MEETING DATE: 8/28/06

AGENDA ITAM: Approval of a Resolution adopting the Disadvantaged Business Enterprise Program and Setting of Goals for Fiscal Year 2006-07

ATTACHMENTS

Attachment 1

RESOLUTION NO. 2006-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CULVER CITY, CALIFORNIA, ADOPTING A DISADVANTAGED BUSINESS ENTERPRISE PROGRAM AND SETTING GOALS FOR FISCAL YEAR 2006-2007

WHEREAS, pursuant to Department of Transportation regulation 49 CFR Parts 23 and 26, as amended and regulations promulgated thereunder, to be eligible for federal funds the City of Culver City is required to have a Federal Transit Administration (FTA) approved Disadvantaged Business Enterprise (DBE) program and set goals for Fiscal Year 2006-2007.

NOW, THEREFORE, the City Council of the City of Culver City, California, DOES HEREBY RESOLVE, as follows:

1. The DBE program attached hereto and made a part hereof is hereby reapproved, readopted and extended for FY 2006-2007.

2. The DBE goal of eight (8) percent in FTA-funded contracting opportunities is hereby approved and adopted for FY 2006-2007.

APPROVED and ADOPTED this _____day of ________________ 2006.

____
GARY SILBIGER, MAYOR
City of Culver City, California

ATTEST:

____
CHRISTOPHER ARMENTA,
City Clerk

APPROVED AS TO FORM:

____
CAROL A. SCHWAB,
City Attorney

RDBE Council Reso

Attachment 2

Culver CityBus

DISADVANTAGED BUSINESS ENTERPRISE PROGRAM FY 2006-07

CULVER CITY MUNICIPAL BUS LINES

CULVER CITY, CA

TABLE OF CONTENTS

POLICY

Culver City Municipal Bus Lines (CCMBL) began operations in 1928, and is the second oldest municipal bus operation in Los Angeles County. After over seventy (70) years of operations, CCMBL provides 7 fixed-route local transit lines in the West Los Angeles area of Los Angeles County. In FY 05, over 5.4 million customers rode CCMBL.

The City Council of Culver City encourages the participation of Disadvantaged Business Enterprises (DBEs) in its procurement and contracting activities. The City reaffirms its commitment to award its contracts and purchase orders in a non-discriminatory manner regardless of the individual's or entity's race, color, creed, sex, age, national origin or physical disability. CCMBL is committed to carrying out all of the requirements set forth in 49 CFR Parts 23 and 26, as amended, "Participation by Disadvantaged Business Enterprises in the Department of Transportation Programs," substantial amendments to which were made effective as of March 4, 1999. In striving to include DBEs in all phases of DOT-assisted projects under this Program, CCMBL is also committed to employing race neutral means, as that term is defined in the federal regulations, to the maximum extent possible. <u>Starting in FY 07, CCMBL shall not establish contract goals until regional Los Angeles County disparity studies are completed.</u>

Passed and adopted by the City Council of Culver City on August 28, 2006.

____

Transportation Director

I. OBJECTIVES

Culver City Municipal Bus Lines (CCMBL) encourages ready, willing and able DBEs to become involved in all phases of its contracting, including but not limited to, CCMBL procurement activities, fixed-price contracting, regular purchases of goods and services, and special government grant procurements. Pursuant to this Program, CCMBL may establish, pending the findings of appropriate regional disparity studies, appropriate contract goals for expenditures on federally funded programs entered into with small business concerns owned and controlled by socially and economically disadvantaged individuals; provided, however, that it has first made a determination, on an annual basis, that its overall goals for DBE participation in DOT-assisted projects cannot be met through the use of race neutral means. Starting in FY 07, CCMBL shall not establish contract goals until regional Los Angeles County disparity studies are completed.

To further Program goals, CCMBL shall do the following:

1. Ensure that its contracts are awarded and administered in a non-discriminatory manner;

2. Help remove barriers to DBE participation in the bidding, award and administration of CCMBL contracts;

3. Ensure that only firms that fully meet the eligibility standards set forth in 49 CFR Parts 23 and 26, as amended, are certified as eligible DBEs;

4. Identify DBE enterprises that are qualified to provide CCMBL with required materials, equipment, supplies and services, and develop a good rapport with the owners, managers and sales representatives of those enterprises;

5. Develop communications programs and procedures that will acquaint prospective DBEs with CCMBL's contract procedures, activities and requirements and allow DBEs to provide CCMBL with feedback on existing barriers to participation and effective procedures to eliminate those barriers; and

6. Administer the Program in close coordination with the various divisions within CCMBL so as to facilitate the successful implementation of this Program.

II. APPLICABILITY

As a recipient of federal financial assistance from the Federal Transit Administration ("FTA") of the DOT, CCMBL is required to implement a DBE Program in accordance with the requirements of 49 CFR Parts 23 and 26, as amended. The Program set forth herein applies to all CCMBL contracts that are funded over $250,000 (excluding bus procurements), in whole or in part, by FTA federal financial assistance.

It is the policy of CCMBL that no person will be excluded from participation in, denied the benefits of, or otherwise be discriminated against in connection with the award and performance of any contract on the basis of race, color, sex, national origin or other protected status.

In the administration of the DBE Program, CCMBL will not directly or through contractual or other arrangements, use criteria or methods of administration that have the affect of defeating or substantially impairing the accomplishment of the objectives of this DBE Program.

III. DEFINITIONS

Where applicable, the definitions set forth in 49 CFR Parts 23 and 26, as amended, shall be used to implement this Program. Some of the most common terms are defined below:

1. DBE

   A DBE is a for-profit, small business concern: 1) that is at least fifty-one percent (51%) owned by one or more individuals who are socially and economically disadvantaged, or, in the case of a corporation, in which fifty-one percent (51%) of the stock is owned by one or more socially and economically disadvantaged individuals; and 2) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

2. Small Business Concern

   A small business concern is an existing small business, as defined by section 3 of the Small Business Act and the Small Business Administration regulations (13 C.F.R. Part 121), whose average annual gross receipts for the previous three years has not exceeded $16.6 million (or as adjusted for inflation by the Secretary of FTA) pursuant to the terms and 49 CFR Part 26.

3. Socially and Economically Disadvantaged Individuals

The following classes of individuals will be rebuttably presumed to be socially and economically disadvantaged individuals:

a. Black or African Americans (including persons having origins in any of the Black racial groups of Africa);

b. Hispanic or Latino Americans (including persons of Central or South American, Cuban, Dominican, Mexican, Puerto Rican, or other Spanish or Portuguese culture or origin, regardless of race);

c. Native Americans (including persons who are Aleuts, American Indians, Eskimos, or Native Hawaiians);

d. Asian-Pacific Americans (including persons whose origins are from Brunei, Burma (Myanmar), Cambodia (Kampuchea), China, the Commonwealth of the Northern Marianas Islands, the Federated States of Micronesia, Fiji, Guam, Hong Kong, Indonesia, Japan, Juvalu, Kirbati, Korea, Laos, Macao, Malaysia, Nauru, the Philippines, Samoa, Taiwan, Thailand, Tonga, the U.S. Trust Territories of the Pacific Islands (Republic of Pilau), or Vietnam);

e. Subcontinent Asian Americans (including persons whose origins are from Bangladesh, Bhutan, India, the Maldives Islands, Nepal, Pakistan, or Sri Lanka);

f. Women; or

g. A member of any other group that is designated as socially and economically disadvantaged by the Small Business Administration or applicable federal law.

Additionally, any other individual who is able to demonstrate, by a preponderance of evidence, that he or she is socially and economically disadvantaged may be eligible for DBE certification.

However, as provided in 49 CFR Parts 23 and 26, as amended, any otherwise eligible individual whose personal net worth is in excess of Seven Hundred and Fifty Thousand Dollars ($750,000) may not qualify for a social and economic disadvantage status.

4. Race-Neutral

A procedure or program that is used to assist all small businesses, regardless of whether they may have received or are eligible to receive DBE certification. For the purposes of this Program, race-neutral includes gender neutrality.

5. Race-Conscious

A measure or program that is specifically focused on assisting DBEs, including women-owned DBEs. Measures typically will involve establishing DBE contract goals, where necessary.

IV. RESPONSIBILITY FOR DBE PROGRAM IMPLEMENTATION AND ADMINISTRATION

A. **The City Council** is ultimately responsible for ensuring that CCMBL fully implements its DBE Program.

B. **The Transportation Director** is responsible for overseeing DBE Program implementation.

C. **The Purchasing Officer** is responsible for the contracting and procurement of goods and services; for initiating procedures and developing strategies to ensure that CCMBL's purchasing and contracting activities are carried out in a non-discriminatory manner; problem identification when DBE goals are included in contracts; auditing specific contracts and removing obstacles to achieving DBE contract goals, where applicable; and providing the DBE Liaison Officer and other staff with assurance that DBE program guidelines have been followed.

D. **The City Attorney's Office** is responsible for providing advice to the City Council, the Transportation Director, division managers on the legal ramifications of DBE Program implementation.

E. **DBE Liaison Officer**. The Senior Management Analyst (Transportation Administration) has been designated DBE Liaison Officer. The Liaison Officer is the primary person responsible for all aspects of this Program, and will work closely with the operating division and other divisions and consultants of CCMBL, including procurement and others who are responsible for making decisions relative to CCMBL's construction, procurement and professional service contracts. The Liaison Officer shall have full authority for the implementation and administration of this Program, including efforts to contact and assist DBEs, maintain a close working relationship with local DBE affiliates, and to develop information and recommendations in the development of bid packages and procurement plans. The DBE Liaison Officer shall have direct and independent access to the Transportation Director, who shall assign adequate staff to assist the Liaison Officer in the performance of his/her duties. The Liaison Officer shall also hold the following duties and responsibilities:

- Gathering and reporting statistical data and other information as required by FTA;
- Reviewing third party contracts and purchase requisitions for compliance with this program;
- Working with appropriate departments to establish overall annual goals;
- Ensuring timely notification to the DBE community of bid and contract opportunities;
- Identifying contracts and procurements so that required DBE goals are included in solicitations for both race-neutral and race-conscious DBE participation, and monitoring the results;
- Analyzing CCMBL progress toward DBE goal attainment, and identifying ways to improve progress;
- Participating in pre-bid meetings;
- Analyzing and assessing the available resources and evidence for the establishment and achievement of an annual overall participation goal for DBEs each fiscal year;
- Advising the Transportation Director, City Attorney's Office and City Council on DBE matters;
- Conducting race-neutral measures to facilitate DBE participation through outreach and other communication programs, training and business development programs, restructuring contracting opportunities, simplifying bonding, surety and insurance requirements or other race-neutral means;
- Planning and conducting DBE training and providing technical assistance;
- Providing outreach to DBEs and community organizations with advice on DBE Program issues and contract opportunities;

- Participating in the contract bid and award process including establishing specific contract goals where appropriate, reviewing contract specifications, attending pre-bid conferences and evaluating bids for contractor responsibleness, responsibility and good faith efforts;

- Monitoring specific contract performance and actual DBE participation;

- Monitoring overall DBE participation, adjusting overall goals and means of achievement, assessing areas of over concentration of DBE participation and reporting to CCMBL, the City Council and appropriate federal authorities, FTA as needed;

- Participating in the statewide Unified Certification Program in accordance with 49 CFR 26.81; and

- Maintaining all appropriate records and documentation of the DBE Program.

F. **Reconsideration Official.** The Transportation Director appoints the Deputy Transportation Director as the Reconsideration Official for fiscal year 2006-2007. The Reconsideration Official shall be responsible for responding to challenges or complaints arising out of or related to this DBE Program, including those related to certification challenges, the review of good faith compliance efforts by bidding firms, and determination of the amount of work actually performed by DBEs, except those decertification proceedings requiring a hearing officer, as set forth below in Section 9(E).

V. ADMINISTRATIVE REQUIREMENTS

a) Financial Institutions

CCMBL, through the Culver City Camber of Commerce and those specific area chambers in which we provide service, shall investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the Los Angeles area and shall make reasonable efforts to use these institutions in connection with its DOT-assisted projects. In order to determine eligible DBE financial institutions, CCMBL may use the investigations and determinations of other relevant public entities receiving DOT assistance; such as the Los Angeles County Metropolitan Transportation Authority. Additionally, CCMBL shall encourage its prime contractors on DOT-assisted projects to use such financial institutions.

b) DBE Directory

1. Pursuant to 49 CFR § 26.31, the Liaison Officer will maintain and update a DBE directory. The DBE Directory shall include the firm's name, address, telephone number, and types of work (utilizing Standard Industry Codes (SICs) for which the firm is certified as a DBE. Additionally, the DBE Directory may include, whenever possible, the date the firm was established, the legal structure of the firm, the percentage owned by disadvantaged individuals, capacity, previous work experience and a contact person.

2. CCMBL will use the DBE Directory as a resource in developing overall and contract-specific DBE participation goals and in conducting outreach and other programs for DBEs. <u>In maintaining this DBE Directory, CCMBL will use, in part or in whole, the directory from the California Department of Transportation (Caltrans) or the Los Angeles County Metropolitan Transportation Authority (METRO).</u>

c) Overconcentration of DBEs

Should the Liaison Officer determine that DBE participation is so over concentrated in certain types of work or contracting opportunities that it unduly burdens the participation of non-DBEs in that type of work, he or she, or his or her designee, will develop appropriate measures to address the overconcentration. The DBE Representative will seek approval from the FTA or appropriate federal authority, and upon receipt of the FTA or appropriate federal authority's approval, the measures will become part of this Program.

d) Business Development and Mentor-Protégé Programs

Where necessary to solicit ready, willing and able DBEs or to ensure that an over concentration of DBEs does not exist in any type or activity of work, CCMBL may, at its discretion, implement business development and/or mentor-protégée programs for DBEs. Additionally, where directed to do so by the FTA, DOT or other appropriate operating administration, CCMBL shall implement such programs. These programs shall assist DBEs develop business skills and experience in areas related to the services required by CCMBL. Any such programs implemented by CCMBL shall comply with the federal guidelines set forth in Appendices C and D to 49 CFR Part 26.

e) Transit Vehicle Manufacturer Certification

CCMBL will require all of its transit vehicle manufacturers to certify that they have established an annual overall DBE participation goal that has been approved by the FTA (or has been submitted but not disapproved) before they can bid on any CCMBL contracts.

VI. DETERMINING, ACHIEVING AND COUNTING OVERALL ANNUAL AND CONTRACT SPECIFIC DBE GOALS

A. OVERALL ANNUAL DBE GOAL

In accordance with 49 CFR § 26.41 et seq., the City Council shall establish an annual overall goal on a federal fiscal year basis for the participation of DBEs in all budgeted contracts utilizing FTA or other DOT federal financial assistance. The annual overall goal shall be expressed as a percentage of the total amount of FTA funds CCMBL anticipates expending in the fiscal year. CCMBL's annual overall goal represents the number of ready, willing and able DBEs that are available to participate in contracting opportunities and is reflective of the amount of DBE participation CCMBL would expect absent the effects of discrimination. CCMBL Transit intends to meet this goal to the maximum extent feasible by implementing the race-neutral measures described below. Where race-neutral measures are inadequate to meet the annual overall goals, CCMBL will establish specific contract goals for particular projects with subcontracting opportunities. Starting in FY 07, CCMBL shall not establish contract goals until regional Los Angeles County disparity studies are completed.

The method by which CCMBL will establish its DBE Program goals is more fully described in Attachment A to this Program.

As set forth in the Report attached as **Attachment B** and hereby incorporated by reference into this Program, CCMBL's overall DBE program goals for fiscal year 2006-2007 will be 8 percent.

1. DBE Eligibility

CCMBL shall require all DBEs listed in bids to have obtained appropriate certification. The DBE Liaison Officer shall review each bidder's DBE Report to confirm the status of each DBE listed. CCMBL will accept current certifications by FTA and its agencies, the Small Business Administration, or other FTA federal financial assistance recipients. CCMBL will require any firm listed but not currently certified as a DBE to submit the proper certification information within five days of bid opening in order to be included in the bidder's DBE achievements.

CCMBL shall require all prime contractors to make good faith efforts to replace any DBE subcontractor that is unable to perform successfully with another DBE subcontractor. In order to ensure that a particular substitute firm is an eligible DBE, all such substitutions of subcontractors must be approved by CCMBL before bid opening and/or promptly during contract performance.

2. Race Neutral Means

This Program does not establish DBE quotas or set-asides for CCMBL contracts. Rather, this Program reflects a good faith effort on CCMBL's part to support DBE firms that are ready, willing, and able to carry out work on its behalf. Under no circumstances shall CCMBL exclude any person or firm from participation, deny any person or firm the benefits of, or otherwise discriminate against any person or firm on the basis of race, color, sex or national origin. Only after it makes a determination, on an annual basis,that its overall goal for DBE participation in its DOT-assisted projects cannot be reached through race neutral means shall CCMBL establish DBE contract goals for the fiscal year.

To that end, CCMBL may use one or more of the following measures and others, where appropriate, to meet its overall Program goals in a race-neutral manner:

1) Arrange solicitations, times for the presentations of bids, quantities, specifications, and delivery schedules in a way that will facilitate DBE participation;

2) Assist in DBE's overcoming limitations in bonding and financing;

3) Provide technical assistance;

4) Provide outreach and communications programs to DBEs;

5) Provide business development activities including financial ability, technical/business capacity, use of emerging technology and start-ups in non-traditional business areas for DBEs; and

6) Distribute the DBE directory electronically and otherwise as requested.

B. CONTRACT GOALS

1. **Establishing Contract Goals**

CCMBL shall establish contract-specific DBE participation goals on particular prime contracts with subcontracting opportunities only when it cannot achieve its annual overall Program goal using race-neutral measures. Starting in FY 07, CCMBL shall not establish contract goals until regional Los Angeles County disparity studies are completed. Where a contract-specific DBE goal has been established, the bidder or proposer must meet the contract-specific goal or demonstrate that it has made good faith efforts to do so. A bidder shall be ineligible for an award if it does not meet the contract goals or demonstrate it has made good faith efforts to do so.

Contract goals, where applicable, shall be established based on a recommendation and information furnished by the Liaison Officer. These goals shall be set, where necessary, according to the factors outlined below:

1) The projected portion of the overall annual goal that will be met by establishing contract-specific goals;

2) The progress towards achieving annual overall goals;

3) The full range of activities in the proposed contract;

4) The availability of DBEs as prime contractors or subcontractors in the types of work involved in the performance of the proposed contract;

5) The unique conditions of the project that might affect the ability of the prime contractor to coordinate, utilize or incorporate subcontractors or suppliers into the project. (Projects consisting of only one or two subtrades may not be appropriate for a contract-specific goal due to the fact that establishing a goal could result in restrictive bidding);

6) The effect that the contract-specific goal might have on the time of completion; and

7) Any other relevant criteria.

If, during the course of a fiscal year, CCMBL determines that through the implementation of its contract goals it has met its overall DBE goals for that year, it shall reduce or eliminate its contract goals to the extent necessary.

If CCMBL has obtained DBE participation that exceeds its overall DBE goals for two consecutive fiscal years, it shall reduce its contract goals for the next fiscal year accordingly. Additionally, if CCMBL has met its overall DBE goals through race neutral means for two consecutive years, it will continue to use race neutral means and not set contract goals until such time that it has not met its overall DBE goals for a fiscal year.

2. Awarding Contracts with Contract-Specific Goals

Each solicitation for which a DBE contract goal has been established will require the bidders/offerors to submit the following information under sealed bid procedures as a matter of responsiveness, with the initial proposals under contract negotiation procedures, or, where applicable, prior to the commitment to perform the contract:

a) The names and addresses of DBE firms that will participate in the contract;

b) A description of the work that each DBE will perform;

c) The dollar amount of the participation of each DBE firm;

d) Written documentation of commitment to the use DBE subcontractors whose participation the prime submits as part of its efforts to meet a contract goal;

e) Written confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and

f) If the DBE contract goal has not been met, evidence of good faith efforts to meet the goal.

CCMBL shall award applicable contracts to the lowest responsible bidder as required by the California Public Contract Code Sections 20914 and 20916. A bidder that fails to demonstrate that it achieved the contract-specific DBE participation goal and fails to demonstrate that it made good faith efforts to do so shall be deemed non-responsive and shall, therefore, be ineligible for award of the contract.

The Liaison Officer, or his or her designee, shall review the total dollar value of the work and the percentage of the total contract bid price reported on the bidder/contractors's DBE Report for accuracy and shall compare it to the contract-specific goal established for the contract.

3. Determination of Good Faith Efforts

If the amount of DBE participation submitted by a bidder/contractor does not meet the contract-specific-goal, the DBE Representative shall review the good faith effort report submitted by the bidder/contractor as required by the contract document. The DBE Representative shall determine whether the bidder Contractor has demonstrated good faith efforts to meet the contract-specific goal in accordance with 49 CFR Part 26 Appendix A.

Good faith efforts include, but are not limited to, the following:

1) Whether the contractor solicited capable DBEs through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices);

2) Whether the contractor solicited DBEs with sufficient time to allow them to respond, and if appropriate steps were taken, to follow up with interested DBEs;

3) Whether the bidder/contractor selected portions of work to be performed by DBEs and, where appropriate, broke 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;

4) Whether the contractor negotiated in good faith with interested DBEs (documentation includes names, addresses and phone numbers; description of information provided regarding plans and specifications; and indication as to why additional agreements could not be reached);

5) Whether the contractor made efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials or related assistance or services;

6) Whether the contractor made efforts to assist interested DBEs in obtaining bonding, lines of credit or insurance;

7) Whether the contractor effectively used the services of available minority/women community organizations, contractor groups or other organizations to provide assistance in recruitment and placement of DBEs;

8) Whether other bidders on the procurement met DBE goals; and

9) Whether the contractor makes any other form of good faith effort as set forth in Appendix A to 49 CFR Part 26.

4. Bidder's Right to Administrative Reconsideration

In the event that the Liaison Officer determines that the apparent low bidder has not met the contract-specific goal and has not demonstrated good faith efforts to do so, the Liaison Officer will notify the bidder in writing. The notification shall explain the basis and include the reasons for the determination, and shall inform the bidder of his or her right to submit further written documentation and have an opportunity to meet with the Reconsideration Official pursuant to the provisions of Section 9(D).

In the event that the Reconsideration Officer finds that the bidder has not met the contract goal or demonstrated good faith efforts, CCMBL will deem said bidder non-responsive and evaluate the bidder submitting the next lowest bidder.

5. Recommendation for Award of Contract with DBE Goal

Following the determination of the lowest responsible bidder, the DBE Representative shall prepare a report to the Transportation Director on the lowest responsible bidder's compliance with the DBE requirements, which may be reviewed by the City Council prior to the time its awards the contract. If the City Council disagrees with the recommendation, it shall reject all bids or refer the matter back to the Transportation Director and/or Liaison Officer or their designee for further evaluation and recommendation. The decision of the City Council on the award of contract, if such a decision is made, shall be final and binding on all parties.

C. COUNTING AND TRACKING DBE PARTICIPATION

Once a firm has received DBE certification, the total dollar value of the work actually performed by the DBE may be counted toward the contract goal, provided the DBE performs a commercially useful function. In determining what proportion of the expenditure shall be applied towards the DBE goal, the criteria set forth in 49 CFR Section 26.55 and the following shall apply:

1) The total dollar amount of the contract actually performed by a DBE or a subcontractor who is a DBE.

2) Where a DBE performs work for CCMBL as part of a joint venture, the total dollar amount equal to the distinct, clearly defined portion of the work carried out on the contract by the DBE may be counted towards the DBE goal.

3) Only 60% of the expenditures for materials and supplies required under the contract and obtained from regular dealers who are DBEs, as defined in 49 C.F.R. Section 26.55, may be counted toward the award goals if the vendor is not the manufacturer. 100% of such expenditures may be counted if the DBE manufacturer is the manufacturer.

4) If the DBE is not a manufacturer or a regular dealer, the following fees and/or commissions may be counted, provided that the fee and/or commission is not unreasonable or excessive as determined by CCMBL in light of the customary fees charged for similar services:

    a) The fees or commissions charged for providing a bona fide service, such as professional, technical, consultant or managerial services and assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for the contract may be counted;

    b) The fees charged for delivery of materials and supplies required on the job site (but not the cost of the materials and supplies) when the hauler, trucker or delivery service is not also the manufacturer or a regular dealer in the materials and supplies; and

    c) The fees or commissions charged for providing any bonds or insurance specifically required for the performance of the contract.

No prime contractor may terminate for convenience any DBE subcontractor listed in its bid and perform the work with its own forces or those of an affiliate without CCMBL's prior written approval.

A contractor must make a good faith effort to replace a defaulting DBE subcontractor with another certified DBE. The prime must immediately notify the Liaison Officer of any DBE's inability to perform and provide reasonable documentation to substantiate its claim. The contractor must receive CCMBL's approval prior to substituting a DBE. The contractor will provide copies of new or amended subcontracts and a completed DBE certification application form for each new DBE, or must provide sufficient good faith efforts documentation. If the contractor fails or refuses to comply in the time specified by CCMBL, the Transportation Department 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 contract officer may issue a termination for default proceeding.

VII. REQUIRED CONTRACT PROVISIONS

CCMBL shall require the following provisions be included in agreements arising out or related to all its federally assisted projects:

A. Nondiscrimination Affirmation

1. Each financial assistance agreement that CCMBL executes with the FTA will include the following statement:

   "The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any FTA-assisted contract, or in the administration of its DBE Program. The recipient shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of FTA-assisted contracts. The recipient's DBE Program, as required by 49 CFR Part 26, and as approved by FTA, is incorporated by reference in this agreement. Implementation of this DBE Program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to CCMBL of its failure to carry out its approved program, the Federal Transit Administration 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.)"

2. Each FTA-assisted contract CCMBL signs with a contractor, and each subcontract the prime contractor signs with a subcontractor, will include the following statement:

"The contractor, subrecipient 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 FTA-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in termination of this contract or such other remedy as CCMBL deems appropriate."

B. Prompt Payment Policy and Provisions

CCMBL shall include the following provision in each FTA-assisted contract:

"No later than Thirty (30) days after receiving payment from CCMBL for work satisfactorily performed by any of its subcontractors for services rendered arising out of or related to this Agreement, CONTRACTOR shall make full payment to its subcontractors of all compensation due and owing under the relevant subcontract agreement, unless excused by CCMBL for good cause pursuant to provisions of Section 1.1 below."

"No later than Fifteen (15) days after receiving payment of retention from CCMBL for work satisfactorily performed by any of its subcontractors for services rendered arising out of or related to this Agreement, CONTRACTOR shall also make full payment to its subcontractors of all retentions withheld by it pursuant to the relevant subcontract agreement, unless excused by CCMBL for good cause pursuant to provisions of Section 1.1 below."

"1.1 Good Cause

"CONTRACTOR may only delay or postpone any payment obligation (or retention) to any of its subcontractors for services rendered arising out of or related to this Agreement where, in CCMBL's sole estimation, good cause exists for such a delay or postponement. All such determinations on CCMBL's part that good cause exists for the delay or postponement of CONTRACTOR's payment obligation to its subcontractor must be made in writing prior to the time when payment to the subcontractor would have been otherwise due by CONTRACTOR."

C. Legal Remedies

CCMBL requires that its contracts with prime contractors and prime contractor/subcontractor contracts shall include the following provision:

"In addition to those contract remedies set forth under relevant provisions of California law, either party to this Agreement may, where applicable, seek legal redress for violations of this Agreement pursuant to relevant provisions of 49 C.F.R. Parts 23 and 26, federal or state statutory provisions governing civil rights violations, and relevant federal and state provisions governing false claims or 'whistle blower' actions, as well as any and all other applicable federal and state provisions of law."

D. Administrative Remedies

CCMBL requires that its contracts with prime contractors contain the following provision:

"CONTRACTOR's failure to make good faith efforts to comply with CCMBL's DBE program shall be considered a material breach of this AGREEMENT and may give rise to certain administrative penalties and proceedings, including, but not limited to, those set forth in 49 C.F.R. Part 26.107."

E. DBE Program Compliance

CCMBL requires that its contracts with prime contractors and prime contractor/subcontractor contracting shall include the following provision:

"CCMBL has established a DBE Program pursuant to 49 C.F.R. Parts 23 and 26. The requirements and procedures of CCMBL's DBE Program are hereby incorporated by reference into this Agreement. Failure by any party to this Agreement to carry out CCMBL's DBE Program procedures and requirements or applicable requirements of 49 C.F.R. Part 26 shall be considered a material breach of this Agreement, and may be grounds for termination of this Agreement, or other such appropriate administrative remedy. Each party to this Agreement shall ensure that compliance with CCMBL's DBE Program shall be included in any and all sub-agreements entered into which arise out of or are related to this Agreement."

VIII. DBE CERTIFICATION STANDARDS

A. Burden of Proof

Each firm, partnership or individual claiming DBE certification and submitting bids to CCMBL has the burden of proof by a preponderance of the evidence standard to show that it has met the requirements for DBE certification. In making determinations regarding DBE eligibility, social and economic disadvantage (as defined below) will be rebuttably presumed where the firm, partnership or individual has submitted affidavits and required supporting documentation representing that it holds a social and economic disadvantage status, as defined below. The presumption of social and economic disadvantage may be rebutted where, in CCMBL's estimation and in accordance with the procedures for determining certification eligibility set forth below, insufficient evidence supports the affidavit of the firm, partnership or individual claiming such social and economic disadvantage status.

Where CCMBL has a reasonable basis to doubt an individual's or firm's claim of social and economic disadvantage, it shall require the individual or firm to demonstrate, by a preponderance of the evidence, that he or she falls within a category of social and economic disadvantage and may institute, where applicable, a certification review proceeding as more fully described in Section IX.

All firms, partnerships, or individuals who do not submit affidavits asserting social and economic disadvantage status, or whose assertion of social and economic disadvantage has been rebutted, will not be presumed to hold such a status and bear the burden of demonstrating to CCMBL that they are socially and economically disadvantaged.

B. Definitions

1) "Disadvantaged Business" is a small business concern owned and controlled by socially and economically disadvantaged individuals.

2) "Socially and Economically Disadvantaged Individuals" means those individuals who are citizens of the United States (or lawfully admitted permanent residents) and who are women, Black or African Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans and any other individuals found to be disadvantaged by the Small Business Administration pursuant to Section 8(a) of the Small Business Act. CCMBL shall make a rebuttable presumption that individuals in the following groups are socially and economically disadvantaged:

   a) "Black or African Americans," which includes persons having origins of any of the Black racial groups of Africa;

   b) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, Portuguese or other Spanish culture or origin, regardless of race;

   c) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

d) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar),Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific (Republic of Palua), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbat, Juvalu, Mauru, Federated States of Micronesia, or Hong Kong;

e) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

f) Women;

g) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA; and

h) CCMBL may determine that individuals who are not a member of one of the above-listed groups are socially and economically disadvantaged.

3) "Rebuttal of Presumption of Disadvantage" means there is creditable evidence supporting a finding that an individual presumed to be socially and economically disadvantaged has a personal net worth in excess of Seven Hundred and Seventy Thousand Dollars ($750,000), or a reasonable basis to believe that the individual is not a member of an above-described socially disadvantaged group.

4) "Small Business Concern" means a small business as defined pursuant to Section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto. If a business is not a small business concern, it is not an eligible DBE regardless of ownership by socially and economically disadvantaged individuals.

a) In general, a small business concern shall not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals which has annual average gross receipts in excess of $16.6 million over the previous three fiscal years. (See 13 C.F.R. Part 121.402.) This figure may be adjusted from time to time for inflation.

b) In determining whether a particular business is a small business concern, CCMBL shall apply the standards established by the Small Business Act (13 CFR Part 121 et seq.) which may impose more restrictive annual gross receipt restrictions, depending on the type of business.

5) "Owned and Controlled" is defined as a business concern that is at least 51 percent owned by one or more socially and economically disadvantaged individuals, or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals, or, in the case of a partnership or limited liability company, at least 51 percent of the interest is owned by one or more socially and economically disadvantaged individuals, as demonstrated by the substance, not merely the form, of these various ownership arrangements.

6) "Joint Venture" is an association of two or more businesses formed to carry out a single business enterprise for profit, for which purpose they combine their property, money, efforts, skills and knowledge.

Firms Not Presumed to Be Socially or Economically Disadvantaged. CCMBL has established a procedural form for certification determinations of individuals who are not members of one of the presumed socially and economically disadvantaged groups listed above.

Individuals applying for certification who must meet the following criteria:

(a) Their business must be a small business concern.

(b) They must have had a personal experience of substantial and chronic social disadvantage in American society, not in other countries.

(c) They must possess at least one of the following features of individual social disadvantage: that is, they must feel that their individual social disadvantage stems from color; gender; national origin; physical handicap; long-term residence in an environment isolated from the mainstream of American society; or other similar cause beyond their control.

(d) They must demonstrate a negative impact on entry into or advancement in the business word because of social disadvantage. This may be determined by considering the following:

(i) Education. They can demonstrate they have been denied equal access to business or professional schools, curricula, exclusion from social and professional association with students and teachers, educational honors, or any other social patterns of pressure which have discouraged them from pursuing a professional or business education.

(ii) Employment. They can demonstrate unequal treatment in hiring, promotions, professional advancement, or other terms or conditions of employment.

(iii) Business History. They can demonstrate unequal access to credit or capital, acquisition of credit or capital, or other unequal treatment in pursuing and obtaining business opportunities.

IX. CERTIFICATION PROCEDURES

A. Unified Certification Program (UCP)

CCMBL has adopted and is now a full participant in the UCP.

B. Initial Certification Program

Until it has entered a UCP agreement, CCMBL shall establish procedures designed to ensure that this Program secures only those firms that meet DBE certification requirements, as defined by federal law and regulations. CCMBL may accept as evidence DBE certification determinations made by other appropriate public entities.

In order to determine whether a firm is an eligible DBE upon its initial request for DBE certification, CCMBL or another certifying entity, shall, at a minimum, require that the following steps have been taken by the agency conducting the certification:

(1) Perform an on-site visit to the offices of the firm and to any job sites on which the firm is working at the time of the eligibility investigation;

(2) Obtain the resumes and/or work histories of the principal owners of the firm and personally interview these individuals;

(3) Analyze the ownership of stock in the firm, if it is a corporation, and analyze the bonding and financial capacity of the firm;

(4) Determine the work history of the firm, including contracts it has received and work it has completed;

(5) Obtain or compile a list of equipment owned or available to the firm and the licenses held by the firm and its key personnel to perform the work it seeks to do as part of this DBE Program; and

(6) Obtain a statement from the firm of the type of work it prefers to perform as part of this DBE Program.

When making determinations regarding certification, CCMBL or other certifying entity shall consider all facts contained in the record as a whole. Additionally, all information provided by bidders or contractors that is labeled by contractor as being proprietary information and which CCMBL reasonably determines as such, shall be kept confidential by CCMBL to the extent allowed by law.

If, at any time during the bidding process or after the applicant has been awarded a CCMBL contract, a change in circumstances has occurred affecting the applicant's ability to continue to claim a DBE status, it must submit written notification, in the form of an affidavit, of this change and the reasons therefor to CCMBL within Thirty (30) days of the occurrence of the change. Whenever the factual basis upon which a decision DBE certification has changed, CCMBL may at any time conduct a certification review of the firm prior to its regular time for recertification.

Where required, CCMBL or the certifying entity shall make its determination of a firm's eligibility for initial DBE certification within Ninety (90) days of receiving all the required information from the applicant. CCMBL or the certifying entity may extend the time in which to consider a firm's eligibility for DBE certification by an additional Sixty (60) days; provided written notice is given to the applicant of the delay in the determination and the reasons therefor.

In the event CCMBL or certifying entity determines that an applicant is not eligible for a DBE status, it shall provide the applicant with written reasons why this determination has been made. All applicants whose applications for DBE status have been denied by CCMBL may appeal to the DOT pursuant to the procedures and provisions of 49 CFR 26.89.

C. Recertification Procedures

Unless the factual basis upon which the DBE's initial certification has changed or reasonable grounds exists for a certification review, CCMBL shall ensure that all firms considered eligible on its accepted DBE Directory have been recertified every three (3) years, on or about the firm's anniversary date of its initial DBE certification. Additionally, upon request the firm must provide CCMBL with annual affidavits by its owner(s) by the anniversary date of the firm's initial certification stating that there have been no changes in the firm's circumstances affecting its ability to continue meeting DBE certification requirements. Failure to provide this annual affidavit may be grounds for denial of DBE recertification.

D. Reconsideration and Reapplication Procedures

Any bidder/contractor whose contention of good faith efforts to comply with CCMBL DBE Program goals has been denied by CCMBL shall have an opportunity, at its request, to have the matter reconsidered by CCMBL. If so requested, the bidder/contractor will have an opportunity to meet with the Reconsideration Officer, or his or her designee, to discuss CCMBL's decision denying the good faith efforts claim of the bidder; provided, however, that the bidder/contractor has presented documentation and written argument prior to such a reconsideration meeting discussing the adequacy of the bidder/contractor's good faith efforts. Subsequent to this meeting, CCMBL shall provide a written response to the bidder/contractor, explaining the basis for its determination in the matter. Pursuant to 49 CFR section 26.53, CCMBL's reconsideration determination is not appealable to the DOT.

Where CCMBL has determined that any portion of DBE participation claimed by a contractor has not served a commercially useful function pursuant to 49 CFR section 26.55, the contractor may provide evidence to the Reconsideration Officer rebutting this finding on CCMBL's part. Any subsequent determination by CCMBL finding that a DBE did not serve a commercially useful purpose on any of its DOT-assisted projects may be appealed to the appropriate federal authority.

Any firm whose DBE status has been denied by CCMBL may not reapply for DBE certification within a Twelve (12) month period from the time the previous application was made. For purposes of determining when this twelve month period begins to accrue, the date upon which the applicant receives its written notice of denial from the CCMBL shall be considered the date upon which the application has been denied.

E. Removal Procedures

Any person may file a complaint alleging that a firm currently on CCMBL's DBE Directory may not claim a DBE status; provided, however, any complaints must state the reasons therefor and provide information supporting the complaint. The identities of individuals submitting such complaints shall be kept confidential by CCMBL pursuant to the terms of 49 C.F.R. Section 26.109(b). However, in the event a decertification proceeding is commenced, the third party complainant shall be informed by CCMBL that the complaint will be disclosed to the firm sought to be decertified.

When seeking to remove firms that have already received DBE certification from its Directory on the basis of a third party complaint or on the basis of its own reasonable information and belief, CCMBL shall do the following:

(1) If CCMBL determines that there is reasonable cause to decertify the firm, CCMBL shall provide the affected firm with notice of the proposed decertification and a statement of reasons for the decertification. This notice shall also include a statement to the firm to be certified of its right to a hearing on the matter.

(2) CCMBL shall appoint an individual to be officer at the hearing who is familiar with DOT DBE certification procedures, but who has not been involved in CCMBL's consideration of the firm under review for decertification. This individual may, but need not be, an administrative law judge.

(3) A court reporter, or other state-certified transcriber of public adjudicatory proceedings, shall make a verbatim record of the decertification hearing proceedings. Should the firm request DOT or other appropriate federal authority's review of the hearing officer's statement of decision, CCMBL shall provide a certified transcript of the hearing record to the firm at the firm's expense.

(4) At the hearing, the firm under consideration for decertification shall be provided an opportunity to respond to the reasons for the proposed action and the right to provide information and arguments on the matter.

(5) The hearing officer shall make a determination on the matter based upon the record and only based upon the grounds for decertification set forth below. The hearing officer's decision shall also include a statement of decision and the reasons therefor as set forth in (6) below. However, the decision may not be based on a reinterpretation or changed opinion of the information available to CCMBL at the time of the certification of the firm. The hearing officer's decision affirming CCMBL's proposed decertification decision must be based on one of the following grounds:

    (a) Changes in the firm's circumstances have occurred since the certification of the firm that have rendered it ineligible for DBE certification;

(b) Information was not available to CCMBL at the time the firm was certified which serves as an independent basis for the firm's decertification;

(c) Information was concealed or misrepresented by the firm in previous certification actions submitted by the firm;

(d) A change in certification standards has occurred since the certifying the firm; or

(e) A documented finding of CCMBL error in the prior or relevant certification of the firm.

(6) The hearing officer shall provide the firm to be decertified and the third party complainant, where applicable, with notice of the decision, which shall include a statement of reasons for the decision within specific references made to the record supporting each reason for the decision. Additionally, notice of decision shall be provided to CCMBL.

(7) The firm shall remain a DBE certified entity until the decision regarding decertification has been provided the parties.

F. Process for Certification Appeals

A firm that has been denied certification or whose eligibility is removed may make an administrative appeal to the DOT, FTA, or other appropriate federal authority pursuant to 49 C.F.R. Section 26.89. Should a firm seek an appeal, it must make written request with the appropriate federal authority within ninety (90) days of the date of CCMBL's final decision, which written request must include information concerning why CCMBL's decision should be reversed, and any other legal requirements.

X. MONITORING AND RECORD-KEEPING

A. Bidders List

CCMBL will maintain a bidders list consisting of all firms bidding on prime contracts and bidding or quoting subcontracts on FTA or other DOT assisted projects. For every firm, the following information will be included: firm name, firm address, firm status as a DBE or non-DBE, the age of the firm, and the annual gross receipts of the firm.

B. Monitoring Payments to DBEs

CCMBL will implement appropriate mechanisms to ensure that its prime contractors and subcontractors comply with DBE program regulatory requirements. Specifically, CCMBL will maintain records on the following:

(1) Procedures which have been adopted to implement this Program, including technical assistance efforts and referral and communication procedures;

(2) Contracts awarded to DBEs, including name of firm, nature of work, total value of the contract and/or subcontract and the overall percentage of DBE awards;

(3) Specific efforts to identify and award contracts to DBEs including the number and names of firms contacted and invited to bid on a contract, the number of names of DBEs responding and the publications in which the contract procurement was advertised;

(4) Payments made by Prime Contractors to DBE subcontractors; and

(5) All documentation related to the meeting of overall DBE goals through race neutral means and contract goals. Data related to race neutral and contract goals DBE program achievements shall be kept and recorded separately.

C. Federal Reporting Requirements

CCMBL will continue to require information concerning its DBE program to FTA and other appropriate federal agencies.

XI. PUBLIC PARTICIPATION AND OUTREACH

A. Public Participation

CCMBL, in addition to any advertising required by law for construction bids, will provide bid information to the following:

1) Local and regional DBE focused publications, containing project description, pre-bid meeting date, bid opening date and a notice to disadvantaged contractors and/or subcontractors indicating that they may obtain lists of prospective contractors as well as contract specifications from CCMBL.

2) Disadvantaged contractors and/or subcontractors who are identified as firms that may render the necessary construction activity.

B. Outreach Efforts

To the maximum extent feasible, CCMBL will meet its overall DBE goal by using race-neutral means. Race-neutral efforts may include, but are not limited to, the following:

1) Arranging solicitations, times for presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE and other small businesses;

2) Providing technical assistance and other similar services;

3) Carrying out information and communications programs on contracting procedures and specific contract opportunities;

4) Implementing a supportive service program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses through the Regional Certification Reciprocity Council (RCRC);

5) Ensuring distribution of CCMBL's DBE data base through print and electronic means to the widest feasible universe of potential prime contractors; and

6) Other means and methods as deemed necessary.

XII. COMPLIANCE WITH FEDERAL LAW

It is the intent of CCMBL to comply with all applicable federal laws, regulations, or other requirements governing its DBE Program, including, but not limited to, the procedures and requirements set forth 49 C.F.R. Parts 23 and 26 and those established under the SBE. To the extent that any provision or procedure set forth in this Program conflicts or is inconsistent with any federal law, regulation or other requirement, the federal law, regulation or other requirement shall govern the implementation of this Program.

Attachment A

1. Establishing a Base Figure

CCMBL will develop a base figure to express the availability of DBEs as a percentage of all contractors, subcontractors, manufacturers and suppliers in the relevant contracting markets. CCMBL will follow one of the methodologies provided in the federal regulations and provide the appropriate documentation for its annual overall DBE Program goals.

a. Using the goal of another recipient

The last specific example included in the rule is using the goal of another recipient as the base figure for goal setting. This example is intended to avoid the duplicative work and to lighten the load on smaller recipients. Using the goal of another recipient is only allowable if that recipient's goal was set in accordance with this rule and the recipient performed similar contracting in a similar market area.

CCMBL will use the Los Angeles County Metropolitan Transportation Authority's (LACMTA) goal for FY2005-06 as the base figure in calculating the goal for FY2006-07. The LACMTA used the recommended formulas under the new rule to calculate their goal of 8%. The LACMTA and CCMBL are located in the same market area and may utilize the same DBE vendors for FTA assisted capital projects.

b. Analyzing Available DBEs in the Relevant Contracting Markets

The Liaison Officer will conduct, or have conducted, a similar analysis to determine the DBEs that are available to participate as contractors, subcontractors, manufacturers and suppliers in the projected contracts for the fiscal year. This analysis will include a description of the available DBEs relative to the geographical boundaries of the solicitations, the SICs for the types of work to be contracted, and any other factors as described in above. CCMBL will consult a variety of sources including, but not limited to, the DBE Directory, the Bidder's List, the County Business Patterns Database and any relevant disparity studies.

c. Calculating the Base Figure

The Liaison Officer will compare, or have compared, the available DBEs in the relevant contracting markets for the fiscal year to the available businesses in the relevant contracting markets for the fiscal year. The calculation will include a weighting factor according to the contract expenditure patterns.

2. **Adjusting the Base Figure:**

Pursuant to 49 CFR § 26.45(d), CCMBL will adjust the base figure based on demonstrable evidence indicating that the availability of DBEs for FTA-assisted contracts for the fiscal year may be higher or lower than the base figure indicates. At a minimum, the Liaison Officer will analyze the results of CCMBL's efforts to contract with DBEs for the past two years, any available and relevant disparity studies (to the extent that they are not accounted for in the base figure), any available and relevant results of other, similar FTA recipients' efforts to contract with DBEs, any relevant feedback or projections from DBE professional organizations, the Small Business Administration or others.

Using the data collected regarding over-concentration, DBE availability of firms ready, willing and able, and other necessary adjustments (such as how long each project will span), a goal will be set at the level of DBE participation expected absent the effects of discrimination.

3. **Projection of Percentage of Overall Goal to be Achieved Through Race Neutral and Race Conscious Measures:**

Once the annual overall goal is proposed, the Liaison Officer will analyze and project the maximum feasible portion of that goal that can be achieved by using race neutral methods. Where the projected portion of the goal using race-neutral methods is less than the annual overall goal, the remaining portion will be achieved by establishing contract goals for particular projects that have subcontracting opportunities. <u>Starting in FY 07, CCMBL shall not establish contract goals until regional Los Angeles County disparity studies are completed.</u> Any overconcentration of DBEs in a particular trade will be excluded from race-conscious contract goals.

The Liaison Officer shall monitor and adjust the use of contract-specific goals in accordance with 49 CFR 26.51(f). When projecting the percentage of the overall annual goal to be achieved through establishing contract-specific goals, the Liaison Officer shall analyze the actual achievement of the overall annual goal through race-neutral methods in the previous two years. When establishing contract-specific goals during the current fiscal year, the DBE Representative shall analyze the progress towards achieving the overall annual goal and increase or reduce the use of contract-specific goals accordingly. DBE race-conscious contract goals will be used only on those FTA assisted contracts that have subcontracting opportunities. DBE contract goals will be established so as to cumulatively result in meeting that portion of CCMBL's overall goal that is not projected to be met through race-neutral means.

4. Adopting and Publishing the Overall Annual DBE Goal

Upon completion of the analysis described above, the Liaison Officer will prepare an Overall Annual Goal Report. The report shall document the analysis and methodology as well as the proposed goal and estimate to be achieved through race-neutral measures. The Report will be furnished to the Transportation Director. Upon the Director's recommendation, the proposed overall annual goal will be submitted to the City Council for authority to publicize the proposed goal for public comment.

5. Publication of Proposed Overall Annual Goal

Pursuant to 49 CFR § 26.45(g), CCMBL will publish the proposed overall annual goal in general circulation and DBE-oriented media. The notice shall include a statement that the methodology and proposed goal are available for inspection by the public for 30 days from the date of publication. The notice shall also include a statement that CCMBL will accept public comments to the proposed goal and methodology for a period of 45 days from the date of publication and provide instructions for the submission of comments. Upon receipt of public comments, the Liaison Officer will prepare a summary report analyzing the public comments received, if any, to the Transportation Director.

Attachment B

Culver City Municipal Bus Lines
Disadvantaged Business Enterprise (DBE)
Fiscal Year 2006-07 Annual Goal

CCMBL hereby announces its Fiscal Year 2006-07 transit system procurement goal of for Disadvantaged Business Enterprises (DBEs). The methodology used to calculate the base number and the goal is consistent with 49 CFR Parts 23 and 26.

Overall Goal Setting Methodology

1. Expected Funding for FY 2006-2007

Work Category	Work Category Description	NAICS Codes	Estimated Dollar Value	% of Federal Funding by Work Category
A	CNG Facility Expansion	238990/ 237	$1,600,000	100%

2. Base Figure Calculations (§26.45)

Work Category	# of DBEs	# of Firms
A	84	1101

$$\text{Base Figure} = \frac{\text{\# of Ready, Willing, and Able DBEs}}{\text{Number of Ready, Willing, and Able Firms}}$$

With weighting, the Base Figure resulting from this calculation is as follows:

$$\text{Base Figures} = \frac{\text{(DBEs in A)}}{\text{Firms in A}}$$

$$\text{Base Figure} = \frac{84}{1101}$$

Base Figure = .076 = 8% FY 06 GOAL

Attachment C
Control Determinations for DBE Certification Evaluations

1. In determining whether socially and economically disadvantaged owners control a firm, CCMBL will consider all firms listed in the DBE Directory for the County of Los Angeles, which is supplied by the California Department of Transportation (Caltrans). The U. S. Census Bureau County Business Pattern Database will be used to record the total number of ready, willing, and able firms.

Attachment 3

Metropolitan Transportation Authority

One Gateway Plaza
Los Angeles, CA 90012-2952

213.922.2000 Tel
metro.net

Metro

JUNE 26, 2006

TO: BOARD OF DIRECTORS

THROUGH: ROGER SNOBLE
CHIEF EXECUTIVE OFFICER

FROM: LONNIE MITCHELL
EXECUTIVE OFFICER
PROCUREMENT & MATERIAL MANAGEMENT

SUBJECT: RACE-NEUTRAL DBE PROGRAM & DISPARITY STUDY PURSUANT TO NINTH CIRCUIT COURT OF APPEALS DECISION

ISSUE

Ninth Circuit Court Decision

In May, 2005, the U.S. Court of Appeals for the Ninth Circuit, in the case of *Western States Paving vs. Washington Department of Transportation*, held that, in the absence of adequate evidence of discrimination, it is unconstitutional for a recipient of federal Department of Transportation (DOT) funds to utilize race- and gender-conscious (hereinafter race-conscious) goals in its contracting.

U.S. DOT Guidance

As a result of this decision, DOT has advised agencies in the Ninth Circuit's jurisdiction, including Metro, that a recipient agency's use of Disadvantaged Business Enterprise (DBE) contract goals must be predicated upon evidence of discrimination or its effects within the transportation contracting industry

Impact to Metro

Metro has examined the evidence it has on hand concerning discrimination and its effects. Based on this information, which includes a 1995 disparity study, Staff has determined that it may not have evidence to support the continued use of race-conscious goals. Under these circumstances, Metro would be putting itself at significant litigation risk if it continues to use race-conscious goals.

According to the DOT guidance, since Metro may lack the evidence to support the use of race-conscious contract goals, Metro is required to implement a wholly race- and gender-neutral (hereinafter race-neutral) program. Additionally, Metro is required to initiate an evidence gathering process to determine evidence of discrimination or its effects in the greater Los Angeles area transportation contracting industry. This evidence gathering process is better known as a disparity/availability study. Metro has earmarked $500,000 for this effort.

With few exceptions, generally there is no difference in how the DBE program regulations apply to a race-and gender-neutral program as compared to a race- and gender-conscious program. In a wholly race-neutral program, Metro would not establish individual contract goals for DBE participation on any of its US DOT-assisted contracts. Rather, Metro would implement methods that aim to facilitate small business and DBE participation on its contracts. Such methods include the unbundling of contracts, providing technical, capital and bonding assistance, and facilitating business development programs. Metro would continue to collect the data required to be reported in the Uniform report of DBE Awards or Commitments and Payments Form and to monitor compliance with the commercially useful function, prompt payment and retainage requirements.

The move from a race-conscious program to a wholly race-neutral program does not have retroactive application. Thus, contracts executed and approved prior to the implementation of a race-neutral program would not be affected by this change.

BACKGROUND

DBE Program Requirement

DOT recipient agencies who let $250K or more in DOT-assisted contracts, including Metro, are required under the federal DBE regulations to set an overall goal for DBE participation on their DOT-assisted contracts. The overall goal must reflect a recipient agency's determination of the level of DBE participation it would expect absent the effects of discrimination. The overall goal is determined from an examination of DBE relative availability in the recipient agency's local market using DBE directory information, census data, bidders lists, disparity or similar studies, historical information, and data on local market conditions.

Recipient agencies must meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating DBE participation. Race neutral means include but are not limited to: (1) arranging contracts in ways to facilitate small business participation such as unbundling large contracts or requiring prime contractors to subcontract portions of the work; (2) providing bonding, financing and technical assistance, (3) communicating contract opportunities to the small business community and (4) providing business supportive and development services. Recipient agencies are required to establish contract goals (race-conscious means) to meet any portion of the overall goal it does not project being able to meet using race-neutral means. Contract goals must provide for participation by all certified DBEs and must not be subdivided into group specific goals.

Metro's DBE Program

Metro annually submits its overall goal projection to DOT for review and approval. This overall goal projection consists of a breakout of the portion of the goal that Metro expects to meet through race-neutral means, including the basis for that projection, and the portion Metro expects to meet using race-conscious methods, i.e. setting contract goals. In a narrowly tailored DBE program, Metro must meet the maximum portion of its DBE overall goal through race-neutral means.[1] To ensure that Metro's DBE program meets the narrowly tailored requirement to overcome the effects of discrimination, Metro must adjust its use of contract goals according to the progress it is making in meeting the overall goal through race-neutral means. As an example, if during the course of any year in which Metro is using contract goals it projects exceeding the overall goal, it must reduce or eliminate the use of contract goals.

Since the issuance of the current DBE program requirements in 1998, Metro has regularly submitted and received DOT approval of its overall goal following this process.

New Evidentiary Standard to Support Use of DBE Contract Goals

However, in May 2005 in the case of *Western States Paving vs. Washington Department of Transportation*, the Ninth Circuit held that a recipient agency's DBE program must be narrowly tailored to accomplish the remedial objectives established by Congress to be constitutional. To be narrowly tailored, the court stated that recipient agencies must as an element of its DBE program produce sufficient evidence of discrimination or its effects in its transportation contracting industry to justify the use of race-conscious measures. The court also suggested that a narrowly tailored program must structure its use of race-conscious measures to provide remedial relief to those groups that have actually suffered discrimination. The court added that to include groups within a DBE program who have not suffered discrimination would provide such groups with an unconstitutional competitive advantage at the expense of both non-minorities and any minority groups that have actually been targeted for discrimination.

Caltrans Response to Ninth Circuit Decision

In response to the Ninth Circuit's decision and related guidelines issued by the Federal Highway Administration (FHWA), the California Department of Transportation (Caltrans) implemented an evidence gathering process, that concluded in March 2006 to assess evidence of discrimination and its effects in the State of California's transportation contracting industry.

Caltrans conducted approximately 20 public forums throughout the State, gathered testimonials, disparity studies and other related evidence as required by the Ninth Circuit ruling. In the end, Caltrans along with the FHWA, concurred that the evidence of discrimination in California's transportation contracting industry did not meet the legal

[1] Narrowly tailored features include: (1) race conscious remedies are used only when race neutral means prove ineffective, (2) race-conscious measures are employed in a flexible manner and for a limited duration (3) the program is tied to the labor market in each state and (4) the program is designed to minimize the burden on non-minorities.

standards established by the Ninth Circuit case and, therefore, was insufficient to support continued use of race conscious measures.

Caltrans subsequently informed the FHWA and the public that, pending the results of a more comprehensive study of the facts, it would be implementing a wholly race-neutral DBE program effective May 1, 2006.

DOT Guidance

In March, 2006, the DOT issued through the *Federal Register* a notice of policy implementation entitled *Western States Guidance for Public Transportation Providers* seeking public comment. In essence, the guidance issued by DOT stated that recipient agencies who seek to use race-conscious goals must first look to marshal evidence of discrimination that would respond to the Ninth Circuit's decision in *Western States.* A recipient agency's record must contain evidence suggesting that minorities or women currently suffer or have ever suffered discrimination in the relevant transportation contracting industry. Otherwise, according to the guidance document, a recipient agency's DBE program would not be narrowly tailored to further congress' remedial objective and would conflict with the guarantees of equal protection.

DISCUSSION

Impact to Metro's DBE Program

The impact of the Ninth Circuit decision is that, to use race conscious goals, Metro must possess evidence of discrimination or its effects that support the continued use of DBE contract goals to the FTA and/or FHWA. Absent adequate evidence of discrimination or its effects, it would be unconstitutional for Metro, even under the umbrella of the constitutional DOT regulations, to use race-conscious goals in its DBE Program.

If the evidence of discrimination and its effects identified by Metro pertains to some, but not to all, of the groups that the federal DBE regulations presume to be socially and economically disadvantaged, then the race-conscious goals utilized by Metro would apply only to the group or groups for which the evidence is adequate.[2] A disparity study will determine this. The DOT has indicated that it will consider program waivers of the federal DBE regulations' prohibition of group-specific goals in this situation.

Disparity Study

Upon implementing a wholly race-neutral program, Metro would be required to immediately begin to conduct a rigorous and valid study to determine whether there is evidence of discrimination or its effects in the transportation contracting industry. Studies to determine the presence of discrimination or its effects are often referred to as disparity or availability studies. The study is designed to determine, in a fair and valid way, whether evidence of the kind the Ninth Circuit decision determined was essential to a DBE program including race-conscious elements exists.

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[2] These groups include women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA.

NEXT STEPS

Metro's FFY07 DBE Program

At the start of the Federal Fiscal Year 2007 (October 1, 2006), Metro will implement a wholly race-neutral program for its Federal Transit Administration (FTA) related DBE program. Concurrent with the implementation of this program, Metro will conduct an availability/disparity study to identify whether a race-conscious program is warranted on its FTA related DBE program. With respect to FHWA funds, Metro is also a sub-grantee of FHWA funds through Caltrans. On June 1, 2006, Metro reported to the Caltrans Office of Local Programs and Alameda Corridor that it does not anticipate awarding any FHWA-assisted contracts. Barring any changes, the Western States Paving decision will have no impact on Metro's FHWA related DBE program this Federal Fiscal Year. Should a change in this status occur, Metro agreed to adopt Caltrans' Race-Neutral DBE Program for all FY07 FHWA-related contracts.

Use of Anticipated Levels of Participation to Suggest DBE Participation

Under the wholly race-neutral program, Metro will implement an approach that is currently being used by other recipient agencies, including Caltrans, where each request for proposal will include a description of the number of DBE firms that are available to perform on the contract. Based on the number of ready, willing and able DBE firms identified, a figure will be presented that describes the Anticipated Level of Participation (ALP) of DBE firms that would be expected to be achieved based on the relative availability of DBE firms. Staff will revise the current goal evaluation process to fit this program, and will also examine boiler plate contract language, DBE plan, reporting forms, other program items that may need to be adjusted to fit the ALP approach.

Metro's Disparity Study

Consistent with the DOT-issued guidelines, Metro will conduct an independent availability/disparity study since the demographics of Metro's market area differs from that of Caltrans and other transit properties that may also be conducting similar studies. Metro plans to immediately solicit requests for proposals to contract with a consultant to begin accumulating the evidence necessary to meet evidentiary standards established in the Ninth circuit court decision. Metro's study will focus on avoiding the pitfalls that the court identified in the WSDOT program and will include a breakout of the effects of discrimination on each of the presumptive groups if necessary. The costs for the disparity study may be reimbursed by US DOT, according to availability of funds and sharing formulas.

Upon completion of study and direction of results, Metro may again use race-conscious goals at least for those groups where the effects of discrimination are shown to affect the ability of a group to compete on a nondiscriminatory basis.