

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 CCCCCO, the services are provided by ten Small Business Development Centers (SBDC) located throughout California. The SBDCs are a part of the CCCCCO 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/>.