

BEFORE THE COUNCIL OF THE  
METROPOLITAN SERVICE DISTRICT

FOR THE PURPOSE OF REPEALING )  
METRO CODE SECTIONS 2.04.100- )  
.180, AND FOR THE PURPOSE OF )  
ENACTING NEW PROVISIONS ESTAB-) )  
LISHING AND GOVERNING METRO'S )  
CONTRACTING PROCEDURES FOR )  
MINORITY, WOMEN, AND DISAD-) )  
VANTAGED BUSINESS ENTERPRISES )

ORDINANCE NO. 92-466A

Introduced by  
Councilor Tanya Collier

WHEREAS, Metro Code 2.04.100-.180 previously governed the Metropolitan Service District's contracting program for disadvantaged businesses; and

WHEREAS, the Metro Council finds that a revision of the Metropolitan Service District's contracting program is desirable; now, therefore,

THE COUNCIL OF THE METROPOLITAN SERVICE DISTRICT HEREBY ORDAINS:

Section 1. The current Metro Code Sections 2.04.100-.180 are repealed.

Section 2. New Metro Code Sections 2.04.100, 2.04.200, and 2.04.300 are adopted, as follows:

"2.04.100 Minority Business Enterprise Program (MBE Program) For Locally-Funded Contracts, Findings, Purpose and Authority:

(a) The Metro Council supports the aspirations of minorities to enter the mainstream of social, political and economic life.

(b) The Metro Council finds:

- (1) The opportunity for full participation in our free enterprise system by minorities is essential;
- (2) Greater economic opportunity for minorities is essential;
- (3) Review of Metro programs to remedy historical patterns of exclusion of and discrimination against racial or ethnic groups is needed;

- (4) Public policies and programs to eliminate the effects of long-term, open and pervasive exclusion of and discrimination against minorities from the business sector, including increased opportunities to integrate minorities into the full economic life of the community should be reviewed; and
- (5) In cooperation with the private sector, the affected populations, interest groups and appropriate governmental entities, a program of review should be established to recommend remedies for the unfortunate effects of social, political and economic inequity that still exist.

(c) It is the purpose of the MBE Program to establish and implement a program to encourage the utilization by Metro of minority-owned businesses, to the greatest extent permitted by law, by creating for such businesses the maximum possible opportunity to compete for and participate in locally-funded Metro contracting activities. The MBE Program does not apply to federally-funded contracts, which are governed by Metro Code 2.04.300 et seq. The MBE Program shall be administered simultaneously and in addition to the provisions of Metro Code Sections 2.04.200-.290.

(d) Metro Code Sections 2.04.100 to 2.04.190 shall be known and may be cited as the "Metro Minority Business Enterprise Program," hereinafter referred to as the "MBE Program."

2.04.105 Policy Statement:

(a) Through this MBE Program, Metro:

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

(b) It is the policy of Metro to provide equal opportunity to all persons to access and participate in the locally-funded projects, programs and services of Metro. Metro and Metro contractors shall 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 the MBE Program shall apply to all Metro departments, commissions and project areas except as expressly provided herein.

(d) The objectives of the MBE Program shall be:

- (1) To assure that provisions of the MBE Program are adhered to by all Metro departments, contractors and employees; and
- (2) To initiate and maintain efforts to increase, to the greatest extent permitted by law, program participation by minority businesses.

**2.04.110 Definitions:** For purposes of Metro Code Sections 2.04.100 to 2.04.190, the following definitions shall apply:

(a) "Capable" means a Minority Business Enterprise registered with the Executive Department who upon request from the bidder can supply two favorable references of prior work of the type being subcontracted for.

(b) "Competitive" means the subcontract bid submitted by the Minority Business Enterprise was within 10 percent of either the budgeted amount, subbid estimate or the lowest bid received by the bidder. The bidder shall make either the budgeted amount or the subbid estimate available upon request. This term relates to price only and must not be interpreted to mean that a bid deemed competitive is therefore entitled to the subcontract award.

(c) "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.

(d) "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 the MBE Program a lease or a purchase order of \$500.00 or more is a contract.

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

(f) "Documentation" means written materials purporting to establish the satisfaction of a good faith effort requirement that are capable of verification. These may include, but are not limited to, copies of business logs, correspondence or newspaper ads.

(g) "Economically Feasible Unit" means a unit of work identified in a project suitable for subcontracting in the normal course of business. These would be units that a contractor would ordinarily identify as suitable for performance by a subcontractor. The intent here is to have identified units that would be attractive to a serious and qualified subcontractor and not be shunned by that subcontractor because the unit of work is too small to be profitable.

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

(i) "Interested" means a Minority Business Enterprise that has expressed to Metro and/or the bidder an interest in learning more about the project identified in the initial solicitation by the bidder.

(j) "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 MBE and non-MBE, the MBE 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 MBE and a non-MBE must receive Metro approval prior to contract award.

(k) "Justification" means a maintaining or showing of a sufficient reason why an action was taken and that the action was not taken for an impermissible reason. Permissible reasons include, but are not limited to, not meeting bid invitation specifications or not being the low bid. An impermissible reason would be one that is arbitrary or capricious or based on race, sex, national origin, marital status or religion.

(l) "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.

(m) "Lessee" means a business or person that leases, or is negotiating to lease, property from Metro or an actual or potential Metro contractor on Metro's or the contractor'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 at the facility.

(n) "Minority Business Enterprise or MBE" means a small business concern which is certified as such by the Executive Department and:

(1) Which is at least 51 percent owned by one or more minority 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 minority individuals; and

(2) Whose management and daily business operations are controlled by one or more of the minority individuals who own it.

(o) "Minority Individual" has the meaning established by ORS 200.005(7).

(p) "Negotiate" means to engage in good faith discussions with the potential subcontractors about their proposals/bids, and the work for which a bid is sought, including sharing with them any cost estimates from the request for proposals or invitation to bid documents, if available.

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

(r) "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.

(s) "Reasonable Number" means at least three (3) firms of those MBEs certified as such by the Executive Department, or a greater number of such firms, if so specified in any particular contract by the Liaison Officer. Consideration should be given to the specialty of subcontracting or materials supply desired as well as the location of the project and whether or not the subcontractor is willing to perform work out of their geographic area.

(t) "Rebuttable Presumption" means a presumption which may be rebutted, or disproved, by evidence.

(u) "Small Business Concern" means a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto.

2.04.115 Notice to Contractors and Subcontractors: Contractors of Metro accepting locally-funded contracts under the MBE Program shall be advised that failure to carry out the applicable provisions of the MBE 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 be responsible for administering the MBE Program. The Executive Officer may, by Executive Order, designate a Liaison Officer and, if necessary, other staff adequate to administer the MBE Program on the Executive's behalf. For purposes of Metro Code Sections 2.04.100-.190, all references to the "Liaison Officer" shall mean the Executive Officer, unless the Executive Officer has designated another individual as the "Liaison Officer," in which case the individual so designated shall perform the functions required by the MBE Program.

(b) The Liaison Officer shall be responsible for developing, managing and implementing the MBE Program, and for disseminating information on available business opportunities so that MBEs 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 MBE Program.

(c) The Liaison Officer shall begin immediately to design a technical assistance and outreach program which shall be established by January 1, 1993. This program shall include at least the following elements:

- (1) A regularly-scheduled contractor orientation program to promote compliance with and understanding of the provisions of the MBE Program and Metro;
- (2) Feasible options for bonding, insurance, and banking assistance for MBEs;
- (3) A program designed to assist Metro departments in enhancing opportunities for MBEs;
- (4) A fully-developed and maintained resource list to include all available resources for MBEs; and
- (5) A system for agency-wide reporting of MBE outreach efforts and accomplishments.

(d) The Liaison Officer shall have the responsibility for monitoring implementation of the requirements of the MBE Program and shall have the power to request from Metro departments, bidders/proposers, and/or contractors any relevant records, information and documents.

(e) The Liaison Officer shall be responsible for gathering all information concerning compliance with this chapter and shall have access to all pertinent Metro records.

**2.04.125 Directory:** A directory of MBEs 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 the MBE Program requirements.

**2.04.130 Minority-Owned Banks:** Metro will seek to identify minority-owned banks and banks utilizing equal opportunity banking practices, including community reinvestment, and, to the greatest extent permitted by law, use their services. In addition, Metro will encourage prime contractors, subcontractors and consultants to utilize such services by sending them brochures and service information on such banks.

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

- (a) Making affirmative efforts to solicit proposals from MBEs.
- (b) Examining alternatives for arranging contracts by size and type of work so as to enhance the possibility of participation by MBEs.
- (c) Arranging solicitations, time for the presentation of bids, quantities specifications and delivery schedules so as to facilitate the participation of MBEs.
- (d) Referring MBEs in need of management assistance to established agencies that provide direct management assistance to such businesses.
- (e) Carrying out specific information and communications programs on contracting procedures and specific contracting opportunities in a timely manner, with such programs being bilingual, and in conformance with any requirements of the Americans with Disabilities Act, where appropriate.
- (f) Distribution of copies of the MBE Program to organizations and individuals concerned with MBE programs.
- (g) Periodic reviews with department heads to ensure that they are aware of the MBE Program goals and desired activities on their parts to facilitate the purposes of the MBE Program. Additionally, departmental efforts toward and success in meeting the purposes of the MBE Program shall be factors considered during annual performance evaluations of the department heads.
- (h) Monitoring and ensuring that MBE planning centers and likely MBE contractors are receiving requests for bids, proposals and quotes.
- (i) Distribution of lists to potential MBE contractors of the types of goods and services which Metro regularly purchases.
- (j) Advising potential MBE vendors that Metro does not certify MBEs, and directing them to the Executive Department.
- (k) Specifying purchases by generic title rather than specific brand name whenever feasible.
- (l) Establishing an interdepartmental contract management committee which will meet regularly to monitor and discuss, among other issues, potential MBE participation in contracts. In an effort to become more knowledgeable regarding MBE resources, the committee shall also invite potential MBE contractors to attend selected meetings.
- (m) Requiring that at least one MBE 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 MBEs on the certification list capable of providing the service or item. Any such waivers shall be in writing, and shall be kept in the appropriate files. For contracts over the dollar amounts indicated in this section, all MBEs known to Metro in the business of providing the service(s) or item(s) required shall be mailed bid or proposal information.

(n) Requiring that all prospective bidders attend scheduled prebid conferences on all construction contracts with an estimated value of over \$50,000.

(o) The Executive Officer or his/her designee, may establish and implement additional affirmative action techniques which are consistent with the MBE Program and designed to facilitate participation of MBEs in Metro contracting activities.

#### 2.04.140 Certification of Minority Business Eligibility:

(a) To participate in the MBE Program, contractors, subcontractors and joint ventures must have been certified by the Executive Department 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 Executive Department's list in determining whether a prospective contractor or subcontractor is certified as a MBE. A prospective contractor or subcontractor must be certified as a MBE by the Executive Department or appear on its certification list prior to the pertinent bid opening or proposal submission date to be considered by Metro to be an eligible MBE. Metro will adhere to any applicable Recertification Rulings.

(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.

#### 2.04.145 Annual Minority Business Goals:

(a) The Metro Council shall, by resolution each June, establish annual MBE goals for the ensuing fiscal year. Such annual goals shall be established separately for construction contracts, labor and materials contracts, personal services contracts and procurement 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 MBEs likely to be available to compete for the contracts;
- (3) Past results of Metro's efforts under the MBE Program; and
- (4) Existing goals of other Portland metropolitan area contracting agencies, and their experience in meeting these goals.

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

**2.04.150 Good Faith Efforts at Maximizing MBE Opportunities:**

(a) Good faith efforts at maximizing MBE opportunities shall be required for construction contracts over \$50,000.

(b) At the discretion of the Liaison Officer, good faith efforts at maximizing MBE opportunities may be required for any other contract. This requirement shall be made in writing prior to the solicitation of bids for such contract.

(c) Where good faith efforts are required, the Liaison Officer shall direct the inclusion of a clause in any RFP or bid documents which requires that the prime contractor, prior to entering into any subcontracts, make good faith efforts at maximizing MBE opportunities, as that term is defined in Section 2.04.160.

**2.04.155 Contract Award Criteria:**

(a) To be eligible for award of contracts subject to good faith efforts requirements, prime contractors must prove that they have made good faith efforts at maximizing MBE opportunities prior to the time bids are opened or proposal are due. Bidders/Proposers are required to utilize the most current list of MBEs certified 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 good faith efforts requirements have been established shall require all bidders/proposers to submit with their bids and proposals a statement indicating that they have made good faith efforts as defined in Section 2.04.160. To document good faith efforts, all bidders and proposers shall complete and endorse a Minority 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 MBE in which the MBE promises not to provide subcontracting quotations to other bidders/proposers are prohibited.

(d) Bidders/proposers shall, at the time of bid opening, (or proposal submission date when no public opening is had), submit to Metro detailed MBE Utilization forms listing names of MBEs who will be utilized and the nature and dollar amount of their participation. This form will be binding upon the bidder/proposer. Within five (5) 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 MBE subcontractors and suppliers to be utilized in performance of the contract. A sample Letter of Agreement will be provided by Metro. The MBE Utilization forms shall be provided by Metro with bid/proposal documents.

(e) An apparent low bidder/proposer who states in its bid/proposal that good faith efforts at maximizing MBE opportunities were performed shall submit written evidence of such good faith efforts within two (2) 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 show good faith efforts at maximizing MBE opportunities, 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 (2) days of notice of such ineligibility of the low bidder, submit evidence of good faith efforts 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/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. Any such waivers shall be in writing, and shall be kept in the appropriate files.

**2.04.160 Definition and Determination of Good Faith Efforts:**

(a) **Good Faith Efforts by Metro:** Metro, through its Liaison Officer, shall make good faith efforts to maximize MBE opportunities on locally-funded contracts to which good faith efforts requirements apply, including the following:

- (1) Identifying project elements for which a significant minority capability exists for execution and/or a significant interest by minority firms has

been expressed and directing that contractors define economically feasible units as a part of their subcontracting plan which address these identified or targeted project elements;

- (2) Advertising in, at a minimum, one newspaper of general circulation, one minority-oriented publication, and one trade-oriented publication. The advertisement must announce subcontracting or material supply opportunities on the project at least ten (10) days before bids or proposals are due;
- (3) Providing written notice soliciting subbids/proposals to not less than a reasonable number of MBEs for each subcontracting or material supply work item selected pursuant to (1) above not less than ten (10) days before bids/proposals are due.

If there are less than three certified MBEs listed for that work or supply specialty then the solicitation must be mailed to at least the number of MBEs 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.

- (4) Using the services of minority community organizations, including at least two minority contractor groups, local, state and federal minority business assistance offices or other organizations identified by the Executive Department that provide assistance in the recruitment and placement of MBEs; where applicable, advising and assisting MBEs in obtaining lines of credit or insurance required by Metro or the bidder/proposer; and, otherwise, making efforts to encourage participation by MBEs.

The Liaison Officer shall maintain adequate documentation of all of Metro's good faith efforts.

(b) Good Faith Efforts by Bidders/Proposers: Bidders or proposers on locally-funded contracts to which good faith efforts requirements apply shall demonstrate that they have made good faith efforts at maximizing MBE opportunities. Performing and documenting all of the following actions constitutes a rebuttable presumption that the bidder has made good faith efforts as required by Metro's MBE Program:

- (1) Identifying and incorporating in the subcontracting plan specific economically feasible units which may be performed by MBEs to increase the likelihood of participation of such enterprises;

**Documentation Required:** Identification of selected economically feasible units in subcontracting plan; inclusion of Metro targeted units mandatory.

- (2) Attendance at any pre-solicitation or prebid meetings that were scheduled by Metro to inform MBEs 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.

- (3) Making, not later than five (5) days before bids/proposals are due, follow-up phone calls to all MBEs who attended any pre-solicitation or prebid meetings that were scheduled by Metro, 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 MBE to whom a solicitation letter was sent (e.g., bid submitted, declined, no response). In instances where MBE bids were rejected, the dollar amount of the bid rejected from the MBE 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.

- (4) Providing those MBEs expressing an interest with information about the plans, specifications and the requirements for the identified subcontracting or material supply work. This may be satisfied by a referral to a plan center.
- (5) Negotiating with interested, capable and competitive MBEs submitting bids and not rejecting any bids without justification. Bid shopping is prohibited.
- (6) If Metro or the bidder/proposer requires bonding, lines of credit or insurance, notifying the MBE of this requirement and referring them to a potential source where this requirement may be met.

(c) The good faith efforts documented by the bidder/proposer must be certified to be reasonably expected to produce participation in this project by capable and competitive MBEs.

(d) Bid invitations will contain a MBE Program Compliance form for recording and documenting the completion of the above-listed actions. Completion of the form and

documentation of the above-listed actions, 1 through 6, is mandatory. Failure to complete and submit the form and/or any required documentation will result in the bid being rejected as nonresponsive. The Liaison Officer shall determine, if necessary, whether good faith efforts have been met pursuant to the criteria of the MBE Program by verifying the documentation of the lowest, responsible bidder.

(e) A bidder/proposer who contracts with Metro shall not discriminate against MBEs in the awarding of subcontracts. A contractor's good faith efforts at maximizing MBE opportunities must be reasonably expected by the contractor to produce participation by MBEs. Contractor shall certify as part of the bid documents accompanying the bid on a public contract that the contractor has not discriminated against MBEs in obtaining any required subcontracts and that the contractor reasonably expected the above-documented good faith efforts to result in participation by MBEs. Example of certifying statement: By signing this document bidder hereby certifies that bidder has not discriminated against MBEs in obtaining any subcontracts for this project, and that the documented good faith efforts of bidder/proposer at maximizing MBE opportunities were reasonably expected to result in participation of MBEs in this project in compliance with Metro's MBE Program.

(f) Notwithstanding any other provision of this section, bidders and proposers on locally-funded contracts to which good faith efforts apply need not accept the bid of a MBE on any particular subcontract or material supply item if the bidder/proposer demonstrates that none of the MBEs 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.

(g) 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 good faith efforts 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.

2.04.165 Replacement of MBE Subcontractors: Prime contractors shall not replace a MBE subcontractor with another subcontractor, either before contract award or during contract performance, without prior notice to Metro. Prime contractors who replace a MBE subcontractor shall make good faith efforts as described in the preceding section in selecting a replacement.

2.04.170 Monitoring, Records and Reports:

(a) Metro, through the Liaison Officer, shall develop and maintain a recordkeeping system to identify and assess MBE contract awards, and prime contractors' progress in demonstrating good faith efforts. Specifically, the following records will be maintained:

- (1) The name of the contractor;
  - (2) Awards to MBEs by number, percentage and dollar amount;
  - (3) A description of the types of contracts awarded to MBEs;
  - (4) The extent to which good faith efforts were demonstrated and reasons therefor;
  - (5) The extent to which annual contract goals were met or not and the reasons therefor; and
  - (6) Any other information the Liaison Officer deems necessary.
- (b) All MBE records will be separately maintained.
- (c) The Liaison Officer shall prepare reports, at least semiannually, detailing performance of the MBE Program. The reports shall be forwarded to the Metro Council no later than January 1 and June 30 of each year, and shall include at least 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 MBE firms in the reporting period;
  - (5) Statistics, and narrative where appropriate, demonstrating the utilization of MBEs by department and contract category;
  - (6) Statistics, and narrative where appropriate, demonstrating the extent to which annual contract goals have been met or not met;
  - (7) Statistics, and narrative where appropriate, demonstrating the number and type of waivers granted;
  - (8) Explanations of any investigative actions taken by any administrative agency touching on the implementation, monitoring and enforcement of the MBE Program;
  - (9) Descriptions of any problems in the implementation reported by the department, including proposed solutions; and

- (10) Recommendations, as appropriate, regarding amendments to this MBE Program, including recommendations on changes needed to meet annual contract goals, if those goals have not been met.

**2.04.180 Compliance:**

(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 good faith efforts on MBE participation in the contract.

(b) The Liaison Officer may require, at any stage of contract completion, additional documented proof from the contractor of good faith efforts.

**2.04.190 Severability and Intent:**

(a) The provisions of the MBE Program shall be effective in all cases unless otherwise provided for by state or federal law. The provisions of the MBE Program are separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section or portion of the MBE Program or the invalidity of the application thereof to any person or circumstances shall not affect the validity of the remainder of the MBE Program, or the validity of its application to other persons or circumstances.

(b) The MBE Program is intended, and should be construed, as establishing and requiring the maximum efforts at assuring MBE participation in Metro contracting activities that is consistent with the United States and Oregon Constitutions and applicable federal and state law."

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**"2.04.200 Women Business Enterprise Program (WBE Program) For Locally-Funded Contracts, Findings, Purpose and Authority:**

(a) The Metro Council supports the aspirations of women to enter the mainstream of social, political and economic life.

(b) The Metro Council finds:

- (1) The opportunity for full participation in our free enterprise system by women is essential;
- (2) Greater economic opportunity for women is essential;
- (3) Review of Metro programs to remedy historical patterns of exclusion of and discrimination against women is needed;
- (4) Public policies and programs to eliminate the effects of long-term, open and pervasive exclusion of and discrimination against women from the business sector, including increased opportunities to integrate women into the full economic life of the community should be reviewed; and
- (5) In cooperation with the private sector, the affected populations, interest-ed groups and appropriate governmental entities, a program of review should be established to recommend remedies for the unfortunate effects of social, political and economic inequity that still exist.

(c) It is the purpose of the WBE Program to establish and implement a program to encourage the utilization by Metro of women-owned businesses, to the greatest extent permitted by law, by creating for such businesses the maximum possible opportunity to compete for and participate in locally-funded Metro contracting activities. The WBE Program does not apply to federally-funded contracts, which are governed by Metro Code 2.04.300 *et seq.* The WBE Program shall be administered simultaneously and in addition to the provisions of Metro Code Sections 2.04.100-.190.

(d) Metro Code Sections 2.04.200 to 2.04.290 shall be known and may be cited as the "Metro Women Business Enterprise Program," hereinafter referred to as the "WBE Program."

**2.04.205 Policy Statement:**

(a) Through this WBE Program, Metro:

- (1) Expresses its strong commitment to provide maximum opportunity to WBEs in contracting; and



- (2) Informs all employees, governmental agencies and the general public of its intent to implement this policy statement.

(b) It is the policy of Metro to provide equal opportunity to all persons to access and participate in the locally-funded projects, programs and services of Metro. Metro and Metro contractors shall 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 the WBE Program shall apply to all Metro departments, commissions and project areas except as expressly provided herein.

(d) The objectives of the WBE Program shall be:

- (1) To assure that provisions of the WBE Program are adhered to by all Metro departments, contractors and employees; and
- (2) To initiate and maintain efforts to increase, to the greatest extent permitted by law, program participation by women businesses.

2.04.210 Definitions: For purposes of Metro Code Sections 2.04.200 to 2.04.290, the following definitions shall apply:

(a) "Capable" means a Women Business Enterprise registered with the Executive Department who upon request from the bidder can supply two favorable references of prior work of the type being subcontracted for.

(b) "Competitive" means the subcontract bid submitted by the Women Business Enterprise was within 10 percent of either the budgeted amount, subbid estimate, or the lowest bid received by the bidder. The bidder shall make either the budgeted amount or the subbid estimate available upon request. This term relates to price only and must not be interpreted to mean that a bid deemed competitive is therefore entitled to the subcontract award.

(c) "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.

(d) "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 the WBE Program a lease or a purchase order of \$500.00 or more is a contract.

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

(f) "Documentation" means written materials purporting to establish the satisfaction of a good faith effort requirement that are capable of verification. These may include, but are not limited to, copies of business logs, correspondence or newspaper ads.

(g) "Economically Feasible Unit" means a unit of work identified in a project suitable for subcontracting in the normal course of business. These would be units that a contractor would ordinarily identify as suitable for performance by a subcontractor. The intent here is to have identified units that would be attractive to a serious and qualified subcontractor and not be shunned by that subcontractor because the unit of work is too small to be profitable.

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

(i) "Interested" means a Women Business Enterprise that has expressed to Metro and/or the bidder an interest in learning more about the project identified in the initial solicitation by the bidder.

(j) "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 WBE and non-WBE, the 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 WBE and a non-WBE must receive Metro approval prior to contract award.

(k) "Justification" means a maintaining or showing of a sufficient reason why an action was taken and that the action was not taken for an impermissible reason. Permissible reasons include, but are not limited to, not meeting bid invitation specifications or not being the low bid. An impermissible reason would be one that is arbitrary or capricious or based on race, sex, national origin, marital status or religion.

(l) "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.

(m) "Lessee" means a business or person that leases, or is negotiating to lease, property from Metro or an actual or potential Metro contractor on Metro's or the contractor'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 at the facility.

(n) "Women Business Enterprise or WBE" means a small business concern which is certified as such by the Executive Department and:

- (1) 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
- (2) Whose management and daily business operations are controlled by one or more of the women who own it.

(o) "Woman" or "Women" has the meaning established by ORS 200.005(7).

(p) "Negotiate" means to engage in good faith discussions with the potential subcontractors about their proposals/bids, and the work for which a bid is sought, including sharing with them any cost estimates from the request for proposal or invitation to bid documents, if available.

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

(r) "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.

(s) "Reasonable Number" means at least three (3) firms of those WBEs certified as such by the Executive Department, or a greater number of such firms, if so specified in any particular contract by the Liaison Officer. Consideration should be given to the specialty of subcontracting or materials supply desired as well as the location of the project and whether or not the subcontractor is willing to perform work out of their geographic area.

(t) "Rebuttable Presumption" means a presumption which may be rebutted, or disproved, by evidence.

(u) "Small Business Concern" means a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto.

**2.04.215 Notice to Contractors and Subcontractors:** Contractors of Metro accepting locally-funded contracts under the WBE Program shall be advised that failure to carry out the applicable provisions of the WBE Program shall constitute a breach of contract and, after notification by Metro, may result in termination or such other remedy as Metro deems appropriate.

**2.04.220 Liaison Officer:**

(a) The Executive Officer shall be responsible for administering the WBE Program. The Executive Officer may, by Executive Order, designate a Liaison Officer and, if necessary, other staff adequate to administer the WBE Program on the Executive's behalf. For purposes of Metro Code Sections 2.04.200-.290, all references to the "Liaison Officer" shall mean the Executive Officer, unless the Executive Officer has designated another individual as the "Liaison Officer," in which case the individual so designated shall perform the functions required by the WBE Program.

(b) The Liaison Officer shall be responsible for developing, managing and implementing the WBE Program, and for disseminating information on available business opportunities so that 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 WBE Program.

(c) The Liaison Officer shall begin immediately to design a technical assistance and outreach program which shall be established by January 1, 1993. This program shall include at least the following elements:

- (1) A regularly-scheduled contractor orientation program to promote compliance with and understanding of the provisions of the WBE Program and Metro;
- (2) Feasible options for bonding, insurance, and banking assistance for WBEs;
- (3) A program designed to assist Metro departments in enhancing opportunities for WBEs;
- (4) A fully-developed and maintained resource list to include all available resources for WBEs; and
- (5) A system for agency-wide reporting of WBE outreach efforts and accomplishments.

(d) The Liaison Officer shall have the responsibility for monitoring implementation of the requirements of the WBE Program and shall have the power to request from Metro departments, bidders/proposers, and/or contractors any relevant records, information and documents.

(e) The Liaison Officer shall be responsible for gathering all information concerning compliance with this chapter and shall have access to all pertinent Metro records.

**2.04.225 Directory:** A directory of 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 the WBE Program requirements.

**2.04.230 Women-Owned Banks:** Metro will seek to identify women-owned banks and banks utilizing equal opportunity banking practices, including community reinvestment, and, to the greatest extent permitted by law, use their services. In addition, Metro will encourage prime contractors, subcontractors and consultants to utilize such services by sending them brochures and service information on such banks.

**2.04.235 Affirmative Action and Equal Opportunity Procedures:** Metro shall use affirmative action techniques to facilitate WBE participation in contracting activities. These techniques include:

- (a) Making affirmative efforts to solicit proposals from WBEs.
- (b) Examining alternatives for arranging contracts by size and type of work so as to enhance the possibility of participation by WBEs.
- (c) Arranging solicitations, time for the presentation of bids, quantities specifications, and delivery schedules so as to facilitate the participation of WBEs.
- (d) Referring WBEs in need of management assistance to established agencies that provide direct management assistance to such businesses.
- (e) Carrying out specific information and communications programs on contracting procedures and specific contracting opportunities in a timely manner, with such programs being bilingual, and in conformance with any requirements of the Americans with Disabilities Act, where appropriate.
- (f) Distribution of copies of the WBE Program to organizations and individuals concerned with WBE programs.
- (g) Periodic reviews with department heads to ensure that they are aware of the WBE Program goals and desired activities on their parts to facilitate the purposes of the WBE Program. Additionally, departmental efforts toward and success in meeting the purposes of the WBE Program shall be factors considered during annual performance evaluations of the department heads.
- (h) Monitoring and ensuring that WBE planning centers and likely WBE contractors are receiving requests for bids, proposals and quotes.

(i) Distribution of lists to potential WBE contractors of the types of goods and services which Metro regularly purchases.

(j) Advising potential WBE vendors that Metro does not certify WBEs, and directing them to the Executive Department.

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

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

(m) Requiring that at least one 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 WBEs on the certification list capable of providing the service or item. Any such waivers shall be in writing, and shall be kept in the appropriate files. For contracts over the dollar amounts indicated in this section, all WBEs known to Metro in the business of providing the service or item(s) required shall be mailed bid or proposal information.

(n) Requiring that all prospective bidders attend scheduled prebid conferences on all construction contracts with an estimated value of over \$50,000.

(o) The Executive Officer or his/her designee, may establish and implement additional affirmative action techniques which are consistent with the WBE Program and designed to facilitate participation of WBEs in Metro contracting activities.

#### 2.04.240 Certification of Women Business Eligibility:

(a) To participate in the WBE Program, contractors, subcontractors and joint ventures must have been certified by the Executive Department 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 Executive Department's list in determining whether a prospective contractor or subcontractor is certified as a WBE. A prospective contractor or subcontractor must be certified as a WBE by the Executive Department or appear on its certification list prior to the pertinent bid opening or proposal submission date to be considered by Metro to be an eligible WBE. Metro will adhere to any applicable Recertification Rulings.

(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.

**2.04.245 Annual Women Business Goals:**

(a) The Metro Council shall, by resolution each June, establish annual WBE goals for the ensuing fiscal year. Such annual goals shall be established separately for construction contracts, labor and materials contracts, personal services contracts, and procurement 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 WBEs likely to be available to compete for the contracts;
- (3) Past results of Metro's efforts under the WBE Program; and
- (4) Existing goals of other Portland metropolitan area contracting agencies, and their experience in meeting these goals.

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

**2.04.250 Good Faith Efforts at Maximizing WBE Opportunities**

(a) Good faith efforts at maximizing WBE opportunities shall be required for construction contracts over \$50,000.

(b) At the discretion of the Liaison Officer, good faith efforts at maximizing WBE opportunities may be required for any other contract. This requirement shall be made in writing prior to the solicitation of bids for such contract.

(c) Where good faith efforts are required, the Liaison Officer shall direct the inclusion of a clause in any RFP or bid documents which requires that the prime contractor, prior to entering into any subcontracts, make good faith efforts at maximizing WBE opportunities, as that term is defined in Section 2.04.160.

**2.04.255 Contract Award Criteria:**

(a) To be eligible for award of contracts subject to good faith efforts requirements, prime contractors must prove that they have made good faith efforts at maximizing WBE opportunities prior to the time bids are opened or proposal are due. Bidders/Proposers are required to utilize the most current list of WBEs certified 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 good faith efforts requirements have been established shall require all bidders/proposers to submit with their bids and proposals a statement indicating that they have made good faith efforts as defined in Section 2.04.160. To document good faith efforts, all bidders and proposers shall complete and endorse a Women 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 WBE in which the WBE promises not to provide subcontracting quotations to other bidders/proposers are prohibited.

(d) Bidders/proposers shall, at the time of bid opening, (or proposal submission date when no public opening is had), submit to Metro detailed WBE Utilization forms listing names of 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 (5) 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 WBE subcontractors and suppliers to be utilized in performance of the contract. A sample Letter of Agreement will be provided by Metro. The 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 good faith efforts at maximizing WBE opportunities were performed shall submit written evidence of such good faith efforts within two (2) 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 show good faith efforts at maximizing WBE opportunities, 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 good faith efforts 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. Any such waivers shall be in writing, and shall be kept in the appropriate files.

**2.04.260 Definition and Determination of Good Faith Efforts:**

(a) **Good Faith Efforts by Metro:** Metro, through its Liaison Officer, shall make good faith efforts to maximize WBE opportunities on locally-funded contracts to which good faith efforts requirements apply, including the following:

- (1) Identifying project elements for which a significant minority capability exists for execution and/or a significant interest by minority firms has been expressed and directing that contractors define economically feasible units as a part of their subcontracting plan which address these identified or targeted project elements;
- (2) Advertising in, at a minimum, one newspaper of general circulation, one minority-oriented publication, and one trade-oriented publication. The advertisement must announce subcontracting or material supply opportunities on the project at least ten (10) days before bids or proposals are due;
- (3) Providing written notice soliciting subbids/proposals to not less than a reasonable number of WBEs for each subcontracting or material supply work item selected pursuant to (1) above not less than ten (10) days before bids/proposals are due.

If there are less than three certified WBEs listed for that work or supply specialty then the solicitation must be mailed to at least the number of 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.

- (4) Using the services of women community organizations, including women contractor groups, local, state and federal business assistance offices or other organizations identified by the Executive Department that provide assistance in the recruitment and placement of WBEs; where applicable, advising and assisting WBEs in obtaining lines of

credit or insurance required by Metro or the bidder/proposer; and, otherwise, making efforts to encourage participation by WBEs.

The Liaison Officer shall maintain adequate documentation of all of Metro's good faith efforts.

(b) **Good Faith Efforts by Bidders/Proposers:** Bidders or proposers on locally-funded contracts to which good faith efforts requirements apply shall demonstrate that they have made good faith efforts at maximizing WBE opportunities. Performing and documenting all of the following actions constitutes a rebuttable presumption that the bidder has made good faith efforts as required by Metro's WBE Program:

- (1) Identifying and incorporating in the subcontracting plan specific economically feasible units which may be performed by WBEs to increase the likelihood of participation of such enterprises;

Documentation Required: Identification of selected economically feasible units in subcontracting plan; inclusion of Metro targeted units mandatory.

- (2) Attendance at any pre-solicitation or prebid meetings that were scheduled by Metro to inform 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.

- (3) Making, not later than five (5) days before bids/proposals are due, follow-up phone calls to all WBEs who attended any pre-solicitation or prebid meetings that were scheduled by Metro, 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 WBE to whom a solicitation letter was sent (e.g., bid submitted, declined, no response). In instances where WBE bids were rejected, the dollar amount of the bid rejected from the 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.

- (4) Providing those WBEs expressing an interest with information about the plans, specifications and the requirements for the identified

subcontracting or material supply work. This may be satisfied by a referral to a plan center.

- (5) Negotiating with interested, capable and competitive WBEs submitting bids and not rejecting any bids without justification. Bid shopping is prohibited.
- (6) If Metro or the bidder/proposer requires bonding, lines of credit or insurance, notifying the WBE of this requirement and referring them to a potential source where this requirement may be met.

(c) The good faith efforts documented by the bidder/proposer must be certified to be reasonably expected to produce participation in this project by capable and competitive WBEs.

(d) Bid invitations will contain a WBE Program Compliance form for recording and documenting the completion of the above-listed actions. Completion of the form and documentation of the above-listed actions, 1 through 6, is mandatory. Failure to complete and submit the form and/or any required documentation will result in the bid being rejected as nonresponsive. The Liaison Officer shall determine, if necessary, whether good faith efforts have been met pursuant to the criteria of the WBE Program by verifying the documentation of the lowest, responsible bidder.

(e) A bidder/proposer who contracts with Metro shall not discriminate against WBEs in the awarding of subcontracts. A contractor's good faith efforts at maximizing WBE opportunities must be reasonably expected by the contractor to produce participation by WBEs. Contractor shall certify as part of the bid documents accompanying the bid on a public contract that the contractor has not discriminated against WBEs in obtaining any required subcontracts and that the contractor reasonably expected the above-documented good faith efforts to result in participation by WBEs. Example of certifying statement: By signing this document bidder hereby certifies that bidder has not discriminated against WBEs in obtaining any subcontracts for this project, and that the documented good faith efforts of bidder/proposer at maximizing WBE opportunities were reasonably expected to result in participation of WBEs in this project in compliance with Metro's WBE Program.

(f) Notwithstanding any other provision of this section, bidders and proposers on locally-funded contracts to which good faith efforts apply need not accept the bid of a WBE on any particular subcontract or material supply item if the bidder/proposer demonstrates that none of the 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.

(g) 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 good faith efforts 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.

**2.04.265 Replacement of WBE Subcontractors:** Prime contractors shall not replace a WBE subcontractor with another subcontractor, either before contract award or during contract performance, without prior notice to Metro. Prime contractors who replace a WBE subcontractor shall make good faith efforts as described in the preceding section in selecting a replacement.

**2.04.270 Monitoring, Records and Reports:**

(a) Metro, through the Liaison Officer, shall develop and maintain a recordkeeping system to identify and assess WBE contract awards, and prime contractors' progress in demonstrating good faith efforts. Specifically, the following records will be maintained:

- (1) The name of the contractor;
- (2) Awards to WBEs by number, percentage and dollar amount;
- (3) A description of the types of contracts awarded to WBEs;
- (4) The extent to which good faith efforts were demonstrated and reasons therefor;
- (5) The extent to which annual contract goals were met or not and the reasons therefor; and
- (6) Any other information the Liaison Officer deems necessary.

(b) All WBE records will be separately maintained.

(c) The Liaison Officer shall prepare reports, at least semiannually, detailing performance of the WBE Program. The reports shall be forwarded to the Metro Council no later than January 31 and June 30 of each year, and shall include at least 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 WBE firms in the reporting period;
- (5) Statistics, and narrative where appropriate, demonstrating the utilization of WBEs by department and contract category;
- (6) Statistics, and narrative where appropriate, demonstrating the extent to which annual contract goals have been met or not met;
- (7) Statistics, and narrative where appropriate, demonstrating the number and type of waivers granted;
- (8) Explanations of any investigative actions taken by any administrative agency touching on the implementation, monitoring and enforcement of the WBE Program;
- (9) Descriptions of any problems in the implementation reported by the department, including proposed solutions; and
- (10) Recommendations, as appropriate, regarding amendments to this WBE Program, including recommendations on changes needed to meet annual contract goals, if those goals have not been met.

**2.04.280 Compliance:**

(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 good faith efforts on WBE participation in the contract.

(b) The Liaison Officer may require, at any stage of contract completion, additional documented proof from the contractor of good faith efforts.

**2.04.290 Severability and Intent:**

(a) The provisions of the WBE Program shall be effective in all cases unless otherwise provided for by state or federal law. The provisions of the WBE Program are separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section or portion of the WBE Program or the invalidity of the application thereof to any person or circumstances shall not affect the validity of the remainder of the WBE Program, or the validity of its application to other persons or circumstances.

(b) The WBE Program is intended, and should be construed, as establishing and requiring the maximum efforts at assuring WBE participation in Metro contracting activities

that is consistent with the United States and Oregon Constitutions and applicable federal and state law."

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**"2.04.300 Disadvantaged Business Enterprise Program (DBE Program) For Federally-Funded Contracts, Findings, Purpose and Authority:**

(a) It is the purpose of Metro Code Sections 2.04.300 to 2.04.390 to establish and implement a program to encourage the utilization by Metro of disadvantaged businesses by creating for such businesses the maximum possible opportunity to compete for and participate in federally-funded Metro contracting activities. The DBE Program does not apply to locally-funded contracts, which are governed by 2.04.100, .200, and .400 et seq.

(b) Metro Code Sections 2.04.300 to 2.04.390 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) Metro Code Sections 2.04.300 to 2.04.390 shall be known and may be cited as the "Metro Disadvantaged Business Enterprise Program for Federally-Funded Contracts," hereinafter referred to as the "DBE Program."

**2.04.305 Policy Statement:**

(a) Through the DBE Program, Metro:

- (1) Expresses its strong commitment to provide maximum opportunity to disadvantaged 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 the DBE Program shall apply to all Metro departments and project areas except as expressly provided in the DBE Program.

(d) The objectives of the DBE Program shall be:

- (1) To assure that provisions of the DBE Program are adhered to by all Metro departments, contractors, employees and USDOT subrecipients and contractors; and
- (2) To initiate and maintain efforts to increase DBE Program participation by disadvantaged businesses.

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

2.04.310 Definitions: For purposes of the DBE Program, 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 the DBE Program 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 DBE Program and includes lessees.

(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 so certified by an authorized agency and:

- (1) Which is at least 51 percent owned by one or more socially or 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 or economically disadvantaged individuals; and



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

(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 and non-DBE, the DBE 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 and a non-DBE must receive Metro approval prior to contract award to be counted toward any DBE 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 or Economically Disadvantaged Individuals or Disadvantaged Individuals" has the meaning established by ORS 200.005(2), (9), including the rebuttable presumption established by ORS 200.015(3), and the definitions supplied by ORS 200.005(7), (10).

(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.

**2.04.315 Notice to Contractors, Subcontractors and Subrecipients:** Contractors, subcontractors and subrecipients of Metro accepting contracts or grants under the DBE 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.

**2.04.320 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 DBE Program. The Liaison Officer shall report directly to the Executive Officer on matters pertaining to the DBE Program.

(b) The Liaison Officer shall be responsible for developing, managing and implementing the DBE Program, and for disseminating information on available business opportunities so that DBEs 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 DBE Program.

**2.04.325 Directory:** A directory of DBEs as 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 DBE Program requirements.

**2.04.330 DBE-Owned Banks:** Metro will seek to identify DBE-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 banks.

**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.

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

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

(f) Monitor and insure that Disadvantaged planning centers and likely DBE 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 participation.

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

(i) Advising potential DBE vendors that Metro does not certify DBEs, 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 participation in contracts. In an effort to become more knowledgeable regarding DBE resources, the committee shall also invite potential DBE contractors to attend selected meetings.

(l) Requiring that at least one DBE 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 on the certification list capable of providing the service or item. For contracts over the dollar amounts indicated in this section, all known DBEs in the business of providing the service(s) 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 in Metro contracting activities.

**2.04.340 Certification of Disadvantaged Business Eligibility:**

(a) To participate in the DBE Program as a DBE, 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. A prospective contractor or subcontractor must be certified as a DBE 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 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 the DBE 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.

**2.04.345 Annual Disadvantaged Business Goals:**

(a) The Metro Council shall, by resolution each June, establish annual DBE 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 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.

**2.04.350 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 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 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 2.04.360 or 2.04.375. The extent to which DBE participation will be counted toward contract goals is governed by the latter section.

**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 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 (5) 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. The 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 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 2.04.160. 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/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.

#### 2.04.360 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 pre-solicitation 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, disadvantaged and trade-oriented, if any and through a disadvantaged-owned newspaper or disadvantaged-owned trade publication concerning the subcontracting 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.
- (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 and Emerging Small Business that provide assistance in the recruitment and placement of DBEs.

**2.04.365 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.

**2.04.370 Records and Reports:**

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

- (1) Awards to DBEs by number, percentage and dollar amount;
- (2) A description of the types of contracts awarded; and
- (3) The extent to which goals were exceeded or not met and reasons therefor.

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

(c) The Liaison Officer shall prepare reports, at least semiannually, on DBE 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 firms in the reporting period; and

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

**2.04.375 Counting Disadvantaged Business Participation Toward Meeting Goals:**

(a) DBE 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 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) 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 business partner in the joint venture.
- (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 and other relevant factors.
- (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).
- (8) Metro shall count toward the 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.
- (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 disadvantaged 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) DBE Obligation. The recipient or its contractor agrees to ensure that disadvantaged 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 disadvantaged 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 participation shall be counted toward meeting annual goals as follows:

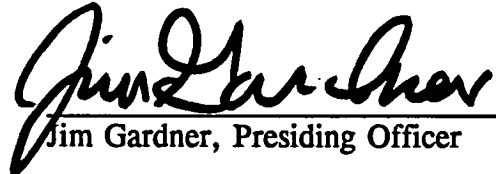
- (1) Except as otherwise provided below, the total dollar value of any contract which is to be performed by a DBE is counted toward meeting annual goals.
- (2) The provisions of paragraphs (a)(2) through (a)(8) of this section, pertaining to contract goals, shall apply equally to annual goals.

**2.04.380 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 participation in the contract.

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

ADOPTED by the Council of the Metropolitan Service District this 24<sup>th</sup>  
day of September, 1992.

  
Jim Gardner, Presiding Officer

ATTEST:

  
Clerk of the Council

gl  
1100

GOVERNMENTAL AFFAIRS COMMITTEE REPORT

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ORDINANCE NO. 92-466A, REPEALING METRO CODE SECTIONS 2.04.100-.180, AND ENACTING NEW PROVISIONS ESTABLISHING AND GOVERNING METRO'S CONTRACTING PROCEDURES FOR MINORITY, WOMEN AND DISADVANTAGED BUSINESS ENTERPRISES

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Date: September 22, 1992

Presented by: Councilor Collier

**COMMITTEE RECOMMENDATION:** At its September 17, 1992 meeting the Governmental Affairs Committee voted 3-0 to recommend Council adoption of Ordinance No. 92-466A. Voting were Councilors Collier, Devlin, and Gronke. Councilor Wyers was absent.

**COMMITTEE DISCUSSION/ISSUES:** Council Analyst Casey Short presented the staff report. He reviewed the history of this ordinance, saying that efforts to revise Metro's Minority/Women/Disadvantaged Business Enterprise (M/W/DBE) program had been before the Governmental Affairs Committee for at least 18 months. The ordinance under consideration was the result of Council staff working with representatives of the Office of General Counsel and a small task force of interested parties to develop the most liberal program possible that would withstand legal scrutiny. The ordinance establishes separate programs for Minority- and Women-owned businesses for locally funded contracts, and a program for Disadvantaged businesses for federally funded contracts. The program focuses on good faith efforts by both Metro and prime bidders for construction contracts over \$50,000, and on good faith and outreach efforts by Metro for other contracts.

The current draft of the ordinance includes changes following an earlier hearing in committee, at which a number of issues were raised. Mr. Short summarized the changes, which are outlined in his September 10 memo to the committee.

Councilor Devlin pointed out that funds to staff the program were requested in the 1992-93 budget process. The budget decision was to acknowledge the Regional Facilities Department had identified some \$50,000 being necessary if the program were implemented, and sufficient funds were in the Support Services Fund contingency for this purpose. Councilor Devlin suggested that if Council adopts the ordinance, the budget amendment process should begin soon thereafter.

Councilor Collier asked about a disparity study. Mr. Short gave some background, saying that federal court decisions direct that a public agency may only establish remedies to correct for past discrimination if such discrimination is documented through a study. Mark Williams of the Office of General Counsel added that an agency such as Metro could be deemed to have participated in discrimination by injecting public money into a discriminatory industry: if a study found an industry had practiced discrimination and Metro had awarded contracts to members of that

industry, Metro could implement narrowly tailored remedies in an effort to correct that discrimination. Such remedies could include the establishment of goals for participation.

Chair Collier asked if the task force supported the ordinance. Mr. Short said he didn't think members of the task force were overly enthusiastic about it, but recognized this is the best we can do.

Chair Collier opened the public hearing and no one testified.



**METRO**

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

# Memorandum

DATE: September 10, 1992  
TO: Governmental Affairs Committee  
FROM: Casey Short<sup>CS</sup>, Council Analyst  
RE: Ordinance No. 92-466A

The Governmental Affairs Committee has on its September 17 agenda consideration of Ordinance No. 92-466A, establishing a program for Minority, Women, and Disadvantaged Business Enterprises (M/W/DBE). Included in your packet are earlier reports discussing the development of this ordinance, which were included in previous agenda packets concerning this item.

The Committee last considered Ordinance No. 92-466 on July 2, 1992. Testimony was presented at that meeting which raised concerns about parts of the proposed M/W/DBE program. As a result of the testimony, Chair Collier directed staff to meet with the Task Force which had developed the ordinance in an effort to resolve the concerns. I also met with Regional Facilities Director Neil Saling to address the concerns he raised at the July 2 meeting, and talked with Kathleen Thomas of Thomas/Wright, Inc., about her issue.

At the July 2 meeting, Ms. Thomas raised a concern that the ordinance might discourage minority- and women-owned firms from bidding on Metro contracts because it would be difficult for small M/WBE firms to comply with the good faith requirements on subcontracting. She later sent me a suggested amendment (attached) which would have waived the good faith efforts for M/WBE's if such a firm were the prime bidder and responsible for at least 25% of the work. Metro's legal counsel advised me that such language would constitute a preference and would therefore not be legal according to court rulings. In addition, the good faith requirements only apply to construction contracts over \$50,000 (unless the liaison officer should require them in a specific instance); in other cases, the ordinance calls for Metro to solicit bids from M/WBE's for contracted services. Because of this focus in the ordinance, only larger construction contractors will generally be subject to the good faith subcontracting provisions.

Changes that are proposed from the earlier version of the ordinance are summarized below. Please note that all changes are in both the MBE and WBE sections of the ordinance, though I cite



below only the MBE section. All "Section" notations below are preceded in the ordinance by the overall Code chapter number (2.04); the WBE sections are the same as the MBE sections, except they begin 2.04.2xx instead of 2.04.1xx.

<u>Page</u>	<u>Section</u>	<u>Summary of change</u>
2	.100(c)	Clarifies that the MBE and WBE sections are both to be implemented, and that one does not supersede the other.
3	.110(b)	Requires a bidder to make available either the budgeted amount or the estimated sub-bid, but deletes the requirement to make available the low bid received. This is in an effort to keep M/WBE's in the process, while not promoting bid shopping.
4	.110(i)	Provides that an MBE may advise Metro of interest in a project, in addition to advising the prime bidder, in an effort to broaden the potential MBE pool.
5	.120(a)	Makes the Metro Executive Officer responsible for administering the program, rather than a staff person. The staff person designated as Liaison Officer will still be the day-to-day administrator, but the elected Executive is clearly to be ultimately responsible.
6	.120(c)	Changes the date for establishing an outreach and assistance program from September 1, 1992 to January 1, 1993, to reflect that the ordinance doesn't go into effect until 90 days after adoption.
6	.120(c)(5)	Adds the requirement that the plan is to include a method for coordination among Metro departments. This is to provide leverage to ensure compliance by the departments.
8	.135(m)	There are two changes here. The first provides that any waivers of the procedures in this section be in writing, as suggested by Clifford Freeman. The second change is to

clarify the meaning of "all known  
MBE's."

- 9           .135(n)           Lowers from \$100,000 to \$50,000 the amount of a construction contract which requires all prospective bidders to attend a prebid conference. This is to conform with Section 2.04.150(a) which requires good faith efforts for construction contracts over \$50,000.
- 10           .155(d)           Requires bidders to submit MBE utilization information to Metro at the time of bid opening, rather than within 24 hours of bid opening. The language is also changed to require this of all bidders, not just the apparent low bidder.
- 11           .155(g)           Again, provides that waivers of procedure be documented in writing.
- 11           .160(a)(1)       Calls for Metro, as part of our good faith efforts, to identify elements of a project that can be done by a minority- or woman-owned firm or firms. Also calls for Metro to direct that the prime contractor include Metro's identified elements as part of the prime's subcontracting plan, in an effort to increase M/WBE participation.
- 12           .160(b)(1)       This item is tied to the above item. It requires a bidder to develop its subcontracting plan in conformance with Metro's direction, as stated above.



**METRO**

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

# Memorandum

DATE: July 30, 1992  
TO: Governmental Affairs Committee  
FROM: Casey Short, <sup>es</sup> Council Analyst  
RE: Ordinance No. 92-466A

The Governmental Affairs Committee considered Ordinance 92-466 on July 2, at which time several new issues were presented dealing with possible changes to the Minority/Women/Disadvantaged Business Enterprise program. I have worked with staff to develop proposed changes in language, and have sent those proposed changes to the members of the task force which helped draft the ordinance with request for their comments.

The proposed changes are incorporated in the attached draft Ordinance 92-466A, and are summarized below. Please note that all listings under the "Section" column are from proposed Chapter 2.04, so I'll just use the last three numbers, with sub-headings as appropriate.

<u>Page</u>	<u>Section</u>	<u>Summary of change</u>
2	.100(c) .200(c)	Clarifies that the MBE and WBE sections are both to be implemented, and that one does not supersede the other.
3	.110(b) .210(b)	Deletes the provision that the prime bidder must make a bid figure available to potential subcontractors, in an effort to reduce bid shopping.
4	.110(i) .210(i)	Provides that an MBE/WBE may advise Metro of interest in a project, in addition to advising the prime bidder, in an effort to broaden the potential MBE/WBE pool.
5	.120(a) .220(a)	Makes the Metro Executive Officer responsible for administering the program, rather than a staff person. The staff person designated as Liaison Officer will still be the day-to-day administrator, but the elected Executive is clearly to be ultimately responsible.

Proposed M/W/DBE Ordinance Revisions  
July 29, 1992  
Page 2

- 6            .120(c)  
              .220(c)            Changes the date for establishing an outreach and assistance program from September 1, 1992 to January 1, 1993, to reflect that the ordinance doesn't go into effect until 90 days after adoption.
- 6            .120(c)(5)  
              .220(c)(5)        Adds the requirement that the plan is to include a method for coordination among Metro departments. This is to provide leverage to ensure compliance by the departments.
- 8            .135(m)  
              .235(m)        There are two changes here. The first provides that any waivers of the procedures in this section be in writing, as suggested by Clifford Freeman. The second change is to clarify the meaning of "all known MBE's/WBE's."
- 10           .155(d)  
              .255(d)        Requires apparent low bidders to submit MBE/WBE utilization information to Metro at the time of bid opening, rather than within 24 hours of bid opening. This suggestion was from Bea Brooks of ODOT.
- 11           .155(g)  
              .255(g)        Again, provides that waivers of procedure be documented in writing.
- 11           .160(a)(1)  
              .260(a)(1)       Changes the language requiring Metro to designate "economically feasible units" for subcontracting, replacing it with language calling for Metro to identify elements of a project for which there are known MBE/WBE firms, or for which MBE/WBE firms have expressed interest.
- 12           .160(b)(1)  
              .260(b)(1)       Requires contractors to submit subcontracting plans, so Metro can help target MBE/WBE firms to bid on applicable portions of the contract.



**METRO**

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

# Memorandum

DATE: June 25, 1992

TO: Governmental Affairs Committee

FROM: Casey Short, <sup>cl</sup> Council Analyst

RE: Ordinance No. 92-466

The Governmental Affairs Committee has on its July 2 agenda consideration of Ordinance No. 92-466, establishing a program for Minority, Women, and Disadvantaged Business Enterprises (M/W/DBE). Included in your packet are two earlier reports, one discussing the development of the ordinance and its provisions in draft form, and the other summarizing a meeting held with representatives of Metro's original task force convened to consider the M/W/DBE program.

The ordinance before you now contains two significant changes from the draft ordinance. The first is that there is no program for Emerging Small Businesses (ESB). There was little support among either the original task force members or the group formed to develop the ordinance for an ESB program, and the Governmental Affairs Committee decided not to include such a program in the ordinance.

The other change from the draft concerns the "good faith efforts" sections of the MBE and WBE programs (sections 2.04.160 and 2.04.260). Pursuant to suggestions from task force representatives at the May 19 meeting, the Governmental Affairs Committee agreed to have Metro take on some of the responsibility for outreach to minority and women-owned businesses. Those efforts on Metro's part include "identifying and selecting specific economically feasible units" to clarify areas eligible for sub-bids. Placing this responsibility on Metro will make the determination uniform for all bidders as to what portions of contracts are to be sub-bid, and decrease the potential for challenges to contractors' compliance with the good faith efforts provisions. The other major change to this section calls for Metro, not the prime contractor, to contact potential minority and women-owned firms to inform them of upcoming contracts. This relieves the contractors from having to perform, and document, extensive outreach efforts. This will place extra responsibility on Metro and will cause extra up-front costs to Metro, but those costs should be recovered in the form of fewer conflicts over outreach and lower bids from contractors because their costs will be lowered.



**METRO**

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

# Memorandum

DATE: May 21, 1992

TO: Governmental Affairs Committee

FROM: Casey Short,<sup>cc</sup> Council Analyst

RE: Meeting with DBE Task Force

I called a meeting for Tuesday, May 19 for the purpose of obtaining opinions from the original Disadvantaged Business Enterprise Task Force on Metro's draft program for Minority, Women, and Disadvantaged Business Enterprises and Emerging Small Businesses. The turnout was disappointing with only four people attending out of 21 who were invited. Those attending were Scott Benge (Benge Construction), Kevin Spellman (Emerick Construction), Ron Anderson (Associated General Contractors), and Jesus Borboa (Office of the Governor's Advocate for Minority, Women, and Emerging Small Business). I have contacted about half of the remaining invitees to find out why they didn't attend, and all said they had other commitments or were ill; none said they didn't attend because of lack of interest.

The comments received at the May 19 meeting were generally favorable. Mr. Anderson said the draft program falls within AGC's approved guidelines for such programs, although the AGC committee for DBE/ESB programs has not formally reviewed it. He suggested some changes in the "good faith effort" section of the draft program, such as requiring advertising in trade publications rather than The Oregonian or minority-oriented publications. He said active contractors of any race or gender would be more likely to read trade publications, such as the Daily Journal of Commerce, than a general circulation daily, and added that several minority-oriented publications are not published daily, which could cause problems with timely notification and response. Mr. Anderson also suggested that Metro be responsible for notifying potential minority- or women-owned businesses of upcoming projects, rather than require the prime bidders to do so. This suggestion would relieve the prime contractors from extensive, and costly, record-keeping and solicitation, and would reduce Metro's monitoring and enforcement effort. While there would be some additional up-front cost to Metro, the end result could be lower project bids and net savings.

Other suggestions included clarifying issues surrounding the terms "negotiate," "qualified," and "bid shopping." There was some discussion of having Metro designate "economically feasible units" in applicable RFP's, to clarify how sub-bids are to be awarded. Mr. Benge suggested raising the dollar amounts for contracts which require higher levels of compliance, arguing that \$50,000 is quite low and many smaller contractors can't afford to do the required paperwork.

Finally, there was some discussion of establishing an ESB program. Mr. Spellman said he would prefer an ESB program which has goals to the MBE/WBE program which requires documentation of good faith efforts. Such a program is easier for the contractors to comply with. He added that he would object to having an ESB program in addition to an MBE and WBE program because he didn't want to have to deal with three separate programs. He concluded by saying it's most important to concentrate on training and outreach.

## STAFF REPORT

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### DRAFT ORDINANCE ESTABLISHING A MINORITY/WOMEN/DISADVANTAGED BUSINESS ENTERPRISE AND EMERGING SMALL BUSINESS PROGRAM

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Date: April 10, 1992

Presented by: Casey Short

**BACKGROUND:** Ordinance No. 91-391 proposed to amend the Metro Code, modifying the provisions related to procurements involving minorities, women and emerging small businesses. That ordinance was first read on May 23, 1991 and was considered several times by the Governmental Affairs Committee without action being taken to forward it to the Council. On October 10, 1991, an emergency ordinance (No. 91-430) was brought before the Council at the request of the Regional Facilities Committee. That ordinance proposed to amend Section 2.04 of the Metro Code to delete provisions giving any preference based on race or gender in Metro contract awards. The reason for the introduction of Ordinance 91-430 was in response to the Ninth Circuit Court's decision in Coral Construction Company v. King County, which Metro General Counsel believed rendered unconstitutional preference provisions of the existing Metro Code. That ordinance failed on an 11-0 vote.

Regional Facilities Department staff has been working with interested members of the community for more than a year to develop a satisfactory contracting/procurement program for minority- and women-owned businesses. Department Director Neil Saling presented a progress report on these efforts to the Governmental Affairs Committee on March 5, 1992. Following that presentation, Committee Chair Tanya Collier directed Council staff to work with a members of the community who were at that meeting to develop a draft ordinance establishing a Metro program for contracting with minority- and women-owned businesses, and to present a report to the Committee at its April 16 meeting. Members of this task force are Casey Short (Metro Council staff), Bruce Broussard (American Contractor), Clifford Freeman (Governor's Advocate, Office of Minority/Women/Emerging Small Business), Shirley Minor (Minor Steele & Associates), and Henry Pelfrey (Dirt & Aggregate Interchange, Inc.).

#### **TASK FORCE ACTIVITY**

The task force met three times, on March 13 and 20, and April 3. Dan Cooper, Metro General Counsel, attended all three meetings, and Rich Wiley, Metro Procurement Officer, attended the first two. Mr. Pelfrey, with assistance from Impact Business Consultants, provided a draft ordinance based on King County's M/WBE program. Discussion at the first two meetings focused on the constraints imposed by federal court decisions on local



governments' ability to establish goals or preference for minority or women contracting without a history of past discrimination having been established. Other issues discussed included the community representatives' desire to establish separate MBE and WBE programs; the nature of outreach efforts that Metro might implement; and the merits of an Emerging Small Business program. There was little interest in establishing such a program. Ms. Minor and Mr. Pelfrey also asked to be provided with statistics showing the participation of minority- and women-owned businesses in Metro contracts in the last few years. (Those statistics were provided from the Regional Facilities Department on April 9, and are included in the agenda packet.)

Between the second and third meetings, Mr. Cooper and Mark Williams of his staff drafted a series of proposed Metro Code sections, which would establish a Minority Business Enterprise (MBE) program, a Women Business Enterprise (WBE) program, a Disadvantaged Business Enterprise (DBE) program, and an Emerging Small Business (ESB) program. Their instructions were to draft the most liberal programs they could which were within the limits of the law as interpreted by the United States Supreme Court (in Crosby v. City of Richmond) and the Ninth Circuit Court (in Coral).

At the third meeting, the task force reviewed the drafts and offered some suggestions for revision. Those revisions have been incorporated in the drafts included in this agenda packet.

#### NATURE OF PROPOSED PROGRAMS

The draft programs have four separate components, as discussed above. The MBE, WBE, and ESB programs apply to locally-funded contracts, while the DBE program is for federally-funded contracts.

#### 1 & 2 - MBE and WBE Programs

The content of the MBE and WBE programs is virtually the same, with the obvious difference that one proposes a program for Minority Business Enterprises and the other proposes a Women Business Enterprises program. The only appreciable differences are in the applicable definitions, for "minority" and "women." There are separate programs, rather than a composite DBE program which would include both groups, at the recommendation of the task force. The task force preferred establishing separate programs in order that the separate categories of minorities and women be considered individually, to avoid having a consolidated set of goals or outreach activities apply to both groups. This would help ensure that neither group suffered as the result of the other's success (i.e., a large number of women-owned businesses might receive Metro contracts, which might increase total DBE participation without increased minority participation).

The draft program consists of the most liberal parts of several programs submitted for our consideration that could be implemented without documentation of past discrimination. Those programs include Metro's current program and those for King County (Washington), the State of Oregon General Services Administration, Oregon State System of Higher Education, and the City and County of San Francisco. It calls for strong good faith efforts on the part of contractors to show they have actively sought minority and women participation in subcontracting, including a mandatory list of activities; establishes annual goals for internal Metro use in tracking the effectiveness of the program; provides for a Liaison Officer to be responsible for managing and enforcing the program, and to establish a technical assistance and outreach program that meets certain criteria spelled out in the document; calls for development of a directory of capable MBE and WBE firms, to be used in soliciting those firms' participation in Metro contracts; requires at least one MBE and one WBE firm to be contacted for consideration in awarding smaller contracts that do not otherwise require formal bids; and directs the Liaison Officer to prepare semi-annual reports detailing performance of both programs, which shall be forwarded to the Council for review.

The proposed program does not include mandatory goals for participation, nor establish any preference for MBE or WBE firms in the award of Metro contracts, because legal counsel believes such actions violate provisions of the U.S. Constitution as interpreted by the federal courts.

Adoption of the MBE and WBE programs as outlined in the drafts would require additional funds for enforcement, monitoring, and implementation. The Regional Facilities Department has not formally reviewed the proposal to determine estimated requirements for increased staffing, however, the Regional Facilities Director, in a brief, informal discussion estimated an additional 1.0 to 1.5 FTE would be needed.

### 3. DBE Program

The Disadvantaged Business Enterprise program applies to federally funded contracts only. The courts have ruled that the Congress may establish goals and preferences for contracts funded with federal dollars, while state and local governments cannot. The DBE program is essentially a continuation of the current Metro DBE program, separated to apply only to federally funded contracts.

### 4. ESB Program

Counsel drafted an Emerging Small Business program, but the task force did not review it nor discuss it in any detail. Community members of the task force were generally not in favor of

establishing an ESB program. Such a program can mandate goals and preferences, but must be based on the size of a business and be "race and gender neutral." An ESB program could be applied to any part of the Metro area the Council designated, such as an Enterprise Zone or Urban Renewal District established by another agency, a First Source Hiring Area such as that used by MERC, or an economically disadvantaged area as designated by the Council.

This program is included for Committee review only because it is an available option for improving participation in Metro contracts by small businesses, many of which are owned by minorities or women. The task force did not endorse it.

#### TASK FORCE RECOMMENDATIONS

The task force agrees that the proposed program is probably as good a program as can be devised without a study of past discriminatory practices, and which conforms with Metro Counsel's interpretation of federal court decisions. The task force strongly encourages the Metro Council to commission such a study, or to participate in a broader study with other local governments in the region. As Mr. Pelfrey put it, this program "has no teeth." It relies on good faith efforts and implementation of an outreach program, but has very little enforcement power or mandatory participation by minority- and women-owned businesses.

The task force further agrees that Metro should clearly establish a DBE program for federally-funded contracts as an independent section of the Code, regardless of the disposition of the proposals for programs for locally-funded contracts.

All members of the task force have been invited to the April 16 committee meeting, and advised they would have the opportunity to speak to the issues.

#### COMMITTEE OPTIONS

Council staff has made little effort to involve other members of the minority contracting community nor representatives of prime contractors in the development of this draft program. If the Governmental Affairs Committee chooses to introduce this draft to Council in ordinance form, hearings and meetings involving interested and affected parties will be held.

If the Committee chooses to pursue a study of past discrimination, staff will investigate efforts underway elsewhere, and will determine how much money would be required to participate in a joint study or commission an independent study.

If the Committee chooses to go no further with this draft, Metro will continue to have a DBE program that legal counsel believes is unconstitutional and which is not being enforced.

BEFORE THE COUNCIL OF THE  
METROPOLITAN SERVICE DISTRICT

FOR THE PURPOSE OF REPEALING )  
METRO CODE SECTIONS 2.04.100- )  
.180, AND FOR THE PURPOSE OF )  
ENACTING NEW PROVISIONS ESTAB-) )  
LISHING AND GOVERNING METRO'S )  
CONTRACTING PROCEDURES FOR )  
MINORITY, WOMEN, AND DISAD-) )  
VANTAGED BUSINESS ENTERPRISES )

ORDINANCE NO. 92-466A

Introduced by  
Councilor Tanya Collier

WHEREAS, Metro Code 2.04.100-.180 previously governed the Metropolitan Service District's contracting program for disadvantaged businesses; and

WHEREAS, the Metro Council finds that a revision of the Metropolitan Service District's contracting program is desirable; now, therefore,

THE COUNCIL OF THE METROPOLITAN SERVICE DISTRICT HEREBY ORDAINS:

Section 1. The current Metro Code Sections 2.04.100-.180 are repealed.

Section 2. New Metro Code Sections 2.04.100, 2.04.200, and 2.04.300 are adopted, as follows:

"2.04.100 Minority Business Enterprise Program (MBE Program) For Locally-Funded Contracts, Findings, Purpose and Authority:

(a) The Metro Council supports the aspirations of minorities to enter the mainstream of social, political and economic life.

(b) The Metro Council finds:

- (1) The opportunity for full participation in our free enterprise system by minorities is essential;
- (2) Greater economic opportunity for minorities is essential;
- (3) Review of Metro programs to remedy historical patterns of exclusion of and discrimination against racial or ethnic groups is needed;

- (4) Public policies and programs to eliminate the effects of long-term, open and pervasive exclusion of and discrimination against minorities from the business sector, including increased opportunities to integrate minorities into the full economic life of the community should be reviewed; and
- (5) In cooperation with the private sector, the affected populations, interested groups and appropriate governmental entities, a program of review should be established to recommend remedies for the unfortunate effects of social, political and economic inequity that still exist.

(c) It is the purpose of the MBE Program to establish and implement a program to encourage the utilization by Metro of minority-owned businesses, to the greatest extent permitted by law, by creating for such businesses the maximum possible opportunity to compete for and participate in locally-funded Metro contracting activities. The MBE Program does not apply to federally funded contracts, which are governed by Metro Code 2.04.300 et seq. The MBE Program shall be administered simultaneously and in addition to the provisions of Metro Code Sections 2.04.200-290.

(d) Metro Code Sections 2.04.100 to 2.04.190 shall be known and may be cited as the "Metro Minority Business Enterprise Program," hereinafter referred to as the "MBE Program."

2.04.105 Policy Statement:

- (a) Through this MBE Program, Metro:
  - (1) Expresses its strong commitment to provide maximum opportunity to MBEs in contracting; and
  - (2) Informs all employees, governmental agencies and the general public of its intent to implement this policy statement.
- (b) It is the policy of Metro to provide equal opportunity to all persons to access and participate in the locally-funded projects, programs and services of Metro. Metro and Metro contractors shall 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 the MBE Program shall apply to all Metro departments, commissions and project areas except as expressly provided herein.

- (d) The objectives of the MBE Program shall be:
- (1) To assure that provisions of the MBE Program are adhered to by all Metro departments, contractors, and employees; and
  - (2) To initiate and maintain efforts to increase, to the greatest extent permitted by law, program participation by minority businesses.

**2.04.110 Definitions:** For purposes of Metro Code Sections 2.04.100 to 2.04.190, the following definitions shall apply:

(a) "Capable" means a Minority Business Enterprise registered with the Executive Department who upon request from the bidder can supply two favorable references of prior work of the type being subcontracted for.

(b) "Competitive" means the subcontract bid submitted by the Minority Business Enterprise was within 10 percent of either the budgeted amount, subbid estimate, or the lowest bid received by the bidder. ~~The bidder shall make one of these figures available upon request.~~ This term relates to price only and must not be interpreted to mean that a bid deemed competitive is therefore entitled to the subcontract award.

(c) "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.

(d) "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 the MBE Program a lease or a purchase order of \$500.00 or more is a contract.

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

(f) "Documentation" means written materials purporting to establish the satisfaction of a good faith effort requirement that are capable of verification. These may include, but are not limited to, copies of business logs, correspondence or newspaper ads.

(g) "Economically Feasible Unit" means a unit of work identified in a project suitable for subcontracting in the normal course of business. These would be units that a contractor would ordinarily identify as suitable for performance by a subcontractor. The intent here is to have identified units that would be attractive to a serious and qualified subcontractor and not be shunned by that subcontractor because the unit of work is too small to be profitable.

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

(i) "Interested" means a Minority Business Enterprise that has expressed to Metro and/or the bidder an interest in learning more about the project identified in the initial solicitation by the bidder.

(j) "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 MBE and non-MBE, the MBE 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 MBE and a non-MBE must receive Metro approval prior to contract award.

(k) "Justification" means a maintaining or showing of a sufficient reason why an action was taken and that the action was not taken for an impermissible reason. Permissible reasons include, but are not limited to, not meeting bid invitation specifications or not being the low bid. An impermissible reason would be one that is arbitrary or capricious or based on race, sex, national origin, marital status or religion.

(l) "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.

(m) "Lessee" means a business or person that leases, or is negotiating to lease, property from Metro or an actual or potential Metro contractor on Metro's or the contractor'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 at the facility.

(n) "Minority Business Enterprise or MBE" means a small business concern which is certified as such by the Executive Department and:

- (1) Which is at least 51 percent owned by one or more minority 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 minority individuals; and
- (2) Whose management and daily business operations are controlled by one or more of the minority individuals who own it.

(o) "Minority Individual" has the meaning established by ORS 200.005(7).

(p) "Negotiate" means to engage in good faith discussions with the potential subcontractors about their proposals/bids, and the work for which a bid is sought, including sharing with them any cost estimates from the request for proposal or invitation to bid documents, if available.

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

(r) "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.

(s) "Reasonable Number" means at least three (3) firms of those MBEs certified as such by the Executive Department, or a greater number of such firms, if so specified in any particular contract by the Liaison Officer. Consideration should be given to the specialty of subcontracting or materials supply desired as well as the location of the project and whether or not the subcontractor is willing to perform work out of their geographic area.

(t) "Rebuttable Presumption" means a presumption which may be rebutted, or disproved, by evidence.

(u) "Small Business Concern" means a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto.

2.04.115 Notice to Contractors and Subcontractors: Contractors of Metro accepting locally-funded contracts under the MBE Program shall be advised that failure to carry out the applicable provisions of the MBE 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 MBE Liaison Officer and, if necessary, other staff adequate to administer the MBE Program. The Liaison Officer shall report directly to the Executive Officer on matters pertaining to the MBE Program.~~ The Executive Officer shall be responsible for administering the MBE Program. The Executive Officer may, by Executive Order, designate a Liaison Officer and, if necessary, other staff adequate to administer the MBE Program on the Executive's behalf. For purposes of Metro Code Sections 2.04.100-.190, all references to the "Liaison Officer" shall mean the Executive Officer, unless the Executive Officer has designated another individual as the "Liaison Officer," in which case the individual so designated shall perform the functions required by the MBE Program.



(b) The Liaison Officer shall be responsible for developing, managing and implementing the MBE Program, and for disseminating information on available business opportunities so that MBEs 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 MBE Program.

(c) The Liaison Officer shall begin immediately to design a technical assistance and outreach program which shall be established by ~~September 1, 1992~~ January 1, 1993. This program shall include at least the following elements:

- (1) A regularly-scheduled contractor orientation program to promote compliance with and understanding of the provisions of the MBE Program and Metro.
- (2) Feasible options for bonding, insurance, and banking assistance for MBEs.
- (3) A program designed to assist Metro departments in enhancing opportunities for MBEs.
- (4) A fully-developed and maintained resource list to include all available resources for MBEs.
- (5) A system for agency-wide reporting of MBE outreach efforts and accomplishments.

(d) The Liaison Officer shall have the responsibility for monitoring implementation of the requirements of the MBE Program and shall have the power to request from Metro departments, bidders/proposers, and/or contractors any relevant records, information and documents.

(e) The Liaison Officer shall be responsible for gathering all information concerning compliance with this chapter and shall have access to all pertinent Metro records.

2.04.125 Directory: A directory of MBEs 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 the MBE Program requirements.

2.04.130 Minority-Owned Banks: Metro will seek to identify minority-owned banks and banks utilizing equal opportunity banking practices, including community reinvestment, and,

to the greatest extent permitted by law, use their services. In addition, Metro will encourage prime contractors, subcontractors and consultants to utilize such services by sending them brochures and service information on such banks.

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

- (a) Making affirmative efforts to solicit proposals from MBEs.
- (b) Examining alternatives for arranging contracts by size and type of work so as to enhance the possibility of participation by MBEs.
- (c) Arranging solicitations, time for the presentation of bids, quantities specifications, and delivery schedules so as to facilitate the participation of MBEs.
- (d) Referring MBEs in need of management assistance to established agencies that provide direct management assistance to such businesses.
- (e) Carrying out specific information and communications programs on contracting procedures and specific contracting opportunities in a timely manner, with such programs being bilingual, and in conformance with any requirements of the Americans with Disabilities Act, where appropriate.
- (f) Distribution of copies of the MBE Program to organizations and individuals concerned with MBE programs.
- (g) Periodic reviews with department heads to ensure that they are aware of the MBE Program goals and desired activities on their parts to facilitate the purposes of the MBE Program. Additionally, departmental efforts toward and success in meeting the purposes of the MBE Program shall be factors considered during annual performance evaluations of the department heads.
- (h) Monitoring and ensuring that MBE planning centers and likely MBE contractors are receiving requests for bids, proposals and quotes.
- (i) Distribution of lists to potential MBE contractors of the types of goods and services which Metro regularly purchases.
- (j) Advising potential MBE vendors that Metro does not certify MBE's, and directing them to the Executive Department.

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

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

(m) Requiring that at least one MBE 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 MBEs on the certification list capable of providing the service or item. Any such waivers shall be in writing, and shall be kept in the appropriate files. For contracts over the dollar amounts indicated in this section, all known MBEs known to Metro in the business of providing the service or item(s) required shall be mailed bid or proposal information.

(n) Requiring that all prospective bidders attend scheduled prebid conferences on all construction contracts with an estimated value of over \$100,000.

(o) The Executive Officer or his/her designee, may establish and implement additional affirmative action techniques which are consistent with the MBE Program and designed to facilitate participation of MBEs in Metro contracting activities.

#### 2.04.140 Certification of Minority Business Eligibility:

(a) To participate in the MBE Program, contractors, subcontractors and joint ventures must have been certified by the Executive Department 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 Executive Department's list in determining whether a prospective contractor or subcontractor is certified as a MBE. A prospective contractor or subcontractor must be certified as a MBE by the Executive Department or appear on its certification list prior to the pertinent bid opening or proposal submission date to be considered by Metro to be an eligible MBE. Metro will adhere to any applicable Recertification Rulings.

(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.

2.04.145 Annual Minority Business Goals:

(a) The Metro Council shall, by resolution each June, establish annual MBE goals for the ensuing fiscal year. Such annual goals shall be established separately for construction contracts, labor and materials contracts, personal services contracts, and procurement 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 MBEs likely to be available to compete for the contracts;
- (3) Past results of Metro's efforts under the MBE Program; and
- (4) Existing goals of other Portland metropolitan area contracting agencies, and their experience in meeting these goals.

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

2.04.150 Good Faith Efforts at Maximizing MBE Opportunities:

(a) Good faith efforts at maximizing MBE opportunities shall be required for construction contracts over \$50,000.

(b) At the discretion of the Liaison Officer, good faith efforts at maximizing MBE opportunities may be required for any other contract. This requirement shall be made in writing prior to the solicitation of bids for such contract.

(c) Where good faith efforts are required, the Liaison Officer shall direct the inclusion of a clause in any RFP or bid documents which requires that the prime contractor, prior to entering into any subcontracts, make good faith efforts at maximizing MBE opportunities, as that term is defined in Section 2.04.160.

2.04.155 Contract Award Criteria:

(a) To be eligible for award of contracts subject to good faith efforts requirements, prime contractors must prove that they have made good faith efforts at maximizing MBE opportunities prior to the time bids are opened or proposal are due. Bidders/Proposers

are required to utilize the most current list of MBEs certified 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 good faith efforts requirements have been established shall require all bidders/proposers to submit with their bids and proposals a statement indicating that they have made good faith efforts as defined in Section 2.04.160. To document good faith efforts, all bidders and proposers shall complete and endorse a Minority 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 MBE in which the MBE 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 at the time of bid opening,~~ (or proposal submission date when no public opening is had), submit to Metro detailed MBE Utilization Forms listing names of MBEs 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 MBE subcontractors and suppliers to be utilized in performance of the contract. A sample Letter of Agreement will be provided by Metro. The MBE Utilization Forms shall be provided by Metro with bid/proposal documents.

(e) An apparent low bidder/proposer who states in its bid/proposal that good faith efforts at maximizing MBE opportunities 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 show good faith efforts at maximizing MBE opportunities, 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 good faith efforts 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. ~~Any such waivers shall be in writing, and shall be kept in the appropriate files.~~

2.04.160 Definition and Determination of Good Faith Efforts:

(a) Good Faith Efforts by Metro: Metro, through its Liaison Officer, shall make good faith efforts to maximize MBE opportunities on locally-funded contracts to which good faith efforts requirements apply, including the following:

- (1) ~~Identifying and selecting specific economically feasible units of the project to be performed by MBEs to increase the likelihood of participation by such enterprises;~~ Identifying project elements for which a significant minority capability exists for execution and/or a significant interest by minority firms has been expressed and directing that contractors define economically feasible units as a part of their subcontracting plan which address these identified or targeted project elements;
- (2) Advertising in, at a minimum, one newspaper of general circulation, one minority-oriented publication, and one trade-oriented publication. The advertisement must announce subcontracting or material supply opportunities on the project at least ten (10) days before bids or proposals are due;
- (3) Providing written notice soliciting subbids/proposals to not less than a reasonable number of MBEs for each subcontracting or material supply work item selected pursuant to (1) above not less than ten (10) days before bids/proposals are due.

If there are less than three certified MBEs listed for that work or supply specialty then the solicitation must be mailed to at least the number of MBEs 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.

- (4) Using the services of minority community organizations, including at least two minority contractor groups, local, state and federal minority business assistance offices or other organizations identified by the Executive Department that provide assistance in the recruitment and

placement of MBEs; where applicable, advising and assisting MBEs in obtaining lines of credit or insurance required by Metro or the bidder/proposer; and, otherwise, making efforts to encourage participation by MBEs.

The Liaison Officer shall maintain adequate documentation of all of Metro's good faith efforts.

(b) Good Faith Efforts by Bidders/Proposers: Bidders or proposers on locally-funded contracts to which good faith efforts requirements apply shall demonstrate that they have made good faith efforts at maximizing MBE opportunities. Performing and documenting all of the following actions constitutes a rebuttable presumption that the bidder has made good faith efforts as required by Metro's MBE Program:

- (1) Identifying and incorporating in the subcontracting plan specific economically feasible units which may be performed by MBEs to increase the likelihood of participation of such enterprises;

Documentation Required: Identification of selected economically feasible units in subcontracting plan; inclusion of Metro targeted units mandatory.

- (2) Attendance at any pre-solicitation or prebid meetings that were scheduled by Metro to inform MBEs 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.

- (3) Making, not later than five days before bids/proposals are due, follow-up phone calls to all MBEs who attended any pre-solicitation or prebid meetings that were scheduled by Metro, 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 MBE to whom a solicitation letter was sent (e.g., bid submitted, declined, no response). In instances where MBE bids were rejected, the dollar amount of the bid rejected from the MBE 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.

- ④ Providing those MBEs expressing an interest with information about the plans, specifications and the requirements for the identified subcontracting or material supply work. This may be satisfied by a referral to a plan center.
- ⑤ Negotiating with interested, capable and competitive MBEs submitting bids and not rejecting any bids without justification. Bid shopping is prohibited.
- ⑥ If Metro or the bidder/proposer requires bonding, lines of credit or insurance, notifying the MBE of this requirement and referring them to a potential source where this requirement may be met.

(c) The good faith efforts documented by the bidder/proposer must be certified to be reasonably expected to produce participation in this project by capable and competitive MBEs.

(d) Bid invitations will contain a MBE Program compliance form for recording and documenting the completion of the above-listed actions. Completion of the form and documentation of the above-listed actions, 1 through 5, is mandatory. Failure to complete and submit the form and/or any required documentation will result in the bid being rejected as nonresponsive. The Liaison Officer shall determine, if necessary, whether good faith efforts have been met pursuant to the criteria of the MBE Program by verifying the documentation of the lowest responsible bidder.

(e) A bidder/proposer who contracts with Metro shall not discriminate against MBEs in the awarding of subcontracts. A contractor's good faith efforts at maximizing MBE opportunities must be reasonably expected by the contractor to produce participation by MBEs. Contractor shall certify as part of the bid 31 documents accompanying the bid on a public contract that the contractor has not discriminated against MBEs in obtaining any required subcontracts and that the contractor reasonably expected the above-documented good faith efforts to result in participation by MBEs. Example of certifying statement: By signing this document bidder hereby certifies that bidder has not discriminated against MBEs in obtaining any subcontracts for this project, and that the documented good faith efforts of bidder/proposer at maximizing MBE opportunities were reasonably expected to result in participation of MBEs in this project in compliance with Metro's MBE Program.

(f) Notwithstanding any other provision of this section, bidders and proposers on locally-funded contracts to which good faith efforts apply need not accept the bid of a MBE on any particular subcontract or material supply item if the bidder/proposer demonstrates that none of the MBEs 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.



(g) 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 good faith efforts 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.

2.04.165 Replacement of MBE Subcontractors: Prime contractors shall not replace a MBE subcontractor with another subcontractor, either before contract award or during contract performance, without prior notice to Metro. Prime contractors who replace a MBE subcontractor shall make good faith efforts as described in the preceding section in selecting a replacement.

2.04.170 Monitoring, Records and Reports:

(a) Metro, through the Liaison Officer, shall develop and maintain a recordkeeping system to identify and assess MBE contract awards, and prime contractors' progress in demonstrating good faith efforts. Specifically, the following records will be maintained:

- (1) The name of the contractor.
- (2) Awards to MBEs by number, percentage and dollar amount.
- (3) A description of the types of contracts awarded to MBEs.
- (4) The extent to which good faith efforts were demonstrated and reasons therefor.
- (5) The extent to which annual contract goals were met or not and the reasons therefor.
- (6) Any other information the Liaison Officer deems necessary.

(b) All MBE records will be separately maintained.

(c) The Liaison Officer shall prepare reports, at least semiannually, detailing performance of the MBE Program. The reports shall be forwarded to the Metro Council no later than January 1 and June 30 of each year, and shall include at least 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 MBE firms in the reporting period;
- (5) Statistics, and narrative where appropriate, demonstrating the utilization of MBEs by department and contract category;
- (6) Statistics, and narrative, where appropriate, demonstrating the extent to which annual contract goals have been met or not met;
- (7) Statistics, and narrative where appropriate, demonstrating the number and type of waivers granted;
- (8) Explanations of any investigative actions taken by any administrative agency touching on the implementation, monitoring and enforcement of the MBE Program.
- (9) Descriptions of any problems in the implementation reported by the department, including proposed solutions; and
- (10) Recommendations, as appropriate, regarding amendments to this MBE Program, including recommendations on changes needed to meet annual contract goals, if those goals have not been met.

2.04.180 Compliance:

(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 good faith efforts on MBE participation in the contract.

(b) The Liaison Officer may require, at any stage of contract completion, additional documented proof from the contractor of good faith efforts.

2.04.190 Severability and Intent:

(a) The provisions of the MBE Program shall be effective in all cases unless otherwise provided for by state or federal law. The provisions of the MBE Program are separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section, or portion of the MBE Program or the invalidity of the application thereof to any person or circumstances shall not affect the validity of the remainder of the MBE Program, or the validity of its application to other persons or circumstances.

(b) The MBE Program is intended, and should be construed, as establishing and requiring the maximum efforts at assuring MBE participation in Metro contracting activities that is consistent with the United States and Oregon Constitutions and applicable federal and state law."

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"2.04.200 Women Business Enterprise Program (WBE Program) For Locally-Funded Contracts, Findings, Purpose and Authority:

(a) The Metro Council supports the aspirations of women to enter the mainstream of social, political and economic life.

(b) The Metro Council finds:

- (1) The opportunity for full participation in our free enterprise system by women is essential;
- (2) Greater economic opportunity for women is essential;
- (3) Review of Metro programs to remedy historical patterns of exclusion of and discrimination against women is needed;
- (4) Public policies and programs to eliminate the effects of long-term, open and pervasive exclusion of and discrimination against women from the business sector, including increased opportunities to integrate women into the full economic life of the community should be reviewed; and
- (5) In cooperation with the private sector, the affected populations, interested groups and appropriate governmental entities, a program of review should be established to recommend remedies for the unfortunate effects of social, political and economic inequity that still exist.

(c) It is the purpose of the WBE Program to establish and implement a program to encourage the utilization by Metro of women-owned businesses, to the greatest extent permitted by law, by creating for such businesses the maximum possible opportunity to compete for and participate in locally-funded Metro contracting activities. The WBE Program does not apply to federally funded contracts, which are governed by Metro Code 2.04.300 et seq. The WBE Program shall be administered simultaneously and in addition to the provisions of Metro Code Sections 2.04.100-190.

(d) Metro Code Sections 2.04.200 to 2.04.290 shall be known and may be cited as the "Metro Women Business Enterprise Program," hereinafter referred to as the "WBE Program."

2.04.205 Policy Statement:

(a) Through this WBE Program, Metro:

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

(b) It is the policy of Metro to provide equal opportunity to all persons to access and participate in the locally-funded projects, programs and services of Metro. Metro and Metro contractors shall 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 the WBE Program shall apply to all Metro departments, commissions and project areas except as expressly provided herein.

(d) The objectives of the WBE Program shall be:

- (1) To assure that provisions of the WBE Program are adhered to by all Metro departments, contractors, and employees; and
- (2) To initiate and maintain efforts to increase, to the greatest extent permitted by law, program participation by women businesses.

2.04.210 Definitions: For purposes of Metro Code Sections 2.04.200 to 2.04.290, the following definitions shall apply:

(a) "Capable" means a Women Business Enterprise registered with the Executive Department who upon request from the bidder can supply two favorable references of prior work of the type being subcontracted for.

(b) "Competitive" means the subcontract bid submitted by the Women Business Enterprise was within 10 percent of either the budgeted amount, subbid estimate, or the lowest bid received by the bidder. ~~The bidder shall make one of these figures available upon request.~~ This term relates to price only and must not be interpreted to mean that a bid deemed competitive is therefore entitled to the subcontract award.

(c) "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.

(d) "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 the WBE Program a lease or a purchase order of \$500.00 or more is a contract.

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

(f) "Documentation" means written materials purporting to establish the satisfaction of a good faith effort requirement that are capable of verification. These may include, but are not limited to, copies of business logs, correspondence or newspaper ads.

(g) "Economically Feasible Unit" means a unit of work identified in a project suitable for subcontracting in the normal course of business. These would be units that a contractor would ordinarily identify as suitable for performance by a subcontractor. The intent here is to have identified units that would be attractive to a serious and qualified subcontractor and not be shunned by that subcontractor because the unit of work is too small to be profitable.

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

(i) "Interested" means a Women Business Enterprise that has expressed to Metro and/or the bidder an interest in learning more about the project identified in the initial solicitation by the bidder.

(j) "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 WBE and non-WBE, the 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 WBE and a non-WBE must receive Metro approval prior to contract award.

(k) "Justification" means a maintaining or showing of a sufficient reason why an action was taken and that the action was not taken for an impermissible reason. Permissible reasons include, but are not limited to, not meeting bid invitation specifications or not being the low bid. An impermissible reason would be one that is arbitrary or capricious or based on race, sex, national origin, marital status or religion.

(l) "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.

(m) "Lessee" means a business or person that leases, or is negotiating to lease, property from Metro or an actual or potential Metro contractor on Metro's or the

contractor'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 at the facility.

(n) "Women Business Enterprise or WBE" means a small business concern which is certified as such by the Executive Department and:

- (1) 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
- (2) Whose management and daily business operations are controlled by one or more of the women who own it.

(o) "Woman" or "Women" has the meaning established by ORS 200.005(7).

(p) "Negotiate" means to engage in good faith discussions with the potential subcontractors about their proposals/bids, and the work for which a bid is sought, including sharing with them any cost estimates from the request for proposal or invitation to bid documents, if available.

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

(r) "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.

(s) "Reasonable Number" means at least three (3) firms of those WBEs certified as such by the Executive Department, or a greater number of such firms, if so specified in any particular contract by the Liaison Officer. Consideration should be given to the specialty of subcontracting or materials supply desired as well as the location of the project and whether or not the subcontractor is willing to perform work out of their geographic area.

(t) "Rebuttable Presumption" means a presumption which may be rebutted, or disproved, by evidence.

(u) "Small Business Concern" means a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto.

2.04.215 Notice to Contractors and Subcontractors: Contractors of Metro accepting locally-funded contracts under the WBE Program shall be advised that failure to carry out the applicable provisions of the WBE Program shall constitute a breach of contract and, after

notification by Metro, may result in termination or such other remedy as Metro deems appropriate.

2.04.220 Liaison Officer:

(a) ~~The Executive Officer shall, by executive order, designate a WBE Liaison Officer and, if necessary, other staff adequate to administer the WBE Program. The Liaison Officer shall report directly to the Executive Officer on matters pertaining to the WBE Program.~~ The Executive Officer shall be responsible for administering the WBE Program. The Executive Officer may, by Executive Order, designate a Liaison Officer and, if necessary, other staff adequate to administer the WBE Program on the Executive's behalf. For purposes of Metro Code Sections 2.04.200-290, all references to the "Liaison Officer" shall mean the Executive Officer, unless the Executive Officer has designated another individual as the "Liaison Officer," in which case the individual so designated shall perform the functions required by the WBE Program.

(b) The Liaison Officer shall be responsible for developing, managing and implementing the WBE Program, and for disseminating information on available business opportunities so that 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 WBE Program.

(c) The Liaison Officer shall begin immediately to design a technical assistance and outreach program which shall be established by ~~September 1, 1992~~ January 1, 1993. This program shall include at least the following elements:

- (1) A regularly-scheduled contractor orientation program to promote compliance with and understanding of the provisions of the WBE Program and Metro.
- (2) Feasible options for bonding, insurance, and banking assistance for WBEs;
- (3) A program designed to assist Metro departments in enhancing opportunities for WBEs;
- (4) A fully-developed and maintained resource list to include all available resources for WBEs.
- (5) A system for agency-wide reporting of WBE outreach efforts and accomplishments.



(d) The Liaison Officer shall have the responsibility for monitoring implementation of the requirements of the WBE Program and shall have the power to request from Metro departments, bidders/proposers, and/or contractors any relevant records, information and documents.

(e) The Liaison Officer shall be responsible for gathering all information concerning compliance with this chapter and shall have access to all pertinent Metro records.

2.04.225 Directory: A directory of 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 the WBE Program requirements.

2.04.230 Women-Owned Banks: Metro will seek to identify women-owned banks and banks utilizing equal opportunity banking practices, including community reinvestment, and, to the greatest extent permitted by law, use their services. In addition, Metro will encourage prime contractors, subcontractors and consultants to utilize such services by sending them brochures and service information on such banks.

2.04.235 Affirmative Action and Equal Opportunity Procedures: Metro shall use affirmative action techniques to facilitate WBE participation in contracting activities. These techniques include:

- (a) Making affirmative efforts to solicit proposals from WBEs.
- (b) Examining alternatives for arranging contracts by size and type of work so as to enhance the possibility of participation by WBEs.
- (c) Arranging solicitations, time for the presentation of bids, quantities specifications, and delivery schedules so as to facilitate the participation of WBEs.
- (d) Referring WBEs in need of management assistance to established agencies that provide direct management assistance to such businesses.
- (e) Carrying out specific information and communications programs on contracting procedures and specific contracting opportunities in a timely manner, with such programs being bilingual, and in conformance with any requirements of the Americans with Disabilities Act, where appropriate.
- (f) Distribution of copies of the WBE Program to organizations and individuals concerned with WBE programs.

(g) Periodic reviews with department heads to ensure that they are aware of the WBE Program goals and desired activities on their parts to facilitate the purposes of the WBE Program. Additionally, departmental efforts toward and success in meeting the purposes of the WBE Program shall be factors considered during annual performance evaluations of the department heads.

(h) Monitoring and ensuring that WBE planning centers and likely WBE contractors are receiving requests for bids, proposals and quotes.

(i) Distribution of lists to potential WBE contractors of the types of goods and services which Metro regularly purchases.

(j) Advising potential WBE vendors that Metro does not certify WBE's, and directing them to the Executive Department.

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

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

(m) Requiring that at least one 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 WBEs on the certification list capable of providing the service or item. Any such waivers shall be in writing, and shall be kept in the appropriate files. For contracts over the dollar amounts indicated in this section, all known WBEs known to Metro in the business of providing the service or item(s) required shall be mailed bid or proposal information.

(n) Requiring that all prospective bidders attend scheduled prebid conferences on all construction contracts with an estimated value of over \$100,000.

(o) The Executive Officer or his/her designee, may establish and implement additional affirmative action techniques which are consistent with the WBE Program and designed to facilitate participation of WBEs in Metro contracting activities.

2.04.240 Certification of Women Business Eligibility:

(a) To participate in the WBE Program, contractors, subcontractors and joint ventures must have been certified by the Executive Department 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 Executive Department's list in determining whether a prospective contractor or subcontractor is certified as a WBE. A prospective contractor or subcontractor must be certified as a WBE by the Executive Department or appear on its certification list prior to the pertinent bid opening or proposal submission date to be considered by Metro to be an eligible WBE. Metro will adhere to any applicable Recertification Rulings.

(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.

2.04.245 Annual Women Business Goals:

(a) The Metro Council shall, by resolution each June, establish annual WBE goals for the ensuing fiscal year. Such annual goals shall be established separately for construction contracts, labor and materials contracts, personal services contracts, and procurement 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 WBEs likely to be available to compete for the contracts;
- (3) Past results of Metro's efforts under the WBE Program; and
- (4) Existing goals of other Portland metropolitan area contracting agencies, and their experience in meeting these goals.

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

2.04.250 Good Faith Efforts at Maximizing WBE Opportunities

(a) Good faith efforts at maximizing WBE opportunities shall be required for construction contracts over \$50,000.

(b) At the discretion of the Liaison Officer, good faith efforts at maximizing WBE opportunities may be required for any other contract. This requirement shall be made in writing prior to the solicitation of bids for such contract.

(c) Where good faith efforts are required, the Liaison Officer shall direct the inclusion of a clause in any RFP or bid documents which requires that the prime contractor, prior to entering into any subcontracts, make good faith efforts at maximizing WBE opportunities, as that term is defined in Section 2.04.160.

2.04.255 Contract Award Criteria:

(a) To be eligible for award of contracts subject to good faith efforts requirements, prime contractors must prove that they have made good faith efforts at maximizing WBE opportunities prior to the time bids are opened or proposal are due. Bidders/Proposers are required to utilize the most current list of WBEs certified 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 good faith efforts requirements have been established shall require all bidders/proposers to submit with their bids and proposals a statement indicating that they have made good faith efforts as defined in Section 2.04.160. To document good faith efforts, all bidders and proposers shall complete and endorse a Women 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 WBE in which the 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~~ ~~at the time of bid opening~~, (or proposal submission date when no public opening is had), submit to Metro detailed WBE Utilization Forms listing names of 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 WBE subcontractors and suppliers to be utilized

in performance of the contract. A sample Letter of Agreement will be provided by Metro. The 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 good faith efforts at maximizing WBE opportunities 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 show good faith efforts at maximizing WBE opportunities, 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 good faith efforts 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. Any such waivers shall be in writing, and shall be kept in the appropriate files.

#### 2.04.260 Definition and Determination of Good Faith Efforts:

(a) Good Faith Efforts by Metro: Metro, through its Liaison Officer, shall make good faith efforts to maximize WBE opportunities on locally-funded contracts to which good faith efforts requirements apply, including the following:

- (1) ~~Identifying and selecting specific economically feasible units of the project to be performed by WBEs to increase the likelihood of participation by such enterprises;~~ Identifying project elements for which a significant minority capability exists for execution and/or a significant interest by minority firms has been expressed and directing that contractors define economically feasible units as a part of their subcontracting plan which address these identified or targeted project elements;
- (2) Advertising in, at a minimum, one newspaper of general circulation, one minority-oriented publication, and one trade-oriented publication. The advertisement must announce subcontracting or material supply

opportunities on the project at least ten (10) days before bids or proposals are due;

- (3) Providing written notice soliciting subbids/proposals to not less than a reasonable number of WBEs for each subcontracting or material supply work item selected pursuant to (1) above not less than ten (10) days before bids/proposals are due.

If there are less than three certified WBEs listed for that work or supply specialty then the solicitation must be mailed to at least the number of 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.

- (4) Using the services of women community organizations, including women contractor groups, local, state and federal business assistance offices or other organizations identified by the Executive Department that provide assistance in the recruitment and placement of WBEs; where applicable, advising and assisting WBEs in obtaining lines of credit or insurance required by Metro or the bidder/proposer; and, otherwise, making efforts to encourage participation by WBEs.

The Liaison Officer shall maintain adequate documentation of all of Metro's good faith efforts.

(b) Good Faith Efforts by Bidders/Proposers: Bidders or proposers on locally-funded contracts to which good faith efforts requirements apply shall demonstrate that they have made good faith efforts at maximizing WBE opportunities. Performing and documenting all of the following actions constitutes a rebuttable presumption that the bidder has made good faith efforts as required by Metro's WBE Program:

- (1) Identifying and incorporating in the subcontracting plan specific economically feasible units which may be performed by WBEs to increase the likelihood of participation of such enterprises;

Documentation Required: Identification of selected economically feasible units in subcontracting plan; inclusion of Metro targeted units mandatory.

- (2) Attendance at any pre-solicitation or prebid meetings that were scheduled by Metro to inform 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.

- ③ Making, not later than five days before bids/proposals are due, follow-up phone calls to all WBEs who attended any pre-solicitation or prebid meetings that were scheduled by Metro, 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 WBE to whom a solicitation letter was sent (e.g., bid submitted, declined, no response). In instances where WBE bids were rejected, the dollar amount of the bid rejected from the 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.

- ④ Providing those WBEs expressing an interest with information about the plans, specifications and the requirements for the identified subcontracting or material supply work. This may be satisfied by a referral to a plan center.
- ⑤ Negotiating with interested, capable and competitive WBEs submitting bids and not rejecting any bids without justification. Bid shopping is prohibited.
- ⑥ If Metro or the bidder/proposer requires bonding, lines of credit or insurance, notifying the WBE of this requirement and referring them to a potential source where this requirement may be met.

(c) The good faith efforts documented by the bidder/proposer must be certified to be reasonably expected to produce participation in this project by capable and competitive WBEs.

(d) Bid invitations will contain a WBE Program compliance form for recording and documenting the completion of the above-listed actions. Completion of the form and documentation of the above-listed actions, 1 through 5, is mandatory. Failure to complete and submit the form and/or any required documentation will result in the bid being rejected as nonresponsive. The Liaison Officer shall determine, if necessary, whether good faith efforts have been met pursuant to the criteria of the WBE Program by verifying the documentation of the lowest responsible bidder.

(e) A bidder/proposer who contracts with Metro shall not discriminate against WBEs in the awarding of subcontracts. A contractor's good faith efforts at maximizing WBE opportunities must be reasonably expected by the contractor to produce participation by WBEs. Contractor shall certify as part of the bid documents accompanying the bid on a public contract that the contractor has not discriminated against WBEs in obtaining any required subcontracts and that the contractor reasonably expected the above-documented good faith efforts to result in participation by WBEs. Example of certifying statement: By signing this document bidder hereby certifies that bidder has not discriminated against WBEs in obtaining any subcontracts for this project, and that the documented good faith efforts of bidder/proposer at maximizing WBE opportunities were reasonably expected to result in participation of WBEs in this project in compliance with Metro's WBE Program.

(f) Notwithstanding any other provision of this section, bidders and proposers on locally-funded contracts to which good faith efforts apply need not accept the bid of a WBE on any particular subcontract or material supply item if the bidder/proposer demonstrates that none of the 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.

(g) 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 good faith efforts 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.

2.04.265 Replacement of WBE Subcontractors: Prime contractors shall not replace a WBE subcontractor with another subcontractor, either before contract award or during contract performance, without prior notice to Metro. Prime contractors who replace a WBE subcontractor shall make good faith efforts as described in the preceding section in selecting a replacement.

2.04.270 Monitoring, Records and Reports:

(a) Metro, through the Liaison Officer, shall develop and maintain a recordkeeping system to identify and assess WBE contract awards, and prime contractors' progress in demonstrating good faith efforts. Specifically, the following records will be maintained:

- (1) The name of the contractor.
- (2) Awards to WBEs by number, percentage and dollar amount.



- (3) A description of the types of contracts awarded to WBEs.
  - (4) The extent to which good faith efforts were demonstrated and reasons therefor.
  - (5) The extent to which annual contract goals were met or not and the reasons therefor.
  - (6) Any other information the Liaison Officer deems necessary.
- (b) All WBE records will be separately maintained.
- (c) The Liaison Officer shall prepare reports, at least semiannually, detailing performance of the WBE Program. The reports shall be forwarded to the Metro Council no later than January 31 and June 30 of each year, and shall include at least 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 WBE firms in the reporting period;
  - (5) Statistics, and narrative where appropriate, demonstrating the utilization of WBEs by department and contract category;
  - (6) Statistics, and narrative, where appropriate, demonstrating the extent to which annual contract goals have been met or not met;
  - (7) Statistics, and narrative where appropriate, demonstrating the number and type of waivers granted;
  - (8) Explanations of any investigative actions taken by any administrative agency touching on the implementation, monitoring and enforcement of the WBE Program.
  - (9) Descriptions of any problems in the implementation reported by the department, including proposed solutions; and

- (10) Recommendations, as appropriate, regarding amendments to this WBE Program, including recommendations on changes needed to meet annual contract goals, if those goals have not been met.

2.04.280 Compliance:

(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 good faith efforts on WBE participation in the contract.

(b) The Liaison Officer may require, at any stage of contract completion, additional documented proof from the contractor of good faith efforts.

2.04.290 Severability and Intent:

(a) The provisions of the WBE Program shall be effective in all cases unless otherwise provided for by state or federal law. The provisions of the WBE Program are separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section, or portion of the WBE Program or the invalidity of the application thereof to any person or circumstances shall not affect the validity of the remainder of the WBE Program, or the validity of its application to other persons or circumstances.

(b) The WBE Program is intended, and should be construed, as establishing and requiring the maximum efforts at assuring WBE participation in Metro contracting activities that is consistent with the United States and Oregon Constitutions and applicable federal and state law."

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**"2.04.300 Disadvantaged Business Enterprise Program (DBE Program) For Federally-Funded Contracts, Findings, Purpose and Authority:**

(a) It is the purpose of Metro Code Sections 2.04.300 to 2.04.390 to establish and implement a program to encourage the utilization by Metro of disadvantaged businesses by creating for such businesses the maximum possible opportunity to compete for and participate in federally-funded Metro contracting activities. The DBE Program does not apply to locally funded contracts, which are governed by 2.04.100, .200, and .400 et seq.

(b) Metro Code Sections 2.04.300 to 2.04.390 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) Metro Code Sections 2.04.300 to 2.04.390 shall be known and may be cited as the "Metro Disadvantaged Business Enterprise Program for Federally-Funded Contracts," hereinafter referred to as the "DBE Program."

**2.04.305 Policy Statement:**

(a) Through the DBE Program, Metro:

- (1) Expresses its strong commitment to provide maximum opportunity to disadvantaged 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 the DBE Program shall apply to all Metro departments and project areas except as expressly provided in the DBE Program.

(d) The objectives of the DBE Program shall be:

- (1) To assure that provisions of the DBE Program are adhered to by all Metro departments, contractors, employees and USDOT subrecipients and contractors.
- (2) To initiate and maintain efforts to increase DBE Program participation by disadvantaged businesses.

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

**2.04.310 Definitions:** For purposes of the DEB Program, 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 the DBE Program 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 DBE Program and includes lessees.

(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 so certified by an authorized agency and:

- (1) Which is at least 51 percent owned by one or more socially or 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 or economically disadvantaged individuals; and

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

(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 and non-DBE, the DBE 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 and a non-DBE must receive Metro approval prior to contract award to be counted toward any DBE 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 or Economically Disadvantaged Individuals or Disadvantaged Individuals" has the meaning established by ORS 200.005(2), (9), including the rebuttable presumption established by ORS 200.015(3), and the definitions supplied by ORS 200.005(7), (10).

(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.

2.04.315 Notice to Contractors, Subcontractors and Subrecipients: Contractors, subcontractors and subrecipients of Metro accepting contracts or grants under the DBE 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.

2.04.320 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 DBE Program. The Liaison Officer shall report directly to the Executive Officer on matters pertaining to the DBE Program.

(b) The Liaison Officer shall be responsible for developing, managing and implementing the DBE Program, and for disseminating information on available business opportunities so that DBEs 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 DBE Program.

2.04.325 Directory: A directory of DBEs and 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 DBE Program requirements.

**2.04.330 DBE-Owned Banks:** Metro will seek to identify DBE-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 banks.

**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.

(d) Distribution of copies of the DBE Program to organizations and individuals concerned with DBE Programs.

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

(f) Monitor and insure that Disadvantaged planning centers and likely DBE 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 participation.

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

(i) Advising potential DBE vendors that Metro does not certify DBEs, 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 participation in contracts. In an effort to become more knowledgeable regarding DBE resources, the committee shall also invite potential DBE contractors to attend selected meetings.

(l) Requiring that at least one DBE 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 on the certification list capable of providing the service or item. For contracts over the dollar amounts indicated in this section, all known DBEs 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 in Metro contracting activities.

2.04.340 Certification of Disadvantaged Business Eligibility:

(a) To participate in the DBE Program as a DBE, 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. A prospective contractor or subcontractor must be certified as a DBE 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 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 the DBE 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.

#### 2.04.345 Annual Disadvantaged Business Goals:

(a) The Metro Council shall, by resolution each June, establish annual DBE 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 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.

2.04.350 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 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 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 2.04.360 or 2.04.375. The extent to which DBE participation will be counted toward contract goals is governed by the latter section.

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, 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. The 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 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 2.04.160. 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.

#### 2.04.360 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 pre-solicitation 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, disadvantaged and trade-oriented, if any and through a disadvantaged-owned newspaper or disadvantaged-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 and Emerging Small Business that provide assistance in the recruitment and placement of DBEs.

2.04.365 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.

2.04.370 Records and Reports:

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

- (1) Awards to DBEs 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 records will be separately maintained. Required DBE information will be provided to federal agencies and administrators on request.

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

**2.04.375 Counting Disadvantaged Business Participation Toward Meeting Goals:**

(a) DBE 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 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) 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 business partner in the joint venture.
- (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 and other relevant factors.

- (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).
- (8) Metro shall count toward the 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.
- (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 disadvantaged 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) **DBE Obligation.** The recipient or its contractor agrees to ensure that disadvantaged 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 disadvantaged 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 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 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.

2.04.380 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 participation in the contract.

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

ADOPTED by the Council of the Metropolitan Service District this \_\_\_\_\_  
day of \_\_\_\_\_, 1992.

\_\_\_\_\_  
Jim Gardner, Presiding Officer

ATTEST:

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

gl 1100

BEFORE THE COUNCIL OF THE  
METROPOLITAN SERVICE DISTRICT

FOR THE PURPOSE OF REPEALING )           ORDINANCE NO. 92-466  
METRO CODE SECTIONS 2.04.100- )  
.180, AND FOR THE PURPOSE OF )           Introduced by  
ENACTING NEW PROVISIONS ESTAB-)           Councilor Tanya Collier  
LISHING AND GOVERNING METRO'S )  
CONTRACTING PROCEDURES FOR        )  
MINORITY, WOMEN, AND DISAD-        )  
VANTAGED BUSINESS ENTERPRISES )

WHEREAS, Metro Code 2.04.100-.180 previously governed the Metropolitan Service District's contracting program for disadvantaged businesses; and

WHEREAS, the Metro Council finds that a revision of the Metropolitan Service District's contracting program is desirable; now, therefore,

THE COUNCIL OF THE METROPOLITAN SERVICE DISTRICT HEREBY ORDAINS:

Section 1. The current Metro Code Sections 2.04.100-.180 are repealed.

Section 2. New Metro Code Sections 2.04.100, 2.04.200, and 2.04.300, are adopted, as follows:

"2.04.100 Minority Business Enterprise Program (MBE Program) For Locally-Funded Contracts, Findings, Purpose and Authority:

(a) The Metro Council supports the aspirations of minorities to enter the mainstream of social, political and economic life.

(b) The Metro Council finds:

- (1) The opportunity for full participation in our free enterprise system by minorities is essential;
- (2) Greater economic opportunity for minorities is essential;
- (3) Review of Metro programs to remedy historical patterns of exclusion of and discrimination against racial or ethnic groups is needed;
- (4) Public policies and programs to eliminate the effects of long-term, open and pervasive exclusion of and discrimination against minorities from the

business sector, including increased opportunities to integrate minorities into the full economic life of the community should be reviewed; and

- (5) In cooperation with the private sector, the affected populations, interested groups and appropriate governmental entities, a program of review should be established to recommend remedies for the unfortunate effects of social, political and economic inequity that still exist.

(c) It is the purpose of the MBE Program to establish and implement a program to encourage the utilization by Metro of minority-owned businesses, to the greatest extent permitted by law, by creating for such businesses the maximum possible opportunity to compete for and participate in locally-funded Metro contracting activities. The MBE Program does not apply to federally funded contracts, which are governed by Metro Code 2.04.300 et seq.

(d) Metro Code Sections 2.04.100 to 2.04.190 shall be known and may be cited as the "Metro Minority Business Enterprise Program," hereinafter referred to as the "MBE Program."

2.04.105 Policy Statement:

(a) Through this MBE Program, Metro:

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

(b) It is the policy of Metro to provide equal opportunity to all persons to access and participate in the locally-funded projects, programs and services of Metro. Metro and Metro contractors shall 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 the MBE Program shall apply to all Metro departments, commissions and project areas except as expressly provided herein.

(d) The objectives of the MBE Program shall be:

- (1) To assure that provisions of the MBE Program are adhered to by all Metro departments, contractors, and employees; and

- (2) To initiate and maintain efforts to increase, to the greatest extent permitted by law, program participation by minority businesses.

2.04.110 Definitions: For purposes of Metro Code Sections 2.04.100 to 2.04.190, the following definitions shall apply:

(a) "Capable" means a Minority Business Enterprise registered with the Executive Department who upon request from the bidder can supply two favorable references of prior work of the type being subcontracted for.

(b) "Competitive" means the subcontract bid submitted by the Minority Business Enterprise was within 10 percent of either the budgeted amount, subbid estimate, or the lowest bid received by the bidder. The bidder shall make one of these figures available upon request. This term relates to price only and must not be interpreted to mean that a bid deemed competitive is therefore entitled to the subcontract award.

(c) "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.

(d) "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 the MBE Program a lease or a purchase order of \$500.00 or more is a contract.

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

(f) "Documentation" means written materials purporting to establish the satisfaction of a good faith effort requirement that are capable of verification. These may include, but are not limited to, copies of business logs, correspondence or newspaper ads.

(g) "Economically Feasible Unit" means a unit of work identified in a project suitable for subcontracting in the normal course of business. These would be units that a contractor would ordinarily identify as suitable for performance by a subcontractor. The intent here is to have identified units that would be attractive to a serious and qualified subcontractor and not be shunned by that subcontractor because the unit of work is too small to be profitable.

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

(i) "Interested" means a Minority Business Enterprise that has expressed to the bidder an interest in learning more about the project identified in the initial solicitation by the bidder.

(j) "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 MBE and non-MBE, the MBE 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 MBE and a non-MBE must receive Metro approval prior to contract award.

(k) "Justification" means a maintaining or showing of a sufficient reason why an action was taken and that the action was not taken for an impermissible reason. Permissible reasons include, but are not limited to, not meeting bid invitation specifications or not being the low bid. An impermissible reason would be one that is arbitrary or capricious or based on race, sex, national origin, marital status or religion.

(l) "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.

(m) "Lessee" means a business or person that leases, or is negotiating to lease, property from Metro or an actual or potential Metro contractor on Metro's or the contractor'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 at the facility.

(n) "Minority Business Enterprise or MBE" means a small business concern which is certified as such by the Executive Department and:

- (1) Which is at least 51 percent owned by one or more minority 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 minority individuals; and
- (2) Whose management and daily business operations are controlled by one or more of the minority individuals who own it.

(o) "Minority Individual" has the meaning established by ORS 200.005(7).

(p) "Negotiate" means to engage in good faith discussions with the potential subcontractors about their proposals/bids, and the work for which a bid is sought, including sharing with them any cost estimates from the request for proposal or invitation to bid documents, if available.

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

(r) "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.

(s) "Reasonable Number" means at least three (3) firms of those MBEs certified as such by the Executive Department, or a greater number of such firms, if so specified in any particular contract by the Liaison Officer. Consideration should be given to the specialty of subcontracting or materials supply desired as well as the location of the project and whether or not the subcontractor is willing to perform work out of their geographic area.

(t) "Rebuttable Presumption" means a presumption which may be rebutted, or disproved, by evidence.

(u) "Small Business Concern" means a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto.

2.04.115 Notice to Contractors and Subcontractors: Contractors of Metro accepting locally-funded contracts under the MBE Program shall be advised that failure to carry out the applicable provisions of the MBE 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 MBE Liaison Officer and, if necessary, other staff adequate to administer the MBE Program. The Liaison Officer shall report directly to the Executive Officer on matters pertaining to the MBE Program.

(b) The Liaison Officer shall be responsible for developing, managing and implementing the MBE Program, and for disseminating information on available business opportunities so that MBEs 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 MBE Program.

(c) The Liaison Officer shall begin immediately to design a technical assistance and outreach program which shall be established by September 1, 1992. This program shall include at least the following elements:

- (1) A regularly-scheduled contractor orientation program to promote compliance with and understanding of the provisions of the MBE Program and Metro.
- (2) Feasible options for bonding, insurance, and banking assistance for MBEs.
- (3) A program designed to assist Metro departments in enhancing opportunities for MBEs.
- (4) A fully-developed and maintained resource list to include all available resources for MBEs.

(d) The Liaison Officer shall have the responsibility for monitoring implementation of the requirements of the MBE Program and shall have the power to request from Metro departments, bidders/proposers, and/or contractors any relevant records, information and documents.

(e) The Liaison Officer shall be responsible for gathering all information concerning compliance with this chapter and shall have access to all pertinent Metro records.

2.04.125 Directory: A directory of MBEs 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 the MBE Program requirements.

2.04.130 Minority-Owned Banks: Metro will seek to identify minority-owned banks and banks utilizing equal opportunity banking practices, including community reinvestment, and, to the greatest extent permitted by law, use their services. In addition, Metro will encourage prime contractors, subcontractors and consultants to utilize such services by sending them brochures and service information on such banks.

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

(a) Making affirmative efforts to solicit proposals from MBEs.

(b) Examining alternatives for arranging contracts by size and type of work so as to enhance the possibility of participation by MBEs.

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

(d) Referring MBEs in need of management assistance to established agencies that provide direct management assistance to such businesses.

(e) Carrying out specific information and communications programs on contracting procedures and specific contracting opportunities in a timely manner, with such programs being bilingual, and in conformance with any requirements of the Americans with Disabilities Act, where appropriate.

(f) Distribution of copies of the MBE Program to organizations and individuals concerned with MBE programs.

(g) Periodic reviews with department heads to ensure that they are aware of the MBE Program goals and desired activities on their parts to facilitate the purposes of the MBE Program. Additionally, departmental efforts toward and success in meeting the purposes of the MBE Program shall be factors considered during annual performance evaluations of the department heads.

(h) Monitoring and ensuring that MBE planning centers and likely MBE contractors are receiving requests for bids, proposals and quotes.

(i) Distribution of lists to potential MBE contractors of the types of goods and services which Metro regularly purchases.

(j) Advising potential MBE vendors that Metro does not certify MBE's, and directing them to the Executive Department.

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

(l) Establishing an interdepartmental contract management committee which will meet regularly to monitor and discuss, among other issues, potential MBE participation in contracts. In an



effort to become more knowledgeable regarding MBE resources, the committee shall also invite potential MBE contractors to attend selected meetings.

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

(n) Requiring that all prospective bidders attend scheduled prebid conferences on all construction contracts with an estimated value of over \$100,000.

(o) The Executive Officer or his/her designee, may establish and implement additional affirmative action techniques which are consistent with the MBE Program and designed to facilitate participation of MBEs in Metro contracting activities.

#### 2.04.140 Certification of Minority Business Eligibility:

(a) To participate in the MBE Program, contractors, subcontractors and joint ventures must have been certified by the Executive Department 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 Executive Department's list in determining whether a prospective contractor or subcontractor is certified as a MBE. A prospective contractor or subcontractor must be certified as a MBE by the Executive Department or appear on its certification list prior to the pertinent bid opening or proposal submission date to be considered by Metro to be an eligible MBE. Metro will adhere to any applicable Recertification Rulings.

(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.

2.04.145 Annual Minority Business Goals:

(a) The Metro Council shall, by resolution each June, establish annual MBE goals for the ensuing fiscal year. Such annual goals shall be established separately for construction contracts, labor and materials contracts, personal services contracts, and procurement 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 MBEs likely to be available to compete for the contracts;
- (3) Past results of Metro's efforts under the MBE Program; and
- (4) Existing goals of other Portland metropolitan area contracting agencies, and their experience in meeting these goals.

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

2.04.150 Good Faith Efforts at Maximizing MBE Opportunities:

(a) Good faith efforts at maximizing MBE opportunities shall be required for construction contracts over \$50,000.

(b) At the discretion of the Liaison Officer, good faith efforts at maximizing MBE opportunities may be required for any other contract. This requirement shall be made in writing prior to the solicitation of bids for such contract.

(c) Where good faith efforts are required, the Liaison Officer shall direct the inclusion of a clause in any RFP or bid documents which requires that the prime contractor, prior to entering into any subcontracts, make good faith efforts at maximizing MBE opportunities, as that term is defined in Section 2.04.160.

2.04.155 Contract Award Criteria:

(a) To be eligible for award of contracts subject to good faith efforts requirements, prime contractors must prove that they have made good faith efforts at maximizing MBE opportunities prior to the time bids are opened or proposal are due.

Bidders/Proposers are required to utilize the most current list of MBEs certified 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 good faith efforts requirements have been established shall require all bidders/proposers to submit with their bids and proposals a statement indicating that they have made good faith efforts as defined in Section 2.04.160. To document good faith efforts, all bidders and proposers shall complete and endorse a Minority 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 MBE in which the MBE 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 MBE Utilization Forms listing names of MBEs 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 MBE subcontractors and suppliers to be utilized in performance of the contract. A sample Letter of Agreement will be provided by Metro. The MBE Utilization Forms shall be provided by Metro with bid/proposal documents.

(e) An apparent low bidder/proposer who states in its bid/proposal that good faith efforts at maximizing MBE opportunities 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 show good faith efforts at maximizing MBE opportunities, 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 good faith efforts 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.

2.04.160 Definition and Determination of Good Faith Efforts:

(a) Good Faith Efforts by Metro: Metro, through its Liaison Officer, shall make good faith efforts to maximize MBE opportunities on locally-funded contracts to which good faith efforts requirements apply, including the following:

- (1) Identifying and selecting specific economically feasible units of the project to be performed by MBEs to increase the likelihood of participation by such enterprises;
- (2) Advertising in, at a minimum, one newspaper of general circulation, one minority-oriented publication, and one trade-oriented publication. The advertisement must announce subcontracting or material supply opportunities on the project at least ten (10) days before bids or proposals are due;
- (3) Providing written notice soliciting subbids/proposals to not less than a reasonable number of MBEs for each subcontracting or material supply work item selected pursuant to (1) above not less than ten (10) days before bids/proposals are due.

If there are less than three certified MBEs listed for that work or supply specialty then the solicitation must be mailed to at least the number of MBEs 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.

- (4) Using the services of minority community organizations, including at least two minority contractor groups, local, state and federal minority business assistance offices or other organizations identified by the Executive Department that provide assistance in the recruitment and placement of

MBEs; where applicable, advising and assisting MBEs in obtaining lines of credit or insurance required by Metro or the bidder/proposer; and, otherwise, making efforts to encourage participation by MBEs.

The Liaison Officer shall maintain adequate documentation of all of Metro's good faith efforts.

(b) Good Faith Efforts by Bidders/Proposers: Bidders or proposers on locally-funded contracts to which good faith efforts requirements apply shall demonstrate that they have made good faith efforts at maximizing MBE opportunities. Performing and documenting all of the following actions constitutes a rebuttable presumption that the bidder has made good faith efforts as required by Metro's MBE Program:

- (1) Attendance at any pre-solicitation or prebid meetings that were scheduled by Metro to inform MBEs 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) Making, not later than five days before bids/proposals are due, follow-up phone calls to all MBEs who attended any pre-solicitation or prebid meetings that were scheduled by Metro, 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 MBE to whom a solicitation letter was sent (e.g., bid submitted, declined, no response). In instances where MBE bids were rejected, the dollar amount of the bid rejected from the MBE 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.

- (3) Providing those MBEs expressing an interest with information about the plans, specifications and the requirements for the identified subcontracting or material supply work. This may be satisfied by a referral to a plan center.

- (4) Negotiating with interested, capable and competitive MBEs submitting bids and not rejecting any bids without justification. Bid shopping is prohibited.
- (5) If Metro or the bidder/proposer requires bonding, lines of credit or insurance, notifying the MBE of this requirement and referring them to a potential source where this requirement may be met.

(c) The good faith efforts documented by the bidder/proposer must be certified to be reasonably expected to produce participation in this project by capable and competitive MBEs.

(d) Bid invitations will contain a MBE Program compliance form for recording and documenting the completion of the above-listed actions. Completion of the form and documentation of the above-listed actions, 1 through 5, is mandatory. Failure to complete and submit the form and/or any required documentation will result in the bid being rejected as nonresponsive. The Liaison Officer shall determine, if necessary, whether good faith efforts have been met pursuant to the criteria of the MBE Program by verifying the documentation of the lowest responsible bidder.

(e) A bidder/proposer who contracts with Metro shall not discriminate against MBEs in the awarding of subcontracts. A contractor's good faith efforts at maximizing MBE opportunities must be reasonably expected by the contractor to produce participation by MBEs. Contractor shall certify as part of the bid documents accompanying the bid on a public contract that the contractor has not discriminated against MBEs in obtaining any required subcontracts and that the contractor reasonably expected the above-documented good faith efforts to result in participation by MBEs. Example of certifying statement: By signing this document bidder hereby certifies that bidder has not discriminated against MBEs in obtaining any subcontracts for this project, and that the documented good faith efforts of bidder/proposer at maximizing MBE opportunities were reasonably expected to result in participation of MBEs in this project in compliance with Metro's MBE Program.

(f) Notwithstanding any other provision of this section, bidders and proposers on locally-funded contracts to which good faith efforts apply need not accept the bid of a MBE on any particular subcontract or material supply item if the bidder/proposer demonstrates that none of the MBEs 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.

(g) 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 good faith efforts 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.

2.04.165 Replacement of MBE Subcontractors: Prime contractors shall not replace a MBE subcontractor with another subcontractor, either before contract award or during contract performance, without prior notice to Metro. Prime contractors who replace a MBE subcontractor shall make good faith efforts as described in the preceding section in selecting a replacement.

2.04.170 Monitoring, Records and Reports:

(a) Metro, through the Liaison Officer, shall develop and maintain a recordkeeping system to identify and assess MBE contract awards, and prime contractors' progress in demonstrating good faith efforts. Specifically, the following records will be maintained:

- (1) The name of the contractor.
- (2) Awards to MBEs by number, percentage and dollar amount.
- (3) A description of the types of contracts awarded to MBEs.
- (4) The extent to which good faith efforts were demonstrated and reasons therefor.
- (5) The extent to which annual contract goals were met or not and the reasons therefor.
- (6) Any other information the Liaison Officer deems necessary.

(b) All MBE records will be separately maintained.

(c) The Liaison Officer shall prepare reports, at least semiannually, detailing performance of the MBE Program. The reports shall be forwarded to the Metro Council no later than January 1 and June 30 of each year, and shall include at least 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 MBE firms in the reporting period;
- (5) Statistics, and narrative where appropriate, demonstrating the utilization of MBEs by department and contract category;
- (6) Statistics, and narrative, where appropriate, demonstrating the extent to which annual contract goals have been met or not met;
- (7) Statistics, and narrative where appropriate, demonstrating the number and type of waivers granted;
- (8) Explanations of any investigative actions taken by any administrative agency touching on the implementation, monitoring and enforcement of the MBE Program.
- (9) Descriptions of any problems in the implementation reported by the department, including proposed solutions; and
- (10) Recommendations, as appropriate, regarding amendments to this MBE Program, including recommendations on changes needed to meet annual contract goals, if those goals have not been met.

2.04.180 Compliance:

(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 good faith efforts on MBE participation in the contract.

(b) The Liaison Officer may require, at any stage of contract completion, additional documented proof from the contractor of good faith efforts.

2.04.190 Severability and Intent:

(a) The provisions of the MBE Program shall be effective in all cases unless otherwise provided for by state or federal law. The provisions of the MBE Program are separate and severable. The invalidity of any clause, sentence, paragraph, subdivision,



section, or portion of the MBE Program or the invalidity of the application thereof to any person or circumstances shall not affect the validity of the remainder of the MBE Program, or the validity of its application to other persons or circumstances.

(b) The MBE Program is intended, and should be construed, as establishing and requiring the maximum efforts at assuring MBE participation in Metro contracting activities that is consistent with the United States and Oregon Constitutions and applicable federal and state law."

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"2.04.200 Women Business Enterprise Program (WBE Program) For Locally-Funded Contracts, Findings, Purpose and Authority:

(a) The Metro Council supports the aspirations of women to enter the mainstream of social, political and economic life.

(b) The Metro Council finds:

- (1) The opportunity for full participation in our free enterprise system by women is essential;
- (2) Greater economic opportunity for women is essential;
- (3) Review of Metro programs to remedy historical patterns of exclusion of and discrimination against women is needed;
- (4) Public policies and programs to eliminate the effects of long-term, open and pervasive exclusion of and discrimination against women from the business sector, including increased opportunities to integrate women into the full economic life of the community should be reviewed; and
- (5) In cooperation with the private sector, the affected populations, interested groups and appropriate governmental entities, a program of review should be established to recommend remedies for the unfortunate effects of social, political and economic inequity that still exist.

(c) It is the purpose of the WBE Program to establish and implement a program to encourage the utilization by Metro of women-owned businesses, to the greatest extent permitted by law, by creating for such businesses the maximum possible opportunity to compete for and participate in locally-funded Metro contracting activities. The WBE Program does not apply to federally funded contracts, which are governed by Metro Code 2.04.300 et seq.

(d) Metro Code Sections 2.04.200 to 2.04.290 shall be known and may be cited as the "Metro Women Business Enterprise Program," hereinafter referred to as the "WBE Program."

2.04.205 Policy Statement:

(a) Through this WBE Program, Metro:

- (1) Expresses its strong commitment to provide maximum opportunity to WBEs in contracting; and

- (2) Informs all employees, governmental agencies and the general public of its intent to implement this policy statement.

(b) It is the policy of Metro to provide equal opportunity to all persons to access and participate in the locally-funded projects, programs and services of Metro. Metro and Metro contractors shall 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 the WBE Program shall apply to all Metro departments, commissions and project areas except as expressly provided herein.

(d) The objectives of the WBE Program shall be:

- (1) To assure that provisions of the WBE Program are adhered to by all Metro departments, contractors, and employees; and
- (2) To initiate and maintain efforts to increase, to the greatest extent permitted by law, program participation by women businesses.

2.04.210 Definitions: For purposes of Metro Code Sections 2.04.200 to 2.04.290, the following definitions shall apply:

(a) "Capable" means a Women Business Enterprise registered with the Executive Department who upon request from the bidder can supply two favorable references of prior work of the type being subcontracted for.

(b) "Competitive" means the subcontract bid submitted by the Women Business Enterprise was within 10 percent of either the budgeted amount, subbid estimate, or the lowest bid received by the bidder. The bidder shall make one of these figures available upon request. This term relates to price only and must not be interpreted to mean that a bid deemed competitive is therefore entitled to the subcontract award.

(c) "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.

(d) "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 the WBE Program a lease or a purchase order of \$500.00 or more is a contract.

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

(f) "Documentation" means written materials purporting to establish the satisfaction of a good faith effort requirement that are capable of verification. These may include, but are not limited to, copies of business logs, correspondence or newspaper ads.

(g) "Economically Feasible Unit" means a unit of work identified in a project suitable for subcontracting in the normal course of business. These would be units that a contractor would ordinarily identify as suitable for performance by a subcontractor. The intent here is to have identified units that would be attractive to a serious and qualified subcontractor and not be shunned by that subcontractor because the unit of work is too small to be profitable.

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

(i) "Interested" means a Women Business Enterprise that has expressed to the bidder an interest in learning more about the project identified in the initial solicitation by the bidder.

(j) "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 WBE and non-WBE, the 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 WBE and a non-WBE must receive Metro approval prior to contract award.

(k) "Justification" means a maintaining or showing of a sufficient reason why an action was taken and that the action was not taken for an impermissible reason. Permissible reasons include, but are not limited to, not meeting bid invitation specifications or not being the low bid. An impermissible reason would be one that is arbitrary or capricious or based on race, sex, national origin, marital status or religion.

(l) "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.

(m) "Lessee" means a business or person that leases, or is negotiating to lease, property from Metro or an actual or potential Metro contractor on Metro's or the contractor'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 at the facility.

(n) "Women Business Enterprise or WBE" means a small business concern which is certified as such by the Executive Department and:

- (1) 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
- (2) Whose management and daily business operations are controlled by one or more of the women who own it.

(o) "Woman" or "Women" has the meaning established by ORS 200.005(7).

(p) "Negotiate" means to engage in good faith discussions with the potential subcontractors about their proposals/bids, and the work for which a bid is sought, including sharing with them any cost estimates from the request for proposal or invitation to bid documents, if available.

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

(r) "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.

(s) "Reasonable Number" means at least three (3) firms of those WBEs certified as such by the Executive Department, or a greater number of such firms, if so specified in any particular contract by the Liaison Officer. Consideration should be given to the specialty of subcontracting or materials supply desired as well as the location of the project and whether or not the subcontractor is willing to perform work out of their geographic area.

(t) "Rebuttable Presumption" means a presumption which may be rebutted, or disproved, by evidence.

(u) "Small Business Concern" means a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto.

2.04.215 Notice to Contractors and Subcontractors: Contractors of Metro accepting locally-funded contracts under the WBE Program shall be advised that failure to carry out the applicable provisions of the WBE Program shall constitute a breach of contract

and, after notification by Metro, may result in termination or such other remedy as Metro deems appropriate.

2.04.220 Liaison Officer:

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

(b) The Liaison Officer shall be responsible for developing, managing and implementing the WBE Program, and for disseminating information on available business opportunities so that 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 WBE Program.

(c) The Liaison Officer shall begin immediately to design a technical assistance and outreach program which shall be established by September 1, 1992. This program shall include at least the following elements:

- (1) A regularly-scheduled contractor orientation program to promote compliance with and understanding of the provisions of the WBE Program and Metro.
- (2) Feasible options for bonding, insurance, and banking assistance for WBEs;
- (3) A program designed to assist Metro departments in enhancing opportunities for WBEs;
- (4) A fully-developed and maintained resource list to include all available resources for WBEs.

(d) The Liaison Officer shall have the responsibility for monitoring implementation of the requirements of the WBE Program and shall have the power to request from Metro departments, bidders/proposers, and/or contractors any relevant records, information and documents.

(e) The Liaison Officer shall be responsible for gathering all information concerning compliance with this chapter and shall have access to all pertinent Metro records.

2.04.225 Directory: A directory of 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 the WBE Program requirements.

2.04.230 Women-Owned Banks: Metro will seek to identify women-owned banks and banks utilizing equal opportunity banking practices, including community reinvestment, and, to the greatest extent permitted by law, use their services. In addition, Metro will encourage prime contractors, subcontractors and consultants to utilize such services by sending them brochures and service information on such banks.

2.04.235 Affirmative Action and Equal Opportunity Procedures: Metro shall use affirmative action techniques to facilitate WBE participation in contracting activities. These techniques include:

(a) Making affirmative efforts to solicit proposals from WBEs.

(b) Examining alternatives for arranging contracts by size and type of work so as to enhance the possibility of participation by WBEs.

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

(d) Referring WBEs in need of management assistance to established agencies that provide direct management assistance to such businesses.

(e) Carrying out specific information and communications programs on contracting procedures and specific contracting opportunities in a timely manner, with such programs being bilingual, and in conformance with any requirements of the Americans with Disabilities Act, where appropriate.

(f) Distribution of copies of the WBE Program to organizations and individuals concerned with WBE programs.

(g) Periodic reviews with department heads to ensure that they are aware of the WBE Program goals and desired activities on their parts to facilitate the purposes of the WBE Program. Additionally, departmental efforts toward and success in meeting the purposes of the WBE Program shall be factors considered during annual performance evaluations of the department heads.

(h) Monitoring and ensuring that WBE planning centers and likely WBE contractors are receiving requests for bids, proposals and quotes.

(i) Distribution of lists to potential WBE contractors of the types of goods and services which Metro regularly purchases.

(j) Advising potential WBE vendors that Metro does not certify WBE's, and directing them to the Executive Department.

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

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

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

(n) Requiring that all prospective bidders attend scheduled prebid conferences on all construction contracts with an estimated value of over \$100,000.

(o) The Executive Officer or his/her designee, may establish and implement additional affirmative action techniques which are consistent with the WBE Program and designed to facilitate participation of WBEs in Metro contracting activities.

#### 2.04.240 Certification of Women Business Eligibility:

(a) To participate in the WBE Program, contractors, subcontractors and joint ventures must have been certified by the Executive Department 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 Executive Department's list in determining whether a prospective contractor



or subcontractor is certified as a WBE. A prospective contractor or subcontractor must be certified as a WBE by the Executive Department or appear on its certification list prior to the pertinent bid opening or proposal submission date to be considered by Metro to be an eligible WBE. Metro will adhere to any applicable Recertification Rulings.

(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.

2.04.245 Annual Women Business Goals:

(a) The Metro Council shall, by resolution each June, establish annual WBE goals for the ensuing fiscal year. Such annual goals shall be established separately for construction contracts, labor and materials contracts, personal services contracts, and procurement 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 WBEs likely to be available to compete for the contracts;
- (3) Past results of Metro's efforts under the WBE Program; and
- (4) Existing goals of other Portland metropolitan area contracting agencies, and their experience in meeting these goals.

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

2.04.250 Good Faith Efforts at Maximizing WBE Opportunities

(a) Good faith efforts at maximizing WBE opportunities shall be required for construction contracts over \$50,000.

(b) At the discretion of the Liaison Officer, good faith efforts at maximizing WBE opportunities may be required for any other contract. This requirement shall be made in writing prior to the solicitation of bids for such contract.

(c) Where good faith efforts are required, the Liaison Officer shall direct the inclusion of a clause in any RFP or bid documents which requires that the prime contractor, prior to entering into any subcontracts, make good faith efforts at maximizing WBE opportunities, as that term is defined in Section 2.04.160.

2.04.255 Contract Award Criteria:

(a) To be eligible for award of contracts subject to good faith efforts requirements, prime contractors must prove that they have made good faith efforts at maximizing WBE opportunities prior to the time bids are opened or proposal are due. Bidders/Proposers are required to utilize the most current list of WBEs certified 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 good faith efforts requirements have been established shall require all bidders/proposers to submit with their bids and proposals a statement indicating that they have made good faith efforts as defined in Section 2.04.160. To document good faith efforts, all bidders and proposers shall complete and endorse a Women 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 WBE in which the 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 WBE Utilization Forms listing names of 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 WBE subcontractors and suppliers to be utilized in performance of the contract. A sample Letter of Agreement will be provided by Metro. The 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 good faith efforts at maximizing WBE opportunities 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 show good faith efforts at maximizing WBE opportunities, 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 good faith efforts 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 Definition and Determination of Good Faith Efforts:

(a) Good Faith Efforts by Metro: Metro, through its Liaison Officer, shall make good faith efforts to maximize WBE opportunities on locally-funded contracts to which good faith efforts requirements apply, including the following:

- (1) Identifying and selecting specific economically feasible units of the project to be performed by WBEs to increase the likelihood of participation by such enterprises;
- (2) Advertising in, at a minimum, one newspaper of general circulation, one minority-oriented publication, and one trade-oriented publication. The advertisement must announce subcontracting or material supply opportunities on the project at least ten (10) days before bids or proposals are due;
- (3) Providing written notice soliciting subbids/proposals to not less than a reasonable number of WBEs for each subcontracting or material supply work item selected pursuant to (1) above not less than ten (10) days before bids/proposals are due.

If there are less than three certified WBEs listed for that work or supply specialty then the

solicitation must be mailed to at least the number of 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.

- (4) Using the services of women community organizations, including women contractor groups, local, state and federal business assistance offices or other organizations identified by the Executive Department that provide assistance in the recruitment and placement of WBEs; where applicable, advising and assisting WBEs in obtaining lines of credit or insurance required by Metro or the bidder/proposer; and, otherwise, making efforts to encourage participation by WBEs.

The Liaison Officer shall maintain adequate documentation of all of Metro's good faith efforts.

(b) Good Faith Efforts by Bidders/Proposers: Bidders or proposers on locally-funded contracts to which good faith efforts requirements apply shall demonstrate that they have made good faith efforts at maximizing WBE opportunities. Performing and documenting all of the following actions constitutes a rebuttable presumption that the bidder has made good faith efforts as required by Metro's WBE Program:

- (1) Attendance at any pre-solicitation or prebid meetings that were scheduled by Metro to inform 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) Making, not later than five days before bids/proposals are due, follow-up phone calls to all WBEs who attended any pre-solicitation or prebid meetings that were scheduled by Metro, 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 WBE to whom a solicitation letter was sent (e.g., bid submitted, declined, no response). In

instances where WBE bids were rejected, the dollar amount of the bid rejected from the 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.

- (3) Providing those WBEs expressing an interest with information about the plans, specifications and the requirements for the identified subcontracting or material supply work. This may be satisfied by a referral to a plan center.
- (4) Negotiating with interested, capable and competitive WBEs submitting bids and not rejecting any bids without justification. Bid shopping is prohibited.
- (5) If Metro or the bidder/proposer requires bonding, lines of credit or insurance, notifying the WBE of this requirement and referring them to a potential source where this requirement may be met.

(c) The good faith efforts documented by the bidder/proposer must be certified to be reasonably expected to produce participation in this project by capable and competitive WBEs.

(d) Bid invitations will contain a WBE Program compliance form for recording and documenting the completion of the above-listed actions. Completion of the form and documentation of the above-listed actions, 1 through 5, is mandatory. Failure to complete and submit the form and/or any required documentation will result in the bid being rejected as nonresponsive. The Liaison Officer shall determine, if necessary, whether good faith efforts have been met pursuant to the criteria of the WBE Program by verifying the documentation of the lowest responsible bidder.

(e) A bidder/proposer who contracts with Metro shall not discriminate against WBEs in the awarding of subcontracts. A contractor's good faith efforts at maximizing WBE opportunities must be reasonably expected by the contractor to produce participation by WBEs. Contractor shall certify as part of the bid documents accompanying the bid on a public contract that the contractor has not discriminated against WBEs in obtaining any required subcontracts and that the contractor reasonably expected the above-documented good faith efforts to result in participation by WBEs. Example of certifying statement: By signing this document bidder hereby certifies that bidder has not discriminated against WBEs in obtaining any subcontracts for this project, and that the documented good faith efforts of bidder/proposer at maximizing WBE opportunities were reasonably expected to result in participation of WBEs in this project in compliance with Metro's WBE Program.

(f) Notwithstanding any other provision of this section, bidders and proposers on locally-funded contracts to which good faith efforts apply need not accept the bid of a WBE on any particular subcontract or material supply item if the bidder/proposer demonstrates that none of the 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.

(g) 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 good faith efforts 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.

2.04.265 Replacement of WBE Subcontractors: Prime contractors shall not replace a WBE subcontractor with another subcontractor, either before contract award or during contract performance, without prior notice to Metro. Prime contractors who replace a WBE subcontractor shall make good faith efforts as described in the preceding section in selecting a replacement.

2.04.270 Monitoring, Records and Reports:

(a) Metro, through the Liaison Officer, shall develop and maintain a recordkeeping system to identify and assess WBE contract awards, and prime contractors' progress in demonstrating good faith efforts. Specifically, the following records will be maintained:

- (1) The name of the contractor.
- (2) Awards to WBEs by number, percentage and dollar amount.
- (3) A description of the types of contracts awarded to WBEs.
- (4) The extent to which good faith efforts were demonstrated and reasons therefor.
- (5) The extent to which annual contract goals were met or not and the reasons therefor.
- (6) Any other information the Liaison Officer deems necessary.

(b) All WBE records will be separately maintained.

(c) The Liaison Officer shall prepare reports, at least semiannually, detailing performance of the WBE Program. The reports shall be forwarded to the Metro Council no later than January 31 and June 30 of each year, and shall include at least 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 WBE firms in the reporting period;
- (5) Statistics, and narrative where appropriate, demonstrating the utilization of WBEs by department and contract category;
- (6) Statistics, and narrative, where appropriate, demonstrating the extent to which annual contract goals have been met or not met;
- (7) Statistics, and narrative where appropriate, demonstrating the number and type of waivers granted;
- (8) Explanations of any investigative actions taken by any administrative agency touching on the implementation, monitoring and enforcement of the WBE Program.
- (9) Descriptions of any problems in the implementation reported by the department, including proposed solutions; and
- (10) Recommendations, as appropriate, regarding amendments to this WBE Program, including recommendations on changes needed to meet annual contract goals, if those goals have not been met.

2.04.280 Compliance:

(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 good faith efforts on WBE participation in the contract.

(b) The Liaison Officer may require, at any stage of contract completion, additional documented proof from the contractor of good faith efforts.

2.04.290 Severability and Intent:

(a) The provisions of the WBE Program shall be effective in all cases unless otherwise provided for by state or federal law. The provisions of the WBE Program are separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section, or portion of the WBE Program or the invalidity of the application thereof to any person or circumstances shall not affect the validity of the remainder of the WBE Program, or the validity of its application to other persons or circumstances.

(b) The WBE Program is intended, and should be construed, as establishing and requiring the maximum efforts at assuring WBE participation in Metro contracting activities that is consistent with the United States and Oregon Constitutions and applicable federal and state law."

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"2.04.300 Disadvantaged Business Enterprise Program (DBE Program) For Federally-Funded Contracts, Findings, Purpose and Authority:

(a) It is the purpose of Metro Code Sections 2.04.300 to 2.04.390 to establish and implement a program to encourage the utilization by Metro of disadvantaged businesses by creating for such businesses the maximum possible opportunity to compete for and participate in federally-funded Metro contracting activities. The DBE Program does not apply to locally funded contracts, which are governed by 2.04.100, .200, and .400 et seq.

(b) Metro Code Sections 2.04.300 to 2.04.390 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) Metro Code Sections 2.04.300 to 2.04.390 shall be known and may be cited as the "Metro Disadvantaged Business Enterprise Program for Federally-Funded Contracts," hereinafter referred to as the "DBE Program."

2.04.305 Policy Statement:

(a) Through the DBE Program, Metro:

- (1) Expresses its strong commitment to provide maximum opportunity to disadvantaged 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 the DBE Program shall apply to all Metro departments and project areas except as expressly provided in the DBE Program.

(d) The objectives of the DBE Program shall be:

- (1) To assure that provisions of the DBE Program are adhered to by all Metro departments, contractors, employees and USDOT subrecipients and contractors.
- (2) To initiate and maintain efforts to increase DBE Program participation by disadvantaged businesses.

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

2.04.310 Definitions: For purposes of the DEB Program, 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 the DBE Program 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 DBE Program and includes lessees.

(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 so certified by an authorized agency and:

- (1) Which is at least 51 percent owned by one or more socially or 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 or economically disadvantaged individuals; and

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

(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 and non-DBE, the DBE 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 and a non-DBE must receive Metro approval prior to contract award to be counted toward any DBE 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 or Economically Disadvantaged Individuals or Disadvantaged Individuals" has the meaning established by ORS 200.005(2), (9), including the rebuttable presumption established

by ORS 200.015(3), and the definitions supplied by ORS 200.005(7), (10).

(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.

2.04.315 Notice to Contractors, Subcontractors and

Subrecipients: Contractors, subcontractors and subrecipients of Metro accepting contracts or grants under the DBE 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.

2.04.320 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 DBE Program. The Liaison Officer shall report directly to the Executive Officer on matters pertaining to the DBE Program.

(b) The Liaison Officer shall be responsible for developing, managing and implementing the DBE Program, and for disseminating information on available business opportunities so that DBEs 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 DBE Program.

2.04.325 Directory: A directory of DBEs and 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 DBE Program requirements.

2.04.330 DBE-Owned Banks: Metro will seek to identify DBE-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 banks.

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.

(d) Distribution of copies of the DBE Program to organizations and individuals concerned with DBE Programs.

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

(f) Monitor and insure that Disadvantaged planning centers and likely DBE 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 participation.

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

(i) Advising potential DBE vendors that Metro does not certify DBEs, 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 participation in contracts. In an effort to become more knowledgeable regarding DBE resources, the committee shall also invite potential DBE contractors to attend selected meetings.

(l) Requiring that at least one DBE 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 on the certification list capable of providing the service or item. For contracts over the dollar amounts indicated in this section, all known DBEs 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 in Metro contracting activities.

#### 2.04.340 Certification of Disadvantaged Business Eligibility:

(a) To participate in the DBE Program as a DBE, 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. A prospective contractor or subcontractor must be certified as a DBE 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 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 the DBE 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.

2.04.345 Annual Disadvantaged Business Goals:

(a) The Metro Council shall, by resolution each June, establish annual DBE 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 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.

#### 2.04.350 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 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 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 2.04.360 or 2.04.375. The extent to which DBE participation will be counted toward contract goals is governed by the latter section.

#### 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, 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. The 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 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 2.04.160. 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.

2.04.360 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 pre-solicitation 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, disadvantaged and trade-oriented, if any and through a disadvantaged-owned newspaper or disadvantaged-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 and Emerging Small Business that provide assistance in the recruitment and placement of DBEs.

2.04.365 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.

2.04.370 Records and Reports:

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

- (1) Awards to DBEs 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 records will be separately maintained. Required DBE information will be provided to federal agencies and administrators on request.

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

2.04.375 Counting Disadvantaged Business Participation Toward Meeting Goals:

(a) DBE 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 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) 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 business partner in the joint venture.
- (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 and other relevant factors.
- (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).

- (8) Metro shall count toward the 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.
  - (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 disadvantaged 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) DBE Obligation. The recipient or its contractor agrees to ensure that disadvantaged 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 disadvantaged 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 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 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.

2.04.380 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 participation in the contract.

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

ADOPTED by the Council of the Metropolitan Service District  
this \_\_\_\_ day of \_\_\_\_\_, 1992.

Jim Gardner, Presiding Officer

ATTEST:

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

gl  
1091





8/3/92 12:10pm  
PREVIOUSLY  
FAXED

August 3, 1992

Mr. Casey Short  
Metropolitan Service District  
2000 SW First Avenue  
Portland, Oregon 97201-5398

Reference: M/W/DBE Ordinance

Dear Casey,

This letter will address the issue that I raised with you last week on the proposed ordinance. I have a previous commitment that will prevent me from attending either the Governmental Affairs Committee meeting this week or the subsequent Council session.

The latest draft has altered the language in Section 2.04.155(d) to provide for the submission of "detailed MBE Utilization Forms" at the time of bid opening, as opposed to the close of the next working day. As I tried to explain to you during our telephone conversation, the paragraph no longer makes sense since, prior to the time of bid opening when these forms would obviously have to be prepared, there is no "apparent low bidder"! If you were to change the language to require all bidders to complete the forms, the subsequent language in the same paragraph must be altered to clearly require only the *low* bidder to furnish the Letters of Agreement.

Notwithstanding these problems which can be easily solved, my real concern is more general. I understand that this suggestion came from Bea Brooks of ODOT. I believe that most of Metro's work relates to building construction whereas ODOT's is obviously heavy highway work. The difference between the industries is substantial. Building contractors receive subcontractor bids up to the very moment of bid opening; this requirement places an additional burden on the primes that can only increase the chance of error. The prior language was more than reasonable.

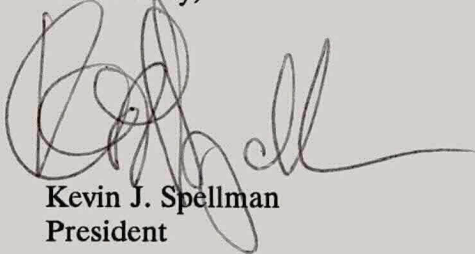
If this concern is not persuasive, I believe that Metro should consider the likely result of this onerous requirement. I suspect that, under these circumstances, most prime contractors would not show any names at bid time and rely upon the showing of good faith, which is a requirement anyway. If the prime was able to contract with M/WBE's, it would simply demonstrate that to Metro after bid. Is Metro likely to reject a bidder that has satisfied the good faith efforts and contracted with a reasonable number of M/WBE's simply because some non-mandatory forms were not provided? I think not.

Mr. Casey Short  
Metropolitan Service District  
August 3, 1992  
Page 2

In summary, I believe that this requirement is onerous to prime bidders and, worse, it achieves nothing and may actually be counter-productive. I urge you and the Governmental Affairs Committee to change the language back to the way it was.

If you have any questions or concerns about this suggestion, I will be happy to discuss them.

Yours truly,

A handwritten signature in black ink, appearing to read "K. Spellman", with a long horizontal flourish extending to the right.

Kevin J. Spellman  
President

mmw

cc: Neil Saling



JUL-30-92 THU 10:34 THOMAS/WRIGHT, INC. P. 01

# Thomas/Wright, Inc.

1340 S.W. Bertha Blvd.  
Portland, Oregon 97219

Civil Engineers • Surveyors

FAX (503) 246-3352  
(503) 246-4293

## FACSIMILE COVER LETTER

Please deliver the following to:

Name: Casey Short

Company: Metro

FAX No.: 273-5589

Date: 7-30-92

Subject: Metro M/WBE Programs

Proj. No.: 9900.01

From: Kathy Thomas

Total Number of Pages (including cover page): 2

If you do not receive all pages, please contact us at (503) 246-4293.

*Suggested language for the WBE/MBE/DBE Programs.*

**WBE Program**

Replace 2.04.250(c) with the following:

Where good faith efforts are required, the Liaison Officer shall direct the inclusion of a clause in any RFP or bid documents which requires that the prime contractor make good faith efforts at maximizing WBE opportunities, as that term is defined in Section 2.04.160. If a contract is awarded to a Minority or Woman-owned Business, these good faith efforts shall not apply, provided the Minority or Woman-owned Business prime proposer accomplishes at least 25% of the value of the contract.

**MBE Program**

Replace 2.04.250(c) with the following:

Where good faith efforts are required, the Liaison Officer shall direct the inclusion of a clause in any RFP or bid documents which requires that the prime contractor make good faith efforts at maximizing MBE opportunities, as that term is defined in Section 2.04.160. If a contract is awarded to a Minority or Woman-owned Business, these good faith efforts shall not apply, provided the Minority or Woman-owned Business prime proposer accomplishes at least 25% of the value of the contract.

**DBE Program**

Replace 2.04.350(c) with the following:

Even though no DBE 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 make good faith efforts, as that term is defined in Section 2.04.160, to achieve DBE participation in the same goal amount as the current annual goal for that contract type. If a contract is awarded to a DBE, these goals shall not apply, provided the DBE prime proposer accomplishes at least 25% of the value of the contract.

## MEMORANDUM

TO: Councilor Tanya Collier,  
METRO - Governmental Affairs Committee

FROM: Margaret R. Garza *meg*  
IMPACT Business Consultants, Inc.

DATE: July 2, 1992

SUBJECT: Proposed M/W/DBE Ordinance

This memorandum is written in reference to the aforementioned proposed ordinance. Frankly, I am very disappointed with the product as it reads. My level of discomfort arises from the fact that the task force assigned to this task assembled a quite different product than the one presently being proposed. Additionally, the task force members contributed many hours in developing a proposed ordinance only to find out that the ordinance being proposed is not what the task force proposed. What was the purpose of the task force? I strongly feel that once again METRO and METRO's staff has undermined the purpose and intent of the task force and for that matter the ordinance.

The proposed ordinance for the locally funded projects solely encourages the utilization of M/W/DBE's, but has no "teeth" if in fact such firms are not utilized. The "encouragement" will only reveal actual dollars to M/W/DBE's in the case where an agency and its staff really believe and exert all efforts to make the program work for those for whom the ordinance is designed to assist. Unfortunately the behavior and patterns established heretofore by the owners (Metro staff) raises concern as to the reality of M/W/DBE's actually realizing contract opportunities.

The statement: "actions speak louder than words" will be the driving force in this type of ordinance. Metro staff has to make M/W/DBE participation happen, but question the staff's willingness to do this. At the time of the inception of the task force and during the numerous meetings, Metro staff was requested by the task force members for the statistical data regarding M/W/DBE utilization on previous projects. To this very date, this data has not been revealed. One is only left to wonder the nature of the secrecy of the numbers.

Page 2. July 2, 1992  
Metro Proposed Ordinance

In short, the proposed ordinance has no teeth and relies heavily on Metro staff to ensure significant M/W/DBE participation on locally funded projects. Again, to date the numbers in terms of performance utilization have not yet been available by Metro staff; and one is only left to question "why" these numbers are not available. Additionally, the staff's level of commitment to this endeavor is highly questionable based on previous patterns.

Thank you for your continued interest in Minority/Women/Disadvantaged business development. Should you have any inquiries in reference to this memo, please do not hesitate to call or write.

Respectfully submitted.



Mr. Casey Short  
Metropolitan Service District  
2000 SW First Avenue  
Portland, Oregon 97201-5398

Post-It™ brand fax transmittal memo 7671 # of pages 1

To	Mr Casey Short	From	Kevin Spellman
Co.	Metro	Co.	Emerick Const.
Dept.		Phone #	777-5531
Fax #	273-5589	Fax #	771-2933

July 2, 1992

Dear Casey,

Thank you for the notice of the Metro Council's Governmental Affairs Committee hearing set for this afternoon. I have reviewed the proposed ordinance that would establish a program for Minority, Women and Disadvantaged Business Enterprises. Unfortunately, I will not be able to attend the hearing, so I am offering these few comments instead.

My comments are limited to the parts of the ordinance that deal with locally-funded contracts. I applaud the inclusion of provisions (2.04.160(a) and 2.04.260(a)) that require Metro to take certain actions that have hitherto been required of bidders/proposers. For Metro to take on those responsibilities is not only more efficient, it is symbolic of Metro's commitment to the process. Further, it removes much of the uncertainty concerning the compliance of bidders/proposers.

I still have two concerns with the program. Firstly, only the low bidder/proposer is required (2.04.155(d), (e) and (f), and 2.04.255(d), (e) and (f)) to provide documentation supporting its good faith effort. Only if that bidder/proposer is rejected is the next lowest required to submit its documentation. Since the requirement for good faith efforts is exclusively a pre-bid exercise, I believe that all bidders should be subject to the same requirement, preventing claims of post-bid manipulation. Metro need only review the documentation from the low bidder/proposer, unless it were inadequate, so that there would be no additional burden placed on staff.

My second concern related to the provision that requires a prime to "negotiate" with MBE's and WBE's (2.04.160 (b)(4) and 2.04.260 (b)(4)). I recognize that this requirement has not changed from the old ordinance, but it has always been unclear. Now that the primes have fewer tests to meet, I fear that this requirement will receive greater scrutiny. It is simply an imprecise requirement that, I believe, will likely be the subject of differing interpretations in the future.

Thank you for the opportunity to comment. I appreciate the chance to be involved and wish you well at the hearing. Please call if you have any questions.

Yours truly,

Kevin J. Spellman  
President

mmw



## PORTLAND PUBLIC SCHOOLS

501 North Dixon Street / Portland, Oregon 97227

Mailing Address: P.O. Box 3107 / Portland, Oregon 97208-3107

Phone: (503) 249-2000, Ext. 570

Donald C. Jeffery  
Staff Attorney

June 29, 1992

Transmitted via fax 273-5589

Metro Council  
Governmental Affairs Committee  
2000 S.W. First Avenue  
Portland, Oregon 97201-5398

Attention: Casey Short, Council Analyst

Subject: M/W/DBE Ordinance

Dear Council Members:

It is encouraging to see that the Metro Council may have an opportunity to consider a positive step toward encouraging participation by minorities in public contracting. I have carefully reviewed the ordinance and believe that it will move Metro in the right direction.

May I, however, interject my perception of reality. The "good faith effort" limitation established by the State Legislature does not produce positive results. The reason is that the effect of the long history of discrimination in the building trades industry in this community remains pervasive. It will take more than the "good faith effort" formula to remediate this history.

I firmly believe that remediation can only be achieved through affirmative action and urge that Metro additionally join the current plans for a metropolitan-wide study planned to be sponsored by Multnomah County. This study will establish a legal foundation to move beyond "good faith effort" and, in fact, involve our minority community in the building trades industry, at least in public contracting.

I deem this step very important to the future health of our community and urge Metro to take a strong position supporting this study.

Yours very truly,

Donald C. Jeffery  
Staff Attorney

DCJ:dm

cc: Councilor Tanya Collier  
Superintendent Matthew Prophet



June 26, 1992

Casey Short, Council Analyst  
METRO  
2000 SW First Avenue  
Portland, OR 97201-5398

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DEPARTMENT OF  
TRANSPORTATION

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CIVIL RIGHTS  
SECTION

Re: Ordinance No. 92-466

FILE CODE:

Dear Mr. Short:

In the proposed ordinance, I again wish to call to your attention under Section 2.04.155 Contract Award Criteria, Page 10(d) that you are permitting the apparent low bidder to name the MBE after the bid award. From experience, we know that this is a detrimental practice that feeds into bid shopping and puts the MBE community at a disadvantage.

The Oregon Department of Transportation has changed this practice to require the prime contractor to name the MBE at the time of the bid opening. Construction contractors did not like this change and vigorously opposed it. Requiring the naming of the MBE at the time of bid opening serves to maximize opportunities for the MBE by increasing major participation and interaction between contractors and MBEs.

I encourage your reconsideration of this section of the ordinance. In any case, should Metro and ODOT participate in joint projects in the future, I would seek to have the naming of the MBE at the time of bid opening prevail.

I will try to be present at the hearing and, if necessary, will speak to this issue.

Sincerely,

*B. M. Brooks* by  
*mk*

Beatrice M. Brooks, Manager  
Civil Rights Section

BMB:mk

cc: Rena Cusma, Exec. Director, Metro  
Audrey Castile, Councilor  
O. B. Hill, NAMCO  
Isabel Hendricks, WCOE

06261m



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355 Capitol St. NE #111  
Salem, OR 97310  
(503) 378-8077  
FAX: 373-7376



**METRO**

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

# Memorandum

DATE: September 25, 1992

TO: Rena Cusma, Executive Officer

FROM: Paulette Allen, Clerk of the Council *PA*

RE: TRANSMITTAL OF ORDINANCE NOS. 92-466A AND 92-467A

Attached for your consideration are true copies of the ordinances referenced above adopted by the Council on September 24, 1992.

If you wish to veto any of the ordinances referenced above, I must receive a signed and dated written veto message from you no later than 5:00 p.m., Thursday, October 1, 1992. The veto message, if submitted, will become part of the permanent record. If no veto message is received by the time and date stated above, these ordinances will be considered finally adopted.

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I, *Walter Sharley*, received this memo and a true copy of Ordinance Nos. 92-466A and 92-467A from the Clerk of the Council on

*9-25-92*.