

**CALIFORNIA DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
AMENDED DISADVANTAGED BUSINESS ENTERPRISE
GOAL AND METHODOLOGY**

Federal Fiscal Year 2009

Executive Summary

For Federal Fiscal Year (FFY) 2009, the California Department of Transportation (Caltrans) will continue the established overall 2008 Disadvantaged Business Enterprise (DBE) goal of 13.5 percent, without any Step Two adjustments. This overall goal is expected to be achieved, in equal proportions of 6.75 percent, through race-neutral and race-conscious measures. Caltrans submits this FFY 2009 goal and methodology to the Federal Highway Administration (FHWA) for review and approval pursuant to 49 Code of Federal Regulation (CFR) section 26.45, for federally assisted highway contracts. Caltrans relied on the 49 CFR section 26 regulation issued on February 2, 1999, and subsequent guidance issued December 21, 2005, to ascertain this goal.

FFY 2009 Goal-Setting Methodology – Section 26.45

Caltrans followed a two-step process for setting its overall DBE goal for FFY 2009.

- Step One describes the calculation of a base figure for the relative availability of DBEs.
- Step Two is the examination of all the evidence available to determine if an adjustment to the base figure is needed to arrive at the overall goal.

Step One Base Figure – Section 26.45(c)

In order to establish the base figure, Caltrans commissioned an Availability and Disparity Study (Study) completed by BBC Research & Consulting (BBC) in July 2007.

The Study:

- Analyzed use and availability of minority/women-owned firms in California transportation contracts.
- Examined other quantitative analysis of marketplace conditions.
- Reviewed anecdotal information from in-depth interviews with nearly 100 business owners and others across California.
- Analyzed oral and written testimony from businesses, trade associations, and other organizations at the 14 public hearings held by Caltrans in March and April 2007; two hearings in Los Angeles; and one hearing each in Eureka, Stockton, Bishop, Fresno, San Luis Obispo, San Diego, Sacramento, San Jose, Redding, Irvine, San Bernardino, and Oakland.

Summary of the Base Figure Analysis

To examine relative availability of minority/women-owned firms, a survey was conducted of business firms related to transportation contracting work in the California marketplace. An analysis of more than 6,673 federally assisted prime contracts and subcontracts from 2002 through 2006 determined the following:

1. Thirty-two percent of firms available for federally funded transportation construction and engineering work are minority/women-owned. Caltrans did not use this figure as availability

for the share of federal funds going to minority/women-owned firms, since not all of these firms are available for every type of transportation-related work.

2. The Study examined contract type, location, and award size of work involved in the Caltrans prime contracts and subcontracts and firms available to do this work. BBC determined the dollar-weighted availability of minority/women-owned firms is 17.6 percent after considering the size, type of work, and locations of the federally assisted transportation contracts and subcontracts in recent years. Caltrans weighted the availability by the dollars going to a number of different transportation work categories and whether the contracts were entered into by Caltrans or local agencies.
3. After excluding minority/women-owned firms that might be too large to meet the U.S. Department of Transportation (USDOT) DBE certification guidelines, the dollar-weighted availability figure for minority/women-owned firms was calculated to be 13.5 percent.

Available Firms Surveyed for Transportation Contracting Work

BBC concluded that the Caltrans internal data on DBEs and minority/women-owned firms available to perform Caltrans contracts and subcontracts did not provide a comprehensive view of businesses available for Caltrans work. Therefore, BBC conducted a telephone survey of California business firms related to transportation contracting. BBC selected California as the relevant geographic market area for the availability analysis, because 95 percent of all 2002 through 2006 transportation construction and engineering project dollars going to prime contractors, or subcontractors, went to firms with offices in California.

Firms contacted in the survey were those listed by Dun & Bradstreet as doing business most pertinent to Caltrans transportation construction and engineering contracts. BBC attempted to reach 49,276 business listings. Of these listings, 9,365 were out of business or otherwise did not have valid phone numbers, leaving 39,911 business establishments with valid phone listings. BBC successfully interviewed 18,675 (or about 47 percent) business establishments with valid phone numbers, a relatively high response rate for a business survey.

Of the 18,675 firms interviewed, 3,398 were for-profit firms reporting they performed work related to transportation construction, maintenance, or design. These firms are considered to be qualified and interested in performing transportation-related work for Caltrans or local governments in the future, or had attempted to obtain transportation-related work in the public or private sector. These firms also identified the regions of California in which they could perform work. Of these 3,398 firms in the transportation construction and engineering industry, 32 percent reported that they were minority/women-owned firms.

Weighted Relative Availability

In the base figure analysis, the Study weighted relative availability of minority/women-owned firms using a methodology that builds upon the guidance USDOT provided in *Tips for Goal Setting in the Disadvantaged Business Enterprise (DBE) Program*.¹ BBC examined type of work, size, contract role, and location of work involved in federally funded projects and the relative availability of minority/women/majority-owned firms to perform that work. The Study developed information for more than 6,000 FHWA-assisted contracts and subcontracts from 2002

¹ Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program, <http://osdbu.dot.gov/?TabId=133>.

through 2006, including contracts using FHWA funds administered through Caltrans that were awarded by local governments or others in California.

The dollar-weighting process used in the Study builds upon the process Caltrans used to develop the FFY 2007 DBE goal, which was approved by FHWA. In the FFY 2007 goal-setting process, Caltrans weighted availability by the dollars going to a number of transportation construction and engineering work categories that considered transportation contracting subindustries and whether the contracts were let by Caltrans or local agencies. The Study examined relative availability of minority/women-owned firms for each of the more than 6,000 FHWA-assisted contracts, and then weighted overall results based on the dollar amounts of each contract and subcontract.

BBC determined 17.6 percent of dollars on FHWA-funded contracts would be expected to go to minority/women-owned firms based on the type, size, contract role, location, and time frame for these contracts and subcontracts, and refers to availability of all minority/women-owned firms, not just the firms that appear to meet the federal guidelines for DBE (49 CFR sections 26.65 and 26.67). After excluding minority/women-owned firms that might be too large to meet the USDOT DBE certification guidelines, the dollar-weighted availability figure for minority/women-owned firms was calculated to be 13.5 percent.

FFY 2009 FHWA-Assisted Contracts

Caltrans will receive approximately \$3 billion in federal-aid highway program assistance for FFY 2009 which is expected to be distributed as follows: \$1.2 billion for Caltrans construction program, \$1 billion for administrative support services, and \$800 million for local assistance construction programs.

In addition, Caltrans expects the types of work, sizes, and locations of contracts to be similar to the FHWA-assisted contracts awarded statewide during FFY 2008, which includes roadway widening and rehabilitation, repairing storm damage, replacing bridges, constructing high-occupancy vehicle lanes, installing or repairing median barriers, and converting two-lane highways to four-lane expressways.

Resulting Baseline Goal

Caltrans considers 13.5 percent DBE participation as the base figure for its overall DBE goal for FFY 2009.

Step Two Adjustments – Section 26.45(d)

Caltrans examined a broad range of evidence in the Study when considering possible Step Two adjustments to the base figure. The Study contained the types of information for a possible Step Two adjustment that are outlined in the DBE Program, including:

- Current capacity of DBEs to perform work on FHWA-assisted contracts, as measured by the volume of work DBEs have performed in recent years.
- Data on employment, self-employment, education, training, and union apprenticeship programs.
- Information on the ability of DBEs to obtain financing, bonding, and insurance.
- Two types of firms counted in the base figure as DBEs: firms currently certified, and minority/women-owned firms that could potentially be certified as DBEs if they applied for certification.

About four of five minority/women-owned firms counted in the base figure are noncertified. Caltrans' experience, other state departments of transportation, and the Study research indicate that encouraging firms to become DBE-certified will continue to be a challenge. When a sample of DBE-eligible, but noncertified minority/women-owned, firms were interviewed, most business owners knew of DBE certification and were interested in certification, but had not previously pursued certification. Common reasons for the lack of interest in getting certification are:

- Certification documentation requirements under 49 CFR Part 26 are complex.
- Documented proof of business ownership, control, and management is extensive and time consuming.
- Some business owners see the requirements to submit business and personal information as intrusive.

Furthermore, the primary incentive for firms to become certified as DBEs was removed in May 2006 when Caltrans discontinued setting a DBE contract goal on federally assisted contracts.

Caltrans considered the DBE attainment over the last four years. As shown in the chart below, DBE attainment significantly dropped under a wholly race-neutral DBE program. Caltrans may only count certified DBEs in the DBE utilization reports prepared and submitted to FHWA. The following table summarizes Caltrans DBE utilization as reported for the last four years:

FFY	Goal	DBE Attainment
2008	13.5%	4.56% ²
2007	10.5%	6.6%
2006	10.5%	8.2%
2005	12.0%	10.9%

Although noncertified minority/women-owned firms are counted as DBEs in the base figure, they cannot be counted as DBEs in the utilization report; Caltrans properly took into account these facts when considering any Step Two adjustments to the base figure. This factor may lessen in importance in the future, if a larger number of minority/women-owned firms choose to become certified DBEs.

Some factors examined suggest a downward adjustment to the base figure. Those factors include past levels of DBE utilization, when race-conscious DBE goals were in place, and data concerning the number of eligible, but noncertified, minority/women-owned firms.

Additionally, BBC's analysis suggests that there are numerous barriers to entry and expansion in the transportation construction and engineering industries that may begin with education and training and continue through forming a business and gaining access to capital (Appendix F of the Study describes this information in detail).

- **Education.** Lack of college education appears to be a barrier for African Americans, Hispanic Americans, and Native Americans, which ultimately affects representation of

² As submitted in the December 1, 2008, Annual Uniform Report of DBE Commitments or Awards and Payments.

these groups in the California engineering industry. Disparities in educational attainment for African Americans and Hispanic Americans appear to be at high school level, which may affect college opportunities and enrollment into engineering programs. These factors may affect the number of African Americans, Hispanic Americans, and Native Americans working as engineers.

- **Employment.** Employment of African Americans in the construction industry is relatively low compared to other industries in California, even among entry-level jobs. The employment of women in construction as a whole is relatively low, and very few women in the construction trades are involved in transportation construction. Employment of Hispanic Americans in the construction industry is considerably higher than for all industries as a whole (37 percent in construction and 29 percent in all industries in California).

There is also low employment of women among civil, environmental, and geological engineers in California that cannot be explained by overall levels of college education.

- **Advancement.** There appears to be disparities in the advancement of Hispanic Americans to certain construction occupations and first-line supervisory positions. Compared to non-Hispanic whites (and men), relatively few African Americans, Hispanic Americans, and women working in construction are managers.
- **Business Formation and Ownership.** BBC examined U.S. Census data on business ownership rates using similar methods to the information reviewed in the court cases involving the Illinois and Minnesota Departments of Transportation.

African Americans, Hispanic Americans, Subcontinent Asian Americans, and women working in the California construction industry are less likely than non-Hispanic whites to own construction businesses. BBC, through regression analysis, identified statistically significant disparities after controlling for neutral factors (see Appendix H of the Study). If qualified members of these groups working in the construction industry owned businesses at the same rate as non-Hispanic whites (and men), then there would be about twice as many construction firms owned by African Americans, Hispanic Americans, Subcontinent Asian Americans, and women in California.

African Americans, Asian-Pacific Americans, Hispanic Americans, and women working in the engineering industry are less likely to be business owners than others in the industry. BBC found statistically significant disparities for African Americans, Asian-Pacific Americans, and women after controlling for factors such as age and education. If African Americans, Asian-Pacific Americans, and women working in the engineering industry owned businesses at the same rate as non-Hispanic whites (and men), there would be nearly twice as many engineering firms owned by members of these groups in California than observed today.

- **Rates of business closure.** BBC analyses found that African American-owned firms in California, in general, are more likely to close than other firms (see Appendix F of the Study).

- **Access to Capital.** Evidence reveals that minority-owned firms face disadvantages in accessing capital necessary to start and expand businesses.
- **Business Capital From Home Equity.** Home equity is an important source of capital for business start-up and growth.
 - Fewer African Americans, Hispanic Americans, and Native Americans in California own homes than non-Hispanic whites, and those who do own homes tend to have lower home values.
 - African Americans, Asian-Pacific Americans, Hispanic Americans, and Native Americans applying for home mortgages are more likely than nonminorities to have their applications denied.
 - African American, Hispanic American, and Native American mortgage borrowers are more likely to have subprime loans.
- **Business Loans.** BBC also identified disparities in access to business loans for certain minority groups. African American, Asian-Pacific American, and Hispanic American-owned businesses have higher denial rates when applying for business loans, and when they receive loans they have smaller loan amounts. After accounting for certain neutral influences, firms owned by African Americans and Hispanic Americans remain significantly more likely to have their loans denied than other firms (see Appendix H of the Study).

More African American and Hispanic American-owned firms that need credit do not apply for loans because they fear being denied the loan.

- **Bonding.** Interviews with business owners and trade associations indicated difficulty obtaining bonding for small and new construction contractors in California. Problems in obtaining bonding were reported in interviews with minority/women-owned firms and nonminority-owned firms (reported in Section VI and Appendix I of the Study). Minority/women-owned firms in the transportation contracting industry in California are more likely to be small businesses than majority-owned firms and, therefore, may be adversely affected by barriers in obtaining bonding.
- **Insurance.** Similarly, some small business owners had problems obtaining insurance as required for Caltrans projects. These issues are further explored in Sections V through VIII and in Appendix I of the Study.
- **Largest Bids of Minority/Women-Owned Firms.** In the Availability Survey, BBC asked firms in the transportation construction and engineering industry to identify the largest contract and subcontract a firm had received or bid on in the past five years. There were some minority groups for which “bid capacity” lagged behind other firms, but these disparities were explained by the firm’s specialization and age.³
- **Business Earnings.** The Study reports U.S. Census data on earnings of business owners in construction and engineering. BBC identified disparities in earnings of firms in

³ The extent to which minority/women-owned firms tend to be younger and in different subindustries than majority-owned firms may not be an entirely “neutral” explanation for disparities in bid capacity if past discrimination has influenced whether there are relatively few older Minority Business Enterprise/Women Business Enterprises (MBE/WBE) firms or the relative concentration of MBE/WBEs in different subindustries.

California for certain minority groups and for women (detailed results are found in Appendices F and H of the Study):

- o Earnings of construction firms owned by African Americans and Hispanic Americans are substantially lower than non-Hispanic whites after controlling for age, education, and other factors (statistically significant differences). African American construction business owners earn about 41 percent less than average. Although these results are for the California construction industry as a whole, African American and Hispanic American-owned businesses in the transportation construction industry have lower annual revenue than majority-owned firms.
- o After controlling for other factors, Subcontinent Asian Americans who own construction firms earn more from their businesses than non-Hispanic whites (statistically significant difference).
- o Women who own engineering firms earn less than men after controlling for factors such as age and education (statistically significant difference).

Caltrans consulted with other local governmental entities and found they were initiating disparity studies; those studies were either incomplete or irrelevant for Caltrans to consider. The local governmental studies evidence examined included:

- Current DBE certification of minority/women-owned firms.
- Rates of business closure.
- Largest bids of minority/women-owned firms.
- Business earnings.
- Input from interested parties.
- Certain factors could be quantified; others were not subject to quantification.

Illinois and Minnesota Departments of Transportation considered information concerning Step Two adjustments to reflect depressed rates of business ownership for minorities and women within those states. As documented in the Study, Appendix H, BBC performed statistical analyses of business ownership rates. BBC identified that business ownership rates for certain groups would be higher than observed rates—statistically significant different rates after controlling for other factors.

BBC performed additional calculations to quantify the effect of adjusting the base figure for the statistically significant differences in ownership rates described above. The figure after the Step Two adjustment would be 39 percent higher than the 13.5 percent base figure for DBE participation, which is equal to 18.8 percent.

Considering the referenced factors, while important, the 13.5 percent base figure represents a level of DBE participation significantly above what has been achieved in the past. The 13.5 percent base figure is a plausible lower bound estimate. Caltrans decided not to make any Step Two adjustment to the base figure for the FFY 2009 overall DBE goal. Caltrans will continue to encourage DBE certification and annually monitor the base figure for potential adjustment.

Public Participation Section 26.45(g)

Consultation

In establishing the overall goal for FFY 2009, Caltrans conducted year-round consultation by hosting monthly Statewide Small Business Council (SBC) and committee meetings. In turn, the SBC members and committee members (Enclosure 1) met with their individual organizations to provide feedback to Caltrans.

Additional consultation in the year included attending three DBE hearings sponsored by the Assembly Select Committee on Procurement, as well as meetings with non-DBE organizations such as:

- Associated General Contractors.
- Associated General Contractors of San Diego.
- Engineering and Utility Contractors Association.
- American Council of Engineering Companies - California.
- Southern California Contractors Association.
- California Public Utilities Commission.
- California Small Business Association.

Over 1,000 one-on-one discussions on the goal and methodology and race-neutral measures were held with small businesses (SB), DBEs, and minority/women-owned firms as they sought help on how to do business with Caltrans.

Caltrans also participated in the following statewide and local chamber of commerce meetings:

- California Hispanic Chamber of Commerce.
- California Black Chamber of Commerce.
- California Asian American Chamber of Commerce.
- California American Indian Chamber of Commerce.

Published Notice

On June 9, 2008, Caltrans published a public notice (Enclosure 2) requesting comment on the proposed FFY 2009 overall DBE goal and methodology. The FFY 2009 overall DBE goal and methodology was made available at the Caltrans Civil Rights office, via the Caltrans' Web site, and by e-mail. The public notice was also listed in the following publications:

<i>Asian Week</i>	<i>Fresno Bee</i>	<i>Record Searchlight</i>
<i>Bakersfield News Observer</i>	<i>Green Sheet</i>	<i>Sacramento Bee</i>
<i>Chinese Daily News</i>	<i>La Opinion</i>	<i>San Bernardino Sun</i>
<i>Construction Bid Source</i>	<i>Los Angeles Sentinel</i>	<i>San Diego Union</i>
<i>Daily Pacific Builder</i>	<i>Oakland Tribune</i>	<i>Small Business Exchange</i>
<i>DBE Good Faith Effort, Inc.</i>	<i>Orange County Register</i>	<i>Stockton Record</i>
<i>Eureka Times</i>	<i>National Association of Women in Construction</i>	

Comments

Caltrans reviewed the following public comments solicited by the public notice:

Parada Painting, Inc.

In their June 16, 2008, e-mail, they state that the Caltrans certification process is too overwhelming for a small company and very costly.

Trans Vision

In their June 16, 2008, e-mail, Trans Vision requested that Caltrans create a new category for Photogrammetry/Aerial Survey since they have not been getting any mapping jobs from prime contractors.

Miniutti & Associates

In their July 15, 2008, letter, they stated, “I completely agree with and have experienced, first hand, eleven out of the seventeen points (barriers below) listed, and feel I could add a couple more, especially regarding: 1. Insurance (from requirements to management issues), and 2. Support—or the lack thereof—from certification offices. The small percent (13.5) set aside for the DBE is not worth it.”

Barbara Demery Gillam & Associates

In their July 17, 2008, e-mail, they commented, “Although certified by Caltrans as a DBE or MBE for several years, they have not been able to obtain any deposition or court reporting assignments with the Caltrans legal department or law firms representing Caltrans.”

Pacific Legal Foundation

In their letter of July 17, 2008, they contend that the Caltrans FFY 2009 goal contains the same fatal flaws as the FFY 2008 goal and urges Caltrans to revise its overall goal and submit a program with only race-neutral measures. As in their letter of September 7, 2007, they incorrectly contend that the proposed DBE goal violates Article I, section 31(a), of the California Constitution. Specifically, they argue that the federal funding exception in Section 31 does not apply to the Caltrans implementation of the federal DBE Program. If Caltrans were to accept Pacific Legal Foundation’s position, it would mean that Caltrans could not, under any circumstances, include any race-conscious or gender-conscious remedies in its implementation of the federal DBE Program. Pacific Legal Foundation also contends the Caltrans DBE Program is not narrowly tailored.

Earth Mechanics, Inc.

In their July 17, 2008, e-mail, they requested Caltrans explain why DBE percentages are not explicitly mentioned in the Caltrans Request for Qualification.

WRECO

In their July 22, 2008, letter, they stated, “It is our belief that the 4% goal for Federal Transit Administration should increase, in order to assist DBE firms further in their attempt to collaborate with large businesses. The DBE Program is vital to the survival of many small minority/women-owned firms in the State of California. Stressing good-faith efforts without establishing true requirements is not enough to ensure prime consulting firms will utilize the expertise of DBE sub-

consultants. Government agencies should also be encouraged to provide complete set-aside projects for DBE firms, qualified firms being constant.”

Force Traffic Control, Inc.

In their July 24, 2008, letter, they contend Caltrans puts excessive emphasis on Disabled Veterans Business Enterprise (DVBE) requirements on State-funded work, with little attention to the plight of certified SB subcontractors who are not DVBEs.

Based on the public consultations throughout the year, DBEs and non-DBEs identified barriers as:

- Access to capital.
- Financial limitations.
- Bonding.
- Prompt payment.
- Access to insurance or limits requirements too high.
- Certification process is too long, too difficult, too costly, and need help to complete the application.
- Recertification should not require documentation be resubmitted unless there was significant business structure changes.
- Projects are too large; therefore, very few DBEs can act as primes.
- DBEs have more success in the private sector as there is less competition, more profit, greater accessibility, and less bureaucracy.
- Primes do not engage in a genuine “good faith effort.”
- Enforcement of the “good faith effort” submitted by primes is desired.
- Bidding process was costly and time/labor intensive.
- Methods of advertisement of projects should include more published notices and mailings.
- Lack of technical assistance and training.
- Internet access and knowledge.
- More user-friendly DBE directory.
- Auditing of public professional service contracts is not efficient and is unfair.

These comments obtained within the last year are identical to the comments received during the anecdotal interviews and public hearing testimony collected by BBC for the Study.

Overall DBE Goal for FFY 2009 and Race/Gender- Neutral/Conscious Measures – Sections 26.45(e) and 26.51

Race-Neutral/Conscious Division

Based on the information collected and data reviewed, Caltrans established an overall statewide 13.5 percent DBE participation goal for FFY 2009. This overall goal is expected to be achieved in equal proportions of 6.75 percent through race-neutral and race-conscious measures. Conversely, following the adoption of the overall goal, as more data on the utilization of DBEs becomes available, future modifications to the proposed proportions may prove to be necessary. Future adjustments, if any, would be based on the effectiveness of each adopted measure with respect to the various groups and the different geographical areas of the State. Gradual and

increasing success of the Caltrans race-neutral measures in achieving the goal will obviate the need for race-conscious measures.

Information Relied Upon

BBC calculated a disparity index on the relative utilization and availability of minority/women-owned firms. The disparity index for federally assisted contracts with DBE project goals is 83 when an index of 100 is needed for parity. An index below 80 has been deemed by some courts to constitute a substantial disparity. BBC conducted additional disparity analyses for specific types of contracts by race, ethnicity, and gender ownership of firms and for different State regions. There was evidence of disparities for both:

- Construction and engineering.
- Prime contracts and subcontracts.

There were disparities across most Caltrans districts. Depending on the type of contract, disparities between utilization and availability were most severe (below the 80 disparity index) for:

- African American – Disparity Index 15.
- Asian-Pacific American – Disparity Index 31.
- Women – Disparity Index 48.
- Native American – Disparity Index 65.

The Study identified African American, Asian-Pacific American, women, and Native American contractors and subcontractors that would require narrow tailoring of race-conscious measures. The Study identified an inference of disparity for the four Groups. For FFY 2009, Caltrans will limit race-conscious measures to African American, Asian-Pacific American, women, and Native American-owned firms on transportation-related contracts.

To narrowly tailor the Caltrans DBE Program to conform with Study results, Subcontinent Asian American and Hispanic American-owned firms will not be included in the individual race-conscious contract goal setting, unless, and until, future data gathering by Caltrans indicates that there is significant disparity between the percent of available contractors and subcontractors from these groups and the percent of contract dollars awarded to these groups.

Western States Paving 407 F.3rd 983, 993 (9th Cir. 2005), quoting *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003):

49 CFR, Part 26 does not require all possible race- and gender-neutral measures be implemented before a recipient can implement race- and gender-conscious measures, but rather the recipient meet the maximum feasible portion of the overall goal using race-neutral means.

Race-Neutral Measures

Caltrans will continue its ongoing race-neutral measures to include:

- Business outreach and communication.
- Technical assistance.
- Improved contracting processes.
- Data collection, monitoring, and reporting.

One of the most successful measures in FFY 2008 has been partnering with the California Community College Chancellor's Office. They provide DBE Supportive Services through ten Small Business Development Centers located throughout the State. The supportive services consist of technical training and one-on-one technical assistance to DBE firms.

Another successful measure has been the appointment of SB liaisons in each of the 12 district offices as a point of contact for SB firms, including DBEs, in those geographic areas as well as for focused outreach, such as local procurement fairs and SB events.

Caltrans continues to maintain a Bidders List on the Caltrans Office Engineer Web site. Over the last five years, Caltrans identified 877 prime contractors and 2,000 subcontractors that make up the Bidders List. To comply with 49 CFR, section 26.11 (c), Caltrans is reviewing the firms available to do Caltrans work as identified in the Study. Firms not already listed on the existing Caltrans Bidders List will be added.

Caltrans FFY 2009 efforts will focus on:

- Expanding the Mentor-Protégé Program statewide to include construction, as well as architectural and engineering.
- Expanding the Web site for easier access to information needed by SB and DBE firms and links to other supportive services, local agencies, and technical assistance.
- Establishing relationships with financial institutions, surety companies, and insurance companies to market Caltrans opportunities in conjunction with SB and DBEs.
- Looking for opportunities to package smaller contracts.

A more detailed list of race-neutral measures is included as Enclosure 3.

Race-Conscious Measures

The race-conscious goal will be achieved by:

- Setting a DBE goal on individual contracts based upon the type of work included in each contract and on the availability of the four targeted groups capable of performing such work.
- Using Appendix A, Good-faith Effort Standards, to justify the award when the goal is not met.
- Encouraging prime bidders to use DBEs, whenever possible.

Waiver of Prohibition on the Use of Group-Specific Goals – Section 26.15 (b) (1) and (2)

A portion of the overall goal will be met using race-conscious measures. As required, Caltrans consulted with the DBE community and hosted 12 public participation meetings, one in each district.

In addition to the 12 public participation meetings, Caltrans collected public comment on the waiver at the following meetings:

- City-County-State-Federal Cooperative Committee meeting, Sacramento, California.
- Caltrans Statewide SBC meetings, Sacramento, California.
- Electrical, Utility, and Contractor Association meetings, Sacramento, California.
- Southern California Contractors Association meetings, Sacramento, California.
- California Unified Certification Program Executive Committee meeting, Long Beach, California.
- California Hispanic Chamber of Commerce Annual Convention and Business Expos, various cities in California.
- American Council of Engineering Companies - California meetings, Sacramento, California.
- Statewide Associated General Contractors meetings, Sacramento, California.

Caltrans proposes to apply the types of program elements included in the federal DBE Program, but to limit eligibility for any race-conscious and gender-conscious program elements to certain groups. As for Subcontinent Asian American and Hispanic-owned firms:

Caltrans utilization of Subcontinent Asian American and Hispanic-owned firms exceeds what would be expected based on availability of those firms on Caltrans State-funded contracts. Caltrans does not comply with applicable law if it extends race-conscious program eligibility to race, ethnic, and gender groups for which the evidence suggests that race-conscious efforts are not required.

Caltrans received approval to implement limited race and gender conscious DBE goals in a letter from Mary E. Peters, Secretary, U.S. Department of Transportation, dated August 7, 2008. The letter states:

The contract goals would be limited to DBEs for whom substantial disparities between availability and utilization exist, namely small businesses owned and controlled by African Americans, Asian-Pacific Americans, Native Americans, and women. Thus, Caltrans seeks to narrowly tailor its use of DBE contract goals to address these disparities.” She also states, “You submitted the request under the waiver procedures of 49 CFR Section 26.1(b) as suggested by guidance issued by the Department in light of the 9th Circuit Court of Appeals decision in *Western States Paving Co. v. Washington State Department of Transportation, et. al.*, 407 F.3d 983 (9th Cir. 2005). The request appears to comply with the procedural requirements of this section, including the requirement for public participation, and it

satisfies the substantive criteria for approval delineated in section 26.15(b)(2). Consequently, your waiver request is granted for a period of 3 Federal Fiscal Years (FY 2008, 2009, and 2010).

Caltrans developed the proposed implementation of the federal DBE Program based on conditions related to transportation contracting in California; information sources included were in the Study. The proposal represents Caltrans best efforts to prevent discrimination against any individual or group in access to contracting opportunities or other benefits of the program. Race-conscious and gender-conscious components of the proposed implementation of the program are narrowly tailored to the race, ethnic, and gender groups for which substantial disparities might exist in accessing Caltrans contracting opportunities.

This proposed implementation meets all FHWA program requirements, and the federal DBE Program is consistent with applicable law, including the:

- Ninth Circuit Court of Appeals decision in *Western States Paving, Inc.*
- Seventh Circuit Court of Appeals decision in *Northern Contracting*.
- Eighth Circuit Court of Appeals decision in *Sherbrooke Turf*.