SANDAG DRAFT PROPOSED AMENDMENT TO FEDERAL TRANSIT ADMINISTRATION OVERALL DISADVANTAGED BUSINESS ENTERPRISE GOAL-SETTING METHODOLOGY FOR FFY 2010-FFY 2012

Introduction

SANDAG has an established Disadvantaged Business Enterprise (DBE) Program in accordance with Title 49 Code of Federal Regulations (CFR) Part 26 provisions, which concerns participation by DBEs in United States Department of Transportation (USDOT) programs. SANDAG receives federal financial assistance from the Federal Transit Administration (FTA), and as a condition of receiving this assistance, SANDAG is required to sign an assurance that it will comply with the DBE regulations. As a recipient of federally assisted funds through FTA, SANDAG is required to develop an Overall DBE Goal for its FTA-assisted projects (Attachment 1). The purpose of DBE goal-setting process is to level the playing field so that DBEs can compete fairly for USDOT-assisted contracts; however, the program must be narrowly tailored in accordance with applicable law. This attached version of the Proposed Amendment is a draft document that would be released for public comment; it proposes a methodology for setting DBE goals for FTA-assisted projects for a period of three federal fiscal years (FFY) – from FFY 2010 to FFY 2012 (October 1, 2009 to September 30, 2012). It is subject to change based on additional information obtained by SANDAG during the public comment period.

Background

Disparity Study

Following the 2005 ruling in Western States Paving Co. v. Washington State Department of Transportation (Ninth Circuit Court of Appeals case), USDOT and all its recipients in the jurisdiction of the Ninth Circuit received a Notice/Guidance from FTA (Docket No. FTA-2006-24063 dated March 23, 2006), which directed recipients to implement a wholly race-neutral DBE program if they did not have sufficient evidence readily available to satisfy the evidentiary standards established in this ruling to implement a race-conscious DBE program. The ruling further required each jurisdiction to review evidence of disparity within its own contracting market and action plans for disparity/availability studies as an appropriate evidence gathering process. In response to this directive, SANDAG commissioned a disparity study to be conducted as a member and funding partner of the Southern California Regional Disparity Study Consortium to assess whether or not disparity exists within the SANDAG market area and the effects therein in relation to FTA-assisted

Recommendation

The Board of Directors is asked to accept the Draft Proposed Amendment to the Federal Transit Administration Overall DBE Goal-Setting Methodology for release to the public for a 45-day comment period.
contracts. The Final Draft FTA Disparity Study was released and published for public comment in November 2009. SANDAG also held a public hearing to collect anecdotal evidence and input from the public. The FTA Disparity Study was finalized in late January 2010 and accepted by the SANDAG Board of Directors in March 2010. This Board report concerns the DBE goal-setting methodology that SANDAG is required to undergo for its FTA-assisted contracting program and use of the FTA Disparity Study in establishing the goal.

New Approval Timeline

Effective March 3, 2010, USDOT issued a new final rule affecting the implementation and management of the USDOT DBE program. The new rule, which amends the current provision requiring annual submission of DBE goals and methodology, now requires submission of a DBE goal and goal-setting methodology that will be valid for a three-year period. Pursuant to this final rule, SANDAG is still required to conduct an annual review to account for changes that may warrant an adjustment to the overall goal or make an adjustment based on changed circumstances (i.e., significant change in the legal standards governing the DBE program, new contracting opportunities presented by the availability of new or different grant opportunities, etc.) to ensure the goal and program as a whole are narrowly tailored throughout the goal period; however, once the goal-setting methodology is established, it will be valid for a three-year period.

Proposed Overall Annual DBE Goal Calculation Methodology for FTA

The Draft Proposed Amendment to FTA Overall DBE Goal-Setting Methodology described in Attachment 1 ("Amendment") was established utilizing the federal two-step goal-setting methodology. Step 1 includes establishing a base figure utilizing quantifiable evidence to determine the relative availability of DBEs (ready, willing, and able to work for SANDAG) within specified industries identified as a part of SANDAG FTA-assisted contracting projects anticipated to be awarded within the period of October 1, 2010 to September 30, 2011. SANDAG utilized the California Unified Certification Program (CUCP) Directory of Certified DBE firms and 2007 United States Census Bureau: County Business Patterns North American Industrial Classification System (NAICS) database to complete Step 1.

Upon establishing the Overall DBE Goal Base Figure, Step 2 of the process requires SANDAG to survey and assess other known relevant evidence to determine what additional adjustments, if any, were needed to narrowly tailor the Base Figure to the SANDAG market area. Factors considered in the adjustment of the Step 1 Base Figure includes: the FTA Disparity Study, SANDAG historical DBE data, and current capacity of DBEs measured by actual attainments, SANDAG Bidders List, and other evidence within the SANDAG market area. After taking these factors into account, the Amendment calls for an Overall DBE Goal of 7.04 percent.

Proposed Race-Conscious and Race-Neutral Projections

As a part of the prescribed goal-setting methodology, SANDAG must ascertain the percentage of its Overall DBE Goal that can be met utilizing race-neutral (RN) and race-conscious (RC) measures. RN measures include outreach efforts to small businesses, assisting small business contractors in obtaining insurance and bonding, and arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBE and other small businesses. A full description of all of SANDAG proposed RN measures is in Section V of Attachment 1. RC measures consist of setting a specific goal in procurements with FTA funding that prime contractors must either meet by contracting with DBE firms or by making a good faith effort to meet by advertising and contacting DBE firms that could carry out the work.
SANDAG is required by law to meet the maximum amount possible of its Overall DBE Goal using RN methods. To ascertain the portion of the Overall DBE Goal that SANDAG predicts it would be able to obtain using RN methods, SANDAG considered two principle factors, historical RN DBE attainments on its FTA-assisted contracts, and historical attainment trends as tangible evidence of the amount it is presumably able to achieve using RN means. To perform this analysis, SANDAG first assessed the RN DBE attainments during the past three (3) federal fiscal years in the two primary FTA-assisted contract work categories (Construction and Professional Services), which contain similar FTA-assisted contracts to those anticipated to be solicited and awarded by SANDAG within the respective goal period. Secondly, the average attainment was calculated.

SANDAG weighted the percentage of USDOT funding anticipated in the forthcoming goal period for the Construction category, which represents a percentage of the anticipated USDOT funding. The weighted amount, based on dollars, of the proposed 7.04 percent goal for construction is 98 percent. Both past RN Construction DBE goal attainment and RN trend factors were used in Attachment 1 to calculate the proposed RC and proposed RN construction goal projection.

SANDAG also weighted the percentage of USDOT funding anticipated in the forthcoming goal period for the Professional Services category, which represents a percentage of the anticipated USDOT funding. The weighted amount, based on dollars, of the proposed 7.04 percent goal for professional services is 2 percent. As with the Construction category, past RN Professional Services DBE goal attainment and RN trend factors were used in Attachment 1 to calculate the proposed RC and proposed RN Professional Services goal projection.

Only the percentage of the Overall DBE Goal that SANDAG predicts it cannot meet using RN methods is proposed to be met using RC means in the Amendment. Based on the evidence and calculations in Section IV of Attachment 1, the following numbers are currently proposed:

<table>
<thead>
<tr>
<th>Project Type</th>
<th>Portion of 7.04% Overall Goal</th>
<th>Race-Neutral Percentage</th>
<th>Race-Conscious Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Construction</td>
<td>98% of 7.04% = 6.9%</td>
<td>3.4%</td>
<td>3.5%</td>
</tr>
<tr>
<td>Professional Services</td>
<td>2% of 7.04% = 0.14%</td>
<td>0.14%</td>
<td>0%</td>
</tr>
</tbody>
</table>

If additional evidence is obtained during the comment period regarding the goal-setting methodology, staff will present this information to the Board for consideration.

Disparity Index

Based on state and federal law, SANDAG is required to narrowly tailor its RC measures so that they only apply where there is evidence of disparity supporting their use. The FTA Disparity Study calculated a disparity index on the relative utilization and availability of minority-owned and women-owned firms. A disparity index below 80 for a particular race/ethnic/gender group has been deemed by some courts to constitute a “substantial disparity.” The disparity index in the FTA Disparity Study is based on FTA-funded contracts during the period of May 2006 through December 2007 when SANDAG was operating its FTA DBE program using solely RN methods (“Race Neutral Period”). Based on the results of the disparity index, SANDAG is proposing to apply the RC portion of its DBE Program only to those groups that have been historically underutilized according to the FTA Disparity Study.

FTA does not allow a program to be tailored to only certain groups of DBEs unless a waiver is sought and obtained from FTA. SANDAG may consider applying for a waiver request from FTA to
limit eligibility for meeting DBE contract goals to only those race/ethnic/gender groups for which there were substantial disparities (underutilization) during the Race Neutral Period. The underutilized DBE categories consist of: African American, Hispanic American, Native American, Subcontinent Asian American, and women-owned firms. SANDAG may determine whether or not to seek a waiver request of limited application from USDOT after comments received from the community consultation and public comment period have been assessed by SANDAG.

Public Participation and Facilitation

In accordance with Public Participation Regulatory Requirements of Title 49 CFR Part 26, minority, women, local business associations, and community organizations within the SANDAG market area would be consulted and provided an opportunity to review the goal analysis and provide input. SANDAG would prepare Outreach Consultation Letters advising the aforementioned business community of the proposed DBE goal analysis and its availability for review and comment. SANDAG would additionally conduct one-on-one meetings with industry and trade groups, including minority and women-specific groups and would host a Small Business Public Facilitation Forum as part of this process.

SANDAG plans to issue a Public Notice in general circulation media and minority focused media publishing the SANDAG Draft Proposed Amendment to FTA Overall DBE Goal-Setting Methodology for the FFY 2010 to FFY 2012. The notice would inform the public that the proposed goal and rationale are available for inspection at SANDAG’s principal office during normal business hours for 45 days following the date of the Public Notice, and that SANDAG would accept comments on the goal analysis for 45 days from the date of the Public Notice. SANDAG will give full consideration to all comments and input received as a part of this process and will assess its impact on the Amendment.

Next Steps

Upon completion of the 45-day public comment period for the proposed FTA DBE goal and goal-setting methodology, one-on-one meetings with industry and trade groups and the Small Business Public Facilitation Forum, SANDAG staff will present all comments to the Board of Directors and determine whether or not SANDAG should seek a waiver request of limited application from USDOT and whether any adjustment to the proposed Amendment is warranted. Once the assessment and/or modifications have been completed, the Board of Directors would be asked to approve the final version of the proposed Amendment to FTA Overall DBE Goal for the FFY 2010 to FFY 2012 goal period in July, and if it is approved, the goal-setting methodology will be sent to FTA for approval.

GARY L. GALLEGOS
Executive Director

Attachment: 1. Report regarding Draft Proposed Amendment to FTA Overall DBE Goal-Setting Methodology for FFY 2010-12 goal period

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