding the potential for Metro to continue to operate under its present program, two factors mitigate against doing so. First, the Metro definitions of DBEs and WBEs, which differed slightly from that of the State, is no longer operative and confusion exists. Metro is in no position to assume responsibility for contractor certification to perpetuate its own definitions. Second, and more importantly, given the policy direction by the State Legislature toward emerging small businesses, it is appropriate that Metro follow suit for locally funded projects. Continuation of the present program in the face of the State's action, weakens Metro's defenses to a legal challenge. The Federal program for disadvantaged business enterprise (DBE), however, has not been changed.

The General Counsel believes that it is appropriate to eliminate the present Metro Code requirements for minority and women business enterprise participation and, in their place, adopt a program consistent with State Law, using participation by emerging small business as a basis for its goals.

What is an emerging small business? Chapter 1043, Oregon Laws 1989 defines an emerging small business (ESB) as follows:

- (1) A business with its principal place of business located in the State of Oregon;
- (2) A business with average annual gross receipts over the last three years not exceeding \$2 million for construction or \$700,000 for non-construction;
- (3) A business which has fewer than 20 employees;
- (4) An independent business; and
- (5) A business properly licensed and legally registered in the State of Oregon.

About 90% of all ESBs now registered with the State were previously listed in the DBE/WBE categories. At the same time, AGC estimates that over 90% of its members could be ESBs, indicating a great potential for ESB firms headed by males or non-minority individuals.

To implement the new Oregon Laws, the State allowed its departments to generate their own programs, designating the Department of Higher Education program as the State Model. To date, the Higher Education model is not complete with ODOT seeming to be in the lead followed by the General Services Administration. (Part of the ODOT success stems from their need to comply with Federal guidelines.) Other agencies such as Portland Community College and the Portland Development Commission, which will be mentioned later, have embraced the ESB concept with new programs.

Based upon the recommendation of General Counsel, Metro began its program revisions in June 1990 by convening a citizen task force. Those participating included:

Jack Kalinoski, AGC  
Lina Garcia-Seabold, Executive Dept.  
Sam Brooks, S. Brooks & Associates  
Bruce Broussard, The American Contractor  
Willie Harris, Federal Highway Admin.  
Scott Benge, Benge Construction  
Kevin Spellman, Emerick Construction  
Barrett Philpott, Housing Authority of Portland  
Margaret Garza, IMPACT  
Shirley Minor, R.W. Steel & Associates  
Jim Cason, Pen Nor  
Grace Gallegos, IMPACT  
Henry Pelfrey, Dirt & Aggregate  
Susan Panek, Executive Department

The series of task force meetings brought forward the following key issues:

- \* The present format of the Metro DBE/WBE program is confusing. Contractors find the provisions for Federally assisted projects and locally funded projects to be similar but with key differences that must be highlighted. The variance in the Federal and Metro definitions of a disadvantaged business enterprise (DBE) is also a source of confusion.
- \* It was suggested that Metro deal only with banks which have a liberal loan policy for minorities. The counterpoint is that Metro has a responsibility to its constituents to pursue good business practices. If both goals are consistent, then Metro would deal with such banks.
- \* Pursuing a program which emphasizes ESBs will lead to contracting with a larger number of firms to achieve the same dollar goal. This effort stems from the size limitation on ESBs which effectively places "large" minority or woman owned businesses outside the program where they must compete with all other contractors. It is projected that it will generally require more ESBs to meet a given dollar goal than attempting to meet the same goal with MBE and WBE firms which have much greater capabilities. These "large" firms would include Marmolejo Construction and Dirt and Aggregate. However, should such "large" firms be successful bidders, they would count toward meeting annual minority and woman business goals.
- \* While minority and women owned businesses make up a large share of ESBs at the present time, this share may shrink as more non-minority and/or male owned ESBs become registered. The task force believed that ESB goals should be expanded as the ESB pool grows to preserve the MBE/WBE opportunities.
- \* Continuation and enhancement of the Metro outreach program is of key importance. Periodic conferences on upcoming Metro contracting opportunities as well as mandatory pre-bid meetings were suggested.
- \* The rules for contract award based on DBE or ESB participation must be kept as simple as possible. Awarding contracts based on meeting MBE and WBE goals as well as ESB goals was unacceptable to those in the position of prime contractors. The description of good faith efforts must be precisely defined and unequivocal.
- \* Prime Contractors did not wish provisions for "negotiating" with ESBs to be included as it suggests bid shopping. This terminology is included in the State law but the practical applicability is not clear.



- \* The task force found the Portland Development Commission (PDC) "Emerging Small Business Opportunity Program" to be a desirable format. While the PDC program is documented in a much more general form, the key elements of that program have been incorporated into the Metro proposed program.

In summary, the proposed Metro Special Contracting Program provides for:

- \* A program aimed at contracting with Disadvantaged Business Enterprises, which include enterprises owned and operated by women, for federally assisted procurements.
- \* A program which mandates efforts by Metro prime contractors to include Emerging Small Business subcontractors in contracts with Metro.
- \* A program which mandates efforts to include Minority Business Enterprises and Women-Owned Business Enterprises in Metro procurement activities.
- \* Establishment of annual participation goals for ESB, DBE, MBE and WBE firms.
- \* Establishment of contract award criteria based on DBE or ESB participation to include a description of acceptable good faith efforts.

NOTE: The proposed Ordinance No. 91-391 was originally prepared for submission to the Council in early April 1991. Prior to inclusion on the Council Agenda for First Reading, the attached letter from the AGC was received. (Attachment B). As the AGC is a major factor in the construction contracting arena, the proposed Ordinance was temporarily withdrawn pending AGC input.

The AGC proposal, as summarized in my April 29, 1991 letter to Jack Kalinoski (Attachment C ), recommends substituting set-asides for emerging small businesses for the proposed system of goals and good faith efforts to attract small businesses as sub-contractors. These set-asides would be placed in effect for contracts less than \$100,000 and Oregon Certified ESB contractors would be selected from designated economically disadvantaged areas within the Metro district boundaries.

As this AGC proposal was not brought forward during the Task Force deliberations, it cannot be recommended as a Task Force product. The proposal does have merit in its simplicity and its direct application to emerging small businesses. The AGC input should be considered a minority report; however, Council should be prepared to hear strong testimony in its favor.

EXECUTIVE OFFICER'S RECOMMENDATION

The Executive Officer recommends approval of Ordinance No. 91-391.

Date: December 8, 1989  
To: Ray Phelps, Director of Finance & Administration  
From: Daniel B. Cooper, General Counsel  
Regarding: HB 3001 (Oregon Laws 1989, Chapter 1043)

=====

At your request, I have reviewed the provisions of Chapter 1043, Oregon Laws 1989, hereinafter referred to as "the act," which became effective on October 3, 1989. You have asked that I review the act and advise you of the effect the act has on the provisions of the Metro Code regarding ~~non-federally funded DBE/WBE participation in Metro contracts~~. A copy of the act is attached.

The act makes significant changes to state law and mandates a new policy direction. Section 10 of the act contains a mandate for "all public agencies" in the state ~~to aggressively pursue policies to encourage utilization of Emerging Small Businesses~~. While the policy direction established by Section 10 of the act contains no penalties for violation thereof, it should not be disregarded.

Section 10 of the act states:

"Public agencies shall aggressively pursue a policy of providing opportunities for available contracts to emerging small businesses and shall cooperate with the Advocate for Minority, Women and Emerging Small Business to determine the best means by which to make such opportunities available."

To carry out this directive the act has defined Emerging Small Business and requires the State Advocate for Minority Women and Emerging Small Businesses (formerly the Advocate for Minority and Women Business) to certify businesses that apply for this designation if they meet certain criteria established by the act. The criteria are racial and gender neutral.

Further, the act amends ORS 279.059 by ~~deleting previous references to requirements for Minority and Women Business Enterprise participation in local government contracts~~ and in its place adopts the following new subsection ORS 279.059(1):

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May 16, 1990  
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"A public contracting agency may require a bidder to subcontract some part of the contract to, or obtain materials to be used in performing the contract from, a business enterprise that is a certified emerging small business."

ORS 200.045(1) and (2) clarify that any "requirements" for Emerging Small Business participation adopted pursuant to ORS 279.059(1) are in effect "goals" and not "set asides." Bidders are entitled to demonstrate "good faith efforts" to meet the requirements based on similar criteria previously mandated for determining compliance with Minority and Women Business participation requirements.

In addition, Section 9 of the act states that:

"A public contracting agency may require a bidder to subcontract some part of the contract to, or obtain materials to be used in performing the contract from, certified emerging small businesses that are, as identified by the public contracting agency, located in, or draw their workforces from within, economically depressed areas, as designated by the Economic Development Department in cooperation with the Employment Division of the Department of Human Resources."

This section apparently creates additional authority for a local government to set requirements for utilizing certain emerging small businesses in public contracts that would not be subject to the good faith efforts test presently contained in ORS 200.045. This conclusion is not free from doubt. It is possible to construe the statutes to authorize actual set asides for emerging small businesses that are located in or draw their workforces from within economically depressed areas. This is in contrast to the other requirements for utilizing emerging small businesses pursuant to ORS 279.059 which cannot be established as true set asides, but rather must be in the form of goals for which bidders must make good faith efforts.

Another key provision of the act that is new is ORS 279.059(2):

"A public contracting agency may require that a contract be awarded to a responsible bidder as defined in ORS 200.005 and 200.045(3)."

ORS 200.005(11) defines responsible bidder as:

~~"Responsible bidder means one who in the determination of the Office of the Advocate for Minority, Women and Emerging Small Businesses, has undertaken both the policy and practice of actively pursuing participation by minority and women businesses in all bids, both public and private, submitted such bidder."~~

ORS 200.045(3) sets for 10 different criteria for determining whether or not a bidder has acted as a responsible bidder:

~~"(3) To determine whether a bidder is a responsible bidder, the performance of all the following actions constitutes a rebuttable presumption that the bidder is responsible. It shall be a rebuttable presumption that the bidder is not responsible if the bidder has not acted consistently with the actions described in this subsection. Efforts that are merely superficial are not good faith efforts."~~

~~"(a) The bidder attended any presolicitation or prebid meetings that were scheduled by the contracting agency to inform minority or women business enterprises of contracting and subcontracting or material supply opportunities available on the project;~~

~~"(b) The bidder identified and selected specific economically feasible units of the project to be performed by minority or women business enterprises in order to increase the likelihood of participation by such enterprises;~~

~~"(c) The bidder advertised in general circulation, trade association, minority and trade oriented, women-focus publications, if any, concerning the subcontracting or material supply opportunities;~~

~~"(d) The bidder provided written notice to a reasonable number of specific minority or women business enterprises, identified from a list of certified minority or women business enterprises provided or maintained by the Executive Department for the selected subcontracting or material supply work, in sufficient time to allow the enterprises to participate effectively;~~

"(e) The bidder followed up initial solicitations of interest by contracting the enterprises to determine with certainty whether the enterprises were interested;

"(f) The bidder provided interested minority or women business enterprises with adequate information about the plans, specifications and requirements for the selected subcontracting or material supply work;

"(g) The bidder negotiated in good faith with interested, capable and competitive minority or women business enterprises submitting bids;

"(h) Where applicable, the bidder advised and made efforts to assist interested minority or women business enterprises in obtaining bonding, lines of credit or insurance required by the contracting agency or contractor;

"(i) The bidder's efforts to obtain minority or women business enterprise participation were reasonably expected to produce a level of participation sufficient to meet the goals of the public contracting agency; and

"(j) The bidder used the services of minority community organizations, minority contractor groups, local, state and federal minority business assistance offices and other organizations identified by the Advocate for Minority, Women and Emerging Small Business that provide assistance in the recruitment and placement of disadvantaged, minority or women business enterprises."

This provision goes beyond the provisions of Section 11 of the act which create a prohibition against discrimination by allowing contracting agencies to in effect require affirmative action in subcontracting for all of their prospective contractors. However, the act leaves the determination of who is a responsible bidder in the hands of the Advocate for Minority, Women and Emerging Small Businesses and sets forth no procedures for how that determination would be made.

The act is silent in several respects regarding implementing the "responsible bidder" provisions. The act does not specify any time period for the Advocate to make such a determination, whether she will develop a list of responsible bidders who would then be the only ones eligible to bid on public contracts subject to this requirement, or whether she would be available to decide on a case-by-case basis whether a bidder has acted as a responsible bidder in the past. Given the limited time generally available after bid opening the volume of public contracts done

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in this state, and the documentation required to determine whether or not a contractor has been a responsible bidder, it is unclear to me how this program would work.

Prior to the effective date of the act, the Metro program (Metro Code Chapter 2.04.100 et seq.) established requirements that contractors either meet goals established by Metro for participation by DBE/WBES as subcontractors, or demonstrate that they had made a good faith effort to do so. The Code provisions describe what evidence is to be considered as to whether or not a bidder had made a good faith effort to comply with the goals.

The Metro program was limited by the previous provisions of ORS chapter 200 and ORS 279.059 in two respects. Pursuant to former ORS 200.065, Metro was required to accept the certification of businesses by the State of Oregon as either being Disadvantaged Business Enterprises or Women-owned Business Enterprises as conclusive. Metro could not have its own separate certification program. This limited Metro in its ability to adopt definitions of DBE/WBE different from the definitions that were contained in state law. Thus, provisions of the Metro Code which defined DBEs/WBES in a slightly different manner than provided in state law were rendered inoperative by this provision by state law adopted by the 1987 Legislature. Further, ORS 279.059 limited all local governments that established programs for participation by DBEs/WBES by limiting their ability to establish "set aside" programs. The effect of the former provisions of ORS 279.059 was to require that whenever a local agency established a requirement for participation the requirement must be considered a "goal." Contracts must be awarded to low bidders who did not meet the "goals" but who nevertheless were able to establish they had made "good faith efforts" to do so.

In addition, the Metro program was subject to challenge on a federal constitutional basis for the same reasons that successful challenges had been mounted against the Multnomah County program by the Oregon Chapter of the Association of General Contractors and found invalid by the Federal District Court for Oregon in 1988, as well as for the reasons set forth in the Supreme Court opinions in the Crosan v. City of Richmond decision referred to in your inquiry to me. While those two court decisions place the Metro program in jeopardy, the provisions of the Metro program which create an exemption from finding a lack of good faith where a bidder can demonstrate that all subcontracts were awarded to the lowest responsive, responsible bidder as conclusively demonstrating good faith are a significant distinction from the programs found unconstitutional in the Multnomah County and



Richmond cases and are grounds to distinguish the Metro program from such actions.

While Metro can legally continue to maintain its existing minority and women business enterprise program ~~it has a positive duty to now include emerging small businesses within that~~ program. Since the adoption of the act, Portland Community College, which was the only other local government in Oregon besides Metro to maintain a DBE/WBE program for non-federally funded projects, has been advised by its attorney to discontinue the program in order to comply with the act. I disagree with the reasoning used to reach the conclusion leading to the advice, but concur in the result.

Given that the policy direction by the Legislature has been to de-emphasize the previous direction to encourage participation by women and minority businesses by establishing goals for participation, the Metro Code should be amended to incorporate the new emerging small business program. A policy determination needs to be made as to what goal levels should be set and whether or not the opportunity for using set asides rather than goals for certain emerging small businesses located in or drawing their workforces from economically depressed areas should be implemented. As part of this Code amendment, I recommend that given the risk of litigation still inherent based on the Richmond and Multnomah County cases, and the change in direction set by the Legislature, it would be appropriate to eliminate the present Metro Code requirements for minority and women business enterprise participation, and instead adopt the state program, using the emerging small business category as the category on which to base goals.

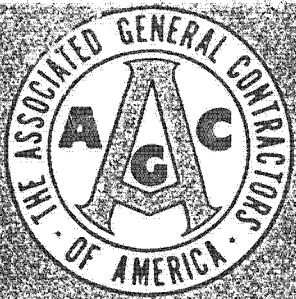
Because of the uncertainties as to how the "responsible bidder" program can be implemented given the need for short timelines in determining who to award contracts to and the need to secure broad competition for contracts in order to keep prices reasonable, and given the fact that there are no implementing regulations adopted at this point, I recommend a wait and see approach on any decision to require that bidders on Metro contracts be determined as being "responsible bidders" by the Advocate for Minority, Women and Emerging Small Businesses. If the "responsible bidder" program can be set forth in a coherent fashion, and a determination can be made that it will not have an adverse impact on Metro's budget by eliminating needed competition on public bids, then such a program certainly can work as a constitutionally sound way to ensure that minorities

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and women have equal opportunity to subcontract on contracts put up for public bid.

DBC/gl  
1009

Attachment



# Associated General Contractors Oregon-Columbia Chapter

National AGC Award Winning Chapter

President's "We Can—We Care" Award Recipient

April 18, 1991

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Mike Roberts

Bob Schommer

Larry Sitz

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Harry Thompson

Frank Ward

Jim Wright

Richard Wright

Bill Purdy

Counsel

Jack R. Kalinoski

Executive Director

Neil Saling  
Director Regional Facilities  
Metropolitan Service District  
2000 SW First  
Portland, OR 97201

Dear Mr. Saling: *Neil*

This letter is intended to address the proposed Metropolitan Service District ordinance requiring subcontracting by successful bidders to Minority, Women and Disadvantaged, as well as Emerging Small, Businesses.

AGC is of the opinion the past practices of Metro and its contractors have not satisfied the goals of providing greater opportunities to the smaller disadvantaged firms. And AGC also is of the opinion the proposed ordinance will not further those goals.

It is for those reasons AGC suggests consideration of the alternative described herein.

Importantly, ORS 200.090 states:

"Public agencies shall aggressively pursue a policy of providing opportunities for available contracts to emerging small businesses and shall cooperate with the Advocate for Minority, Women and Emerging Small Business to determine the best means by which to make such opportunities available."

We do not believe there is any merit in discussing the reasoning for the choice of the "contracts" in the statute. Suffice it to say, we believe the words "contracts" and "subcontracts" are synonymous for the purpose of the statute.

The Metropolitan Service District is mandated by federal statutes and regulations to require bidders to subcontract work on some, if not all, federally assisted projects to Minority and Women Business Enterprises. Metro should adopt one ordinance for this purpose separately, detailing the method by which Metro plans to satisfy these specific requirements, as well as the conditions to be imposed upon bidders for public contracts containing subcontracting requirements. This ordinance should not contain additional requirements for ESB subcontracting. Indeed, many certified ESB's are also certified MBE's or WBE's.

**BUILD  
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9450 S.W. Commerce Circle  
Suite 200  
Wilsonville, Oregon 97070  
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Metro has a statutory obligation to make contract opportunities available to ESB's. Metro also has a responsibility to be of service to its constituents. Metro does not have an obligation to require bidders to subcontract work or services to ESB's. Metro also has a responsibility to make every effort to construct public improvements at the least cost to the District (ORS 279.023).

A separate Metro affirmative action ordinance should be adopted containing the following provisions with respect to projects that are not federally aided.

1. Selected public improvement, maintenance or service contracts not exceeding \$100,000 in estimated cost may be set aside for exclusive bidding by Emerging Small Businesses.
2. For these contracts, Metro may waive the requirement for a surety bond from the successful bidder, but only in those instances where the bidder could not secure a bond and Metro agrees to accept all the normal responsibilities of a surety.
3. Bids will be accepted only from Oregon certified ESB's who reside in, or whose office is located in, a designated economically disadvantaged area within the Metro district boundaries, such as those designated by the City of Portland.

The value of all this seems to be apparent.

1. Bidders for larger contracts are not burdened with two subcontracting requirements, DBE and ESB.
2. Metro is satisfying its federal obligations with respect to subcontracting.
3. Metro is satisfying its statutory requirements to provide opportunities to ESB's as "prime contractors", which is an important distinction as compared to subcontracting.
4. Metro is providing a distinct service to promote the economic welfare of its constituents.

AGC is considering a series of seminars for Emerging Small Businesses designed to follow the contents of a Contractor's Management Guide, which was produced by our members earlier this year. Those who would contract with Metro will greatly benefit if they participate.

The AGC is of the opinion that government and industry should work closely together to find solutions for the problems that have resulted from these types of affirmative action programs. For this reason, we pledge our cooperation in the development of this alternative to the ordinance under consideration.

The AGC has a policy in opposition to set asides for public contracts. Because of this, the proposal contained herein should be considered as preliminary, subject to approval of our Board of Directors on April 26.

Very truly yours,



Jack R. Kalinoski  
Executive Director



# METRO

2000 SW First Avenue  
Portland, OR 97201-5398  
(503) 221-1646  
Fax 241-7417

April 29, 1991

Jack Kalinoski  
Executive Director  
Associated General Contractors  
Oregon-Columbia Chapter  
9450 S. W. Commerce Circle, Suite 200  
Wilsonville, OR 97070

Re: Proposed Metro DBE/ESB Ordinance

Dear Jack:

Thanks for your April 18, 1991 letter addressing the proposed Metro DBE/ESB program. For your information, I have enclosed a copy of the draft staff report which was originally to accompany the proposed program when submitted to the Metro Council. While it will now require some revision, it does provide some insights into Metro's approach to a modified program for contracting with minorities, women and small businesses.

Subject to your corrections, I interpret the primary thrust of your proposal to be the elimination from Metro contracts goals for sub-contracting with Emerging Small Businesses (ESB). In the place of goals, AGC recommends a program of set-asides for exclusive bidding by Oregon certified ESBs who do business from a location in a designated economically disadvantaged area within the Metro district boundaries. The AGC proposal would eliminate the need for contractors to pursue good faith efforts to secure ESB sub-contractors on large, locally funded contracts.

Metro is in the process of analyzing your proposal and determining the potential impacts of accepting all or a part of your proposal. At the same time, let me make some observations from the contents of your April 18th letter.

- Provisions for hiring of DBE subcontractors are applicable only to contracts which are wholly or partially funded with Federal funds. Such contracts constitute a very small percentage of Metro's total contracting program. DBE provisions would not apply to locally funded contracts under the proposed Metro program.

Executive Officer  
Rena Cusma

Metro Council

Tanya Collier  
Presiding Officer  
District 9

Jim Gardner  
Deputy Presiding  
Officer  
District 3

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District 1

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Ruth McFarland  
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Judy Wyers  
District 8

Roger Buchanan  
District 10

David Knowles  
District 11

Sandi Hansen  
District 12

Mr. Jack Kalinoski  
April 29, 1991  
Page 2.

- Metro proposes to include provisions requiring its departments to contact minority and woman-owned businesses in their search for contractors. A key change in the proposed program is that satisfaction of goals for contracting with MBEs or WBEs would be no longer a pre-requisite for contract award. MBE & WBE goals for the agency would be established as benchmarks to measure the participation of such firms, but not be a requirement on contractors.
- The concept of Small Businesses Set-Asides is well established in the Federal sector and operates independently of the programs fostering contracts with DBEs. The degree to which Oregon chooses to emphasize firm smallness over special considerations based on race and gender will probably not become apparent until some of the larger State agencies produce their final programs.

I would appreciate any feedback you may have and am looking forward to a final AGC recommendation following your April 26, 1991 Board of Directors meeting. Also, any comments by the Advocate for Minority, Women and Emerging Small Businesses which you have received would be appreciated.

Sincerely,



Neil E. Saling, Director  
Regional Facilities

NES:jp

Enclosure

cc: Dick Engstrom, Deputy Executive Director  
Dan Cooper, General Counsel



#### 2.04.100 Special Contracting Programs, Purpose and Authority

(a) It is the purpose of this portion of the Metro Code (Sections 2.04.100 through 2.04.180) to establish and implement programs to encourage the utilization by Metro of emerging small businesses, minority/women-owned businesses and businesses owned by disadvantaged individuals by creating for such businesses the maximum possible opportunity to compete for and participate in Metro contracting activities.

(b) Metro Code Sections 2.04.100 to 2.04.180 shall be known and may be cited as the "Metro Special Contracting Program," hereinafter referred to as the "Program."

#### 2.04.105 Policy Statement:

(a) Through this Program, Metro:

(1) expresses its strong commitment to provide maximum contracting opportunity to emerging small businesses, minority/women owned businesses and businesses owned by disadvantaged individuals;

(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) Through this program, Metro provides equal access and opportunity to all persons to 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, sexual orientation, age, religion, physical handicap, political affiliation or marital status.

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

(d) Metro accepts and agrees to the statements of 49 CFR §23.43(a)(1) and (2), and said statements shall be included in all USDOT agreements with USDOT subrecipients and in all USDOT assisted contracts between Metro or USDOT subrecipients and any contractor.

2.04.110 Definitions: For purposes of this Program, the following definitions shall apply:

(a) APPLICANT -- one who submits an application, request or plan to be approved by a USDOT official or by Metro as a condition to eligibility for Department of Transportation (USDOT) financial assistance; and "application" means such an application, request or plan.

(b) 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.

(c) 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 Program a lease or a purchase order of \$500 or more is a contract.

(d) CONTRACTOR -- means the one who participates, through a contract or subcontract, in the Program and includes lessees.

(e) DISADVANTAGED BUSINESS ENTERPRISE or DBE -- means a small business concern 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 whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it. Women and minorities are rebuttably presumed to be disadvantaged.

(f) EMERGING SMALL BUSINESS or ESB--means

(1) A business with its principal place of business located in the State of Oregon;

(2) A business with average annual gross receipts over the last three years not exceeding \$2 million for construction or \$700,000 for nonconstruction;

(3) A business which has fewer than 20 employees;

(4) An independent business; and

(5) A business properly licensed and legally registered in the State of Oregon.

(g) EXECUTIVE DEPARTMENT -- means the State of Oregon's Executive Department.

(h) 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. In a joint venture between an ESB, DBE, or MBE/WBE and non-ESB, non-DBE or non-MBE/WBE, the ESB, DBE or MBE/WBE must be responsible for a clearly defined portion of the work to be performed and must share in the ownership, control, management responsibilities, risks and profits of the joint venture. A joint venture must receive Metro approval prior to contract award.

(i) LABOR AND MATERIALS CONTRACT -- is a contract including a combination of service and provision of materials other than construction contracts. Examples may include plumbing repair, computer maintenance or electrical repair, etc.

(j) MINORITY OWNED BUSINESS or MBE - means a small business concern which is at least 51 percent owned by one or more minorities or, in the case of any publicly-owned business, at least 51 percent of the stock of which is owned by one or more minorities or women, and whose management and daily business operations are controlled by one or more such individuals.

(k) PERSONAL SERVICES CONTRACT -- means a contract for services of a personal or professional nature.

(l) 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.

(m) RECIPIENT -- means any entity, public or private, to whom USDOT financial assistance is extended, directly or through another recipient for any program.

(n) SMALL BUSINESS CONCERN -- means a small business as defined pursuant to Section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto.

(o) USDOT 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 USDOT financial assistance.

(p) USDOT FINANCIAL ASSISTANCE -- means financial aid provided by USDOT 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.

(q) WOMEN OWNED BUSINESS or WBE - means a small business concern which is at least 51 percent owned by one or more women or, in the case of any 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 such individuals.

#### 2.04.120 Liaison Officer:

(a) The Executive Officer shall by executive order, designate a Special Contracting 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.

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

(c) The liaison officer may waive certain provisions in implementing the Program in so far as they do not materially deviate from the intent of the Program and are beneficial to the District.

2.04.125 Directory: A directory of ESBs, DBEs and MBE/WBEs certified by the Executive Department, shall be maintained by the Liaison Officer to facilitate identifying such 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.

2.04.130 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/MBE banks.

2.04.135 Affirmative Action and Equal Opportunity Procedures: Metro shall use affirmative action techniques to facilitate ESB, DBE and MBE/WBE participation in contracting activities. These techniques include:

(a) Arrange solicitations, time for the presentation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation of ESBs, DBEs and MBE/WBEs.

(b) Refer ESBs, DBEs and MBE/WBEs in need of management assistance to established agencies that provide direct management assistance to such businesses.

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

(d) Distribute copies of the Program to organizations and individuals concerned with ESB, DBE and MBE/WBE programs.

(e) Review the Program periodically with department heads to insure that they are aware of the Program goals and desired activities on their parts to facilitate reaching the goals. Additionally, departmental efforts toward and success in meeting ESB, DBE and MBE/WBE goals for department contracts shall be factors considered during annual performance evaluations of the department heads.

(f) Monitor and assure that Disadvantaged and Women Business Enterprise planning centers and likely ESB, DBE and MBE/WBE contractors are receiving requests for bids, proposals and quotes.

(g) Study the feasibility of certain USDOT-assisted contracts and procurement being set aside for DBE participation.

(h) Distribute to potential ESB, DBE and MBE/WBE contractors lists of the types of goods and services which Metro regularly purchases.

(i) Establish an interdepartmental Contract Management Committee which will meet regularly to monitor and discuss, among other issues, potential ESB, DBE and MBE/WBE participation in contracts. In an effort to become more knowledgeable regarding ESB, DBE and MBE/WBE resources, the committee shall also invite potential ESB, DBE and MBE/WBE contractors to attend selected meetings.

(j) Require that at least one DBE or MBE/WBE vendor or contractor be contacted for all contract awards which are not exempt from Metro's contract selection procedures and which are 1) for more than \$500 but not more than \$25,000 in the case of non-personal services contracts; and 2) for more than \$2,500 but not more than \$25,000 for personal services contracts. The Liaison Officer may waive this requirement if he/she determines that there are no DBEs or MBE/WBEs on the certification list capable of providing the service or item. For contracts over the dollar amounts indicated in this section, all known DBEs and WBEs in the business of providing the service or item(s) required shall be mailed bid or proposal information.

(k) The Executive Officer or his/her designee, may establish and implement additional affirmative action techniques which are designed to facilitate participation of ESBS, DBEs and MBE/WBEs in Metro contracting activities.

#### 2.04.140 Certification:

(a) To participate in the Program as ESB, DBE or MBE/WBE, contractors and subcontractors must have been certified by the State of Oregon Executive Department as being qualified and meeting the criteria to be designated as either ESB, DBE, MBE, WBE or any combination thereof.

(b) Prospective contractors or subcontractors which have been denied certification by the Executive Department may appeal such denial pursuant to applicable law. However, such appeal shall not cause a delay in any contract award by Metro. Decertification procedures for USDOT-assisted contractor, or potential contractors 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 Executive Department.

(c) Challenges to certification or to any presumption of social or economic disadvantage shall be made directly to the Executive Department in conformance to applicable law and regulations.

#### 2.04.145 Annual Participation Goals:

(a) The Metro Council shall, by resolution each June, establish annual ESB, DBE and MBE/WBE goals. Such annual goals shall be established separately for construction contracts, labor and materials contracts, personal services contracts, procurement contracts, and USDOT 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 ESBs, DBEs and MBE/WBEs likely to be available to compete for the contracts;

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

(4) for USDOT-assisted contract goals, existing goals of other local USDOT recipients and their experience in meeting these goals; and

(5) for locally-funded contract goals, existing goals of other Portland metropolitan area contracting agencies, and their experience in meeting these goals.

(c) Annual goals for USDOT-assisted contracts must be approved by the United States Department of Transportation. 49 CFR §23.45(g)(3). Metro will publish notice that the USDOT-assisted contract goals are available for inspection when they are submitted to USDOT 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.

(d) Metro will publish notice regarding proposed locally-funded contract goals not later than ten (10) days prior to adoption of the goals.

#### 2.04.150 Contract Goals:

Specific contract goals will be set on a contract by contract basis by the Liaison Officer taking into consideration the established annual goals, the potential subcontracting areas and the availability of ESB, DBE and MBE/WBE firms.



#### 2.04.155 Contract Award Criteria:

(a) To be eligible for award of contracts containing ESB/DBE goals, prime contractors must either meet or exceed the specific goal for ESB/DBE participation, or prove that they have made good faith efforts to meet the goal prior to the time bids are opened or proposals are due. Bidders/Proposers are required to utilize the most current list of ESBs/DBEs certified by the Executive Department in existence at the time of bid opening in all of the bidders'/proposers' good faith efforts solicitations. The address where certified lists may be obtained shall be included in all applicable bid/proposal documents.

(b) All invitations to bid or requests for proposals 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 or that they have made good faith efforts as defined in Sections 2.04.166 or 2.04.170 to do so. To document the intent to meet the goals, all bidders and proposers shall complete and endorse a Special Contracts Compliance form and include said form with bid or proposal documents. The form shall be provided by Metro with bid/proposal solicitations.

(c) Agreements between a bidder/proposer and an ESB/DBE in which the ESB/DBE promises not to provide subcontracting quotations to other bidders/proposers are prohibited.

(d) Apparent low bidders/proposers shall, by the close of the next working day following bid opening (or proposal submission date when no public opening is conducted), submit to Metro detailed ESB/DBE Utilization Forms listing names of ESB/DBEs who will be utilized and the nature and dollar amount of their participation. This form will be binding upon the bidder/proposer. Within five working days of bid opening or proposal submission date, such bidders/proposers shall submit to Metro signed Letters of Agreement between the bidder/proposer and ESB/DBE subcontractors and suppliers to be utilized in performance of the contract. A sample Letter of Agreement will be provided by Metro. The ESB/DBE Utilization Forms shall be provided by Metro with bid/proposal documents.

(e) An apparent low bidder/proposer who states in its bid/proposal that the ESB/DBE goals were not met but that good faith efforts were performed shall submit written evidence of such good faith efforts within two working days of bid opening or proposal submission in accordance with Sections 2.04.166 or 2.04.170. Metro reserves the right to determine the sufficiency of such efforts.

(f) Except as provided in paragraph (g) of this section, apparent low bidders or apparent successful proposers who state in their bids/proposals 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 (e) of this section, shall have their bids or proposals rejected. In that event the next lowest bidder or, for personal services contracts, the firm which scores second highest shall, within two days of notice of such ineligibility of the low bidder/proposer, submit evidence of goal compliance or good faith effort as provided above. This process shall be repeated until a bidder or proposer 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.

(g) The Liaison Officer, at his or her discretion, may waive minor irregularities in a bidder's or proposer's compliance with the requirements of this section provided, however, that the bid or proposal substantially complies with public bidding requirements as required by applicable law.

#### 2.04.166 Federally Assisted Contracts:

(a) Determination of good faith efforts - The DBE program applies to federally funded contracts only. Bidders or Proposers on USDOT-assisted contracts to which DBE 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 include at least the following standards established in the amendment to 49 CFR §23.45(h), Appendix A, dated Monday, April 27, 1981. A showing of good faith efforts must include written evidence of at least the following:

(1) Attendance at any presolicitation or prebid meetings that were scheduled by Metro to inform disadvantaged business enterprises of contracting and subcontracting or material supply opportunities available on the project;

(2) Advertisement in trade association, general circulation, minority and trade-oriented, women- focused publications, if any and through a minority- owned newspaper or minority-owned trade publication concerning the sub- contracting or material supply opportunities at least 10 days before bids or proposals are due.

(3) Written notification to a reasonable number but no less than five (5) DBE firms that their interest in the contract is solicited. Such efforts should include the segmenting of work to be subcontracted to the extent consistent with the size and capability of DBE firms in order to provide reasonable subcontracting opportunities. Each bidder should send solicitation letters inviting quotes or proposals from DBE firms on the segmented portions of the work and specifically describing, as accurately as possible, the portions of the work for which quotes or proposals are solicited from DBE 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 DBE sufficient opportunity to develop quotes or proposals for the work described.

(4) Evidence of follow-up to initial solicitations of interest, including the following:

- (i) the names, addresses and telephone numbers of all DBE contacted;
- (ii) a description of the information provided to DBE firms regarding the plans and specifications for portions of the work to be performed; and
- (iii) a statement of the reasons for non-utilization of DBE firms, if needed to meet the goal.

(5) Negotiation in good faith with DBE firms. The bidder shall not, without justifiable reason, reject as unsatisfactory bids prepared by any DBE firms;

(6) Where applicable, the bidder must provide advice and assistance to interested DBE firms in obtaining bonding, lines of credit or insurance required by Metro or the bidder;

(7) Overall, the bidder's efforts to obtain DBE participation must be reasonably expected to produce a level of participation sufficient to meet Metro's goals; and

(8) The bidder must use the services of minority community organizations, minority contractor groups, local, state and federal minority business assistance offices and other organizations identified by the Executive Department's Advocate for Minority, Women and Emerging Small Business that provide assistance in the recruitment and placement of DBEs and WBEs.

(b) Replacement of DBE Subcontractors: Prime contractors shall not replace a DBE subcontractor with another subcontractor, either before contract award or during contract performance, without prior Metro approval. Prime contractors who replace a DBE subcontractor shall replace such DBE subcontractor with another certified DBE subcontractor or make good faith efforts as described in the preceding section to do so.

#### 2.04.167 Counting DBE Participation Toward Meeting Goals:

DBE participation shall be counted toward meeting the goals on each federally assisted contract as follows:

(1) The total dollar value of a prime contract or subcontract to be performed by DBE is counted toward the applicable goal for contract award purposes as well as annual goal compliance purposes.

(2) Metro shall count toward its contract 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 DBE business partner in the joint venture.

(3) Metro shall count toward its contract goals only expenditures by DBEs that perform a commercially useful function in the work of a contract. A DBE 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 DBE is performing a commercially useful function, Metro shall evaluate the amount of work subcontracted, industry practices and other relevant factors.

(4) Consistent with normal industry practices, a DBE may enter into subcontracts. If a DBE contractor subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices, the DBE shall be presumed not to be performing a commercially useful function. The DBE may present evidence to Metro to rebut this presumption. Metro's decision on the rebuttal of this presumption is subject to review by USDOT for USDOT-assisted contracts.

(5) A DBE which provides both labor and materials may count toward its disadvantaged business goals expenditures for materials and supplies obtained from other than DBE suppliers and manufacturers, provided that the DBE contractor assumes the actual and contractual responsibility for the provision of the materials and supplies.

(6) Metro shall count its entire expenditure to an DBE manufacturer (i.e., a supplier that produces goods from raw materials or substantially alters them before resale).

(7) Metro shall count toward the contract goals 60 percent of its expenditures to DBE suppliers that are not manufacturers, provided that the DBE supplier performs a commercially useful function in the supply process.

(8) When USDOT funds are passed-through by Metro to other agencies, any contracts made with those funds and any DBE participation in those contracts shall only be counted toward Metro's goals. Likewise, any USDOT 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 DBE 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 USDOT-assisted contracts."

#### 2.04.170 Locally Funded Contracts

(a) Good Faith Efforts determination - The ESB program applies to locally funded contracts. Bidders or proposers on locally-funded contracts to which ESB goals apply shall achieve the applicable contract goal or demonstrate that they have made good faith efforts to achieve the goal. Good faith efforts shall include written documentation of at least the following actions by bidders:

(1) Attendance at any presolicitation or prebid meetings that were scheduled by Metro to inform ESBs of contracting and subcontracting or material supply opportunities available on the project;

Documentation required: Signature of representative of bidder or proposer on prebid meeting attendance sheet.

(2) Identifying and selecting specific economically feasible units of the project to be performed by ESBs to increase the likelihood of participation by such enterprises;

Minimum documentation required: At least the documentation required under subsection (4) below.

(3) Advertising in, at a minimum, a newspaper of general circulation, a trade oriented publication and minority oriented or women-focused publication concerning the subcontracting or material supply opportunities on the project at least ten (10) days before bids or proposals are due;

Documentation required: copies of ads published.

(4) Providing written notice soliciting sub-bids/proposals to not less than five (5) ESBs for each subcontracting or material supply work item selected pursuant to (2) above not less than ten (10) days before bids/proposals are due.

If there are less than five certified ESBs listed for that work or supply specialty then the solicitation must be mailed to at least the number of ESBs listed for that specialty. The solicitation shall include a description of the work for which subcontract bids/proposals are requested and complete information on bid/proposal deadlines along with details regarding where project specifications may be reviewed.

Documentation required: Copies of all solicitation letters sent to ESB along with a written statement from the bidder/proposer that all the letters were sent by regular or certified mail not less than 10 days before bids/proposals were due.

(5) Making, not later than five days before bids/proposals are due, follow-up phone calls to all ESBs who have not responded to the solicitation letters to determine if they would be submitting bids and/or to encourage them to do so.

Minimum documentation required: Log showing a) dates and times of follow-up calls along with names of individuals contacted and individuals placing the calls; and b) results attained from each ESB to whom a solicitation letter was sent (e.g., bid submitted, declined, no response). In instances where ESB bids were rejected, the dollar amount of the bid rejected from the ESB must be indicated along with the reason for rejection and the dollar amount of the bid which was accepted for that subcontract or material supply item.

(6) Contacting and requesting assistance of community organizations, minority contractor groups, local, state and federal business assistance offices and other organizations identified by the Executive Department's Advocate for Minority, Women and Emerging Small Business that provide assistance in the recruitment and placement of ESBs; where applicable, advising and assisting ESBs in obtaining lines of credit or insurance required by Metro or the bidder/proposer; and, otherwise, making efforts to encourage participation by ESBs which could reasonably be expected to produce a level of participation sufficient to meet the goals.



Minimum documentation required: Letter from bidder/proposer indicating all special efforts made to facilitate attainment of contract goals, the dates such actions were taken and results realized.

(7) Notwithstanding any other provision of this section, bidders and proposers on locally-funded contracts to which ESB goals apply need not accept the bid of an ESB on any particular subcontract or material supply item if the bidder/ proposer demonstrates that none of the ESBs submitting bids were the lowest responsible, responsive and qualified bidders/proposers on that particular subcontract item and that the subcontract item was awarded to the lowest responsible, responsive bidder/proposer.

Metro reserves the right to require additional written documentation of good faith efforts and bidders and proposers shall comply with all such requirements by Metro. It shall be a rebuttable presumption that a bidder or proposer has made a good faith effort to comply with the contract goals if the bidder has performed and submits written documentation of all of the above actions. It shall be a rebuttable presumption that the bidder has not made a good faith effort if the bidder has not performed or has not submitted documentation of all of the above actions.

(b) Replacement of ESB Subcontractors: Prime contractors shall not replace an ESB subcontractor with another subcontractor, either before contract award or during contract performance, without prior Metro approval. Prime contractors who replace an ESB subcontractor shall replace such ESB subcontractor with another certified ESB subcontractor or make good faith efforts as described in the preceding section to do so.

#### 2.04.175 Counting ESB Participation Toward Meeting Goals:

ESB participation shall be counted toward meeting the goals on each locally funded contract as follows:

(1) The total dollar value of a prime contract or subcontract to be performed by ESB is counted toward the applicable goal for contract award purposes as well as annual goal compliance purposes.

(2) Metro shall count toward its contract 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 ESB business partner in the joint venture.

(3) Metro shall count toward its contract goals only expenditures by ESBs that perform a commercially useful function in the work of a contract. An ESB 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 an ESB is performing a commercially useful function, Metro shall evaluate the amount of work subcontracted, industry practices and other relevant factors.

(4) Consistent with normal industry practices, an ESB may enter into subcontracts. If an ESB contractor subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices, the ESB shall be presumed not to be performing a commercially useful function. The ESB may present evidence to Metro to rebut this presumption. Metro's decision on the rebuttal of this presumption is subject to review by the State Executive Department.

(5) An ESB which provides both labor and materials may count toward its emerging small business or ESB goals expenditures for materials and supplies obtained from other than ESB suppliers and manufacturers, provided that the ESB contractor assumes the actual and contractual responsibility for the provision of the materials and supplies.

(6) Metro shall count its entire expenditure to an ESB manufacturer (i.e., a supplier that produces goods from raw materials or substantially alters them before resale).

(7) Metro shall count toward the contract goals 60 percent of its expenditures to ESB suppliers that are not manufacturers, provided that the ESB supplier performs a commercially useful function in the supply process.

2.04.177 Counting MBE/WBE Participation Toward Meeting Annual Goals:

MBE/WBE participation shall be counted toward meeting the annual goals as follows:

- (1) Subject to the limitations indicated in paragraphs
- (2) through (8) below, the total dollar value of a prime contract or subcontract to be performed by MBEs or WBEs is counted toward the applicable annual goal or contract goal if specified.
- (2) The total dollar value of a contract with a business owned and controlled by minority women is counted toward either the minority business goal or the goal for women, but not to both. Metro shall choose the goal to which the contract value is applied.
- (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 minority or woman business partner in the joint venture.
- (4) Metro shall count toward its goals only expenditures to MBEs and WBEs that perform a commercially useful function in the work of a contract. An MBE or WBE 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 an MBE or WBE is performing a commercially useful function, Metro shall evaluate the amount of work subcontracted, industry practices and other relevant factors.
- (5) Consistent with normal industry practices, an MBE or WBE may enter into subcontracts. If an MBE or WBE contractor subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices, the MBE or WBE shall be presumed not to be performing a commercially useful function. The MBE or WBE may present evidence to Metro to rebut this presumption.

(6) An MBE or WBE which provides both labor and materials may count toward its goals expenditures for materials and supplies obtained from other than MBE or WBE suppliers and manufacturers, provided that the MBE or WBE contractor assumes the actual and contractual responsibility for the provision of the materials and supplies.

(7) Metro shall count its entire expenditure to an MBE or WBE manufacturer (i.e., a supplier that produces goods from raw materials or substantially alters them before resale).

(8) Metro shall count toward the contract goals 60 percent of its expenditures to MBE or WBE suppliers that are not manufacturers, provided that the MBE or WBE supplier performs a commercially useful function in the supply process.

#### 2.04.178 Records and Reports:

(a) Metro shall develop and maintain a recordkeeping system to identify and assess ESB, DBE, MBE and WBE participation in contract awards, prime contractors' progress in achieving goals and affirmative action efforts. Specifically, the following records will be maintained:

(1) Awards to ESBs, DBEs, MBEs and WBEs by number, percentage and dollar amount.

(2) A description of the types of contracts awarded.

(3) The extent to which specified goals were exceeded or not met and reasons therefor.

(b) All ESB, DBE MBE and WBE records will be separately maintained. Required ESB, DBE, MBE and WBE information will be provided to federal agencies and administrators on request.

(c) The Liaison Officer shall prepare reports, at least semiannually, on DBE, ESB and MBE/WBE 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 ESB, DBE, MBE/WBE firms in the reporting period; and
- (5) the extent to which annual goals have been met or exceeded.

2.04.180 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 DBE and WBE participation in the contract.

(b) The Liaison Officer may require, at any stage of contract completion, documented proof from the contractor of actual ESB/DBE participation.