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May 1, 2006

Dear Transportation Construction Community:

It is with regret that I send you this letter to inform you that the California Department of Transportation (Department) must implement a wholly race-neutral Disadvantaged Business Enterprise (DBE) Program effective May 1, 2006. The race-neutral DBE Program may be an interim step, pending the results of an availability and a disparity study to guide administration of the Department's DBE Program in accordance with 49 Code of Federal Regulations (CFR) Part 26.

This action comes as a result of a recent decision from the Ninth Circuit Court of Appeals and guidelines promulgated by the Federal Highway Administration (FHWA) in response to that decision. In short, the Court decision mandated that evidence of discrimination in the transportation contracting industry must be documented in order to implement a DBE race-conscious program. In response to FHWA's direction following this decision, the Department gathered and considered past disparity studies, comments and written evidence received during a 90-day public comment period ending March 20, 2006. After careful analysis, FHWA and the Department concluded the data lacks sufficient evidence to satisfy the strict scrutiny and newly-established evidentiary standards set forth by the Ninth Circuit Court to continue with a race-conscious DBE Program. Therefore, I have no choice but to immediately order a change in the administration of DBE participation in the Department's activities in order to maintain both the constitutionality of the DBE Program and the continuation of federal-aid funding. Effective May 1, 2006, the Department and its subrecipients who receive federal transportation assistance will implement a DBE race-neutral program.

The following factors led to the joint conclusion:

1. The data provided did not identify specific evidence of discrimination suffered by any of the presumptively disadvantaged groups identified in 49 CFR Part 26.5 in the transportation contracting industry in the State of California.
2. The available disparity studies conducted in California were limited in scope to a local government agency or a project, geographically and chronologically limited, and did not provide valid "statistical evidence" of discrimination in transportation contracting.
3. The anecdotal evidence related to transportation contracts in California could not be verified.

The overall California DBE goal to be achieved exclusively by race-neutral measures is 10.5 percent for projects funded through the FHWA and 4 percent for projects funded through the Federal Transit Administration. The Department will identify an "Availability Advisory Percentage" on individual federal-aid contracts, which is intended to assist bidders in ascertaining DBE availability for items of work on the contract. The Department's contract specifications will encourage bidders to utilize DBEs to aid the Department in achieving the statewide DBE goal.

Moving forward, the Department is in the process of executing a contract with a consultant to complete an availability study and a disparity study. I anticipate the availability study will be completed within four months of contract execution and the disparity study by May 2007. When the studies are completed, the Department and FHWA will implement a program that best serves our customers while fulfilling the requirements of the law as identified by the Ninth Circuit Court of Appeals ruling.

During this interim period, be assured the DBE Program is still a viable and integral element of California's construction program and is a requirement for receipt of federal transportation assistance. I ask for your partnership to work with the Department to continue this program by including DBEs in all our federal-assistance transportation projects.

Sincerely,

WILL KEMPTON
Director