



Agenda Item No. 1

To: Rules, Policy and Industrial Relations Committee/Committee of the Whole
Meeting of April 9, 2009

From: Gail Jackson, DBE Program Administrator
Z. Wayne Johnson, Deputy General Manager, Administration and Development
Celia G. Kupersmith, General Manager

Subject: **APPROVE ACTIONS RELATIVE TO RACE-CONSCIOUS
DISADVANTAGED BUSINESS ENTERPRISE GOALS FOR FEDERAL
HIGHWAYS ADMINISTRATION-ASSISTED CONTRACTS**

Recommendation

The Rules, Policy and Industrial Relations Committee recommends that the Board of Directors approve the following actions relative to the return to race-conscious Disadvantaged Business Enterprise (DBE) goals for Federal Highways Administration (FHWA)-assisted contracts:

1. Authorize execution of the *California Department of Transportation Disadvantaged Business Enterprise Program Implementation Agreement for Local Agencies*, which includes requirements for setting contract-specific race-conscious goals on FHWA-assisted contracts.
2. Delegate authority to the General Manager to approve goals on individual FHWA-assisted contracts and revise the District Diversity Program for Contracts accordingly.

Summary

By letter dated March 4, 2009, the District was notified that the Federal Highway Administration (FHWA) had approved the California Department of Transportation's (Caltrans) 2009 DBE Annual Overall Goal. FHWA's approval requires the immediate implementation of the new DBE Program that includes a race-conscious component (RC DBE Program). Effective immediately, Caltrans and local agencies such as the District receiving Federal-aid highway funds must begin transitioning to the new RC DBE Program.

Local agencies have until June 2, 2009, to transition to the newly approved RC DBE Program. As soon as possible, but before June 2, 2009, the District must adopt and execute the attached new local agency *California Department of Transportation DBE Program Implementation Agreement* acknowledging the District's intention to implement the Caltrans' RC DBE Program Plan and to insure that DBEs have an equal opportunity to receive and participate in DOT-assisted contracts. Under the new RC DBE Program, local agencies must incorporate the new race-conscious contract specifications into all federal-aid highway consultant and construction contracts.

Since May 1, 2006, Caltrans had been implementing a wholly race-neutral DBE program, which came as a result of a decision from the Ninth Circuit Court of Appeals and guidelines promulgated by the Federal Highway Administration in response to that decision. In short, the Court decision mandated that the evidence of discrimination in the transportation contracting industry must be documented in order to implement a DBE race-conscious program.

In response to FHWA's direction, Caltrans embarked on an Availability and Disparity Study to identify the level of any discrimination that might exist in the conduct of the State's federally funded transportation program. Caltrans consultants surveyed 18,675 business establishments, evaluated over 600 Caltrans' and local agency contracts from throughout California, and conducted nearly 100 interviews with participants including prime contractors, subcontractors, suppliers, professional consultants, engineers, professional service providers, official representatives from multiple trade associations having a membership base comprised of thousands of minority, non-minority, female, and male business owners, and Caltrans officials and staff.

The study final report was issued on June 29, 2007, and it determined that significant disparity existed within four of the traditional six presumptive DBE groups. Caltrans requested that DOT approve a program that allowed race-conscious goals to be applied to African American, Asian-Pacific American, Women, and Native American businesses in the advertised contracts for Federal-aid highway contracts. These four groups together would be referred to as Underutilized Disadvantaged Business Enterprises (UDBEs). The race-conscious goal established for each contract would be based on the subcontracting opportunities it provides and the availability of UDBEs to participate in those opportunities. At this time, Hispanic American and Subcontinent Asian American businesses are not included in the race-conscious portion of the program. However, use of these businesses would count toward meeting the race-neutral portion of the contract goal. Caltrans proposes to meet its FY 08/09 DBE goal using 6.75% race-neutral and 6.75% race-conscious means.

Each year the District evaluates FHWA-assisted contracts proposed for the upcoming fiscal year. Based on an analysis of the availability of DBEs in work classifications identified for our specific contracting opportunities in proportion to all firms in those same work classifications, the District proposes an overall Annual Anticipated Disadvantaged Business Enterprise Participation Level (AADPL). The District's AADPL is factored into Caltrans' statewide annual overall goal for FHWA-assisted projects. Since 2006, the District has used wholly race-neutral practices to achieve its AADPL. Contract goals were not allowed on race-neutral contracts. With the return to race-conscious goals, the District will evaluate each FHWA-assisted contract and establish a contract-specific goal. Bidders will be directed to achieve the goal or provide proof of "good faith efforts" if they are unable to achieve goals.

DBE program procedures are described in the District's Diversity Program for Contracts, which was last updated and approved by the Board of Directors several years ago. Language regarding establishing contract-specific goals reads: "The goal shall be established by the Board of Directors based upon a recommendation from the General Manager, substantiated by information furnished by the [DBE Program] Administrator and with the concurrence of the Review Committee." However, due to the time-sensitive nature of preparing contract documents for bidding, the Board is asked to

delegate authority to the General Manager to approve goals on individual contracts. It is recommended the new language read: "Each contract specific goal shall be established by the General Manager, substantiated by information furnished by the [DBE Program] Administrator and with concurrence of the Review Committee." Under the District's current procedures, the Review Committee is composed of the District Secretary, District Engineer, and Auditor-Controller.

The return to race-conscious contract goals applies to FHWA-assisted contracting opportunities only. Contracts receiving Federal Transit Administration funding will continue to be administered with race-neutral DBE measures only.

Fiscal Impact

There is no fiscal impact associated with this report. However, in order to remain eligible for funding for federal-aid highway projects, the District must submit an approved California Department of Transportation Disadvantaged Business Enterprise Program Implementation Agreement for Local Agencies before June 2, 2009.

Attachment

CALIFORNIA

DEPARTMENT OF TRANSPORTATION

DISADVANTAGED BUSINESS ENTERPRISE

PROGRAM

IMPLEMENTATION AGREEMENT

FOR

LOCAL AGENCIES

CALIFORNIA DEPARTMENT OF TRANSPORTATION DISADVANTAGED BUSINESS ENTERPRISE IMPLEMENTATION AGREEMENT

For the Golden Gate Bridge, Highway and Transportation District, hereinafter referred to as "RECIPIENT."

I Definition of Terms

The terms used in this agreement have the meanings defined in 49 CFR § 26.5.

II OBJECTIVE/POLICY STATEMENT (§26/1. 26/23)

The RECIPIENT intends to receive federal financial assistance from the U. S. Department of Transportation (DOT) through the California Department of Transportation (Caltrans), and as a condition of receiving this assistance, the RECIPIENT will sign the California Department of Transportation Disadvantaged Business Enterprise Program Implementation Agreement (hereinafter referred to as Agreement). The RECIPIENT agrees to implement the State of California, Department of Transportation Disadvantaged Business Enterprise (DBE) Program Plan (hereinafter referred to as the DBE Program Plan) as it pertains to local agencies. The DBE Program Plan is based on U.S. Department of Transportation (DOT), 49 CFR, Part 26 requirements.

It is the policy of the RECIPIENT to ensure that DBEs, as defined in Part 26, have an equal opportunity to receive and participate in DOT-assisted contracts. It is also their policy:

- To ensure nondiscrimination in the award and administration of DOT-assisted contracts.
- To create a level playing field on which DBE's can compete fairly for DOT-assisted contracts.
- To ensure that their annual overall DBE participation percentage is narrowly tailored, in accordance with applicable law.
- To ensure that only firms that fully meet 49 CFR, Part 26 eligibility standards are permitted to participate as DBEs.
- To help remove barriers to the participation of DBEs in DOT-assisted contracts.
- To assist the development of firms that can compete successfully in the market place outside the DBE Program.

III Nondiscrimination (§26.7)

RECIPIENT will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR, Part 26 on the basis of race, color, sex, or national origin. In administering the local agency components of the DBE Program Plan, the RECIPIENT will not, directly, or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the DBE Program Plan with respect to individuals of a particular race, color, sex, or national origin.

IV Annual DBE Submittal Form (§26.21)

The RECIPIENT will provide to the Caltrans District Local Assistance Engineer (DLAE) a completed *Local Agency DBE Annual Submittal Form* (Exhibit 9-B) by June 1 of each year for the following Federal Fiscal Year (FFY). This form includes an Annual Anticipated DBE Participation Level (AADPL), methodology for establishing the AADPL, the name, phone number, and electronic mailing address of the designated DBELO, and the choice of Prompt Pay Provision to be used by the RECIPIENT for the following FFY.

V Race-Neutral Means of Meeting the Overall Statewide Annual DBE Goal (§26.51)

RECIPIENT must meet the maximum feasible portion of its AADPL by using race-neutral means of facilitating DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE goal, or even if there is a DBE goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low-bid system to award subcontracts).

Race-neutral means include, but are not limited to, the following:

1. Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE, and other small businesses, participation (e.g., unbundling large contracts to make them more accessible to small businesses, requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces);
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 DBEs, and other small businesses, obtain bonding and financing);
3. Providing technical assistance and other services;
4. Carrying out information and communication programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists of bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate);
5. Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;
6. Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of types of work, handle increasingly significant projects, and achieve eventual self-sufficiency;
7. Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;
8. Ensuring distribution of your DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and
9. Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

VI Race Conscious Means of Meeting the Overall Statewide Annual DBE Goal (§26.51(d))

RECIPIENT must establish contract goals for Underutilized Disadvantaged Business Enterprises (UDBEs) to meet any portion of your AADPL you do not project being able to meet using race-neutral means. UDBEs are limited to these certified DBEs that are owned and controlled by African Americans, Native Americans, Women, and Asian Pacific Americans.

VII Quotas (§26.43)

RECIPIENT will not use quotas or set-asides in any way in the administration of the local agency component of the DBE Program Plan.

VIII DBE Liaison Officer (DBELO) (§26.25)

RECIPIENT has designated a DBE Liaison Officer. The DBELO is responsible for implementing the DBE Program Plan, as it pertains to the RECIPIENT, and ensures that the RECIPIENT is fully and properly advised concerning DBE Program Plan matters. The DBELO is a professional employee assigned to the DBE program on a full-time basis. The name, address, telephone number, electronic mail address, and an organization chart displaying the DBELO's position in the organization are found in Attachment A to this Agreement. This information will be updated annually and included on the DBE Annual Submittal Form.

The DBELO is responsible for developing, implementing, and monitoring the RECIPIENT's requirements of the DBE Program Plan in coordination with other appropriate officials. Duties and responsibilities include the following:

1. Gathers and reports statistical data and other information as required.
2. Reviews third party contracts and purchase requisitions for compliance with this program.
3. Works with all departments to determine projected Annual Anticipated DBE Participation Level.
4. Ensures that bid notices and requests for proposals are made available to DBEs in a timely manner.
5. Analyzes DBE participation and identifies ways to encourage participation through race-neutral means.
6. Participates in pre-bid meetings.
7. Advises the CEO/governing body on DBE matters and DBE race-neutral issues.
8. Provides DBEs with information and recommends sources to assist in preparing bids, obtaining bonding and insurance.
9. Plans and participates in DBE training seminars.
10. Provides outreach to DBEs and community organizations to fully advise them of contracting opportunities.

IX Federal Financial Assistance Agreement Assurance (§26.13)

RECIPIENT will sign the following assurance, applicable to and to be included in all DOT-assisted contracts and their administration, as part of the program supplement agreement for each project.

The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract, or in the administration of its DBE Program, or the requirements of 49 CFR Part 26. The recipient shall take all necessary and reasonable steps under 49 CFR, Part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE Program, as required by 49 CFR, Part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.). [Note – this language is to be used verbatim, as it is stated in §26.13(a).]

X DBE Financial Institutions (§26.27)

It is the policy of the RECIPIENT to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community to make reasonable efforts to use these institutions, and to encourage prime contractors on DOT-assisted contracts to make use of these institutions.

Information on the availability of such institutions can be obtained from the DBELO. The Caltrans' Disadvantaged Business Enterprise Program may offer assistance to the DBELO.

XI Directory (§26.31)

RECIPIENT will refer interested persons to the Unified Certification Program DBE directory available from the Caltrans Disadvantaged Business Enterprise Program's website at www.dot.ca.gov/hq/bep.

XII Required Contract Clauses (§§26.13, 26.29)

RECIPIENT ensures that the following clauses or equivalent will be included in each DOT-assisted prime contract:

A. CONTRACT ASSURANCE

The contractor or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR, Part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy, as recipient deems appropriate.

[Note – This language is to be used verbatim, as is stated in §26.13(b). See Caltrans Sample Boiler Plate Contract Documents on the Internet at www.dot.ca.gov/hq/LocalPrograms under "Publications."]

B. PROMPT PAYMENT

Prompt Progress Payment to Subcontractors

The local agency shall require contractors and subcontractors to be timely paid as set forth in Section 7108.5 of the California Business and Professions Code concerning prompt payment to subcontractors. The 10-days is applicable unless a longer period is agreed to in writing. Any delay or postponement of payment over 30 days may take place only for good cause and with the agency's prior written approval. Any violation of Section 7108.5 shall subject the violating contractor or subcontractor to the penalties, sanctions, and other remedies of that Section. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies, otherwise available to the contractor or subcontractor in the event of a dispute involving late payment or nonpayment by the contractor, deficient subcontractor performance, and/or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.

Prompt Payment of Withheld Funds to Subcontractors

The local agency shall ensure prompt and full payment of retainage from the prime contractor to the subcontractor within thirty (30) days after the subcontractor's work is satisfactorily completed and accepted. This shall be accomplished by including either (1), (2), or (3) of the following provisions [local agency equivalent will need Caltrans approval] in their federal-aid contracts to ensure prompt and full payment of retainage [withheld funds] to subcontractors in compliance with 49 CFR 26.29.

1. No retainage will be held by the agency from progress payments due to the prime contractor. Prime contractors and subcontractors are prohibited from holding retainage from subcontractors. Any delay or postponement of payment may take place only for good cause and with the agency's prior written approval. Any violation of these provisions shall subject the violating contractor or subcontractor to the penalties, sanctions, and other remedies specified in Section 7108.5 of the California Business and Professions Code. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies, otherwise available to the contractor or subcontractor in the event of a dispute involving late payment or nonpayment by the contractor, deficient subcontractor performance, and/or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.

2. No retainage will be held by the agency from progress payments due the prime contractor. Any retainage kept by the prime contractor or by a subcontractor must be paid in full to the earning subcontractor in 30 days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment may take place only for good cause and with the agency's prior written approval. Any violation of these provisions shall subject the violating contractor or subcontractor to the penalties, sanctions, and remedies specified in Section 7108.5 of the California Business and Professions Code. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies, otherwise available to the contractor or subcontractor in the event of a dispute involving late payment or nonpayment by the contractor, deficient subcontractor performance, and/or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.

3. The agency shall hold retainage from the prime contractor and shall make prompt and regular incremental acceptances of portions, as determined by the agency of the contract work and pay retainage to the prime contractor based on these acceptances. The prime contractor or subcontractor shall return all monies withheld in retention from all subcontractors within 30 days after receiving payment for work satisfactorily completed and accepted including incremental acceptances of portions of the contract work by the agency. Any delay or postponement of payment may take place only for good cause and with the agency's prior written approval. Any violation of these provisions shall subject the violating prime contractor to the penalties, sanctions, and other remedies specified in Section 7108.5 of the California Business and Professions Code. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies, otherwise available to the contractor or subcontractor in the event of: a dispute involving late payment or nonpayment by the contractor; deficient subcontractor performance; and/or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.

XIII Local Assistance Procedures Manual

The RECIPIENT will advertise, award and administer DOT-assisted contracts in accordance with the most current published Local Assistance Procedures Manual (LAPM).

XIV Transit Vehicle Manufacturers (§ 26.49)

If FTA-assisted contracts will include transit vehicle procurements, RECIPIENT will require each transit vehicle manufacturer, as a condition of being authorized to bid or propose on transit vehicle procurements, to certify that it has complied with the requirements of 49 CFR Part 26, Section 49.

XV Bidders List (§26.11(c))

The RECIPIENT will create and maintain a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote on its DOT-assisted contracts. The bidders list will include the name, address, DBE/nonDBE status, age, and annual gross receipts of the firm.

XVI Reporting to the DLAE

RECIPIENT will promptly submit a copy of the Local Agency Bidder/Proposer-UDBE Commitment (Consultant Contract), (Exhibit 10-O(1) "Local Agency Bidder/Proposer-DBE Commitment (Consultant Contract)") or Exhibit 15-G(1) "Local Agency Bidder-UDBE Commitment (Construction Contract) to the DLAE at the time of award of the consultant or construction contracts.

RECIPIENT will promptly submit a copy of the Local Agency Bidder-DBE Information (Exhibit 15-G(2) "Local Agency Bidder-DBE (Construction Contracts) – Information" or Exhibit 10-O(2) "Local Agency Proposer/Bidder-DBE (Consultant Contracts)-Information" of the LAPM) to the DLAE at the time of execution of consultant or construction contract.

RECIPIENT will promptly submit a copy of the Final Utilization of DBE participation to the DLAE using Exhibit 17-F "Final Report – Utilization of Disadvantaged Business Enterprises (DBE), First-Tier Subcontractors" of the LAPM immediately upon completion of the contract for each consultant or construction contract.

XVII Certification (§26.83(a))

RECIPIENT ensures that only DBE firms currently certified by the California Unified Certification Program will participate as DBEs on DOT-assisted contracts.

XVIII Confidentiality

RECIPIENT will safeguard from disclosure to third parties information that may reasonably be regarded as confidential business information consistent with federal, state, and local laws.

By _____

Celia G. Kupersmith, General Manager _____ Phone Number: __ (415) 923-2203 _____
Golden Gate Bridge, Highway and Transportation District

This California Department of Transportation’s Disadvantaged Business Enterprise Program Implementation Agreement is accepted by:

[Signature of DLAE]

Date: _____

[Print Name of DLAE]

Distribution: (1) Original – DLAE
(2) Signed copy by the DLAE – Local Agency

(Updated: March 4, 2009)

Attachment A

Contact Information for DBE Liaison Officer

Name: Gail Jackson

Title: DBE Program Administrator

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San Rafael, CA 94901

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Electronic Mail Address: gjackson@goldengate.org