

## Management Committee

For the Metropolitan Council meeting of

**Subject:** As part of our regulatory requirements in the administration of the Federal Disadvantaged Business Enterprise (DBE) program, the Metropolitan Council is required to set a DBE program goal every three years. The proposed DBE program goal for FFYs 2021-2023 is 14% DBE participation in USDOT-assisted Council projects. The proposed DBE program goal for FFYs 2021-2023 is 12% DBE participation in EPA-assisted Council projects.

### Proposed Action

That the Metropolitan Council approve the triennial FTA and EPA DBE Program goals.

### Summary of Committee Discussion/Questions

The full reports, including proposed goals and goal setting methodology were presented to Council Committee of the Whole (COW) on June 3, 2020 and approved by Management Committee on July 22, 2020. Council Members posed questions about the methodology and the impacts of expanding the defined market area that were reviewed and addressed by Office of Equal Opportunity (OEO) staff. Discussions with Council Members included the work and actions required to ensure opportunities for DBE businesses in Council activities, that these goals are not a ceiling and the accountability that occurs at the project level. Feedback received from the public through the 30-day public comment period was also shared with Council Members.

Motion by Barber, Seconded by Lilligren Motion Carried

## Management Committee

Meeting date: July 22, 2020

For the Metropolitan Council meeting July 22, 2020

**Subject:** Metropolitan Council Triennial FTA and EPA DBE Program Goal

**District(s), Member(s):** All

**Policy/Legal Reference:** United States Department of Transportation Disadvantaged Business Enterprise Program (49 CFR 26; 26.45), United States Environmental Protection Agency Disadvantaged Business Enterprise Program (40 CFR 33)

**Staff Prepared/Presented:** Elaine Ogilvie, Supervisor Small Business Unit 651-602-1163; Ashanti Payne Assistant Director, Office of Equal Opportunity 651-602-7660

**Division/Department:** RA / Office of Equal Opportunity

### Proposed Action

That the Metropolitan Council approve the triennial FTA and EPA DBE Program goal.

### Background

Triennial FTA DBE Program goal: The U.S. Department of Transportation requires that agencies like the Council administer a DBE program on projects receiving federal funding. The DBE regulations describe many requirements the Council must satisfy to remain eligible for future USDOT funding. One requirement is that the Council engage in an analysis of future transportation spending to set a DBE inclusion goal that will remain in effect for three years. This program goal helps the Council set subcontracting inclusion goals on specific transportation projects that receive USDOT funding.

A preliminary draft of the goals was reviewed within the Council. The Council provided a public comment period that opened June 5, 2020 and closed on July 6, 2020. Comments and inquiries received were considered and incorporated into the final version of the 2021 – 2023 FTA DBE Program Goal Report.

The Council is proposing a 14% overall DBE goal for years 2021-2023.

Triennial EPA DBE Program goal: The U.S. Environmental Protection Agency requires that agencies like the Council administer a DBE program on projects receiving federal funding. Regulation require the Council to annually report DBE participation to remain eligible for future US EPA funding. The Council sets a DBE inclusion goal that will remain in effect for three years. This program goal helps the Council set subcontracting inclusion goals on specific environmental service contracts that receive EPA funding.

A preliminary draft of the goals was reviewed within the Council. The Council provided a public comment period that opened June 5, 2020 and closed on July 6, 2020. Comments and inquiries received were considered and incorporated into the final version of the 2021 – 2023 EPA DBE Program Goal Report.

The Council is proposing a 12% over EPA DBE Program Goal for years 2021-2023.

## **Rationale**

Staff from the Office of Equal Opportunity followed a methodology described by federal DBE regulations.

The following information outlines how OEO arrived at the recommended DBE program goals:

- Calculated the availability of DBE firms compared to all businesses in the seven-county metropolitan area that can perform work typically found on projects that receive federal funds
- Estimated future Council spending on transportation and Environmental Service projects
- Weighted this future spending with the availability of DBEs in the region; and
- Adjusted these figures by considering the levels of past DBE participation on Council projects

## **Thrive Lens Analysis**

The DBE program seeks to ensure nondiscrimination in how federally funded projects are awarded and administered. The triennial DBE program goal methodology helps the Council implement a program that is narrowly tailored, while creating a level playing field and removing barriers for DBEs, as well as promoting their use on Council transportation projects.

These recommended goals reflect the level of DBE participation that the Council would expect absent the effects of discrimination in the region.

Overall, approval of the triennial DBE program goal advances equity and other Thrive outcomes. This approval helps ensure that the Council's DBE program remains in federal compliance, thereby retaining the Council's eligibility to receive future federal funding. In addition, this action supports the region's women and minority owned small business community by helping to barriers that typically affect subcontracting inclusion.

## **Funding**

The Council's triennial DBE Program Goal and the implementation of the DBE program are achieved using general operating funds.

## **Known Support / Opposition**

Through the public comment process, comments expressing both support and opposition have been received and incorporated in the final reports.

**DATE:** Friday, July 24, 2020

**TO:** Chair Christopher Ferguson and members of the Metropolitan Council Management Committee

**FROM:** Metropolitan Council's Office of Equal Opportunity

**SUBJECT:** Metropolitan Council's FTA and EPA Triennial Goal

We are proposing an FTA DBE goal of 14% and an EPA DBE goal of 12%. Through our review of the methodology, market area, relative NAICS codes and firms represented impactful information was identified. Future spend for our FTA funded projects identifies \$115M that is represented as "Misc. Mobilization, fees, contingencies, etc." There is no way to associate those costs with DBE or non-DBE firms, nor can we associate it to a specific work scope or industry code. However, the costs are included in the total future spend which has the same impact of adding to the denominator without appropriately accounting for those dollars in the numerator. This artificially reduces the base goal figure. Therefore, we removed those dollars from the total spend amount. The updated calculations are based on actual identified work with a corresponding industry code. The result for FTA funded projects is a base goal figure of 13.03% and an overall goal of 14%.

Our future spend for EPA funded projects identifies \$37M in this same category. We followed the same process outlined above for FTA calculation. The result for EPA funded projects is a base goal figure of 8.77% and an overall goal of 12%.

In accordance with US Department of Transportation DBE Program Rules the Council provided public notice to announce our proposed overall goal for FTA funded projects to cover FFYs 21 -23. The requirement for public notice includes a 30-day comment period that began on June 5, 2020 and ended July 6, 2020. There was consultation with minority, women's and general contractor groups, and community organizations. The proposed goal and methodology were provided to the members of Southwest LRT DBE and Workforce Advisory Committee and the Minnesota DBE and Workforce Collaborative. In addition, two public forums were conducted via WebEx on June 11 and June 25 that provided the opportunity for informative dialogue, questions and for interested parties to review the Triennial DBE Goal presentation and methodology. Presentation and discussion with Council Members and Divisions occurred prior to public comment. All comments and inquiries were seriously considered, and calculations were reviewed for the final goal setting.

The overwhelming majority of comments received were relative to the actions and efforts that need to occur in order to meet or exceed the proposed goal as opposed to the goal or methodology themselves. This provided the opportunity for the Office of Equal Opportunity to discuss some of the policy changes, outreach, engagement, and small business development efforts that the Council has incorporated and those that will be implemented in the future. It also highlighted the necessary work that needs to occur for the council to achieve our stated goals and objectives. Comments and feedback received during the comment period included the following:

- Hopefully NAICS codes are assigned to the request for bid processes.
- In the past there have been too few businesses owned by people of color who get project bids.
- Within the proposed DBE goal can they provide a disaggregate benchmark of utilization for the specific DBEs?

- These goals fall woefully short AND without committed, creative action by the Met Council, you will not achieve them.
- In order to achieve these goals, the Met Council needs to move aggressively to prioritize contracting with DBE's.
- A better process would have a higher goal and race-conscious practices that specifically support and preference DBE's in contracting.
- It appears that the methodology for the study was done using NAICS codes only which has so MANY faults.
- Between all our civil/racial unrest and moving into a recession, equity will even be more difficult for small firms to survive with less public dollar spending.
- AGC of MN agrees with the goals and methodology as presented by the Metropolitan Council. There is market justification at the present time for a lowered goal threshold as there is a need for more established, available, and capable Minority-Owned Enterprise (MBE) and Women-Owned Enterprise (WBE) firms. The methodology to establish the goal is defensible and well-suited to match market conditions.
- AWC believes the proposed goal of 13% DBE for the FTA is too low. I understand the methodology used including the adjustments. The achievement the past 3 years has been trending upwards at 14%, 15% and 16%.

We received comments relative to the methodology that required OEO to conduct a thorough review. Specific questions were made about the number of certified DBEs represented in various NAICS codes to indicate that they were underrepresented. However, the number of DBE firms and non-DBE firms utilized in the methodology is a result of how the Council defines our market area. In our methodology the market area is the seven-county metropolitan area. How the market area is defined impacts the numbers represented in the numerator (# of certified DBE firms in the specified NAICS code) and the denominator (# of all firms in the specified NAICS code):

$$\text{Work Scope Availability} = \frac{\text{Certified firms in work scope}}{\text{All firms in work scope}}$$

This question relative to market area was received either directly or indirectly from Council Members and the general public and it is important for it to be addressed in the final report. In order to address it OEO performed calculations based on two additional market areas:

- Entire State of MN - to include all certified DBEs and all related non-DBE firms in the state.
- ALL certified DBE firms in the MNUCP Directory (those based in MN and those outside of the State) and all related non-DBE firms in the state.

It is important to note that this does not change the methodology or formula but does impact the numbers included in the numerator and denominator.

Changing the market area to the entire state added to the number of firms in the numerator and denominator. Using the same mathematical formula, the base goal figure is 9.94% as opposed to 10% when the market area used is the seven-county metro. It is slightly lower but not significant enough that it would change the proposed goal.

Including all certified DBEs in the MnUCP Directory and all non-certified firms located in the State of Minnesota adds to the number of firms in the numerator while leaving the number in the denominator unchanged. Using the same mathematical formula produces a base goal figure of 12.88%. This would increase the proposed goal from 13% to 14%. However, based on the methodology chosen there is no

objective or rational way to appropriately account for the non-certified firms that should be added to the denominator. Therefore, we proposed not to define the market area in this manner. Additionally, we have answered the question of how the Council's overall goal is impacted by utilizing the seven -county metro market vs. state-wide.