

**NOTICE OF DECISION ON APPEAL
OF ADOPTED RULE (Rule: R161-17.14)**

POSTING DATE: OCTOBER 19, 2018

In accordance with Austin City Code Section 1-2-15, the City Manager issues this Notice of Decision of Appeal of Adopted Rule ("Notice of Decision") deciding the appeal of the rule amending the City of Austin's Minority-Owned and Women-Owned Business Enterprise Procurement Program Rules (Rule No. R161-17.14, the "Rule"). The appeal was timely filed by the U.S. Hispanic Contractors Association ("USHCA").

BRIEF EXPLANATION OF THE RULE

**OCC RECEIVED AT
OCT 19 '18 PM 12:56**

The Rule adopted amendments to portions of Section 9 (Pre-Award Compliance) of the City's Minority-Owned and Women-Owned Business Enterprise Procurement Program Rules related to the procedures for Good Faith Efforts (GFE) for particular construction contracts. The Rule set forth the City's option to perform the initial notification of a bid opportunity for projects specified in the Rule. The Rule also amended references to the "Department of Small & Minority Business Resources (DSMBR)" to "Small & Minority Business Resources (SMBR)."

EFFECTIVE DATE OF THE RULE

The Rule was adopted on August 20, 2018. In accordance with Austin City Code Section 1-2-12, the appeal suspended the effective date of the Rule pending a decision on the appeal. The effective date of the Rule is now established by this Notice of Decision as October 19, 2018.

AUTHORITY FOR ADOPTION OF THE RULE

The authority and procedure for adoption of a rule to assist in the implementation, administration, or enforcement of a provision of the City Code is provided in City Code Chapter 1-2. The authority to establish procedures for the City's MBE/WBE Procurement Program is established in City Code Sections 2-9A-6, 2-9B-6, 2-9C-6, and 2-9D-6 (Adoption of Rules).

DECISION ON APPEAL

In accordance with City Code Section 1-2-13, the City Manager timely affirms the Rule as adopted with no amendments.

JUSTIFICATION

After careful review of the issues raised on appeal and as authorized by City Code, the City Manager, determines that the changes adopted by the Rule are justified and appropriate based on the reasons cited below and in the attached memorandum and exhibits dated October 2, 2018, and there should be no amendments to the Rule. USHCA presented six issues on appeal. SMBR responded to those issues. The issues and responses are summarized, below:

1. *The request for this administrative change was made on behalf of Prime Contractors not local, small, minority and women-owned businesses.*

SMBR's response: Concerns about GFE notification requirements have been raised by prime contractors and subcontractors, alike. Some subcontractors assert that the GFE notification process is ineffective, as some prime firms simply go through the motions to meet the requirements but then utilize subcontractors with whom they already have long-standing relationships. Subcontractors also expressed frustration about receiving too many notifications from too many different companies or not receiving any notification from the apparent successful bidder/proposer.

The adoption of the proposed rule will lessen the administrative burden on subcontractors and prime contractors, for those identified projects.

2. *The administrative changes were not clearly articulated and presented to the local, small, MBE/WBE stakeholders. There are different interpretations of the administrative changes and the implications of the administrative changes.*

SMBR's response: On November 6, 2017, City staff, HDR Engineering (the Corridor Consultant) and HEW (the MBE/WBE Outreach subconsultant) met with the stakeholders representing the U.S. Hispanic Contractors de Austin, Austin Area Black Contractors, Asian Contractors Association, Greater Austin Black Chamber of Commerce, Greater Austin Asian Chamber of Commerce, Greater Hispanic Chamber of Commerce, Associated General Contractors of Texas and the Associated General Contractors of Austin to present the final draft of the MBE/WBE Outreach Plan, specifically outlining the eight issues that were identified and the actions items that would help address each issue. The changes to the GFE process in the Rule are part of Issue #2 of the Outreach Plan.

3. *The administrative changes were not presented or approved by the Austin City Council appointed MBE/WBE Small Business Advisory Committee.*

SMBR's response: Pursuant to City Code, Administrative Rules do not require approval of the Austin City Council or the MBE/WBE Small Business Enterprise Procurement Program Advisory Committee. However, on March 6, 2018, the MBE/WBE Outreach Plan was presented to the MBE/WBE Small Business Enterprise Procurement Program Advisory Committee. SMBR and the Corridor Program Office also presented an overview of the MBE/WBE Outreach Plan at the March 20, 2018 City Council Work Session.

4. *The MBE/WBE Program is a goal oriented program based upon GFE. GFE is measured and determined by the outreach components. Current and past Disparity Studies speak to the City's role as a passive participant in discrimination in which contracts are awarded. These Disparity Studies include quantitative, qualitative and anecdotal data supporting these findings.*

SMBR Response: The 2016 Disparity Study provided recommendations on several areas for the enhancement of the current MBE/WBE Procurement Program. One finding stated, "There is a uniform perception that the documentation of the Good

Faith Efforts process is too often pro forma ... The mechanical sending out of notices for non-existent opportunities, often to firms that do not do the solicited line of business, for the sole sake of creating a record, needs to be addressed..." Source: 2016 Disparity Study, page 381.

This pilot program provides efficiencies for subcontractors. The remaining steps in the GFE process will still be performed by the prime firms and they will still need to demonstrate real and substantive efforts.

5. *We believe these administrative changes create both a conflict of interest for the City and liability.*

SMBR's response: During the rule amendment process, the proposed amendments and the GFE Pilot Program were reviewed by the Law Department. No conflicts of interest or liability for the City were identified.

6. *This Administrative Appeal process creates an unfair burden on local, small, minority, and women-owned businesses/organizations subjecting them to a meticulous and formal bureaucratic process and standard.*

SMBR's response: The administrative appeal process applies to all individuals and entities that appeal a City of Austin Administrative Rule, not just minority- and women-owned businesses.

The entire SMBR response, with all attachments, is attached to this decision, and incorporated as part of this justification to affirm the adopted rule.


TEXT OF RULE

A copy of the complete text of the Rule as affirmed by this decision is available for public inspection and copying at the following locations and on the City's website at <http://austintexas.gov/departments/small-and-minority-business>. Copies may be purchased at a cost of 10 cents per page:

SMBR
4201 Ed Bluestein Blvd.
Austin, Texas 78721; and

Office of the City Clerk
City Hall
301 West 2nd Street
Austin, Texas 78701

REVIEWED AND APPROVED

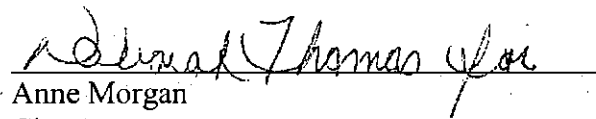


Spencer Cronk
City Manager

Date: October 19, 2018

CERTIFICATION BY CITY ATTORNEY

By signing this Notice of Decision on Appeal of an Adopted Rule (**Rule: R161-17.14**), the City Attorney certifies that the City Attorney has reviewed the decision on appeal and finds that decision on appeal is a valid exercise of the City Manager's authority.




Anne Morgan
City Attorney

Date: October 19, 2018



TO: Spencer Cronk, City Manager, City Manager's Office

FROM: Veronica Briseño, Director, Small & Minority Business Resources Department 

DATE: October 2, 2018

SUBJECT: Appeal from U.S. Hispanic Contractors Association to R161-17-14 – Proposed Revision to Section 9 Pre-Award Compliance – Good Faith Effort (GFE) Pilot Program

This memo serves to respond to the Appeal presented to the City Manager for the Proposed Revision to Section 9 Pre-Award Compliance – Good Faith Effort Pilot Program Rules.

City Council committed to maximizing the participation of small, minority and women-owned firms in the award of design and construction projects in support of the 2016 Corridor Program and Mobility Bond projects. With this commitment, staff from the Small & Minority Business Resources Department (SM BR), Corridor Program Office, Transportation Department and Capital Contracting Office worked closely with the Mobility Program consultant, HDR Engineering, Inc. and HDR's subconsultant, Haynes-Eaglin-Waters, LLC (HEW), in the development of the Corridor Mobility Program MBE/WBE Outreach Plan.

SMBR is currently in the process of fully implementing each action item outlined in the MBE/WBE Outreach Plan. One of the items SMBR is implementing is the GFE Pilot Program which was an initiative proposed by City staff in response to comments received by our stakeholders regarding the current GFE process. The proposed GFE pilot program initiative is allowed in the current MBE/WBE Procurement Program Ordinance. Specifically, Section 2-9A-21 (E)(1) Pre-Award Compliance Procedures, states the following:

For some Contracts, based on criteria to be determined by SMBR in consultation with the user Department and set forth by rule pursuant to Section 2-9A 6 (Adoption of Rules), SMBR shall make the initial contact with MBEs, WBEs and DBEs, as the case may be, in which case a Bidder/Proposer's efforts under this Subsection (E) (1) shall not be considered.

Notice of the proposed rule was posted on June 14, 2018. Public comment on the proposed rule was solicited in the June 14, 2018 notice. SMBR received four comments from the following: Austin Black Contractor's Association, Asian Contractors Association, Capital Contracting Office and Austin Energy. None of the comments received were against the proposed rule. SMBR adopted the rule effective August 20, 2018.

The U.S. Hispanic Contractor's Association (USHCA) filed the notice of Appeal on September 19, 2018. Below is each assertion stated in the USHCA's appeal, followed by SMBR's response.

"1) The request for this administrative change was made on behalf of Prime Contractors not local, small, minority and women-owned businesses."

SMBR's response:

Concerns about GFE notification requirements have been raised by community stakeholders, firms who respond as primes as well as those who respond as subcontractors. Some primes described the notification system as extremely onerous requiring the allocation of dedicated personnel and resources to manage the process and expressed frustration with the availability list in regards to certified vendor contact information or commodity codes.

Some subcontractors/subconsultants view the GFE notification process as ineffective indicating that some prime firms simply go through the motions to meet the requirements noting that these primes typically utilize subs. with whom they already have long-standing relationships. Subcontractors also expressed frustration about receiving too many notifications from too many different companies or not receiving any notification from the apparent successful bidder/proposer.

The adoption of the proposed rule will lessen the administrative burden on subcontractors and prime contractors.

"2) The administrative changes were not clearly articulated and presented to the local, small, MBE/WBE stakeholders. There are different interpretations of the administrative changes and the implications of the administrative changes."

SMBR's response:

On November 6, 2017 staff from SMBR, Corridor Program Office, Transportation Department, and Capital Contracting Office as well as HDR Engineering (the Corridor Consultant) and HEW (MBE/WBE Outreach subconsultant) met with the stakeholders representing the U.S. Hispanic Contractors de Austin, Austin Area Black Contractors, Asian Contractors Association, Greater Austin Black Chamber of Commerce, Greater Austin Asian Chamber of Commerce, Greater Hispanic Chamber of Commerce, Associated General Contractors of Texas and the Associated General Contractors of Austin to present the final draft of the MBE/WBE Outreach Plan, specifically outlining the eight issues that were identified and the actions items that would help address each issue. Attached are the minutes and sign-in sheets to that stakeholder meeting.

"3) The administrative changes were not presented or approved by the Austin City Council appointed MBE/WBE Small Business Advisory Committee."

SMBR's response:

The changes to SMBR's departmental Administrative Rules do not require approval of the Austin City Council or the MBE/WBE Small Business Advisory Committee. However, SMBR has continuously communicated with them on proposed changes.

On March 6, 2018, the MBE/WBE Outreach Plan was presented to the MBE/WBE Small Business Enterprise Procurement Program Advisory Committee. Veronica Briseño, Director and Cloteal Davis Haynes from HEW presented and addressed questions from the committee. Attached is the agenda and meeting minutes.

In addition, staff from SMBR and the Corridor Program Office presented an overview of the MBE/WBE Outreach Plan at the March 20, 2018 City Council Work Session. This presentation was part of the overall Proposed Corridor Construction Program.

"4) The MBE/WBE Program is a goal oriented program based upon provide Good Faith Efforts. The Good Faith Efforts are measured and determined by the outreach components. Current and passed Disparity Studies speak to the City's role as a passive participant in discrimination in which contractors are awarded. These Disparity Studies include quantitative, qualitative and anecdote data supporting these findings."

The 2016 Disparity Study provided recommendations on several areas for the enhancement of the current MBE/WBE Procurement Program. One of the areas stemmed from the anecdotal evidence described in the study regarding the current good faith effort process.

Specifically, the study noted that, *"There is a uniform perception that the documentation of the Good Faith Efforts process is too often pro forma rather than a consistently substantive effort to reach and solicit M/WBE firms. An often legalistic and compliance driven approach to M/WBE solicitation and inclusion is impacting the overall efficacy of the program. For example, non-minority firms will solicit firms for scopes of work already committed to an M/WBE firm. The mechanical sending out of notices for non-existent opportunities, often to firms that do not do the solicited line of business, for the sole sake of creating a record, needs to be addressed. Clearly, the goals should be administered in a flexible manner and that goals never operate as quotas, but the good faith efforts process should be real and substantive."* Source: 2016 Disparity Study, page 381.

The basis of the implementation of this pilot program is to try and address the areas of efficiency and "pro-forma" good faith efforts. This pilot program may provide efficiencies for not only prime firms, but for subcontractors, and for City staff. The remaining eight steps in the good faith effort process will be performed by the prime firm and should demonstrate real and substantive efforts.

"5) We believe these administrative changes creates both a conflict of interest for the City and liability."

SMBR's response:

Prior to the publication of the Notice of the Proposed Rules, the proposed rules as well as the GFE Pilot Program were reviewed by the Law Department. No conflict of interest or liability for the City were identified.

"6) This Administrative Appeal process creates an unfair burden on local, small, minority, and women-owned businesses/organizations subjecting them to a meticulous and formal bureaucratic process and standard."

SMBR's response:

The administrative appeal process is standard for all City departments that require administrative rules to govern a program or process.

If you have any questions related to our response to this appeal, please contact me at 512.974-2156. Thank you.

Cc: Ray Baray, Chief of Staff, CMO
Mike Trimble, Director, Corridor Program Office
Rolando Fernandez, Officer, Capital Contracting Office
Cindy Crosby, Division Chief, Law Department
Edward Campos, Assistant Director, SMBR

Attachments

WHEN

Monday, November 6, 2017- 11AM-1PM

WHERE

George Washington Carver Library- 1161 Angelina St, Austin, TX 78702

WHAT

MBE/WBE Corridor Stakeholder Luncheon

NOTES

Attendance: Veronica Briseño, Edward Campos, Tamela Saldaña, Elton Price, Blender Hill, Cassidy Villegan, Ahide Garcia (SMBR/COA)

Mike Trimble, Susan Daniels, Sara Behunek, Rolando Fernandez, Cynthia Gonzalez, Jorge Riveros (Corridor Program + Contracting Office/COA)

Mark Borenstein, Bob Leahey, Cloteal D. Haynes, Arika Haynes (HDR + HEW)

Joshua Washington (Greater Austin Black Chamber of Commerce), Carol Hadnot and Reginald Worlds (Austin Area Black Contractors Association), Marina Bhargava and Jean Zou (Greater Austin Asian Chamber of Commerce), Aletta Sung (Asian Contractors Association), Juan Oyervides (US Hispanic Contractors Association de Austin), Mary Lou Lugo and Chris Rios (Greater Hispanic Chamber of Commerce), Kristen Ogden Smith (AGC of Texas), Phil Thoden (AGC of Austin),

PURPOSE OF MEETING + INTRODUCTIONS - VERONICA BRISEÑO

- Veronica Briseño opened the meeting with the purpose of the meeting- to share the Issues and Actions of the MBE/WBE Plan for the Corridor Program
- Introductions were made on behalf of the team along with self-introductions of the Stakeholder representatives

OVERVIEW OF CORRIDOR PROGRAM - MIKE TRIMBLE

- Reviewed Local, Mobility and Corridor "buckets" of Mobility Bond and the types of work that will take place with each
- Reviewed the timeframe of the Corridor Project
 - Planning and Prioritization- year 1
 - Implementation- years 2-8
- Emphasized the importance of MBE/WBE participation and commitment from the City for a successful program

ISSUES AND ACTIONS- VERONICA BRISEÑO + CLOTEAL DAVIS HAYNES

- Outlined the eight (8) Issues and Actions included in the MBE/WBE Outreach Plan

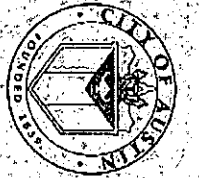
UPCOMING OUTREACH EVENTS- BOB LEAHEY

- Discussed the Industry Input event on Wednesday, December 6th
- Cloteal mentioned a larger Corridor Informational & Networking event will be around March 2018 to discuss typical Design Disciplines, Construction scopes of work, Schedule and other pertinent information.

Q&A

- Carol Hadnot (ABCA)- Suggested that a Prime Contractor helping subs with securing bonding be accepted as Good Faith Efforts
 - Veronica: pointed out that this suggestion could be considered but would require amending the Ordinance
- Carol Hadnot (ABCA)- Emphasized the importance of breaking large bid packages into smaller packages to encourage MWBE participation
- Aletta Sung (ACTA) - Expressed concerns that firms are overwhelmed by the volume of email solicitations and that SMBR assuming this responsibility for Corridor projects would add to problem and that emails may be overlooked.
 - Cloteal: Emphasized requesting assistance from Trade Associations to disseminate solicitation notices to their members and follow up with them would be helpful to ensure that members are aware of Corridor opportunities.
 - Veronica and Cloteal: Clarified that the Trade Associations and Chambers will received notifications as well as the certified firms so they are aware of information and bid notifications upon release
 - Veronica: SMBR could create a special mailbox that Corridor bid notifications & information could come from to differentiate from other notifications
- Juan Oyervides (Hispanic Contractors) - Inquired if the only difference in "Rapid Certification" was the condensed time or if anything else would change.
 - Elton: Clarified that added staff will help with processing certifications at a faster pace, but qualifications and requirements, i.e. appropriate documentation, a complete packet, etc. will remain
- Carol Hadnot(ABCA)- Inquired about site audits for certification in regards to firms that want to expand their Scopes to those required for the Corridor program
 - Elton: As long as similar work experience and access to tools and equipment can be demonstrated, it should not be a problem.
- Kristen Ogden Smith (AGC-Texas)- Suggestion- Distribute a list of names, contact info, and company prior to outreach events so that guests are aware of attendees prior to the event
- Juan Oyervides (Hispanic Contractors): Shared information about a December 7th event that Frost Bank is hosting to provide bonding assistance; invited members of the Corridor team to attend. He also requested an electronic version of the power point presentation.
- Cloteal: Responded that an electronic version of the presentation would be emailed to all Stakeholders and that the final Outreach Plan will be available to distribute in several weeks.

**QUESTIN
MOTION**
2016 MOBILITY BOND



SIGN IN SHEET

WHEN

Monday, November 6, 2017 - 11AM-1PM

WHERE

George Washington Carver Library, 1161 Angelina St, Austin, TX 78702

WHAT

Corridor MBE/WBE Stakeholders Luncheon

NAME	ORGANIZATION/AGENCY	INITIAL
Tam Hawkins	Greater Austin Black Chamber of Commerce	
Joshua Washington	Greater Austin Black Chamber of Commerce	
Carol Hadnot	Austin Area Black Contractors Association	
Reginald Worlds	Austin Area Black Contractors Association	
Marina Bhargava	Greater Austin Asian Chamber of Commerce	
Diana Nguyen	Greater Austin Asian Chamber of Commerce	
Aletta Sung	Asian Contractors Association	
Ravi Pare	Asian Contractors Association	
Frank Fuentes	US Hispanic Contractors Association de Austin	
Juan Oyervides	US Hispanic Contractors Association de Austin	

[Handwritten signatures and initials in the table rows]

Austin MOTION



SIGN IN SHEET

NAME	ORGANIZATION/AGENCY	INITIAL
Luis Rodriguez	Greater Hispanic Chamber of Commerce	CR
Chris Rios	Greater Hispanic Chamber of Commerce	CR
Mary Lou Lugo	Greater Hispanic Chamber of Commerce	MLL
Kristen Ogden Smith	AGC of Texas	KOS
	AGC of Texas	
Phil Thoden	AGC of Austin	PT
Tracey Evers	Associated Builders and Contractors	
	Associated Builders and Contractors	
Veronica Briseño	SMBR/COA	VB
Edward Campos	SMBR/COA	EC
Tamela Saldaña	SMBR/COA	TS
Cassidy Villegan	SMBR/COA	CV
Ahide Garcia	SMBR/COA	AG
Elton Price	SMBR/COA	EP
Blender Hill	SMBR/COA	BH

**Austin
MOTION**



SIGN IN SHEET

Mike Trimble	Corridor Program Office/COA	<i>WBT</i>
Susan Daniels	Corridor Program Office/COA	<i>SA</i>
Sara Behunek	Corridor Program Office/COA	<i>SH</i>
Jorge Riveros	ATD/COA	<i>JR</i>
Rolando Fernandez	CCO/COA	<i>RC</i>
Cynthia Gonzalez	CCO/COA	<i>CG</i>
Mark Borenstein	HDR	<i>MBS</i>
Bob Leahy	HDR	<i>RL</i>
Cloreal D. Haynes	HEW	<i>CDH</i>
Arika Haynes	HEW	<i>AH</i>
Jessica Engelhardt	Rifeline	<i>JE</i>



**MBE/WBE and Small Business Enterprise
Procurement Program Advisory Committee**

Tuesday, March 6, 2018 5:30 PM

City Hall, Boards & Commissions Room, 301 W. 2ND Street, Austin Texas

AGENDA

CALL TO ORDER

1. APPROVAL OF MINUTES

2. CITIZEN COMMUNICATION: GENERAL

The first 10 speakers signed up prior to the meeting being called to order will each be allowed a three-minute allotment to address their concerns regarding items not posted on the agenda.

3. NEW BUSINESS

For discussion and possible action on recommendations to City Council (City Code § 2-1-163(B)) regarding the following:

- a. Update from Constructive Ventures, Aspen Heights & CIM Group and representatives of Balfour Beatty on 2nd tier subcontracts related to The Independent at 3rd & West/Austin Energy Block 24
- b. 2016 Mobility Bond Program Update
- c. 2016 Corridor Mobility Bond Program MBE/WBE Outreach Plan
- d. Review and approval of the 2018 committee meeting schedule

4. OLD BUSINESS

For discussion and possible action on recommendations to City Council (City Code § 2-1-163(B)) regarding the following:

- a. Update from the Purchasing Office on purchasing policies and processes.
- b. Update on the proposed revisions to the Minority-Owned, Women-Owned (MBE/WBE) and Small Business Enterprise Procurement Program ordinances based on the City's Disparity Study
- c. Monthly update on the 1) Council Awards; 2) Third Party Project; and 3) Request for Change (RFC) reports

5. FUTURE AGENDA ITEMS

- a. MBE/WBE Small Business Enterprise Procurement Program Advisory Committee Officer Elections – April 2018
- b. Update from the Corridor Program Office on prior transportation bonds and their relation/integration to the 2016 Mobility Bond Program – Spring 2018

ADJOURNMENT

The City of Austin is committed to compliance with the American with Disabilities Act. Reasonable modifications and equal access to communications will be provided upon request. Meeting locations are planned with wheelchair access. If requiring Sign Language Interpreters or alternative formats, please give notice at least 2 days (48 hours) before the meeting date. Please call Angela Hill at SMBR, at (512) 974-7639 for additional information; TTY users route through Relay Texas at 711. For more information on the MBE/WBE and Small Business Procurement Program Advisory Committee, please contact Angela Hill at (512) 974-7639.



The MBE/WBE and Small Business Enterprise Procurement Program Advisory Committee convened in a regular meeting on Tuesday, March 6, 2018 at 301 W. 2nd Street, in the City Council Chambers, in Austin Texas.

Board Members in Attendance:

Eliza May, Reginald Worlds, Barbra Boeta, Schiller Liao, Regina Adams, and Frances Jones.

1. APPROVAL OF MINUTES

The minutes for the regular meeting of November 7, 2017 were considered for approval. The minutes were approved on a motion by Committee Member Barbra Boeta and seconded by Committee Member Schiller Liao. Minutes approved on a 6-0 vote.

2. CITIZEN COMMUNICATION: GENERAL

No citizens signed up for Citizen Communication

3. NEW BUSINESS

For discussion and possible action on recommendations to City Council (City Code § 2-1-163(B)) regarding the following:

- a. Update from Constructive Ventures, Aspen Heights & CIM Group and representatives of Balfour Beatty on 2nd tier subcontracts related to The Independent at 3rd & West/Austin Energy Block 24

Item postponed to the April 3, 2018 meeting

Committee moved to consider item 3d and then items 3c and b

- d. Review and approval of the 2018 committee meeting schedule.
Discussion: **Barbra Boeta made motion to consider the 2018 meeting schedule. Frances Jones seconded.**

The 2018 meeting schedule:

April 6; May 2; June 6; July – Cancelled; August 1; September 5; October 3; November 13; and December 5

- c. 2016 Corridor Mobility Bond Program MBE/WBE Outreach Plan
Discussion; No Action

- b. 2016 Mobility Bond Program Update

Committee recessed at 6:58 p.m. and did not reconvene.

ADJOURN

Chair May adjourned the meeting at 7:19 p.m.