

# **RTD'S SUBCONTRACTOR PERFORMANCE SELF-INSURED PROGRAM**

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# PURPOSE OF THE PROGRAM

To eliminate bonding as an obstacle to the participation of small and disadvantaged business sub-contractors in RTD construction projects.

## Background

2004 – RTD signed Memoranda of Understanding (MOUs) with The African American Leadership Group (TAALG), the Hispanic Contractors Association, and Colorado Women’s and Minority Chamber committing to keep those and other DBE/SBE contractors and business groups informed of RTD FasTracks project development and contracting opportunities.

A key concern raised by these groups – the impediment bonding posed to small businesses.

# RTD EXPERIENCE WITH SELF INSURANCE

RTD had a history of owner-controlled and self-insured programs for construction projects

- Liability
- Worker's Compensation
- Railroad Protection
- Builder's Risk
- Property coverage

Risk/benefit principles comparable - avoid premiums and transaction costs for multiple party coverage

# LEGAL REQUIREMENTS

## DRIVING THE PROGRAM

### COLORADO BONDING REQUIREMENT

**C.R.S. 38-26-106** requires that contractor's post a bond "*in a penal sum not less than one-half of the total amount payable under the terms of the contract*" or for contracts in excess of \$500 million not less than one half the maximum amount payable in any contract year. Bond pays for labor, materials of performance for work by contractor.

- Contractor's typically flow down bonding requirements to their sub-contractor's but this is not statutorily required in Colorado.

### FEDERAL DBE REQUIREMENTS

**49 C.F.R.26.51(b)** Race-neutral means include, but are not limited to, the following:  
(2) providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g. by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids and providing services to help DBE's and other small business obtain bonding and financing).

# KEY PROGRAM ELEMENTS

RTD sets up self-funded risk pool to cover claims that could otherwise have been made against subcontractor sureties – failure to pay for materials, or failure to perform

RTD prohibits contractors from requiring subcontractor payment and performance bonds

RTD prohibits subcontractors from obtaining bonds unless there is no charge in the bid

RTD establishes eligibility and monitoring requirements for subcontractors in program

**ALL** subcontractors with contracts equal to or less than \$500 thousand required to participate in program

- Whether or not DBE/SBE,
- Whether or not able to bond independently
- Program would not be affordable if only high risk subcontractors were included

# COST OF THE PROGRAM

- Program funding is based on assumed savings – no premiums collected from participants
  - ❑ Note: in Colorado, a surety bond is an insurance contract (see, C.R.S. 13-3-1102; Transamerica Premier Insurance Company v. Brighton School District 27 J, 940 P. 2d 348 (Colo. 1997)).
  - ❑ The receiving or collection of any premium, commission, membership fees, assessments, dues or other consideration for any insurance or any part thereof by an unauthorized insurer constitutes transacting insurance business in Colorado (C.R.S. 10-3-903).
- RTD works with insurance broker to determine amount each sub-contractor would have paid for bonds had it been required to provide them, plus overhead and profit that would have been added at every tier
- RTD deposits that amount in Program Fund
- Prime contractor agrees by contract to limit claims against subcontractors that would have been made against payment or performance bond to amounts in Program Fund.
  - Prime must require subs at every level to put corresponding contract requirement in its subcontracts.

# COST OF THE PROGRAM (CONT.)

- RTD responsible for administration of claims
- Prime may pursue claims process under prime contract if claims not resolved to Prime contractor satisfaction
- All subcontractors participating required to be qualified for Program through RTD Evaluation Process and to allow ongoing monitoring of performance
- Evaluation and Monitoring cost – in addition to loss fund
- Retention of insurance broker to develop cost model, evaluate savings, develop manual, administer program – in addition to loss fund

# EVALUATION AND MONITORING

## Evaluation

Each subcontractor required to submit pre-qualification Evaluation forms

- Years in business
- Employee and management experience
- Business controls – financial, scheduling and estimating
- Financial capacity of company – assets, working capital, lines of credit
- Dollar volume of annual and project experience
- Prior bonding and claims experience

## Monitoring

Monitoring is designed to avoid poor or late performance, or non-payment of suppliers or sub-subcontractors

Subcontractors submit to RTD and Prime Contractor

- Scheduling
- Manpower utilization projections
- Monthly earned values
- Payment status to all vendors and sub-subcontractors
- Lien waivers from suppliers and sub-subcontractors
- Change order requests

RTD and Contractor may meet with, request corrective action procedures or require financial monitoring of subcontractor



# RESULTS

- West Corridor construction near completion
- No claims
- 39 subcontractors in the Program - 38 DBE subcontractors
  - 13 new subcontractors to RTD
  - 9 subcontractors that had never qualified for a bond
- 11 contractors did not qualify
- Contract maximum value increased to about \$1 million based on change orders
  - Average value of enrolled subcontractors \$270,756
  - Total value of work \$8.1 million covered by program
- Estimated savings to RTD compared to construction bonds - \$243,681 (does not include Program Development and Monitoring)