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# Harris County Auditor's Office



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## Memorandum

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Adrian Garcia, Commissioner Precinct 2  
Steve Radack, Commissioner Precinct 3

R. Jack Cagle, Commissioner Precinct 4  
DeWight Dopslauf, Purchasing Agent  
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CC: Joe Madden, County Judge's Office  
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Robert Soard, County Attorney's Office  
Leslie Wilks Garcia, First Assistant County Auditor

RE: Disadvantaged Business Enterprise Consulting Engagement

Date: July 24, 2020

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The Audit Division is issuing this consulting engagement memo to provide you with the results of our evaluation of Harris County's Disadvantaged Business Enterprise (DBE) Program. This engagement was requested at Commissioners Court on June 30, 2020. The objectives of the engagement were to:

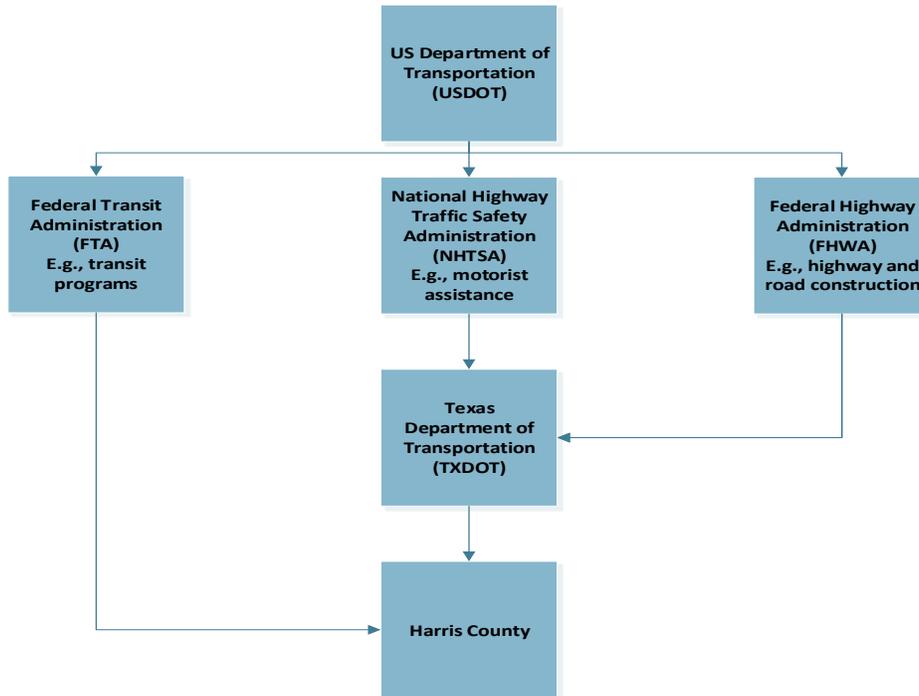
1. Determine the current state of Harris County's DBE Program.
2. Perform DBE Utilization Analysis for FY2020 United States Department of Transportation (USDOT) transportation grants.
3. Understand disaster declaration authority as it relates to procurement guidelines.

## Overview

On August 20, 2003, Commissioners Court authorized the Harris County Public Infrastructure Department to execute an inter-agency agreement between Harris County and the Texas Department of Transportation (TXDOT) for funding construction in the amount of \$2,811,600 for the Transportation Plaza improvements as part of the downtown restoration of the courthouse complex. Following this approval, the Harris County Public Infrastructure Department requested that the Harris County Community and Economic Development Department (CEDD), currently the Community Services Department (CSD), assist in the administration of this agreement since CEDD had experience in administering and monitoring other federal grant programs. On June 20, 2006, Commissioners Court authorized the filing of applications with the Federal Transit

Administration (FTA), a division of the USDOT, for federal transportation assistance and approved CEDD as the administrator of all non-infrastructure federal and state transit and transportation funds received by Harris County. As a recipient of USDOT-assisted projects, Harris County is required to have and maintain a DBE Program per 49 Code of Federal Regulations (CFR) Part 26.

#### Transportation Grants Structure



On November 20, 2007, Commissioners Court approved the DBE Policy Statement, adopting the TXDOT Memorandum of Understanding (MOU) and the Texas Unified Certification Program (TUCP) Memorandum of Agreement. The MOU is the agreement that allows a Local Government Agency to utilize TXDOT’s DBE Program and identifies the responsibility of each Local Government Agency as it pertains to the DBE Program. TUCP is a certification program for the DBEs in Texas. The purpose of the TUCP includes certifying and/or decertifying DBE applicants and maintaining a unified DBE directory to be available to all partners. Harris County does not certify DBEs; therefore, it utilizes TUCP’s certified DBE list.

#### Socially and/or Economically Disadvantaged Businesses

Federal and state agencies set different goals to utilize socially and/or economically disadvantaged businesses. Federal granting agencies may place additional requirements to utilize socially and/or economically disadvantaged businesses as noted with DBE requirements for USDOT funds and Section 3 requirements for Housing and Urban Development Funds (HUD). In the State of Texas, the Comptroller established the Historically Underutilized Businesses (HUB) program in order to promote full and equal business opportunities for Minority and Women Business Enterprises (MWBE) in an effort to remedy disparity in state procurement and contracting.

The DBE Program goal is to ensure nondiscrimination in the award and administration of USDOT-assisted projects in the department’s highway, transit, and airport financial assistance programs. A DBE is defined as a for-profit small business that is at least 51% owned by one or more individuals who are socially and economically disadvantaged. For a DBE to be deemed economically disadvantaged, an individual must not exceed certain economic criteria and must be certified by TUCP as a DBE.

The Section 3 program requires that recipients of certain HUD financial assistance, to the greatest extent possible, provide training, employment, contracting, and other economic opportunities to low and very low income persons, especially recipients of government assistance for housing, and to businesses that provide economic opportunities to low and very low income persons.

A MWBE certification requires a for-profit small business to be at least 51% owned by one or more individuals who are only socially disadvantaged (minority, women, and veteran), but not necessarily economically disadvantaged. MWBE participation goals cannot be required for procurements unless there has been a disparity study performed demonstrating past or present discrimination warranting a MWBE program.

### DBE Liaison Requirements

The executed MOU presented to Commissioners Court in November 2007 is between TXDOT and Harris County for Federal Highway Administration (FHWA) funds. The MOU states that Harris County will adopt TXDOT's DBE Program and will adhere to TXDOT reporting and compliance requirements. The DBE Policy Statement, signed by the Harris County Judge in 2007, is required by 49 CFR §26.23 for USDOT-assisted projects. Per 49 CFR §26.25, "You must have a DBE liaison officer, who shall have direct, independent access to your Chief Executive Officer concerning DBE program matters. The liaison officer shall be responsible for implementing all aspects of your DBE program. You must also have adequate staff to administer the program in compliance with this part". The policy statement designated the Director of CEDD or his/her designee as the DBE Liaison Officer, who's responsible for implementing all aspects of the DBE Program. The Harris County's Transit Services website is referenced for the full Policy Statement. Per the Transit Service's website, "The Director of the Harris County Community Services Department (HCCSD), formerly known as the Harris County Community and Economic Development Department has delegated Mr. Gene Simeon as the DBE Liaison Officer (DBELO)."

## Observations

### Objective #1: Determine the current state of Harris County's DBE Program.

#### DBE Program

Harris County does not have a centralized DBE Program to ensure compliance with all USDOT-assisted projects. Based on our review, the DBE Liaison is only responsible for FTA awards, with the exception of the previous Transportation Plaza Grant and Houston TranStar Expansion FHWA/TXDOT awards. There have been two DBE Liaisons, the first was appointed by the CEDD/CSD Director and served from 2007-2015 and the second is the current CSD Transit Services Compliance Manager/DBE Liaison Officer. From 2007 to present, all **non**-FTA, USDOT-assisted projects that required DBE compliance were the responsibility of the department that received the grant.

Furthermore, Harris County does not have a centralized grants compliance department to ensure that the County fulfills all requirements related to the various grant awards received. Management informed us that there was a grants monitoring team imbedded in the Public Infrastructure Department; however, this department was dissolved in 2015 and this team was eliminated.

We were able to validate that current TXDOT funded projects are reimbursement based and therefore, require DBE utilization reporting to receive reimbursements. TXDOT did include the reimbursement forms in the grant packet and the County Engineering Department has been submitting those forms monthly.

The following chart illustrates by year, the USDOT– assisted awards that fell within the Harris County CSD DBE Liaison’s defined scope to monitor and those USDOT assisted awards that were **not** in the DBE Liaison’s scope.

| Fiscal Year  | USDOT - Program Expenditures | Within DBE Liaison Scope | Outside DBE Liaison Scope or Program Ineligible |
|--------------|------------------------------|--------------------------|---|
| 2008         | \$1,275,561                  | \$350,140*               | \$925,421                                       |
| 2009         | \$1,727,990                  | \$1,504,245              | \$223,745                                       |
| 2010         | \$3,932,402                  | \$2,405,573**            | \$1,526,829                                     |
| 2011         | \$4,956,566                  | \$3,336,100**            | \$1,620,466                                     |
| 2012         | \$3,054,915                  | \$2,573,607**            | \$481,308                                       |
| 2013         | \$4,932,831                  | \$3,713,557**            | \$1,219,274                                     |
| 2014         | \$10,417,352                 | \$8,951,757**            | \$1,465,595                                     |
| 2015         | \$5,531,858                  | \$3,922,598**            | \$1,609,260                                     |
| 2016         | \$5,514,103                  | \$3,621,320**            | \$1,892,783                                     |
| 2017         | \$6,335,208                  | \$3,059,169**            | \$3,276,039                                     |
| 2018         | \$6,667,312                  | \$3,290,314**            | \$3,376,998                                     |
| 2019         | \$24,672,012                 | \$4,385,801              | \$20,286,211                                    |
| 2020         | \$17,297,962                 | \$3,514,388              | \$13,783,574                                    |
| <b>Total</b> | <b>\$96,316,072</b>          | <b>\$44,628,569</b>      | <b>\$51,687,503</b>                             |

\* FY2008 period is (3/1/2007 - 2/29/2008). The MOU was executed on 11/20/2007.

\*\* Includes FHWA Projects for Transportation Plaza Grant & Houston TranStar Expansion.

### Harris County’s External Audit of the DBE Program

FTA performs a grant compliance audit of Harris County’s FTA program every 3 years. In FY2015, FTA’s audit report had 1 issue related to the DBE Program which stated that 4 procurement files lacked the “Prompt Payment and Return of Retainage Clause.” The FY2018 audit report also included 1 issue related to the DBE program, which stated the established DBE Goal for the Federal FY 2016 and 2017 had not been reached and a detailed shortfall analysis was not performed. In both cases, FTA accepted Harris County’s corrective action plan. We were not able to obtain evidence that TXDOT had audited Harris County’s FHWA/TXDOT award compliance.

### DBE Procurement and Outreach

Per 49 CFR §26.1.e, the USDOT set an objective to promote the use of DBEs in all types of federally-assisted contracts and procurement activities conducted by recipients. The Purchasing Agent informed us that B2Gnow software has been purchased to help automate DBE procurement and outreach for projects Countywide. Harris County has not implemented the B2Gnow software to identify TUCP certified DBE vendors to support the 49 CFR §26 objectives. Although Harris County has not implemented B2Gnow, the state provides a website to locate DBE Firms. CSD Transit Services Management informed us that CSD has a system in place to identify TUCP certified DBE vendors. Transit Services provides the vendor information to the Purchasing Department for use in advertising and outreach for procurements.

### DBE Payment Requirements

Per 49 CFR §26.29, prime contractors are required to pay all subcontractors for satisfactory performance of their contracts and release retainage within 30 days. However, the more restrictive Texas Government

Code §2251.022 supersedes and decreased that payment timeframe to 10 days. The B2Gnow software should allow Harris County to track payments to DBE subcontractors to ensure compliance with the statutory requirements. CSD Transit Services Management informed us that CSD has a system in place to track payments to DBE prime and subcontractors.

## Objective #2: Perform DBE Utilization Analysis for FY2020 transportation grants.

### DBE Goal Requirements

USDOT-assisted projects must set an overall goal for DBE participation per 49 CFR §26.45, except in certain cases. Harris County’s DBE goals are based on the relative availability of TUCP DBEs for Harris County’s projects.

### FTA – Within DBE Liaison’s Scope

Harris County’s FTA goals are calculated based on CSD’s DBE Goal Update FY2018 – FY2020 Methodology. The DBE Liaison reported the following DBE utilization in its Semi-Annual Reports to the FTA:

| Federal Fiscal Year * | Total FTA Awards | Amount Paid to DBE Firms | DBE Utilization % | DBE Goal % |
|-----------------------|------------------|--------------------------|-------------------|------------|
| 2015                  | \$70,896         | \$29,454                 | 41.55%            | 4%         |
| 2016                  | \$98,433         | \$1,125                  | 1.14%             |            |
| 2017                  | \$1,715,666      | \$62,732                 | 3.66%             |            |
| 2018                  | \$1,584,984      | \$104,440                | 6.59%             | 6%         |
| 2019                  | \$24,176         | \$5,030                  | 20.81%            |            |
| 2020**                | \$7,340          | \$0                      | 0%                |            |

\* Reporting periods are for the Federal Government Fiscal Year (October 1st – September 30th).

\*\* At the time of fieldwork, only half of FY2020 was available for recap.

### FHWA Passed Through TXDOT – Outside DBE Liaison’s Scope

TXDOT provides the DBE goal for Harris County TXDOT projects, as the DBE utilization is credited to TXDOT overall DBE goal with FHWA. Harris County has 4 active TXDOT awarded projects. Management informed us that, until recently, TXDOT handled the award process of these funds for Harris County.

| Project Award – Harris County FY | TXDOT Project          | TXDOT DBE Goal % | Amount Paid to DBE Firms thru FY2020 |
|----------------------------------|------------------------|------------------|--------------------------------------|
| 2019                             | Fairmont Parkway       | 5%               | \$256,474                            |
| 2019                             | North Eldridge Parkway | 3%               | \$37,058                             |
| 2019                             | Cypress Drive          | 3%               | \$121,606                            |
| 2019                             | Spring Cypress Road    | 1%               | \$43,123                             |

Overall, Harris County spent \$17,297,962 in USDOT-assisted projects in FY2020, which was passed through from various agencies. The funds spent included contracts for goods and services as well as payroll and other fringe benefits. The table below breaks down the USDOT funding source, project contracts subject to DBE requirements, which are referred to as program eligible, and the amount of FY2020 funds

paid to DBE and Non-DBE firms. Program ineligible expenditures typically include employees' payroll and travel expenses.

| <b>Harris County Fiscal Year 2020</b> |                                     |                             |  |  |
|---------------------------------------|-------------------------------------|-----------------------------|--|--|
| <b>Type of USDOT Funding</b>          | <b>USDOT - Program Expenditures</b> | <b>DBE Program Eligible</b> | <b>Program Eligible Expenditures Paid to DBE Firms</b> | <b>Program Eligible Expenditures Paid to non-DBE Firms</b> |
| FTA Direct Funding                    | \$3,514,388                         | \$2,183,293*                | \$124,131  | \$2,059,162  |
| FHWA Passed Through TXDOT             | \$10,372,473                        | \$9,890,823*                | \$458,261  | \$9,432,562  |
| FHWA Passed Through HGAC              | \$2,348,097                         | 0*, **                      | 0**  | 0**  |
| NHTSA Funding Passed Through TXDOT    | \$1,063,004                         | \$48,690*                   | 0  | \$48,690   |
| <b>Totals</b>                         | <b>\$17,297,962</b>                 | <b>\$12,122,806*</b>        | <b>\$582,392</b>                                       | <b>\$11,540,414</b>  |

\* Excludes payroll and travel amounts paid to Harris County employees.

\*\* Grants passed through HGAC were for payroll only and did not include outside procurement.

| <u>Legend - Acronyms Used</u>                          |
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| FTA - Federal Transit Administration                   |
| FHWA - Federal Highway Administration                  |
| NHTSA - National Highway Traffic Safety Administration |
| TXDOT - Texas Department of Transportation             |
| HGAC - Houston Galveston Area Council                  |

### **Objective #3: Understand disaster declaration authority as it relates to procurement guidelines.**

During a state of emergency, state and federal regulations allow a local government to suspend the normal procurement processes to expedite goods and services to its residents. Texas Government Code Section 418.108 (a) states “the presiding officer of the governing body of a political subdivision may declare a local state of disaster.” The Harris County Judge has issued a Declaration of Local Disaster for recent events such as COVID-19, Tropical Storm Imelda, and Hurricane Harvey.

Pursuant to the Purchasing Agent’s *Procedures for Emergency Operations*, existing County contracts will cover most department needs during an emergency and should be utilized whenever possible. Additionally, Title 2 CFR 200.320(f) states, that Procurement by “non-competitive proposals is procurement through solicitation of a proposal from only one source and may be used when an urgent need or emergency for the requirement will not permit a delay resulting from competitive solicitation.”

It should be noted that federal granting agencies can require a disaster declaration from the Governor or the President for procurement requirements to be bypassed. For example, Section 5324 of Title 49, Chapter 53 states “that an emergency, for FTA purposes, is defined as a natural disaster affecting a wide area or a catastrophic failure from any external cause, as a result of which the declaration comes from the Governor of the State and the Secretary of Transportation has concurred; or the President has declared a major disaster under the Stafford Act”.

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## Recommendations

1. Commissioners Court should consider expanding the role and responsibility of the DBE Liaison to include the monitoring of all USDOT-assisted projects received by Harris County. In addition, the Court should determine the department to which the DBE Liaison should report.
2. Harris County should provide resources necessary to implement the B2Gnow software for the modules purchased: Contract Compliance, Outreach, and Event Management and connection to certified HUB, MWBE, and DBE directories as recommended in the Harris County Disparity Study performed. We acknowledge the Harris County Purchasing Agent has hired a consultant on July 20, 2020, to help advise and implement the system. The system should address Harris County's current gaps in DBE subcontractor payments and outreach efforts.
3. Commissioners Court should consider creating a centralized Grants Compliance department. This department should be responsible for monitoring Harris County's grants compliance and providing education to department grant recipients.