

BEFORE THE METRO COUNCIL

AMENDMENTS TO METRO CODE) ORDINANCE NO.
PROVISIONS REGARDING)
DISADVANTAGED BUSINESS)
ENTERPRISE PROGRAM INVOLVING) Introduced by Mike Burton,
FEDERALLY-FUNDED CONTRACTS) Executive Officer

[RECITALS]

Now, Therefore, the Metro Council Hereby Ordains as follows:

SECTION 1. Section 2 is added to and made a part of Metro Code Section 2.04.010.

SECTION 2. "OMWESB" means the Oregon Department of Consumer and Business Services Office of Minority, Women and Emerging Small Business.

SECTION 3. Metro Code Section 2.04.325 is amended to read as follows:

A directory of DBEs as certified by ODOT or the Executive Department, as applicable, OMWESB shall be maintained by the DBE 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 DBE Program requirements.

SECTION 4. Metro Code Section 2.04.335 is amended to read as follows:

2.04.335 Affirmative Action and Equal Opportunity Procedures

Metro shall use affirmative action techniques to facilitate DBE and participation in contracting activities. These techniques include:

(a) Arranging solicitations; time for the presentation of bids, quantities specifications and delivery schedules so as to facilitate the participation of DBEs.

(b) Referring DBEs 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.

SECTION 5. Metro Code Section 2.04.340 is amended to read as follows:

2.04.340 Certification of Disadvantaged Business Eligibility

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

~~(b)~~ (b) To participate in the DBE Program as a DBE, joint ventures shall have been approved by Metro in accordance with procedures set forth in the Metro Contracting Manual.

~~(b)(c)~~ Metro ~~will not perform certification or recertification of businesses or consider challenges to socially and economically disadvantaged status. Rather Metro will shall utilize rely upon the certification and recertification processes and the certification list of ODOT OMWESB, 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.~~ A prospective contractor or subcontractor must be certified approved as a DBE by OMWESB ~~one of the above agencies, as applicable, and appear on the OMWESB 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 and be counted toward meeting attaining DBE program goals. Metro will shall adhere to the recertification rulings resulting from 105(f) or state law, as applicable. adopted by OMWESB.~~

~~(e)~~ (d) 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, 1983, Federal Register, Vol. 45, No. 130, p. 45287, and will be administered by the agency which granted certification.

~~(d)~~ (e) Challenges to certification or to any presumption of social or economic disadvantage with regard to the USDOT-assisted portion of the DBE Program, as provided for in 49 CFR 23.69, shall conform to and be processed in accordance with the ODOT provisions for appeal, 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

~~(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.~~

(f) Complaints regarding implementation of the Metro DBE program shall be processed in compliance with 49 CFR § 23.73.

SECTION 6. Metro Code Section 2.04.345 is amended to read as follows

2.04.345 Annual Disadvantaged Business Goals

(a) The Metro eCouncil shall, by resolution each ~~August~~ July, establish annual DBE goals for the ensuing federal fiscal year and shall submit such goals and the methodology to create them to ODOT by August 1 of each 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 shall~~ be established ~~taking into consideration~~ using a methodology incorporating 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 DBEs likely to be available to compete for the contracts;
- (3) Past results of Metro's efforts under the DBE Program; and
- (4) Existing goals of other local USDOT recipients 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).~~

~~(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.

SECTION 8. Metro Code Section 2.04.355 is amended to read as follows:

2.04.355 Contract Award Criteria

(a) To be eligible for award of contracts containing a DBE goal, prime contractors must either meet or exceed the specific goal for DBE 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 certified by ~~the Executive Department~~ OMWESB 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 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 2.04.360 to do so. To document the intent to meet the goals, 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 a DBE in which the 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 had), submit to Metro detailed DBE utilization forms listing names of 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 DBE subcontractors and suppliers to be utilized in performance of the contract. A sample letter of agreement ~~will be provided by Metro. and~~ the DBE utilization forms shall be provided by Metro with bid/proposal documents in the Metro Contracting Manual.

(e) An apparent low bidder/proposer who states in its bid/proposal that the 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 section 2.04.360. 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

- (4) Metro shall count toward its goals only expenditures to 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, except where such industry practices conflict with the DBE program requirements, and other relevant factors contained in 49 CFR § 23.47.
- (5) 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.
- (6) 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.
- (7) Metro shall count its entire expenditure to a DBE manufacturer ~~(i.e., a supplier that produces goods from raw materials or substantially alters them before resale)~~ regular dealer and service provider in accordance with 49 CFR § 23.47.
- (8) Metro shall count expenditures made to DBE trucking and DBE equipment leasers for services required for performance of contracts in accordance with 49 CFR § 23.47, provided that such expenditures are determined by Metro to be reasonable and not excessive in comparison with expenditures customarily allowed for similar services.
- ~~(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~~

(b) The DBE liaison officer may require, at any stage of contract completion, documented proof from the contractor of actual DBE participation.

(c) Failure by any contractor to comply with the DBE provisions contained in this chapter shall constitute a breach of contract and may subject the contractor to sanctions in accordance with ORS 200.075.

ADOPTED by the Metro Council this ____ day of _____, 1998.

Jon Kvistad, Presiding Officer

ATTEST:

Approved as to Form:

Recording Secretary

Daniel B. Cooper, General Counsel

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STAFF REPORT

**IN CONSIDERATION OF ORDINANCE NO. _____ AMENDING METRO
CODE CHAPTER 2.04.300; MODIFYING THE DBE PROGRAM FOR
FEDERALLY FUNDED CONTRACTS; AND DECLARING AN EMERGENCY**

Date: _____, 1999

Presented by: Scott Moss and Jim Waki

PROPOSED ACTION

Adoption of amendments to Metro Code 2.04 making modifications to the Disadvantaged Business Enterprise Program

FACTUAL BACKGROUND AND ANALYSIS

**In 1992, Metro added to the Metro Code an MBE and WBE program.
(Ordinance No. 92-466)**

In 1994 the Metro Council authorized expenditures for a Regional Disparity Study in association with other regional governmental partners to study Metro's utilization of minority and women owned firms.

**In June 1997, Metro Amended Metro Code Chapter 2.04, Modifying the MBE/WBE Program, established an ESB Program and amended Metro Code sections 2.04.300-390 to comply with all relevant federal regulations relating to participation of Disadvantaged Business Enterprises in federally funded Department of Transportation contracts.
(Ordinance No. 97-692A)**

In December 1997, Metro staff met with ODOT and FHWA representatives at the request of ODOT due to issues raised by FHWA pertaining to Metro's development of its own DBE Program. ODOT reported in June of 1997 it had conducted a subrecipient review on Metro's DBE Program but did not clarify whether Metro was in compliance with the DBE program requirements. FHWA provided comments to ODOT regarding sections of Metro's DBE Program that required further action before Metro's program could be deemed in noncompliance.

Metro staff reviewed the comments and made revisions as recommended by FHWA and submitted draft revisions to ODOT and FHWA staff for their review. On May 20, 1998 ODOT's Office of Civil Rights and FHWA responded that Metro's Draft DBE Code revisions needed additional provisions. Revisions were made and submitted as requested. On January 20, 1999 ODOT approved Metro's DBE Program documents. Staff recommends that the revisions to the DBE section of the Metro Code be incorporated in order to comply with FHWA requirements.

This ordinance makes the following proposed changes:

- **Removes Metro and adds state of Oregon Office of Minority Women and Emerging Small Business as DBE certifying authority.**
- **Identifies DBE owned banks and encourages prime contractors to utilize their services.**
- **Adds reference to federal regulations (49CFR Subparts) and ODOT provisions for challenges to DBE certification and deletes Metro Code sections on challenges.**
- **Revised to clarify that Metro will establish DBE goals for ODOT funded projects only.**
- **Adds sanctions in accordance with ORS 200.075 for prime contractors and or DBE's who violate contractual requirements.**
- **Makes housekeeping changes to Metro's DBE section in accordance with Federal requirements.**

The proposed changes have been reviewed by ODOT, FHWA and Metro staff. Staff is available for questions. Implementation would be _____, 1999. No additional funding is requested for this ordinance.

EXECUTIVE OFFICER'S RECOMMENDATION

The Executive Officer recommends adoption of Ordinance No. 99- _____

**METRO**

Date: April 26, 1999

To: Becky Shoemaker, Office of General Counsel

From: Jim Waki, Risk and Contracts *J.W.*

RE: Non Submitted Metro Ordinance, Metro Disadvantaged Business Program
Number 98-765

The enclosed proposed ordinance revision and staff report regarding the Metro Disadvantaged Business Program were not presented to the Metro Council last year as planned. This was due to delay in obtaining approval of the revision from the Oregon Department of Transportation. ODOT did issue an approval letter January 20, 1999.

Shortly after, the Federal Department of Transportation issued final DBE regulations in (49 CFR Part 26) which requires recipients of federal contracts to submit revised DBE programs that meet the new requirements. There were significant revisions made. The Metro Code Revision that was to be submitted to Council will now have to be reviewed again by ODOT for compliance to the new federal regulations. Additional revisions will probably be required again before ODOT approval.

After this process is completed, we will submit a request for a new ordinance number and submit a current revision to Council for their consideration.

Please contact me if you need more information.

cc: Scott Moss