

AGENDA DATE: May 23, 2006



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Planning

Services

Services

RESOURCE MANAGEMENT AGENCY

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AGENDA ITEM

ITEM NO. _____
County Wide

SUBJECT:

Adoption of a Race-Neutral Disadvantaged Business Enterprise (DBE) program for use on federally funded transportation projects.

REQUEST(S):

It is recommended that the Board of Supervisors adopt the Resolution that provides for the following:

1. Approve the Tulare County Race-Neutral DBE Program;
2. Authorize the Director of Transportation to sign said program;
3. Authorize the Director of Transportation to sign and submit all subsequent reports and forms required pursuant to Caltrans DBE Guidelines for Race-Neutral DBE Programs.

SUMMARY:

On December 19, 2000, the Board of Supervisors adopted the Disadvantaged Business Enterprise (DBE) program currently in use by the County of Tulare. Each year, the Director of Transportation submits the annual overall goal information for the subsequent federal fiscal year. The most recent annual overall goal information was submitted in September 2005 for the 2005/06 federal fiscal year. Each year the County calculated and submitted its goal utilizing the race-conscious methodology as allowed by Caltrans DBE guidelines.

In late 2005, a Ninth Circuit Court of Appeals decision involving the Washington State Department of Transportation (WSHDOT) held that WSHDOT lacked sufficient evidence to support the use of race conscious measures on federal-aid contracts. The Ninth Circuit's decision is controlling authority for California and other western states within its jurisdiction.

After an assessment by Caltrans of its DBE program and the use of race-conscious goals on individual contracts, Caltrans was concerned that its program may not meet the new evidentiary standards established by the Ninth Circuit. As such Caltrans has determined, that as of May 1, 2006, all recipients of federal funds for transportation projects will adopt and use a race-neutral DBE program.

According to 49 Code of Federal Regulations (CFR) Part 26.5, a *race neutral* measure or program is one that, while benefiting DBEs, is not solely focused on DBE firms. Race neutral measures focus on developing the business practices of all small businesses, not just DBEs. While, on the other hand, a *race-conscious* measure or program is one that is focused specifically on assisting only DBEs.

The overall California DBE goal to be achieved exclusively by race-neutral measures is 10.5 percent for projects funded by the Federal Highways Administration and 4 percent for projects funded by the Federal Transit Administration.

The Race-Neutral DBE Program agreement must be approved and submitted to Caltrans by no later than June 1, 2006. Failure to meet this deadline may result in a suspension of the County's ability to receive Authorizations to Proceed on its federally funded projects. This would directly affect our ability to bid, award and construct the Road 80 overlay project this summer.

FINANCING:

The direct costs associated with administering this program are unknown. The staff assigned to administer this program is funded through the Road Fund. We anticipate spending approximately \$2.3 million on federally funded projects over the next 12 months.

ALTERNATIVES:

Do not participate in the DBE Program and do not receive federal funds for transportation projects.

INVOLVEMENT OF OTHER DEPARTMENTS OR AGENCIES:

Caltrans prepared the model Race-Neutral DBE Program. County Counsel reviewed the Race-Neutral DBE Program.

SIGNATURE REQUIREMENTS:

County Administrative Officer/Clerk of the Board of Supervisors or authorized Deputy to attest to the Resolution, and the Director of Transportation to sign the DBE Program.

ADMINISTRATIVE SIGN OFF:

RESOURCE MANAGEMENT AGENCY

Britt L. Fussel, P.E.
Assistant Director-Engineering
County Surveyor

Henry Hash, Director

BLF

Submittal Date: May 10, 2006

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BEFORE THE BOARD OF SUPERVISORS
COUNTY OF TULARE, STATE OF CALIFORNIA

IN THE MATTER OF DISADVANTAGED)
BUSINESS ENTERPRISES (DBE)) RESOLUTION NO.
PROGRAM FOR FEDERALLY FUNDED)
TRANSPORTATION PROJECTS)

UPON MOTION OF SUPERVISOR , SECONDED BY SUPERVISOR
, THE FOLLOWING WAS ADOPTED BY THE BOARD OF
SUPERVISORS, AT AN OFFICIAL MEETING HELD MAY 23, 2006, BY THE
FOLLOWING VOTE:

AYES:
NOES:
ABSTAIN:
ABSENT:

ATTEST: C. BRIAN HADDIX
COUNTY ADMINISTRATIVE OFFICER/
CLERK OF THE BOARD OF SUPERVISORS

BY: _____

* * * * *

1. Approved the Tulare County Race-Neutral DBE Program;
2. Authorized the Director of Transportation to sign said program;
3. Authorized the Director of Transportation to sign and submit all subsequent reports and forms required pursuant to Caltrans DBE Guidelines for Race-Neutral DBE Programs.

DISADVANTAGED BUSINESS ENTERPRISE RACE-NEUTRAL IMPLEMENTATION AGREEMENT

For the County of Tulare, 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’s Disadvantaged Business Enterprise 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 DBE Annual Submittal Form 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 Annual DBE Goal (§26.51)

RECIPIENT will assist Caltrans to achieve its Overall Statewide DBE Goal by race neutral means that may include, but are not limited to the following:

1. Advertising solicitations, scheduling bidding periods and opening times, and packaging quantities, specifications, and delivery schedules in ways that facilitate DBE and other small business participation.
2. Providing assistance to DBE and small businesses in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, and providing services to help DBEs and other small businesses obtain bonding and financing).
3. Providing technical assistance and other services to DBE and small businesses.
4. Providing 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 including DBE's and small businesses; providing the 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 kinds 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 been historically low.
8. Assisting DBEs and other small businesses to develop their capability to utilize emerging technology and conduct business through electronic media.
9. Implementing or developing a mentor-protégé program.

VI 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.

VII DBE Liaison Officer (DBELO) (§26.25)

RECIPIENT has designated the Director of Transportation as the 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 has a staff of employees assigned to the DBE program 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.

VIII 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).]

IX 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.

X 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.

XI 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

A prime contractor or subcontractor shall pay to any subcontractor not later than 10-days of receipt of each progress payment, in accordance with the provision 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 include 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 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 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.

XIV 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).

XV Bidders List (§26.11)

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/non-DBE status, age, and annual gross receipts of the firms.

XVI Reporting to the DLAE

RECIPIENT will promptly submit a copy of the Local Agency Bidder-DBE Information (Exhibit 15-G or Exhibit 10-O of the LAPM) to the DLAE at the time of execution of consultant or construction contract award. RECIPIENT will promptly submit a copy of the Final Utilization of DBE participation to the DLAE using Exhibit 17-F 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.

Henry Hash
Director of Transportation
DBE Liaison Officer
Phone Number: (559) 733-6291

Date: _____

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

[Signature of DLAE]

Date: _____

[Print Name of DLAE]

DBE Liaison Officer
Location in the
Resource Management Agency
Organization Chart

5/4/2006

Attachment A

