

BEFORE THE COUNCIL OF THE
METROPOLITAN SERVICE DISTRICT

FOR THE PURPOSE OF AMENDING METRO)
CODE CHAPTER 2.04 RELATING TO)
DISADVANTAGED BUSINESS ENTERPRISES,))
WOMEN-OWNED BUSINESS ENTERPRISES,)
AND EMERGING SMALL BUSINESS ENTER-))
PRISES, ESTABLISHING AN EFFECTIVE)
DATE AND DECLARING AN EMERGENCY)

ORDINANCE NO. 91-430

Introduced by Council
Regional Facilities
Committee

THE COUNCIL OF THE METROPOLITAN SERVICE DISTRICT HEREBY ORDAINS:

Section 1. Code Amendments. The provisions of Metro Code Sections 2.04.100 to 2.04.180 are amended, and new Sections 2.04.200 to 2.04.280 are added, as set forth in the attached Exhibit A.

Section 2. Annual Goals. Until further revised by the Council, the goals for Emerging Small Business participation for locally funded contracts shall be:

Construction Contracts	13 percent
Labor & Materials Contracts	10 percent
Personal Services Contracts	3.75 percent
Procurement Contracts	12 percent

Section 3. Further Action. The Council directs that the Executive Officer consult with affected members of the business community, as well as others, and return recommended changes in the Metro Code regarding participation in Metro contracts by Emerging Small Businesses to the Council before January 1, 1992.

Section 4. Emergency Clause. The Council finds that pursuant to ORS 198.550(3) this Ordinance should be introduced, read once, and put to a final vote all in one meeting without being described in a published agenda because an emergency exists. In order to realize considerable public savings by the utilization of an Request for Proposals process for securing a design/build team contract to remodel the Sears Building facility in time to meet the Council's need to close the purchase of the Sears Building by December 16, 1991, the Council must approve issuance of an RFP by October 10, 1991. The Council has been advised on October 2, 1991, that the present provisions of Metro Code Chapter 2.04 that will be amended by this Ordinance are unconstitutional based on a recent decision of the United States Court of Appeals for the 9th Circuit. Failure to immediately amend the Metro Code to resolve the constitutional defect will jeopardize the contracting process to be utilized to remodel the Sears Building as well as jeopardize the validity of all contracts Metro currently is in the process of procuring. Therefore, an emergency is found to exist and this Ordinance

may be adopted by the Council by the unanimous approval of all members of the Council present at the meeting at which it is considered, a quorum being required.

Section 5. Effective Date. This Ordinance being necessary for the immediate preservation of the public health, safety, and welfare, an emergency is declared to exist, and this Ordinance takes effect upon passage.

Tanya Collier, Presiding Officer

ATTEST:

Clerk of the Council

DBC/gl
1056

STAFF REPORT

CONSIDERATION OF ORDINANCE 91-430 FOR THE PURPOSE
OF AMENDING METRO CODE CHAPTER 2.04 RELATING TO
DISADVANTAGED BUSINESS ENTERPRISES, WOMEN-OWNED
BUSINESS ENTERPRISES, AND EMERGING SMALL BUSINESS
ENTERPRISES, ESTABLISHING AN EFFECTIVE DATE AND
DECLARING AN EMERGENCY.

DATE: October 9, 1991

PRESENTED BY: Neil Saling

Factual Background & Analysis

The current Disadvantaged Business Program (Program) which has been developed and followed for the past ten years, consists of two separate programs: the DBE Program, required for application to contracts which utilize federal funds and an MBE/WBE Program which is applicable to locally funded projects. In his October 2, 1991 opinion, General Counsel Dan Cooper concluded that the provisions of the Metro Code relating to participation by minority-owned businesses in locally funded contracts are unconstitutional.

This emergency Ordinance makes changes to the Metro Code to modify or remove those provisions determined to be constitutionally unacceptable.

The Oregon State Legislature has created a race and gender neutral class of enterprises called Emerging Small Businesses (ESB). An ESB is defined 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 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.

Guidance provided by the Regional Facilities Committee suggests that the present Code provisions relating to MBE/WBE participation in locally funded projects be converted directly to ESB provisions.

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Based upon the above guidance, the existing Program has been divided into two distinct new programs: the "Disadvantaged Business Program for Federally Funded Contracts" and the "Emerging Small Business Program." The Disadvantaged Business Program remains virtually unchanged from the present Code; the new ESB Program replicates the provisions of the current MBE/WBE program.

Incorporated into the proposed Ordinance are goals for the ESB Program. The participation percentages, which are derived from the dollar value of contracts, are the sum of the previous MBE and WBE goals.

The action on the emergency Ordinance constitutes Phase 1 of a two-phase modification of the Code. The second phase will provide for public involvement in expanding and modifying the scope of the ESB Program to take full advantage of all aspects of this special contracting program. Implementation of the second phase will take place after the Executive Officer makes a recommendation to the Council prior to January 1, 1992.

Recommendation

The Council Regional Facilities Committee recommends approval of emergency Ordinance No. 91-430.

EXHIBIT A

2.04.100 Disadvantaged Business Program for Federally Funded Contracts, 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 which are funded in whole or in part by federal funds.

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

(c) This ordinance shall be known and may be cited as the "Metro Disadvantaged Business Program for Federally Funded Contracts," hereinafter referred to in Metro Code Sections 2.04.100 to 2.04.180 as the "DBE Program," "Program" or "This Ordinance."

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

(Ordinance No. 83-165, Sec. 1; amended by Ordinance No. 84-181, Sec. 1; all previous Ordinances repealed by Ordinance No. 87-216, Sec. 1; amended by Ordinance No. 87-231, Sec. 1)

2.04.105 Policy Statement:

(a) Through this Program, Metro:

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

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

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

(d) The objectives of the program shall be:

- (1) To assure that provisions of this ordinance are adhered to by all Metro departments, 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.

(Ordinance No. 83-165, Sec. 2; amended by Ordinance No. 84-181, Sec. 1; all previous Ordinances repealed by Ordinance No. 87-216, Sec. 1; amended by Ordinance No. 87-231, Sec. 1)

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

(a) "Applicant" means 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 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) "Department or USDOT" means the United States Department of Transportation, including its operating elements.

(f) "Disadvantage 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
- (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 DBE Program**, 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 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 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) "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.

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

(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) "Socially and Economically Disadvantaged Individuals or Disadvantaged Individuals" means those individuals who are citizens of the United States (or lawfully admitted permanent residents) and who are Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans or Asian-Indian Americans and any other minorities or individuals found to be disadvantaged by the Small Business Administration pursuant to section 8(a) of the Small Business Act. Certifying recipients shall make a rebuttable presumption that individuals in the following groups are socially and economically disadvantaged. Certifying recipients also may determine, on a case-by-case basis, that individuals who are not a member of one of the following groups are socially and economically disadvantaged:

- (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.

(g) "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.

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

(Ordinance No. 165, Sec. 3; amended by Ordinance No. 84-181, Sec. 2; all previous Ordinances repealed by Ordinance No. 87-216, Sec. 1; amended by Ordinance No. 87-231, Sec. 1; and Ordinance No. 88-252, Sec. 1)

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.~~

(Ordinance No. 83-165, Sec. 4; all previous Ordinances repealed by Ordinance No. 87-216, Sec. 1; amended by Ordinance No. 87-231, Sec. 1)

2.04.120 Liaison Officer:

(a) The Executive Officer shall by executive order, designate a Disadvantaged Business Liaison Officer and, if necessary, other staff adequate to administer the Program. The Liaison Officer shall report directly to the Executive Officer on matters pertaining to the Program.

(b) The Liaison Officer shall be responsible for developing, 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.

(Ordinance No. 83-165, Sec. 5; amended by Ordinance No. 86-197, Sec. 1; all previous Ordinances repealed by Ordinance No. 87-216, Sec. 1; amended by Ordinance No. 87-231, Sec. 1)

2.04.125 Directory: 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.

(Ordinance No. 83-165, Sec. 6; all previous Ordinances repealed by Ordinance No. 87-216, Sec. 1; amended by Ordinance No. 87-231, Sec. 1)

2.04.130 Minority DBE-Owned Banks: Metro will seek to identify minority-owned DBE banks within the policies adopted by the Metro Council and make the greatest feasible use of their services. In addition, Metro will encourage prime contractors, subcontractors and consultants to utilize such services by sending them brochures and service information on certified DBE/WBE banks.

(Ordinance No. 83-165, Sec. 7; amended by Ordinance No. 84-181, Sec. 3; all previous Ordinances repealed by Ordinance No. 87-216, Sec. 1; amended by Ordinance No. 87-231, Sec. 1)

2.04.135 Affirmative Action and Equal Opportunity Procedures: Metro shall use affirmative action techniques to facilitate DBE and WBE 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 ~~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) 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 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 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 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.

(l) 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 \$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.

(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.

(Ordinance No. 83-165, Sec. 8; amended by Ordinance No. 84-181, Sec. 4; Ordinance No. 86-197, Sec. 1; all previous Ordinances repealed by Ordinance No. 87-216, Sec. 1; amended by Ordinance No. 87-231, Sec. 1)

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

(d) Challenges to certification or to any presumption of social or economic disadvantage 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.

(Ordinance No. 83-165, Sec. 9; amended by Ordinance No. 84-181, Sec. 5; all previous Ordinances repealed by Ordinance No. 87-216, Sec. 1; amended by Ordinance No. 87-231, Sec. 1; and Ordinance No. 88-252, Sec. 1)

2.04.145 Annual Disadvantaged Business Goals:

(a) The Metro Council shall, by resolution each June, 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 DBEs and WBEs likely to be available to compete for the contracts;
- (3) Past results of Metro's efforts under the Program; and
- (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).

(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.

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

(Ordinance No. 83-165, Sec. 10; amended by Ordinance No. 86-197, Sec. 1; all previous Ordinances repealed by Ordinance No. 87-216; amended by Ordinance No. 87-231, Sec. 1; and Ordinance No. 88-252, Sec. 1)

2.04.150 Contract Goals:

(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.

(Ordinance No. 83-165, Sec. 11; repealed by Ordinance No. 87-216, Sec. 1; amended by Ordinance No. 87-231, Sec. 1; and Ordinance No. 88-252, Sec. 1)

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 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 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/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 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 DBE/WBE subcontractors and suppliers to be utilized in performance of the contract. A sample Letter of Agreement will be provided by Metro. 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 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 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, 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.

(Ordinance No. 83-165, Sec. 12; amended by Ordinance No. 86-197, Sec. 1; all previous Ordinances repealed by Ordinance No. 87-216, Sec. 1; amended by Ordinance No. 87-231, Sec. 1)

2.04.160 Determination of Good Faith Efforts:

(a) Bidders or Proposers on federally funded contracts including 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 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-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, 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:
 - (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 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. 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 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 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, 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) 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 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 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 DBE/WBE to whom a solicitation letter was sent (e.g., bid submitted, declined, no response). 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 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 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 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.~~

(Ordinance No. 83-165, Sec. 13; amended by Ordinance No. 84-181, Sec. 6 and Ordinance No. 86-197, Sec. 1; all previous Ordinances repealed by Ordinance No. 87-216, Sec. 1; amended by Ordinance No. 87-231, Sec. 1; and Ordinance No. 88-252, Sec. 1)

2.04.165 Replacement of DBE-~~er~~-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-~~er~~-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.

(Ordinance No. 83-165, Sec. 14; amended by Ordinance No. 86-197, Sec. 1; all previous Ordinances repealed by Ordinance No. 87-216, Sec. 1; amended by Ordinance No. 87-231, Sec. 1)

2.04.170 Records and Reports:

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

- (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 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-~~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 DBE/~~WBE~~ firms in the reporting period; and

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

(Ordinance No. 83-165, Sec. 15; amended by Ordinance No. 84-181, Sec. 7, and Ordinance No. 86-197, Sec. 1; all previous Ordinances repealed by Ordinance No. 87-216, Sec. 1; amended by Ordinance No. 87-231, Sec. 1)

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

~~(3)~~ (2) 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)~~ (3) 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) (4) Consistent with normal industry practices, 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. Metro's decision on the rebuttal of this presumption is subject to review by USDOT for USDOT-assisted contracts.
- (6) (5) 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) (6) 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) (7) 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) (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 MBE ~~DBE~~ requirements of 49 CFR Part 23 apply to this agreement.
- (b) MBE ~~DBE~~ 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."

(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.

(Ordinance No. 83-165, Sec. 16; amended by Ordinance No. 84-181, Sec. 8; and Ordinance No. 86-197, Sec. 1; all previous Ordinances repealed by Ordinance No. 87-216, Sec. 1; amended by Ordinance No. 87-231, Sec. 1; and Ordinance No. 88-252, Sec. 1)

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 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)

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2.04.200 Emerging Small Business Program, Purpose and Authority:

(a) It is the purpose of the Metro Code Sections 2.04.200 through 2.04.280 to establish and implement programs to encourage the utilization by Metro of emerging small businesses by creating for such businesses the maximum possible opportunity to compete for and participate in Metro's locally funded contracting activities.

(b) Metro Code Sections 2.04.200 to 2.04.280 shall be known and may be cited as the "Metro Emerging Small Business Program," hereinafter referred to as the "ESB Program" or "Program."

2.04.205 Policy Statement:

(a) Through this Program, Metro:

- (1) Expresses its strong commitment to provide maximum contracting opportunity to emerging small businesses; and
- (2) Informs all employees, governmental agencies and the general public of its intent to implement this policy statement.

(b) 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.

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

(a) "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.

(b) "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.

(c) "Contractor" means the one who participates, through a contract or subcontract, in the Program and includes lessees.

(d) 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.

(e) "Executive Department" means the State of Oregon's Executive Department.

(f) "Joint Venture" means 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 and non-ESB, the ESB 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 between an ESB and a non-ESB must receive Metro approval prior to contract award in order for the ESB share of the joint venture to count toward meeting the goal.

(g) "Labor and Materials Contract" means 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.

(h) "Personal Services Contract" means a contract for services of a personal or professional nature.

(i) "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.

2.04.220 Liaison Officer:

(a) The Executive Officer shall by Executive Order designate a 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 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.

2.04.225 Directory: A directory of ESBs 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.

2.04.235 Affirmative Action and Procedures: Metro shall use affirmative action techniques to facilitate ESB 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.

(b) Refer ESBs 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 the Program.

(e) Review the Program periodically with department heads to ensure 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 goals for department contracts shall be factors considered during annual performance evaluations of the department heads.

(f) Monitor and assure that planning centers and likely ESB contractors are receiving Request for Bids, proposals and quotes.

(g) Distribute to potential ESB contractors lists of the types of goods and services which Metro regularly purchases.

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

(i) Require that at least one ESB 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 ESBs on the certification list capable of providing the service or item. For contracts over the dollar amounts indicated in this section, all known ESBs in the business of providing the service or item(s) required shall be mailed bid or proposal information.

(j) The Executive Officer or his/her designee may establish and implement additional affirmative action techniques which are designed to facilitate participation of ESBs in Metro contracting activities.

2.04.240 Certification:

(a) To participate in the Program as ESB 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 ESB.

(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.

(c) Challenges to certification shall be made directly to the Executive Department in conformance to applicable law and regulations.

2.04.245 Annual Participation Goals:

(a) The Metro Council shall, by resolution each June, establish annual ESB Goals. Such annual goals shall be established separately for construction contracts, labor and materials contracts, personal services contracts and procurement contracts.

(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 likely to be available to compete for the contracts;
- (3) Past results of Metro's efforts under the Program; and

- (5) Existing goals of other Portland metropolitan area contracting agencies, and their experience in meeting these goals.

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

2.04.250 Contract Goals:

(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 ESB 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 2.04.260, to achieve ESB 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(s) 2.04.260 and/or 2.04.275. The extent to which ESB participation will be counted toward contract goals is governed by the latter section.

2.04.255 Contract Award Criteria:

(a) To be eligible for award of contracts containing ESB goals, prime contractors must either meet or exceed the specific goal for ESB 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 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 Invitation 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 2.04.260 to do so. To document the intent to meet the goals, all bidders and proposers shall complete and endorse a 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 in which the ESB 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 Utilization Forms listing names of ESBs 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 subcontractors and suppliers to be utilized in performance of the contract. A sample Letter of Agreement will be provided by Metro. The ESB 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 goal was 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 2.04.260. 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 goal or will show good faith efforts to meet the goal, 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.

2.04.260 Good Faith Efforts Determination:

(a) Bidders or proposers 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 subbids/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 ten (10) days before bids/proposals were due.

- (5) Making, not later than five (5) 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, 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 goal.

Minimum documentation required: Letter from bidder/proposer indicating all special efforts made to facilitate attainment of the goal, 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 goal 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.

2.04.275 Counting ESB Participation Toward Meeting the Contract Goal: ESB participation shall be counted toward meeting the goal on each locally funded contract as follows:

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

(b) Metro shall count toward the goal 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.

(c) Metro shall count toward the goal 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.

(d) 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.

(e) An ESB which provides both labor and materials may count toward its emerging small business or the ESB goal 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.

(f) 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).

(g) Metro shall count against the goal 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.

2.04.278 Records and Reports:

(a) Metro shall develop and maintain a recordkeeping system to identify and assess ESB 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 by number, percentage and dollar amount;
- (2) A description of the types of contracts awarded; and
- (3) The extent to which specified goals were exceeded or not met and reasons therefor.

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

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

2.04.280 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 ESB participation in the contract.

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

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