



MEMO

To: NCRA Board of Directors

From: Mitch Stogner

Date: August 12, 2009

Subject: Agenda Item ^{H-2} - Discussion and Possible Approval of Updated Policies and Procedures Section 1700 – Disadvantaged Business Enterprise Program (DBE)

Since 1983, the U.S. Department of Transportation has required agencies which receive federal funds to implement a plan and establish a goal for Disadvantaged Business Enterprise (DBE) participation to ensure that small minority-owned and women-owned businesses are not disadvantaged by unlawful discrimination. Up until May 1, 2006, Caltrans required agencies to annually establish unique goals for DBE participation in federally funded contracts, determine which percentage of their annual goals would be met using DBE-neutral, and DBE-race conscious methods, and monitor these contracts for DBE compliance.

Effective on May 1, 2006, Caltrans changed to a race-neutral DBE program for the state and the RTC no longer established race conscious contract goals. The change was a response to the Ninth Circuit Court of Appeals, which mandated that evidence of discrimination in the transportation contracting industry must be documented in order to implement a DBE race-conscious program. Based on the results of a Caltrans funded availability and disparity study, which identified evidence of discrimination that would withstand judicial scrutiny, agencies are again required to establish a DBE program that includes both race-neutral and race-conscious goals for federally funded programs.

Staff Recommendation:

Approve the required FY 2009/10 Disadvantaged Business Enterprise (DBE) Program Plan and authorize staff to submit the California Department of Transportation DBE Program Implementation Agreement (Attachment 1) and Local Agency DBE Annual Submittal Form (Attachment 2) to Caltrans for approval.

Exhibit 9-B Local Agency DBE Annual Submittal Form

TO: CALTRANS DISTRICT 1
District Local Assistance Engineer

The amount of the Annual Anticipated DBE Participation Level (AADPL) and methodology are presented herein, in accordance with Title 49 of the Code of Federal Regulations, Part 26, and the State of California, Department of Transportation Disadvantaged Business Enterprise (DBE) Program Plan. The North Coast Railroad Authority submits our AADPL information. We have established an AADPL of 5.9% (1.5% Race Neutral; 4.4% Race Conscious) for the Federal Fiscal Year 09/10 beginning on October 1, 2009 and ending on September 30, 2010.

Methodology:

The instructions contained within the document entitled "AADPL Calculations Including UDBEs" dated March 25, 2009, and posted on the Caltrans Local Assistance were used to calculate the AADPL. The resulting computations are included in Attachment 2. The Caltrans instructions are located online at: <http://www.dot.ca.gov/hq/LocalPrograms/DBE/AADPL%20Calc%20UDBE%20mar25tg.doc>.

In summary, the methodology results is an annual participation level for DBE's and Underutilized DBE's based on the anticipated activities to be funded with federal funds, and the Underutilized DBE's and the DBE's in North Coast Railroad Authority's market area (defined as those counties in Caltrans District 1 and District 4). Specifically the following steps were employed to calculate the AADPL:

1. Determine the numerator of the calculation by identifying the North American Industry Classification System (NAICS) work categories likely to be contracted in Fiscal Year 2009-10 using Federal funds. For each NAICS Work Category, determine total number of DBEs in the agency's Market Area that can perform that type of work. To do this, use the California Unified Certification Program (CUCP) website, accessed by using the DBE Query Form link found at http://www.dot.ca.gov/hq/bep/dbe_query.htm.
2. Search for DBEs and UDBEs by county and NAICS categories.
3. Narrow the search by eliminating firms that are not located within the NCRA Market Area (defined as the following counties in Caltrans District 1 and 4: counties of Del Norte, Humboldt, Lake, and Mendocino, Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano, and Sonoma).
4. Determine the total number of firms to use as the denominator of the calculation, by determining the total number of firms in the NCRA Market Area that are willing to perform work for each NAICS category identified in step 1, using the following website: <http://censtats.census.gov/cbpnaic/cbpnaic.shtml>.
5. Select California, then the counties in the NCRA Market Area, then the NAICS categories to get a county by county list of the total number of establishments. The sum of all of the county totals is the denominator for each NAICS category.
6. After completing the above tasks, make a table showing the following information for each NAICS Work Category:
 - a. Number of DBE Firms (numerator)
 - b. Number of Total Firms (denominator)
 - c. Percentage of total contract funding in the NAICS Work Category (Weight).
7. Calculate the AADPL for each work category, then multiply this by the weight of the total work to be performed.

AADPL (per work category) =

$$\left[\sum \frac{\text{No. of DBEs in a Work Category}}{\text{No. of All Firms in same Work Category}} \times \text{Weight} \right] \times 100$$

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- Each Work Category AADPL is then multiplied by its percentage (Weight) of the total work to be performed. The resulting numbers are then added up to obtain the overall AADPL Base Figure:

AADPL (Base Figure) =

$$\left[\frac{\# \text{ of DBEs in 237310}}{\# \text{ of all firms in 237310}} \times 0.4 + \frac{\# \text{ of DBEs in 238210}}{\# \text{ of all firms in 238210}} \times 0.1 + \frac{\# \text{ of DBEs in 541330}}{\# \text{ of all firms in 541330}} \times 0.5 \right] \times 100$$

- Calculate the Race Conscious portion of AADPL using the same method shown above, except substitute UDBEs for DBEs. UDBE's consist of the following: Black, Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians), Asian Pacific (Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, The US Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong, and Women.
- Calculate the Race Neutral portion of the AADPL: Overall AADPL minus the Race-Conscious portion.

Disadvantaged Business Enterprise Liaison Officer (DBELO)

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Planned Race-Neutral Measures

NCRA will use the following race-neutral means of facilitating DBE participation for the upcoming Federal fiscal year, per 59 CFR Part 26.51 and Section V of the California Department of Transportation Race Conscious DBE Program Implementation Agreement for Local Agencies.

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:

- 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);
- 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);
- Providing technical assistance and other services;

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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.

Prompt Pay

Federal regulation (49 CFR 26.29) requires one of three methods be used in federal-aid contracts to ensure prompt and full payment of any retainage, kept by the prime contractor or subcontractor, to a subcontractor. Attachment 1 is a listing of the three methods, and the designation of provision #3 as the prompt payment provision the NCRA will use.

49 CFR Part 26.29(d) requires providing appropriate means to enforce prompt payment. These means may include appropriate penalties for failure to comply with the terms and conditions of the contract. The means may also provide that any delay or postponement of payment among the parties may take place only for good cause, with the local agency's prior written approval. NCRA, at its discretion, may randomly require the prime contractor to produce records to verify said prime contractor has made prompt payments to subcontractors. Failure to make prompt payments to subcontractors or failure to provide such records upon reasonable request by NCRA may trigger penalties in amounts deemed appropriate by NCRA.

Submitted by:

Mitch Stogner, Executive Director
North Coast Railroad Authority

Date

(707) 563-3280
Phone Number

Caltrans District Local Assistance Engineer

Date

Distribution:

(1) Original - DLAE

(2) Signed copy by the DLAE - Local Agency

Exhibit 9-B Local Agency DBE Annual Submittal Form

Attachment 1

Prompt Payment of Withheld Funds to Subcontractors

Federal regulation (49 CFR 26.29) requires one of the following three methods be used in federal-aid contracts to ensure prompt and full payment of any retainage kept by the prime contractor or subcontractor to a subcontractor.

Please check the box of the method chosen by the local agency to ensure prompt and full payment of any retainage.

- Method 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
- Method 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.
- Method 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.

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Attachment 2

The following table shows the resulting race-conscious, race-neutral and total Annual Anticipated DBE Participation Levels based on the projected federally funded contracts in fiscal year 2009-10.

NORTHCOAST RAILROAD AUTHORITY Project Goal Calculator for ISTE A Funded Projects In Federal FY 2009-10										
Industry Code	Work Category	"A" Est- imated Dollar Value	"B" % of Work by Industry Code	"C" Total Firms (DBE & Non-DBE) in District 1 & 4 Counties based on 2006 Census Data	"D" All DBE Firms in District 1 & 4 Counties From CUCP	"E" % DBE Firms 100*(D)/(C)	"F" AADPL% All DBE Firms (B)*(E)	"G" UDBE Firms in District 1 & 4 Counties From CUCP	"H" % UDBE Firms 100*(G)/(C)	"I" AADPL% UDBE Firms (B)*(H)
115112	Soil Preparation, Planting, & Cultivating	29	0.3%	53	1	1.9%	0.0%	1	1.9%	0.0%
212321	Construction Sand & Gravel Mining	1,057	11.9%	22	1	4.5%	0.5%	-	0.0%	0.0%
221310	Water Supply and Irrigation Systems	29	0.3%	75	1	1.3%	0.0%	1	1.3%	0.0%
237310	Highway, Street, and Bridge Construction	102	1.2%	219	37	16.9%	0.2%	22	10.0%	0.1%
237990	Other Heavy and Civil Engineering Construction	1,057	11.9%	95	14	14.7%	1.8%	12	12.6%	1.5%
238110	Poured Concrete Foundation and Structure Contractors	415	4.7%	452	13	2.9%	0.1%	7	1.5%	0.1%
238120	Structural Steel and Precast Concrete Contractors	415	4.7%	84	10	11.9%	0.6%	7	8.3%	0.4%
238210	Electrical Contractors	354	4.0%	1757	39	2.2%	0.1%	33	1.9%	0.1%
238990	All Other Specialty Trade Contractors	966	10.9%	659	41	6.2%	0.7%	32	4.9%	0.5%
324121	Asphalt Paving Mixture and Block Manufacturing	47	0.5%	34	1	2.9%	0.0%	1	2.9%	0.0%
334419	Other Electronic Component Manufacturing	354	4.0%	86	3	3.5%	0.1%	3	3.5%	0.1%
423390	Other Construction Material Merchant Wholesalers	380	4.3%	56	4	7.1%	0.3%	4	7.1%	0.3%
423610	Electrical Apparatus and Equip, Wiring Supplies, and Related Equip Merchant Wholesalers	354	4.0%	323	7	2.2%	0.1%	6	1.9%	0.1%
423810	Construction and Mining (except Oil Well) Machinery and Equipment Merchant Wholesalers	144	1.6%	65	1	1.5%	0.0%	-	0.0%	0.0%
424930	Flower, Nursery Stock, and Florists' Supplies Merchant Wholesalers	29	0.3%	97	2	2.1%	0.0%	1	1.0%	0.0%
484220	Specialized Freight (except Used Goods) Trucking, Local	1,194	13.5%	437	12	2.7%	0.4%	11	2.5%	0.3%
532412	Construction, Mining, and Forestry Machinery & Equip Rental/Leasing	1,472	16.6%	127	6	4.7%	0.8%	6	4.7%	0.8%
541320	Landscape Architectural Services	18	0.2%	268	10	3.7%	0.0%	9	3.4%	0.0%
541620	Environmental Consulting Services	39	0.4%	317	36	11.4%	0.0%	33	10.4%	0.0%
561730	Landscaping Services	29	0.3%	1968	9	0.5%	0.0%	8	0.4%	0.0%
562112	Hazardous Waste Collection	21	0.2%	22	1	4.5%	0.0%	-	0.0%	0.0%
562211	Hazardous Waste Treatment & Disposal	21	0.2%	19	1	5.3%	0.0%	1	5.3%	0.0%
811213	Communication Equip Repair & Maintenance	354	4.0%	34	1	2.9%	0.1%	-	0.0%	0.0%
	TOTAL	8,875	100.0%	7,269	251	3.5%	5.9%	198	2.7%	4.4%

Total AADPL = 5.9% Race-conscious AADPL = 4.4% Race-neutral AADPL = 5.9% - 4.4% = 1.5%