CHAPTER 9 CIVIL RIGHTS AND DISADVANTAGED BUSINESS ENTERPRISES

CONTENTS

Section	Subject	Page Number
9.1	INTRODUCTION	9-1
9.2	DEFINITIONS, ROLES AND RESPONSIBILITIES	9-1
	Definitions	9-1
	FHWA Responsibilities	9-2
	Caltrans Responsibilities	9-2
	Local Agency Responsibilities	9-3
9.3	CIVIL RIGHTS	9-4
	Nondiscrimination (Title VI Compliance)	9-4
	Accessibility	9-4
	Methods of Compliance	9-6
	Contractor Compliance	9-6
	Civil Rights Complaints	9-7
	Civil Rights Compliance Reviews of Location Procedures	9-7
9.4	LOCAL AGENCY DBE PROGRAM	9-8
	DBE Program Options	9-8
	DBE Program Elements	9-8
	Policy Statement	9-8
	DBE Liaison Officer	9-9
	Bidders List	9-9
	Contract Provisions	9-9
	Contract Assurance	9-9
	Prompt Progress Payment to Subcontractors	9-9
	Prompt Payment of withheld Funds to Subcontractors	9-9
	Monitoring and Enforcement Mechanisms	9-10
	Overall Goal Process	9-10
	Transit Vehicle Manufacturers	9-10
	Good Faith Efforts	9-10
9.5	ANNUAL OVERALL GOAL	9-10
	Process	9-10
	Public Participation	9-11
	Amount of Overall Goal	9-11
	Methodology—Step 1	9-11
	Use of DBE Directories and Census Bureau Data	9-12
	Use of a Bidders List	9-12
	Use of Data from a Disparity Study	9-12
	Use of the Goal of Another Local Agency	9-12
	Use of Alternative Methods	9-12

Methodology—Step 2 9-13
Race-Neutral/Race-Conscious Components 9-13
Expected Participation 9-14
Transit Vehicle Manufacturers 9-14
Transit Vehicle Manufacturer's Annual Goal 9-14

9.6 CONTRACT GOAL 9-15
Participation Opportunities 9-15
Adjusting Contract Goals 9-16
Construction Contract Requirements 9-17
Final Report 9-17
Counting Work Toward the Contract Goal 9-17
Performed by DBE 9-18
Joint Venture 9-18
Commercially Useful Function 9-18
DBE Trucking 9-19
Materials and Supplies 9-20
Not Counting Participation 9-20
Apparent Lack of Control 9-21
DBE Eligibility 9-21
Certification 9-22
Decertification 9-22
Exception 9-23
Appeal 9-23

9.7 GOOD FAITH EFFORTS 9-23
Anticipated Actions 9-24
Administrative Reconsideration 9-25
Substitutions 9-25
Noncompliance 9-25

9.8 REFERENCES 9-26

EXHIBITS

Exhibit	Description	Page Number
9-A	MODEL DBE PROGRAM FOR LOCAL AGENCIES	9-27
9-B	ANNUAL OVERALL GOAL INFORMATION	9-45
9-C	GUIDELINES FOR CIVIL RIGHTS COMPLIANCE REVIEWS OF LOCATION PROCEDURES	9-47

CHAPTER 9 CIVIL RIGHTS AND DISADVANTAGED BUSINESS ENTERPRISES

9.1 INTRODUCTION

This section has been prepared to provide guidance for the local agency in complying with the Civil Rights requirements for federal-aid transportation programs. The information contained in this section has been extracted from other documents and should not be considered as a replacement or substitute for the laws, rules and regulations, agreements, circulars, and other guidance available.

Part 21 of Title 49 of the Code of Federal Regulations (CFR) implements the provisions of Title VI of the Civil Rights Act of 1964 to the end that no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving federal financial assistance from the FHWA.

After the Civil Rights Act of 1964, other laws were added to prohibit discrimination in other areas:

- Sex added by Federal Aid Highway Act of 1973 {23 USC 324}
- Disabilities added by Section 504 of the Rehabilitation Act of 1973 {29 USC 790}
- Age added by Age Discrimination Act of 1975 {42 USC 6101}
- Scope expanded by Civil Rights Restoration Act of 1987 {P.L. 100-209} to include <u>all</u> of a recipient's and contractor's programs or activities whether federally assisted or not
- Accessibility for those with disabilities added by the Americans with Disabilities Act of 1990

9.2 DEFINITIONS, ROLES AND RESPONSIBILITIES

DEFINITIONS

<u>Disadvantaged Business Enterprises (DBE)</u> - A for-profit "small business concern" that is at least 51 percent <u>owned and controlled</u> by one or more socially and economically disadvantaged individuals. The management and daily business operations must also be controlled by one or more such individuals. These individuals must be citizens of the United States and (1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis, or (2) who are either Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, women, or any other group found to be socially and economically disadvantaged by the Small Business Administration. This definition was revised in 1987 to include women. As used in this manual, the DBE term includes the Minority Business Enterprise (MBE) and the Women-Owned Business Enterprise (WBE) programs.

<u>Race-conscious measure or program</u> is one that is focused specifically on assisting only DBEs, including women owned DBEs.

Race-neutral measure or program is one that is, or can be, used to assist all small businesses. For purposes here, race neutral includes gender neutrality.

Small Business Concern – Small Business Concern means, with respect to firms seeking to participate as DBEs in U.S. Department of Transportation (DOT) assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that also does not exceed the cap on average annual gross receipts specified in Section 26.65(b) of 49 CFR.

Good Faith Efforts - For all projects where a DBE goal is established, the contractor is required to submit a listing of DBE participants and work to be performed to meet the goal. Good faith effort means that the contractor must have taken all necessary and reasonable steps to achieve DBE participation. Appendix A to Part 26 of 49 CFR provides guidance for determining good faith effort.

FHWA RESPONSIBILITIES

The Federal Highway Administration (FHWA) administers the payment of federal-aid highway funds to recipients: States, counties, cities, and other agencies such as transit districts for transportation related projects. The FHWA is responsible for monitoring these agencies for compliance with Title VI and other aspects of the Civil Rights Acts of 1964, 1968, and 1973, all concerning nondiscrimination in administration of federal funds.

FHWA has ultimate responsibility over all of the Civil Rights Programs (U.S. Department of Transportation-assisted recipients).

CALTRANS RESPONSIBILITIES

Caltrans responsibilities are as follows:

- Ensure local agency compliance with Title VI civil rights requirements.
- The Disadvantaged Business Enterprise Program assists the District Local Assistance Engineer (DLAE) in responding to local agencies' requests for assistance with questions/issues relative to DBE matters.
- Assist with training courses for local agencies' staff that will include civil rights discussion.
- At the request of local agency or third party, analyze and recommend resolution of Title VI discrimination complaints.
- The Disadvantaged Business Enterprise Program administers the DBE program and maintains a directory of certified DBE contractors.
- Each DLAE will review and approve the local agency's DBE program.

- Each DLAE will review and approve the local agencies' annual overall goal information.
- The DLAE is the focal point for advice and assistance on civil rights and DBE matters.
- The DLAE will ensure that the final DBE Utilization Report (for consultant and construction contractors) is reported to the Division of Local Assistance (DLA) for inclusion in the Caltrans DBE report to FHWA.
- DLA assembles statewide local agency DBE final utilization information and provides information for quarterly reports for FHWA.
- The DLAE will be responsible for DBE oversight of local agencies pursuant to the *Local Assistance Procedures Manual* (LAPM) regulations.
- The DLAE will review at least one contract per year for each local agency with an active construction project. This will include reviewing records of DBE and non-DBE subcontractor utilization, substitutions, good faith efforts, and DBE complaints, as well as checking if a DBE Liaison Officer has been designated.
- The DLAE will review at least one complete Plans, Specifications & Estimate (PS&E) package for federal provisions (including new DBE requirements) per year. If deficiencies are discovered, more frequent reviews should be conducted and a corrective action plan is to be submitted by the local agency for the DLAE's approval.
- The DLAE will maintain a list of each local agency's designated DBE Liaison Officer which will be updated annually with the local agency's submittal of their annual goal.
- The DLAE will maintain a file with an index of all local agencies' DBE programs and annual goals.
- DLA and the DLAE monitor local agencies' DBE program by conducting process reviews. The FHWA will be invited to participate in these process reviews.

LOCAL AGENCY RESPONSIBILITIES

The local agency responsibilities include:

- Developing a DBE Program and submitting it to the Caltrans' DLAE for approval.
- Developing annual overall goal information and submitting it to the Caltrans' DLAE for review.
- Designating a DBE Liaison Officer, accountable to the Chief Executive Officer of the local agency, to administer the DBE Program.
- Ensuring prompt and full payment to the prime contractor/subcontractor compliance with the prompt payment clauses of the contract.

- Designate an EEO Compliance Officer to administer the Title VI civil rights requirements.

- Establishing contract specific goals for participation by DBEs, when warranted to achieve the annual overall goal, before submitting a "Request for Authorization" (see Chapter 3, "Project Authorization" of this manual) for the engineering and construction phases of a federal-aid project.

- Including the contract goals and appropriate DBE specifications in the PS&E documents.

- Ensuring contractor compliance in meeting contract DBE goal with qualified DBEs or making good faith efforts, including review and evaluation of good faith efforts to determine responsiveness to DBE provisions for award of contract and for subcontractor substitutions.

- Completing the "Report of Final DBE Utilization" forms.

- Reviewing and taking action for noncompliance with DBE requirements by local agency' contractors and consultants.

9.3 CIVIL RIGHTS

NONDISCRIMINATION (TITLE VI COMPLIANCE)

Caltrans, under Title VI of the Civil Rights Act of 1964 and related statutes, ensures that no person in the State of California shall, on the grounds of race, color, sex and national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity it administers. Local agencies sign this assurance as part of their master agreement with Caltrans. This assurance must be included in all DOT-assisted contracts executed by local agencies.

Caltrans will continue to provide ongoing guidance and technical assistance in this area. Updates to the Caltrans Title VI Program Plan will be communicated to local agencies as they occur. For further information, please contact your DLAE.

ACCESSIBILITY

49 CFR Part 27, requires nondiscrimination on the basis of disability in programs and activities receiving or benefiting from federal financial assistance. Local agencies, as part of their master agreements with Caltrans, sign assurances to this extent. Further explanation of compliance requirements under Section 504 of the Rehabilitation Act and the American Disability Act (ADA) are outlined below:

Section 504 of the Rehabilitation Act of 1973, as amended most recently in 1998, (codified as 29 U.S.C. §791 et seq.) requires that any entity receiving federal funds must ensure that persons with disabilities:

- Are not discriminated against in any and all aspects of employment, or

- Denied access to the goods or services that these federal fund recipients provide.

The intent of The Americans with Disabilities Act of 1990, (Public law 101-336,codified as 42 U.S.C. 12101 et seq.) was to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency for persons with disabilities." This law extended the protections offered for persons with disabilities further to include the following:

- Title I of the ADA requires all private employers of 15 or more be covered for employment practices, regardless of whether or not they receive any funds directly or indirectly from the federal government; (Title I of the act). For State and local government, the number of employees is irrelevant. All parts of the entity are covered, regardless of the number of employees in that sub-division.

- Title II of the ADA requires that all activities of State and local governments, including contracting and purchasing of services, must be operated in a manner that makes their services accessible to and useable by persons with disabilities. Thus, the public entity has the responsibility to ensure that any services they would perform but have decided to contract out with local entities or private businesses to provide, must be accessible to and useable by persons with disabilities. (Title II of the act). State and local governments must ensure that the "system in its entirety," but not necessarily every location where services are provided, is accessible to and useable by persons with disabilities. This extends to public transportation of any sort. All new construction must be barrier free. (Please see Chapter 11, “Design Standards”, of this manual)

- Title III of the ADA requires that providers of public accommodations in 12 general categories must be accessible to and useable by persons with disabilities, unless to do so would create an undue financial hardship or administrative burden. This includes all private transportation carriers that offer their goods and services to the public These businesses must not discriminate in the "goods, services, facilities, procedures and privileges, advantages and accommodations" offered to the public. Under this title of the ADA, alterations to facilities to allow access must be made that are "readily achievable," and all new construction must be barrier free.

- Title V of the ADA explicitly prohibits coercion, intimidation or threats against persons exercising their rights under the ADA. It also specifically excludes from coverage religious organizations, Indian tribes, and "exclusive private clubs" with a 501c classification by the Internal Revenue Service (IRS). It also excluded from consideration, as a person with a disability, individuals who are currently, illegally using controlled substances as defined in the Controlled Substance Act. Persons who are homosexual, transexual or trans-gender, or who have addictions to gambling, or other specific sexual conditions are not considered to be a "person with a disability" under the act.

- Title V of the ADA also states that should another federal, state or local statute offer greater access to services or provide greater protections for persons with disabling conditions, then it shall be followed. In California, several state statutes and regulations offer greater access or protections than those of the ADA, and therefore have precedence over the ADA's provisions in that area.

A. For example, in many cases the California Building Code (Title 24) have stronger requirements than does the Americans with Disabilities Act Access Guidelines (ADAAG) code. Thus, in California, Title 24 has precedence in these areas. However, the ADAAG has some areas that are stronger than California, such as elevators, when that code will apply over the state standard.

B. The Unruh Civil Rights Act (Civil Code Div. I, Part 2, §§51- 53.4) offer greater protections, in that persons with less severe disabling conditions may be eligible, and they have greater recourses to redress than under the ADA. Thus, it would have precedence over the ADA in this respect.

C. California Government Code 11135 additionally requires that any State of California entity have a process developed to deal with complaints. This process is to determine whether there is prima face evidence of discrimination against persons with disabilities in the contracting or purchasing process. If prima face evidence exists, then the allegations must be investigated and, should evidence be found of discrimination, action taken to immediately correct the discrimination or terminate the contract, or both.

As Caltrans updates the CT ADA Program Plan, additional information and guidance will be provided to local agencies. For further information concerning local obligations, you could contact your DLAE.

METHODS OF COMPLIANCE

1. Assurances by Agencies: The State signs annual assurances with the FHWA to certify compliance with the law. Similar assurances are agreed to by the local agency when they execute the "Local Agency-State Agreement for Federal-Aid Projects" (see Chapter 4, "Agreements," of this manual).

   The Program Supplement Agreement for each project will include the local agency's reaffirmation of the Nondiscrimination Assurances contained in the "Local Agency-State Agreement for Federal-Aid Projects."

2. Review: Methods of administration by the State and local agencies are subject to periodic reviews by the FHWA.

3. Field Reviews: Caltrans and FHWA may choose to audit local agencies directly. A field review may be held if felt necessary in any agency, particularly in the event of complaints to the Office of Federal Contract Compliance, or the Equal Employment Opportunity Commission. Caltrans Civil Rights Program personnel will participate in these field reviews.

CONTRACTOR COMPLIANCE

The local agency is responsible for ensuring that the Title VI of the Civil Rights Act of 1964 requirements are being complied with by the contractor. Part 60, Section 60-4.3 of Title 41 of the CFR contains information on contractor compliance. The requirements are discussed in Chapter 16, Section 16.12, "Equal Employment Opportunity," of this manual. Title VII of the Civil Rights Act of 1964 {42 U.S.C. 2000e} additionally states:

"It shall be an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges, of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Any employee who alleges employment discrimination or harassment against their contractor or subcontractor employer under Title VII should immediately be referred to the U.S. Equal Employment Opportunity Commission (EEOC) and/or the Department of Fair Employment and Housing (DFEH). A referral to the employer's EEO Officer may also be appropriate. If a member of the public alleges discrimination on the part of contractor or subcontractor employee(s), the complainant should also be referred to the EEOC and/or DFEH.

CIVIL RIGHTS COMPLAINTS

The procedures in this section have been established to receive and resolve alleged civil rights discrimination complaints concerning a local agency project or projects funded with federal-aid funds.

Any Title VI complaint received by the local agency will be investigated by Caltrans.

> A local agency will not investigate itself. If a complaint is filed against the local agency, the local agency will forward the complaint to Caltrans Headquarters, Civil Rights Investigation Unit, within 10 days of the date the complaint is received. The complainant will be informed of appeal rights to the FHWA California Division by the Caltrans investigative staff. . An appeal will be accepted by FHWA up to 180 days FROM THE DATE OF RECEIPT OF THE DECISION. Caltrans will investigate and submit a report of findings to FHWA within 60 days of receipt of the complaint.

Caltrans will include a summary report of its findings on all Title VI complaints in its annual Title VI update report to FHWA.

CIVIL RIGHTS COMPLIANCE REVIEWS OF LOCATION PROCEDURES

Caltrans will monitor a local agency's location procedures to assure compliance with Title VI and Title VIII of the Civil Rights Acts of 1964 and 1968, respectively. The "Guidelines for Civil Rights Compliance Reviews of Location Procedures" (see Exhibit 9-C), written in question form, shall be used to the extent applicable as a minimum guide. These guidelines are intended to suggest areas where compliance reviews may be appropriate, not to limit the range of questions that may be asked. After a review is completed, the reviewer should have a rather comprehensive knowledge of the agency's highway location procedures as they pertain to civil rights. Based upon the answers to these questions, the reviewer should be able to judge whether or not the agency is in

compliance with Title VI and Title VIII and recommend appropriate remedial action.

9.4 LOCAL AGENCY DBE PROGRAM

Local agency recipients of federal funds shall comply with all the elements of Title 49, Part 26 of the CFR entitled "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs." These provisions apply to all federal-aid funded transportation projects.

After October 1, 2000, each local agency shall implement a Disadvantaged Business Enterprise (DBE) Program and establish an annual overall goal prior to submitting a "Request for Authorization" to proceed with a federal-aid project.

In this manual, federal-aid contracts refers to U.S. Department of Transportation (DOT) assisted contracts, which includes funding from the FHWA, Federal Transit Administration (FTA) and the Federal Aviation Administration (FAA).

DBE PROGRAM OPTIONS

A local agency has two options in complying with DBE Program requirements. The options are:

1. Adopt the DLA "Model DBE Program" for local agencies along with their methodology(Exhibit 9-A), or

2. Develop its own DBE Program, or modify the "Model DBE Program" in compliance with Part 26 of Title 49 CFR.

Under option one, the local agency adopts the DLA Model DBE Program and submits it to the DLAE for review of the draft, which is followed by the later submittal of the final for approval, acceptance signature and date.

Under option two, the local agency prepares its own DBE program with all the elements required by Part 26 of Title 49 CFR, and submits it to the DLAE for review of the draft, which is followed by the later submittal of the final for approval, acceptance signature and date.

DBE PROGRAM ELEMENTS

The required elements of a DBE program are prescribed in 49 CFR Part 26. This is available at the DOT Office of Small and Disadvantaged Business Utilization website on the Internet at http://osdbuweb.dot.gov/programs/dbe/dbe.htm. One important element is that the Caltrans Business Enterprise Program certifies eligible DBEs as discussed in Section 9.5 of this chapter. Other elements are highlighted below.

POLICY STATEMENT

Each program shall contain a policy statement expressing a commitment to the DBE program, stating its objectives, and outlining responsibilities for its implementation.

Each local agency will circulate the statement throughout its organization and to the DBE and non-DBE business communities that perform work on its DOT-assisted contracts (one way is to include the policy statement in each contract solicitation).

DBE LIAISON OFFICER

Each local agency must designate a DBE liaison officer who shall have direct independent access to the local agency's Chief Executive Officer concerning DBE program matters. This person shall be responsible for the duties as described in Exhibit 9-A.

BIDDERS LIST

Each local agency will be required to create and maintain a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote to the local agency on DOT-assisted contracts. The bidders list will include the name, address, DBE/non-DBE status, date established, and annual gross receipts of firms.

A local agency may include in its bidding process a clause requiring prime bidders to report the names/addresses, and other pertinent information, of all firms who quote to them on subcontracts as a way to establish their bidders list. Also, a survey of consulting firms and contractors that were awarded DOT-assisted contracts in the past may be used to obtain bidders list data.

CONTRACT PROVISIONS

Contract Assurance

DBE regulations require the following contract assurance statement in every DOT-assisted contract and subcontract:

"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."

Prompt Progress Payment to Subcontractors

Attention is directed to Section 7801.5 of the California Business and Professions Code, which requires a prime contractor or subcontractor to pay any subcontractor not later than 10 days of receipt of each progress payment, unless otherwise, agreed to in writing. In addition, federal regulation (49 CFR 26.29) requires a prime contractor or subcontractor to pay a subcontractor no later than 30 days of receipt of each payment unless, any delay or postponement of payment among the parties takes place only for good cause and with the prior written approval of the agency. Section 7801.5 of the California Business and Professions Code also contains enforcement actions and penalties. These requirements apply to both DBE and non-DBE subcontractors.

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:

1. The local agency may decline to hold retainage from prime contractors and prohibit prime contractors and subcontractors from holding retainage from subcontractors.
2. The local agency may decline to hold retainage from prime contractors and include a contract clause obligating the prime contractor, and subcontractors to make prompt and full payment of any retainage kept by the prime contractor or subcontractor to all subcontractors within 30 days after the subcontractor's work is satisfactorily completed.
3. The local agency may hold retainage from the prime contractor and provide for prompt and regular incremental acceptances of portions of the contract, pay retainage to prime contractors based on the acceptances, and include a contract clause obligating the prime contractor and subcontractors to pay all retainage owed to all subcontractors for satisfactory completion of the accepted work within 30 days after receipt of the retainage. This clause must require the prompt release of retainage payments from the prime contractor to the subcontractor within a specified number of days after the subcontractor's work is satisfactorily completed.

In the above methods, a subcontractor's work is satisfactorily completed when all tasks called for in the subcontract have been accomplished and documented as required by the agency. When an agency has made an incremental acceptance of a portion of the contract work, the work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed. Federal regulation (49 CFR 26.29) also requires that any delay or postponement of payment among the parties may take place only for good cause, must have the prior written approval of the agency, and that appropriate means of enforcement such as those contained in Section 7801.5 of the California Business and Professions Code, must be included in the contract.

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MONITORING AND ENFORCEMENT MECHANISMS

This section is for the local agency to explain the means it will use to ensure compliance with the DBE regulations by all participants.

OVERALL GOAL PROCESS

Establishing an overall goal is a two-step process. The overall goal must be segregated into race-neutral and race-conscious components. The information to be considered for analysis in establishing the goal is discussed in detail under Section 9.5, "Annual Overall Goal."

TRANSIT VEHICLE MANUFACTURERS

If the local agency is an FTA recipient, the local agency must require in its DBE program that each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, certify that it has complied with the requirements elsewhere in this chapter.

GOOD FAITH EFFORTS

A good faith effort must be documented if a bidder's proposal does not meet the contract goals or if a substitution is needed where a non-DBE subcontractor is the only ready, willing, and able subcontractor to perform the work and the contract goal is not otherwise met. More information is discussed in Section 9.6, "Good Faith Efforts" of this manual.

9.5 ANNUAL OVERALL GOAL

PROCESS

The amount of the overall goal, the method to calculate the goal, and the breakout of estimated race-neutral and race-conscious participation will be required annually by June 1 in advance of the federal fiscal year beginning October 1 for federal-aid contracts. Submittals will be to the Caltrans DLAE, using Exhibit 9-B of this chapter. An exception to this will be if FTA or FAA recipients are required by FTA or FAA to submit the annual information to them or a designee by another date. FHWA recipients will follow this process:

As part of establishing an overall goal, the local agency must provide for public participation. This public participation must include consultation with minority, women's and general contractor groups; community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and the local agency's efforts to establish a level playing field for the participation of DBEs.

With that consultation referenced, the local agency will submit the draft overall goal information (amount of overall goal, the method to calculate the goal, and the breakout of estimated race-neutral and race-conscious participation) by June 1 to the Caltrans DLAE for preliminary comments. With Caltrans' preliminary comments incorporated, the local

agency will proceed with the public participation process (described below) which allows public input into the overall goal.

After the public participation process, the local agency will submit the overall goal information to the Caltrans DLAE. The submittal will include a summary of the information, copies of the public notices, comments received during this public participation process, and the local agency's response to these comments. This will be due to the DLAE by September 1 so that the DLAE will have one month for a final review and the local agency may begin using the overall goal on October 1 of each year.

The local agency is not required to obtain Caltrans' prior concurrence with the proposed overall goal. However, if the Caltrans' review concludes that the overall goal has not been correctly calculated, or that the method for calculating goals is inadequate, the DLAE may, after consulting with the local agency, adjust the overall goal or require that the local agency do so. The adjusted overall goal or review comments will be binding on the local agency.

PUBLIC PARTICIPATION

Once the DLAE has responded with preliminary comments to the local agency's draft overall goal information and the comments have been incorporated into the draft overall goal information, the local agency will publish a notice of the proposed overall goal, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at the local agency's principal office for 30 days following the date of the notice, and informing the public that comments will be accepted on the goal for 45 days following the date of the notice. The notice must be published in general circulation media and available minority-focused media and trade association publications. The notice will include addresses to which comments may be sent and addresses (including offices and websites) where the proposed goal and its rationale may be inspected .

AMOUNT OF OVERALL GOAL

For an FHWA recipient, the overall goal should be expressed as a percentage of all federal-aid highway funds that a local agency will expend in FHWA-assisted contracts in the forthcoming fiscal year. If the local agency is also an FTA and FAA recipient, the percentage is determined in a similar way, but it includes FTA and FAA-assisted contracts—excluding FTA funds used to purchase transit vehicles.

The overall goal is a determination of the level of DBE participation the local agency would expect absent the effects of discrimination. The overall goal is split into two components: race-neutral and race-conscious.

METHODOLOGY—STEP 1

The overall goal methodology is a two-step process as described in 49 CFR Part 26, Section 26.45. The first step is determining a base figure for the relative availability of DBEs that are ready, willing and able to participate in the federal-aid contracting program. Five methods are described to accomplish this first step, although other methods or combinations of methods to determine a base figure may be used, subject to review and

comments by DLAE.

USE OF DBE DIRECTORIES AND CENSUS BUREAU DATA

Determine the number of ready, willing and able DBEs in your market from your DBE directory. Using the Census Bureau's County Business Pattern (CBP) database, determine the number of all ready, willing and able businesses available in your market that perform work in the same SIC codes. (Information about the CBP database may be obtained from the Census Bureau at their website, www.census.gov/epcd/cbp/view/cbpview.html.) Divide the number of DBEs by the number of all businesses to derive a base figure for the relative availability of DBEs in your market.

USE OF A BIDDERS LIST

By using the required Bidders List, determine the number of DBEs that have bid or quoted on your DOT-assisted prime contracts or subcontracts in the previous year. Determine the number of all contractors and consultants that have bid or quoted on prime or subcontracts in the same time period. Divide the number of DBE bidders and quoters by the number of all contractors and consultants to derive a base figure for the relative availability of DBEs in your market.

USE OF DATA FROM A DISPARITY STUDY

Caltrans will not set out specific requirements for what data or analysis is required before a disparity study can be used for setting a goal, because Caltrans believes that the design and conduct of the study is best left to the local officials and the professional organizations with which they contract to conduct the study. Instead, Caltrans offers simple general principles that should apply to all studies used for goal setting. Any study data relied on in the goal setting process should be as recent as possible and be focused on the transportation contracting industry.

Disparity studies generally contain a wide array of statistical data, as well as anecdotal data and analysis that can be particularly useful in the goal-setting process. The data, which a good disparity study provides, can be an excellent guide for a recipient to use to set a narrowly-tailored goal. When setting the goal, first use the study's statistical evidence to set a base figure for the relative availability of DBEs. Other study information, whether it is anecdotal data, analysis or statistical information about related fields, should be included when making adjustments to the base figure (see Step 2 below), but not included in the base figure for the relative availability of DBEs.

USE OF THE GOAL OF ANOTHER LOCAL AGENCY

If another DOT recipient in the same, or substantially similar, market has set an overall goal in compliance with 49 CFR Part 26, you may use that goal as a base figure for your goal.

USE OF ALTERNATIVE METHODS

Local agencies may use other methods to determine a base figure for their overall goal. Any methodology chosen must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in the local agencies' market.

METHODOLOGY—STEP 2

Once a base figure has been determined, local agencies must survey their jurisdiction to determine what types of relevant evidence is available to them. Then, relying on their own knowledge of their contracting markets, local agencies must review the evidence to determine whether either an up or down adjustment from the base figure is needed. Some types of evidence to consider include the following:

- The current capacity of DBEs to perform work in your DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years;
- Evidence from disparity studies conducted anywhere within your jurisdiction, to the extent it is not already accounted for in your base figure; and
- If your base figure is the goal of another recipient, you must adjust it for differences in your local market and your contracting program.

You may also consider available evidence from related fields that affect the opportunities for DBEs to form, grow and compete. These include, but are not limited to:

- Statistical disparities in the ability of DBEs to get the financing, bonding and insurance required to participate in your program;
- Data on employment, self-employment, education, training and union apprenticeship programs, to the extent you can relate it to the opportunities for DBEs to perform in your program.

If you attempt to make an adjustment to your base figure to account for the continuing effects of past discrimination (often called the "but for" factor) or the effects of an ongoing DBE program, the adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought.

RACE-NEUTRAL/RACE-CONSCIOUS COMPONENTS

Each time a local agency submits its overall goal for review by Caltrans, the local agency must also submit its projection of the portion of the goal that they expect to meet through race-neutral means and their basis for that projection. This projection is subject to approval by the DLAE in conjunction with the review of the overall goal.

Local agencies must meet a portion of their overall goal, to the maximum extent feasible, by using race-neutral means of facilitating DBE participation.

Race-neutral DBE participation includes any time a DBE obtains 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, obtains 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 business 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. Providing information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs and other small businesses on recipient mailing lists for 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 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 historically been low.
8. Ensuring distribution of the DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors.
9. Assisting DBEs and other small businesses to develop their capability to utilize emerging technology and conduct business through electronic media.

Race-conscious measure is an overall goal component that focuses on assisting only DBEs. The use of contract goals is the primary example of a race-conscious measure in the DBE program. Local agencies must establish contract goals to meet any portion of their overall goal they do not project being able to meet using race-neutral means.

EXPECTED PARTICIPATION

If a local agency's overall goal is 18% and the overall goal is segregated into 14% race-conscious and 4% race-neutral components, then it would be expected that some local agency contracts will have DBE goals which will result in an overall participation of 14% of the total local agency federal-aid highway funding for the fiscal year. Also, other local agency contracts will have no DBE goals, or will have participation that exceeds the contract goal, or DBE participation through a prime contract a DBE obtains through customary competitive procedures, all of which will result in an overall participation of 4% of the total local agency federal-aid highway funding for the same year.

TRANSIT VEHICLE MANUFACTURERS

If the local agency is also an FTA recipient, FTA assistance used in transit vehicle procurements are not used in the base amount from which an overall goal is calculated.

TRANSIT VEHICLE MANUFACTURER'S ANNUAL GOAL

Transit vehicle manufacturers must establish and submit for FTA's approval an annual

overall percentage goal. In setting the overall goal, transit vehicle manufacturers should be guided, to the extent applicable, by the principles underlying Section 26.49, Part 26 of Title 49 CFR. The base from which transit vehicle manufacturers calculate this goal is the amount of FTA financial assistance included in transit vehicle contracts that will be performed during the fiscal year in question. Transit vehicle manufacturers must exclude from this base funds attributable to work performed outside the United States and its territories, possessions, and commonwealths.

In lieu of complying with the aforementioned procedures, local agencies may, with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles. Transit vehicle manufacturers should contact FTA for applicable procedures.

9.6 CONTRACT GOAL

A contract goal is a percentage of the total contract amount that is expected to be performed by certified DBE firms. Local agencies may use contract goals only on those DOT-assisted contracts that have subcontracting, supplier, or trucking possibilities.

Local agencies are not required to set a contract goal on every DOT-assisted contract. Local agencies are not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract may be higher or lower than that percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. However, over the period covered by an overall goal, contract goals must be set so that they will cumulatively result in meeting the portion of the overall goal that is not projected to be met through the use of race-neutral means.

Caltrans approval of each contract goal is not necessarily required. However, Caltrans may review and approve or disapprove any contract goal that a local agency establishes.

A contract goal must provide for participation by certified DBEs and must not be subdivided into group-specific goals.

PARTICIPATION OPPORTUNITIES

The local agency should structure its project development, and contract items and specifications in a manner which provides opportunities for DBE participation.

Participation by disadvantaged business enterprises is possible at four main points in the process for developing local federal-aid transportation projects. They are:

- Preliminary engineering and environmental analysis
- Final design
- Right of way acquisition
- Construction, including construction management

Preliminary engineering studies and environmental analysis are the first steps in developing a local transportation project. Disadvantaged business enterprises may be engaged to perform all of these activities as a prime consultant or some of these activities

as a member of a team of consultants.

Completion of final design and preparation of plans, specifications, and estimates normally are a continuation of preliminary engineering activities. However, in some situations the agency employs different consultants and professional teams to perform these final design activities. Disadvantaged business enterprises may be engaged at this point.

Acquisition of right of way for local transportation projects may be performed by the local agency or by a qualified consulting firm. Qualified disadvantaged business enterprises may be considered for performance of right of way activities.

Disadvantaged business enterprises may participate in bidding for construction contracts for projects developed by local agencies. Other opportunities for participation in construction include work as subcontractors, suppliers, vendors, truckers, etc.

ADJUSTING CONTRACT GOALS

To ensure that local agencies' DBE programs are narrowly tailored to overcome the effects of discrimination, it may be necessary for an adjustment in the use of contract goals during the fiscal year for which the overall goal applies. This adjustment may be needed as a result of more or less subcontracting items with DBE opportunities for a contract that was not foreseen during the overall goal analysis. The scope of work on a contract may differ from what was originally thought of during overall goal analysis. Also, a contract change order may have a direct bearing on the DBE participation opportunities for the contract. Other reasons may warrant the need for adjustments.

Contract goals may also need adjustment induced by how the overall goal is set. These adjustments may be needed for the following reasons:

1. If the local agency estimates that they can meet their entire overall goal for a given year through race-neutral means, they must implement their program without setting contract goals during that year.

2. If, during the course of any year in which contract goals are used, a local agency determines that it will exceed their overall goal, they must reduce or eliminate the use of contract goals to the extent necessary. Contract goals are not to be set after the overall annual goal is achieved. If the local agency determines that it will fall short of their overall goal, then it must make appropriate modifications in their use of race-neutral and/or race-conscious measures to meet the overall goal.

3. If the DBE participation that was obtained by race-neutral means alone meets or exceeds a local agency's overall goals for two consecutive years, the local agency is not required to make a projection of the amount of goal that can be met using such means in the next year. The local agency will not set contract goals on any contracts in the next year. The local agency will continue using only race-neutral means to meet their overall goal unless and until they do not meet their overall goal for a year.

4. If a local agency obtains DBE participation that exceeds their overall goal in two consecutive years through the use of contract goals (i.e., not through the use of race-neutral means alone), the local agency must reduce their use of contract goals

proportionately in the following year.

Caution is needed regarding making adjustments during the fiscal year. If a local agency handles a large volume of contracts simultaneously, DBE utilization will occur during different times of a contract. High usage of DBEs that overlap at the same time may seemingly warrant an adjustment—only to make a counter adjustment later when an overlap of low DBE usage occurs. It is also important to note that many contracts will encompass multiple fiscal years with DBE usage concentrated unevenly during the contract term.

CONSTRUCTION CONTRACT REQUIREMENTS

The local agency must determine the individual project goal based on the work performed and the availability of certified DBE contractors in the geographic area (a specific goal may not be appropriate for every project). These goals must be consistent with the following policies:

- Individual contract goals are established in order to achieve fair DBE participation.
- The project analysis starts with the availability and capacity of certified DBE contractors (in the project area) to perform the items of work. The contractible items of work are evaluated by the local agency in light of the project type and size, and normal industry contracting practices.
- All contract bidders are required to meet the contract goal, or document that they have made adequate good faith efforts to meet the goal if they did not succeed in obtaining the DBE participation specified in the contract specifications.
- The contract goals are set to allow non-disadvantaged as well as DBE contractors to compete for contract work.

FINAL REPORT

The "Final Report of Utilization of Disadvantaged Business Enterprises (DBE), First Tier Subcontractors", Exhibit 17-F, is reviewed by the local agency and certified for completion and accuracy. The local agency must submit this report as part of its "Report of Expenditures" package before final payment is made (see Chapter 17, "Project Completion" of this manual.)

COUNTING WORK TOWARD THE CONTRACT GOAL

Actual payment to subcontractors that are certified DBEs and performing a commercially useful function will be counted as DBE participation in meeting the contract goal. If the prime contractor is a qualified DBE, his/her work is reported and counted toward the contract goal.

"Final Report Utililization of Disadvantaged Business Enterprises (DBE), First Tier Subcontractors", Exhibit 17-F, is the DBE utilization form to be completed at the completion of a contract and submitted to the DLAE (see Chapter 17 for specific instructions). The information in this report is required by the Disadvantaged Business Enterprise Program and the FHWA to demonstrate DBE compliance on local agency projects.

Specific instances of counting DBE participation toward a contract goal is presented in the following sections.

PERFORMED BY DBE

When a DBE participates in a contract, count only the value of the work actually performed by the DBE toward the DBE goal.

- Count the entire amount of that portion of a construction contract (or other contract not covered by the following bullet) that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).

- Count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, toward the DBE goal, provided that the local agency determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.

- When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.

JOINT VENTURE

When a DBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward the DBE goal.

COMMERCIALLY USEFUL FUNCTION

Count expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.

- A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, the local agency must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.

- A DBE does not perform a commercially useful function if its role is limited to

that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, the local agency must examine similar transactions, particularly those in which DBEs do not participate.

- If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, one must presume that it is not performing a commercially useful function.

- When a DBE is presumed not to be performing a commercially useful function as provided in the previous bullet, the DBE may present evidence to rebut this presumption. The local agency's determination as to whether the firm is performing a commercially useful function should be based upon the type of work involved and normal industry practices.

- Local agencies' decisions on commercially useful function matters are subject to review by the DLAE.

DBE TRUCKING

Use the following factors in determining whether a DBE trucking company is performing a commercially useful function:

- The DBE must be responsible for the management and supervision of the entire trucking operation for which it is getting credit on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.

- The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.

- The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.

- The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.

- The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by a DBE.

- A lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.

MATERIALS AND SUPPLIES

Count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:

- If the materials or supplies are obtained from a DBE manufacturer, count 100 percent of the cost of the materials or supplies toward DBE goals.

  Note: For purposes of counting DBE participation, a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

- If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies toward DBE goals.

  Note: For purposes of counting DBE participation, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

  To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.

  A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.

  Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not considered regular dealers for purposes of counting DBE participation.

- With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided the local agency determines the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. However, do not count any portion of the cost of the materials and supplies themselves toward DBE goals.

NOT COUNTING PARTICIPATION

If a firm is not currently certified as a DBE at the time of the execution of the contract, do not count the firm's participation toward any DBE goals, except as provided for under “Decertification” of this section.

Do not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward a local agency's overall goal.

Do not count the participation of a DBE subcontractor toward the prime contractor's DBE achievements or the local agency's overall goal until the amount being counted toward the goal has been paid to the DBE.

APPARENT LACK OF CONTROL

In order for a firm to become a certified DBE, it needs to meet the various requirements prescribed in the Code of Federal Regulations, as administered by Caltrans. The DBE must be in control of the firm. Some situations may arise where the work to be performed by the DBE is being performed by someone else. The local agency will have to use discretion of when to investigate, or report, apparent cases of fraud to Caltrans. Caution is needed because those involved in performing the work may legitimately be doing so. Three areas are highlighted here:

1. Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

2. The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.

3. The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

DBE ELIGIBILITY

Firms (consultant or contractors) certified as eligible DBEs is a decision that is made by the Caltrans Disadvantaged Business Enterprise Program (BEP). Caltrans can also remove the eligibility of a firm and issue a written notice of ineligibility. A directory of

certified DBE firms is available from the BEP website at www.dot.ca.gov/hq/bep.

The Caltrans directory list is available in hard copy from:

Caltrans
Publications Distribution Unit
1900 Royal Oaks Drive
Sacramento, CA 95815
Phone: (916) 445-3520

An electronic listing of DBEs is also available on the Website of the Caltrans Civil Rights Program under the Caltrans Bulletin Board System. For further information, contact the Caltrans Disadvantaged Business Enterprise Program, Systems Support (916) 654-6598 or 654-3496.

CERTIFICATION

A DBE may request certification from Caltrans by requesting an application form at:

Caltrans
Business Enterprise Program
Office of Certification Analysis
PO Box 942874, MS - 79
Sacramento, CA 94274-0001
Phone: (916) 227-9599

The form may also be downloaded from the internet at:
www.dot.ca.gov/hq/bep/downloads.html

DECERTIFICATION

Regarding DBE participation on a contract, two different actions can take place depending on when a firm was issued a notice of ineligibility relative to when the contract was executed:

1. When a prime contractor has made a commitment to use an ineligible firm, or the local agency has made a commitment to use a DBE prime contractor, but a subcontract or contract has not been executed before the issuance of the decertification notice, the ineligible firm does not count toward the contract goal or overall goal. The local agency must direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate that it has made a good faith effort to do so.

2. If a prime contractor has executed a subcontract with a firm before the local agency notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where the local agency had let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after the local agency issued the notice of its ineligibility shall not count toward the local agency's overall goal, but may count toward the contract goal.

Exception

If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, the local agency may continue to count its participation on that contract toward overall and contract goals.

Appeal

When Caltrans makes an administratively final removal of a firm's eligibility, the firm may appeal the removal to the DOT under Section 26.89 of 49 CFR Part 26. Caltrans will provide information for an appeal with the removal of eligibility.

9.7 GOOD FAITH EFFORTS

Whether as a bidder or contractor of a DOT-assisted contract, good faith efforts are required to meet the contract goal. This applies even if the bidder or prime contractor is a DBE.

When a local agency establishes a contract goal on a DOT-assisted contract, a bidder must, in order to be responsible and/or responsive, make good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if a bidder does not meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of 49 CFR Part 26 which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful. No local agency shall require that a bidder meet a contract goal in order to be awarded a contract.

In any situation in which a contract goal has been established, the use of good faith efforts must be allowed. Each local agency must make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. It is important to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere pro forma efforts are not good faith efforts to meet the DBE contract requirements. We emphasize, however, that local agencies' determination concerning the sufficiency of the firm's good faith efforts is a judgment call; meeting quantitative formulas is not required.

Caltrans also strongly cautions local agencies against requiring that a bidder meet a contract goal (i.e., obtain a specified amount of DBE participation) in order to be awarded a contract, only that the bidder makes an adequate showing of good faith efforts. Title 49, CFR Part 26 specifically prohibits DOT financial recipients from ignoring bona fide good faith efforts.

ANTICIPATED ACTIONS

The following types of actions should be considered by a local agency as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

- 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.

- Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goal 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.

- 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.

- 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 agreements could not be reached for DBEs to perform the work.

  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 the 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.

- 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. nonunion employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.

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

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

- 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.

ADMINISTRATIVE RECONSIDERATION

If the goal is not met, a bidder must, in order to be responsible and/or responsive, have made good faith efforts to meet the DBE goal by documenting commitments for participation by sufficient DBE firms, or document adequate good faith efforts to actively and aggressively obtain participation by a sufficient number of DBE firms. An administrative review (see Section 26.53, CFR 49 Part 26) and judgment call of the good faith efforts should be made prior to award in each instance by the local agency. If the local agency determines that the apparent successful bidder/offeror has failed to meet the good faith requirements, the local agency must, before awarding the contract, provide the bidder/offeror an opportunity for administrative reconsideration in accordance with Section 26.53, CFR 49 Part 26.

SUBSTITUTIONS

After a contract has been executed, which specified goals for DBE participation, adequate good faith efforts are required for any needed substitution of DBE subcontractors to the extent needed to meet the contract goal.

Local agencies must require that a prime contractor not terminate for convenience a DBE subcontractor listed in the Local Agency Bidder DBE Information form (or an approved substitute DBE firm) and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without the local agency's prior written consent.

When a DBE subcontractor is terminated, or fails to complete its work on the contract for any reason, the local agency must require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal.

NONCOMPLIANCE

Local agencies must include in each prime contract a provision for appropriate administrative remedies that will be invoked if the prime contractor fails to comply with the good faith efforts requirements during the contract.

9.8 REFERENCES

49 CFR Part 26 (DBE Regulations)
49 CFR Part 21 (Title VI Regulations)
23 USC 140(b)
23 CFR 200 and 230

MODEL DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM FOR LOCAL AGENCIES

This Program is in accordance with Title 49 of the Code of Federal Regulations Part 26.

MODEL DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM

City/County of _____

I Definitions of Terms

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

II Objectives /Policy Statement (§§26.1, 26.23)

The *[Name of Local Agency Recipient]* has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 26. The *[Name of Local Agency Recipient]* has received federal financial assistance from the DOT, and as a condition of receiving this assistance, the *[Name of Local Agency Recipient]* will sign an assurance that it will comply with 49 CFR Part 26.

It is the policy of the [*Name of Local Agency 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 our policy:

To ensure nondiscrimination in the award and administration of DOT-assisted contracts;
To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
To ensure that the DBE Program 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; and
To assist the development of firms that can compete successfully in the market place outside the DBE Program.

[Name or title of appropriate person or office] has been delegated as the DBE Liaison Officer. In that capacity, *[Name or title]* is responsible for implementing all aspects of the DBE program. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by the *[Name of Local Agency Recipient]* in its financial assistance agreements with the California Department of Transportation (Caltrans).

[Name of Local Agency Recipient] has disseminated this policy statement to the *[identify the governing board or officials of the local agency recipient]* and all the components of our organization. We have distributed this statement to DBE and non-DBE business communities that perform work for us on DOT-assisted contracts. *(Note: One acceptable method is to include this policy statement in your DOT-assisted contracts*

III Nondiscrimination (§26.7)

[Name of Local Agency 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 its DBE program, the *[Name of Local Agency 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 with respect to individuals of a particular race, color, sex, or national origin.

IV DBE Program Updates (§26.21)

[Name of Local Agency Recipient] will continue to carry out this program until the *[Name of Local Agency Recipient]* has established a new goal setting methodology or until significant changes to this DBE Program are adopted. *[Name of Local Agency Recipient]* will provide to Caltrans a proposed overall goal and goal setting methodology and other program updates by June 1 of every year.

V Quotas (§26.43)

[Name of Local Agency Recipient] will not use quotas or set asides in any way in the administration of this DBE program.

VI DBE Liaison Officer (DBELO) (§26.25)

[Name of Local Agency Recipient] has designated the following individual as the DBE Liaison Officer*: [Provide name, address, telephone number, and e-mail address]*. In that capacity, *[Name of DBELO]* is responsible for implementing all aspects of the DBE program and ensuring that the *[*Name of Local Agency Recipient*]* complies with all provisions of 49 CFR Part 26. This is available on the Internet at osdbuweb.dot.gov/main.cfm. *[Name of DBELO]* has direct, independent access to the *[*indicate chief executive officer of local agency recipient*]* concerning DBE program matters. *[Specify resources available to the* DBELO*; e.g. The DBELO has a staff of 2 professional employees assigned to the DBE program on a full-time basis and two support personnel who devote a portion of their time to the program.]* An organization chart displaying the DBELO's position in the organization is found in Attachment ___ to this program.

The DBELO is responsible for developing, implementing and monitoring the DBE program, in coordination other appropriate officials. Duties and responsibilities include the following *(suggested)*:

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 set overall annual goals.
4. Ensures that bid notices and requests for proposals are available to DBEs in a timely manner.
5. Identifies contracts and procurements so that DBE goals are included in solicitations (both race-neutral methods and contract specific goals) and monitors results.
6. Analyzes *[Name of Local Agency Recipient]*'s progress toward goal attainment and identifies ways to improve progress.
7. Participates in pre-bid meetings.
8. Advises the CEO/governing body on DBE matters and achievement.
9. Chairs the DBE Advisory Committee.
10. Participates with the legal counsel and project director to determine contractor compliance with good faith efforts.

11. Provides DBEs with information and assistance in preparing bids, obtaining bonding and insurance.
12. Plans and participates in DBE training seminars.
13. Provides outreach to DBEs and community organizations to advise them of opportunities.

VII Federal Financial Assistance Agreement Assurance (§26.13)

[Name of Local Agency Recipient] will sign the following assurance, applicable to 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). However, approval authority of the recipient's DBE Program has been delegated to Caltrans for DOT-assisted contracts.]

VIII DBE Financial Institutions

It is the policy of the *[Name of Local Agency 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 DBE Liaison Officer. The Caltrans Disadvantaged Business Enterprise Program may offer assistance to the DBE Liaison Officer.

IX Directory (§26.31)

[Name of Local Agency Recipient] will refer interested persons to the DBE directory available from the Caltrans Disadvantaged Business Enterprise Program website at www.dot.ca.gov/hq/bep.

X Overconcentration (§26.33)

[Name of Local Agency Recipient] has not identified any types of work in DOT-assisted contracts that have a overconcentration of DBE participation. If in the future *[Name of Local Agency Recipient]* identifies the need to address overconcentration, measures for addressing overconcentration will be submitted to the DLAE for approval.

XI Business Development Programs (§26.35)

[Name of Local Agency Recipient] does not have a business development or mentor-protégé program. If the *[Name of Local Agency Recipient]* identifies the need for such a program in the future, the rationale for adopting such a program and a comprehensive description of it will be submitted to the DLAE for approval.

XII Required Contract Clauses (§§26.13, 26.29)

Contract Assurance

[Name of Local Agency Recipient] ensures that the following clause is placed in every DOT-assisted contract and subcontract:

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 it 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."]*

Prompt Payment

[Name of Local Agency Recipient] ensures that the following clauses or equivalent will be included in each DOT-assisted prime contract:

Prompt Progress Payment To Subcontractors

A prime contractor or subcontractor shall pay to any subcontractor not later 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, or deficient subcontractor performance, 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 form 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 prime contractor or subcontractor in the event of a dispute involving late payment, or nonpayment by the contractor, or deficient subcontractor's performance, or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.

OR

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 prime contractor or subcontractor in the event of a dispute involving late payment, or nonpayment by the contractor, or deficient subcontractor's performance, or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.

OR

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 prime contractor or subcontractor in the event of a dispute involving late payment, or nonpayment by the contractor, or deficient subcontractor's performance, or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.

XIII Monitoring and Enforcement Mechanisms (§26.37)

The *[Name of Local Agency Recipient]* will assign a Resident Engineer (RE) or Contract Manager to monitor and track actual DBE participation through contractor and subcontractor reports of payments in accordance with the following:

After Contract Award

After the contract award the *[Name of Local Agency Recipient]* will review the award documents for the portion of items each DBE and first tier subcontractor will be performing and the dollar value of that work. With these documents the RE/Contract Manager will be able to determine the work to be performed by the DBEs or subcontractors listed.

Preconstruction Conference

A preconstruction conference will be scheduled between the RE and the contractor or their representative to discuss the work each DBE subcontractor will perform.

Before work can begin on a subcontract, the local agency will require the contractor to submit a completed "Subcontracting Request," Exhibit 16-B of the LAPM or equivalent. When the RE receives the completed form it will be checked for agreement of the first tier subcontractors and DBEs. The RE will not approve the request when it identifies someone other than the DBE or first tier subcontractor listed in the previously completed "Local Agency Bidder DBE Information," Exhibit 15-G. The "Subcontracting Request" will not be approved until any discrepancies are resolved. If an issue cannot be resolved at that time, or there is some other concern, the RE will require the contractor to eliminate the subcontractor in question before signing the subcontracting request. A change in the DBE or first tier subcontractor may be addressed during a substitution process at a later date.

Suppliers, vendors, or manufacturers listed on the "Local Agency Bidder DBE Information" will be compared to those listed in the completed Exhibit 16-I of the LAPM or equivalent. Differences must be resolved by either making corrections or requesting a substitution.

Substitutions will be subject to the Subletting and Subcontracting Fair Practices Act (FPA). Local agencies will require contractors to adhere to the provisions within Subletting and Subcontracting Fair Practices Act (State Law) Sections 4100-4114. FPA requires the contractor to list all subcontractors in excess of one half of one percent (0.5%) of the contractor's total bid or $10,000, whichever is greater. The statute is designed to prevent bid shopping by contractors. The FPA explains that a contractor may not substitute a subcontractor listed in the original bid except with the approval of the awarding authority.

The RE will give the contractor a blank Exhibit 17-F, "Final Report Utilization of Disadvantaged Business Enterprises, First Tier Subcontractors" and will explain to them that the document will be required at the end of the project, for which payment can be withheld, in conformance with the contract.

Construction Contract Monitoring

The RE will ensure that the RE's staff (inspectors) know what items of work each DBE is responsible for performing. Inspectors will notify the RE immediately of apparent violations.

When a firm other than the listed DBE subcontractor is found performing the work, the RE will notify the contractor of the apparent discrepancy and potential loss of payment. Based on the contractor's response, the RE will take appropriate action: The DBE Liaison Officer will perform a preliminary investigation to identify any potential issues related to the DBE subcontractor performing a

commercially useful function. Any substantive issues will be forwarded to the Caltrans Disadvantaged Business Enterprise Program. If the contractor fails to adequately explain why there is a discrepancy, payment for the work will be withheld and a letter will be sent to the contractor referencing the applicable specification violation and the required withholding of payment.

If the contract requires the submittal of a monthly truck document, the contractor will be required to submit documentation to the RE showing the owner's name; California Highway Patrol CA number; and the DBE certification number of the owner of the truck for each truck used during that month for which DBE participation will be claimed. The trucks will be listed by California Highway Patrol CA number in the daily diary or on a separate piece of paper for documentation. The numbers are checked by inspectors regularly to confirm compliance.

Providing evidence of DBE payment is the responsibility of the contractor.

Substitution

When a DBE substitution is requested, the RE/Contract Manager will request a letter from the contractor explaining why substitution is needed. The RE/Contract Manager must review the letter to be sure names and addresses are shown, dollar values are included, and reason for the request is explained. If the RE/Contract Manager agrees to the substitution, the RE/Contract Manager will notify, in writing, the DBE subcontractor regarding the proposed substitution and procedure for written objection from the DBE subcontractor in accordance with the Subletting and Subcontracting Fair Practices Act. If the contractor is not meeting the contract goal with this substitution, the contractor must provide the required good faith effort to the RE/Contract Manager for local agency consideration.

If there is any doubt in the RE/Contract Manager's mind regarding the requested substitution, the RE/Contract Manager may contact the DLAE for assistance and direction.

Record Keeping and Final Report Utilization of Disadvantaged Business Enterprises

The contractor shall maintain records showing the name and address of each first-tier subcontractor. The records shall also show:

1. The name and business address, regardless of tier, of every DBE subcontractor, DBE vendor of materials and DBE trucking company.
2. The date of payment and the total dollar figure paid to each of the firms.
3. The DBE prime contractor shall also show the date of work performed by their own forces along with the corresponding dollar value of the work claimed toward DBE goals.

When a contract has been completed, the contractor will provide a summary of the records stated above. The DBE utilization information will be documented on the form "Final Report-Utilization of Disadvantaged Business Enterprises (DBE), First-Tier Subcontractors" (Exhibit 17-F) and will be submitted to the DLAE attached to the Report of Expenditures. The RE will compare the completed "Final Report-Utilization of Disadvantaged Business Enterprises (DBE), First-Tier Subcontractors" form to the contractor's completed "Local Agency Bidder-DBE-Information" (Exhibit 15-G) and, if applicable, to the completed "Subcontracting Request" (Exhibit 16-B). The DBEs shown on the completed "Final Report-Utilization of Disadvantaged Business Enterprises (DBE), First-Tier

Subcontractors" form should be the same as those originally listed unless an authorized substitution was allowed, or the contractor used more DBEs and they were added. The dollar amount should reflect any changes made in planned work done by the DBE. The contractor will be required to explain in writing why the names of the subcontractors, the work items or dollar figures are different from what was originally shown on the completed "Local Agency Bidder-DBE-Information" form when:

- There have been no changes made by the RE.
- The contractor has not provided a sufficient explanation in the comments section of the completed "Final Report-Utilization of Disadvantaged Business Enterprises (DBE), First-Tier Subcontractors" form.

The explanation will be attached to the completed "Final Report-Utilization of Disadvantaged Business Enterprises (DBE), First-Tier Subcontractors" form for submittal. The RE will file this in the project records.

The local agency's Liaison Officer will keep track of the DBE certification status on the Internet at www.dot.ca.gov/hq/bep and keep the RE informed of changes that affect the contract. The RE will require the contractor to act in accordance with existing contractual commitments regardless of decertification.

The DLAE will use the PS&E checklist to monitor the *[Name of Local Agency Recipient]*'s commitment to require bidders list information to be submitted to the *[Name of Local Agency Recipient]* from the awarded prime and subcontractors as a means to develop a bidders list. This monitoring will only take place if the bidders list information is required to be submitted as stipulated in the special provisions.

[Name of Local Agency Recipient] will bring to the attention of the DOT through the DLAE any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in §26.109. *[Name of Local Agency Recipient]* also will consider similar action under our own legal authorities, including responsibility determinations in future contracts.

XIV Overall Goals (§26.45)

Amount of Goal

[Name of Local Agency Recipient]'s overall goal for the federal fiscal year FY _____(FY 2001 or later) is the following: ___% of the federal financial assistance in DOT-assisted contracts. This overall goal is broken down into ____% race-conscious and ____% race-neutral components.

Methodology

Before working on this section, refer to the two step process and choice of methods in Section 9.5, "Annual Overall Goal."

Breakout of Estimated Race-Neutral and Race-Conscious Participation

Before working on this section, refer to race-neutral and race-conscious in Section 9.5, "Annual Overall Goal."

Process

Starting with the federal fiscal year 2002, the amount of overall goal, the method to calculate the goal, and the breakout of estimated race-neutral and race-conscious participation will be required annually by June 1 in advance of the federal fiscal year beginning October 1 for DOT-assisted contracts. Submittals will be to the Caltrans' DLAE. An exception to this will be if FTA or FAA recipients are required by FTA or FAA to submit the annual information to them or a designee by another date. FHWA recipients will follow this process:

Once the DLAE has responded with preliminary comments and the comments have been incorporated into the draft overall goal information, the *[Name of Local Agency Recipient]* will publish a notice of the proposed overall goal, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at the *[Name of Local Agency Recipient]*'s principal office for 30 days following the date of the notice, and informing the public that comments will be accepted on the goals for 45 days following the date of the notice. The notice must be published in general circulation media and available minority-focused media and trade association publications. The notice will include addresses to which comments may be sent and addresses (including offices and websites) where the proposal may be reviewed.

The overall goal resubmission to the Caltrans DLAE, will include a summary of information and comments received during this public participation process and *[Name of Local Agency Recipient]*'s responses. This will be due by September 1 to the Caltrans DLAE. The DLAE will have a month to make a final review so the *[Name of Local Agency Recipient]* may begin using the overall goal on October 1 of each year.

If there is a design build please refer to Appendix B of this Model DBE Program.

XV Contract Goals (§26.51)

[Name of Local Agency Recipient] will use contract goals to meet any portion of the overall goal *[Name of Local Agency Recipient]* does not project being able to meet by the use of race-neutral means. Contract goals are established so that, over the period to which the overall goal applies, they will cumulatively result in meeting any portion of the overall goal that is not projected to be met through the use of race-neutral means.

Contract goals will be established only on those DOT-assisted contracts that have subcontracting possibilities. Contract goals need not be established on every such contract, and the size of contract goals will be adapted to the circumstances of each such contract (e.g., type and location of work, availability of DBEs to perform the particular type of work). The contract work items will be compared with eligible DBE contractors willing to work on the project. A determination will also be made to decide which items are likely to be performed by the prime contractor and which ones are likely to be

performed by the subcontractor(s). The goal will then be incorporated into the contract documents. Contract goals will be expressed as a percentage of the total amount of a DOT-assisted contract.

XVI Transit Vehicle Manufacturers (§26.49)

If DOT-assisted contracts will include transit vehicle procurements, *[Name of Local Agency 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. *[Name of Local Agency Recipient]* will direct the transit vehicle manufacturer to the subject requirements located on the Internet at http://osdbuweb.dot.gov/programs/dbe/dbe.htm.

XVII Good Faith Efforts (§26.53)

Information to be Submitted

[Name of Local Agency Recipient] treats bidders'/offerors' compliance with good faith effort requirements as a matter of responsiveness. A responsive proposal is meeting all the requirements of the advertisement and solicitation.

Each solicitation for which a contract goal has been established will require the bidders/offerors to submit the following information to *[Local Agency Recipient's address]* no later than 4:00 p.m. on or before the fourth day, not including Saturdays, Sundays and legal holidays, following bid opening:

1. The names and addresses of known DBE firms that will participate in the contract;
2. A description of the work that each DBE will perform;
3. The dollar amount of the participation of each DBE firm participation;
4. Written and signed documentation of commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;
5. Written and signed confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and
6. If the contract goal is not met, evidence of good faith efforts.

Demonstration of Good Faith Efforts

The obligation of the bidder/offeror is to make good faith efforts. The bidder/offeror can demonstrate that it has done so either by meeting the contract goal or documenting good faith efforts. Examples of good faith efforts are found in Appendix A to Part 26 which is attached.

The following personnel are responsible for determining whether a bidder/offeror who has not met the contract goal has documented sufficient good faith efforts to be regarded as responsive: *[Name individuals or committee who performs this function.]*

[Name of Local Agency Recipient] will ensure that all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before a commitment to the performance of the contract by the bidder/offeror is made.

Administrative Reconsideration

Within 10 days of being informed by *[Name of Local Agency Recipient]* that it is not responsive because it has not documented sufficient good faith efforts, a bidder/offeror may request administrative reconsideration. Bidder/offerors should make this request in writing to the following reconsideration official*: [provide name, address, phone number, e-mail address]*. The reconsideration official will not have played any role in the original determination that the bidder/offeror did not make or document sufficient good faith efforts.

As part of this reconsideration, the bidder/offeror will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The bidder/offeror will have the opportunity to meet in person with the reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so. The *[Name of Local Agency Recipient]* will send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process is not administratively appealable to Caltrans, FHWA or the DOT.

Good Faith Efforts when a DBE is Replaced on a Contract

[Name of Local Agency Recipient] will require a contractor to make good faith efforts to replace a DBE that is terminated or has otherwise failed to complete its work on a contract with another certified DBE, to the extent needed to meet the contract goal. The prime contractor is required to notify the RE immediately of the DBE's inability or unwillingness to perform and provide reasonable documentation.

In this situation, the prime contractor will be required to obtain *[Name of Local Agency Recipient]* prior approval of the substitute DBE and to provide copies of new or amended subcontracts, or documentation of good faith efforts. If the contractor fails or refuses to comply in the time specified, *[Name of Local Agency Recipient]* contracting office will issue an order stopping all or part of payment/work until satisfactory action has been taken. If the contractor still fails to comply, the contracting officer may issue a termination for default proceeding.

XVIII Counting DBE Participation (§26.55)

[Name of Local Agency Recipient] will count DBE participation toward overall and contract goals as provided in the contract specifications for the prime contractor, subcontractor, joint venture partner with prime or subcontractor, or vendor of material or supplies. See the Caltrans' Sample Boiler Plate Contract Documents. Also, refer to XIII. "After Contract Award."

XIX Certification (§26.83(a))

[Name of Local Agency Recipient] ensures that only DBE firms currently certified on the Caltrans' directory will participate as DBEs in our program.

XX Information Collection and Reporting

Bidders List

The *[Name of Local Agency 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 firms.

Monitoring Payments to DBEs

Prime contractors are required to maintain records and documents of payments to DBEs for three years following the performance of the contract. These records will be made available for inspection upon request by any authorized representative of the *[Name of Local Agency Recipient]*, Caltrans, FHWA, or DOT. This reporting requirement also extends to any certified DBE subcontractor.

Payments to DBE subcontractors will be reviewed by the *[Name of Local Agency Recipient]* to ensure that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts stated in the schedule of DBE participation.

Reporting to Caltrans

[Name of Local Agency Recipient] - Final utilization of DBE participation will be reported to the DLAE using Exhibit 17-F of the Caltrans' LAPM.

Confidentiality

[Name of Local Agency 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.

_____
[Signature of Local Agency Recipient's Chief Executive Officer] Date: _____

This Disadvantaged Business Enterprises Program is accepted by:

_____
[Signature of DLAE] Date: _____

APPENDIX A TO PART 26 -- GUIDANCE CONCERNING GOOD FAITH EFFORTS

I. When, as a recipient, you establish a contract goal on a DOT-assisted contract, a bidder must, in order to be responsible and/or responsive, make good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.

II. In any situation in which you have established a contract goal, part 26 requires you to use the good faith efforts mechanism of this part. As a recipient, it is up to you to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. It is important for you to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere pro forma efforts are not good faith efforts to meet the DBE contract requirements. We emphasize, however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call: meeting quantitative formulas is not required.

III. The Department also strongly cautions you against requiring that a bidder meet a contract goal (i.e., obtain a specified amount of DBE participation) in order to be awarded a contract, even though the bidder makes an adequate good faith efforts showing. This rule specifically prohibits you from ignoring bona fide good faith efforts.

IV. The following is a list of types of actions which you should consider as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

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.

V. In determining whether a bidder has made good faith efforts, you may take into account the performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts.

APPENDIX B
TO BE USED FOR DESIGN-BUILD CONTRACTS

The following are hereby incorporated into the Agency's Disadvantaged Business Enterprise (DBE) Program:

II Objectives /Policy Statement (§§26.1, 26.23)

At the end of the first paragraph, add the following:

The Agency recognizes that certain modifications are necessary to adapt the program for use in connection with design-build contracts, and has therefore established certain procedures applicable to design-build DBE contracts under the DBE Program. Public Contract Code Section 4109 requires subcontractors to be identified by the prime contractor for the subletting or subcontracting of any portion of the work in excess of one-half of 1 percent of the prime contractor's total bid. Exceptions are only in the cases of public emergency or necessity, and then only after a finding reduced to writing as a public record of the awarding authority setting forth the facts constituting the emergency or necessity. The written public record of the awarding authority/Agency as to either emergency or necessity is attached hereto (See Appendix C for sample).

XIII Monitoring and Enforcement Mechanisms (§26.37)

At the end of the first paragraph below "After Contract Award", add the following paragraph:

After Design-Build Contract Award

As described in the Section entitled "GOOD FAITH EFFORTS" below, each proposer for an Agency design-build contract will be required to submit a DBE Performance Plan as part of a responsive proposal. Following award of a design-build contract and during both the design and construction portions of the project, the design-build contractor will be required to submit documentation, in the form of progress reports described below, to show that the design-build contractor is meeting the contract goal for the project, or if the goal is not being met, the design-build contractor must submit satisfactory evidence that it has made good faith efforts, in accordance with Section XVII, to meet the goal. Evidence of good faith efforts, as described in 49 CFR Part 26 Section 26.53 and Appendix A, will be monitored by the Agency throughout the duration of the design-build project.

At the end of the first paragraph below "Preconstruction Conference", add the following sentence:

_____The contractor will promptly provide the Agency with the information required by the form entitled "Local Agency DBE Information" upon selection of any DBE or other subcontractor not previously identified by the design-build contractor. During the course of the contract, differences must be explained and resolved by either making corrections or requesting a substitution.

At the end of the fourth paragraph below "Construction Contract Monitoring", add the following paragraph:

_____The contractor will provide DBE Progress Reports to the Agency with each invoice and will provide an annual report on or before August 1 of each year of the design-build contract. Each report must also include a narrative summary stating whether the contractor is on target with respect to the DBE goal set forth in the design-build contract, whether the goal has been exceeded (stating the amount of the excess), or whether the contractor is behind target (stating the amount of the deficit).

XVII Good Faith Efforts (§26.53)

At the end of the third paragraph below "Information to be Submitted", add the following items:

> ***7. A DBE Performance Plan containing a detailed description of the design-build contractor's planned methodology for achieving the DBE goal stated in the contract, including a description of the good faith efforts the design-build contractor intends to undertake to achieve that goal.***
> ***8. A design-build proposal must also include an affidavit that the proposer will either attain the DBE goals for the design-build contract or will exercise good faith efforts to do so.***

At the end of the first paragraph below "Demonstration of Good Faith Efforts", add the following sentence:

If it is a design-build contract, each contractor proposing will be required to submit a DBE Performance Plan as part of a responsive proposal and good faith efforts.

_____
[Signature of Local Agency Recipient's Chief Executive Officer] Date: _____

This Disadvantaged Business Enterprise Program for design-build contracts is accepted by:

_____
[Signature of DLAE] Date: _____

APPENDIX C

RESOLUTION OF THE (Agency Name) REGARDING NECESSITY OR EMERGENCY FOR SUBSEQUENT SUBCONTRACTOR IDENTIFICATION AND SELECTION FOR DESIGN-BUILD CONTRACTS

(REQUIRED BY PUBLIC CONTRACT CODE SECTION 4109 ENTITLED "Public Emergency Grounds For Change")

A. EXPLANATION OF PUBLIC NECESSITY OR EMERGENCY

B. FACTS CONSTITUTING THE PUBLIC NECESSITY OR EMERGENCY

C. FINDINGS

D. RESOLUTION FOR SUBSEQUENT IDENTIFICATION OF SUBCONTRACTORS

E. ADOPTION OF PROCEDURE TO BE USED BY DESIGN-BUILD CONTRACTOR FOR SUBSEQUENT IDENTIFICATION OF SUBCONTRACTORS

F. CERTIFICATE OF SECRETARY

1. **MOTION MADE AND DATE**

2. **VOTING RESULTS**

3. **SIGNATURES**

   (a) **Secretary**

   (b) **Chairperson**

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(Agency Letterhead)

ANNUAL OVERALL GOAL INFORMATION

TO: CALTRANS DISTRICT _____
District Local Assistance Engineer

The amount of overall goal, methodology, breakout of estimated race-neutral and race-conscious participation, and any DBE program updates are presented herein in accordance with Title 49 of the Code of Federal Regulations Part 26, and as described in the *Local Assistance Procedures Manual*.

The City/County/Region of _____
submits our annual overall goal information (and any needed updates of our DBE program) for your review and comment. We [propose][1] [have established][2] an annual overall DBE goal of _____ % for the Federal Fiscal Year _____ / _____ , beginning on _____ and ending on _____ .

Methodology

[Before working on this section, refer to the two step process and choice of methods discussed in Chapter 9 of the *Local Assistance Procedures Manual*.]

Breakout of Estimated Race-Neutral and Race-Conscious Participation

[Before working on this section, refer to the race-neutral and race-conscious discussion in Chapter 9 of the *Local Assistance Procedures Manual*.]

DBE Program Updates

[Include in this section any changes to the approved DBE program]

_____ _____
DBE Liaison Officer Date

[1] To be used for submittal due June 1 of every year.
[2] To be used for submittal due September 1 of every year.

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GUIDELINES FOR CIVIL RIGHTS COMPLIANCE REVIEWS OF LOCATION PROCEDURES

GENERAL

In accordance with Title VI and Title VIII of the Civil Rights Act of 1964 and 1968, local agencies are required to follow certain location procedures on federal-aid highway projects. This guideline may be used to suggest areas for review.

1. As a result of the choice of highway locations or the procedures used in arriving at the choice, has the Agency, State, or Federal Highway Administration received any civil rights complaints? If so, what were the complaints and what has been done to resolve them?

2.a. To what extent does the agency employ minority staff personnel in the location program under review? Are these personnel involved in the following:

- Developing and comparing alternatives,
- Assessing impacts, and
- When used, operating through consultant contracts?

Are they involved in any other related areas? If not, what is being done to recruit and hire minority personnel?

2.b. What training or education sessions are conducted to increase the skills of minorities as well as non-minorities? Are promotional opportunities available for minorities? Does the Agency fill professional as well as nonprofessional positions with minorities? If not, what is being done to rectify these situations?

3. Does the Agency choose consultant firms without discrimination on the basis of race, sex, color, or national origin? Is there evidence that minority consultant and consultants with minority staffs offered equal employment opportunity? How many of these firms have contracts and what type are they?

4. Does the process for preparation of Environmental Impact Statements, or do the Environmental Impact Statements themselves, reflect any indication of a violation of any of the provisions of Title VI or Title VIII? If so, elaborate.

LOCATION DETERMINATION

When reviewing the process leading to location determination on a specific project, the following questions are to be used:

1.a. To what extent has the agency or consultant compiled the following information for use in the location determination?

1.b. The racial character of the portion of the area through which the alternate locations pass, including the approximate number by race of persons and families affected by each alternate (affected means all persons directly displaced or located in areas

directly adjoining the road.)

1.c. The social and economic character of the area through which alternates pass, including levels of income, whether the area is commercial or residential, and the approximate number of minority and non-minority owners of businesses and residences in the area.

1.d. The racial character of the people employed in the area affected by each alternate.

2. How was the racial and ethnic data used to identify possible problem areas and adverse impacts, such as relocation difficulties or possible changes in minority income capabilities, mobility, or community cohesion? What efforts have been made to rectify these problem areas and minimize the adverse impacts?

3. Will a minority area be bypassed or separated from contiguous areas by an of the alternatives, and if so, what effect will this have on the minority community? To what extent will it perpetuate patterns of segregation?

4. How will each of the alternates affect the use of various community facilities and services such as hospital, libraries, shopping areas, fire stations, police installations, schools, churches, parks and recreation centers by minority groups in the area?

5. To what extent will each of the locations produce an adverse effect of residential, commercial and industrial development existing or planned within minority communities?

6. What attempt has the Agency made to satisfy minority community planning goals and needs? To what extent were the goals and needs determined utilizing input from the minority community?

7. Have the gradeline, safety considerations, cross-street treatment, pedestrian overpasses, and other design features been established for alternatives to the same degree in minority areas as in nonminority areas?:

8. Is access to and from the various alternates provided without discrimination?

9. Would the alternates have an effect on traffic volumes on adjacent streets within minority communities? To what extent has the Agency studied the effect of increased or decreased traffic on residences and businesses?

10. To what extent have aesthetics, noise, and air quality been considered within minority communities?

11. Has all the above information been adequately tabulated and mapped for use in the location determination?

COMMUNITY PARTICIPATION

In any review of projects, a determination should be made that the minority groups have had an opportunity to provide meaningful input into the decision-making process regarding their goals and needs as they pertain to the location determination. The following questions should be used:

1. To what extent do the Agency's procedures provide for consultation with and dissemination of information to minority community and groups?

2. Where non-English speaking minorities are involved, what provisions are made to overcome language barriers?

3. How are the minority leaders identified and encouraged to provide suggestions and ask questions about locations?

4. To what extent are informal hearings and meetings held with the affected minority communities and groups?

5. To what extent does the Agency respond to questions asked and consider comments made by minorities?

6. To what extent are minority community and groups represented on the various councils, boards, and committees, etc., that provide input to the location determination? How were these representatives selected and have they been given an equal voice?

PUBLIC HEARINGS

When reviewing the conduct of public hearings, the following questions should be used:

1. Are hearing(s) held at a place and time convenient to minority community and groups?

2. Are advertisements of the hearing(s) (i.e., newspapers, posters, radio, etc.) adequate to provide notification to minorities?

3. Where non-English speaking minorities are involved, what provisions are made to overcome language barriers both in advertisements and at the hearing(s) ?

4. Are minority leaders specifically invited to attend and present their views? Do they attend? Do they make comments?

5. To what extent does the Agency respond to questions asked and consider comments made by minority persons at the hearing(s)?

6. To what extent are fair housing requirements and the availability of hardship acquisition discussed at public hearings when minorities are to be relocated.

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