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## DELIVERING ON THE PROMISE: Strengthening the Disadvantaged Business Enterprise Program of the New Orleans Regional Transit Authority

Prepared by Metro-Source, LLC

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### • OVERVIEW

In November 2009, the Regional Transit Authority (RTA), PolicyLink<sup>1</sup>, and Citizens United for Economic Equity (CUEE) entered a partnership agreement to evaluate the Agency's Disadvantaged Business program to ensure the goals of economic opportunity passed by a resolution of the RTA Board of Commissioners, as well as its statutory federal obligations, could be met in practice.

In anticipation of the federal TIGER grant award to extend the streetcar alignment along Loyola Ave, and the ongoing contract opportunities provided by the Agency, the following evaluation was undertaken in early 2010. It consisted of Metro-Source evaluating the Agency's recent track record on DBE subcontracting, focus groups with DBE certified subcontractors, and a survey of best practices of other agencies and Federal Transit Authority recommendations. This evaluation informed the attached

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<sup>1</sup> PolicyLink is a national research and advocacy organization dedicated to advancing social and economic inclusion. PolicyLink opened a regional office in New Orleans in 2005 to promote economic inclusion the rebuilding of the city after the floods.

recommendations for bringing the Agency into compliance with federal statute and local goals, and becoming a national model for effective practice.

## • •BACKGROUND

The New Orleans Regional Transit Authority (RTA) is the US Department of Transportation Federal Transit Authority (FTA) funding recipient for New Orleans. As an FTA funded agency receiving over \$250,000 annually in planning, capital and/or operating assistance per fiscal year, the RTA is required by federal law to operate a Disadvantaged Business Enterprise (DBE) Program in compliance with federal regulations. The Federal Department of Transportation's policy concerning DBE utilization is articulated in the US Code of Federal Regulation, 49 CFR Part 26 and requires recipients of FTA funds to set an overall goal that "levels the playing field" and mandates the amount of DBE participation that can realistically be expected in the absence of discrimination. The policy explicitly prohibits the use of quotas, and recipients of FTA funds must obtain as much as possible of the DBE goals through race-neutral measures such as training and technical assistance, bonding assistance, business assistance and breaking contracts into small economically feasible pieces – measures that will afford access to opportunity. In the absence of these race-neutral programs, FTA funding recipients are required to establish goals on a project-by-project basis toward attainment of the overall goal for DBE participation.

Beyond goal setting, the federal policy calls for:

- monitoring of contractor's performance;
- designing and implementing measures to assure goal attainment;
- implementation of race-neutral means of achieving DBE participation;
- evaluation of bids and proposals to ensure compliance with policy;
- certification of program participants; and
- fulfillment of quarterly and annual federal reporting requirements.

In addition to the federal program, the State and Local Disadvantaged Business Enterprise (S/LDBE) program recently approved by the RTA Board requires much the same level of effort. While the S/LDBE program has no reporting mandates, retention of records for the S/LDBE program is considerable to protect the agency from legal challenges by unsuccessful bidders.

This report provides an analysis of the RTA’s outcomes, policies and practices of the Agency’s DBE program. Additionally, best practice research on DBE programming for US Department of Transportation funded agencies and focused interviews with local and regional DBEs were conducted and considered in the development of recommendations for improvement of the program.

### ●●● DBE OPPORTUNITY ANALYSIS

In evaluating the performance of the RTA’s DBE program, an analysis of goal attainment was conducted from fiscal year 2001 through 2009. The evaluation found that total underperformance for the agency for the nine year period amounted to over \$14 million in lost opportunities for disadvantaged businesses.

Year	Value (\$000)	Goal	Actual	Variance (\$000)
2001	\$44,275	30%	11%	(\$8,412)
2002	\$45,616	17%	19%	\$912
2003	\$3,788	24%	3%	(\$795)
2004	\$2,120	24%	13%	(\$233)
2005	\$8,574	30%	3%	(\$2,315)
2006	\$25,908	20%	9%	(\$2,850)
2007	\$2,505	20%	0%	(\$501)
2008	\$5,970	17%	29%	\$716
2009	\$7,907	20%	8%	(\$949)
	<b>\$146,663</b>	<b>22%</b>	<b>11%</b>	<b>(\$14,427)</b>
<b>Avg.</b>	<b>\$16,296</b>			<b>(\$1,603)</b>

In determining the root cause of the RTA’s DBE program underperformance, it was noted that the agency lacks the proper coordination and communication protocols to

ensure that the RTA is DBE compliant with respect to goal-setting, monitoring and enforcement. There are no regular meetings of DBE and functional departments to discuss DBE contracting opportunities. Staff from key functional areas of the RTA appear to view DBE goal-setting as a component necessary for winning board approval of a project, but not as a means of ensuring proper DBE participation. The absence of coordination and communication, coupled with the limited staff resources, directly contributes to the inadequacy of goal setting, monitoring and enforcement policies and results in underutilization.

DBE goals at the RTA are not set on a project basis, as allowed by Part 26 of the federal regulations,. The Disadvantaged Business Enterprise Liaison Officer (DBELO) sets annual goals based on a preliminary list of prospective projects, but there is no follow-up during the course of the federal fiscal year to assess project changes and impacts on the DBE program. As project goals are not set, the DBELO uses the annual goal as a proxy. This lack of project goal setting and the lack of follow-up on annual goal changes result in inconsistent program performance.

A review of the goal setting methodology for annual and contract goals suggests that the full use of regulatory flexibility is not utilized. For example, CFR Part 26.45 states that goal-setting is a two-step process to determine the Relative Availability of DBEs for anticipated federally funded projects. The first step determines the Base Figure which is derived by totaling of all DBEs listed on the Unified Certification Registry in the RTA's jurisdiction or by using previous Bidders Lists from similar projects. The DBE data (the numerator) is compared to a broader measure as reported by the latest Census Bureau's County Business Patterns (the denominator).

The second step of the goal-setting process allows for a more subjective adjustment to the Base Figure with respect to current market conditions which may impact DBE capacity, based on additional data that is available in local disparity studies, as well as

adjustments for bid history in the local market. As this adjustment has not been made historically, there appears to be either reluctance or lack knowledge of available data to support a more subjective adjustment in the Step 2 portion of the calculation. Thus, historically, only adjustments based on an average of DBE participation from prior years has been included in the calculation.

Additionally, the regulations allow for the calculation of contract specific-goals when it is determined that meaningful DBE participation would only be achieved if goals are set. That is, without the “level playing field” established by a contract goal, DBE participation would not likely occur. Thus, the CFR Part 26.51 suggests the preference of using Race Neutral (no contract goal) means to achieve the overall annual DBE participation goal; however, it also allows for the setting of “Race Conscious” goals when the overall goal will not be met through Race Neutral means. Given the RTA’s history of falling short of its annual goal, Race Conscious (contract specific) goals should be utilized whenever subcontracting opportunities are available. The use of such contract goals, monitored closely, would generally result in enhanced DBE participation over the course of the goal-setting period.

Other changes to practices at the RTA will also strengthen participation. The RTA does not have a formal public outreach program, limiting the DBE participation to an informed few. Advertised contracting opportunities are narrowly focused on the Times Picayune newspaper, limiting exposure to non-mainstream audiences. This lack of adequate advertising fosters a perception that the RTA does not operate in an open and transparent manner.

To its credit, the Board of Commissioners recently agreed to participate in the City of New Orleans’ race neutral DBE program. To effectively expand DBE certification and contracting opportunities to meet this goal new practices and structures must be put in place.

## ●●●●OBSERVATIONS OF LOCAL AND REGIONAL DBES

Focus group discussions conducted by Metro Source in February 2010 with local and regional DBEs revealed several opportunities for improvement in the agency's program. The focus group exercises included participation of DBE's with contract experience with the RTA, as well as participation by certified DBEs that have been unsuccessful at attaining contracts or subcontracts on RTA projects.

Among the DBE contractors participating in the focus group discussions the most notable observation is the absence of "good faith efforts" by the prime contractors to effectively engage DBEs in the opportunities. DBE contractors noted that contact by the prime contractors is generally a fax or phone call within days of the bid submission with little time for bid preparation and no face-to-face contact for clarification of bid specifications or details.

Overall, the DBEs in attendance had experienced such practices as shopping DBEs after the bid award, and coercion of DBEs to lower bid prices to unprofitable levels. As a remedy, the DBEs strongly recommended that prime contractors be required to submit their bids with the listing of certified DBEs they will utilize on the project and the amount of the subcontract for each. Requiring the bid submission to include both the name and contract value for the DBE, it is believed, will lessen the price shopping and coercion of DBE contractors to lower bid values.

The DBEs describe "good faith efforts" as a mechanism for the prime contractors' exclusion of DBEs, and disregard of the intent of the programs provisions. In recommending remedies for ensuring good faith efforts the DBEs participating in the focus groups suggested: 1) clear scope of work from prime contractors; 2) mandatory working meetings with DBEs by prime contractors to clarify bid documents; 3) passing the prime contractors' supplier relationships to the DBEs (as it was noted that DBE

supplier relationships are generally retail and much higher than the costs to the primes); 4) the offering of incentives that make the DBE more valuable to the prime; and 5) leadership intent of the program set by the Board and Senior Management.

Additionally, the DBEs indicated difficulty in identifying contract and bid opportunities at the RTA, which many described as exacerbated in the post-Katrina environment where it appeared that the agency “just wanted to get things done as quickly as possible” and not be hindered by strict enforcement of DBE policy and procedures. As well, it was noted that in pre-bid conferences the DBELO does not have equal authority to representatives from the purchasing and/or capital departments of the RTA. Suggestions to alleviate this gap in access to opportunity included: 1) e-mail and fax-blasts to certified DBEs announcing contracting opportunities; 2) publication and regular updates of the agency’s spending forecast so that DBEs can plan their marketing with the Agency and its prime contractors; 3) pre-bid walk throughs on capital projects to include both DBEs and prime contractors; 4) operation of a plan room where DBEs can access bid specifications and be prepared to bid in a timely and efficient manner; and 5) matchmaking sessions with DBEs and primes to build relationships.

The DBEs did point to efforts by the DBELO to connect them to prime contractors bidding on the agency’s projects, but advised that subsequent attempts by the DBEs to call the primes and establish a business relationship did not provide access to contract opportunities and resulted in unreturned phone calls. As such, the DBEs strongly suggested that networking DBEs with primes should be a focused activity involving face-to-face meetings and some level of neutral brokering by the DBELO.

Moreover, the DBEs participating in the discussion reported that their only contact with the DBELO was during the certification and/or recertification process, not in an ongoing facilitative brokering role. To remedy this gap, the DBEs recommended that the DBE Directory be expanded and periodically updated to include detailed information on the

capacity of the DBEs, including bonding and insurance limits, past projects, history of project size, and references. It was noted that including information on capacity makes the DBE list more user friendly for prime contractors and affords DBEs an additional mechanism for marketing their services to both prime contractors and the agency.

In the general discussion of barriers to effective DBE participation it was noted that bonding, insurance and working capital remain a major impediment. Even the DBEs with bonding and insurance in place noted that their capacity was limited to smaller projects or scopes. Recommendations to mitigate these deficiencies included: 1) breaking contracts into smaller projects dedicated to DBEs; 2) waiving bonding on low-risk projects; and 3) providing working capital or contract lines of credit for DBE contractors.

Additionally, the DBEs noted that the financial burden of slow payment practices for both regular invoices and retainages and recommended: 1) a 30-day payment policy; and 2) retainages paid when the DBE completes his/her job as opposed to paying the retainage at the end of the project. Tellingly, one of the DBE contractors in the focus group advised that her business is still waiting for retainage fees for an RTA project that she completed in 2008.

Noting that the cost of doing business with DBEs is slightly higher given the higher overhead rate for most small businesses, it was recommended that the agency look at financial incentives for meeting and/or exceeding DBE participation. The State of Louisiana offers a \$50,000 tax credit for prime contractors that participate in the state's Mentor-Protégé program, yet DBEs participating in the focus group were either unaware of the program or had been unsuccessful in teaming with a mentor. As such, the recommendation was amended to include lowering the retainage for primes that meet or exceed DBE goals, coupled with fines and penalties for primes that fail to meet the goals. This notion of the "carrot and the stick" was recognized by all focus group participants as an effective remedy for compliance with DBE goals.

In the main, DBE opportunity conferences and seminars were described by the DBEs as “dog and pony shows” with little to show for the time the business owners takes from their regular business activity to attend these functions. However, DBEs noted a need for detailed information of spending forecasts before the beginning of the fiscal year, as well as focused meetings with prime contractors and detailed meetings on bid specifications on a project-by-project basis. As well, technical assistance was seen as a need for some DBEs, particularly with back office activities such as taxes and accounting. Probing this issue revealed that many of the DBEs conducted their bidding and estimating without benefit of an audited overhead conducted by a Certified Public Accountant. As such, assistance with calculation of overhead rates was considered as a valuable technical assistance tool for DBEs to better ensure effective estimating on the front end and profitability on the back end.

#### ●●●●DBE PROGRAMMING BEST PRACTICES

In examining best practice research for DBE programs, sources include both federal and state programs, as well as international programs in South Africa and the UK. First and foremost among the best practices is the notion that the DBELO must be an advocate on behalf of DBE contractors and have the availability to investigate complaints, mediate disputes between DBEs and prime contractors, and develop and implement remedies that ensure effective program performance. Notably, these responsibilities are in addition to program compliance requirements for goal setting, DBE certification, monitoring performance, monitoring payments to DBE subcontractors and federal reporting mandates.

FTA best practice recommendations reinforce the importance of prompt payment policy for both DBE and non-DBE subcontractors. The practice includes provisions for prompt

payment of both regular invoices and retainage fees, as well as penalties for failure to comply. Notably, the Chicago Transit Authority (CTA) has one of the most aggressive programs for prompt payment requiring 1) payment of all subcontractors with five days of the prime contractor's receipt of payment from the agency; 2) payment of retainage amounts with 14 days of satisfactory completion of work; 3) with holding prime contractor payments until adequate evidence of subcontractor payment has been provided; and 4) automatic breach of contract if the prompt payment policy is not strictly adhered to. Prompt payment policies are considered in best practice research for both race-neutral and race-conscious DBE programs.

In addition to prompt payment the FTA promotes financial and technical assistance programs as best practice mechanisms for facilitating DBE participation. Specifically, the FTA recommends such measures as reducing bonding requirements, eliminating the impact of surety costs from bids and assisting DBEs to obtain financing. As of 2006, there were 10 state Departments of Transportation (DOTs) with DBE equity investing and lending programs with the state of Mississippi providing a pool of over \$26 million. Georgia, Hawaii and Wisconsin have loan programs operated directly by the Department of Transportation. In Wisconsin the financial assistance program includes long-term counseling and is designed to help DBEs move to prime contractors. In Washington State interest from the state's deposits in CDs are linked to a commercial loan pool which lowers the interest rate on loans to DBEs by two percent. Florida, Maryland and Tennessee operate a bond guarantee program.

As well, providing technical assistance and supportive services that build DBE capacity are recommended best practices and encompass such measures as assistance with business and financial management, business development and growth models, technological capacity building, and programs to assist start-up firms. Fourteen state DOTs provide targeted business development services to DBEs including Ohio which sponsors a Minority Contractors and Business Assistance Program. Here again, these

practices are recommended for enhancement of both race-neutral and race-conscious DBE participation.

In a survey of the DBE programs of 36 state DOTs the research revealed that one-third of the agencies had developed and implemented some form of mentor-protégé program to aid in small and disadvantaged business development. Additionally, some of the respondents advised that the use of incentives for prime contractors resulted in significant increases in DBE utilization. Thus, unlike the technical and financial assistance recommended by the FTA, many of the state DOTs provide incentives to primes to provide the needed technical assistance and support that build DBE capacity. Notably, in 2004 the North Carolina Department of Transportation helped establish and fund a Minority Business Enterprise Center which provides both technical assistance and financing for DBEs on state transportation projects.

Research conducted by the Center for Community Economic Development noted the creation of advisory councils and commissions around the issue of supplier diversity as a best practice for identifying barriers and expanding opportunities for DBEs. In the period from 2003 through 2007 councils or commissions were established in Indiana, Maryland, Colorado, New York and Illinois. These councils generally included professional organizations such as local and regional Chambers of Commerce, as well as minority- and women business advocacy organizations such as Black and Hispanic Chambers of Commerce and local chapters of the Federation of Women Contractors.

There are 31 state DOTs that still have race and gender conscious programs including Massachusetts, Arizona, Delaware, Florida, Indiana, Maryland, North Carolina, Pennsylvania, South Carolina, Virginia and Washington. Notably, of the programs identified as a best-practice model the Maryland Department of Transportation has conducted a disparity study every year since 1990 to ensure the narrow tailoring of their program to the needs and availability of their statewide minority- and women-owned

businesses, as required by federal law. As well, Washington DOT reestablished race and gender contracting goals in 2006 as a result of the findings of a disparity study.

Packaging contract opportunities to afford access by DBEs is a best practice mechanism for increasing participation. Additionally, the FTA supports the practice of extending the time for prime contractors to not only identify DBEs to participate, but also to extend the time to have the DBEs certified. These practices have proven successful in increasing participation by both the Miami-Dade and New York City transit agencies.

With regard to “good faith efforts” the FTA again highlights the policy of the Chicago Transit Authority (CTA) which requires that prime contractors consider all qualified DBEs that express an interest in the project opportunity. Further, CTA requires that the prime contractor provide the reason for rejecting a qualified DBE, document their efforts to unbundle the scope into economically feasible units so that DBEs can participate and document their effort to assist a DBE to access the bonding, insurance, equipment, supplies and materials required for participation on the project. As well, CTA allows apparent low bidders that fail to meet the DBE goal in the initial bid to have one opportunity for meeting the DBE requirements before the bid is rejected for non-compliance.

## ●●●●●FINDINGS AND GENERAL RECOMMENDATIONS

Evaluation of the DBE Program for the RTA revealed that the DBE Department is clearly understaffed and due to this understaffing the department cannot reasonably be expected to comply with the DBE Code of Federal Regulations as stated in 49 CFR, Part 26 with respect to certification, goal-setting, monitoring, enforcement and reporting. The lack of adequate resource provisions reflects that the DBE department is not

regarded as an important policy tool in the RTA with respect to its federal obligations to engage small and minority businesses in its contracting opportunities.

Inadequate organizational support for the DBE program is reflected in the following shortcomings:

- lack of adequate staffing for the obligations of the department;
- lack of productive coordination and communication protocols; and
- failure to deliver on program performance with respect to business utilization and community engagement.

Systemic changes, intensive staff training and attitudinal changes within the organization will all need to be addressed to effectively meet the goals set by the Board of Commissioners. As such, the Board of Commissioners and senior management must rededicate itself to the DBE program by 1) becoming more informed (trained) with respect to the DBE program requirements; 2) setting the proper tone internally by elevating the status of the program and ensuring that all stakeholders coordinate and communicate with the DBE department in a timely and effective fashion; and 3) utilizing the DBE program as a policy tool to engage the community in an open and transparent manner.

## ●●●●●●**DETAILED RECOMMENDATIONS**

Beyond leadership and compliance, the best practice research provides significant insight into policies and programmatic measures for improving the RTA's DBE program. As well, focus group interviews conducted with certified DBEs reveal the need for more innovative and effective practices to better ensure successful program outcomes. As such, the recommendations detailed below provide a comprehensive action plan to both remedy program deficiencies and create effective innovation in the program.

## **Governance and Management**

- Provide Part 26 training to senior staff and the Board of Commissioners.
- Establish a DBE committee of the Board; meet no less than quarterly to review participation/utilization, internal coordination/communication and public outreach.
- Provide adequate DBE staffing, training and operating resources to fully comply with Part 26.
- Establish standing staff meetings to review the contract pipeline and to discuss DBE goal-setting for each eligible project. Meetings should include responsible stakeholders from Capital, Procurement and Administrative departments. Such meetings should be held no less than monthly.
- Establish Pre-Board agenda meetings to review upcoming action items. Review DBE participation and ensure all stakeholders are adequately informed as to agenda contents prior to submittal to the board for approval.

## **Policy and Procedures**

- Add a prompt payment policy for all projects that have a DBE goal and require prompt payment to all DBE subcontractors for both invoices and retainage.
- Require bid submissions by prime contractors to include the names and contract values of all DBEs participating on the contract.
- Develop a standard and detailed definition of good faith efforts that requires prime contractors to demonstrate the reasons certified DBEs were not selected to participate.
- Add contract language imposing fines and penalties for failure to meet DBE goals and/or comply with reporting requirements.
- Have all bids and proposals reviewed by the DBE office for compliance prior to technical evaluation and contractor selection.
- Advertise contracting opportunities in non-mainstream media, including media specifically targeting minority communities.

- Organize match making sessions between DBE and Prime Contractors to build relationships and showcase DBE capacity.

### **Innovative Practices**

- Identify opportunities for “unbundling” projects and creating smaller economically feasible projects that afford DBEs the opportunity to bid as primes.
- Expand the DBE listing to include relevant information on DBE capability and performance, thus serving as a showcase for DBE capacity.
- Organize a roundtable of Community Development Financial Institutions (CDFIs) and Small Business Assistance organizations to develop a DBE assistance program.
- Work with local banks to establish a line of credit for contractors and/or provide a loan-loss reserve to leverage capital for a contract finance or working capital program for DBEs.
- Conduct risk assessments on small projects, waiving surety or establishing an owner-controlled surety program.
- Lowering the retainage percentages for primes based on DBE goal attainment.
- Establish a public outreach program to receive continuous feedback from DBE contractors on goals, attainment, and enforcement
- Institutionalize a process to notify the DBE office as soon as new project timelines are known and ensure they identify ready, willing, and able DBE contractors (i.e. Loyola. Streetcar line extension)
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### **●●●●●● CONCLUSIONS**

Despite the economic and social advances of the past 30 years disparities persist with per-capita and median income for whites double that of African Americans for a period of over three decades. In post-Katrina New Orleans economic disparity persists with data indicating that Blacks and the poor were disproportionately impacted by the storm.

Since the storm, New Orleans has become smaller, whiter, older, better educated and less poor. Yet comparisons of 2000 Census data and the 2006 American Community Survey (ACS) reveal that while the number of individuals in poverty decreased from 27.9% to 22.2%, the disparity between Black and White residents remains steady, with 31% of the Black population below poverty compared to only 9% of Whites.

Clearly, the RTA can utilize the tools at its command to create better economic inclusion of disadvantaged firms and play a leadership role in the reduction of economic disparity that persists in New Orleans. As such, and given the profound and proven potential of policies for inclusion to afford access to opportunity for income and wealth creation, it is imperative that the RTA utilize both federal and local DBE policy as a tool for promoting economic parity. Moreover, as the Code of Federal Regulations mandating DBE programming calls for both race-neutral and race-conscious activities, federally funded agencies are uniquely positioned to provide a broad spectrum of economic impact in the local community.

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