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July 21, 2006

**TO:** BOARD OF DIRECTORS

**THROUGH:** ROGER SNOBLE  
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**SUBJECT:** RACE-NEUTRAL DBE PROGRAM & DISPARITY STUDY  
PURSUANT TO NINTH CIRCUIT COURT OF APPEALS  
DECISION

**ISSUE**

**Ninth Circuit Court Decision**

In May, 2005, the U.S. Court of Appeals for the Ninth Circuit, in the case of *Western States Paving vs. Washington Department of Transportation*, held that, in the absence of adequate evidence of discrimination, it is unconstitutional for a recipient of federal Department of Transportation (DOT) funds to utilize race- and gender-conscious (hereinafter race-conscious) goals in its contracting.

**U.S. DOT Guidance**

As a result of this decision, DOT has advised agencies in the Ninth Circuit's jurisdiction, including Metro, that a recipient agency's use of Disadvantaged Business Enterprise (DBE) contract goals must be predicated upon evidence of discrimination or its effects within the transportation contracting industry

**Impact to Metro**

Metro has examined the evidence it has on hand concerning discrimination and its effects. Based on this information, which includes a 1995 disparity study, Staff has determined that it may not have evidence to support the continued use of race-conscious goals. Under these circumstances, Metro would be putting itself at significant litigation risk if it continues to use race-conscious goals.

According to the DOT guidance, since Metro may lack the evidence to support the use of race-conscious contract goals, Metro is required to implement a wholly race- and gender-neutral (hereinafter race-neutral) program. Additionally, Metro is required to initiate an evidence gathering process to determine evidence of discrimination or its effects in the greater Los Angeles area transportation contracting industry. This evidence gathering process is better known as a disparity/availability study. Metro has earmarked \$500,000 for this effort.

With few exceptions, generally there is no difference in how the DBE program regulations apply to a race-and gender-neutral program as compared to a race- and gender-conscious program. In a wholly race-neutral program, Metro would not establish individual contract goals for DBE participation on any of its US DOT-assisted contracts. Rather, Metro would implement methods that aim to facilitate small business and DBE participation on its contracts. Such methods include the unbundling of contracts, providing technical, capital and bonding assistance, and facilitating business development programs. Metro would continue to collect the data required to be reported in the Uniform report of DBE Awards or Commitments and Payments Form and to monitor compliance with the commercially useful function, prompt payment and retainage requirements.

The move from a race-conscious program to a wholly race-neutral program does not have retroactive application. Thus, contracts executed and approved prior to the implementation of a race-neutral program would not be affected by this change.

## **BACKGROUND**

### **DBE Program Requirement**

DOT recipient agencies who let \$250K or more in DOT-assisted contracts, including Metro, are required under the federal DBE regulations to set an overall goal for DBE participation on their DOT-assisted contracts. The overall goal must reflect a recipient agency's determination of the level of DBE participation it would expect absent the effects of discrimination. The overall goal is determined from an examination of DBE relative availability in the recipient agency's local market using DBE directory information, census data, bidders lists, disparity or similar studies, historical information, and data on local market conditions.

Recipient agencies must meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating DBE participation. Race neutral means include but are not limited to: (1) arranging contracts in ways to facilitate small business participation such as unbundling large contracts or requiring prime contractors to subcontract portions of the work; (2) providing bonding, financing and technical assistance, (3) communicating contract opportunities to the small business community and (4) providing business supportive and development services. Recipient agencies are required to establish contract goals (race-conscious means) to meet any portion of the overall goal it does not project being able to meet using race-neutral means. Contract goals must provide for participation by all certified DBEs and must not be subdivided into group specific goals.

## **Metro's DBE Program**

Metro annually submits its overall goal projection to DOT for review and approval. This overall goal projection consists of a breakout of the portion of the goal that Metro expects to meet through race-neutral means, including the basis for that projection, and the portion Metro expects to meet using race-conscious methods, i.e. setting contract goals. In a narrowly tailored DBE program, Metro must meet the maximum portion of its DBE overall goal through race-neutral means.<sup>1</sup> To ensure that Metro's DBE program meets the narrowly tailored requirement to overcome the effects of discrimination, Metro must adjust its use of contract goals according to the progress it is making in meeting the overall goal through race-neutral means. As an example, if during the course of any year in which Metro is using contract goals it projects exceeding the overall goal, it must reduce or eliminate the use of contract goals.

Since the issuance of the current DBE program requirements in 1998, Metro has regularly submitted and received DOT approval of its overall goal following this process.

## **New Evidentiary Standard to Support Use of DBE Contract Goals**

However, in May 2005 in the case of *Western States Paving vs. Washington Department of Transportation*, the Ninth Circuit held that a recipient agency's DBE program must be narrowly tailored to accomplish the remedial objectives established by Congress to be constitutional. To be narrowly tailored, the court stated that recipient agencies must as an element of its DBE program produce sufficient evidence of discrimination or its effects in its transportation contracting industry to justify the use of race-conscious measures. The court also suggested that a narrowly tailored program must structure its use of race-conscious measures to provide remedial relief to those groups that have actually suffered discrimination. The court added that to include groups within a DBE program who have not suffered discrimination would provide such groups with an unconstitutional competitive advantage at the expense of both non-minorities and any minority groups that have actually been targeted for discrimination.

## **Caltrans Response to Ninth Circuit Decision**

In response to the Ninth Circuit's decision and related guidelines issued by the Federal Highway Administration (FHWA), the California Department of Transportation (Caltrans) implemented an evidence gathering process, that concluded in March 2006 to assess evidence of discrimination and its effects in the State of California's transportation contracting industry.

Caltrans conducted approximately 20 public forums throughout the State, gathered testimonials, disparity studies and other related evidence as required by the Ninth Circuit ruling. In the end, Caltrans along with the FHWA, concurred that the evidence of discrimination in California's transportation contracting industry did not meet the legal

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<sup>1</sup> Narrowly tailored features include: (1) race conscious remedies are used only when race neutral means prove ineffective, (2) race-conscious measures are employed in a flexible manner and for a limited duration (3) the program is tied to the labor market in each state and (4) the program is designed to minimize the burden on non-minorities.

standards established by the Ninth Circuit case and, therefore, was insufficient to support continued use of race conscious measures.

Caltrans subsequently informed the FHWA and the public that, pending the results of a more comprehensive study of the facts, it would be implementing a wholly race-neutral DBE program effective May 1, 2006.

### **DOT Guidance**

In March, 2006, the DOT issued through the *Federal Register* a notice of policy implementation entitled *Western States Guidance for Public Transportation Providers* seeking public comment. In essence, the guidance issued by DOT stated that recipient agencies who seek to use race-conscious goals must first look to marshal evidence of discrimination that would respond to the Ninth Circuit's decision in *Western States*. A recipient agency's record must contain evidence suggesting that minorities or women currently suffer or have ever suffered discrimination in the relevant transportation contracting industry. Otherwise, according to the guidance document, a recipient agency's DBE program would not be narrowly tailored to further congress' remedial objective and would conflict with the guarantees of equal protection.

## **DISCUSSION**

### **Impact to Metro's DBE Program**

The impact of the Ninth Circuit decision is that, to use race conscious goals, Metro must possess evidence of discrimination or its effects that support the continued use of DBE contract goals to the FTA and/or FHWA. Absent adequate evidence of discrimination or its effects, it would be unconstitutional for Metro, even under the umbrella of the constitutional DOT regulations, to use race-conscious goals in its DBE Program.

If the evidence of discrimination and its effects identified by Metro pertains to some, but not to all, of the groups that the federal DBE regulations presume to be socially and economically disadvantaged, then the race-conscious goals utilized by Metro would apply only to the group or groups for which the evidence is adequate.<sup>2</sup> A disparity study will determine this. The DOT has indicated that it will consider program waivers of the federal DBE regulations' prohibition of group-specific goals in this situation.

### **Disparity Study**

Upon implementing a wholly race-neutral program, Metro would be required to immediately begin to conduct a rigorous and valid study to determine whether there is evidence of discrimination or its effects in the transportation contracting industry. Studies to determine the presence of discrimination or its effects are often referred to as disparity or availability studies. The study is designed to determine, in a fair and valid way, whether evidence of the kind the Ninth Circuit decision determined was essential to a DBE program including race-conscious elements exists.

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<sup>2</sup> These groups include women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA.

## **NEXT STEPS**

### **Metro's FFY07 DBE Program**

At the start of the Federal Fiscal Year 2007 (October 1, 2006), Metro will implement a wholly race-neutral program for its Federal Transit Administration (FTA) related DBE program. Concurrent with the implementation of this program, Metro will conduct an availability/disparity study to identify whether a race-conscious program is warranted on its FTA related DBE program. With respect to FHWA funds, Metro is also a sub-grantee of FHWA funds through Caltrans. On June 1, 2006, Metro reported to the Caltrans Office of Local Programs and Alameda Corridor that it does not anticipate awarding any FHWA-assisted contracts. Barring any changes, the Western States Paving decision will have no impact on Metro's FHWA related DBE program this Federal Fiscal Year. Should a change in this status occur, Metro agreed to adopt Caltrans' Race-Neutral DBE Program for all FY07 FHWA-related contracts.

### **Use of Anticipated Levels of Participation to Suggest DBE Participation**

Under the wholly race-neutral program, Metro will implement an approach that is currently being used by other recipient agencies, including Caltrans, where each request for proposal will include a description of the number of DBE firms that are available to perform on the contract. Based on the number of ready, willing and able DBE firms identified, a figure will be presented that describes the Anticipated Level of Participation (ALP) of DBE firms that would be expected to be achieved based on the relative availability of DBE firms. Staff will revise the current goal evaluation process to fit this program, and will also examine boiler plate contract language, DBE plan, reporting forms, other program items that may need to be adjusted to fit the ALP approach.

### **Metro's Disparity Study**

Consistent with the DOT-issued guidelines, Metro will conduct an independent availability/disparity study since the demographics of Metro's market area differs from that of Caltrans and other transit properties that may also be conducting similar studies. Metro plans to immediately solicit requests for proposals to contract with a consultant to begin accumulating the evidence necessary to meet evidentiary standards established in the Ninth circuit court decision. Metro's study will focus on avoiding the pitfalls that the court identified in the WSDOT program and will include a breakout of the effects of discrimination on each of the presumptive groups if necessary. The costs for the disparity study may be reimbursed by US DOT, according to availability of funds and sharing formulas.

Upon completion of study and direction of results, Metro may again use race-conscious goals at least for those groups where the effects of discrimination are shown to affect the ability of a group to compete on a nondiscriminatory basis.