U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
CALIFORNIA DIVISION
650 Capitol Mall, Suite 4-100
Sacramento, CA. 95814

April 2, 2009

IN REPLY REFER TO
HDA-CA
File #: 901
Document #: S52465

Mr. Will Kempton, Director
California Department of Transportation
1120 N Street
Sacramento, CA 95814

SUBJECT: FY 2009 Disadvantaged Business Enterprise (DBE) Goal Methodology Approval

Dear Mr. Kempton:

In accordance with the provisions of 49 CFR Part 26, the Federal Highway Administration has reviewed the California Department of Transportation's (Caltrans) revised FY 2009 DBE goal methodology submitted on February 26, 2009 that provided additional explanatory information to your goal originally submitted on August 20, 2008. For the Federal-aid highway program in FY 2009, Caltrans submitted an overall goal of 13.5% (6.75% of which it projects to meet through race neutral means and 6.75% through race conscious means). Our review considered the overall goal as well as the description of the data and methodology used in arriving at the overall goal, including the base figure calculation and evidence supporting the calculation; adjustments, if any, made to the base figure and the evidence supporting these adjustments; a summary of the relevant evidence in your jurisdiction; the projection of the portion of the overall goal that Caltrans will meet through race neutral as opposed to race conscious means and the basis for the projections; and the evidence of public participation in establishing the overall goal.

After reviewing this information, we have determined that the goal setting methodology you have employed is consistent with the requirements of 49 C.F.R. § 26.45 and that you have followed the requirements for public participation in establishing your overall goal as set forth in 49 C.F.R. § 26.45(g). Further, we have also approved your projection of the portions of your overall goal that you expect to meet through race neutral and race conscious means. That projection is subject to modification during the fiscal year in accordance with 49 C.F.R. § 26.51. The basis for our conclusions is set forth more fully in the attached document.

As you are aware, Caltrans still must submit separate overall DBE goal for programs funded by the Federal Transit Administration and the Federal Aviation Administration, based upon the goal setting approach outlined in the State's DBE program. Caltrans should contact its regional FTA and FAA offices for further guidance and assistance on these matters.

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Caltrans has determined that there is no need to submit any changes to its DBE program that was approved by the Federal Highway Administration on April 3, 2000 as modified by amendments to your plan approved on January 21, 2004. Your DBE program, as previously approved by FHWA, contains all of the elements required by 49 C.F.R. part 26 and therefore continues to be in compliance with the requirements for the DBE program.

I would like to take this opportunity to thank you and your staff for your efforts in getting this program to the approval stage.

Sincerely,

Walter C. Waidelich, Jr.
Division Administrator

cc: Randell Iwasaki, Chief Deputy Director
Olivia Fonseca, Civil Rights Deputy Director
Robert Padilla, DBE Program Manager

Explanation for Approval of California DBE Program Goal Setting Process for Fiscal Year 2009

This document sets forth the Federal Highway Administration's reasons for approving the California State Department of Transportation's (Caltrans') Disadvantaged Business Enterprise (DBE) goal methodology and the portion of the goal to be attained by race- and gender- neutral means for FY 2009.

Goal Setting Methodology Section 26.45

The regulations require recipients to set overall goals based on demonstrated evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate on DOT-assisted contracts.

- **Step One: Base Figure Section 26.45(c)**

Under the DBE regulations, Caltrans must begin the process by determining the base figure for the relative availability of DBEs. Consistent with the regulations, Caltrans relied on the results of the June 2007 Availability and Disparity Study (hereafter Study) conducted by BBC Research & Consulting (hereafter BBC) to derive its base figure.

BBC used a modified version of the custom census approach used by the Illinois and Minnesota Departments of Transportation that was accepted by the Seventh and Eighth Federal Circuit Courts of Appeals, respectively, to estimate the relative availability of DBEs. BBC refined the availability data by weighting it by the type of work, contractor role (prime vs. subcontractor), location of work, size of the work element, contract date and whether a contract is a Caltrans or local agency contract. This weighting process in described in detail in Section II, Page 8 of the Study. It excluded from the DBE availability calculation (the numerator) minority- and women-owned construction and engineering firms not likely to qualify for DBE certification because of their size and likely personal net worth.

In the first steps of the BBC analysis, of roughly 3,398 firms, 32 percent were identified as minority- or woman-owned (MBE/WBE). Thirty percent of the construction firms are minority- or woman-owned prime contractors and 33 percent are minority- or woman-owned subcontractors. Among the engineering-related firms, 29 percent are minority- or woman owned prime consultants and 34 percent are minority- or woman-owned subconsultants.

BBC conducted a statistical analysis that examined thousands of prime contracts and subcontracts for California Federal-aid highway projects from 2002 through 2006. For each contract element, BBC estimated the number of minority- and woman-owned

firms and the total number of firms surveyed that were available for that work based on:

- Specialization of work;
- Prime contract versus subcontract role;
- Location of work;
- Size of contract or subcontract element;
- Contract date; and
- Caltrans versus local agency project.

BBC then weighted the relative MBE/WBE availability for each contract element by the dollars for that element. The details of this process are described in Appendix D of the Study.

The MBE/WBE relative availability was then weighted by the relative value of work done during the period of 2002 through 2006. The sum of the aggregate availability yields a 17.6 percent MBE/WBE availability for Federal-aid highway contracts. This means that, after considering type of work, contract role, location and size of work involved in federally-funded projects and the types, contract roles, locations and contract sizes for work performed by available firms, 17.6 percent of dollars on federally-funded contracts would go to minority- and women-owned firms (MBE/WBEs) if available MBE/WBEs received the same amount of work as similarly-situated majority-owned firms available for such work. Firms that would not qualify as DBEs because they exceed the size standard and are not likely to meet the personal net worth limit were excluded from the pool of available M/W/DBEs, resulting in a revised base figure of 13.5%.

• Step 2 Adjustments Section 26.45(d)

Once a base figure is calculated, Caltrans must examine all of the evidence available in its jurisdiction to determine if an adjustment is needed to the base figure to arrive at the overall goal. The Study looked at types of information described in the DBE regulations governing the Step 2 analysis.

- Current capacity of DBEs to perform work on FHWA-assisted contracts, as measured by the volume of work DBEs have performed in recent years.
- Barriers to entry such as education, training, employment, and advancement.
- Rates of business formation, closure, and earnings.
- Access to capital (including home ownership, home value, mortgage loan denials, sub prime loans, business loan denial rates, and business loan values), bonding, and insurance.

See the Study, Section III and Appendix F and H. Caltrans also considered in its Step 2 analysis the impact of the high number of potential DBEs that have not sought certification. Based on the evidence, Caltrans reached the qualitative decision that a Step 2 adjustment is not necessary.

Past volume of work performed

The Study reported that DBEs were awarded nine percent of contract dollars based on analysis of Caltrans and Local Assistance federally-funded contracts from 2002 through April 2006. However, it would not be appropriate to make a downward adjustment for past DBE participation as a measure of DBE capacity. In past goal submissions Caltrans has not made such an adjustment because a very small percentage of the DBEs are awarded contracts. Thus, DBE capacity is greater than that reflected in the volume of work performed by a select few DBEs. Under the circumstances we agree with Caltrans that past participation is not an adequate measure of DBE capacity.

Current DBE certification of minority-and women-owned firms

The 13.5 percent base figure includes minority- and women-owned firms that could potentially be certified as DBEs. BBC reports that about one-fifth (or 20%) of minority-and women-owned firms identified in the availability analysis were DBE-certified in 2006. Consequently, according to Caltrans, a downward adjustment could be justified on this basis. We disagree. The consideration of this factor as part of the step two analysis is misplaced; it bears no relation to a determination of the level of DBE participation one would expect absent the effects of discrimination.

Possible Quantifiable Adjustments

BBC was able to quantify disparities in business ownership rates, which was some of the evidence examined in considering a potential Step 2 adjustment. The overall DBE goal would have been 18.8 percent if Caltrans made this adjustment. However, Caltrans decided to not make an upward adjustment at this time, choosing instead "a lower bound estimate" of DBE participation in a discrimination free transportation contracting market.

Other evidence examined in the Study, while important, did not yield quantifiable adjustments to the base figure. For example, barriers to obtaining financing may affect current availability of DBEs, but the impact is complex and not readily quantified.

• Public Participation Section 26.45(g)

The regulations require that Caltrans provide for public participation when establishing its overall goal. Caltrans consulted with its Statewide Small Business

Council whose members represent over 30 contractor associations representing minority and women contracting firms in all major types of work done in the State's Federal-aid Highway Program. It consulted with seven different non-DBE contractor associations and four different minority chambers of commerce.

The overall goal methodology was released or made available to the public on June 9, 2008. Also, on June 9, 2008, Caltrans published a public notice requesting comments on its FY 2009 DBE goal in nine general circulation newspapers and eleven construction industry and minority-focused publications. At the conclusion of its 45-day public comment period Caltrans received numerous comments, including that the DBE goal violates Article I, Section 31(a) of the California Constitution. Caltrans determined that the federal funding exception in Section 31 does apply to the Caltrans' implementation of the federal DBE program.

Caltrans has carefully considered all of the comments and determined that no changes to the overall goal are warranted.

- **Race and Gender-Neutral and Conscious Measures Section 26.51**

The regulations require Caltrans to meet the maximum feasible portion of its overall goal by using race- and gender-neutral means of facilitating DBE participation and to submit its projection of that portion of the goal it expects to meet through race-neutral means.

Race-Neutral and Race-Conscious Division: Caltrans anticipates that it can achieve 6.75% of its DBE participation through race and gender neutral means and 6.75% through race and gender conscious means. The race and gender neutral projection is based on the race and gender neutral DBE participation it achieved during F.Y. 2007 under a race-neutral program that involved no use of contract goals (6.6%) and it anticipated that it would get about the same amount of race neutral DBE participation in F.Y. 2008.

On August 7, 2008, Caltrans received a DBE program waiver to narrowly tailor the implementation of its program based on the existence of statistically significant disparities documented in the Study for some but not all of the presumptive groups. The waiver permits the use of DBE contract goals of limited application.

Race-Neutral Measures Implemented by the State: Caltrans has identified numerous race and gender-neutral measures or initiatives it is implementing or plans to implement to meet its goal. Some of the measures include:

- Technical training and one-on-one assistance to small business firms provided through ten Small Business Development Centers located throughout the state.

- Focused outreach such as local procurement fairs and small business events coordinated by Small Business Liaisons in each of Caltrans' 12 district offices.

- Expanding Caltrans' web site for easier access to information needed by small businesses with links to other supportive services, local agencies, and technical assistance.

- Establishing relationships with financial institutions, surety companies, and insurance companies to market Caltrans contracting opportunities to small businesses.

Caltrans must secure FHWA approval before implementing any initiative (e.g., mentor-protégé program) that represents a substantial change to its DBE program as determined by FHWA.

Conclusion

For the above reasons, the California Department of Transportation goal setting methodology and race-neutral/race-conscious projections for FY 2009 are approved.

Division Administrator

4/2/09
Date

Attachment: copy of goal methodology approved