

**DEPARTMENT OF TRANSPORTATION
PROPOSED PERMANENT RULES RELATING TO STATE-AID OPERATIONS
STATEMENT OF NEED AND REASONABLENESS**

The Commissioner of Transportation presents facts showing the need for and reasonableness of the proposed rules governing Targeted Group Business Goals.

INTRODUCTION

The Commissioner of Transportation (Commissioner), under Minnesota Statutes, Section 161.321, proposes to adopt rules creating goal requirements for portions of state-aid funded highway construction contracts to be subcontracted to Targeted Group Businesses (TGBs). This action is being taken to provide greater opportunities for TGBs by extending the Department's TGB program for state funded construction contracts to the state-aid construction program. Minnesota Statutes, Section 161.321, subdivision 6, grants the Commissioner the authority to promulgate rules necessary to carry out this statute. Minnesota Statutes, Section 162.02, subdivision 2, and Minnesota Statutes, Section 162.09, subdivision 2 grant the Commissioner the authority to promulgate rules to govern the state-aid program.

The Commissioner recognizes that state and state-aid construction contracts provide many employment opportunities, and that the TGB program is crucial to maintaining a diverse and competitive work force for Minnesota's future. It is the goal of the Department, therefore, to maximize opportunities for targeted group small businesses on state and state-aid funded contracts, through the use of goals for subcontracting requirements. To extend the existing targeted group business program for state contracts to the state-aid program, it was necessary for rules to be promulgated.

The Commissioner directed the Division of State Aid to proceed with the promulgation of rules to establish TGB goal requirements for state-aid funded contracts. Notice of Solicitation of Outside Information and Opinion concerning the possible adoption of rules relating to TGB requirements was published in the State Register on Tuesday, July 6, 1993. Approximately 30 written and oral comments were received and taken to the State Aid Rules Committee for their consideration.

The State Aid Rules Committee was called to make a recommendation to the Commissioner, and met for the first time on August 5, 1993. The committee used the statutes, the existing Department TGB program, and Department of Administration rules as a guide in establishing rules for the state-aid TGB requirements. The committee met two additional times, and on September 20, 1993, recommended a draft of proposed rules to the Commissioner.

The Department believes that the proposed rules provide the maximum opportunity for targeted group businesses to participate in state-aid funded construction contracts by giving TGBs access to the construction contracts with good opportunity for TGB participation, while at the same time not placing an unacceptable administrative burden upon local agencies because contracts which provide little opportunity have been exempted. The adoption of these rules will help to promote a diverse and competitive workforce, and provides equal access to state-aid funded employment opportunities.

SMALL BUSINESS CONSIDERATIONS

In proposing these rules, the Commissioner has considered the provisions of Minnesota Statutes, section 14.115, relating to the impact of the proposed rules on small business.

The purpose of these rules is to require portions of construction work to be subcontracted to TGBs, as defined in Minnesota Statutes, section 161.321, subdivision 1(d), to assist them in gaining access to state-aid funded contracts. It is estimated that 4%-6% of the state-aid construction dollars may be secured by targeted group businesses. These rules will provide greater opportunities for small businesses that are TGBs.

Small businesses that receive state-aid contracts as a prime contractor may be subject to additional reporting and to the goal requirements as a result of the adoption of these rules. However, the commissioner's main objective in this rulemaking proceeding is to establish only those requirements directly mandated or permitted by Minnesota Statutes, section 161.321, or those necessary to implement, administer, or enforce that section.

The Department solicited comments from the public, TGBs, City and County Engineers, and the Association of General Contractors to insure that these rules did not impose undue or unnecessary burdens upon small businesses. Based upon comments received, these rules have been limited to apply only to those contracts that exceed \$300,000 in state or state-aid funds. This limitation will diminish the potential for impact to small businesses, because contracts of less than \$300,000 will be exempt.

The Department maintains a listing of parties interested in Department rulemaking proceedings, and will notify those parties as well as the parties listed previously concerning the adoption of these rules.

EXPENDITURE OF PUBLIC MONEY BY LOCAL PUBLIC BODIES

The adoption of these proposed rules will require an additional expenditure of approximately \$325,000 per year by the state and local agencies. This \$325,000 will be incurred through direct increases in construction bid prices, and through administrative overhead costs of the local agencies and the Department for

additional time and staff to process TGB contract documents. Construction costs and local overhead costs will be born by the state-aid account or local funds. Department overhead costs will be reimbursed from the State Aid administrative account, indirectly reducing the construction funds available to local agencies. The \$325,000 of additional expenditures will be shared by the 203 local agencies receiving state-aid, averaging \$1600 per year per agency, for every year the rules are in effect.

PART BY PART STATEMENT OF NEED AND REASONABLENESS

8820.2950, Subpart 1. SCOPE.

The purpose of this subpart is to define the scope of the rules. This subpart is needed to define the types of state funded or state assisted contracts to which the TGB rules will apply.

This subpart limits the scope of the rules to projects with \$300,000 or more of state and state-aid funds. This subpart is reasonable because Department experience has indicated that contracts less than \$300,000 provide little opportunity for participation by TGBs, and that there is sufficient work available in contracts over \$300,000 to fulfill the intent of the TGB program. There would be no additional benefit to TGBs if projects under \$300,000 were required to be included because TGBs are already fully employed with work from the larger contracts. By exempting projects of less than \$300,000 from the requirements in these rules, unnecessary administrative (i.e. time/staff) and financial burdens for cities and counties as well as the Department are avoided.

Subpart 2. DEFINITIONS

These definitions are needed so that the public can adequately understand and interpret these rules. These definitions are critical components of measuring compliance with these rules.

- A. Award. This definition is needed because portions of these rules apply to activities that occur prior to award, and other portions apply to activities that take place after the award, and so it is necessary to identify the event that is the award. This definition is reasonable because it is the same definition used in the governing legislation, Minnesota Statutes, section 161.321, subdivision 1(a).
- B. Commissioner's Designee. This definition identifies the Commissioner's designee. This definition is needed in order to differentiate this individual, who is responsible for administering the TGB program, from designees for other purposes. This definition is reasonable because it is in

words normally understood by an average person, and aids the public in complying with these rules.

- C. Contract. This definition is needed in order to describe which contracts these rules apply to. This definition is reasonable because it is the same definition used in the governing legislation, Minnesota Statutes, section 161.321, subdivision 1(b). This definition was modified to expressly state that state-aid funded contracts are included. This modification is necessary to clarify that these rules will apply to state-aid funded projects. This modification is reasonable because the definition in statute does not mention "state-aid funds" in particular, and this modification will avoid confusion.
- D. Contracting Authority. This definition identifies who the contracting authority is. The rules require contractors to submit waiver requests to the contracting authority, and so this definition is needed in order to avoid misdirected requests. This definition is reasonable because contractors are accustomed to submitting documentation to the contracting authority as defined, and so it will aid contractors in complying with these rules.
- E. Contractor. This definition clarifies who is considered a contractor for purposes of these rules. This definition is needed so that the Department of Administration and this Department will interpret this term uniformly. This definition is reasonable because it is commonly used by this Department and the Department of Administration in the administration of existing targeted group business programs, and so aids the public in complying with these rules.
- F. Goal. This definition clarifies what a goal is. This definition is needed because TGB goals are a critical component of measuring compliance with these rules. This definition is reasonable because it is the same as the definition used in the Department's own TGB program, and because it clearly identifies that goals are a percentage of the state or state-aid funds only, which is the limit of the Department's statutory authority. Use of the same definition aids the public in understanding any complying with these rules.
- G. Prime Contractor. This definition identifies the contractor to whom the contract is awarded. This definition is needed to distinguish the prime contractor from subcontractors, and because the TGB goals apply only to the prime contractor. This definition is reasonable because it is the same as the definition used in the Department's own TGB program, and so aids the public in complying with these rules.
- H. Subcontractor. This definition identifies the contractors who perform work covered by a contract for the prime contractor. Subcontractor's need to be identified because these rules required subcontracting a percentage of the contract value to subcontractors who are TGBs. This definition is reasonable because it is the same definition used in the governing

legislation, Minnesota Statutes, section 161.321, subdivision 1(c).

- I. Targeted Group Business. This definition is needed because these rules require portions of contracts to be subcontracted to contractors who are targeted group businesses. This definition is reasonable because it is the same definition used in the governing legislation, Minnesota Statutes, section 161.321, subdivision 1(d).

Subpart 3. TARGETED GROUP BUSINESS GOALS.

Item A

This item requires the county or city engineer to establish TGB goals, in consultation with the Department (the Commissioner's designee). This item also describes the criteria that will be used to establish the TGB goals. In addition, this item allows TGB participation on any pay item of the contract, whether that pay item is state funded or not, and limits credit to 60% of the value for subcontractors that provide materials only. This item also requires TGB specifications to be those supplied by the Department.

This item is needed to describe the process by which targeted group business participation goals will be established and administered.

Requiring the county or city engineer to establish the TGB goals in consultation with the Commissioner's designee is reasonable because such a requirement capitalizes on the local engineer's knowledge of the project and the Department's knowledge of the availability of TGBs. Thus, such a requirement promotes efficiency and results in maximum opportunities for TGBs. For only one or the other of these two parties to set the goal would lead to decisions being made without complete knowledge of all pertinent information.

It is reasonable to compute the percentage for TGB participation on the state-aid and state funded portion of the contract only, because the Commissioner does not have the statutory authority to establish TGB requirements for locally funded projects. Thus, goal requirements are limited to the state or state-aid funded portion of the contract, and local funds are excluded.

TGB participation on any portion of the contract is necessary because single pay items are frequently funded by a combination of local and state-aid funds. Therefore, it is administratively impractical to attempt to limit TGB participation to only the state-aid funded portions of pay items. TGB participation on any portion of the contract is reasonable because it provides greater opportunity for participation by TGBs in the workforce, which is consistent with the overall purpose of the rules. By not limiting the available work to that which was state funded, employment opportunities for TGBs are enhanced and a diverse and competitive

workforce maintained. Allowing participation on any portion of the contract also eliminates the contract administration problems associated with tracking which pay items or portions of pay items are state-aid or state funded.

Limiting credit toward the TGB goal to 60% for subcontractors who provide materials only is reasonable, because contract pay items are typically used for furnishing and installing the item. This 60% limitation is consistent with established Department practices for TGBs and rules of the Department of Administration. Not limiting the credit toward meeting the goal would allow 100% credit toward work which may not actually have been performed by a TGB. This would be contrary to the intent of these rules, and would cause confusion in the administration of the program.

Requiring TGB specifications to be those required by the Department is reasonable because such a requirement avoids confusion among contractors and TGBs who might bid on these projects, because all specifications statewide will be the same. Thus this requirement promotes effective administration of the TGB program. This requirement also eliminates the need for each agency to develop their own specifications which would be inefficient and unnecessary.

Item B

This item establishes a waiver procedure in the event that there are not sufficient TGBs available to accomplish the amount of work that is required by the goal. This item is required by Minnesota Statutes, Section 161.321, subdivision 2(c), and is needed so that projects may proceed if there is a shortage of TGBs. This item is reasonable because a shortage of TGBs indicates that TGBs have had sufficient opportunity to secure state or state-aid contracts, and that further goal requirements would be unnecessary.

Item C

This item gives final decision making authority for determination of the contract goal and for granting waivers from the TGB requirements to the State Aid Engineer. This section is needed to preserve the Department's control over the TGB program and to provide an arbitrator in the event that the required agreement cannot be reached. It is reasonable that the Department should have final decision making authority in determining TGB goals and granting waivers, because under Minnesota Statutes, Section 161.3211, the Commissioner of Transportation is responsible to the Commissioner of Administration for the Department of Transportation's compliance with Minnesota Statutes, Section 161.321 and the rules implementing the TGB program. Furthermore, it is reasonable to provide a neutral third party to resolve disputes who is accountable to the Department, but who is also aware of the local agency's perspective. The State Aid Engineer is

the only individual who can fill both of these roles, and so it is reasonable that the State Aid Engineer should resolve disputed decisions.

Item D

This item limits the amount of a subcontract that a TGB can in turn subcontract. This item is needed to insure that a TGB actually performs the work that it has bid on, and is required by Minnesota Statutes, Section 161.321, subdivision 3. This item also allows TGBs to subcontract up to 50% of any trucking. This provision is needed because trucking is an unpredictable portion of the work required for most specialties (the need for trucks varies depending upon time available to complete the work). These circumstances are not always apparent at the time the bid is awarded, and may result in an otherwise qualified TGB subcontractor losing a subcontract. This trucking provision is reasonable because it provides greater employment opportunities for TGBs who do not have the resources to maintain truck fleets large enough to handle peak workload situations. Thus this section enhances employment opportunities for TGBs and is consistent with the overall purpose of the rules.

Subpart 4. LOCAL PROGRAM CERTIFICATION

This subpart allows local agencies to assume all the responsibilities of the Department in the administration of the TGB program within their own jurisdiction, if they so desire. This subpart describes the process to be used by a local agency when requesting permission to administer its own minority-owned business assistance program and the procedure that will be used to periodically review any authority granted. This subpart also gives the Department the authority to revoke the authority granted.

This subpart is needed because a number of the larger local agencies already operate successful local minority-owned business assistance programs that would make the Department's targeted group business program a redundant effort. It is necessary that the Department have the ability to revoke certification because under Minnesota Statutes, Section 161.3211, the Commissioner is responsible to the Commissioner of Administration for the Department's compliance with Minnesota Statutes, Section 161.321 and the rules implementing the TGB program.

This subpart is reasonable because it allows local agencies to continue to operate their own local programs, provided that they comply with the Commissioner's program policy, and thus promotes governmental efficiency and compliance with the requirements set forth in these rules. It is reasonable that the Commissioner's designee should have the authority to revoke local program certification, so that in the event that a local agency does not

adhere to the Commissioner's policy for the State Aid Targeted Group Business Program, the local program can be placed under Department direction.

WITNESSES AND SUMMARY OF TESTIMONY

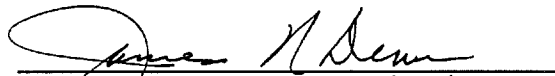
If a hearing is required, the Department will introduce its Statement of Need and Reasonableness as an exhibit into the record in accordance with Minnesota Rules, part 1400.0500, subpart 3. The following Department personnel will be available at the hearing, if one is required, for questioning by the Administrative Law Judge and other interested persons, or to briefly summarize all or a portion of the Statement of Need and Reasonableness if requested by the Administrative Law Judge.

1. Dennis C. Carlson. Mr. Carlson is the Director for the Department's Division of State Aid for Local Transportation (State Aid Engineer), and the chairperson of the State Aid Rules Committee.
2. Julie Skallman. Ms. Skallman is the Assistant State Aid Engineer and served with the State Aid Rules Committee that developed these rules.
3. Carl Fransen or Ernest Lloyd. Mr. Fransen and Mr. Lloyd represent the Departments Equal Employment Opportunity Office. Together with their staff they administer the Departments existing TGB program, and would be the Commissioner's designee.
4. Mark Gieseke. Mr. Gieseke is the State Aid Plans Engineer and has been responsible for drafting the rules and rulemaking documents, and also served with the State Aid Rules Committee.

CONCLUSION

Based on the above part-by part justification, the rules are needed to establish a Targeted Group Business program that will result in a diverse and competitive workforce for the State of Minnesota. The Department's proposed rules are a reasonable means of attaining a diverse workforce while minimizing the impacts to local agencies. Only those provisions necessary to achieve the objectives of Minnesota Statutes, Section 161.321, or those that are required to effectively implement, administer, and enforce that section have been included in these rules.

DATE: 12-6-93


James N. Denn, Commissioner
Department of Transportation