

**REVIEW OF THE FEDERAL TRANSIT  
ADMINISTRATION DISADVANTAGED  
BUSINESS ENTERPRISE PROGRAM  
IMPLEMENTATION AT THE  
METROPOLITAN COUNCIL'S LIGHT  
RAIL PROJECT OFFICES**

*Program Evaluation and Audit*



November 2017

# INTRODUCTION

## *Background*

To expand ridership options, stimulate economic growth, and ease congestion - Metro Transit is currently in the Engineering phase of two New Starts Light Rail Extension Projects.

The Disadvantaged Business Enterprise (DBE) Program was created by Congress to encourage and promote the usage of businesses owned by socially and economically disadvantaged groups in contracting opportunities with projects that are federally-assisted. The Program is narrowly tailored, mostly race-neutral, and sometimes race-conscious. The federal Program prescribes an aspirational goal of 10% of the total contract amount be awarded to DBEs. This aspirational goal is set with the intention of improving access to contracting opportunities for socially and economically disadvantaged women and minority enterprises. States and agencies are not mandated to achieve this goal, though, a good faith effort in attempting to be more inclusive is expected. An agency is required to have a DBE Program if it receives more than 250,000 dollars a fiscal year from the Department of Transportation (DOT).

The Council administers a Disadvantaged Business Enterprise Program that sets a 15% DBE goal on DOT- assisted transit contracts. The New Starts Projects DBE goal is calculated separately and is dependent on the contract-size and contractor availability. The current DBE goal for New Starts' contracts ranges from 15 – 19%. To date, the Transit System Development (TSD) division has awarded 13 contracts with DBE participation goals valuing approximately \$280,000,000 combined. Nearly \$52,200,000 (18.6%) has been awarded to DBE firms.

This review of New Starts Project Office DBE Program is consistent with the Thrive MSP 2040 Principles of Accountability, Collaboration, and Integration as well as Thrive 2040 Outcomes of Equity and Stewardship.

## *Purpose*

The purpose of this review is to assess the implementation of and adherence to 49 CFR Part 26 – Participation by Disadvantaged Businesses Enterprises in the Department of Transportation Financial Assistance Programs and the Metropolitan Council DBE Program Plan.

## *Scope*

Audit reviewed the DBE Program monitoring activities from project development through the engineering phase for each New Starts project. Thirteen contracts with DBE participation were reviewed.

## *Methodology*

Audit used the following forms of inquiry to assess the Metropolitan Council's implementation of its DBE Program.

Review and analysis of:

- 49 CFR Part 26 - Participation by Disadvantaged Businesses Enterprises in the Department of Transportation Financial Assistance Programs.
- Compliance Audits from the FTA
- State and Council regulations and policies
- The Metropolitan Council's Disadvantage Business Program Plan
- The Minnesota Unified Certification Program Document
- Payments made to DBEs
- Subcontract agreements and work orders
- The Office of Equal Opportunity DBE Consultant work instructions
- Monitoring and outreach activities of the DBE Program

Interviews with

- Staff of the Office of Equal Opportunity (OEO)
- TSD Contract and project managers
- Owners and principals of DBEs

# Observations

## The Office of Equal Opportunity is generally compliant with FTA DBE Program requirements.

To maintain compliance with regulation and achieve objectives, the Small Business Unit (SBU) staff execute DBE certifications in a timely manner, work with the procurement department to host pre-bid engagement meetings and meet and greets, engage prime contractors and Council staff in DBE Program management, maintain a DBE directory with the appropriate information, complete site visits, track DBE achievement via monthly progress reports, provide support to DBE firms when requested, and when applicable, the OEO staff will refer firms to the Minnesota Department of Transportation (MNDOT) for business assistance. These activities - along with compliance with Metropolitan Council policies, procurement processes, federal law, and state law - help the Council meet the following objectives of the DOT DBE Program:

- To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance Programs;
- To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
- To ensure that the Department's DBE Program is narrowly tailored in accordance with applicable law;
- To help remove barriers to the participation of DBEs in DOT-assisted;
- To promote the use of DBEs in all types of federally-assisted contracts and procurement activities conducted by recipients;
- To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs;

The DBE Program as it currently is implemented does not fully meet the DOT DBE objective of “assisting the development of firms that can compete successfully in the marketplace outside the DBE Program.” The Council DBE Program Plan (5.3.1) states the OEO will provide services to “improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency.” However, the Program plan does not detail how this will happen or what measures would indicate success.

The DOT DBE regulations state that recipients may or must, if directed, have a business development program. The OEO reported they have not been directed by the FTA to create such a program. The Council participates in a Mentor-Protégé Program, but it appears limited to the construction phase of transit projects to the exclusion of firms that are not construction based.

Audit interviewed eight DBEs. All stated they are doing very well working on Council projects. They have all added staff and seven have expanded their business services. A common theme is that working on megaprojects allows for planned stability within their firm. All firms agreed that it was beneficial to obtain a DBE certification. For most, a substantial portion of their work is as a subcontractor on public projects with DBE goals. Five of the firms mentioned that if not for the DBE goal requirement, many prime contractors would not contract out their work to small businesses. One owner responded that the DBE Program gives you an opportunity to establish your credibility and strengthen your reputation so that as you grow and work with various primes,

you will be able to successfully compete in any contracting environment with or without the Program.

There was agreement among all firms that without the certification, the firm would either be unable to grow or not be in business. Three firms stated they have no expectation of graduation or voluntary withdrawal from the DBE Program because it would not be as lucrative. Others have stated that there is no room to grow a firm within the Program because certain restrictions limit profitability. This raises questions about whether the objectives or interpretation of the Program address the right issues and provide the appropriate remedies. Additionally, it draws into question whether these firms are using the Program as intended. Part of the Program goal is to assist small businesses gain access, whether that be through DBE certification or assistance meeting primes. This becomes difficult when there are firms with no intent to graduate. Those who do intend to graduate may have established relationships with primes making it difficult for new firms to gain access. The purpose is to level the playing field, not to give sustained benefit which may inadvertently negatively impact new DBEs and non-DBEs alike.

If a firm declares they have no expectation to graduate, they have admitted to not using the Program as it was intended. This is contrary to Program objectives and should, under normal circumstances, trigger an enhanced review. Another DBE Objective “to ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs -” is met in part, annually, with each review of the affidavit of no change<sup>1</sup>. However, the OEO lacks a mechanism to evaluate the continued social and economic disadvantage of firms within the Program<sup>2</sup>. OEO staff stated that if they were to be informed that a firm had no ambition to graduate the Program, they would tell the firm owner that that is unacceptable and offer resources to help the firm owner find ways to graduate. Appendix C to Part 26 – DBE Business Development Program Guidelines details the guidelines for a business development program that would have the intent of helping the firm graduate and compete outside of the DBE Program.

Lastly these firms requested opportunities to learn more about contracting with the Council. Specifically:

- Meetings to generally learn about submitting quality proposals.
- Alternative meeting arrangements.
- Creation of programs for small businesses or qualified bidders.
- A more robust Program offering that is not construction-centric.

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<sup>1</sup> “This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form...that your firm continues to meet SBA business size - 49 CFR §26.83

<sup>2</sup> See 49 CFR Part §26.67

## **DBE Monitoring**

### ***Contract DBE Goal Monitoring is Not Adequate***

The FTA requires real-time reporting of DBE achievement. However, neither project office contract managers nor the OEO DBE specialist provide verified, real-time payment updates. OEO staff are preparing monthly reports to monitor the progress of prime contractor's achievement of DBE goals, however those reports are currently based on invoiced amounts rather than actual payments made. The OEO no longer uses a web-based system, created after a previous DBE audit recommendation, to inquire about the status of accounts receivable by the DBE. The report showed what had been billed to date and what was requested in the current invoice. The paid to date assumes payment has been made without verification.

### ***OEO is not Monitoring Good Faith Effort Throughout Contract***

Six of the 13 contracts are currently open and of those, three are currently exceeding their goal and three are within 3% of their goal. Of the seven closed contracts, four exceeded their goals and three failed to meet their goal but were found to be compliant with the Program. When a contract fails to meet the goal, the OEO is responsible for reviewing the Good Faith Effort (GFE)<sup>3</sup> made to attempt to meet the goal. This is typically completed near the end of the contracting period, too late to review mid-contract adjustments and offer alternatives if requested.

A review of the closeout documentation revealed limited information on what the DBE specialist did throughout the contract duration to monitor GFE aside from monthly progress reporting and intermittent site-visits. The closeout process verifies the original contract value against the verified final payment. Audit found no evidence that the DBE specialist is kept abreast of scope changes that reduce or augment the initial contract value.

Audit found that two contract monitoring folders for prime contractors that had failed goals did not have any record of meetings with the prime to discuss their shortcoming. It is unclear when the DBE Specialist requires documentation of GFE as Audit found three instances when the documentation was requested near the end of a contract or when there was little work left to be completed. Audit found only two instances in which the documentation had been provided prior to contract closing.

### ***Prompt Payment of Subcontractors is not Verified***

Prompt payment of subcontractors for work satisfactorily completed is a law at both the federal and state level. Federal law mandates payment within 30 days of receiving a proper invoice. State law requires the Metropolitan Council to pay for services no later than 35 days after receipt of a proper invoice. Federal law also requires the payor notify the payee of an improper invoice within 7 days of receipt. Minnesota law requires notification within 10 days of receipt of an improper invoice. The DOT DBE regulations mandate that the Council DBE Program require that

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<sup>3</sup> Good Faith Effort refers to the contractor taking reasonable action at the onset and during contract execution to meet the participation goal. See 49 CFR 26 Appendix A – Guidance Concerning Good Faith Efforts

contract clauses include language on prompt payment within 30 days. The Council follows the more restrictive state law of 10 days. Neither the TSD nor the OEO could verify prompt payment.

To verify the timeliness of payments, Audit requested each of the prime contractors with DBE subcontractors to provide a full invoice payment history. Of the 242 prime invoices reviewed 225 had associated subcontractor requests for payment. Audit reviewed approximately 980 DBE subcontractor invoices. For purposes of this report, Audit allowed 15 days from date of Council payment to the prime contractor as on-time to allow for potential delays in receipt. Of the 986 subcontractor invoices reviewed, approximately 73% were paid within the 15 days and 27% were paid after the 15-day prompt payment period. 48 payments were paid more than 30 days late.

The Project Management Plan and the Contracting Approach Plan, written by the TSD, detail how the OEO will interact with project office staff as it relates to DBE operations. The Project Management Plan speaks of construction related committees and the Contracting Approach Plan speaks of assuring actual payment<sup>4</sup> and working with the OEO to address deficiencies in master contracts but not what those deficiencies might be. Section 4.4 Contract Implementation of the Contracting Approach plan states that the contract manager will be responsible for ensuring that all prime contractors submit evidence that actual payments have been made to the DBE monthly. Audit found no assurance of prompt payment for DBE or Non – DBE subcontractors alike, though the TSD has a responsibility to assure the execution for all subcontractors.

### ***Inclusion of Federal Clauses in Subcontracts is not Verified***

According to the FTA Best Practices and Lessons Learned Manual published in 2016:

The management of subcontracts usually involves three areas:

- Assurance that the prime contractor has included the required “flow-down” provisions (clauses) from the prime contract in the subcontract.
- The prime contractor’s compliance with the Disadvantaged Business Enterprise (DBE) requirements in its prime contract, including compliance with prompt payment requirements.
- Assurance that the prime contractor has selected its critical subcontractors in a prudent fashion to protect the recipient’s program interests.

The management and contracting plans from the project offices do not specify the OEO as the unit responsible for the monitoring the inclusion of contract clauses. As a result, because the TSD believes the OEO to be responsible for work it has not specified, neither department has ensured the inclusion of required DBE, Council, CTIB, or other stakeholders’ contractual clauses, though, the FTA grant agreement, FTA DBE regulations, Council contracts, and the Metropolitan Council DBE Program plan mandate inclusion, neither office has reviewed their inclusion.

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<sup>4</sup> The Contract Manager is responsible for ensuring that all prime contractors submit on a monthly basis the evidence of actual payments to each DBE listed on the contract, using the DBE Progress/Project Report. The OEO will review and monitor the amount actually paid to each DBE and non-DBE in accordance with the DBE Program.

## Updates Are Needed to Program Materials

The current Metropolitan Council DBE Plan was last updated in 2009. It is not reflective of current language in 49 CFR Part 26 or of practices the plan stated the OEO would commit to implement as it manages the Council's DBE Program. The plan predates the current light rail project offices and no statement or updates have been made to reflect regional changes since 2009 or to incorporate Thrive 2040 commitments.

The DBE specialist workplan was last updated in 2015 and is currently being updated. While it generally identifies the overall scope of work, many procedural details are missing, not complete, or are noncompliant. There is no mechanism to self-evaluate effectiveness. Audit observed:

- There is no consistency between the Program plan or workplan as to when or how often site visits should be performed.
- There is no guidance in the workplan on what aspects of Program implementation should be consistently monitored or how they should be monitored to proactively address potential issues. It does not detail which conditions may trigger an enhanced review of a firm.
- There is no guidance in the workplan on how to ensure prompt payment or what remedial actions the OEO would enact.
- The workplan does not address how to remedy unintentional inequities in policies and operations.
- The workplan does not detail how to move DBE firms through the Program towards graduation.



## Conclusion

The Disadvantaged Business Enterprise Program was created to level the playing field. The objective of the DBE Program is to help these small businesses develop the ability to equally compete on certain federal projects, gain experience, and graduate the Program. Audit found the OEO met many of the Program objectives with opportunity to create strategies to better meet some objectives.

Both the TSD and the OEO have a responsibility to assure state and federal laws are abided by in implementing the Program. Definitions, roles, and responsibilities are not defined enough to mitigate breach of contract language and law regarding prompt payment and contract clause review.

The Program Plan and DBE specialist work instructions are outdated. Updating and refining work instructions is necessary to improve Program compliance and effectiveness.

# Recommendations

Program Evaluation and Audit recommendations are categorized according to the level of risk they pose for the Council. The categories are:

- **Essential** – Steps must be taken to avoid the emergence of critical risks to the Council or to add great value to the Council and its programs. Essential recommendations are tracked through the Audit Database and status is reported twice annually to the Council's Audit Committee.
- **Significant** – Adds value to programs or initiatives of the Council, but is not necessary to avoid major control risks or other critical risk exposures. Significant recommendations are also tracked with status reports to the Council's Audit Committee.
- **Considerations** – Recommendation would be beneficial, but may be subject to being set aside in favor of higher priority activities for the Council, or may require collaboration with another program area or division. Considerations are not tracked or reported. Their implementation is solely at the hands of management.
- **Verbal Recommendation** – An issue was found that bears mentioning, but is not sufficient to constitute a control risk or other repercussions to warrant inclusion in the written report. Verbal recommendations are documented in the file, but are not tracked or reported regularly.

**1. (Essential) The Office of Equal Opportunity and the Transit System Development Division should work together to develop contract monitoring and oversight work processes to ensure compliance with federal, state and Council regulations.**

Both units have a role in the implementation and operation of the DBE Program at the Council. To better coordinate their work, there should be a well-tailored written work process that defines the accountability and responsibility of each unit. The work processes should define the oversight role of the OEO and the contract management role of the TSD staff, especially as it relates to monitoring the progress toward DBE goals for specific contracts; reviewing the inclusion of required clauses in subcontracts; and of prompt payment to subcontractors. Working together the OEO and the TSD may address Thrive 2040 principles of collaboration and integration while attempting to deliver equitable and prosperous outcomes for the region.

**Management Response:** *The Project Management and OEO staff agree with this recommendation. OEO and TSD will work together, along with other Council internal stakeholders, to develop processes for contract monitoring and oversight. Staff will also reach out to peer agencies to learn about their processes for contract monitoring and oversight as it relates to this recommendation.*

*In response to prompt payments of subcontractors, Project Management and OEO staff envision developing separate processes for professional services contracts and construction contracts. There are substantial differences in complexity between professional service and construction contracts. The goal of these processes will be to ensure that payments are made to subcontractors promptly.*

**Staff Responsible:**

Deputy Project Director, SWLRT  
Deputy Project Director, BLRT  
Assistant Director, OEO; Small Business Unit Manager, OEO  
SWLRT/BLRT DBE Consultant III, OEO

**Timetable:** End of Quarter 2, 2018

**2. (Essential) The Office of Equal Opportunity should update the Metropolitan Council's DBE Program Plan and DBE Specialist Work Instructions.**

The Metropolitan Council's DBE Program plan is outdated. The plan should be updated to reflect updated DOT DBE regulation language and the OEO implementation strategies to achieve Program objectives and Thrive 2040 commitments. The updated plan should also identify appropriate roles and responsibilities of all actors involved in the operation of the DBE Program. As part of this update, consider options to expand or redefining OEO's role in assisting the development of firms that can compete successfully in the marketplace outside the DBE Program.

**Management Response:** *The OEO staff agree with this recommendation. The updated plan and work instructions will provide thorough and comprehensive direction for OEO and involved Council staff.*

*The OEO staff will work with members of the Minnesota Unified Certification Program to reinforce the program's objectives of assisting DBE firms that are able to compete successfully outside the program.*

**Staff Responsible:**

Assistant Director, OEO  
Small Business Unit Manager, OEO  
SWLRT/BLRT DBE Consultant III, OEO

**Timetable:** End of Quarter 4, 2017



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