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February 6, 2008

Gene K. Fong, Division Administrator
U.S. Department of Transportation
Federal Highway Administration
California Division
650 Capitol Mall, Suite 4-100
Sacramento, CA 95814

Dear Mr. Fong:

We received and reviewed your request for additional information concerning the Disadvantaged Business Enterprise (DBE) Amended Goal and Methodology for federal fiscal year (FFY) 2008, submitted by the California Department of Transportation (Caltrans) on December 18, 2007. The request pertained to the following eight areas.

I. STEP TWO ADJUSTMENTS

II. PUBLIC COMMENTS CONCERNING GOAL

III. RACE/GENDER-CONSCIOUS CONTRACT GOALS FOR ALL WOMEN, NOT JUST WHITE WOMEN

IV. ITEMS IN 49 CODE OF FEDERAL REGULATIONS (CFR) SECTION 26.15 (b) (1) AND (2)

V. INFERENCE OF DISPARITY AND WHETHER THERE IS SUFFICIENT EVIDENCE OF EFFECTS TO SUPPORT REINSTATING THE USE OF DBE CONTRACT GOALS

VI. RACE-NEUTRAL AND RACE-CONSCIOUS PROJECTIONS

VII. APPROACH TO DETERMINING DBE AVAILABILITY IN CALIFORNIA, ILLINOIS, AND MINNESOTA

VIII. PLANS TO DEVELOP A BIDDERS LIST

The following presents the response to your request for additional information. When appropriate, this response will reference sections of the Caltrans DBE Availability and Disparity Study (Study) completed June 2007.

I. STEP TWO ADJUSTMENTS

A. *Summary of information request.*
In your submission, you identify possible sources of Step Two Adjustments and conclude that after taking all of these factors under consideration, they appear to offset or cancel each other out; therefore, you did not make any Step Two Adjustments. Please quantify the Step Two Adjustment factors identified in your availability and disparity analysis and quantify the affects of these factors on your FFY 2007-2008, overall DBE goal if you were to do Step Two Adjustments.

B. *Response.*
As required by 49 CFR Section 26.45 (d), the Study examines a broad array of information available in California to determine what adjustment, if any, was needed to the base figure in order to arrive at an overall goal.

B.1. This evidence included:
- B.1.1. Current capacity of DBEs to perform work for Caltrans as measured by the volume of work DBEs have performed in recent years.
- B.1.2. Opportunities for DBEs to form, grow, and compete include:
  - B.1.2.1. Statistical disparities in DBE ability to get the financing, bonding, and insurance required to participate in the Caltrans program.
  - B.1.2.2. Data on employment, self-employment, education, training, and union apprenticeship programs as they relate to opportunities for DBEs to perform in the Caltrans program.

B.2. Other evidence examined included:
- B.2.1. Current DBE certification of minority- and women-owned firms.
- B.2.2. Rates of business closure.
- B.2.3. Largest bids of minority- and women-owned firms.
- B.2.4. Business earnings.
- B.2.5. Input from interested parties.
- B.2.6. Certain factors could be quantified; others were not subject to quantification.

C. *Factors that suggest a downward adjustment to the base figure.*

C.1. There are reasons for Caltrans to consider both upward and downward adjustment to the base figure for overall DBE participation, as discussed in detail in Section III of the Study.

C.2. Reasons to consider a downward adjustment to the base figure include:

C.2.1. Past volume of work performed.
DBEs were awarded 9 percent of contract dollars based on the BBC Research and Consulting (BBC) analysis of Caltrans and Local Assistance federally-funded contracts from 2002 through April 2006. This demonstrated participation is lower than the base figure of 13.5 percent DBE participation.

C.2.2. Current DBE certification of minority- and women-owned firms.
The 13.5 percent base figure counts minority- and women-owned firms that could potentially be certified as DBEs; however, only about one-in-five minority- and women-owned firms in the availability analysis were DBE certified in 2006.

D. *Factors that suggest an upward adjustment to the base figure.*
Analysis of local marketplace data reveals reasons for upward adjustments to the base figure; these include:

D.1. Construction business ownership rates.

D.1.1. Statistical analyses suggest there are only 61 percent as many African American-owned construction businesses in California as one would anticipate if African Americans working in the industry owned businesses at the same rate as similarly situated non-Hispanic, white males.

D.1.2. Disparities in construction business ownership rates are somewhat larger for subcontinent Asian Americans/52 percent, Hispanic Americans/53 percent, and women/54 percent. In other words, there could be nearly twice as many African American-, subcontinent Asian American-, Hispanic- and women-owned firms in the California construction industry, if these groups owned businesses at the same rate as similarly situated non-Hispanic, white men.

D.2. Engineering business ownership rates.

D.2.1. Statistical analyses suggest that there are only 40 percent as many African American-owned engineering businesses in California, as one would anticipate, if African Americans working in the industry owned businesses at the same rate as similarly situated non-Hispanic, white males.

D.2.2. Disparities in engineering business ownership rates are also suggested for Asian-Pacific Americans/67 percent, and women/64 percent.

D.3. Analyses also indicate entry barriers into the California construction and engineering industries lower business earnings, and other barriers such as access to capital. Appendices F and H of the Study describes this quantitative information. Appendix I, presents qualitative information pertinent to these issues.

E. *Step Two Adjustments Summary.*

E.1. Caltrans did include all of the evidence examined in consideration of whether or not to make any Step Two Adjustments to the base figure for the overall annual DBE goal. Some factors indicated a potential upward adjustment and other factors indicated a potential downward adjustment. It was determined that the information suggesting an adjustment in one direction did not outweigh an adjustment on the opposite direction.

E.2. It is also important to point out that 49 CFR, Section 26.45 (d) does not require a Step Two Adjustment to the base figure, but simply provides recipients the ability to make such adjustments, if necessary; see *Northern Contracting, Inc. v. Illinois*, 473 F.3rd 715, 723 (7th Cir. 2007).

II. PUBLIC COMMENTS CONCERNING GOAL

A. *Summary of information request.*
Please address public comments made by the Pacific Legal Foundation, the American Civil Rights Institute, and other organizations and individuals questioning your methodology or evidence relied upon to support your goal.

B. *Response.*
Caltrans has reviewed public comments from the following:

B.1. Pacific Legal Foundation

B.1.1. Contends—incorrectly—that the proposed DBE goal violates Article I, section 31 (a), of the California constitution. Specifically, Pacific Legal Foundation argues that the federal funding exception in Section 31 does not apply to the Caltrans implementation of the federal DBE Program. Caltrans finds this position to be untenable; if one were to accept the Pacific Legal Foundation position, it would mean that Caltrans could not, under any circumstances, include any race- or gender-conscious remedies in its implementation of the federal DBE Program.

B.1.2. Suggests that the Study may only create an inference of discrimination and not establish intentional acts of discrimination by Caltrans.

B.1.3. Appears to argue that Caltrans would be unable to remedy the effects of discrimination by others. Court decisions that have considered the validity of the federal DBE Program and its implementation by recipients of federal funds have not required a showing of intentional acts of discrimination by the government as a basis for a finding that remedial action is necessary.

B.1.4. Appears to take the position that Caltrans must fully implement all possible race- and gender-neutral remedies before implementing any race-based measures; however, the Ninth Circuit decision in *Western States Paving* states, "'[n]arrow tailoring does not require exhaustion

of every conceivable race-neutral alternative,' it does 'require serious, good faith consideration of workable race-neutral alternatives.'"

***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."

B.2. American Civil Rights Institute

In the September 14, 2007, letter, the American Civil Rights Institute begins by stating that proper Caltrans implementation of the federal DBE Program threatens State sovereignty. Caltrans implemented the federal DBE Program since enactment of Proposition 209, without the far-reaching consequences envisioned by the American Civil Rights Institute; Caltrans sees no justification for this concern. The American Civil Rights Institute:

B.2.1. Appears to state that anecdotal evidence of discrimination, and other anecdotal information in the Study constitutes padding. The anecdotal information collected from public hearings, in-depth personal interviews, and other sources follows guidance from court decisions and 49 CFR Part 26. It does not represent padding, but rather important information to guide implementation of the federal DBE Program in California.

B.2.2. States the Study and Caltrans, bear the burden of proving discrimination, and that neither the Study nor Caltrans proves discrimination. Proving actual discrimination is not the burden Caltrans bears in deciding to include race-conscious measures in its implementation of the federal DBE Program.

B.2.3. Argues that the disparities identified in the Study may be "naturally occurring, based on choices and demographic factors that government need not be concerned with."

B.2.4. Argues, without offering any evidence, that the identified disparities are random. The Study, however, contains sophisticated analyses including statistical methods that demonstrate that randomness can be rejected as a cause of certain disparities.

Please note:

- Caltrans agrees with the American Civil Rights Institute that neutral remedies should be an important part of its implementation of the federal DBE Program; however, the American Civil Rights Institute argues that Caltrans should first implement the neutral remedies before considering race- and gender-based remedies.
- As discussed elsewhere in this response, Caltrans is not required to exhaust every conceivable neutral remedy before considering race- and gender-based measures.

B.2.5. Appears to criticize Caltrans for not including Hispanic-owned firms as eligible for the proposed race-conscious remedies.

B.2.6. Is correct in pointing out Hispanic American-owned firms may face many of the same difficulties as other groups of minority- and women-owned firms.

Please note:

- Hispanic American-owned firms are not included in the groups eligible for such remedies because—overall—the Study did not find a substantial disparity in the utilization of Hispanic American-owned firms, without DBE goals in Caltrans contracts.
- Caltrans is criticized for not making a Step Two Adjustment to the overall DBE goal. The federal DBE Program does not require Caltrans to make any specific adjustment, but rather to consider information pertinent to a possible adjustment; the Study provided this information, which Caltrans examined.

B.2.7. Urges Caltrans to implement a solely neutral program until there is more history on the utilization of minority- and women-owned firms in Caltrans federally-funded contracts after May 1, 2006, when the Caltrans discontinued setting DBE contract goals.

B.2.8. Points out that the post-program period—May through December 2006—is too short a time period to reach conclusions concerning opportunities for minority- and women-owned firms on federally-funded contracts absent DBE contract goals. Caltrans agrees a much longer time period is necessary. This is why Caltrans examined utilization and availability of minority- and women-owned firms on State-funded contracts for 2002 through 2006, when determining whether or not there would be disparities in DBE utilization without any race- or gender-conscious program element. Caltrans is proposing implementation of race- and gender-conscious remedies for only those groups exhibiting a substantial disparity between utilization and availability for these contracts during this five-year period.

B.3. Center for Equal Opportunity

B.3.1. In a letter dated September 13, 2007, the Center for Equal Opportunity urges Caltrans not to implement any race-, ethnicity-, or gender-conscious remedies as part of its implementation of the federal DBE Program.

B.3.2. Incorrectly asserts that such an action is banned under the California constitution.

B.3.3. States, "If it is at all a close question, then Caltrans should not use preferences based on race, ethnicity, and sex;" however, there is no support for this position in the regulations or case law.

B.3.4. In its criticism of the Study, suggests that it was improper to consider disparities in business ownership rates; however, 49 CFR, Part 26 specifically requests the federal aid recipient to consider this information.

B.3.5. Incorrectly states that the only relevant information is that minority- and female-owned firms are either not submitting bids because of discrimination or the bids are not being accepted because of discrimination; 49 CFR, Part 26 requires the recipient consider a much broader set of information, which the Study correctly does.

B.3.6. Argues that the Study erred by including uncertified minority- and women-owned firms in its analysis; yet, this methodology was used by the state departments of transportation in Illinois and Minnesota and favorably reviewed by the Seventh and Eight Circuits.

B.3.7. Argues that the Study undercounts non-DBE capacity, because the BBC-grouped firms are able to perform contracts of $20 million or more into one category.

B.3.8. The BBC did not group all of these firms into one category—and importantly—weighted $100 million prime contracts differently from $20 million contracts; each contract element was weighted in accordance with its dollar size.

B.3.9. There is no underweighting of firms able to perform the largest contracts, and very few minority- and women-owned firms were found among firms that performed contracts of $20 million or more.

B.3.10. There was no accounting for firm capacity in the methodologies used by Illinois and Minnesota that were favorably considered by the Seventh and Eight Circuits.

B.3.11. Makes the statement that the appropriate DBE utilization rate is 13.5 percent and the actual utilization of minority- and women-owned firms was 14.7 percent; this is an apples-to-oranges comparison. The pertinent availability benchmark with which to compare utilization of 14.7 percent is 17.6 percent, which pertains to utilization and availability for minority- and women-owned firms for Caltrans federally-funded contracts, when DBE contract goals were in place; see Section IV, Page 8 of the Study.

B.3.12. Makes the unsubstantiated claim that, with better data, the analysis would show less of a disparity than what was found in the Study. It also questions, without justification, why the benchmark to assess existence of a disparity is a comparison of minority- or women-owned firm performance relative to those owned by non-Hispanic white men.

B.3.13. Appears to suggest that the disparity analysis should compare performance of one minority group versus another minority group. There is no basis in the regulations or relevant cases for this type of analysis. This is also not a proper research method; if one followed the logic of the Center for Equal Opportunity, severe discrimination against one minority group could apparently be tolerated as long as it was no more or less severe than the discrimination against another minority group.

B.3.14. States that it is "inherently divisive, stigmatizing, unfair, and immoral" for Caltrans to use race- and gender-conscious remedies. Seems to state that it—or Caltrans—is in a better position to make these moral judgments than the federal government. The Center ignores the federal DBE Program, Congressional findings, and the federal regulations.

B.3.15. Correctly points out that there are neutral remedies available to Caltrans that can be useful in opening contracting opportunities to all firms; Caltrans can do more in this area than it has in the past. Caltrans agrees, and plans to implement a strong set of neutral measures in combination with limited race- and gender-conscious remedies. As discussed elsewhere in this response, Caltrans need not exhaust all conceivable neutral remedies before considering any race- and gender-based remedies.

B.4. Associated General Contractors of America (AGC) – California and San Diego Chapter

B.4.1. The AGC – California and San Diego Chapter, September 24, 2007, letter raises two points about the Study:

B.4.1.1. Disagreement that non-certified minority- and women-owned firms should be considered when calculating the overall annual DBE goal.

B.4.1.2. Concern about whether the availability analysis understates the capacity of non-DBEs.

B.4.2. Elsewhere in this response, Caltrans discusses why it is proper to include non-certified minority- and women-owned firms when calculating the base figure for the overall DBE goal.

B.4.2.1. The Study does consider whether or not the base figure should be adjusted downward because of the fact that many minority- and women-owned firms are not presently DBE certified, which is part of the Step Two Adjustment also discussed in this response.

B.4.2.2. The Study issue of non-certified minority- and women-owned firm consideration follows 49 CFR, Part 26 guidance for both the base figure and Step Two Analyses decisions in the Seventh and Eighth Circuits in *Northern Contracting* and *Sherbrooke Turf*.

B.4.2.3. Importantly, the Study does not include minority- and women-owned firms that may be too large to be DBE-certified in the overall goal; a point that may have been missed by the AGC.

B.4.3. The AGC is incorrect in asserting that disparity analysis should have been conducted based on certified DBEs, not all minority- and women-owned firms.

B.4.3.1. Such an analysis would not provide an apples-to-apples comparison of relative success of minority- and women-owned firms versus non-Minority Business Enterprise (MBE)/Women's Business Enterprise (WBE) firms.

B.4.3.2. Because of the size limits for DBE certification, this analysis would connt the most successful minority- and women-owned firms as non-DBE. If disparities were then found for DBEs, it could be because the most successful minority- and women-owned firms were included as non-DBEs.

B.4.3.3. The AGC suggestion would prodnce potentially misleading information; the Ninth Circuit in *Western States Paving* required examination of evidence of discrimination against minority- and women-owned businesses in the transportation contracting industry, not limited to certified DBEs.

B.4.4. The AGC is mistaken as to how the Study treats the largest Caltrans contracts and considers firms available for those contracts.

B.4.4.1. The AGC appears to believe that a contract in excess of $20 million only counts as $20 million in the availability and utilization calculations; this is not correct. The full dollar amount of large contracts is included—well in excess of $20 million in some cases. The Study does not assign a cap when crediting dollars of a specific contract to a firm; a $100 million contract is counted as $100 million, not $20 million.

B.4.4.2. Related to this issue:

B.4.4.2.1. The AGC expresses concern that the survey question concerning size of past contract awards or bids used a cut-off of $20 million. Because most firms that had bid on, or performed contracts of this size, were non-MBE/WBEs—more specificity in this high-dollar response category—would not affect the results of the Study.

B.4.4.2.2. There is also no reason to believe that measuring capacity based on total dollar volume of work is a preferable method than the largest contract approach, or that it would change the results of the analysis. Because the Study disparity analysis methodology examined Caltrans work—contract-by-contract—a largest contract approach was needed to perform the analysis.

B.4.4.3. As explained in Section II of the Study, the availability figures used in the Study are dollar-weighted.

B.4.4.3.1. Exhibits A through E—offered in the AGC letter—compare utilization based on number of contract awards to the dollar-weighted availability figures presented in the Study.

B.4.4.3.2. Exhibits A through E present an apples-to-oranges comparison. The AGC did not recalculate availability to be the share of contracts expected for each group. Therefore, the disparity indices for number of contracts presented in Exhibits A through E are fundamentally flawed.

B.4.4.3.3. Because the disparity analysis methodology was used in the Study, there is no reason to believe that an analysis based on share of contracts—if properly executed—would yield a different result than share of dollars. Furthermore, disparity analysis based on share of dollars is a standard established by relevant court decisions.

B.4.4.4. In summary, the AGC contention that these two issues unfairly inflate DBE availability and capacity is without merit.

B.4.4.4.1. Caltrans disagrees with the AGC suggestion that the Study approach to these two issues is without support from regulations or judicial decisions.

B.4.4.4.2. Further, changes in the approach would not necessarily lead to a lower overall DBE goal or different groups considered for any race- or gender-conscious remedies.

B.4.4.4.3. Finally, the AGC points to the importance of making maximum feasible use of race-neutral alternatives, a point where we agree.

B.5. Transbay Joint Powers Authority (TJPA)
The September 21, 2007, letter from the TJPA correctly restates information indicating disparities for Hispanic American-owned firms in business ownership, and access to capital and business earnings.

B.5.1. Caltrans does not disagree with the TJPA that certain disparities exist for Hispanic American-owned firms. Disparities are also present when one compares utilization and availability of Hispanic American-owned firms in Caltrans State-funded transportation contracts; however, the disparity index 81 was not at the level some courts have deemed to constitute a substantial disparity.

B.5.2. This was among the key pieces of information that led Caltrans not to propose inclusion of Hispanic American-owned firms in the race- and gender-conscious measures.

B.6. Western Paving Contractors, Inc. and Rose Cote

B.6.1. In an October 1, 2007, letter, Western Paving Contractors state that the DBE goal for Caltrans implementation of the federal DBE Program should be 32 percent, which is the portion of the California transportation contracting industry comprised by minority- and women-owned firms. However, this figure is based on a head count of available firms—before adjustment—for types, sizes, locations, and contract roles involved in federally-funded transportation contracting projects. Such adjustments are necessary to follow guidance in 49 CFR, Part 26 and relevant court decisions.

B.6.2. Western Paving Contractors also disagrees with excluding minority women from any race- and gender-based programs. The Caltrans new proposal to Federal Highway Administration (FHWA) clarifies that Hispanic American women and subcontinent Asian American women would be treated on the same basis as white women in considering eligibility for any race- and gender-conscious program elements.

B.6.3. Western Paving Contractors incorrectly state that the proposed 13.5 percent overall DBE goal would serve to restrict the growth of disadvantaged business and prohibit the economic development of new disadvantaged businesses.

A number of factors were considered before establishing the overall goal including potential expansion of the minority and female business community and possible growth of existing minority- and women-owned firms.

B.6.3.1. The proposed goal balances several factors suggesting a higher goal and several factors suggesting a lower goal, as described in the Study.

B.6.3.2. At the end of its letter, Western Paving Contractors argues for a 40.6 percent interim race-conscious goal for California. For the reasons previously stated, we believe that such a goal would not be in compliance with 49 CFR, Part 26 and relevant court decisions.

B.7. La Raza Roundtable

The September 27, 2007, letter from the La Raza Roundtable, Santa Clara County states the evidence in the Study suggests that Hispanic Americans have not achieved "parity;" Caltrans would agree.

B.7.1. Caltrans concluded that the available evidence may not support inclusion of Hispanic American-owned firms in race-conscious remedies at this time.

B.7.2. The La Raza Roundtable letter is incorrect in other respects.

B.7.2.1. The Study did not rely on Census data to determine availability of minority- and women-owned firms.

B.7.2.2. The methodology for determining availability did not downwardly skew the relative number of DBEs or increase the number of other firms, as described in detail in other portions of this response.

B.8. Hispanic Engineers Business Corporation

B.8.1. The September 17, 2007, letter from the Hispanic Engineers Business Corporation—augmented by a September 27 letter—notes evidence that Hispanics are left behind in educational and economic opportunities in California.

B.8.2. The letter also correctly points out that minority women should be included in any race-and gender-conscious remedies extended to white women.

B.8.3. Furthermore, the Hispanic Engineers Business Corporation states that there are disparities for Hispanic American-owned firms for certain sets of Caltrans contracts and sub contracts; this is correct.

B.8.4. The letter raises questions that are effectively addressed in the Study.

B.8.4.1. For example, the disparity analysis was correctly performed, based on:

B.8.4.1.1. Dollars of contracts and sub contracts.

B.8.4.1.2. Use of number of contracts.

B.8.4.1.3. Sub contracts would not have been correct; as discussed elsewhere in this response and in the Study.

B.8.4.2. The letter is incorrect when stating that the process of filtering and weighting firms in the availability analysis treated minority- and women-owned firms differently than majority-owned firms.

B.8.4.2.1. The Study treated these groups in the same way.

B.8.4.2.2. It is also proper to exclude minority- and women-owned firms that might be too large to be DBE-certified when determining the base figure.

B.8.5. As discussed elsewhere in this response, the Study did examine the level of past DBE participation in Caltrans contracts, and certain anecdotal information, when considering possible Step Two Adjustments to the DBE goal.

B.9. Inspection Services, Inc. (ISI)

A letter from ISI questioned the use of Dun & Bradstreet data as a source for the availability survey. Reasons for use of Dun & Bradstreet data in the Study are fully explained in Section II and Appendix C of the Study.

B.9.1. ISI is correct in noting that minority women-owned firms should be eligible for any gender-conscious remedy available to white women.

B.9.2. ISI is incorrect in its concern that firms need to actively update or list themselves in the database to be included in the Dun & Bradstreet data. Dun & Bradstreet has many other ways of identifying firms, which is one of the advantages of using the Dun & Bradstreet firm lists, as a starting point for the Study.

B.9.4. Contacting local professional organizations, as suggested in the letter, would not result in a more accurate representation of firms available to perform work for Caltrans as many firms that can perform work for Caltrans are not members of professional organizations.

B.10. Curren D. Price, Jr., Assembly Member, 51st District

The September 28, 2007, letter from Assembly Member Price:

B.10.1. Expresses concern that the Caltrans-proposed overall DBE race-based component is too low, especially compared with DBE goals for other states. The analysis of the overall DBE goal in the Study did not take

into account the overall DBE goals in other states because 49 CFR, Part 26 and relevant court decisions require Caltrans to focus on conditions in its own transportation contracting marketplace. The proposed overall DBE goal is well-supported by the availability analysis conducted in the Study.

B.10.2. The letter states—without support—that the Study used availability figures that were not indicative of the true availability of Hispanic American-owned firms in the marketplace.

B.10.3. The letter also indicates that city, county, and special district agencies throughout the State might use the DBE goal established by Caltrans as a precedent. If true, Caltrans should not let this possibility affect proper analysis of an overall DBE goal for Caltrans implementation of the federal DBE Program.

B.11. Business and Economic Committee of the El Sereno Neighborhood Council (LA-32)

Caltrans received a copy of the Resolution dated September 26, 2007, from the LA-32, which was critical of the fact that Hispanic American-owned firms would not be included as eligible for any race- and gender-conscious programs that might be used by Caltrans in the implementation of the federal DBE Program.

B.11.1. The Resolution points out evidence that Hispanic Americans have not achieved economic parity in California. The Resolution also correctly points out that the Study identified disparities for Hispanic American-owned firms for certain sets of Caltrans contracts or sub contracts.

B.11.2. The Resolution correctly notes that evidence of discrimination against white women-owned firms should be considered evidence of discrimination against women of any race or gender, and that minority women should be included in any race- or gender-conscious program elements, as noted elsewhere in this response.

B.11.3. The Resolution, however, is mistaken when it criticizes the methodology behind the Study.

B.11.3.1. As discussed elsewhere in this response, the Study consistently applied filters and weighting in the availability analysis to both minority- and women-owned firms and to majority-owned firms; see Section II and appendices C and D in the Study.

B.11.3.2. In calculating the base figure, the Study did not count as potential DBEs those minority- and women-owned firms that might be too large to meet DBE certification guidelines. This is appropriate under 49 CFR, Part 26, since utilization of these firms cannot count toward achieving the overall DBE goal.

B.11.3.3. Finally, Caltrans appropriately reviewed past levels of DBE utilization when considering potential Step Two Adjustments to the overall goal.

B.12. Subcontinent Asians comments.

B.12.1. Comments on behalf of subcontinent Asians expressed concerns that Subcontinent Asian American-owned firms would not be eligible for any race- and gender-conscious remedies that Caltrans might apply when implementing the federal DBE Program.

B.12.2. A number of issues are raised after review of the comments which:

B.12.2.1. Suggest the Study relied on utilization based on number of contracts when conducting the disparity analysis; it did not.

B.12.3.2. Indicate that the disparity index should have "additional parameters" to account for the fact that some firms were not DBE-certified; the Study did include non-certified firms in its calculations of utilization and availability.

B.12.3.3. Argued that many firms with qualifications and skills choose not to be in the process. The availability analysis in the Study captured firms with qualifications and skills for Caltrans work that have not been utilized by Caltrans in the past; the Study does present a number of contracts received by subcontinent Asian American-owned firms as prime consultants.

B.12.3.4. Criticize the Study for not providing information on the size of the sample; this information is provided in the Study appendices.

B.12.3.5. Ask if the Study was evaluated by an independent and unbiased entity with experience in similar studies; the consultant who prepared the Study is an independent, unbiased entity with experience in similar studies. The methodology used in the Study is consistent with what the Seventh and Eight Circuits have approved for other state departments of transportation; these studies were prepared by other consultants.

B.12.3.6. Raised a question concerning the United States (U.S.) Census data and the ethnic samples taken in the Study to know whether "the sample size is consistent with the overall census;" Study methodology was to start with the entire list of firms in California within the relevant industry groups, not a sample of firms.

B.12.3.7. Raised a question as to whether subcontinent Asian American-owned firms can be successful in a race-neutral environment. The Study found that, overall, subcontinent Asian American-owned firms have been successful in a race-neutral environment.

B.12.3.8. Point out that white women-owned firms receive the largest share of contract and sub contract dollars, and question why race- and gender-conscious remedies should be available for white women-owned firms. Examining relative utilization is only part of the disparity analysis. When compared with relative availability, there was substantial disparity in the utilization of white women-owned firms.

B.12.3.9. The Comments correctly identify the need to monitor participation of Subcontinent Asian American-owned firms, which Caltrans will do.

B.13. California Hispanic Chamber of Commerce
In a September 18, 2007, letter, the California Hispanic Chamber of Commerce:

B.13.1. Correctly points out that certain disparity analyses show disparity indices for Hispanic American-owned firms to be well below 80, a value that has been deemed by some courts to constitute "substantial disparity;" however, analysis of overall participation of Hispanic American-owned firms in Caltrans State-funded transportation contracts identified a disparity index of 81.

B.13.2. Argues for a 32 percent overall DBE goal.

B.13.2.1. The letter criticizes the Study analysis of availability when determining the base figure for the overall DBE goal.

B.13.2.2. The Chamber incorrectly states that the Study did not consistently apply the weighting of availability results to minority- and women-owned firms versus other firms. The Study did consistently weight the availability information for all firms regardless of ownership status, a process which is fully described in Section II and Appendix D of the Study.

B.13.2.3. As noted elsewhere in this response, dollar-weighting of availability results to reflect the types of work involved in recipient contracts is consistent with 49 CFR, Part 26.

B.13.3. Criticizes the downward adjustment from 17.6 percent availability to 13.5 percent availability.

B.13.3.1. The Study makes this adjustment to account for minority- and women-owned firms that appear to be too large to meet the size limits for DBE certification.

B.13.3.2. The Study makes this adjustment before determining a base figure; this adjustment could have instead been made as part of a Step Two Adjustment, with the same result.

B.13.4. Asserts that Caltrans should have reviewed anecdotal information when considering a Step Two Adjustment to its overall DBE goal; the Study did include anecdotal information in this assessment; see Section III of the Study.

B.13.5. Is correct in its contention that minority women should be included in any remedy available to white women; the most recent Caltrans proposal to FHWA includes all women in the gender-conscious portion of the program.

B.13.6. Contends that Caltrans should reduce the portion of its goal to be met through race- and gender-neutral means to zero; this suggestion is not supported and is inconsistent with 49 CFR, Part 26 and relevant case law. This contention also suggests that the Caltrans-proposed race- and gender-neutral remedies would have no positive impact on DBE utilization.

B.13.7. Asserts that prime contractors will no longer use Hispanic American-owned firms on Caltrans contracts if Hispanic American-owned firms are not eligible to count toward contract goals.

B.13.7.1. There is evidence to the contrary: even when DBE goals have been in place, non-DBE-certified minority- and women-owned firms were utilized as subcontractors on Caltrans contracts.

B.13.7.2. These non-certified firms included non-certified Hispanic American-owned businesses; see Figure IV-7 on Section IV, Page 8 of the Study.

B.14. In an August 23, 2007, letter, Thever and Associates state that "failure to include South Asian-owned businesses in the proposed race-conscious remedies violates FHWA rules and principles;" however, subcontinent Asian American-owned firms would be included as eligible for race-conscious remedies and would not be in compliance with Western States Paving and the guidance given by FHWA.

III. RACE/GENDER-CONSCIOUS CONTRACT GOALS FOR ALL WOMEN, NOT JUST WHITE WOMEN

A. *Summary of information request.*
Your Study *cites a disparity index for Caucasian women of 48. Please explain why there is adequate justification for race-conscious contract goals for all women.*

B. *Response.*
As explained in the Study, the BBC analyzed utilization and availability for white women-owned firms rather than all women-owned firms, to control for the effect of gender of the business owner, in determining whether or not there were disparities in utilization of firms in Caltrans contracts; i.e., Figure II-5 on Section II, Page 5 of the Study for more explanation.

B.1. The analysis showed that there was a disparity for white women-owned firms when examining utilization and availability for Caltrans State-funded construction and engineering contracts for 2002 through 2006; a disparity index of 48.

B.2. Certain anecdotal information, as well as certain quantitative information for the local marketplace, also identified evidence of disadvantages based on gender of the business owner. Because this evidence is consistent with discrimination against women, any remedy Caltrans provides to white women should be available to all women; otherwise Caltrans would be unfairly treating minority women because they are minority.

B.3. There is a practical side to this response as well; minority women could seek DBE certification solely based on gender—and not their race or ethnicity—and would be eligible for any gender-conscious remedy available to white women.

B.4. Finally, there appears to he a substantial disparity between utilization and availability for all women—combining white and minority women—on Caltrans State-funded construction and engineering contracts for 2000-2006.

B.4.1. The BBC preliminary analysis conducted to respond to this information request suggests a disparity index of 59. This additional information is provided to help address the question of inclusion of minority women-owned firms in any remedy available to white women-owned firms, not as a substitute for the disparity analysis included in the report.

B.4.2. The Study has already correctly examined the issue of whether or not gender affects opportunities in Caltrans contracting.

IV. ITEMS IN 49 CODE OF FEDERAL REGULATIONS (CFR) SECTION 26.15 (b) (1) AND (2)

A. *Summary of information request.*
You requested a waiver to implement limited race-conscious contract goals. Address items cited in 49 CFR, Section 26.15 (b) (1) and (2).

B. *Response.*

B.1. In response to the requirement in 49 CFR, Section 26.15 (b) (1), that the recipient must have public participation in developing the proposal, including consultation with the DBE community, Caltrans met this requirement through 12 public participation meetings, one in each District, from August 13 to August 22, 2007.

B.2. In addition to the 12 public participation meetings, Caltrans collected public comment at the following locations:

B.2.1. City-County-State-Federal Cooperative Committee Meeting
August 16, 2007, Sacramento, California

B.2.2. Caltrans Statewide Small Business Council Meeting
August 17, 2007, Sacramento, California

B.2.3. Statewide Electrical and Utility Association
August 22, 2007, Sacramento, California

B.2.4. Southern California Contractors Association-Caltrans Statewide Meeting
August 22, 2007, Sacramento, California

B.2.5. California Unified Certification Program Executive Committee Meeting
August 24, 2007, Long Beach, California

B.2.6. California Hispanic Chamber of Commerce 28th Annual Convention and Business Expo
August 24, 2007, Irvine, California

B.2.7. Statewide Consulting Engineers and Land Surveyors of California Meeting
September 13, 2007, Sacramento, California

B.2.8. Statewide AGC Meeting
August 28, 2007, Sacramento, California

B.2.9. Statewide AGC Construction Subcommittee Meeting
September 7, 2007, Sacramento, California

B.3. Reasons for why the Caltrans proposal meets requirements in 49 CFR, Section 26.15 (b) (2) include the following:

B.3.1. Through the combination of neutral program elements coupled with targeted race- and gender-conscious contract goals for specific groups, Caltrans can achieve the proposed 13.5 percent annual DBE goal.

B.3.1.1. Caltrans proposes to apply the types of program elements included in the federal DBE Program, but to limit eligibility for any race- and gender-conscious program elements to certain groups.

B.3.1.2. Caltrans does not need to include subcontinent Asian American-owned firms or Hispanic American-owned firms in the groups eligible to meet race-conscious contract goals in order to meet the overall annual goal.

For example, Caltrans utilization of subcontinent Asian American-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.

B.4. Caltrans developed the proposed program based on conditions related to transportation contracting in California; information sources included the Study, completed for Caltrans in June 2007.

B.5. The proposed implementation of the federal DBE Program represents Caltrans' best efforts to prevent discrimination against any individual or group in access to contracting opportunities or other benefits of the program.

B.5.1. Race- 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 without these measures.

B.5.2. The proposed implementation meets all FHWA program requirements.

B.4.3. The federal DBE Program is consistent with applicable law, including the:

B.4.3.1. Ninth Circuit decision in *Western States Paving*.

B.4.3.2. Seventh Circuit decision in *Northern Contracting*.

B.4.3.3. Eighth Circuit decision in *Sherbrooke Turf*.

V. INFERENCE OF DISPARITY AND WHETHER THERE IS SUFFICIENT EVIDENCE OF EFFECTS TO SUPPORT REINSTATING THE USE OF DBE CONTRACT GOALS

A. *Summary of information request Part A – Defining Inference of Disparity. Please clarify what is meant by "inference of disparity," as used in your disparity Study and goal submission.*

B. *Response Part A – Defining Inference of Disparity.*
The Study includes definitions of disparity on Page 2 of Appendix A; these are as follows:

B.1. Disparity.
A difference or gap between an actual outcome and a reference point. For example, a difference between an outcome for one race/ethnic group and an outcome for non-Hispanic whites may constitute a disparity.

B.2. Disparity analysis.
Comparisons of actual outcomes with what might be expected based on other data. Analysis of whether there is a disparity between DBE utilization and availability is one tool in examining whether there is evidence consistent with discrimination against DBEs.

B.3. Disparity index.
Computed by dividing percentage utilization by percentage availability and then multiplying the result by 100; a disparity index of 100 indicates parity.

AA. *Summary of information request Part B – Sufficient evidence of discrimination or its effects to support reinstating the use of DBE contract goals.*
Tell us whether you believe you have sufficient evidence of discrimination or its effects to support reinstating the use of DBE contract goals (see the Western States guidance we issued).

BB. *Response Part B – Sufficient Evidence of Discrimination or its Effects to Support Reinstating the use of DBE Contract Goals.*

BB.1. Caltrans believes it has sufficient evidence of discrimination to reinstate the use of DBE contract goals.

BB.1.1. The BBC calculated a disparity index on the relative utilization and availability of minority- and women-owned firms.

BB.1.2. 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.

BB.1.3. The 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, for both prime contracts and sub contracts.

BB.2. For State-funded contracts—without DBE goals—disparities between utilization and availability below 80 disparity index, were most severe for:

BB.2.1. African American	Disparity Index 15
BB.2.2. Asian Pacific American	Disparity Index 31
BB.2.3. Caucasian women	Disparity Index 48
BB.2.4. Native American	Disparity Index 65

BB.3. The Study identified African American, Asian Pacific American, Women, and Native American contractors and subcontractors who would require narrow tailoring of race-conscious measures. The Study identified an inference of disparity for the four groups.

VI. RACE-NEUTRAL AND RACE-CONSCIOUS PROJECTIONS

A. *Summary of information request.*
Please clarify how you derived your race-neutral and race-conscious projections.

B. *Response.*

B.1. On December 1, 2007, Caltrans reported to the FHWA, the DBE Uniform Report of DBE Awards or Commitments and Payments.

B.2. For the period October 1, 2006, through September 30, 2007, a total of $1,988,967,734 was awarded to prime contractors. Of this amount, $131,895,251—or 6.6 percent—of the total dollars were awarded to DBEs in a race neutral environment.

B.3. Through the combination of neutral program elements coupled with targeted race- and gender-conscious contract goals for specific groups, Caltrans can achieve the proposed 13.5 percent annual DBE goal.

VII. APPROACH TO DETERMINING DBE AVAILABILITY IN CALIFORNIA, ILLINOIS, AND MINNESOTA

A. *Summary of information request.*
Summarize the differences in the approach you used in determining DBE availability and the approach used in Illinois and Minnesota. Include the rationale for your choice.

B. *Response.*

B.1. The approach used to determine DBE availability in the Caltrans Study and the approach used in Illinois and Minnesota is similar in significant respects. The approach in the Study somewhat refines the approach in Illinois and Minnesota. Both the similarities and refinements are outlined below.

B.2. There are a number of similarities in approaches.

B.2.1. Custom Census.
The Study team determined that a telephone survey of firms in California was a preferable approach to analyzing availability than relying on:

B.2.1.1. Firm counts from the DBE directory and U.S. Census data.

B.2.1.2. Pre-qualification lists, which are not a part of standard Caltrans practice.

B.2.1.3. A Bidders List, which Caltrans has not yet implemented successfully.

B.2.1.4. Studies for the state departments of transportation in Illinois and Minnesota used a similar approach. The Illinois and Minnesota studies utilized what is termed custom census approaches to availability that was

favorably reviewed by federal district courts. The studies did not rely on firm counts from the DBE directory, U.S. Census data, pre-qualification lists, or Bidders Lists.

B.2.2. Dun and Bradstreet Firm Lists.
The starting point for Caltrans availability analysis and the studies performed in Illinois and Minnesota was a list of firms in those states that performed work possibly related to state departments of transportation contracting. Dun and Bradstreet is widely considered to be the foremost provider of information for individual businesses in the U.S.

B.2.3. Telephone interviews to determine firm ownership status.
Both the Study and the studies for Illinois and Minnesota included telephone calls to firms in the Dun and Bradstreet database to determine minority, female, and majority ownership status.

B.2.3.1. A difference in the Study was that the Study team attempted to reach all firms within relevant industry codes in the Dun and Bradstreet list.

B.2.3.2. The studies in Illinois and Minnesota first drew samples of firms for the telephone interview portion of the analysis and made phone calls to subsets of the Dun and Bradstreet list.

B.2.4. Minority- and women-owned firms/not necessarily DBE-certified.

B.2.4.1. The Caltrans availability analysis and the studies performed in Illinois and Minnesota examined the relative number of minority- and women-owned firms available to perform work related to state DOT contracting.

B.2.4.2. The analyses were not limited to firms presently certified as DBEs when determining relative availability.

B.2.5. Results weighted by dollars of work, by type.
The availability analysis in the Study and the analyses performed in the studies for Illinois and Minnesota weighted results for each sub-industry by the dollars of work going to that sub-industry.

B.3. The U.S. Department of Transportation (USDOT) suggests considering the availability of firms based on their ability to perform specific types of work. The example USDOT gives in Tips for Goals Setting in the DBE Program—which is cited in the *Northern Contracting* court decision[1]—is as follows:

[1] 473 F.3d at 723.

> "If 90 percent of an agency's contracting dollars is spent on heavy construction and 10 percent on trucking, the agency would calculate the percentage of heavy construction firms that are MBEs or WBEs and the percentage of trucking firms that are MBEs or WBEs, and weight the first figure by 90 percent and the second figure by 10 percent when calculating overall MBE/WBE availability."[ii]

The weighting methods employed in the Study are consistent with this guidance.

B.4. Key refinements.

B.4.1. The Study team methodology for analyzing MBE/WBE availability took the previous custom census approach reviewed by the courts as a starting point and added several layers of additional screening when determining firms available for transportation construction and engineering work; see Section II of the Study for more detail.

B.4.2. This additional screening included the following controls: Qualifications and interest in performing work for Caltrans and/or local governments, as a prime contractor and/or as a subcontractor.

B.4.2.1. In the Study, telephone survey questions screened for qualifications and interest in performing work related to transportation construction or engineering contracts for Caltrans and/or local governments.

B.4.2.2. Separate qualification questions pertained to work as a prime contractor and as a subcontractor. For example, firms are not counted as available for Caltrans prime contracts if a firm does not indicate qualifications and interest in performing prime contracts for Caltrans.

B.4.2.3. Controls for size of contracts or sub contracts performed by available firms.

B.4.2.3.1. In the Study, a small firm, whether minority- or majority-owned, is not counted in the availability analysis in the same way as a firm that performs $100 million dollar construction contracts.

B.4.2.3.2. The BBC availability analysis only counts a firm as available for a specific prime contract or subcontract, if the firm has bid on or performed a contract of a similar size, based on firm responses to questions in the telephone survey.

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

B.4.2.4. Controls for geographic scope of contracting.

B.4.2.4.1. Telephone survey questions also screened for the geographic scope of each contractor's work.

B.4.2.4.2. In the Study, firms are only counted as available for work within the geographic area in which they perform work. This additional screening was performed by BBC to further refine the availability estimates beyond what could be accomplished through the methods used in the Illinois and Minnesota studies.

VIII. PLANS TO DEVELOP A BIDDERS LIST

A. *Summary of information request.*
Please submit your plans to develop a bidders list that complies with 49 CFR, Section 26.11 (c).

B. *Response.*
In 1999, Caltrans initiated a Bidders List survey, which resulted in approximately 7,000 responses from transportation-related contracting firms. To update this listing, Caltrans provides a Bidders List Survey on the Office Engineer Website. Additionally the Study availability listing provides Caltrans with a current Bidders List, which complies with 49 CFR, Section 26.11 (c).

If you have any questions, please contact Olivia Fonseca, Deputy Director, Civil Rights, at (916) 324-0449, or by email, at olivia_fonseca@dot.ca.gov.

Sincerely,

For WILL KEMPTON
Director

c: Lance Yokota, Civil Rights Program Manager, FHWA
Randell H. Iwasaki, Chief Deputy Director
Olivia Fonseca, Deputy Director, Civil Rights