

**Board Report**

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**CONSTRUCTION COMMITTEE  
JUNE 17, 2021****SUBJECT: FEDERAL TRANSIT ADMINISTRATION  
OVERALL DISADVANTAGED BUSINESS ENTERPRISE GOAL****ACTION: APPROVE RECOMMENDATIONS****RECOMMENDATION**

APPROVE 28% Disadvantaged Business Enterprise (DBE) overall goal for Federal Fiscal Years (FFY) 2022 - 2024 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.

**DISCUSSION**

The Metro proposed DBE overall goal for FFY 2022 - 2024 is 28%, a 1% increase from the current FFY 2019- 2021 goal of 27%. The proposed overall goal was established by using the two-step goal-setting process 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 availability and disparity study data from Metro's 2017 a disparity study (Study), posted at:

<https://www.metro.net/about/metro-disparity-study/>.

Overall DBE Goal Calculation Methodology

**Base Figure**

The Overall DBE Goal Methodology Report FFY 2022 - 2024 (Goal Setting Report), Step 1 establishes 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. Metro expects to award nearly \$970 million worth of FTA-assisted construction, professional services, and goods and services contracts in FFY 2022 through FFY 2024. Approximately, \$314 million, or 32 percent, of those dollars are associated with previously awarded mega projects that will let subcontracting opportunities in FFYs 2022 through

2024.

As part of its Step 1 analysis, Metro only counted the contract dollars on those mega projects that Metro expects to award during the new goal-setting period. Metro also projected the amount of anticipated subcontracting associated with future projects based on information about similar projects that the agency previously awarded. Metro evaluated each anticipated project and assigned it a specific work type (i.e., *subindustry*) based on the 2017 Disparity Study. For a full list of the work types included in the Step 1 analysis, see Appendix E of the 2017 Disparity Study report.

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 22.6%, see Figure 1 of Attachment A.

A Step 2 Adjustment is to be considered 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, are needed. Metro considered the Current capacity of DBEs to perform work on USDOT-assisted contracting, information related to employment, self-employment, education, training, and unions, any disparities in the ability of DBEs to get financing, bonding, and insurance, and other relevant data. Metro made an upward adjustment that specifically accounts for barriers that minorities and women face related to business ownership in the local marketplace. This factor has a clear, direct, and quantifiable effect on the availability of minority- and woman-owned businesses for Metro work, and making an upward adjustment reflects Metro's commitment to remedying the continuing effects of past race- and gender-based discrimination in the marketplace. As such, the adjustment uses potential DBE availability that has been adjusted for disparities in business ownership rates. Doing so yields an overall DBE goal of 27.9%, rounded to 28%, see Figure 3 of Attachment A.

### 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 showed substantial disparity 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), supporting the continued use of narrowly tailored DBE contract goals for these groups. However, the disparity indices showed Subcontinent Asian American (161), to be at parity (over-utilized), requiring Metro to seek a limited waiver from the US DOT to remove Subcontinent Asian American as eligible for DBE contract goals.

#### Limited Application Waiver

The DBE Program 49 CFR § 26.47 requires that overall goals must provide for participation by all certified DBEs, must not be subdivided into group specific goals, and must submit to FTA a waiver for approval to do so. In July 27, 2018, Metro staff submitted a waiver letter to FTA Region 9 - Office of Civil Rights for submission to the Office of the Secretary (OSEC) to not consider Subcontinent Asian American-owned DBE firms as eligible for DBE contract goals for the FFY2019-2021 overall goal period. The limited waiver was reviewed by FTA Headquarters and was forwarded to the U.S. Department of Transportation (US DOT), Office of the Secretary for approval. Metro submitted a status to FTA in May 2019 and was informed that FTA would notify Metro of any change in status. This change remains pending.

Notwithstanding, in keeping with the federal requirement, Metro will submit an updated waiver request to FTA for the FFY2022-2024 goal period. Metro is required to make no changes to its program until it receives a response from the OSEC. As such, all DBE groups will remain eligible for contract goals subject to receiving a response to the waiver letter. If approved, staff will notify the Board and the contracting community of any change to the implementation of contract-specific goals.

#### Public Participation

The DBE overall goal and goal methodology report and public notice was posted on the Metro website on May 13, 2021. A 30-day public comment period was conducted beginning May 13, 2021 and ended on June 13, 2021. Staff held three virtual public meetings on May 25<sup>th</sup>, 27<sup>th</sup> and on June 3<sup>rd</sup>, 2021. Staff issued e-blasts to inform the minority and women business, and businesses at large, of the public notice, the public meetings and ways to submit written or verbal comments. The public notice was also posted on Metro's social media accounts and included in over 14 minority and women and majority newspapers. Metro presented the goal and goal methodology report to the Transportation Business Advisory Council at the June 3<sup>rd</sup> monthly meeting.

#### Pandemic Consideration

Metro is aware of substantial impacts to small businesses due to the economic challenges presented by the COVID-19 pandemic. While quantitative information on the impacts for small businesses in Metro's market area are not yet available, DEOD is continuing to monitor the market and look for opportunities to assist small businesses as they adapt to new economic conditions. DEOD expects to learn more about the impact of the pandemic in its next disparity study to be awarded in FY22 Q1 with a 10 to 12-month timeline to complete.

#### 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	28%	FFY 2022 - 2024
New York City Transit	8%	FFY 2019 - 2021
San Francisco Municipal Railway	22%	FFY 2020 - 2022
Metropolitan Atlanta Rapid Transit Authority	23%	FFY 2021 - 2023
Denver Regional Transportation District	20.3%	FFY 2020 - 2022
Chicago Transit Authority	26%	FFY 2018 - 2020
San Francisco Bay Area Rapid Transit	16%	FFY 2020 - 2022
Dallas Area Rapid Transit	31%	FFY 2020 - 2022
Caltrans	17.6%	FFY 2019 - 2021
Santa Clara Valley Transportation Authority	20%	FFY 2019 - 2022
Washington Metropolitan Area Transit Authority	25%	FFY 2020 - 2022
Metrolink (SCRRA)	12%	FFY 2019 - 2021
Orange County Transportation Authority	11%	FFY 2019 - 2021
Maryland Transit Administration	30%	FFY 2020 - 2022

### **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 FY22 budget for multiple capital and non-capital projects.

### **IMPLEMENTATION OF STRATEGIC PLAN GOALS**

This report supports strategic plan Goal 5.5, "Expanding opportunities for businesses and external organizations to work with Metro."

### **ALTERNATIVES CONSIDERED**

The triennial overall DBE goal is a requirement under the DBE program and a condition of receiving FTA funds, and as such, staff does not recommend an alternative.

### **NEXT STEPS**

- Submit DBE overall goal and goal methodology and limited waiver request to FTA by August 1, 2021 deadline, in order to prevent any delay in the receipt of federal funds

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- Overall DBE goal effective October 1, 2021 through September 30, 2024
  - Notify the Board of US DOT, Office of Secretary approval or disapproval of limited waiver, and notify contracting community of any changes.

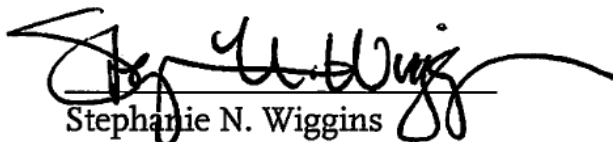
### **ATTACHMENTS**

Attachment A - Overall DBE Goal Methodology Report FFY 2022 - 2024

Attachment B - Overall DBE Goal Presentation

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