

**Board Report**

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**EXECUTIVE MANAGEMENT COMMITTEE  
JUNE 20, 2018****SUBJECT: FEDERAL TRANSIT ADMINISTRATION  
DISADVANTAGED BUSINESS ENTERPRISE OVERALL  
GOAL****ACTION: RECOMMENDATION****RECOMMENDATION**

APPROVE 27% Disadvantaged Business Enterprise (DBE) overall goal for Federal Fiscal Years (FFY) 2019 - 2021 for contracts funded, in whole or in part with Federal Transit Administration (FTA) funds.

**ISSUE**

The United States Department of Transportation (USDOT) Disadvantaged Business Enterprise (DBE) Program regulations, 49 Code of Federal Regulations (CFR) Section 26.21, require FTA grantees, who can reasonably anticipate awarding \$250,000 or more in prime contracts, to submit an overall goal to FTA for the participation of DBE firms every three years. The current FFY 2016 - 2018 three-year overall goal is 26%.

**DISCUSSION**

The Metro proposed DBE overall goal for FFY 2019 - 2021 is 27%, a 1% increase from the current goal. The proposed overall goal was established by using the two-step goal-setting methodology prescribed in 49 CFR § 26.45. Metro's base figure for establishing the relative availability of DBEs follows the method suggested in 49 CFR § 26.45(c)(3), the use of data from a disparity study (Study). Metro's 2017 Study conducted by BBC Research Consulting (BBC), analyzed prime contract and subcontract procurement data for a five-year period from January 11, 2011 through December 21, 2015.

The Study provided comprehensive analyses of DBE utilization, DBE availability and the extent to which race conscious remedial action can be applied to the DBE program. The draft Study report was released and made available to stakeholders (including the Transportation Business Advisory Council), contracting community and the general public for review and comment during a 45-day comment period from November 17, 2017 through January 2, 2018. Metro held three public hearings

in December 2017 to present study findings and receive comments. Staff presented the final Study report at the February 2018 Executive Management and Audit Committee.

### Overall DBE Goal Calculation Methodology

In the proposed Overall DBE Goal Methodology Report FFY 2019 - 2021 (Goal Setting Report), found in Figure 1 of Attachment A, Step 1 includes establishing a base figure of relative DBE availability. This was done by utilizing quantifiable evidence to determine the relative availability of minority and woman-owned businesses that are ready, willing, and able to perform transportation-related work. The Study calculated a weighted base enumerating availability in accordance with the proportion of contracts reviewed during the Study period. In its review of anticipated contracts Metro expects to award in the upcoming goal period, it was determined that such contracts are similar to the types, and size of contracts that were analyzed during the Study period. As such, staff recommends the Study base figure of 27%.

Once the base figure has been calculated, Step 2 of the process requires Metro to consider other known factors to determine what additional adjustments, if any, to the base figure are needed. Factors considered in this review include past DBE participation and private sector discrimination. Additionally, anecdotal evidence collected during the performance of the Disparity Study was reviewed. After taking these factors into account, no adjustment to the base figure was made. The weighted base figure of 27% is recommended as the overall goal.

### Race-Conscious Application

DBE contract-specific goals can be set higher or lower than the overall goal based on the scope of work of the contract and the identified subcontracting opportunities. Guidance issued by the USDOT and FTA as a result of the decision of the Ninth Circuit Federal Court in the *Western States Paving Co., Inc. v. Washington State Department of Transportation* mandates that race-conscious measures used to remedy effects of discrimination must be “narrowly tailored” to those groups where there is sufficient demonstrable evidence of discrimination.

As such, recipients in the Ninth Circuit cannot consider the use of a race-conscious goal unless a finding of disparity has been made for the ethnic and gender groups to be included in the application. The Study found all groups with the exception of Subcontinent Asian American-owned businesses, exhibited disparity indices substantially below parity on contracts without DBE goals. A disparity index of 100 indicates parity between participation and the availability for a particular group for a specific set of contracts. A disparity less than 80 has been deemed by several courts to be a “substantial” disparity between participation and availability and have accepted it as evidence of adverse conditions for M/WBEs. The Study shows disparity indices for groups on contracts with no goals as follows: Hispanic American (59), Black American (30), Non-Hispanic white women (37), Asian-Pacific American (73), Native American (52), and Subcontinent Asian American (161). The Study results support the continued use of DBE contract goals, narrowly tailored to those groups with substantial

disparity.

Limited Application Waiver

The DBE Program 49 CFR § 26.47 requires that overall goals must provide for participation by all certified DBEs and must not be subdivided into group specific goals.

FTA guidance requires Metro to submit a waiver for approval to sub-divide (apply limited application) race conscious DBE contract goals. Metro intends to submit a limited waiver request to FTA to allow the agency to limit its use of race and gender-conscious measures (i.e., DBE contract goals) to those DBE groups for which compelling statistical evidence of discrimination—that is, substantial disparities. Based on results from the 2017 Metro Disparity Study, staff will request to limit its use of DBE contract goals to the following business groups: Black American-owned DBEs, Hispanic American-owned DBEs, Native American-owned DBEs, Asian Pacific American-owned DBEs, and woman-owned DBEs. Metro would not consider Subcontinent Asian American-owned DBEs as eligible for DBE contract goals at this time. The limited waiver is reviewed by FTA Headquarters and forwarded to the U.S. Department of Transportation (US DOT), Office of the Secretary for approval. If approved, staff will notify the Board and the contracting community of any change to the implementation of contract-specific goals.

Public Participation

In accordance with the regulations, Metro staff conducted a consultation meeting at the May 3, 2018 TBAC meeting to present the proposed overall goal and goal methodology, and to seek comments from minority and woman-owned businesses. The DBE overall goal and goal methodology and presentation were posted on the Metro website May 11, 2018. A 30-day public comment period was conducted beginning May 11, 2018 and ended on June 11, 2018. Staff held public meetings on May 17, 2017 and on June 6, 2017 at Metro Headquarters. Staff also issued e-blasts to inform the business community of the public notice, public meetings and ways to submit written or verbal comments. As of the filing of this report, staff has received relatively few comments on the proposed goal. One representative of a DBE asked how this would impact goals on projects and expressed concern that contract goals are being met primarily through suppliers.

Comparison of Other Agency Overall Goals

Metro staff surveyed other transportation agencies to determine the level of overall goals in comparison to Metro’s Overall DBE Goal. The results are summarized below:

Agency Name	Overall DBE Goal	Goal Period
Los Angeles County Metropolitan Transportation Authority	27%	FFY 2019 - 2021
New York City Transit	6%	FFY 2016 - 2018
San Francisco Municipal Railway	15%	FFY 2017 - 2019

Metropolitan Atlanta Rapid Transit Authority	16%	FFY 2018 - 2020
Denver Regional Transportation District	19%	FFY 2014 - 2016
Southeastern Pennsylvania Transportation Authority	15%	FFY 2018 - 2020
San Francisco Bay Area Rapid Transit	17%	FFY 2017 - 2019
Dallas Area Rapid Transit	25%	FFY 2017 - 2019
Caltrans	6.95%	FFY 2016 - 2019
Santa Clara Valley Transportation Authority	13%	FFY 2017 - 2019
Washington Metropolitan Area Transit Authority	22%	FFY 2017 - 2019
Metrolink	25%	FFY 2016 - 2018
Orange County Transportation Authority	10%	FFY 2016 - 2018
Maryland Transit Administration	30%	FFY 2017 - 2019

**DETERMINATION OF SAFETY IMPACT**

This board action will not have an impact on safety standards for Metro.

**FINANCIAL IMPACT**

Funding to support the DBE Program is included in the FY18 budget for multiple capital and non-capital projects.

**ALTERNATIVES CONSIDERED**

The triennial overall DBE goal is a requirement under the DBE program and a condition of receiving FTA funds.

**NEXT STEPS**

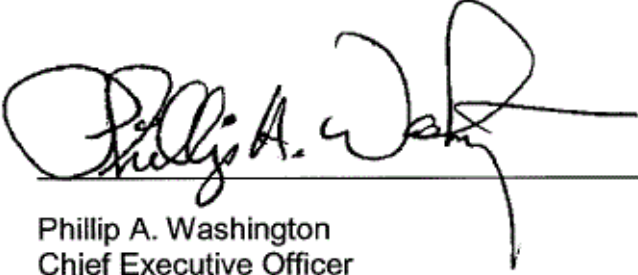
- Submit DBE overall goal and goal methodology and limited waiver request to FTA by August 1, 2018 deadline, in order to prevent any delay in the receipt of federal funds
- Overall DBE goal effective October 1, 2018 through September 30, 2021
- Notify the Board of US DOT, Office of Secretary approval or disapproval of limited waiver
- If limited waiver is approved, notify contracting community of changes to application of contract-specific goals

**ATTACHMENTS**

Attachment A - Overall DBE Goal Methodology Report FFY 2019 - 2021

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