


**DATE:** July 22, 2009  
**TO:** Metropolitan Council Management Committee  
**FROM:** Katie Shea, Director of Program Evaluation and Audit   
**SUBJECT:** DBE Evaluation and Contract Award for Metro Transit Construction Contracts

### **Background**

49 CFR, parts 23 and 26 (The U.S. Department of Transportation) requires all grant recipients to have a Disadvantaged Business Enterprise (DBE) Program. The Council, as a grantee of the Federal Transit Authority (FTA), part of the U.S. DOT, has a DBE program covering all transit projects with a cost exceeding \$50,000. The program is administered by the Office of Diversity and Equal Opportunity (ODEO) with regular reports to the Regional Administrator and the Council.

### **History of Audits**

The DBE Program and compliance with it during the Hiawatha Light Rail Project was the subject of a 2005 internal audit, where numerous issues were found related to having shared compliance responsibilities between the Council, the grantee, and MnDOT, a subrecipient and constructor of the line. The program was audited by FTA in 2007, when findings were reported related to the need for improvements in monitoring and recordkeeping. Most recently, Program Evaluation and Audit reviewed the DBE program for federal compliance in 2008. That audit found that the program generally met federal requirements, but needed improvement in monitoring, documentation and payment tracking. The report was approved and accepted by the Council's Audit Committee last fall.

However, recently concerns were raised to a Council Member about ODEO's role in accepting or rejecting bids for Council contracts. Specifically, allegations had been made to some Council members that contract award decisions were being made based on undue influence from ODEO during the DBE evaluation. It was requested that we review recent contracts with DBE requirements to assess whether or not the DBE evaluation process affected the competitiveness of the bidding process. This memorandum summarizes the findings from that review. Bob Lundberg was the team leader and conducted the fieldwork and analysis for this review.

## **Scope**

This review included all FTA funded and completed construction projects awarded from 2005 through 2008 that exceeded \$50,000 and therefore were required to be reviewed for DBE opportunities. There were 17 projects that met the threshold during that period.

## **The FTA and the Council's DBE Program**

The Code of Federal Regulations Title 49, part 26.55 (*Participation of Disadvantaged Business Enterprises in Department of Transportation Programs*) establishes procedures for participation of disadvantaged business enterprises (DBEs) in federally funded projects. Metropolitan Council policy 3-4-6 *Inclusion of Disadvantaged Business Enterprises* and the Council's DBE program, overseen by ODEO, incorporate the federal regulations, requiring that specific numeric goals be set whenever subcontracting is possible on FTA funded procurements exceeding \$50,000 in value. Specifically, the requirements are as follows:

- Set a project goal based on subcontracting opportunities, type of work and available DBEs
- Evaluate contractor proposed DBE participation and Good Faith Efforts (GFE)
- Monitor and report actual DBE participation

## **The Process**

After the general project information has been developed (definition, cost estimate, DBE goal from ODEO), a contract initiation memo (CIM) initiates the contracting process that includes solicitation, evaluation and award. The DBE goal and forms to record anticipated DBE participation and GFE are included in the contract solicitation documents made available to any firm wishing to bid on the project. ODEO staff members also attend pre-bid meetings with potential bidders to explain the DBE requirements, the documents needed for their proposal, and where to find information such as the directory of certified DBEs or contact information for DBE staff to assist with questions.

The contractor is then responsible for reviewing the project specifications, identifying aspects of the project that DBEs could accomplish, selecting appropriate DBEs, soliciting those DBEs, identifying the DBE subcontracts that they expect to use, and listing the value of subcontracts to be awarded. It is also the contractor's responsibility to ensure that DBE firms are currently certified when disclosing its subcontracting opportunities. If the contractor cannot identify DBE subcontract participation equal to or greater than the project goal, it must also describe its GFE. The contractor lists its expected DBE contractors and relative participation on forms attached to the solicitation documents.

Good faith efforts are actions taken by the contractor to obtain DBE participation, even if the contractor has not been able to identify sufficient DBE participation to meet the goal.

GFE documentation provides ODEO with evidence that the contractor has done its best to locate and subcontract with DBE firms wherever possible.

According to FTA regulations, a contractor can meet the project goal by obtaining sufficient DBE participation to meet it or by showing enough GFE to demonstrate that they made every reasonable attempt to get DBE participation even if they didn't succeed (49 CFR 26.52). A contractor that bids DBE subcontracting participation that meets the project goal is equal in responsiveness to contract requirements as the contractor who identifies zero DBE subcontracting participation and relies wholly on acceptable GFE, e.g. either would "pass" the ODEO DBE evaluation.

After the contractor bids are received, the Procurement Department reviews each bid for responsiveness to the solicitation requirements and each contractor for its responsibility to provide a complete and quality finished project. The three apparent lowest responsive, responsible bids are identified and their respective DBE participation and GFE forms are forwarded to ODEO. ODEO reviews the proposed participation to verify that the subcontractors listed are certified DBEs and that the amount of participation has been correctly calculated.

ODEO also assesses the bidder's good faith efforts, where applicable, i.e. whether it demonstrated that it took all necessary and reasonable steps to achieve a DBE goal, even if the contractor was not successful. Some of the types of actions that constitute GFE under 49 CFR, part 26 include:

- Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract.
- Selecting portions of the work to be performed by DBEs in order to increase the likelihood that DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.
- Providing interested DBEs with adequate information about the plans, specifications and requirements of the contract in a timely manner to assist them in responding to a solicitation.
  - Negotiating in good faith with DBEs – evidence of such negotiation includes names, addresses and phone numbers of DBEs that were considered; a description of information provided about project plans and specifications and evidence as to why an agreement was not reached for the DBE to perform the work.
  - The fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goals, as long as such costs are reasonable. Also, the desire of the prime contractor to perform the work with its own forces does not relieve the bidder of the responsibility to make GFE.

- Not rejecting DBEs as unqualified without sound reasons based on a thorough investigation of their capabilities.
- Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance required by the recipient or contractor.
- Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials or related assistance or services.
- Effectively using the services of available community and trade organizations to provide assistance in the recruitment and placement of DBEs.

Upon completion of its evaluation of the contractor's proposed DBE participation and GFE, ODEO makes a determination if the bidder passes or fails to pass the DBE requirements as stated in the solicitation (based on federal regulations). ODEO then composes and sends a memo to Procurement explaining the review process and results. The memo contains the following information:

- The proposed DBE participation for the project,
- Listing of the DBE subcontractors,
- Verification that the DBE subcontractors are certified as DBEs,
- A listing of documented GFE,
- Confirmation that the listed DBE firms were requested to submit bids by the contractor, that they declined and why,
- A statement that the bidder has passed or failed to pass DBE requirements by meeting the goal or through GFE.

Procurement uses the memo information to evaluate the bidders as responsive or non-responsive to the solicitation requirements. Bids that fail to meet DBE requirements are generally excluded from further consideration, per FTA regulations in 49 CFR, part 26 which require successful bidders to either meet the goal or demonstrate adequate GFE. Procurement then selects the winning bidder, generally the one who submitted the lowest priced, responsive, responsible bid.

### **Audit Review**

As stated above, Program Evaluation and Audit (Audit) reviewed all FTA funded and completed construction projects from 2005 through 2008 that exceeded \$50,000 and would, therefore, be required to meet the DBE requirements. The review can be summarized as follows.

- One project did not have any subcontracting opportunities so no ODEO evaluation of the project was performed (no DBE participation expected).
- For the remaining 16 projects, 48 contractor's DBE submissions were evaluated by ODEO with the following results:
  - 34 passed, with 23 meeting or exceeding the project goal. Eleven contractors proposed DBE participation that was less than the project goal but included acceptable GFE.

- 13 did not pass; 7 because the bid goal was less than the project goal and the contractor did not provide evidence of adequate GFE and 6 because the bid was less than the project goal and no GFE was submitted, rendering the bids non-responsive.
- One bid was withdrawn by the contractor.
- 9 winning bids were equal to or greater than the project goal for DBE participation; 7 were less, but all included adequate GFE.
- 9 winning contractors had final DBE attainments that were more than their original bid; 7 were less.
- Half of the contractors' final attainment was more than or equal to the project goal and half were less.
- In 14 instances, the winning contractor was the lowest bidder; in 2 instances, it was the second lowest where the lowest failed the DBE evaluation.
- In 14 of the 48 evaluations, the contractor included firms that were not currently certified DBEs. In two instances, ODEO identified certified DBEs within the contractor's bidding materials that the contractor had not initially identified as DBEs.

Audit also reviewed the consistency of ODEO evaluations. The following six examples are representative of how ODEO conducted evaluations for the other 10 contracts as well.

1. All three contractors submitted forms indicating DBE participation that was less than the project goal. Two of the contractors proposed subcontracting opportunities close to the project goal. They also proposed acceptable GFE. They passed the ODEO evaluation. The third contractor proposed DBE participation substantially lower than the other two and did not submit acceptable GFE. Although DBE participation and GFE are weighted equally by ODEO, in this case, the contractors that passed ODEO evaluation proposed acceptable GFE; the one that failed did not.
2. Two contractors listed DBE subcontracting opportunities that exceeded the project goal while a third contractor included zero participation, but included acceptable GFE. All three contractors passed the ODEO evaluation.
3. One contractor listed DBE subcontracting opportunities that exceeded the project goal and did not include GFE documentation; however, upon ODEO review, it was found that none of the listed subcontractors was currently a certified DBE. The contractor failed the ODEO evaluation. The contractor requested an Administrative Reconsideration Hearing. One was held and the contractor's GFE was again determined to be lacking.
  - a. A second contractor included DBE subcontracting opportunities much less than the project goal and its GFE were not adequate. The contractor also failed the ODEO evaluation.
  - b. A third proposed DBE subcontracting that exceeded the project goal and did not include GFE documentation. The DBE participation passed the ODEO evaluation because the contractor met (or in this case, exceeded) the goal. In this instance, the second lowest cost bidder was the only one to pass the ODEO evaluation and Procurement chose that one as the lowest responsive, responsible bid.

4. One contractor bid qualified DBE subcontracting opportunities exceeding the project goal and the contractor passed the ODEO evaluation. Two other contractors bid minimal DBE opportunities, one being 0%. The contractor bidding 0% included real and substantial GFE and passed ODEO evaluation. The other contractor did not and it failed.
5. All three contractors bid DBE subcontracting opportunities that were less than the project goal. One firm provided documentation of real and substantial GFE and passed the ODEO evaluation; the other two did not and they failed.
6. The DBE subcontracting participating identified in two of the bids exceeded the project DBE goal and both firms passed ODEO evaluation. The other contractor failed to submit the DBE forms and it failed ODEO evaluation.

## **Findings**

- 1. There is no clear relationship between the amount of DBE participation bid and the actual amount achieved.**

In 50% of the projects, the actual DBE participation was greater than the project goal, and in the other 50%, it was less. In nine instances, actual participation exceeded the amount originally bid; in 7 instances, it was less. The winning bidders' goals and actual performance are detailed in Exhibit 1, attached.

- 2. Bids that did not pass the ODEO evaluation failed due to violations of FTA requirements.**

Thirty-four bidders passed the evaluation, with 23 meeting or exceeding the project DBE goal. Eleven contractors proposed less DBE participation than the project goal, but they also included acceptable GFE. Thirteen did not pass. Seven failed because their bid goal was less than the project goal and the contractor did not provide adequate GFE, and six others failed because the bid was less than the project goal and no GFE information was submitted.

- 3. Contractor proposals were evaluated consistently for DBE components.**

In reviewing the files and memoranda created by ODEO in their review process, their review follows the steps and criteria outlined by the FTA in 49 CFR part 26 and the Council's DBE Plan. The reviews are thoroughly documented and Audit was able to connect any rejected bids to the appropriate federal DBE regulation to understand why it failed the evaluation.

- 4. DBE compliance is one component of the larger procurement process. It is a pass/fail test that provides results to the Procurement Department, which ultimately oversees the selection process. There is no evidence that ODEO exercises influence over any other part of the process.**

Fourteen of the 16 contracts reviewed were awarded to the lowest bidder. Two were awarded to the second lowest bidder, where the lowest failed the DBE evaluation. However, Procurement initially selected the three lowest responsive, responsible bidders that were evaluated by ODEO based on criteria established in the initial RFP, and Procurement ultimately made the final selection. ODEO provided only a pass/fail evaluation on the DBE component of the contract proposal for each bid given to them by Procurement.

## **Conclusion**

Based on recent audits, the Council's DBE program has been found to be largely compliant with federal regulations and Council policy. Further, it appears to play a limited but critical role in the procurement of contracts over \$50,000 funded with FTA dollars. Understanding that concerns have arisen about ODEO's role in the procurement process, Audit found no evidence in contract procurements exceeding \$50,000 over the last three years, that DBE staff played any role other than conducting the pass/fail DBE evaluation they are required to perform. Any "failed" bids were sent to Procurement documented in detail with reasons they did not meet federal DBE requirements. Bids that passed were also sent on to Procurement with no recommendation from ODEO, just that they passed the DBE evaluation. It appears that the concerns that have been raised are likely based on a misunderstanding of how the DBE program works.