ALAMEDA COUNTY
CONGESTION MANAGEMENT AGENCY

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**Memorandum**

*May 11, 2009*
*Agenda Item 5.3*

**Date:** April 22, 2009

**To:** Administration and Legislation Committee

**From:** Liz Brazil, Contracts Administrator

**Subject:** **Mandatory Race Conscious DBE Program**

**Action Requested**

The Department of Transportation (Caltrans) adopted a race conscious program based on the Federal Highway Administration's (FHWA) approval of the 2009 Disadvantaged Business Enterprise (DBE) Annual Overall Goal. The FHWA approval requires immediate implementation of the new DBE Program that includes a race conscious component. As part of the implementation of this race conscious program, local agencies must also change to a race conscious DBE program to maintain federal fund eligibility. It is recommended that the CMA Board authorize the Executive Director or his designee to sign the attached DBE Race-Conscious Implementation Agreement with Caltrans.

**Discussion**

As announced in the Chief of Local Assistance's letter dated March 4, 2009, Caltrans implemented the Race Conscious DBE Program. Under the new Race Conscious (RC) DBE Program, local agencies must incorporate the race conscious contract specifications into all federal-aid consultant and construction contracts.

Impacts to Federal Aid Projects:

- ***All contracts awarded after June 2, 2009*** *shall include RC DBE requirements (i.e. contract goals, good faith efforts).*
- *Any project that receives Authorization to Proceed under the old Race Neutral (RN) DBE requirements must award the contract by June 2, 2009.*
- *Any Authorization to Proceed received under the old RN DBE requirements that does not meet the June 2, 2009 contract award deadline, shall be re-evaluated. Local agencies must resubmit their projects to Caltrans for approval to ensure compliance with the new*

*RC DBE requirements prior to bid opening. Authorizations to Proceed will be withdrawn if projects do not comply with the new RC DBE requirements.*

- *Contracts awarded after June 2, 2009, that do not meet the new RC DBE requirements will be ineligible for federal funding.*
- *Local agencies' Request for Authorization to Proceed for projects under the old RN DBE Program will continue to be received and processed subject to the preceding conditions.*
- *In submitting Requests for Authorization to Proceed for projects under the old RN DBE Program, project sponsors must be mindful of the minimum advertising period of three weeks and the time it takes for bid opening and contract approval by their governing bodies.*
- *Requests for Authorization to Proceed with the new RC DBE requirements may be submitted for processing and have funds obligated/authorized before the District Local Assistance (DLAE) receives the new DBE Implementation Agreements. However, projects shall not be awarded prior to the approval of the new DBE Implementation Agreement by the DLAE.*
- *Existing federal-aid project contracts awarded with race neutral requirements shall continue under the old RN DBE Program.*

In addition, according to the Caltrans Mandatory Race Conscious letter:

> *Contract goals and the Good Faith Effort requirements are reinstated; however, they are limited to Underutilized DBEs (UDBEs). The findings from the Caltrans Availability and Disparity Study revealed statistically underutilization in four of the six groups presumed to be disadvantaged as defined by the Code of Federal Regulations, 49 CFR Part 26. The four groups: are African American, Asian Pacific American, Native American and Women. Contract Goals will be limited to these four groups of UDBEs. Use of the UDBEs above the contract goal and/or use of UDBEs owned and controlled by Hispanic Males or Subcontinent Asian Males shall be reported and counted toward the Race Neutral portion of the local agencies' overall Anticipated Annual DBE Percentage Levels (AADPLs).*
>
> *Local agencies are not required to resubmit previously approved 2008/2009 AADPL's that include segregated Race Conscious and Race Neutral components; however, contract goals shall be recalculated and placed on all contracts after the local agency has executed the new DBE Implementation Agreement. The 2009/2010 AADPLs shall report segregated RC and RN anticipated percentage level components. Guidance for AADPL calculation under the new RC DBE Program is available at the Caltrans DLA website under "Announcements."*

The CMA 2009 Goal and Methodology provides for 6.65 percent for race-conscious goal and a 12.88 percent race-neutral goal for an overall 19.5 percent program goal.

The Caltrans' DBE Race Conscious/ Race Neutral Program "Frequently Asked Questions" is attached to provide more background information.

CALIFORNIA

DEPARTMENT OF TRANSPORTATION

DISADVANTAGED BUSINESS ENTERPRISE

PROGRAM

IMPLEMENTATION AGREEMENT

FOR

**Alameda County Congestion Management Agency**

**CALIFORNIA DEPARTMENT OF TRANSPORTATION DISADVANTAGED BUSINESS ENTERPRISE IMPLEMENTATION AGREEMENT** for the **Alameda County Congestion Management Agency**; hereinafter referred to as "ACCMA".

## 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. Liz Brazil, the Contracts Administrator/DBELO, has been assigned to the DBE program on a part-time basis and two support personnel who devote a portion of their time to the program. 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 accompanied 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_____
Dennis R. Fay, Executive Director

_____ Phone Number: (510) 836-2560
Mark Green, CMA Chair

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

_____ Date: _____
[Signature of DLAE]

_____
[Print Name of DLAE]

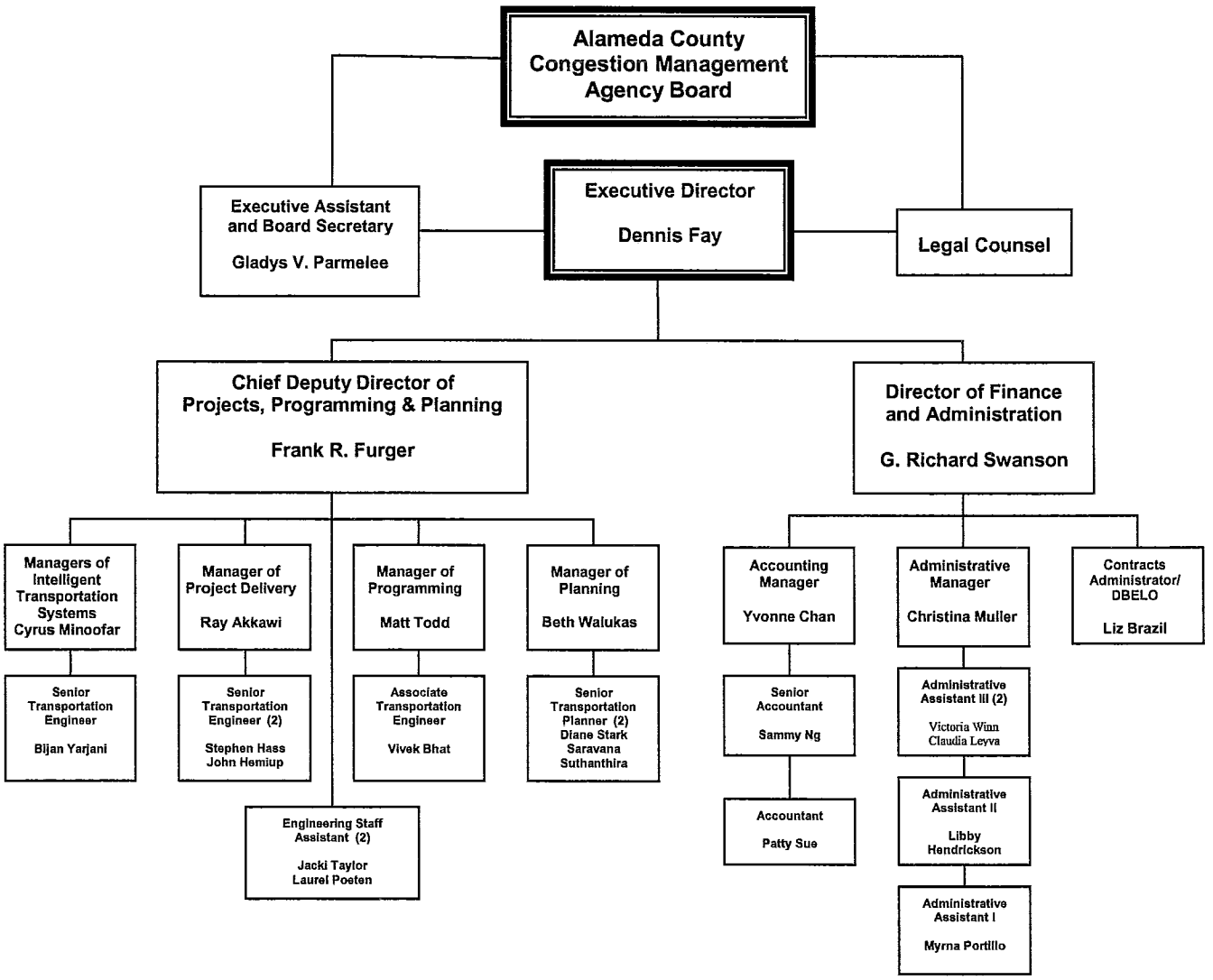
Distribution: (1) Original – DLAE
(2) Signed copy by the DLAE – Local Agency

(Updated: March 4, 2009)

Attachment A

**DBE Liaison Officer**
Liz Brazil, Contracts Adminstrator/DBELO
1333 Broadway. Suite 220
Oakland, CA 94612
(510) 350-2333
Lbrazil@accma.ca.gov

# Alameda County Congestion Management Agency
# Organizational Chart




( x ) – Indicates number of positions
Note: Three authorized positions vacant

Revised April 2009

**DEPARTMENT OF TRANSPORTATION**
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*Flex your power!*
*Be energy efficient!*

March 4, 2009

TO: ALL CITIES AND COUNTIES IN CALIFORNIA
METROPOLITAN PLANNING ORGANIZATIONS
REGIONAL TRANSPORTATION PLANNING AGENCIES

Dear Directors:

Re: Mandatory Race Conscious DBE Program

The Federal Highway Administration (FHWA) has approved the California Department of Transportation's 2009 Disadvantaged Business Enterprise (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 the California Department of Transportation (Caltrans) and local agencies receiving federal-aid funds must begin transitioning to the new RC DBE Program.

**Transition Period**

Local agencies may have until June 2, 2009 to transition to the newly approved RC DBE Program. This allows local agencies until June 2, 2009, to adopt and execute the new RC DBE Program and allows projects authorized to proceed under the old Race Neutral (RN) DBE program to proceed to contract award. As soon as possible but before June 2, 2009, local agencies must adopt and execute a new *California Department of Transportation DBE Program Implementation Agreement* (DBE Implementation Agreement). Upon execution of the new DBE Implementation Agreement, local agencies shall proceed under the new RC DBE Program. Under the new RC DBE Program, local agencies must incorporate the new race conscious contract specifications into all federal-aid consultant and construction contracts. These specifications are incorporated in the new contract boilerplate language referenced below.

**Impacts to Federal-Aid Projects**

- **ALL CONTRACTS AWARDED AFTER June 2, 2009 SHALL INCLUDE RC DBE REQUIREMENTS (i.e. contract goals, good faith efforts).**
- **Any project that receives Authorization to Proceed under the old RN DBE requirements must award the contract by June 2, 2009.**
- **Any Authorization to Proceed received under the old RN DBE requirements that does not meet the June 2, 2009 contract award deadline, shall be re-evaluated.**

**Local agencies must resubmit their projects to Caltrans for approval to ensure compliance with the new RC DBE requirements prior to bid opening. Authorizations to Proceed will be withdrawn if projects do not comply with the new RC DBE requirements.**

- **Contracts awarded after June 2, 2009, without meeting the new RC DBE requirements will be ineligible for federal funding.**
- **Local agencies' Requests for Authorization to Proceed for projects under the old RN DBE Program will continue to be received and processed subject to the preceding conditions.**
- **In submitting Requests for Authorization to Proceed for projects under the old RN DBE Program, the project sponsors need to be mindful of the minimum advertising period of three weeks, and the time it takes for bid opening and contract approval by their governing bodies.**
- **Requests for Authorization to Proceed with the new RC DBE requirements may be submitted for processing and have funds obligated/authorized before the District Local Assistance Engineer (DLAE) receives the new DBE Implementation Agreements; however, projects shall not be awarded prior to the approval of the new DBE Implementation Agreement by the DLAE.**
- **Existing federal-aid project contracts awarded with race neutral requirements shall continue under the old RN DBE Program.**

**Contract Goals Limited to Underutilized Disadvantaged Business Enterprises (UDBEs)**

Contract goals and the Good Faith Effort requirement are reinstated; however, they are limited to Underutilized DBEs (UDBEs). The findings from the Caltrans Availability and Disparity Study revealed statistically significant underutilization in four of the six groups presumed to be disadvantaged as defined by the Code of Federal Regulations, 49 CFR Part 26. The four groups are African American, Asian Pacific American, Native American and Women. Contract goals will be limited to these four groups of UDBEs. Use of the UDBEs above the contract goal and/or use of DBEs owned and controlled by Hispanic Males or Subcontinent Asian Males shall be reported and counted toward the Race Neutral portion of the local agencies' overall Anticipated Annual DBE Percentage Levels (AADPLs).

**Old RN and New RC DBE Forms, Boilerplate Specifications**

For contracts that will be advertised and awarded under the old RN DBE Program, the appropriate DBE forms will be available on the Local Assistance Website:
http://www.dot.ca.gov/hq/LocalPrograms/DBE_CRLC.html

You may download the new DBE Implementation Agreement and consultant and construction contract boilerplate language from the Local Assistance website at:
http://www.dot.ca.gov/hq/LocalPrograms/

For specific guidance on federal-aid consultant and construction contracts and access to the new DBE forms, please refer to the enclosures addressing consultant contracts and construction contracts.

**Local Assistance Procedures Manual (LAPM)**

The Division of Local Assistance will be issuing the changes to the LAPM. Until the LAPM changes are issued, the updated forms, guidance, and Frequently Asked Questions are available on the Caltrans, Division of Local Assistance (DLA) website:
http://www.dot.ca.gov/hq/LocalPrograms/

**Annual Anticipated DBE Percentage Levels (AADPL)**

Local agencies are not required to resubmit previously approved 2008/2009 AADPLs to include segregated Race Conscious (RC) and Race Neutral (RN) components; **however, contract goals shall be calculated and placed on all contracts after the local agency has executed the new DBE Implementation Agreement**. The 2009/2010 AADPLs shall report segregated RC and RN anticipated percentage level components. Guidance for AADPL calculation under the new RC DBE Program is available at the Caltrans DLA website under "Announcements."

If you have questions, please refer to the Frequently Asked Questions posted on the Caltrans, DLA website: http://www.dot.ca.gov/hq/LocalPrograms/ before contacting your DLAE.

Sincerely,

DENIX D. ANBIAH, Chief
Division of Local Assistance

Enclosures

c: Local Agency DBE Liaison Officers

# Enclosure 2

**Construction Contracts:** Contracts to be advertised and awarded before the execution of the new DBE Implementation Agreement and before June 2, 2009, may proceed to advertise and award using Race Neutral boilerplate specifications and Race Neutral LAPM Exhibits 12-D, 15-A, 15-B, 15-G. 15-I, 15-L and 17-F. All other contracts shall use the new Race Conscious boilerplate specifications and the following new Race Conscious LAPM Exhibits currently located on the Caltrans Local Assistance website under "Announcements:"

- Exhibit 3-D: Request for Authorization to Proceed with Construction
- Exhibit 3-E: Request for Authorization to Proceed Data Sheet(s)
- Exhibit 12-D: PS&E Checklist
- Exhibit 15-A: Local Agency Construction Contract Administration Checklist
- Exhibit 15-B: Resident Engineer's Construction Contract Administration Checklist
- Exhibit 15-G(1): Local Agency Bidder/Proposer UDBE Commitment (Construction Contracts)
- Exhibit 15-G(2): Local Agency Bidder/Proposer DBE Commitment (Construction Contracts)
- Exhibit 15-H: Good Faith Efforts Submittal
- Exhibit 15-I: Local Agency Bid Opening Checklist
- Exhibit 15-L: Local Agency Contract Award Checklist
- Exhibit 17-F: Final Report Utilization of DBE, First-Tier Subcontractors

# Enclosure 1

**Consultant Contracts:** Contracts awarded prior to June 2, 2009, whose authorizations were granted prior to the adoption of the Race Conscious DBE Implementation Agreement may follow the Race Neutral DBE Program. All contracts awarded after June 2, 2009 must follow the Race Conscious DBE Program and use the following new Race Conscious LAPM Exhibits currently located on the Caltrans Local Assistance website under "Announcements."

- Exhibits 3-A, 3-B, or 3-C: Request to Proceed with Preliminary Engineering, Right-of-Way, or Utility Relocation
- Exhibit 3-E: Request for Authorization to Proceed Data Sheet(s)
- Exhibit 10-C: Consultant Agreement Reviewers Checklist
- Exhibit 10-D: Consultant Agreement Outline
- Exhibit 10-I: Notice to Bidders/Proposers DBE Requirements and Instructions
- Exhibit 10-J: Standard Agreement for Subcontractor/DBE Participation
- Exhibit 10-O(1): Local Agency Bidder/Proposer UDBE Commitment (Consultant Contracts)
- Exhibit 10-O(2): Local Agency Bidder/Proposer DBE Commitment (Consultant Contract)
- Exhibit 17-F: Final Report Utilization of DBE, First-Tier Subcontractors

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**Frequently Asked Questions:**
**Disadvantaged Business Enterprise (DBE) Race-Conscious/Race-Neutral Program**

***1. What prompted the California Department of Transportation (Caltrans) to review its Disadvantaged Business Enterprise (DBE) Program?***

The Federal Highway Administration (FHWA) issued guidelines on December 21, 2005, to all State Departments of Transportation in response to the Ninth Circuit Court of Appeals decision dated May 9, 2005, (*Western States Paving Co. v. Washington State DOT*), requiring recipients of federal-aid transportation to conduct an Availability/Disparity Study (*Study*). The purpose of a *Study* is to ascertain whether discrimination exists in a state's transportation contracting industry and, if so, to identify its scope and extent on certain groups. The results of the *Study* can then be used to adopt remedies to the findings.

In response to *Western States,* Caltrans examined its DBE Program and determined it did not have the necessary quantitative evidence to support continuation of its race-conscious program. On May 1, 2006, Caltrans suspended all race-conscious requirements and continued with implementing a wholly race-neutral program.

On June 27, 2006, Caltrans contracted with BBC Research and Consulting (BBC) to conduct the *Study*, which is currently being used by Caltrans in sustaining its DBE Program. A goal of the *Study* was to identify availability/utilization of DBEs in California. The complete *Study* can be found on the Caltrans Web site at http://www.dot.ca.gov/hq/bep/dbe_program.htm.

***2. What is Caltrans Overall Annual Disadvantaged Business Enterprise Goal and Methodology?***

The federal fiscal year (FFY) overall DBE goal is 13.5 percent with 6.75 percent to be achieved through race-neutral measures and 6.75 percent to be achieved through race-conscious measures.

Pursuant to 49 Code of Federal Regulation (CFR), Section 26.45, FHWA requires Caltrans to submit its proposed statewide goal and supporting methodology by August 1 each year for concurrence. The statewide goal must be expressed as a projection of the portions of the goal that are expected to be met with race-neutral and race-conscious means.

On August 1, 2007, Caltrans submitted for approval, its Overall Annual DBE Goal and Methodology for FFY 2008 to FHWA. The submittal identified an overall DBE goal of 13.5 percent; to be achieved in equal proportion; race-neutral and race-conscious measures and further requested a waiver to implement race-conscious goals of limited application to four identified groups: African American, Asian-Pacific American, Native American, and Women-owned firms. On August 7, 2008, the United States Department of Transportation (USDOT) approved Caltrans waiver request. However, Caltrans had still not received approval from FHWA on the goal and methodology.

In August 2008, Caltrans submitted for approval, its Overall Annual DBE Goal and Methodology for FFY 2009 to FHWA. On March 2, 2009, Caltrans received approval from FHWA to immediately implement our FFY 2009 DBE Goal and Methodology which provides for a 6.75 percent race-conscious goal and a 6.75 percent race-neutral goal for an overall 13.5 percent program goal.

Additionally, the overall annual goal for both FFYs proposed to Federal Transit Administration was 4 percent.

***3. Why are the race-conscious goals limited to African American, Asian-Pacific American, Native American, and Women owned firms?***

BBC calculated a disparity index on the relative utilization and availability of minority/ women-owned firms. The disparity index for federally-assisted contracts with DBE project goals is 83 when an index of 100 is needed for parity. An index below 80 has been deemed by some courts to constitute a substantial disparity. BBC conducted additional disparity analyses for specific types of contracts by race, ethnicity, and gender ownership of firms and for different State regions. There was evidence of disparities for construction and engineering contracts for both prime and subcontracts.

There were disparities across most Caltrans districts. Depending on the type of contract, disparities between utilization and availability were most severe (below the 80 disparity index) for:

- African American – Disparity Index 15
- Asian-Pacific American – Disparity Index 31
- Women – Disparity Index 48
- Native American – Disparity Index 65

To conform with *Study* results, Subcontinent Asian American and Hispanic American-owned firms will not be included in the individual race-conscious contract goal setting, unless—and until—future data gathering by Caltrans indicates that there is significant disparity between the percent of available contractors and subcontractors from these groups and the percent of contract dollars awarded to these groups.

***4. What are race-neutral and race-conscious measures?***

Race-neutral measures are activities or programs undertaken by Caltrans and other entities that benefit and assist all small businesses equally, including DBEs. Examples of race-neutral measures can be found on the USDOT, Office of Small and Disadvantaged Business Utilization's Web site at http://osdbu.dot.gov/DBEProgram/final/final69.cfm under CFR 26.51(b).

Race-conscious measures, such as the use of establishing an individual contract goal, are those measures and programs focused on specifically assisting DBEs.

Federal regulations require that a recipient of federal highway and transit funds implement an approved DBE Program that consists of establishing a statewide DBE utilization goal and using race-neutral means to the maximum feasible extent to achieve the goal. Where race-neutral measures prove inadequate to achieve the goal, states are required to use race-conscious measures, such as a DBE participation goal for individual contracts.

***5. How does Caltrans set individual contract goals?***

Division of Engineering Services, Office Engineer (DES-OE) is responsible for the advertising, bid opening, award, and approval of all of Caltrans construction projects greater than $147,000. Approximately three weeks before the project is advertised to the public, DES-OE electronically

compares the number of DBEs in the Civil Rights database to the contract items of work and the number of certified DBEs and Underutilized Disadvantaged Business Enterprises (UDBE) available for each item. Once the proposed goal is set, it is sent to Civil Rights for final approval. When Civil Rights approves the goal, it is incorporated into the contract documents.

***6. How is the statewide goal divided between the Disadvantaged Business Enterprises and the Underutilized Disadvantaged Business Enterprises?***

Caltrans proposes a 13.5 percent overall annual DBE goal, to be achieved in equal proportion 6.75 percent race-neutral and 6.75 percent race-conscious. For the purpose of calculating attainment of the proposed overall annual DBE goal, the following designations apply:

a) Race-neutral participation and measures include all DBE firms, regardless of race, ethnicity, or gender. Subcontinent Asian American and Hispanic American participation will count toward the 6.75 percent race-neutral portion of the overall annual goal of 13.5 percent.

b) Race-conscious participation and measures include UDBE firms for which contract goals of limited application will be applied to include the four identified groups: African American, Asian-Pacific American, Native American, and Women-owned firms.

The prime contractor is obligated to make "good faith efforts" to meet the established DBE goal to which they have committed. Individual contract goal attainment will be monitored and as data is collected on final utilization, adjustments to the overall annual goal and minority group application will be made.

***7. Who evaluates the contract for Disadvantaged Business Enterprise attainment and how is the evaluation performed?***

The DBE submittal form and good faith effort documentation from the low bidder is sent to the Contract Evaluation Unit (CEU) in Civil Rights. The evaluation assesses DBE certification status, participation percentage, subcontract dollars, and work categories in order to conclude one of the following:

(a) The bidder met the UDBE goal; or
(b) the bidder did not meet the stated goal, but did make good faith efforts to meet the stated goal; or
(c) the bidder did not meet the stated goal and did not make good faith efforts to meet the stated goal.

If the conclusion of the evaluation is "a" or "b", DES-OE proceeds with the award to the bidder. If the conclusion is "c", CEU offers the bidder the right to appeal (administrative reconsideration) before the Caltrans Good Faith Efforts Reconsideration Committee, consisting of representatives from Office Engineer, Civil Rights, and Local Assistance.

***8. What criteria are used to evaluate a prime contractor's submission of a Good Faith Effort?***

When evaluating the Good Faith Effort submitted by a prime contractor, the following major components, as adopted by Appendix A to 49 CFR Part 26, are examined:

A. Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

B. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.

C. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.

D. (1) Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.

(2) A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

E. Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.

F. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.

G. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

H. Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

I. Other: Utilization of Subcontinent Asian Americans and Hispanic Americans towards race- neutral measures.

***9. After contract execution, how does the contractor report utilization of Disadvantaged Business Enterprise and Underutilized Disadvantaged Business Enterprise?***

DES-OE provides the contract to the Division of Construction after award of the contract, a list of all intended subcontractors that exceed ½ of 1 percent of the bid amount, as a requirement of the Subletting and Subcontracting Fair Practices Act (Public Contract Code, sections 4100 Et. Seq.). The District Construction staff (resident engineer, inspectors, and labor compliance officer) monitors the construction of the project to ensure if the intended subcontractors are used as the prime contractor indicated, that item of work is paid in a timely manner, and that DBE subcontractors perform a commercially useful function.

Additionally, prime contractors are requested to submit a Small Business Utilization Report form quarterly during the term of the contract and are compensated by Caltrans if they do. The reporting specifications are included in all solicitations.

If there are no issues with the above, then Construction staff ensures the prime contractor submits the Final Utilization Report (Form CEM-2402F) at the end of the contract which is then submitted to Civil Rights. A $10,000 retention is made until the Form CEM-2402F is submitted. If the prime contractor intends to substitute an intended DBE, then the prime contractor must comply with the requirements of the Subletting and Subcontracting Fair Practices Act and find another DBE subcontractor to replace the original intended subcontractor, or demonstrate a good faith effort when unable to find a replacement DBE. A prime contractor who fails to properly substitute a DBE with another DBE or obtain an approved good faith effort may incur penalties.

***10. How does the Caltrans Disadvantaged Business Enterprise Program affect Local Agencies Annual Anticipated Disadvantaged Business Enterprise Percentage Levels?***

In order to address underutilization of the four groups, Caltrans must set contract goals targeted **only** to those underutilized groups. Therefore, a Local Agency who gets federal funds through Caltrans, must have their Annual Anticipated DBE Percentage Levels (AADPLs) reflect a race-conscious portion limited to the four underutilized groups. The race-neutral portion of the AADPLs will be inclusive of all six groups.

Local agencies have inherent time consuming steps to take to incorporate race-conscious DBE goals. In order to maintain a narrowly tailored DBE Program, local agencies must calculate their AADPLs based on their respective market areas, types of work, and total dollars. They must also schedule and present the new race-conscious "DBE Program Implementation Agreement" to

their governing bodies (City Council, Board of Supervisors, etc.) for approval and thereafter provide a signed copy to the District Local Assistance Engineer for acceptance and signature.

To the extent possible, Local Agencies are encouraged to implement their race-conscious DBE Program by May 2, 2009. More information on the implementation of the DBE Program by local agencies can be found on the Caltrans Local Assistance Web site at http://www.dot.ca.gov/hq/LocalPrograms/DBE_CRLC.html.

***11. Where can a Disadvantaged Business Enterprise obtain assistance, training, and technical assistance to participate in Caltrans projects?***

Caltrans entered into a Memorandum of Understanding with the California Community College Chancellor's Office (CCCCO) to provide no-cost training, individualized technical assistance, and outreach to DBEs. Under the administration of the CCCCO, the services are provided by ten Small Business Development Centers (SBDC) located throughout California. The SBDCs are a part of the CCCCO Economic and Workforce Development Initiative and over the years, has served more than 40,000 small businesses owners, many of which are DBEs.

Training courses include marketing, cost estimating, bid and proposal development, business, wage and employment law, as well as accounting and cash flow management.

For further information on the California Community College Chancellor's Office, go to their website at http://www.buildcalifornia.org/.

***12. Where else can a Disadvantaged Business Enterprise obtain information regarding Caltrans projects and/or assistance?***

The Caltrans Division of Procurement and Contracts provides services in the areas of procurement, publications, warehousing, service contracts, architectural and engineering contracts, minor public works contracts (under $147,000), and all emergency force account contracts for phase one emergencies that immediately restore services. Their website is http://caltrans-opac.ca.gov/.

Information on construction projects greater than $147,000, as well as information on long term emergency contracts, can be obtained on the Caltrans Office Engineer website at http://www.dot.ca.gov/hq/esc/oe/ or the Caltrans Division of Construction website at http://www.dot.ca.gov/hq/construc/.

Information on the Caltrans Disadvantaged Business Enterprise Program is available within the Caltrans Civil Rights office website at http://www.dot.ca.gov/hq/bep/.