



## **Program Evaluation and Audit**

### **Metro Transit**

### **Non-Rail Construction Projects**

### **DBE Compliance**

September 5, 2008

# INTRODUCTION

## Background

Title 49, Part 26.55 of the Code of Federal Regulations (*Participation of Disadvantaged Business Enterprises in Department of Transportation Programs*) establishes procedures for participation of disadvantaged business enterprises (DBE) in Federal Transit Administration (FTA) funded contracts. Council policy 3-4-6, *Inclusion of Disadvantaged Business Enterprises*, incorporates the federal regulations and requires that numerical goals no less than the Metropolitan Council's (Council) approved overall DBE program goals are to be set whenever subcontracting is possible on FTA funded procurements over \$50,000.

A previous review of DBE compliance by both Program Evaluation & Audit (Audit) and the FTA on construction of the Hiawatha LRT in 2005 revealed instances of non-compliance with DBE regulations by the contractor and some of its subcontractors. A subsequent FTA review of the Council's DBE program in 2006 highlighted some key areas for improvement. This review of non-rail construction project DBE compliance is being conducted as a follow-up on the status of program changes and enhancements made since the two prior reviews were completed.

## Assurances

This audit was conducted in accordance with the Institute of Internal Auditors' *International Standards for the Professional Practice of Internal Auditing* and the U. S. Government Accountability Office's *Government Auditing Standards*.

## Scope

The scope of this review is to determine the level of Metro Transit compliance with DBE requirements in non-rail construction contracts to include internal controls, contract administration procedures and actual practices. The review will include Metro Transit FTA funded non-rail construction projects entered into during the three year period August 2005 through April 2008.

## Methodology

To gain an understanding of compliance with DBE requirements in Metro Transit non-rail construction contracts, the following methods of inquiry were used:

- Metro Transit Facilities & Engineering (Engineering) and Office of Diversity and Equal Opportunity (ODEO) personnel were interviewed.
- Contract DBE clauses were reviewed.
- Metro Transit contract administration policies and procedures were reviewed.
- Non-rail construction projects were sampled and DBE documentation analyzed.
- The Council's Diversity Plan (Plan) was reviewed.

# OBSERVATIONS

## Council DBE Plan Responsibilities

The Council's DBE Plan establishes the policies and procedures by which the Council can comply with federal DBE contracting regulations. Audit compared the DBE Liaison Officer, Project Manager and Council Authorized Representative (CAR) responsibilities to documentation found in the respective project files to determine the extent to which documentation practices comply with Plan requirements. A summary of the results follows:

### *DBE Liaison Officer (ODEO)*

- |  |          |
|--|----------|
| ● Establish DBE goals  | Yes      |
| ● Evaluate bids to meet DBE goals and Good Faith Efforts       | Yes      |
| ● Monitor Good Faith Efforts to meet goal                      | Sporadic |
| ● Monitor compliance with goal                                 | Sporadic |
| ● Approve DBE substitutes                                      | No       |
| ● Monitor DBE payments   | No       |
| ● Receive Contract Initiation Memo (CIM) from requesting party | Yes      |

### *Project Manager*

- |   |              |
|---|--------------|
| ● Ensure DBE maintains certification and verify with ODEO       | No           |
| ● DBE used in accordance with contract                          | Yes          |
| ● Potential problems referred to ODEO                           | Yes          |
| ● Contractor continues DBE outreach during contract performance | Sporadic     |
| ● Refer DBE substitute requests to ODEO                         | No           |
| ● Conduct monthly site visits                                   | Since 1/1/08 |
| ● Ensure Contractor submits monthly DBE Progress/Project Report | Yes          |
| ● Ensure all reports are sent to ODEO                           | Yes          |

### *Council Authorized Representative (CAR)*

- |   |              |
|---|--------------|
| ● Ensure DBE maintains certification and verify with ODEO       | No           |
| ● DBE used in accordance with contract                          | Yes          |
| ● Potential problems referred to ODEO                           | Yes          |
| ● Contractor continues DBE outreach during contract performance | Sporadic     |
| ● Refer DBE substitute requests to ODEO                         | No           |
| ● Conduct monthly site visits                                   | Since 1/1/08 |

Project files reviewed by Audit contained CIMs from the requesting department. The files also documented ODEO's process for establishing DBE goals and evaluating contractor DBE and Good Faith Efforts proposals. Project Managers (Engineering) and CARs (Engineering) monitored Contractors to assure that DBE subcontractors were used in accordance with contract provisions. They also referred potential problems to ODEO. In addition, the Engineering project files contained monthly DBE Progress/Project Reports (Report) from the Contractor that were then forwarded to ODEO.

Audit found only sporadic documentation that ODEO monitored Contractor compliance with DBE goals or Contractor Good Faith Efforts to meet goals and no evidence that ODEO monitored DBE payments. One of the projects required the substitution of a new DBE subcontractor for one that could no longer perform. Although both ODEO and Engineering identified the need for obtaining a substitute DBE to finish the work, Audit found no documentation that the Project Manager or CAR referred DBE substitute firms to ODEO or that ODEO approved any substitutes. In addition, the files reviewed by Audit disclosed sporadic documentation of Project Manager and CAR monitoring of Contractor continued DBE outreach during the project, full documentation of monthly site visits since January 1, 2008, and no evidence that DBE subcontractor certifications were reviewed. Finally, Engineering implemented the following documentation procedures at the beginning of 2008 to provide evidence of monitoring DBE usage and progress toward meeting the project goal.

- Change Order notices have been prominently annotated to state if additional DBE participation has become available due to the contract change.
- Section 4 of the Weekly Progress Meeting minutes has been set aside to record discussions regarding DBE utilization.
- A new section has been added to the Daily Journal Field Report to report on DBE sub-contractor activities.

### **Counting DBE Participation**

Section 5.6 of the Plan and Title 49, Part 26 of the Code of Federal Regulations provides the following guidance on counting DBE participation toward meeting the contract goal:

- The value of work completed after the DBE ceases to be certified can be counted toward the contract goal but not the Council's overall goal.
- The value of work completed is NOT counted until the DBE is actually paid for that work.
- DBE subcontracted work is only counted to the extent subcontracted to another DBE.
- The DBE must perform a commercially useful function.
- There are special requirements for trucking companies.
- Materials/supplies obtained from a DBE manufacturer are counted 100 percent toward the goal.
- Materials/supplies obtained from a regular DBE supplier are counted 60 percent toward the goal.

Each month the Contractor is required to submit a Report as evidence of DBE participation and payment. Sixteen project files should have contained Reports; however, Audit found them in only nine, and of these nine, four contained erroneous reports.

- In one instance, a DBE went out of business after completing only about 14 percent of its contracted obligation. Diversity and Engineering appropriately urged the Contractor to obtain a substitute DBE to complete the business. However, the Report was never changed to reflect the reduced DBE contract amount. As a result, the Contractor continued to report a higher contracted DBE percentage than actually occurred.
- The Reports for a second Contractor had numerous mathematical errors, was not signed and contained the written “signature” of an Administrative Assistant. Contractual documents should be signed by someone authorized to bind the firm. It is not normal for an Administrative Assistant to have such authority. In addition, the presence of a second person signing the document other than the one compiling the data gives the Contractor the opportunity to review the data for possible errors.
- A third Contractor neither dated nor signed its Report and again made many mathematical errors, the type of which could indicate that the person filling out the form did not understand how it should be done.
- The fourth Contractor continued to report the same percentage DBE invoiced effort even though DBE activity had not changed but the total amount invoiced to Metro Transit had increased. Under these circumstances, the DBE invoiced percentage should have decreased.

Engineering revised the Report form on April 18, 2008 in an effort to make it easier for the Contractor to provide accurate DBE subcontractor contract and payment data.

Discussions with ODEO (Diversity) personnel disclosed that they have an excellent understanding of counting participation under the Plan. However, Audit found no evidence that either Engineering or Diversity required documentation that the Contractor had paid the DBE prior to including the related effort in the Report and counting it toward the project’s DBE goal.

## Construction Projects

Audit reviewed the 19 non-rail construction projects entered into by Metro Transit during the three year period August 2005 through April 2008 that were financed with FTA funds.

### *Diversity File Documentation*

A review of construction project files in the Diversity Department disclosed the following:

- Seven projects are complete.
  - All seven files had evidence of a bid evaluation, including Contractor DBE proposals (Form 485, Part A) and/or Good Faith Efforts (Form 485, Part B).
  - Four files contained Contractor monthly Reports and the Contract Initiation Memo (CIM).
  - Two files contained the Council's Notice To Proceed.
  - Two projects met DBE goals and the files contained evidence of Diversity monitoring activity.
  - One project met the goal with no evidence of monitoring. However, the Contractor was a DBE and required only minimal oversight.
  - On two projects there was no evidence of monitoring and it could not be determined if the Contractor met the goal for there were no monthly Reports in the files.
  - One project goal was not met. However, monitoring indicated that services previously scheduled to be completed by a DBE were received free of charge from the project owner.
  - One project goal was not met due to a DBE going out of business. The problem was identified early and discussions were held during weekly project meetings. A substitute DBE was not used and the Contractor continued to list the defunct DBE on its monthly Report at its full contract value throughout the duration of the project.
- Two contracts were less than \$50,000 and no DBE goal is required by Council policy.
- Nine projects are currently in progress
  - Eight project files contained contractor DBE proposals and bid evaluations by Diversity.
  - Seven contained Good Faith Efforts proposals and Notice to Proceed documents.
  - Six files contained CIMs and five contained monthly Reports.
  - Four contained no evidence of Diversity monitoring. Two projects did not have DBE goals, only Good Faith Efforts, but showed indications of monitoring. Two projects were meeting goals and the file contained documentation of monitoring, and one project was not meeting its goal but the project file contained evidence of monitoring by Diversity.
- One Contractor was unable to locate any DBE firms; however, Diversity approved the proposed Good Faith Efforts and it was selected for award.

*Facilities & Engineering File Documentation*

A review of the 19 construction project files in the Facilities & Engineering Department (Project Management and CAR responsibility) disclosed the following:

- Seven projects have been completed.
  - Four Contractors met DBE goals.
  - One did not meet its goal because Metro Transit was provided the product and services free of charge by the owner that the DBE would have provided.
  - Another Contractor did not meet its goal because one of its major DBE subcontractors had gone out of business when only \$24,000 of its \$195,000 contract was completed. Although Weekly Project Meeting minutes disclosed that this problem was identified early, the file contained no evidence that the Project Manager worked with the Contractor to find a substitute DBE.
  - It could not be determined from the file documentation if the seventh project did or did not meet its DBE goal.
- Two contracts were under the \$50,000 threshold that the Council has set for requiring DBE participation and monitoring.
- Nine projects are currently in progress. Seven are on tract to meet their DBE or Good Faith Efforts goals; two are not.
  - One project is 99 percent complete. The project goal is 17 percent, the Contractor was approved for 14.7 percent through its Good Faith Efforts and documentation supports an actual 14.2 percent participation rate. Weekly Progress Meeting Minutes indicate that the Contractor was repeatedly requested to use additional DBE sub-contractors.
  - Another project is 99 percent complete with a 16.5 percent goal but with only 10.0 percent DBE under contract. The project file contained no evidence that the Project Manager monitored the Contractor to assure that the DBE goal would be met.
  - One project has a DBE goal of 17.0 percent; however, the contractor was approved for 2.0 percent based upon its Good Faith Efforts. Daily Journal Field Reports and Weekly Project Meeting minutes indicated that the Good Faith Efforts were being monitored and that the goal would be met.
- One Contractor was unable to locate any DBE firms; however, Diversity approved their Good Faith Efforts and they were selected for award.

## CONCLUSIONS

*1. Office of Diversity and Equal Opportunity (ODEO) personnel, construction Project Managers and CARs have responsibilities for assuring that Metro Transit complies with DBE regulations on federally funded projects. Documentation exists within ODEO and Engineering which indicates that some of these responsibilities are accomplished while others are not.*

The files document ODEO's process for establishing DBE goals and evaluating Contractor DBE and Good Faith Efforts proposals. Project Managers and CARs monitored Contractors to assure that DBE sub-contractors were used in accordance with the contract. They also referred potential problems to ODEO. In addition, project files contained documentation that the Project Manager received monthly Reports from the Contractor and forwarded them to ODEO.

Audit identified only sporadic documentation that ODEO monitored Contractor compliance with DBE goals or Contractor Good Faith Efforts and there was no evidence that ODEO monitored DBE payments. One project required the substitution of a new DBE subcontractor for one that could no longer perform. Audit found no documentation that the Project Manager or CAR referred DBE substitutes to ODEO or that ODEO approved any substitutes. In addition, the project files disclosed sporadic documentation of Project Manager and CAR monitoring of Contractor continued DBE outreach during the project, full documentation of monthly site visits since January 1, 2008, and no evidence that DBE subcontractor certifications were reviewed.

*2. Although Metro Transit's Diversity Department adequately assesses Contractor ability to meet project DBE goals prior to contract award, insufficient documentation exists to support a conclusion that appropriate analysis and guidance is provided during project construction to assure that the Contractor would actually meet project goals upon completion.*

Fifteen of 18 project files documented Contractor DBE proposals and Diversity's evaluation of them, and 10 of 11 files documented Good Faith Effort proposals. However, only nine of 16 files contained Contractor monthly Reports and those were merely filed; there was no indication that they were used to monitor subcontractor DBE progress. In addition, only one of the seven completed project files contained an assessment regarding the extent to which the Contractor met project DBE goals.

*3. Metro Transit Construction Project Management and CAR personnel maintain adequate records regarding the application of standard practices for counting DBE participation; however, the data included in those records indicate that monitoring could be improved in order to meet contracted goals.*

One Contractor did not meet its DBE goals due to the loss of a DBE early in the contract, and although Weekly Project Meeting minutes disclosed that this problem was identified early, the file contained no evidence that the Project Manager or CAR



actually worked with the Contractor to find a substitute DBE. The Contractor continued to report the lost DBE at its full contract value throughout the remainder of the project. In addition, two projects currently in progress are not on track to meet their DBE goals.

One project is 99 percent complete. The project goal is 17 percent, the Contractor was approved for 14.7 percent through its Good Faith Efforts, and documentation supports an actual 14.2 percent participation rate. Weekly Progress Meeting Minutes indicate that the Contractor was repeatedly requested to use additional DBE subcontractors. The other project is also 99 percent complete with a 16.5 percent goal but with only 10.0 percent DBE under contract. In both of these instances, the project files showed no evidence of the Project Manager or CAR monitoring the Contractors to assure that the DBE goals would be met.

*4. Metro Transit Diversity and Engineering Department personnel have a good understanding of the regulations regarding counting DBE participation in FTA funded projects. However, there is no evidence within the project files that DBEs have actually been paid prior to their effort being included in the Report and counted toward the project's DBE goal.*

Neither Engineering nor Diversity required evidence that the Contractor had paid the DBE prior to including the related effort in the monthly Report and counting it toward the project's DBE goal. A Contractor normally pays its subcontractors after receiving payment; however, it appears to be standard practice to count DBE participation at the time the Contractor submits its progress payment request rather than when the DBE subcontractor is paid.

## 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) Office of Diversity & Equal Opportunity and Engineering personnel responsible for assuring compliance with the Council’s Plan are to review the Plan and revise it as appropriate and also review the applicable Code of Federal Regulations to assure they fully understand their responsibilities. Documentation exists within ODEO and Engineering which indicates that some responsibilities are understood and accomplished while others are not.**

ODEO personnel follow a documented process for establishing DBE goals and evaluating Contractor DBE and Good Faith Efforts proposals. Project Managers and CARs monitor Contractors to assure that DBE subcontractors are used in accordance with the contract and when problems arise, they are referred to ODEO. Project Managers and CARs also received the monthly Reports and forwarded them to ODEO.

There was no evidence that ODEO monitored DBE payments. In addition, one project required the substitution of a new DBE sub-contractor for one that could no longer perform. Audit found no documentation that the Project Manager or CAR referred DBE substitutes to ODEO or that ODEO approved any substitutes. Finally, the files disclosed sporadic documentation of Project Manager and CAR monitoring of Contractor continued DBE outreach during the project, full documentation of monthly site visits since January 1, 2008, and no evidence that DBE subcontractor certifications were reviewed.

**Management Response:** *Engineering and Facilities (E&F) will review the Council's Plan and provide comment and or proposed modifications to ODEO as may be appropriate. E&F will also record and document referrals of DBE substitutes to ODEO when appropriate.*

*Actions will be completed by: December 31, 2008.*

*Staff Responsible: Joe Edwards and Kevin Ryan.*

*The Office of Diversity and Equal Opportunity (ODEO) will review and update the Council's Disadvantaged Business Enterprise (DBE) plan. With the update of the plan a detailed process will be developed to monitor DBE payments and the process to substitute a contracted DBE will be documented. ODEO will work closely with E&F to ensure the mutual understanding of all responsibilities.*

*Actions will be completed by: December 31, 2008*

*Staff Responsible: Pat Calder (lead), Johnnie Burns, Roderic Southall and Tracy Jackson*

**2. (Essential) Office of Diversity & Equal Opportunity personnel are to conduct continuous work-in-process analyses of Contractor DBE participation and a detailed final project analysis to ensure DBE goals are met.**

Fifteen of 18 project files documented Contractor DBE proposals and Diversity's evaluation of them, and 10 of 11 files documented Good Faith Effort proposals. However, only nine of 16 files contained Contractor monthly Reports and those were merely filed; there was no indication that they were used to monitor subcontractor DBE progress. Finally, only one of the project files for the seven completed projects contained an assessment regarding the extent to which the Contractor met project DBE goals.

**Management Response:** *As stated above ODEO will conduct a review and update the Councils DBE Plan and a detailed process of monitoring the DBE payments will be provided. The final assessment documentation will also be reviewed.*

*Actions will be completed by: December 31, 2008*

*Staff Responsible: Pat Calder (lead), Johnnie Burns, Tracy Jackson and Roderic Southall*

**3. (Essential) Project Managers and CARs are to analyze DBE Participation Reports received with Contractor monthly payment requests to assure that the reports are prepared properly and that all efforts are taken by the Contractor to meet its contracted DBE goals.**

One Contractor did not meet its DBE goals due to the loss of a DBE early in the contract, and although minutes from Weekly Project Meetings disclosed that this problem was identified early, the file contained no evidence that the Project Manager or CAR actually worked with the Contractor to find a DBE substitute. The Contractor continued to report the lost DBE at its full contract value throughout the

remainder of the project. In addition, two projects currently in progress are not on track to meet their DBE goals. One project is 99 percent complete, the Contractor's approved goal and Good Faith Efforts is 14.7% and the actual DBE participation rate is 14.2%. The other project is also 99 percent complete with a 16.5 percent goal but only 10 percent DBE under contract. In both of these instances, the Engineering project files showed no evidence of the Project Manager or CAR monitoring the Contractors to assure that the approved DBE goals would be met.

**Management Response:** *E&F will revise internal procedures to insure monthly documentation of a review of contractor DBE programs against established goals. In cases where it may appear that a goal is in jeopardy, E&F will alert the contractor and seek appropriate response.*

*Actions will be completed by: December 31, 2008.*

*Staff Responsible: Joe Edwards and Kevin Ryan*

4. **(Essential) Office of Diversity & Equal Opportunity and Engineering Department personnel are to review DBE regulations and the Council's Plan regarding counting DBE participation in FTA funded projects. Although one of the requirements is that a DBE be paid prior to its work being counted, there is no evidence within the project files that this practice has been followed.**

Neither the Engineering nor Diversity project files contained evidence that Contractors had paid their DBE sub-contractors prior to including the related effort in their monthly Reports. The Contractor is required to do so; however, it appears to be standard practice to count DBE participation at the time the Contractor submits its progress payment request rather than when the DBE sub-contractor is paid.

**Management Response:** *E&F will review the requirements of the Council Plan and will provide comment and or proposed modifications to ODEO accordingly.*

*Actions will be completed by: December 31, 2008*

*Staff Responsible: Joe Edwards and Kevin Ryan*

*ODEO will review and update the Councils DBE plan. For reporting purposes DBE participation is only counted after the DBE is paid.*

*Actions will be completed by: December 31, 2008.*

*Staff Responsible: Pat Calder (lead), Johnnie Burns, Tracy Jackson and Roderic Southall*

- 5. (Essential) Office of Diversity & Equal Opportunity and Engineering Department personnel are to develop a checklist of required documentation, make a practice of accumulating written evidence of compliance with all Plan and Federal DBE requirements and placing both the checklist and the appropriate documentation in the project file.**

Discussions with ODEO and Engineering personnel disclosed that those employees responsible for complying with Plan and Federal DBE requirements are very knowledgeable and accomplish many of the required tasks; however, the project files do not reflect their efforts. For example, nine projects are in progress. Diversity files of five of these contain evidence of monitoring; however, four do not. Engineering files indicated that seven of the projects were on track to meet their goals or Good Faith Efforts; however, two were not and there was no documentation in the project files indicating that these two projects were being monitored to meet their DBE goals.

***Management Response:*** *E&F will develop a suitable checklist and provide to ODEO for comment prior to incorporating the checklist into E&F internal procedures.*

*Actions will be completed by: December 31, 2008*

*Staff Responsible: Joe Edwards, John Edmunds and Kevin Ryan*

*ODEO will update the Council's DBE plan and together ODEO and E&F will develop a checklist.*

*Actions will be completed by: December 31, 2008*

*Staff Responsible: Pat Calder (lead), Johnnie Burns, Tracy Jackson and Roderic Southall*